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SUPERIOR COURT OF NEW JERSEY

LAW DIVISION, CIVIL PART
ESSEX COUNTY
DOCKET NO. L-7138-06
A.D.# _____

ROLANDO FERNANDES,)	
)	
Plaintiff,)	
)	TRANSCRIPT
vs.)	OF
)	TRIAL
DAR CONSTRUCTION CO., ET AL.,)	
)	
Defendant.)	

Place: Essex County Courthouse
465 Dr. Martin Luther King Jr.
Blvd.
Newark, New Jersey 07102

Date: February 2, 2011

BEFORE:
HONORABLE THOMAS R. VENA, J.S.C. AND JURY

TRANSCRIPT ORDERED BY:

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A.D.# _____

JARED P. DU VOISIN, ESQ.
(Tompkins, McGuire, Wachenfeld & Barry)

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I N D E X²

<u>Witnesses</u>	<u>Voir Dire</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
<u>FOR THE PLAINTIFF</u>					
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<u>ARGUMENT</u>					
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BY: Mr. Cobuzio			66 74 76 81		
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<u>THE COURT</u>					
Decision			77 97		
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1 1

2 Colloquy

3 THE COURT: Good morning, everyone. Please
4 be seated.

5 JURORS: Good morning.

6 THE COURT: Glad everyone arrived safely.
7 We're all present and accounted for, ready to proceed
8 from where we left off. We have another witness on
9 behalf of the defendant. Ready, Mr. Cobuzio?

10 MR. COBUZIO: Yes, Your Honor. We call to
11 the stand Dr. Edward Decter.

12 THE COURT: Dr. Decter, please take the
13 stand.

14 COURT OFFICER: Step up to the stand. Raise
15 your right hand.

16 DR. DECTER: Let me put this down. May I
17 leave this right here?

18 THE COURT: Yes. Sure.

19 D R. E D W A R D D E C T E R, DEFENDANT'S WITNESS,
20 SWORN

21 COURT OFFICER: State your name, please.

22 THE WITNESS: Edward Decter, D-e-c-t-e-r.

23 THE COURT: Please be seated. Good morning.

24 THE WITNESS: Good morning.

25 THE COURT: Mr. Cobuzio, whenever you're
ready.

MR. COBUZIO: Thank you, Judge.

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2 Decter - Voir Dire Direct

3 VOIR DIRE DIRECT EXAMINATION BY MR. COBUZIO:

4 Q Doctor, just try and keep your voice up. The
acoustics here -- Doctor, can you kindly give the jury
the benefit of your educational background?

5 A Yes, sir. I did my undergraduate schooling at the
University of Maryland in College Park, Maryland. I
6 then after the University of Maryland went to
Guadalajara, Mexico, for two years where I studied
7 medicine and I transferred into Creighton Medical
School in Omaha, Nebraska, where I graduated in 1975.

8 I then did a one-year internship in general
surgery at Temple University Hospital in Pennsylvania
9 and then I completed a four-year orthopedic residency
at the Hospital for Joint Diseases, Orthopedic
10 Institute in Manhattan. I graduated Joint Disease in
1980, and I've been in practice in the State of New
11 Jersey since 1980.

12 Q Are you board certified?

12 A Yes, sir.

13 Q What is board certification?

13 A It means you've passed the qualifying examination
given by the American Board of Orthopedic Surgery.
14 There's about 22 specialty boards in the United States,
of which orthopedics, which is the discipline of
15 medicine of the musculoskeletal system.

16 Q Do you have any hospital affiliations?

16 A Yes, sir. I'm a full attending at St. Barnabas
Medical Center and St. -- in Livingston. I'm the chief
17 of orthopedics and medical director of the Short Hills
Surgical Center in Short Hills, New Jersey, and that's
18 where I do my outpatient surgery.

19 Q Do you, in fact, operate on people?

19 A I do.

20 Q And have you been in the operating room
recently?

20 A I'm there every week, sir. From here, I'm going
21 to there. I had to push things back today to
accommodate the Court.

22 Q Do you have a practice where you actually
treat patients as well?

23 A Yes, sir. I have a very nice orthopedic treating
practice. Yes, sir.

24 Q And do you have any -- are you a physician
for any professional teams or amateur teams?

25 A I was a team physician for four professional
sports teams in my career, and one was the Red Bull,
which was the professional indoor -- Red Bull, which
was the professional soccer team. I stopped doing that
about two years ago. The New Jersey Gladiators, which
were the professional arena indoor football team, the

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2 Decter - Direct

3 Ironmen, which was a professional indoor arena soccer
4 team, and the indoor professional lacrosse team. I've
5 been the team physician for St. Benedict's Prep across
the street for -- forever, and I had run a sports
medicine program in the City of Newark for many years.

6 Q Do you lecture to other physicians with
regard to hip replacements?

7 A I have given some lectures regarding the Leinbach
8 hip prosthesis, which is a type of prosthesis that is
used for fractures and I've given some lectures on
that. I helped write the protocol for the Leinbach hip
replacement years ago, very early 80's.

9 MR. COBUZIO: Okay. At this time, Judge, I
10 would like to qualify the doctor in the field of
orthopedics as an expert.

11 THE COURT: Mr. Clark?

12 MR. CLARK: No objection, Your Honor. Thank
you.

13 THE COURT: Okay. Dr. Decter is qualified as
an expert in this court and accepted as so in the field
of orthopedics.

14 DIRECT EXAMINATION BY MR. COBUZIO:

15 Q Now, doctor, you've rendered actually three
reports where you actually touched the patient and
physically examined him. Is that right?

16 A Yes, sir.

17 Q That's one before the hip surgery and two
after the hip surgery. Is that right?

18 A Yes. One on October 19th, 2007, the other one on
October 31st, 2008, and on June 11th, '09.

19 Q And you're aware that Dr. -- do you know who
Dr. Reber (phonetic) is?

20 A Sure.

21 Q Who is he?

22 A He's a colleague of mine. He was actually in our
practice for a couple of years and he went out on his
own.

23 Q Okay. You're aware in this case that he's
rendered a few reports, only one of which where he
actually touched the patient and that was before the
hip surgery. You're aware of that?

24 A Yes, sir.

25 Q Okay. Now, Dr. Reber in this matter
testified as to the CT scan, which you had available to
you at the time of your reports and you also reviewed
again today. Is that right?

A Yes, sir.

Q And his testimony on the stand for this jury
was that the fractures that Mr. Fernandes sustained
actually went into the hip joint. I know there's a

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2 Decter - Direct

3 fancy word for that, but I can't say and I don't think
the jury can say it. It's the hip joint.

4 A Into the acetabulum or the ball and socket, which
makes up the hip. This is very paramount to understand
5 this. This is key to understanding the case.

6 Q Okay. And is there any objective evidence by
way of radiology reports, which suggest that the
fracture actually went into the hip joint and if you
7 could please explain to the jury what that is, what you
relied on for purposes of expressing your opinion here?

8 THE WITNESS: Your Honor, do you mind if I
stand?

9 THE COURT: I don't mind at all.

(Witness moves away from microphone)

10 THE WITNESS: There was a CAT scan done on
plaintiff's hip on November 9th, 2004, which was about
11 a month after the accident and CAT scan stands for
computerized axial tomography. It cuts through a body
12 part and transacts -- and this was done at Northfield
Imaging and it says here, there are multiple fractures
13 identified in this patient. There is a fracture
present involving the anterior -- aspect of the sacrum
14 with -- disruption -- and I just happened to have a
pelvis and a sacrum here to demonstrate what we're
15 talking about.

BY MR. COBUZIO:

16 Q If you want to step down and show the jury
that, -- here. All right.

17 A So there was a fracture through the sacrum, and it
talks about the superior anterior portion of the
18 sacrum. That's the sacrum. It's the bone in your back
here and the reason it's called sacrum is the sacrum
19 bone is the last bone in your body to -- So there was a
fracture there and it says that it had some cordical
20 disruption was visualized, meaning the cortex, the
outer part of the bone is called the cortex. The inner
21 part is called the medullary canal, and so there's less
-- Then there was a fracture involving the superior
22 lateral aspect of pubic ramus bilaterally and it says,
this is in close proximity to the medial portion of the
23 acetabuli bilateral.

24 This is important. It says, it's in close
proximity. It doesn't say that it extended into the
acetabulum or into the joint. Why is this important?
25 It's important because if the socket and the ball and
socket is not disrupted, the articular surface or the
end of the bone is not going to be affected. So this
is important as well. So if it was a fracture, this is
the socket we're talking about. The is the pubic ramus
here. Okay. There was a fracture that came close to

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3 this area, and I'll show it to you here on the film.
4 But it did not enter the acetabulum -- the articulating
5 surface of the hip joint.

6 Q Just so we can put it in context, doctor,
7 sorry to interrupt, it's important for purposes of your
8 opinion just so the jury can orient themselves a little
9 bit with your testimony, is it your testimony that the
10 hip replacement is not related to the trauma?

11 A Yes.

12 Q Okay. And, now, let please continue to
13 explain why.

14 A -- there's a fracture of the bilateral interior
15 intracranial -- that's this down here, intracranial in
16 this area. So there's a fracture interiorly and
17 superiorly with approximation to the medial aspect of
18 the acetabulum --

19 Now, when you look at the blown-up pictures
20 of this CAT scan that I just read to you, this is one
21 of the most important things to really see. Can you
22 all see it? This is the transaxial cut of the hip done
23 in a transaxial projection. So they're taking the hip
24 joint and they're cutting through it, so they can see
25 the boney architecture and they can actually see the
hip joint. All right?

Now, what it shows here is something that's
very important. This is the transaxial view. This is
the ball of the hip joint, and this is the hip joint.
Now, remember I talked about cortical disruption or
cortex? Cortex is the outer area of a bone. So you
can see this line right here. It is the outer cortex
and in here is the inner cortex. Okay? Do you all see
the outer and inner cortex? The fracture involved the
outer cortex and does not propagate in the hip joint.
This is the hip joint.

Had this fracture gone all the way through,
then I would opine that there is a probability that
this hip replacement would have been related to the
fracture, but it does not. The total integrity of the
inner cortex -- now, what you see right here, this spot
right here, that's a cyst. That's an arthritic cyst.
Okay? This CAT scan was done, as I said, one month
after the accident and the gentleman already has
osteoarthritis of his right hip.

Q Are you referring to an x-ray, doctor?

25 A I'm referring to this x-ray right here, 12/7/04.

Q Doctor, just while you're on it, all your
opinions in this matter are within a reasonable degree
of medical probability. Is that correct?

A That is correct.

Q Continue, doctor, with regard to the x-ray

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2 Decter - Direct

3 and the osteoarthritis.

4 A This is the x-ray, 12/7/04, two months after the
5 accident. You're seeing narrowing of the joint space,
6 okay? This doesn't happen in two months. That's been
7 there before. That is not something that happened in
8 two months' time. That not --

9 He also has an osteo-- or a spur in the
10 superior portion of his acetabulum and he already has
11 them on -- hip two months after the accident.

12 Q Doctor, let me stop you there for a minute.
13 This man has been pretty much a laborer and plumber
14 most of his adult life. He was approximately 52 years
15 old at the time of the accident. Based on your
16 practice and training, is this something you would see
17 in a person who had a working history such as that?

18 MR. CLARK: Judge, I just want to object
19 because I've looked at all his reports and I've looked
20 at them last night and this stuff, this new thing is
21 not in any of the reports. This is something that's
22 just come up.

23 THE COURT: What new thing? The question
24 wasn't a new thing. Somebody have arthritis when
25 they're that age, essentially, is what he asked. I
think Dr. Decter is more qualified to answer that
question.

MR. CLARK: Yes. But this whole thing about
-- this sudden thing about somehow saying that the hip
is not related is not in his reports at all. It's all
new.

THE COURT: Okay. Noted. Continue.

18 MR. COBUZIO: Thank you, doctor. Thank you,
19 Judge.

20 THE WITNESS: So there's evidence two months
21 after the accident that the gentleman has
22 osteoarthritis in his right hip.

23 BY MR. COBUZIO:

24 Q Do your findings -- or strike that -- do your
25 opinions with regard to the fracture not going into the
joint space, are they consistent with what's depicted
on the CT scan?

26 A It's what's in the CT scan is what is read by the
27 radiologist, even as to lay people, who are not
28 doctors, you can clearly see the fracture here. It's
29 plain as day. But you can also see that the fracture
30 has not gone into the joint, and that's key. That's
31 paramount. Now, another important study that was done
32 in this case was what's called an arctigram (phonetic)
33 of the right hip.

34 Q Please explain to us, doctor, what findings
35 were made with regard to the arctigram? Again, that's

2 Decter - Direct

3 another objective test done by a radiologist. It was
done by a radiologist. Is that right?

4 A Yes. It was.

5 Q And it's something that you relied upon for
purposes of your opinion. Is that correct?

6 A Yes.

7 Q Please explain to the jury the significance
of the arctigram from 2005.

8 A It says here, an arctigram done in July of '05,
which is about nine months after the accident, a --
arctigram -- did this MRI of the hip and it says
there's an area of sub-- no fractures are seen and no
joint effusion and the opinion was degenerative
subcortical cyst change along the right acetabulum.
10 There was no fracture of either the hip and there's no
joint space -- and the -- are normal.

11 Q What does that suggest -- what does that tell
you, doctor, by way of -- by way of lay opinion for
purposes of this jury to understand?

12 A It's consistent with the osteoarthritis that was
13 seen two months after the accident.

14 Q Can one develop osteoarthritis within two
months following a traumatic accident?

15 A Within a reasonable degree of medical probability,
it's unlikely. That would be my testimony. Another
very important study was what's called an MR-- a right
16 hip arthrogram where they injected contrast or they
injected steroid into the hip and Novocaine and they
17 did an x-ray, and this was done on 7/8/05. It says, in
-- front view and a -- view of the hip shows
18 hypertrophic spurring in the -- and mild joint space
narrowing. That's what we're looking at here, this
19 hypertrophic boney overgrowth and some joint space
narrowing, consistent with the arthritis that is
20 identified two months after the accident.

21 Q Does he also have arthritis on the other side
now?

22 A He has a little bit, but not as much as the right
side. Then they did a repeat right hip arthrogram in
2008, three years later, and it says here, the right
23 hip shows mild hip joint narrowing and spur
coordination. If this gentleman had an arthritic -- a
24 post-traumatic arthritic condition, you would have seen
rapid progression over three years time, progression of
25 the disease process because there would have been a
joint that was incongruent or not fitting in the ball
and socket. But because this fracture did not go into
the ball and socket, there was no incongruity ever
established. That's very, very important to understand
that the radiologist doesn't say there was advancement

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2 Decter - Direct

3 of the arthritis. There was mild arthritis. That's
4 what it was and, yet, this gentleman went onto have a
total hip replacement.

5 Q And it's your opinion, therefore, that the
hip replacement, based on your review of the medical
6 records supplied, all the medical records in this case,
that the hip replacement --

7 MR. CLARK: Objection. Leading, Judge.
Asked and answered.

8 THE COURT: I'll allow it.
BY MR. COBUZIO:

9 Q Is it your testimony then, doctor, that the
hip replacement was not necessary nor was it causally
related to this accident?

10 A I'm going to say that I don't believe that the hip
11 replacement in my medical opinion was caused by this
accident because the arthritis was very present two
12 months after the accident and didn't progress over
time. That's number two. And, number three, the
13 fracture didn't go into the joint, as I understand
there was testimony that it went into the joint. And
14 if you understand nothing more about this case, the
most tell tail thing is the blow-up of this film that
shows it does not violate or affect the second cortex.
15 If there was a fracture of the second cortex, my
testimony would be a lot different today.

16 Q Doctor, you agree, however, that the
plaintiff in this case did, in fact, suffer from pelvic
17 fractures and you identified those for --

18 A Absolutely. There's no doubt the gentleman had
pelvic fractures around the hip.

19 Q Do fractures heal?

20 A Fractures heal.

21 Q And --

22 A The fractures were not in the hip joint. Now,
that's the key here.

23 Q Were they displaced or not displaced? Can
you describe them?

24 A Yes. There was some displacement here of the
fractured -- yes.

25 Q But there's no surgery necessary to fix them.
Is that correct?

A You don't have to fix these types of fractures.
The only time you have to stabilize these fractures, if
you have an unstable pelvis or someone has excessive
bleeding, I see -- trauma or people fracture their
sacrum because there's a lot of blood supply back
there, and there's disruption of the whole pelvic rim,
that you would need what's called an external fixator
on the pelvis and pull the pelvis back together to try

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2 Decter - Direct

3 and stop the bleeding.

4 Q When you examined this plaintiff, Mr.
5 Fernandes, your last exam, which was after the hip
6 replacement, -- remember, Dr. Reber never saw him after
7 the hip replacement -- you, in fact, put him through
8 different ranges of motion after to move his hip, move
9 his leg. Is that right?

10 A Now, just let me get that report in front of me.

11 Q Sure. June 11th. June 11, 2009.

12 A Can you please repeat your question?

13 Q Sure. You examined the plaintiff on June 11,
14 2009, after his hip replacement, at least a year or
15 more, and you did a physical exam of his hips and what
16 did you find?

17 A Well, I examined his back and his hips. I did
18 both.

19 Q I'm going to get to the back. We'll keep
20 them separate.

21 A But his hips showed full, unrestricted motion. He
22 complained of pain and palpation on the right sacral
23 iliac from back in this area where he had the fracture.
24 He complained of pain back there, and he was also
25 walking with use of a cane at that time as well.

Q What is full range of motion, unrestricted --
of the hip?

A It means he had full flexion, extension, internal,
external rotation, abduction where you bring the leg
out and adduction where you bring the leg in.

Q Now, Dr. Reber in this matter testified --
and I'm going to refer to the back. Dr. Reber
testified as to a disk bulge or bulges in the back to
be caused by the trauma. Are there any studies
available to you, MRIs or CT scans available to you,
which you would rely on for purposes of forming an
opinion as to whether or not the bulges were causally
related to the trauma?

A First of all, bulges are -- when you have a disk
in your back, okay, these are the disks in your lower
back and these are the vertebral bodies and these are
the nerves that are throughout your back, go down your
leg, the sciatic nerve and -- These are the disks. In
the adult population, a bulging disk is not necessarily
-- is not pathological and especially with the absence
of an annular tear, the annulus that goes around the
disk, if that's torn and there's a bulge, you can see
that that is post-traumatic. Okay? But a bulge in and
of itself in a degenerative spine, which is what this
gentleman has, -- and I'll read you the report. It
says, mild degenerative disk disease -- L4, greater
than L4, 5, no significant central canal stenosis or

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2 Decter - Direct

3 herniated disks identified.

4 Q Does that suggest that the disk pathology was
caused by an acute trauma?

5 A No. Au contraire, is the degenerative disk, it
can bulge. It doesn't have the water content to bulge.
6 If this report says there was an annular tear, which is
the -- disk, then there could be a good argument that
it's post-traumatic, but there's no annual tear here
7 and bulging disks in the adult population are very
physiological.

8 Q Are there any other MRIs of the lumbar spine,
which support your opinion or the CT scans of the
9 lumbar spine, which support your opinion that this is a
degenerative condition?

10 A Well, then there was another MRI done of the
lumbar spine. There was one done in '05.

11 Q Excuse me for one second, doctor. I'm
getting distracted by the back of the room. I don't
12 want the jury to be distracted, so doctor, please
continue.

13 A There was another MRI done in November of 2008.

14 Q And is there anything on that MRI to suggest
that the disk pathology was caused by an acute trauma?

15 A No. It shows what is called bilateral facet
hypertrophy changes. At L3, 4, they talk about an
annular bulge but no -- I mean, a bulging disk but no
16 annular tear. And at L5, S1, they talk about an
annular disk bulging and bilateral facet hypertrophy.
17 And what that, again, means in English, the facet on
the articulating surface is here. That holds the spine
18 together. Hypertrophy means overgrowth or arthritis
and that's what that is, an arthritic spine.

19 Q Is that something you expect in a man of his
age or his with his employment history?

20 A Well, it's not uncommon as we get older to have
degeneration of our disks and develop arthritis in our
21 back.

22 Q So it really doesn't even matter about what
your employment was? Anybody can get it?

23 A Well, yes. Most people do get it.

24 Q Now, doctor, you examined the plaintiff, you
actually put your hands on him on June 11, 2009. Were
there any objective findings in the lumbar spine?

25 A I found that he was able to -- bend at 70 degrees.
He then complained of discomfort. The discomfort I
thought he was complaining of was more his right sacral
iliac where he had the fracture and that's why I
thought it was related to that. I then did a straight
leg raising test to put his leg perpendicular to his
body. That was negative. That's checking for any type

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2 Decter - Direct

3 of nerve entrapment or sciatic nerve injury. His motor
4 strength testing was noted to be normal, and his
reflexes were noted to be normal.

5 Q Did you find any permanent disabilities
associated with the lumbar spine, doctor?

6 A I thought it was more from his sacral iliac joint
7 where he had the fracture, sir. You know, I don't
8 think his lumbar spine -- I mean, you know, the ham
bone is connected to the hip bone and all that stuff is
connected, but I think it was more from the sacral
fracture where his pain was.

9 Q In fact, it was a -- there was a TMG NCB
10 study done. That's a nerve conduction study by Dr.
Robaton (phonetic). Did that support your findings
that there was no reticular component?

11 A Yeah. There was no -- there was no -- when he had
12 his surgery, the surgeon thought he had some sciatic
13 nerve entrapment and he released the sciatic nerve,
which is by the area that you're operating. There was
no EMG documentation to support that. He had two EMGs,
I believe.

14 Q Doctor, is there anything in your report of
June -- are there any findings in your report of June
11, 2009, which would suggest to you that Mr. Fernandes
15 is incapable of gainful employment?

16 A I certainly think that this gentleman is capable
of gainful employment. Yes, sir.

17 Q All right. Did you have an opportunity to
review the left shoulder -- the records with regard to
the left shoulder, in particular, the x-rays?

18 A Yeah. There was a report that I generated.

19 Q What was the date of that report, sir?

20 A That's May 10th -- May 20th, 2010.

21 Q This is a report based on your actual review
of the films. Is that right?

22 A Yes.

23 Q And you reviewed the film. What did it tell
you?

24 A It said that there is, indeed, a very small
25 avulsion of the inferior glenoid. The glenoid is the
shoulder socket that's analogous to the hip socket,
except it's much more shallow. I said, the age is
indeterminate. If, in fact, the plaintiff did not
sustain a dislocation of the left shoulder at the time
of this accident, I cannot causally relate a small chip
avulsion (boney bankart) to the accident in question.
The way you get a little chip fracture or what's called
a boney bankart lesion is by dislocating your shoulder
and there was no history that I could see that he
dislocated his shoulder.

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2 Decter - Direct

3 Q Doctor, have you told us all our opinions
4 with regard to the right hip, the left shoulder, and
the lumbar spine?

5 A I've given you anything you've asked me.

6 Q Okay. Well, is there any other evidence in
the treating records other than what you've testified
to, to support your conclusions?

7 A I totally concur, he sustained pelvic fractures as
a result of this accident. I do not believe the
fracture extended into the joint. He had preexisting
8 osteoarthritis, which was evident two months after the
accident. He had some degeneration of his lumbar
9 spine, none of which was traumatically induced. I
believe he may have had a temporary exacerbation of an
10 underlying degenerative condition, sprained his back
and as far as his shoulder is concerned, there's no
11 history or record that he dislocated his shoulder and
that he had this little boney fragment that, in the
12 absence of a dislocation and it was age determinate,
you couldn't tell how old that fracture was or that
13 piece of bone was there.

14 MR. COBUZIO: No further questions, doctor.
..Thank you very much.

15 THE COURT: Cross-examine.

MR. CLARK: Yes, Your Honor. Thank you.

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2 Decter - Cross

3 CROSS-EXAMINATION BY MR. CLARK:

4 Q Doctor, you're testifying in court here today
on behalf of essentially Mr. Cobuzio's client. Is that
right?

5 A Yes, sir.

6 Q Now, your client -- you never treated my
client. Is that right?

7 A No. There was no doctor/patient relationship.
That's correct.

8 Q So, really, your client in this case is Mr.
Cobuzio or Mr. Cobuzio's office. Is that right?

9 A Yes. That's the same as Dr. Reber examined the
patient for you, I examined the patient for Mr.
Cobuzio. That's correct, sir.

10 Q So your client is, essentially, Mr. Cobuzio
and Mr. Cobuzio's office, right?

11 A Yes, sir.

12 Q Now, what percent of your career do you do --
is devoted to doing the forensic evidence where you
write reports, defense medical exams, and testify in
13 court as opposed to actually treating patients? What's
the percentage breakdown?

14 A I'll tell you exactly. I'll give you the
percentage. On a normal work week, I'll see between
15 100 and 125 private treating patients where there's a
doctor/patient relationship and then I'll do about 400
16 to 500 surgeries a year and I'll do approximately about
30 of these what are called forensic or medical legal
17 evaluations where there is no doctor/patient
relationship. So that's sort of the breakdown, sir, as
18 to how it is.

19 Q So what would be the percentage to actually
treating patients and what percentage is the forensic
part, testifying and writing reports?

20 A Well, I just gave it to you. I said, I see about
100, 125 to 30.

21 Q Yes. But what's the percentage?

22 A You mean, in a work week? It's about 30 percent
of my work week.

23 Q Thirty percent is what, court or patient?

24 A Is what?

25 Q Thirty percent is what?

26 A Seventy percent is treating patients and operating
and about thirty percent is about doing forensic
medical legal work.

Q Now, of the portion doing the legal work,
mostly but not all it is on behalf of defendants or
defense law firms. Isn't that right?

A I would say that 95 percent is on behalf of
defendants. Yes, sir.

1 14

2 Decter - Cross

3 Q Now, doctor, this part of your career in
4 terms of testifying in court on behalf of defendants,
that's big business for you. Isn't it?

5 A Well, is it a big business? It's a percentage of
my income. Yes, sir. As a matter of fact, Dr. Reber
even does work for -- you know, with us, too.

6 Q He does work for what?

7 A He does work -- he does independent medical exams
on behalf of defendants.

8 Q In fact, doctor, you are a five percent
shareholder or greater in a company called ExamWorks
Group, Inc. Are you not?

9 A I'm not. No.

10 Q You have nothing to do with ExamWorks, Inc.?

11 A I don't own any stock in ExamWorks, Inc.

12 Q You're on a -- do you have any relationship
with ExamWorks, Inc.?

13 A Yes. I do work for them. Yes. I do independent
medical evaluations for them.

14 Q For ExamWorks, Inc., and their clients,
right?

15 A Yes.

16 Q Did I write the name of the company down,
ExamWorks, Inc.?

17 A Yeah.

18 Q So your testimony here today is that you're
not a shareholder of ExamWorks, Inc.?

19 A I do not own any stock in ExamWorks, Inc.

20 Q Have you ever had any interest in ExamWorks,
Inc.?

21 A I did. Yes.

22 Q ExamWorks, Inc., has a website, right?

23 A Yes.

24 Q I'm going to show you plaintiff's Exhibit 48,
which is a copy of the -- section of ExamWorks, Inc.
Just read along with me, if you would.

25 A Sure.

MR. COBUZIO: Can I see the exhibit before
you show the witness?

BY MR. CLARK:

Q This is your website, right, doctor?

23 A It's ExamWorks, Inc.'s website. I sold my company
24 to ExamWorks.

Q Read along with me, if you would. ExamWorks,
25 Inc., is a leading provider of independent medical
exams and IND-related services to the defense legal
industry, third-party administrators.

A Hold it. Who crossed out -- who --

Q Stop. Stop.

A You crossed something out.

1 15

2 Decter - Cross

3 Q Stop. Stop.

MR. COBUZIO: Objection, Judge.

4 MR. CLARK: Judge, side bar, please.

THE COURT: Okay.

5 MR. COBUZIO: My copy doesn't have the
redaction, so I don't know what we're talking about.

6 THE COURT: We'll find out. Excuse us.

(Discussion at side bar - unable to transcribe)

7 (End of discussion at side bar)

BY MR. CLARK:

8 Q You're aware ExamWorks, Inc., has a website,
correct?

9 A Yes. I've never read it. I didn't create it. I
don't own ExamWorks. I sold my company to ExamWorks.
10 That's what I did, two years ago.

MR. COBUZIO: Objection. Objection, Judge,
11 to any questioning then dealing with the webpage. The
doctor says, he has never read it, he doesn't know
12 what's on it, and he sold his company to them. He has
no affiliation. You can't get anymore than that,
13 Judge.

MR. CLARK: Judge, I want to cross-examine
14 him on his representation to this jury that he has
nothing to do with ExamWorks, Inc.

15 MR. COBUZIO: That's not what he said.
Objection. Objection.

16 THE COURT: Wait. Wait. Wait.

MR. COBUZIO: That's not what he said, Judge.
17 He's mischaracterizing the testimony. He said, he gets
referral work through ExamWorks, that's it.

18 THE COURT: You can explore that
relationship, but you can't ask him to testify about
19 something that he doesn't have any information about.
So let's move away from the website and, if you want to
20 ask him what he knows about ExamWorks, I'm a little
aloft as to what the relevance is, but I'll give you
21 some latitude. But let's move it along.

BY MR. CLARK:

22 Q Isn't it true, doctor, that ExamWorks, Inc.,
-- ExamWorks, Inc., is in business to do defense
23 medical exams on patients like this on behalf of
clients, defense law firms. Isn't that true?

24 A It's part of it. It does bill review, it does
peer review, it does medical legal evaluations. It
25 will take plaintiff work, so it does many things
besides just what plaintiff is trying to characterize
that it does just defense medical legal evaluations.
It does bill review. It does other things, too.

Q Doctor, ExamWorks, Inc., is an -- recently,
right?

1 16

2 Decter - Cross

3 A It did, October 28th, 2010.

4 Q That means it put itself on the New York
Stock Exchange for it to be traded, right?

5 A Yes. When I sold my company, I sold it to
businessmen. They, in turn, took it and took it
public. Eddie Decter, orthopedic surgeon, --

6 Q I'm going to show you a copy of the
registration statement --

7 MR. COBUZIO: Objection.

8 BY MR. CLARK:

9 Q -- of ExamWorks, Inc., when it did the IPO.
Do you see that?

10 MR. COBUZIO: Objection for relevance, Judge.

THE COURT: What's the relevance of that?

11 THE WITNESS: What does that have to do with
anything? It went public. I told you it went public.

12 THE COURT: Okay. Don't answer the question.

MR. COBUZIO: Doctor, please refrain from
answering until the objection can be ruled upon.

THE WITNESS: Sure.

13 BY MR. CLARK:

14 Q Doctor, isn't it true that ExamWorks, Inc.,
and you have a service agreement?

15 A Yeah. I do independent medical exams for them.
Whatever that agreement is, I do work for them. Okay?
I do work for ExamWorks. They have cases for me to
review. I do it. I get paid per case. I'm a
piecemeal worker. I do it. Yes.

17 Q And isn't it true, doctor, that with the
years December 31, 2008 and 2009 and for the six months
ending June 30, 2009 and 2010, the company paid Dr.
Decter \$279,000, \$819,000, \$398,000, and \$503,000,
respectively, for IME services performed on behalf of
ExamWorks clients?

20 A You know, I can't -- I don't have that information
in my hand. I didn't bring my W-2 or 1099, whatever it
is. I'll tell you what I make a year, sir. I'm not --

21 Q Okay, doctor. Well, why don't we -- if you
forget, take a look at --

22 MR. COBUZIO: Judge, objection.

23 BY MR. CLARK:

24 Q -- take a look at the SEC document and see if
that refreshes your recollection as to whether or not
that is correct.

25 MR. COBUZIO: Wait. Objection, Judge. He's
showing him a document that's never been produced in
discovery, number one, and number two is, it's an out-
of-court document.

MR. CLARK: The doctor said he doesn't
remember. I'm using it to refresh his recollection.

1 17

2 Decter - Cross

3 THE WITNESS: Sir, if it's in the SEC thing,
4 I got it.

5 THE COURT: Wait a minute now. Wait a minute
6 now. Let me respond to the objection. Please do not
7 -- if you're offering him a document to attempt to
8 refresh his recollection, that purpose is not to
9 convince the doctor somehow or another that the
10 document you're showing him is authoritative and,
11 therefore, should be something that he should rely on
12 because, for all of the reasons Mr. Cobuzio brought up,
13 this document is not admissible. Hand him a piece of
14 paper, whether it's what you used to wrap your lunch in
15 or whatever it is, you can use it and ask him if the
16 witness -- if the witness' recollection is now
17 refreshed with regard to how much money he made from
18 ExamWorks, Inc., nothing more.

19 BY MR. CLARK:

20 Q Doctor, I'm going to show you plaintiff's
21 Exhibit 47. Take a look at Page F-30 at the bottom,
22 carrying over to the next page. Does that refresh your
23 recollection as to how much money you made in the years
24 2008 to 2010 doing defense medical exams on behalf of
25 the clients of ExamWorks, Inc.? Does that refresh your
memory?

A Yeah. Let me read it, okay? This would be
accurate, sir. Yes.

Q Thank you.

A You're welcome.

Q So if we add up \$279,000, \$819,000, \$398,000,
and \$540,000, --

A Thank you, sir.

Q Is that --

A You can add it up. Go ahead.

Q Okay. Isn't it true that you have personally
made over \$2,036,000 a year in 2008 and 2009 doing
exams on behalf of clients like Mr. Cobuzio and his
office? Isn't that true?

A Yes. And I've also made more money than that
doing surgery in my medical practice because this is
really about 30 percent of my income. So that's the
way it is. That's the facts.

Q Doctor, isn't it also true that when
ExamWorks, Inc., this defense medical exam company went
public, -- Now, you said that you're not currently a
stockholder of ExamWorks, Inc. Is the SEC disclosure
document incorrect when it says, the company is a part
of the --

THE COURT: Now, you're doing exactly what I
told you not to do.

MR. CLARK: All right.

1 18

2 Decter - Cross

3 MR. COBUZIO: Thank you, Judge.

4 THE WITNESS: Sir, my --

5 MR. COBUZIO: No. Don't answer.

6 THE COURT: No. No. There's no question.

7 MR. COBUZIO: It's been ruled upon.

8 BY MR. CLARK:

9 Q You're not a stockholder of ExamWorks, Inc.,
10 anymore?

11 MR. COBUZIO: Objection, Judge. Asked and
12 answered.

13 THE COURT: Three times.

14 THE WITNESS: I am no longer a stockholder of
15 this company.

16 THE COURT: No. No. Don't answer the
17 question. Now, we've got the answer.

18 MR. COBUZIO: Third time.

19 BY MR. CLARK:

20 Q All right. Well, it's true, is it not, Dr.
21 Decter, that your wife, Jean Decter, is a 3.6 percent
22 shareholder of the company. Is that true?

23 A It is true.

24 Q Okay. You're still married, correct?

25 A I am still married. Yes, sir.

Q Okay. 3.6 percent your wife currently owns?

15 A I don't even -- you know more than I do, to be
16 honest with you, sir.

17 Q Well, she owns, does she not, 1 million, 69,
18 700, and 7,000 shares of ExamWorks, Inc.?

19 A No.

20 Q That's not right?

21 A That's not right anymore.

22 Q It was at one time?

23 A My children -- can I answer the question or not?
24 I don't know if I can answer.

25 THE COURT: No. You're not answering the
question. What you're attempting to do is explain your
answer to the question.

THE WITNESS: Answer the -- I'm sorry.

22 MR. COBUZIO: Judge, just note my objection.
23 I mean, what's the relevance of all this?

24 BY MR. CLARK:

25 Q Doctor, isn't it true that when the IPO --

MR. COBUZIO: Judge, I objected.

THE COURT: Okay. Let's hear the question.

BY MR. CLARK:

Q Doctor, isn't it true that when the company
went public in October, it was selling between \$16 and
\$18 a share?

A Yes, sir.

Q Doctor, isn't it true that, as of yesterday,

1 19

2 Decter - Cross

3 the sell price of ExamWorks, Inc., was \$21.88?

4 MR. COBUZIO: Objection, Judge. He's
testifying now? Judge, I mean, come on. Mr. Clark is
testifying.

5 THE COURT: Well, that often happens in
cross-examination. If Dr. Decter happens to know
6 whether or not that is true, he can say, yes, he could
say, no, that's not it, or he can say, I have no idea.

7 THE WITNESS: I didn't check it. I don't
know what it was yesterday, so.

8 BY MR. CLARK:

9 Q Do you want to take a look at the e-trade for
now?

MR. COBUZIO: Objection, Judge.

10 THE WITNESS: Sir, I don't deny anything
you're saying is factual. It is what it is, sir.
11 Whatever the stock closed at yesterday, it closed at
yesterday.

12 BY MR. CLARK:

13 Q 21.88 times 1,069,707 is \$23,405,000. Isn't
that right?

14 A Well, that's right, but the point is, sir, that my
children own more of the stock and my wife doesn't own
all of that stock anymore, so it is what it is.

15 Q \$23,405,189. Doctor, isn't it also true that
the commission of ExamWorks, Inc., is to rely on the
16 local professional presence, enhance quality of
service, and improve workloads of the defense medical
17 review process?

18 A If I can see what you're reading and that's what
it says, then that's what it says.

19 THE COURT: No. No. If you know.

THE WITNESS: I don't know. I didn't see the
website.

20 THE COURT: Next question.

THE WITNESS: I don't know.

21 BY MR. CLARK:

22 Q Isn't it true that ExamWorks, Inc., is
dedicated to serving its client?

23 A You're always dedicated to serving your patients,
your clients. That's what you're trying to do. You're
trying to --

24 Q But ExamWorks, Inc., doesn't serve -- it
doesn't serve patients, right? It only serves clients?

25 A There are many times where there's take-over
treatment.

Q Doctor, are you aware that a cubic yard of
dirt weighs over a ton?

A I am not aware of that, sir.

Q Doctor, do you disagree with the report of

1 20

2 Decter - Cross

3 Dr. Schmauz (phonetic) --

4 MR. COBUZIO: Objection, Judge. You've
already ruled on this issue.

5 MR. CLARK: This is cross-examination, Judge,
and --

6 THE COURT: So?

7 MR. CLARK: Dr. Reber was cross-examined on
the -- of other doctors in this case.

8 MR. COBUZIO: No. He wasn't.

9 MR. CLARK: Multiple --

10 MR. COBUZIO: Your Honor ruled on that.

11 THE COURT: Objection is sustained.

12 MR. COBUZIO: Thank you, Judge.

13 BY MR. CLARK:

14 Q Doctor, you reviewed the record in this case,
correct, the records of Dr. Schmauz, Dr. Prower
15 (phonetic), Dr. Hartspan (phonetic), Dr. Chote
(phonetic)?

16 A Whatever is in my report, sir, in the four corners
of my report, that's what I reviewed.

17 Q Thank you. You said, the four corners of
your report, right?

18 A I said, whatever I said in my report, that's what
I reviewed.

19 Q In fact, in your report of October 19th,
2007, you said there was widening of the sacral iliac
20 joints, there were fractures of the superior lateral
aspects of the pubic range bilaterally, there was
21 bilateral fractures in the pubic range, there was a
fracture to the medial aspect of the left --

22 A Excuse me, but you're wrong. You're
misrepresenting something, okay? I said there was no
23 widening of the sacral iliac joint. That's what my
report says. I didn't say there was widening. That's
24 not what the report says.

25 MR. COBUZIO: Please get the report in front
of you, doctor.

THE WITNESS: I have the report in front of
me.

MR. COBUZIO: Thank you.

26 BY MR. CLARK:

27 Q You said in the -- section that this
individual sustained pelvic fractures as demonstrated
28 on the CAT scan and that these are causally related to
this accident. You said that, right?

29 A I did. The fractures were caused by the accident.
I'm not disputing that at all, not for one second.

30 Q All right, doctor. And, also, in your report
of October 10, 2008, you said that he sustained a
fracture of the left sacrum and left pubic rami. He's

1 21

2 Decter - Cross

3 undergone a total hip replacement for osteoarthritis,
4 and it was our opinion that the above injuries are
causally related to the accident. You wrote that,
correct?

5 A Excuse me. Can I get the --

Q Did you write that?

6 A Can I get the report in front of me? I have
multiple reports. Give me a second. Just give me a
7 second. What date are you talking about?

Q October 10, 2008.

8 A Okay. Let me get it in front of me here.

Q Doctor, the better -- strike that.

9 THE COURT: Well, --

MR. COBUZIO: Wait. Wait.

10 MR. CLARK: Sorry.

THE WITNESS: I don't have that report in
11 front of me. So do you have it? May I please have it?

MR. CLARK: Sure.

12 THE WITNESS: Okay. Thank you.

BY MR. CLARK:

13 Q -- read --

A Sure.

14 Q He sustained a fracture of the left sacrum
and left pubic rami. He has undergone total hip
15 replacement for osteoarthritis.

A Right.

16 Q It is my opinion that the above injuries are
causally related to the accident. Did I read that
17 right?

A I want to answer. Can I still look at it first?

18 Q The question is, did I read that right?

A Yes. But I want to read it.

19 Q You had an opportunity to prepare before
this, right, read your right reports?

20 A Yes, sir. I'm sure on redirect I'll be asked the
question.

21 Q Now, doctor, as far as the back goes, you
found no permanent injury in the back. Isn't that
22 right?

A That's correct.

23 Q Okay. Now, you testify in court a lot.
Don't you?

24 A Last year, I testified, I think, 24 times.

25 Q And you testified here that the plaintiff's
injuries are from degenerative changes. You testified
about that, right?

A The injuries are not from degenerative changes.
The structural findings on the MRI are degenerative.

Q You say that all the time in all these cases.
Don't you?

1 22

2 Decter - Cross

3 A No, sir. That's not true.

4 Q Okay. Do you recall the case -- in February
of 2007 when you -- when you were the defense medical
expert --

5 MR. COBUZIO: Objection, Judge.

6 BY MR. CLARK:

7 Q -- and you testified that the plaintiff had
no permanent injury?

8 MR. COBUZIO: Objection, Judge.

9 BY MR. CLARK:

10 Q Do you recall that testimony?

11 THE COURT: Hang on. What's the objection?

12 MR. COBUZIO: Same objection Mr. Clark made,
something that wasn't produced in discovery pursuant to
a notice to produce.

13 MR. CLARK: It's cross-examination, Judge.
-- refreshes his memory.

14 THE COURT: I'll allow it.

15 MR. COBUZIO: Allow the doctor to at least
read the testimony.

16 THE WITNESS: Without having the report in
front of me of the case you're talking about, sir, I
have no specific recollection.

17 BY MR. CLARK:

18 Q All right. Well, how about the MEDINA
(phonetic) case? Do you remember the MEDINA case from
Essex County, December of 2008 when you were the
defense expert and you testified that we had both
defendants and maintained that the plaintiff had not
sustained the herniation as a result of the accident
and that her back pain was a result of degenerative
changes. Do you recall that case?

19 A No, sir.

20 Q How about the RUBO (phonetic) from 2010 in
Essex County?

21 MR. COBUZIO: Judge, unless we know the case,
then --

22 BY MR. CLARK:

23 Q Where you testified that Rubo --

24 MR. COBUZIO: Objection. Objection.

25 THE COURT: When he starts objecting, you
stop talking.

MR. COBUZIO: I mean, this is used -- this
testimony is being used. We don't know anything about
those cases. We don't know if the man fell off a
ladder or fell off, you know, one step. We don't know
the pathology in the spine. We don't know the
pathology in the hips. We don't know the x-rays. We
don't know the MRIs, and you're using one statement out
of transcripts to try and impeach the witness. It's

1 23

2 Decter - Cross

3 not permissible.

4 THE COURT: All that is true and,
5 nevertheless, he can confront him with the report.
6 What your obligation, Mr. Clark, is to show him the
7 report, ask him whether or not that's his report, and
8 then ask him questions with regard to that report and,
9 if he can answer the question, he can. If he can't, he
10 can't.

11 BY MR. CLARK:

12 Q Doctor, --

13 MR. COBUZIO: Judge, my objection, though, is
14 every case is different. Are we going to hear -- are
15 we here to opine as to every case the doctor ever
16 testified to? How is that relevant?

17 BY MR. CLARK:

18 Q Dr. Decter, --

19 THE COURT: I'm not -- I'm going to allow it.
20 It's cross-examination.

21 BY MR. CLARK:

22 Q Doctor, here's your report from the FRABONI
23 (phonetic) case. Do you remember the FRABONI case in
24 District Court where you were the expert, Dr. Decter?

25 A That's not my medical report, sir. Sir, it's not
my medical report.

THE COURT: He said, no. Next.

THE WITNESS: It's not my report, sir.

BY MR. CLARK:

Q Do you recall writing in that case that it
was your --

MR. COBUZIO: Objection, Judge. He said,
it's not his report.

MR. CLARK: I'm not talking about the report.
I'm asking him if he recalls that case or recalls --

THE WITNESS: I have no specific recollection
of any case that you've asked me about, sir. I do not
have -- without the charts in front of me, I can't
recall a case from 2008. I'm sorry.

BY MR. CLARK:

Q Maybe I can help you refresh your
recollection, Dr. Decter.

A Okay.

Q Do you recall the FRABONI case? Do you
recall giving an opinion that it was your medical
opinion that the above-named individual may have
sustained temporary soft tissue injury of the lumbar
spine, but it was your medical opinion and conclusion
that he did not sustain permanent injury to his lumbar
spine as a result of this accident. Do you recall
that?

MR. COBUZIO: Judge, what are we doing with

1 24

2 Decter - Cross

3 this? Objection.

THE WITNESS: No, sir.

4 THE COURT: Thank -- so you've got to cut it
out, Mr. Clark. You can't do that anymore. Until the
5 doctor can identify something as something that he --

MR. COBUZIO: Thank you, Judge.

6 THE COURT: -- he said, what you're trying to
do is to testify. Don't do that.

7 BY MR. CLARK:

Q Doctor, can you recall one case where you
8 came to court and testified that actually the disk
bulge was related to the accident and that the
9 plaintiff had suffered permanent injury? There's no
cases like that. Are there?

10 A If there was an annular tear and the patient had
physical findings to go along with the mechanical
11 nature of that, I would say it's a permanent injury.
But if you're asking me name, date, case, courthouse, I
12 can't tell you that, sir.

Q Doctor, the better ExamWorks, Inc., does, the
13 better you do. Isn't that right?

A No, sir. I don't get it.

14 Q The better ExamWorks serves its clients, the
client being people like Mr. Cobuzio's law firm and
15 defense law firms, the better you do and your family

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2 Decter - Redirect

3 does. Isn't that right?

4 A I don't really understand your question. But
you're saying, if the stock goes up, my family does
better? Yeah. That's the math. That's correct.

5 MR. CLARK: No further questions. Thank you,
doctor.

6 THE COURT: Redirect?

7 REDIRECT EXAMINATION BY MR. COBUZIO:

8 Q Doctor, does any of this influence your
opinions that you gave here today?

9 A No, sir. I came here and I told the truth. I
told the truth about the fracture, and the jury can see
the truth. I'm not making anything up. It's black and
white. This is not extended to the joint. If Dr.
10 Reber said this extended to the joint and was cause to
the arthritis from two months after the accident, I'm
11 quite surprised with him. He's a good friend of mine.
He's a good guy. -- in our practice, but you can all
12 see that. This is not into the joint. It does not
affect the articulation of this hip. Therefore, I do
13 not believe that the total hip -- and, truthfully, -- I
won't even go there. I don't believe this total hip
14 was caused by the accident at all. You don't see the
arthritis develop two months afterwards and that's
15 what's there in plain day sight, it's blown up by

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2 Decter - Recross

3 plaintiff's attorney for you all to see and it's quite
obvious.

4 Q And you actually reviewed the film itself as
well. Is that right?

5 A I did. It's the same thing as the film in the far
right corner down there and it's the same thing where
6 there's an osteoarthritic lesion two months after the
accident. That doesn't exist from this accident.

7 Q Thank you, doctor.

8 A It predated the accident.

9 MR. COBUZIO: Thank you, doctor. No further
questions.

10 THE COURT: Recross?

11 RE CROSS-EXAMINATION BY MR. CLARK:

12 Q Doctor, the board is not really black and
white, right?

13 A No. It's in color, actually.

14 Q That's right. What is in black and white is
your report of October 10, 2008. Read along with me,
15 if you would. Well, actually, now, it's in orange
because I highlighted it.

16 A Right.

17 Q He sustained a fracture of the left sacrum,
the left pubic rami. He has undergone total hip
18 replacement for osteoarthritis. It is my opinion that
the above injuries are causally related to the
19 accident.

20 A The fractures are causally related to the
accident.

21 Q I read that -- but the question is, did I
read that right, doctor?

22 A You read it right, but what it says is the
fractures were caused by the accident, not the
23 osteoarthritis was caused by the accident.

24 Q Doctor, you have 43 million reasons for
testifying --

25 MR. COBUZIO: Judge, this is supposed to be
-- this goes now beyond the scope of redirect.

THE COURT: Sustained. That's enough.

MR. COBUZIO: Thank you.

THE WITNESS: Sir, I don't -- never mind.

MR. COBUZIO: You don't have to answer,
doctor.

THE WITNESS: I wouldn't -- I won't even
lower myself.

THE COURT: Okay. Thank you, doctor.

THE WITNESS: Thank you, Your Honor.

THE COURT: Mr. Cobuzio, what's next?

MR. COBUZIO: Judge, I have one read-in and
then I can rest. If you'll just bear with me a second,

1 27

2 Decter - Recross

3 I'll --

4 break? MR. CLARK: Judge, could we take a brief -- a

5 THE COURT: Okay.

6 MR. COBUZIO: I'd -- it's two lines.

7 MR. CLARK: Can we take a break?

8 THE COURT: Before the two lines?

9 MR. CLARK: Yes.

10 MR. COBUZIO: Well, Judge, I'm done after the
11 two lines, so that would be the logical time to take a
12 break.

13 THE COURT: Do the two lines.

14 MR. COBUZIO: I mean, I don't want the jury
15 to go out and come back in.

16 THE COURT: Do the two lines.

17 MR. COBUZIO: I'm trying to think ahead.

18 MR. CLARK: What two lines are you reading?
19 Where are we at?

20 MR. COBUZIO: Yes. This is a reading from
21 the transcript of Mr. Fernandes, the plaintiff in the
22 case, and the question was,

23 Q "Did you have any difficulty at any time in
24 those three to four days you were there just prior to
25 your accident or at any -- location?

A No."

1 28

2 Colloquy

3 That's it, Judge. I'm finished.

4 THE COURT: What are the magic words, Mr.
Cobuzio?

5 MR. COBUZIO: I'm sorry, Judge. Defense
rests, Judge.

6 THE COURT: Thank you very much. Rebuttal,
Mr. Clark?

7 MR. CLARK: Yes, Judge. But I'd like to take
a break before rebuttal. Very briefly.

8 THE COURT: Okay. All right. We're going to
take a break, mid-morning break, 15 minutes and then
we'll go for another half an hour and take our lunch
break. Okay? Fifteen minutes. Please don't discuss
the case, even though the defendant has rested.

10 (Break)

11 THE COURT: You guys are getting to be
experts at this. We'll have to get you in here and
give you regular jurors for all the cases. At \$5 a
day, you can handle that, right? Defendant has rested.
Mr. Clark, is there any rebuttal?

13 MR. CLARK: No, Your Honor. Thank you.

14 THE COURT: All right. Ladies and gentlemen,
the evidential and testimonial portion of our
proceeding is complete. We are actually ahead of
15 schedule. We do have some fighting we have to do
amongst ourselves. We can't do that in front of you.
16 That's -- as I think I might have mentioned before,
that's the, you know, toothpaste and the tooth concept.
17 We can't talk in front of you about what it is that
you're going to be told and what it is that you're
18 going to be instructed as to the law because you'll
hear stuff that you're not supposed to hear and we
19 can't really -- it's hard to tell you, remember what
somebody just said, well, pretend you didn't hear that.

20 So what we're going to do is it's going to
take at least an hour or two to really thrash out --
21 the lawyers really are entitled to know what it is I'm
going to tell you with regard to what the law is before
22 they make their closing statements. So I have to spend
an hour or two -- it's going to be after lunch -- doing
23 that, explaining what I'm going to charge you as to the
law, getting their input as to what they think should
24 be charged, and hashing all that out.

25 Then we would be ready at, oh, I don't know,
2:30, 3:30 or so to have summation and charge. I'm not
going to make you come hang around all that time to --
well, we wouldn't even be able to finish the summation
and charge in the amount of time we had left in a day.
So we're going to start -- we're going to resume for
you -- we're going to resume this case for us after

2 Colloquy

3 lunch, but for you, we're going to resume at 9:30
 4 tomorrow morning and all you're going to hear about
 5 tomorrow morning, all that's happening since all our --
 6 the evidential and testimonial portion is complete. By
 7 tomorrow morning, you're going to hear, first, the
 8 lawyers are going to argue to you why they think, you
 9 know, that they should -- their clients should succeed
 10 and, after that, you'll hear from me with regard to
 11 what the law is, and then the rest is up to you.

12 But until that happens and you're all in the
 13 same room in the process of deliberating, please don't
 14 discuss the case, even amongst yourselves, certainly
 15 not with anybody else. Even though all the evidence is
 16 in, you still know it's not proper to do that, as well
 17 as not proper to conduct your own investigation or
 18 something of that nature.

19 Be careful going home. It's supposed to be
 20 better weather tomorrow, but you know, we'll see.
 21 Thank you. You're excused for the day. See you
 22 tomorrow.

23 (Jury excused for the day)

24 (Tape Off - Tape On)

25 THE COURT: Okay. What do you want to put on
 the record, --

MR. COBUZIO: Yes, Your Honor. There are two
 stipulations that we want to put on the record. The
 first stipulation deals with the amount of medical
 bills that the defendant will stipulate to as
 reasonable and customary, however, not causally
 related, and that is \$75,000, which is a compromised
 number from the workers' compensation lien in terms of
 the medicals that were paid.

26 The other stipulation --

MR. CLARK: Can I comment on it first before
 the second?

MR. COBUZIO: Yes. Yes.

MR. CLARK: Just so the record is clear,
 Judge, we have -- there was an \$85,000 workers'
 compensation component dealing with the meds, and we
 agreed that, to compromise that, we're going to say
 that is \$75,000. I just want the record to be clear
 that that's not all the plaintiff is claiming for past
 meds.

27 You have plaintiff's Exhibit 34, which has
 28 about \$11,000 in past meds from Dr. Wu (phonetic)
 29 dealing with exams and office treatments, et cetera.
 30 We also talked about -- so that's it. I just want that
 31 to be clear.

THE COURT: Okay?

MR. COBUZIO: That's fine, Judge. Judge, the

1 30

2 Colloquy

3 second stipulation deals with the past lost wage claim,
4 which you may recall was the subject of some discussion
5 in light of Mr. Clark wanting to reopen the case and
6 put in tax returns. Your Honor asked us to try to
7 agree on a number. We originally agreed to \$44,000
8 being the workers' compensation payment for temporary
9 disability. However, Mr. Clark and I agreed that the
10 lost wage -- past lost wage component would be
11 \$100,000. Mr. Clark says, I think we're going to be
12 able to handle that in the charging conference, but the
13 number that will go on the boards as the stipulated
14 amount will be \$100,000 and, again, the defendant still
15 challenges causation, in other words, whether or not
16 all that time was lost as a result of the work-related
17 injuries or the injuries.

THE COURT: Okay.

11 MR. CLARK: Judge, just may I comment on that
12 stipulation?

12 THE COURT: Go right ahead.

13 MR. CLARK: Yes. I always said when we have
14 the discussions that it would be a net number and
15 they've agreed to that, and I think the jury charge
16 should just be adjusted accordingly because I think --
17 I think the charge says that the jury has to net out
18 the number, and so that that would affect that because
19 our agreement is, as I understand it, 100,000 is, in
20 fact, a net number. Thank you.

21 THE COURT: Okay. But let me have it in
22 front of me, so I can be more intelligently
23 understanding what it is that you're saying. Okay? So
24 we'll do that this afternoon.

25 MR. COBUZIO: All right. Do you want us to
hand you any of the material? We'll give you that this
afternoon then, Judge?

20 THE COURT: Yes.

21 MR. COBUZIO: Okay.

22 THE COURT: Yes.

23 MR. COBUZIO: Then we have motions that have
24 to be made.

25 MR. CLARK: I handed -- I handed in our
proposed charge as far as the standard stuff like
negligence. I just cited to the model jury charge, so
I didn't --

THE COURT: Yes. And I have some questions
with regard to things that you didn't ask for that
would ordinarily be there, but we'll -- you know, we'll
talk about it this afternoon

MR. CLARK: Yes.

MR. COBUZIO: Thank you, Judge.

THE COURT: The first thing we'll do is

1 31

2 Colloquy

3 motions you have. We'll do that at 1:30. Okay? You
have something you want me to look at?

4 MR. COBUZIO: I have something for you,
Judge. If you want it now or I'll give it to you after
5 lunch. I don't know when you want to read it.

6 THE COURT: With regard to a motion?

7 MR. COBUZIO: With regard to a motion on
punitive damages, Judge, and I believe there should be
-- we're making -- are you making a motion on duty
because it's --

8 MR. CLARK: Yes. I was going to -- I was
going to move for a directed verdict on liability.
9 Yes.

10 MR. COBUZIO: Okay. So we'll argue the duty
issue at that time.

11 MR. CLARK: The one that Judge Lombardi
decided or --

12 MR. COBUZIO: Yes. I mean, right now, Judge,
as it stands, Judge Lombardi issued an opinion on duty
that there were material questions of fact that the
13 jury must consider before it can decide duty, and I
think Your Honor has to make a decision as a matter of
14 law that either we did or we did not owe a duty to Mr.
Fernandes because the jury is not going to consider
15 that question now that you've heard all the evidence.
So that will -- assuming Mr. Clark is really making
16 that motion for a directed verdict and -- well, he's
making a motion for a directed verdict, which is
17 something different than duty, but the issue really is
is whether or not we owe a duty.

18 THE COURT: Okay. I got it. On punitive, so
you have -- and you have something --

19 MR. COBUZIO: Can he approach, Judge?

20 THE COURT: Yes. Yes. You have something
other than what I already got from you with regard to
the -- you gave me something, Mr. Clark, about -- as
21 part of your proposed jury charge on punitives. I know
that.

22 MR. COBUZIO: Judge, I just would remark, our
trial brief that I handed to you in the beginning has
23 all the arguments on duty. Do you want the jury
charges now, too, Judge?

24 THE COURT: No. I'm not going to have time
to.

25 MR. COBUZIO: Okay. That's fine.

THE COURT: And we don't have time, I think.
You'll have it done, soon. It's not something you have
to -- you have to --

MR. COBUZIO: Yes. We've got a lot of work
to do here. We have to redact the exhibits. We've got

2 Colloquy

3 to, you know, argue about the charges, so --

4 THE COURT: Okay. So what we'll do is we'll
do -- you know, we'll do the motion, we'll do the
charges, and then you can redact and you can do them
5 right here, and if you have, you know, an issue, I'll
deal with it.

6 MR. COBUZIO: Fair enough, Judge.

7 THE COURT: All right? And if there's
something that I need to think about while you guys are
redacting, I can think.

8 MR. COBUZIO: Yes. We're just going to
follow Your Honor's -- my intention is just to follow
9 Your Honor's ruling with regard to the conclusions of
other physicians who weren't called to testify.

10 MR. CLARK: Judge, --

11 THE COURT: I need somebody to tell me ready,
set, think. You know?

12 MR. CLARK: With regard to duty, that's in
our trial brief, too, which -- well, our trial -- our
summary judgment brief is our trial brief. That's our
13 argument as to duty. I think most of the facts will
probably match up with -- at trial.

14 As far as punitive damages goes, I have
cases, which are highlighted, flagged, and I can hand
15 them in, if I can just get them back at some point or I
can give cites or something. Like I have -- and as
16 also on punitive damages, I had meant to argue that on
sort of my feet so to speak and, also, in the jury
17 charge.

18 THE COURT: Okay. That's fine.

19 MR. CLARK: Would you like these? These
cases are highlighted and flagged. There's one that's
actually right on it. It's a construction accident
case.

20 THE COURT: No. I'll -- on the punitive
damage issue?

21 MR. CLARK: Yes.

22 THE COURT: Probably not. I don't want to
pretend I'm going to do more than --

23 MR. CLARK: Can I give you two cites then?
Can I give you a cite?

24 THE COURT: I've got to be honest with
everybody. I'm not going to read any of the cases that
Mr. Cobuzio cites. I'm only going to read what he says
25 about them.

MR. CLARK: All right. So I'll just -- I'll
just -- I have it all highlighted here.

THE COURT: Yes. I mean, there's not enough
time to do that. If there are cases that I'm not
familiar with that I think I have to read, you know,

2 Argument - Clark

3 we'll take a break. We have the luxury of having the
4 afternoon without a jury to deal with whatever we have
to deal with, right?

5 MR. COBUZIO: Thank you, Judge.

6 THE COURT: Okay. Till 1:30.

(Luncheon recess)

7 THE COURT: Please be seated, everyone. Good
afternoon. Are we on the record?

8 COURT CLERK: We certainly are. I wouldn't
miss it.

9 THE COURT: All right. Outside the presence
of the jury, we're on the record. Let's do motions
first. Then we'll take a break and then do charge
conference, okay? Motions.

10 MR. CLARK: Judge, at this time, plaintiff
would like to make a motion for a directed verdict on
11 the issue of liability. We did submit a trial brief,
which included a summary judgment motion. The duty of
12 a general contractor is set forth in our brief, and the
general contractor's duty is set forth under ALLOWAY
13 and the progeny cases.

14 It is essentially that a general contractor
really has a non-delegable duty to manage safety on the
15 worksite and ensure OSHA compliance among its
subcontractors. Among the things that OSHA requires is
16 compliance with the general safety, health provisions,
which require that the workers be trained, that there
17 be supervision, that there be safety inspections, that
there be oversight, that there be investigations. The
18 evidence in this case is overwhelming, that the
defendants DAR failed to comply with its duties under
19 New Jersey law that they manage safety and force the
OSHA regulations with respect to the general health and
20 safety regulations with respect to specific regulations
applicable to this matter, include the trench safety
regulations.

21 There's a number of items in the trench
safety regulations, but perhaps the most pertinent item
22 is the item that says, if the trench is over five feet,
it must be protected by an OSHA-compliant, shoring
23 protection system or it needs to be sloped back or
benched to, I believe it's 30 degrees of repose, and
24 that was not done in this case. Under the OSHA
regulation, there has to be daily inspections on every
25 shift and as needed during the shift to ensure that the
regulations are being complied with. It has to be done
by a competent person and an OSHA-competent person as
defined in the statute.

The admission of the defendant through its
answers to interrogatories, its deposition testimony,

2 Argument - Clark

3 as confirmed at the trial testimony was that Norberto
4 Jean Salle is designated as the person most
5 knowledgeable in safety. He inspected the trench. He
6 concluded it was not likely to collapse. That's if you
7 view the evidence favorable to the defendant, which is
8 that the trench was less than four feet.

9 The overwhelming evidence in this case is
10 that the trench was more than five feet deep and,
11 therefore, they can't get out from under it by saying,
12 well, we inspected and concluded it was not likely to
13 collapse. But even if we're going to view the fact in
14 the light favorable to the defendant that it was less
15 than five feet, the defendant admitted that it
16 inspected the trench and concluded it was not likely to
17 collapse.

18 There's an admission on the record from
19 Norberto Jean Salle that -- well, there's a number of
20 admissions, including that. They did really nothing to
21 comply with OSHA and enforce the health and safety
22 provisions. Was DAR negligent in this case? I don't
23 see how any reasonable juror could conclude otherwise,
24 and I think the issue should be taken away from the
25 jury at this point given the overwhelming evidence.

I would also note that one of the defenses in
opening was we hired a competent contractor and one of
the early rulings in the case was that because our
position was that Fritas (phonetic) was not a competent
contractor and, among the things we wanted to do to
show that was to show Fritas' prior OSHA violations and
citations of that, specifically related to trench
excavation.

And just for the record, I would note -- and
this was in Lindsey Gallagher's file, which was
produced in connection with this deposition in the
discovery phase of this case. Fritas was cited a
number of times in the past, 2002, I believe, 2003.

21 THE COURT: I don't know what this has to do
22 with your --

23 MR. COBUZIO: There's no testimony as to
24 that.

25 THE COURT: -- your motion, Mr. Clark.

MR. CLARK: The point of the motion, Judge,
is that we were not allowed to enter that unless the
defendants argued that we hired a -- that one of the
defenses was that they hired a competent contractor.
So that defense was essentially abandoned. So the --
so that there is no viable defense here of having hired
a competent contractor. They stayed away from that
and, ergo, we did not, you know, bring up the OSHA
violations. So because of that and the overwhelming

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2 Argument - Cobuzio

3 evidence, we file a motion for a directed verdict on
4 the issue of liability. Thank you, Judge.

5 MR. COBUZIO: Your Honor, may I respond
6 briefly?

7 THE COURT: Mr. Cobuzio?

8 MR. COBUZIO: First of all, the OSHA
9 violations that Counsel just referenced never came into
10 the case and can't come into the case. Secondly, our
11 defense is, was, and we have maintained that we hired a
12 competent contractor, somebody who had knowledge with
13 regard to trench excavation, in this case Mr. Fritas,
14 so that's still in the case. I really don't know where
15 that's going.

16 With regard to -- my associate is going to
17 argue the issue of duty. But just for purposes of, if
18 Your Honor finds duty, the question for the jury is,
19 was our conduct reasonable under the circumstances?
20 Mr. Carlson testified and the OSHA regulations indicate
21 that our conduct has to be reasonable.

22 The employer has the primary responsibility
23 for the safety of its employees. We can discharge our
24 responsibility for trench excavation, if we hire a
25 competent contractor. It's our position, we have hired
a competent contractor. Plaintiff -- plaintiff denies
that with his testimony. I mean, that's what trials

2 Argument - Clark

3 are for, so there's a question as to whether or not our
4 conduct was reasonable, if Your Honor -- if Your Honor,
5 in fact, finds as a matter of law there's a duty. And
with that, Your Honor, I'll tag my associate, and he
can argue the issue of why there is no duty.

6 MR. CLARK: I would just --

7 MR. COBUZIO: Can we finish? Let me just
finish, Judge.

8 MR. CLARK: Yes. I just wanted to comment on
the same motion, though, before you go into duty.

9 MR. COBUZIO: Okay. All right. All right.

10 MR. CLARK: Judge, I'm reading from my notes
of January 25th, 2011, the pretrial motions. One of
the motions was to bar evidence of the prior OSHA
11 citations. We had extensive discussion about it, and
Your Honor's ruling was as follows. Leave the OSHA
violations out for now unless the defense indicates
that Fritas is a competent contractor. The OSHA
12 violations issues came up. It was objected to, and we
did not press forward because I believe they had
13 abandoned the defense of a competent contractor and now
that everything is closed and the jury is gone, now,
14 they want to argue in closing that they did, in fact,
hire a competent contractor.

15 Well, then in that case, I would like to
reopen and bring in the OSHA violations because the
16 reason I didn't do that was because of the related
objections and, now, they want to have their cake and
17 eat it too and argue in closing that he was, in fact, a
competent contractor. Well, then I should be able to
18 bring into evidence -- and this is the reason I didn't
because Your Honor's ruling.

19 MR. COBUZIO: Judge, --

20 MR. CLARK: Leave the OSHA violations out,
unless the defense indicates that Fritas is a competent
contractor.

21 MR. COBUZIO: Judge, it's always been a
defense in the case. I told them that it's the expert
22 reports, that we hired a competent contractor to do the
job. This is almost absurd. It's like the lost wage
23 thing. We're going back into it. Your Honor said for
now, leave them out. Leave them out of opening. And
24 then the testimony came in from Mr. Carlson, OSHA. Mr.
Clark had the OSHA violations. He tried to get them in
25 through Fritas. I objected. It's inadmissible
hearsay. I objected to it and, certainly, an OSHA
violation isn't against Mr. Fritas. There wasn't even
a foundation that DAR even knew about it.

So this is -- the competent contractor
defense has always been in it and it's really not a

2 Argument - Clark

3 defense, Judge. It's what I have to do to be
4 reasonable under the circumstances. So with regard to
that, Judge, it's for the jury.

5 MR. CLARK: Judge, they -- if they were going
to argue that they hired a competent contractor and
6 that is why this issue came up and it was objected to
and sustained and they filed a motion to bar any
7 evidence of the OSHA violations based on some legal
principles and the Court's ruling, I take umbrage with
8 defendant's argument that the Court's ruling was
absurd. The Court's ruling was not absurd. It was a
9 reasonable ruling. It says, leave the OSHA violations
out for now, unless the defense in the case is that
10 Fritas is a competent contractor. If they were going
to open the door in the trial that he was a competent
contractor, the ruling was that they could come in.

11 MR. COBUZIO: I did, Judge, and he never
12 admitted them and I never said Your Honor's ruling was
absurd.

13 MR. CLARK: Because --

14 MR. COBUZIO: I'm saying what you're doing is
absurd, to reopen after you rested, yet again, and the
15 case is closed and we dismiss the jury, all of a
sudden, you want to reopen the whole case again and put
16 in an OSHA violation. If you had -- if you had a
belief when Fritas was testifying that I have abandoned
the competent contractor defense, then you didn't read
my expert report.

17 We should have had a side bar and the Judge
could have ruled on it in terms of this witness or
18 getting it in through Carlson. In fact, you ever tried
to get it in through Carlson. You even tried to ask
19 him about it, and Carlson was prepared to respond to
it. It's one OSHA violation before this accident, and
20 there's no foundation that DAR even knew about it. It
was never established.

21 MR. CLARK: See, that's the argument, when
you say a competent contractor, the question is knew or
22 should have known. First of all, Norberto Jean Salle
testified, yeah, he knew about Fritas' checkered OSHA
23 safety past --

24 MR. COBUZIO: No. He didn't.

25 MR. CLARK: -- and their history. It's in
his deposition. Okay? But we didn't go there because
of the Judge's ruling and, secondly, it's not one
violation. There is a series of violations, which
involve the very statutes we're talking about here and
it's not that they're against DAR. It goes squarely on
the defense of DAR hiring an incompetent contractor.

THE COURT: All right. Let's hear from Mr.

2 Argument - DuVoisin

3 DuVoisin on the issue of duty, and we'll deal with it
all at once.

4 MR. DU VOISIN: Thank you, Judge.

5 MR. CLARK: Just for the record, I'm just --
I'm also making a motion to bar any reference or
argument enclosing that they hired a competent
6 contractor based on all that. Thank you, Judge.

7 THE COURT: Okay.

8 MR. DU VOISIN: Thank you, Judge. We just
heard a lot about OSHA regulations, and this discussion
about duty has to start with the notion -- and this is
from COSTA V. GIACCIONE (phonetic) or I don't know how
9 you pronounce that, but --

10 MR. CLARK: GAICCIONE.

11 MR. DU VOISIN: 408 N.J. Super. 372 to 373
that non-compliance with OSHA regulations or compliance
with OSHA regulations, this is quote, "does not
necessarily place a tort duty of care on the general
12 contractor." That's not what -- OSHA regulations in
terms of the duty of care that's owed are irrelevant
13 for the Court's consideration.

14 Now, what's relevant, Judge, -- and I'll be
very quick -- the Court has to determine -- this is
from ALLOWAY -- whether a reasonable jury, Judge,
15 weighing the evidence in plaintiff's favor could
determine the existence of fact based on the
16 foreseeability of the risk of the injury, the
relationship of the party, and the opportunity to take
17 corrective measures would support the determination
that there was duty, and that's from 157 N.J. at 240.

18 Now, we can compare this case with the
ALLOWAY case, for instance. In ALLOWAY, the
19 plaintiff's employer and the general contractors that
they sought to held liable had mutual employees. The
20 foreman, I believe, for the subcontractor who employs
the plaintiff also was an employee of the general
21 contract. That's not the case here.

22 There's no contract in this case putting the
onus on the general contractor to provide for safety as
there was in ALLOWAY. I would put to Your Honor that
23 this case is also similar to SLACK V. WHELAN (phonetic)
where, again, the Court granted summary judgment on the
24 issue of duty. In that case, the Court observed that
there was no control and matter over the
25 "subcontractor's work," and I know Mr. Clark might say,
well, that involved a homeowner, but the Court in the
SLACK case specifically indicated that they would find
the same, if it was a general contractor or a
homeowner.

There was no control over the manner and

2 Argument - DuVoisin

3 means of the subcontractor's work, as was demonstrated
4 in this case, and really DAR did nothing but schedule
5 and coordinate the work. That does not give rise to a
6 duty of care in this case, Judge.

7 And, finally, to contrast in the COSTA case,
8 which I cited for Your Honor earlier, that was a
9 homeowner, but the Court found he was a general
10 contractor, found he owed a duty of care because he
11 oversaw the operation, purchased materials for the
12 subcontractors, and had a history with this particular
13 kind of construction. In this case, DAR did not
14 purchase materials for Fritas, it didn't oversee
15 Fritas' work, and it didn't have history with trench
16 excavations, which is why they hired Fritas to do this
17 job. That's what the case is all about.

18 So, Judge, in closing, I would just say, the
19 facts that have now been educed in evidence don't give
20 rise to the level where a reasonable jury could
21 conclude that a duty of care was even owed to get this
22 to an issue of whether DAR's conduct was reasonable.
23 Thanks, Judge.

24 THE COURT: Thank you very much. Anybody
25 ..want to add anything else on this particular set of
motions?

MR. COBUZIO: Your Honor, --

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2 Argument - Cobuzio

3 MR. CLARK: Okay. Sorry. No. You can go.

4 MR. COBUZIO: Judge, you know, I just -- I
5 just want to refresh the Court's recollection very
6 briefly that Mr. Carlson testified as to the definition
7 of a competent contractor, that Fritas was the
8 competent contractor, what the competent contractor
9 standard means in terms of reasonableness of the GC's
10 responsibilities under OSHA and, frankly, you know,
11 it's always been in the case.

12 I have notes, too, from Your Honor's ruling.
13 The prior OSHA violations you ruled were inadmissible
14 hearsay, could not be allowed. One, you didn't know
15 the nature and scope of the violation. Two, the
16 conduct, which resulted in the OSHA's violations, you
17 didn't know that either. And, three, you didn't know
18 whether or not DAR even knew about it and you said, the
19 complexion of the case may change, but if we stay with
20 a competent contractor, just keep it out of your
21 openings and, frankly, it's always been in the case. I
22 never stipulated that I wasn't going to put up a
23 competent contractor defense, so you know, to say now
24 that it's not in the case and now allow me to argue
25 that to a jury, which is a motion that Mr. Clark just
made orally, I think, would be -- would be,
respectfully, improper.

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2 Argument - Clark

3 THE COURT: Okay. You get the last word.

4 MR. CLARK: Judge, just address the duty

or --

5 THE COURT: Sure.

6 MR. CLARK: As to the duty, Judge, one of the
things Mr. DuVoisin said was that violation of an OSHA
regulation is not ipso facto negligence. Also, it's
compliance with an OSHA regulation does not entitle
7 them to a summary judgment.

8 I agree with Mr. DuVoisin's recitation of the
law on that. In fact, that's in our proposed jury
charge. That's the one point I want to make on the
9 duty. The other point I want to make on the duty is
that -- I think the law says that a duty is a question
of law for the Court, whether or not a duty exists is a
question of law for the Court, whether or not there's
10 been a breach of that duty, i.e., the facts, is a
question of fact for the jury.

11 So the jury should not be deciding whether or
not there's a duty here. It should only be Your Honor,
12 and I would note that Judge Lombardi, having looked at
everything, already found such a duty and I believe
13 that duty is bodied in our proposed jury charge.

14 As far as SLACK V. WHELAN goes, that was a
homeowner case and the Appellate Division in COSTA V.

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2 Argument - Clark

3 GACCIONE could not have been anymore clear that the
4 facts in SLACK V. WHELAN represent an exceptionally
5 unusual circumstance, which really has no applicability
to this case. So I believe there is a duty as Judge
Lombardi found.

6 If I comment on the OSHA violations issue,
I'll just be repeating myself. The --

7 THE COURT: Don't do that.

8 MR. CLARK: I won't. Thank you.

9 MR. COBUZIO: Judge, I just have to just
10 respond because Judge Lombardi didn't find that. I can
11 show you the transcript, Page 48. It's this -- and
12 I'll read it to Your Honor. It's this Court's --
13 Judge, and I agree the issue of duty now is before you
14 to decide as a matter of law before the jury can get
15 it, but what Judge Lombardi found, it's this Court's
determination that listening to all the factual issues
raised and referring to the record and the deposition
testimony, et cetera, this Court does find that, I
think, there is genuine issues of material fact that
exist as to foreseeability of injury, relationship of
the parties, other negligence and control
considerations, whether they had an opportunity -- and
I say this is because there are some facts that are
certainly in dispute, wherein, it might determine

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2 Argument - Clark

3 whether there should be a duty or not. That was his
4 opinion, so, you know, the issue of duty has never been
5 decided. It's not like it's a res judicata issue.
6 It's for Your Honor to decide based on the evidence.

7 THE COURT: I'm satisfied that it is. I'm
8 also satisfied that with regard to Mr. Clark's motion
9 relative to liability to the degree to which it asks
10 for the Court to find as a matter of law the existence
11 of a duty, that motion is granted. I'm satisfied that
12 ALLOWAY stands for the proposition that the general
13 contractor has a non-delegable duty of care. I'm
14 somewhat -- it is somewhat interesting from an academic
15 prospective as to how that occurs in an employment
16 situation and how it is that a general contractor can
17 be held liable in what is a third-party action when,
18 clearly, absent extraordinary circumstances, an
19 employer, who may be the one more directly negligent,
20 cannot be held liable under the terms of the workers'
21 compensation statute.

22 Nevertheless, I believe the Supreme Court in
23 ALLOWAY made it clear that a third-party action against
24 the general contractor can be maintained in a general
25 -- and that is because a general contractor under
circumstances similar to what's occurred here has a
responsibility for the safety of the individuals
working on the job site.

For that reason, there is, as a matter of
law, a duty on the part of the general contractor and,
in this case, a duty on the part of DAR to exercise
reasonable care in the maintenance of its work site.
Now, that duty is not imposed by or strictly or solely
designed by the existence of or breach thereof of any
OSHA regulation. A breach of OSHA regulation or
regulations can well be evidence of negligence, but is
not per se negligence and a breach in and of itself
does not create a finding, even if there had been a
finding of breach, not necessarily a breach of a duty
of care.

That's despite some of the testimony from the
experts, it may have much to do with what the standard
of care is for the conduct of a general contractor, but
it doesn't per se describe the standard of care, nor
would a finding of a breach of a -- or a violation of
an OSHA violation automatically mean that there's been
a breach of duty care and, thus, since there is a duty
of finding a negligence. That is a question for the
jury to determine.

Further, what is clear is that there is a
factual dispute that will allow the jury to determine
not only whether or not there's been a breach of the

2 Argument - Clark

3 duty of care and -- but there is even a factual dispute
4 as to whether or not the perimeters of the OSHA
5 regulations have been violated. There is a significant
6 dispute here. As I believe the defense expert made
quite clear, it's the key to determining liability is
where and how deep was the trench of the location where
it collapsed on the plaintiff.

7 Nobody is disputing that there was a trench
8 and that the plaintiff was in the trench and that the
9 trench collapsed, but that's about all the parties
10 agree on, where it was, how deep it was, and the like
and whether or not it caused -- proximately caused
injury and the nature and extent to that injury is
what's in dispute here and that's what the jury is here
to determine.

11 Now, the defendant didn't abandon any of its
12 defenses with regard to meeting the challenge of
exercising --

13 (Tape Off - Tape On)

14 THE COURT: -- the Court's ruling with regard
15 to prior violations --

16 (Tape Off - Tape On)

17 THE COURT: -- closer to --

18 (End of Tape 1)

19 THE COURT: -- why the Court barred the
20 introduction of those prior -- any prior OSHA
21 violations. I didn't know then, I don't know now what
22 those violations were, who they were against, how many
23 there were, what were they for and, frankly, that all
goes to the reason why one doesn't admit evidence of
prior bad acts because, to admit evidence of prior bad
acts would be -- would be necessary to show the
existence of some pattern, custom, or habit to the
degree to which there was any --

24 Suffice it to say, the Court did not find and
25 does not find now that there was a basis to, in effect,
under the rules, have a trial within a trial or trials,
multiple trials within a trial to determine whether or
not what the circumstances were and the degree to which
they are comparable and, therefore, constituting a
pattern, custom, or habit.

That doesn't mean that simply because -- that
at no point did the defendant in any way abandon any
defenses that they might have. To suggest, however,
that simply hiring a competent contractor or a
contractor that they believed to be competent was
enough to -- in and of itself to constitute a defense,
this Court does not believe that that is so.

That doesn't mean that Mr. Cobuzio is barred
from suggesting that one of the ways in which they met

2 Argument - Clark

3 their duty was by hiring somebody that they had
4 experience with over the period of however many years
5 that they had experience with. All add to the
6 testimony, I did not for a single moment bar any
7 evidence of any conduct relative to knowledge that the
8 defendant might have with regard to the abilities or
9 lack thereof of the subcontractor employer in this
10 case.

11 The degree to which its knowledge was
12 relevant, that information was admissible and, to some
13 degree, was testified to both by the plaintiff and by
14 the defendant. For all those reasons, the plaintiff --
15 the remainder of the plaintiff's motion for a directed
16 verdict on liability is denied, as well as the
17 plaintiff's motion to bar the defendant from suggesting
18 in his closing that Fritas was a competent contractor.

19 MR. COBUZIO: Thank you, Judge.

20 THE COURT: What's next?

21 MR. COBUZIO: Judge, I handed the Court
22 before the break a motion to bar the plaintiff's claim
23 for punitive damages. I, essentially, set forth as
24 concisely as possible the arguments that I'm going to
25 -- that I raised.

26 The strongest -- well, they're all strong
27 arguments why the punitive damage claim should be
28 dismissed. First and foremost, the complaint does not
29 include a claim for punitive damages and I attached
30 that and I realized it wasn't filed by Mr. Clark or by
31 a prior law firm, and a reading of the complaint filed
32 by the prior law firm reveals that in the damage
33 clause, the claim for punitive damages was never made.
34 The rules do require that it be made, and that's the
35 Punitive Damages Act, 2A:15-5.1. An award of punitive
36 damages must be specifically prayed for in the
37 complaint.

38 Now, it's anticipated that Mr. Clark may
39 argue that he filed an amended complaint on motion when
40 he sought to bring in the wife's per quod claim. In
41 this particular case, Judge, again, the prior complaint
42 was not filed by Mr. Clark, but the complaint that he
43 did file -- well, the complaint that he did serve with
44 the motion -- let's be precise about that -- the
45 complaint served with the motion, the motion to amend
46 included per quod claim, had stuck in it a punitive
47 damage claim in the damage clause, and I would say to
48 you, Your Honor, the Court was pretty clear on our
49 motion to dismiss for failure to state a claim. They
50 ordered that that complaint be dismissed.

51 So there is no filed complaint, which
52 includes a punitive damage claim. The order is dated

2 Argument - Clark

3 February 29th, 2008, and it reads, the amended
4 complaint of plaintiffs, Maria Fernandes and Rolando
Fernandes, be and hereby is dismissed with prejudice.

5 And so that complaint -- that amended
6 complaint was never filed, number one. Number two is
7 somewhat surreptitiously, perhaps. If there was a new
8 claim for damages being made for punitive damages and
9 the plaintiff wanted to amend his complaint, he would
10 have to put the Court on notice and not stick it into
11 the amended complaint. So even if Your Honor was to
12 deem it filed, it certainly behooves one to believe
13 that that was the true intent of the plaintiff and,
14 i.e., to put in the per quod claim and then stick in a
punitive damage claim.

15 But, again, that complaint was never filed.
16 It was dismissed. The only complaint that is filed
17 with the Court, which the Court can rely on, is the
18 first complaint.

19 The next anticipated argu--

20 THE COURT: But it was filed and then it was
21 dismissed, right?

22 MR. COBUZIO: No. It was a motion -- it was
23 ..a motion to --

24 MR. DU VOISIN: Yes.

25 MR. COBUZIO: Was it filed?

THE COURT: To amend. That motion was --

MR. COBUZIO: The motion to amend.

THE COURT: Motion to amend. That motion was
26 granted. Wasn't it?

MR. COBUZIO: Yes. That's true, Judge.

27 That's -- I'm sorry. And then there was a motion
28 brought by us to dismiss.

29 THE COURT: Which was also granted.

30 MR. COBUZIO: Which was also granted, so the
31 complaint was dismissed. I apologize for that. The
32 second argument deals -- the anticipated argument is
33 that Counsel wants to amend the pleadings to conform to
34 the evidence, and that's not appropriate in this
35 situation. That's not what you do under 4:9-2. An
36 amendment to pleadings to conform with the evidence is
37 either upon consent of the parties -- and, of course,
38 I'm not giving that -- or, in the Court's discretion,
39 presentation of the merits of the action will thereby
40 be subserved and, in this particular case, this is a
41 damage aspect, punitive damages. That's not the merits
42 of the claim, Judge. The merits of the claim is
43 negligence, duty, that kind of thing.

44 The -- and the third basis, Judge, is that
45 there really aren't sufficient facts. I mean, you have
all the facts before you to suggest that there is a

2 Argument - Clark

3 cognizable claim for punitive damages in this case.
4 And, finally, I would just add that, typically,
5 punitive damage claims are handled in a separate
6 proceeding before the same jury and it wouldn't be
7 appropriate at this time.

8 So I've given you four reasons why it should
9 be dismissed. Certainly, I'm standing on the strongest
10 argument and that is, it was never pled. Thank you,
11 Judge.

12 THE COURT: Mr. Clark?

13 MR. CLARK: Yes, Judge. With respect to a
14 punitive damages claim, one of the things to get the
15 claim at trial is it has to be asked for in the
16 complaint, it has to be prayed for in the complaint. I
17 think when the Punitive Damages Act speaks in terms of
18 praying for it in a complaint, what they mean is the
19 wherefore clause because that is the prayer for relief
20 is the wherefore clause. A punitive damages claim is
21 not a separate cause of action. It's a damages remedy,
22 and the proposed amended complaint was attached to the
23 motion. It was inserted, you know, clear as day into
24 the wherefore clause and I would agree that it wasn't
25 discussed in the factual section, but I think that the
Punitive Damages Act simply is asking that it be put in
the wherefore clause and that you ask for it. I don't
think it's a separate cause of action where it has to
be discussed and argued and all that.

A per quod claim, I believe, is a derivative
claim. It's derivative of the underlying claim, so I
think to the extent the motion requested to amend the
pleading to include a per quod claim, I believe that it
was appropriate to include it in the wherefore clause
because the damages that are sought in a per quod claim
derived from the underlying claim.

The proposed amended pleading was included
with the papers, so I do take umbrage of any suggestion
that it was somehow surreptitious or slipped in there.
It was in there. It was in the proposed amended
pleading.

THE COURT: It was in the proposed amended
pleading.

MR. CLARK: Yes.

THE COURT: We all agree. We'll also agree
that it was not mentioned in the -- in the motion
itself, either in the notice of motion or in the
certification of whatever was offered in support of the
motion to amend the complaint, right?

MR. CLARK: That's right.

THE COURT: Why not?

MR. CLARK: Why not? Why not? Well, --

2 Argument - Clark

3 THE COURT: If what you're saying now is that
 4 you have -- that your intention in making that motion
 5 was to amend the complaint to include a punitive
 6 damages section, then you knew full well that's what
 7 you were asking for. That's what you're telling me
 8 now. And if you knew full well that's what you were
 9 asking for, why didn't you tell the Court?

10 MR. CLARK: Well, in a case -- in a case like
 11 this, why didn't we tell the Court? Well, one, I
 12 believe that we did tell the Court inasmuch as it was
 13 attached in the amended pleading. Number two, --

14 THE COURT: If that was so, why would you
 15 have to send anything other than the amended pleading?
 16 You could say, Dear Court, please amend our pleading in
 17 the form attached hereto without saying anything about
 18 why.

19 MR. CLARK: The Court rules requires that the
 20 proposed amended pleading be attached and I think that,
 21 you know, it was a one-page certification, two
 22 paragraphs, and it does say, we are doing it to name
 23 the wife for a per quod claim. When we reviewed the
 24 file, it wasn't there. It was a one-page
 25 certification. It was, in my view, something of a pro
 forma motion and if --

THE COURT: Pro forma for purposes of adding
 the per quod claim.

MR. CLARK: To add that cause of action.

THE COURT: Right. That was its purpose.

MR. CLARK: Correct, but the punitive
 damages --

THE COURT: No other purpose.

MR. CLARK: Well, it was also to clean up the
 pleading. The language of that pleading is different
 from the other law firm. It's different than the form
 that we use in a case such as this. So it was also
 generally to clean it up. But the punitive damages
 claim, it's not a separate cause of action. It's a
 prayer for relief. It's a damage.

THE COURT: Let's face it, Mr. Clark, --

MR. CLARK: I'm sorry?

THE COURT: Be honest.

MR. CLARK: Yes.

THE COURT: That's in there because the form
 that you just said, the cleaning up the language that
 you use, had it in there. So it just carried over on
 the form.

MR. CLARK: No. It's more than a form. I
 mean, we definitely would have looked at that and said,
 this needs punitive -- we need to ask in the
 complaint --

2 Argument - Clark

3 THE COURT: Then why didn't you tell the
4 Court that?

5 MR. CLARK: In hindsight, I suppose we could
6 have made it more clear, but it is attached to the
7 pleading. The rule requires that the pleading be
8 attached. The pleading was attached and it was
9 included in there, so if we -- Judge, if we had -- if
10 we had filed a motion and attached a pleading without
11 it in the wherefore clause and then got the order and
12 then filed it with it in there, I can certainly see
13 that.

14 THE COURT: But on the other hand, you're
15 suggesting, I believe, that the dismissal of that
16 amended complaint with prejudice doesn't serve as a
17 dismissal of that punitive damage claim because the
18 Court didn't say, oh, by the way, that punitive damage
19 claim, we're dismissing that, too.

20 MR. CLARK: I guess -- I guess it somewhat
21 goes both ways as well because when the defendant filed
22 the motion and if we look -- and I have the motion
23 papers here and I'm sure the in the court file, but
24 when the defendant filed the motion, it all talks about
25 the per quod claim. It doesn't mention anything about
also moving to dismiss the punitive damages claim or
sort of teeing up the punitive damages claim on its
merits as it's now being teed up. So --

THE COURT: Did you make a motion to
reconsider, to the Court that dismissed the complaint
to reconsider and preserve the demand for punitive
damages when the Court signed the order dismissing the
amended complaint in its entirety with prejudice?

MR. CLARK: No. Because the motion papers
were so clear that it was only moving to dismiss the
per quod claim and --

THE COURT: You're talking out of both sides
of your mouth.

MR. CLARK: I'm sorry?

THE COURT: The papers were so clear that
we're only dismissing the per quod claim, but the
papers weren't so clear that you were only asking to
add the per quod claim?

MR. CLARK: In hindsight, it could have been
done a better form, certainly, in hindsight. It is --

THE COURT: You can't have it both ways.
It's either dismissed with prejudice, including the
punitive damages claim, or it isn't asked for in the
first place. You can't have it both ways. It's
either, you're asking the Court to read behind what is
actually there.

MR. CLARK: The other -- the other question,

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3 too, is how does it relate under the Punitive Damages
4 Act. The Punitive Damages Act simply says, it must be
5 requested in the complaint. The question becomes, is a
6 dismissal of a per quod claim in an amended complaint,
7 which includes the request to the prayer for punitive
8 damages is the dismissal of the per quod claim, does
9 that also render it unaskable at trial when the
10 punitive damages claim -- when the PDA says it has to
11 be requested? I think that would be something of a new
12 issue, so to speak, or a legal issue.

13 I say to the Court that it wasn't simply a
14 matter of form. It was definitely thought about and
15 said, this case needs a punitive damages claim in the
16 wherefore clause, so it was put in there more than in a
17 form way.

18 We attached it in the proposed amended
19 pleading. There was no opposition to it on the motion
20 and, when it was moved to dismiss, nothing was said
21 about the punitive claim, so the question remains, does
22 that render the plaintiff unable to ask to make that
23 claim at the time of trial? Is that what the Punitive
24 Damages Act and the Legislature meant when it said, it
25 has to be asked for in the complaint, that if it also
happens to get dismissed, a tagalong way, so to speak,
does that render that as -- you know, to end the query.

But, again, in all candor to the Court in
answering your questions directly, yes, it was more
than a form. You put it in there. I repeat myself
again. I don't think we were being surreptitious or
anything like that because it was attached in the
proposed amended pleadings the rule requires, and it
was a one-page certification.

So I don't know what more I can say about
that. I suppose, in the future, if we have a situation
like this, we will specifically put it in the
certification requesting it.

21 THE COURT: Good idea.

22 MR. CLARK: And I don't know what more I
23 could say on the procedural aspect, unless Your Honor
24 has any questions.

25 THE COURT: Okay. No.

MR. CLARK: With respect to the substantive
aspect, the standard for whether or not there's
sufficient evidence for a jury to consider punitive
damages would be whether or not the defendant's actions
were wanton or willful or with reckless disregard for
the rights of the plaintiff. I believe that there is
sufficient evidence in this case related to
compensatory damages. We have not sought to enter any
evidence that would only be relative to punitive

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3 damages in the compensatory phase of the trial.

4 However, with that said, I believe that there
5 is sufficient evidence in this case already to raise a
6 question for the jury as to the punitive damages claim.
7 Their federal regulations, I think we have raised at
8 least a question of fact as to whether or not the
9 defendants disregarded the federal regulations, OSHA
10 compliance, or what we've talked about.

11 There is a case, which is similar. SMITH V.
12 WHITTAKER, I think, is a key case on punitive damages.
13 It's 160 N.J. 221, and that kind of really kind of lets
14 that Supreme Court 1999, lays out the general standard.
15 So I looked and I tried to find some cases in the OSHA
16 context. Then I found was the Third Circuit -- federal
17 Third Circuit case called SANTILLIAN (phonetic), 289
18 Federal Appx. 491. It's the Third Circuit coming out
19 of the Virgin Islands.

20 And alien worker from the Dominican Republic
21 can sue the construction site owner and project manager
22 asserting negligence claims for serious and permanent
23 injuries when the worker fell two stories, head first
24 onto a concrete floor. And the trial Court awarded --
25 entered judgment for \$50,000 in punitive damages
against the project manager but set aside \$100,000
punitive damages award against the owner.

I think that case is somewhat instructive in
terms of applying the punitive damages standard.
Standard in the Third Circuit coming out of the Virgin
Islands is very similar to New Jersey State law, which
is both based on the second statement of torts.

Among the things the Court talks about is
that we conclude the District Court was correct to
uphold the jury's decision to award punitive damages
against -- but erred when it struck the jury's decision
to award punitive damages against Zela (phonetic).
Among the things talked about was that the behavior of
the defendant in failing to manage safety and enforce
the OSHA regulations was anything less than reckless
and indifference to the rights of others.

And this part is interesting. When the
accident occurred, Nasser (phonetic), instead of
calling an ambulance, placed Santillian in his car,
poured rum over him, -- I guess that's what they do in
the Virgin Islands. The poured rum over him, left him
at the emergency room door, and lied repeatedly about
what had occurred both with the medical staff at the
hospital who needed the information in order to treat
Santillian and to the police in order to cover up the
fact that the accident had occurred at the construction
site.

2 Argument - Clark

3 The Court found that Zela and Nassar failed
4 to follow safety regulations at the site set by OSHA.
5 There was no safety equipment was being used.
6 Santillian was on the roof without protection. A
7 forklift was used, being pushed -- towards Santillian
8 two stories up.

9 The Court said, the jury's decision to award
10 punitive damages against Zela was reckless in retaining
11 Nasser to oversee the construction of the target
12 building pursuant to the Restatement of Torts Second,
13 and I think the same applies here in terms of DAR both
14 retaining Fritas under these circumstances to dig these
15 trenches and its own actions of failing to enforce the
16 regulations on his job site. The absence of an
17 accident -- a prior evidence alone is not sufficient
18 proof that the construction of the building was
19 conducted in a proper manner.

20 What is clear from the evidence presented at
21 trial -- and I think this is analogous at our case --
22 is that the conditions at the target building
23 construction site were extremely poor. There was no
24 safety equipment of any kind provided to the workers.
25 I think there's plenty of testimony in our case in that
regard, Your Honor.

26 The relevant permits from the local
27 authorities had not been secured. Well, that one
28 doesn't apply here. Workers' compensation coverage was
29 not paid in that case. That also does not apply here.
30 There was ample evidence at trial via the testimony of
31 witnesses for a reasonable jury to conclude that the
32 project manager was aware of these conditions from the
33 time the project commenced through the date of the
34 accident.

35 Despite her testimony to the contrary, the
36 knowledge of poor conditions and the decision to
37 continue to employ Nasser as the manager of the
38 construction site to form the basis of the liability.
39 So I think there is sufficient evidence in this case,
40 Judge, on the merits to bring the punitive damages
41 question to the jury and, procedurally, it would only
42 come after. In the event there is a compensatory
43 damage verdict, at that point, the jury would -- you
44 know, if the claim is permitted, the jury would
45 consider it at that point.

46 I don't have any additional evidence that I
47 believe I would offer. The defendant would have the
48 opportunity to bring evidence of its financial
49 condition because that's relevant, if they want to do
50 that under the TAR (phonetic) case. So procedurally
51 speaking, as far as we're concerned, it would be

2 Argument - Clark

3 nothing more than an additional jury charge and, if the
4 defendant would so choose, to present evidence as to
the financial condition.

5 I think this was -- so that's it on the
punitive damages issue, Judge. Thank you.

6 THE COURT: Thank you. All right. On August
29th, 2006, the complaint in this case was filed. The
7 complaint did not ask for, did not seek, there was no
prayer for relief for punitive damages. Motion was
made and filed October 17th, 2007, to amend the
8 complaint. The notice of motion says, notice of motion
to amend the complaint. On the notice of motion, it
9 requests for an order granting leave to file an amended
complaint to name Maria Fernandes as a plaintiff.
10 That's what the notice was provided directed to Mr.
Cobuzio. Please take notice, that's why we're filing
11 this motion.

12 In support thereof, Mr. Clark writes, dated
October 9th, 2007, under penalty of law for making any
willfully false statement says, "this office took over
13 the handling of this file from a previous law firm on
or about June 25th, 2007. Upon review of the file, it
14 appears that no per quod claim on behalf of the
plaintiff's wife had been filed. Accordingly,
15 plaintiff makes within to amend complaint to name Maria
Fernandes as a plaintiff for her per quod claim. This
16 motion is made pursuant to Rule 4:9-1."

17 How hard would it have been to say when you
said, Mr. Clark, upon review of the file, it appears
that no per quod claim was made to say, no per quod
18 claim or punitive damages claim was made? You didn't.
You didn't put the Court or Mr. Cobuzio on notice of
19 the fact that you contained therein your first amended
complaint and jury demand, which was filed on January
20 7th, 2008. An insertion of the words punitive damages
twice, one at the end of Count 1 and one at the end of
21 Count 2.

22 Subsequently, that complaint was dismissed in
its entirety with prejudice by the same Judge that
granted the motion to amend the complaint. So not only
23 was that to the degree to which anybody could interpret
that motion as resulting in a leave to grant an
24 amendment to include a punitive damages claim, it was
improvidently granted.

25 It being improvidently granted, it was,
nonetheless, granted and the complaint was nonetheless
filed. However, that complaint in its entirety was
dismissed with prejudice. It no longer exists. The
only complaint that exists that is before this Court
having been tried or being tried is the motion -- is

2 Argument - Clark

3 the complaint that was filed in 2006 by the plaintiff
4 through its then Counsel's office. There is no
5 punitive damage claim in this case.

6 That having been said, let me also note for
7 the record that there has been nothing that provided --
8 that has been provided to this Court that this Court
9 can glean that provides an opportunity for a reasonable
10 jury to conclude that there was any willful or wanton
11 behavior on the part of the defendant general
12 contractor that proximately caused any injury to the
13 plaintiff and -- on the merits alone. If there had
14 been a cognizable demand for punitive damages, it would
15 be dismissed in any event. Motion is granted.

16 MR. COBUZIO: Thank you, Judge.

17 MR. CLARK: Thank you, Your Honor.

18 THE COURT: You're welcome. Anything else?
19 Take a break and move to charges?

20 MR. COBUZIO: Yes. Judge, I don't know if
21 this is an appropriate time to talk about whether six
22 or eight are going to deliberate. I don't know what
23 your procedure is.

24 THE COURT: During the charge conference,
25 ..after break.

MR. COBUZIO: Charge? Okay. Okay. Thanks,
Judge.

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NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

55

Colloquy

55

(Break)

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

56

Colloquy

56

THE COURT: Okay. All are present and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

57

Colloquy

57

outside the presence of the jury. Mr. Cobuzio, you

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

58

Colloquy

58

have something in the way of proposed charges?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

59

Colloquy

59

MR. COBUZIO: Yes, Your Honor.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

60

Colloquy

60

MR. CLARK: Do I have a copy?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

61

Colloquy

61

MR. COBUZIO: Oh, I gave it to -- I gave it

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

62

Colloquy

62

to you before lunch.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

63

Colloquy

63

MR. CLARK: You gave me the verdict sheet.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

64

Colloquy

64

MR. COBUZIO: No. We gave you the verdict

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

65

Colloquy

65

sheet --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

66

Colloquy

66

MR. CLARK: That's it. All I got was a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

67

Colloquy

67

verdict sheet.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

68

Colloquy

68

MR. COBUZIO: Yes. I gave you this. You had

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

69

Colloquy

69

it laying on the -- here, have another one, with the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

70

Colloquy

70

verdict sheet and the proposed charges.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

71

Colloquy

71

MR. CLARK: Okay. All right. I'll collect

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

72

Colloquy

72

the -- this is extra.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

73

Colloquy

73

MR. COBUZIO: Yes.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

74

Colloquy

74

MR. CLARK: All right. I thought it was just

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

75

Colloquy

75

a verdict sheet. Let's see, have I got mine now?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

76

Colloquy

76

Thanks.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

77

Colloquy

77

THE COURT: Okay. All right. In the 112

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

78

Colloquy

78

standard charges, we have no requests from Mr. Clark.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

79

Colloquy

79

Mr. Cobuzio, you're just looking for -- making sure

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

80

Colloquy

80

burden of proof, preponderance of the evidence, and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

81

Colloquy

81

false in one, false in all is in the case.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

82

Colloquy

82

MR. COBUZIO: I'm just trying to -- I'm

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

83

Colloquy

83

following you. Where are you now, Judge?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

84

Colloquy

84

THE COURT: 1:-- 1.12, the general provisions

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

85

Colloquy

85

for a standard charge. That goes through -- well, at

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

86

Colloquy

86

least up through the credibility charge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

87

Colloquy

87

MR. COBUZIO: Okay.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

88

Colloquy

88

THE COURT: The only request that's being

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

89

Colloquy

89

made is by you and you're asking for the standard

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

90

Colloquy

90

charge -- the model charge on burden of proof,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

91

Colloquy

91

preponderance of the evidence, and false in one, false

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

92

Colloquy

92

in all.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

93

Colloquy

93

MR. COBUZIO: That's correct.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

94

Colloquy

94

THE COURT: Mr. Clark, do you want to be

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

95

Colloquy

95

heard on the false in one, false in all charge?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

96

Colloquy

96

MR. CLARK: No. No. I leave it up to Your

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

97

Colloquy

97

Honor's -- you know, I rely on Your Honor's discretion

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

98

Colloquy

98

as to it. You've seen more of these than I have, so --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

99

Colloquy

99

THE COURT: Yes. I don't see any -- do you

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

100

Colloquy

100

want to talk to me about that, Mr. Cobuzio? Is there

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

101

Colloquy

101

something that you find to be dramatic that -- I mean,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

102

Colloquy

102

I don't know exactly what the standard is in terms of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

103

Colloquy

103

when one charge is false in one, false in all, but in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

104

Colloquy

104

my view, the general charge as to credibility makes it

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

105

Colloquy

105

clear that the jury is entitled to believe or

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

106

Colloquy

106

disbelieve a witness and is entitled to believe all of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

107

Colloquy

107

what they say or none of what they say or part of what

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

108

Colloquy

108

they say. That's what the credibility charge says.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

109

Colloquy

109

The false in one, false in all charge really

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

110

Colloquy

110

essentially says the same thing, only it highlights the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

111

Colloquy

111

proposition that a -- specifically, if a juror finds

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

112

Colloquy

112

that somebody told a falsehood in one thing, they're

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

113

Colloquy

113

entitled to disbelieve everything they say in the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

114

Colloquy

114

entirety of the testimony.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

115

Colloquy

115

I, as a general rule, reserve that charge for

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

116

Colloquy

116

when I get the sense of somebody getting -- that the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

117

Colloquy

117

jury could conclude somebody had gotten on the stand

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

118

Colloquy

118

and is willfully blind.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

119

Colloquy

119

MR. COBUZIO: I'll leave it to Your Honor's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

120

Colloquy

120

discretion.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

121

Colloquy

121

THE COURT: So I'm not going to charge false

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

122

Colloquy

122

in one, false in all. So the reasons I just described.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

123

Colloquy

123

Okay. Moving onto the Chapter 5 charges, negligence.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

124

Colloquy

124

Before we do that, we have the expert testimony charge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

125

Colloquy

125

We qualified four people -- five people, I believe, as

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

126

Colloquy

126

experts.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

127

Colloquy

127

MR. COBUZIO: I believe that's true, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

128

Colloquy

128

So you had three, I had two. Yes.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

129

Colloquy

129

THE COURT: I know that Mr. Clark tried to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

130

Colloquy

130

get a hypothetical question asked and answered on

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

131

Colloquy

131

cross-examination of a defense expert, but I don't see

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

132

Colloquy

132

the charge -- optional charge on hypothetical questions

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

133

Colloquy

133

being particularly applicable here and you're not

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

134

Colloquy

134

asking for it, so --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

135

Colloquy

135

MR. COBUZIO: Correct, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

136

Colloquy

136

THE COURT: The actual charge on the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

137

Colloquy

137

conflicting expert testimony, I don't think that that's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

138

Colloquy

138

necessary, although there clearly is conflicting expert

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

139

Colloquy

139

testimony. All right. No other requests in that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

140

Colloquy

140

regard. We move onto Chapter 5. 510A is being asked

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

141

Colloquy

141

for by both parties, negligence and ordinary care.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

142

Colloquy

142

It's at that point that I will incorporate

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

143

Colloquy

143

some of what Mr. Clark included in his request to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

144

Colloquy

144
charge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

145

Colloquy

145

MR. COBUZIO: What would that be there,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

146

Colloquy

146

Judge?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

147

Colloquy

147

THE COURT: Violation of the statute, effect

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

148

Colloquy

148

of OSHA, contractor's non-delegable duty. Is there

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

149

Colloquy

149

something about any of that?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

150

Colloquy

150

MR. COBUZIO: Your Honor, there -- I'm trying

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

151

Colloquy

151

to follow you. Certainly, we're at 510B. There is a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

152

Colloquy

152

standard charge with regard to standards of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

153

Colloquy

153

construction, custom, and usage in the industry or

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

154

Colloquy

154

trade, which is 510H. I mean, there's an actual model

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

155

Colloquy

155

jury charge. If Your Honor is referring to Mr. Clark's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

156

Colloquy

156

request -- and I'm not sure I'm there yet, Judge, or

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

157

Colloquy

157

you're there, but if you're incorporating Mr. Clark's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

158

Colloquy

158

request that actual standards be identified in the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

159

Colloquy

159

charge, I would object to that simply because you're

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

160

Colloquy

160

really repeating the evidence and, now, you're putting

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

161

Colloquy

161

the evidence in from the bench, which, one, seems to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

162

Colloquy

162

give it a little bit more credibility and, two, you can

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

163

Colloquy

163

also put in then, you know, -- I would argue, if you're

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

164

Colloquy

164

going to go down that road, then you should also put in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

165

Colloquy

165

the citations referenced in my expert's report with

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

166

Colloquy

166

regard to controlling employers and reasonableness and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

167

Colloquy

167

what's a competent person.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

168

Colloquy

168

So there is a standard charge. It's dated, I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

169

Colloquy

169

think, the 10th -- March 10th. It's 5.10H, and I think

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

170

Colloquy

170

it covers what Mr. Clark wants, which is that if

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

171

Colloquy

171

there's violations of industry standards, you can be

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

172

Colloquy

172

considered per se negligence. I think to include what

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

173

Colloquy

173

Mr. Clark is proposing, which appears to be attached to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

174

Colloquy

174

his proposed jury charge, all the citations to the OSHA

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

175

Colloquy

175

regulations, I think that's -- I would object to that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

176

Colloquy

176

and I think that's improper. I mean, you're repeating

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

177

Colloquy

177

the evidence from the plaintiff's case in a charge with

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

178

Colloquy

178

particularity, which is prejudicial to the defendant.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

179

Colloquy

179

I think the charge should just be equal charge as to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

180

Colloquy

180
both.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

181

Colloquy

181

THE COURT: Mr. Clark?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

182

Colloquy

182

MR. CLARK: With respect to -- I heard Mr.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

183

Colloquy

183

Cobuzio address two aspects of the proposed charge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

184

Colloquy

184

The proposed charge we submitted a few days ago is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

185

Colloquy

185

modeled after 5.10H and 5.30D. There's two aspects Mr.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

186

Colloquy

186

Cobuzio addressed. One is the aspect dealing with

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

187

Colloquy

187

standards in the industry standards and the second was

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

188

Colloquy

188

dealing with the OSHA statute itself.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

189

Colloquy

189

With respect to the industry standards, the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

190

Colloquy

190

charge says that evidence has been produced as to the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

191

Colloquy

191

standard in the industry such as those -- Judge, do you

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

192

Colloquy

192

mind if I sit --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

193

Colloquy

193

THE COURT: Go right ahead.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

194

Colloquy

194

MR. CLARK: -- because, that way, I can also

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

195

Colloquy

195

look at the model jury charge on the computer.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

196

Colloquy

196

THE COURT: Yes. No problem.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

197

Colloquy

197

MR. CLARK: And I think that this -- I think

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

198

Colloquy

198

it is consistent to reference the standards that the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

199

Colloquy

199

experts refer to. The Court is free to accept or

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

200

Colloquy

200

reject those standards and, if there's other standards

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

201

Colloquy

201

that Counsel wants to put in there, I don't have any

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

202

Colloquy

202

problem with Counsel putting those standards in there.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

203

Colloquy

203

But I think that this charge fairly -- you know, is in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

204

Colloquy

204

line with the model jury charge and adopted to this

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

205

Colloquy

205

case in terms of its standards.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

206

Colloquy

206

I would just say that there's a good case,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

207

Colloquy

207

CONSTANTINO V. VENTRIGLIA (phonetic), Appellate

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

208

Colloquy

208

Division -- 324 Super. 437, Appellate Division 1999,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

209

Colloquy

209

which really discusses in detail about charging the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

210

Colloquy

210

jury as to industry standards and OSHA regulations in a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

211

Colloquy

211

construction accident case. So I think that case is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

212

Colloquy

212

very helpful.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

213

Colloquy

213

But in any event, I think that the proposed

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

214

Colloquy

214

charges that deals with the industry standards is in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

215

Colloquy

215

line with the model jury charge. It is, I believe,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

216

Colloquy

216

fairly adapted to this case.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

217

Colloquy

217

THE COURT: I think -- I think it is. The

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

218

Colloquy

218

part that I think, though, that's troubling for Mr.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

219

Colloquy

219

Cobuzio and the one I want to address with you, Mr.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

220

Colloquy

220

Clark, is whether or not in the course of charging

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

221

Colloquy

221

relative to and explaining to the jury what the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

222

Colloquy

222

standards are, we're telling the jury that the OSHA

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

223

Colloquy

223

regulations, a violation thereof, could be evidence of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

224

Colloquy

224

negligence but is not in and of itself negligence. If

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

225

Colloquy

225

we read verbatim the actual OSHA regulations and ask

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

226

Colloquy

226

the jury to determine whether or not those regulations

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

227

Colloquy

227

have been violated, aren't we (a) confusing them, (b)

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

228

Colloquy

228

asking them to make -- to reach conclusions that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

229

Colloquy

229

they're not -- that ought to be based on the testimony

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

230

Colloquy

230

as opposed to what is evidence of negligence as opposed

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

231

Colloquy

231

to per se negligence and doesn't it make more sense

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

232

Colloquy

232

simply to tell them everything that you just said but

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

233

Colloquy

233

to tell them that, to the degree to which they heard

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

234

Colloquy

234

testimony indicating that defendant violated OSHA

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

235

Colloquy

235

violations, if they can conclude that, then they can

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

236

Colloquy

236

accept that as evidence of negligence as opposed to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

237

Colloquy

237

reading the entirety of the OSHA regulations to them,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

238

Colloquy

238

which is going to totally confuse them.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

239

Colloquy

239

MR. CLARK: Yes. I would like to respond to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

240

Colloquy

240

that, Your Honor.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

241

Colloquy

241

THE COURT: Okay.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

242

Colloquy

242

MR. CLARK: Charging the OSHA regulations --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

243

Colloquy

243

you know, this is not sort of like a unique area of the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

244

Colloquy

244

law. It's really no different than an auto accident

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

245

Colloquy

245

red light, green light case. A jury may rely upon a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

246

Colloquy

246

statute to determine the reasonableness of the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

247

Colloquy

247

defendant's conduct and whether or not the defendant

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

248

Colloquy

248

was negligent. They may rely upon the statute, so long

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

249

Colloquy

249

as the plaintiff is within the class of persons

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

250

Colloquy

250

supposed to be protected by the statute. It's no

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

251

Colloquy

251

different than in an auto accident case, if there's a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

252

Colloquy

252

red light, green light case, the jury would ordinarily

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

253

Colloquy

253

be charged the red light, green light statute and the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

254

Colloquy

254

same principle applies.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

255

Colloquy

255

Simply because someone violated a motor

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

256

Colloquy

256

vehicle law doesn't mean it's negligence per se and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

257

Colloquy

257

compliance with the law, of the motor vehicle law

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

258

Colloquy

258

doesn't give the defendant a dismissal. The jury still

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

259

Colloquy

259

has to determine all the facts and circumstances, but

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

260

Colloquy

260

it's not different than charging the jury the red

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

261

Colloquy

261

light, green light statute or charging them a left turn

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

262

Colloquy

262

statute because it's something they can consider.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

263

Colloquy

263

We're definitely not asking that they be

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

264

Colloquy

264

charged the entirety of the OSHA regulations, only the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

265

Colloquy

265

ones that are fairly applicable to this case and I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

266

Colloquy

266

think that would be a standard operation in any

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

267

Colloquy

267

negligence case to read to the jury what the applicable

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

268

Colloquy

268

statute that they may consider and it's all in the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

269

Colloquy

269

qualified language in there. It's may, and that is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

270

Colloquy

270

modeled.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

271

Colloquy

271

If we were to scroll down and look at the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

272

Colloquy

272

motor vehicle -- an auto case, you would -- I believe

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

273

Colloquy

273

we would find the same thing, and I can pull that up.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

274

Colloquy

274

THE COURT: Yes. I'm familiar with that.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

275

Colloquy

275

MR. CLARK: And for whatever it's worth,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

276

Colloquy

276

Judge, in my experience in these cases at trial -- and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

277

Colloquy

277

Your Honor will do whatever thinks is fit in this case,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

278

Colloquy

278

but in other cases that I have tried, whether it be a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

279

Colloquy

279

ladder fall-down case, the jury is charged -- has been

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

280

Colloquy

280

charged in my experience the general safety regulations

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

281

Colloquy

281

that may fairly apply and, also, is charged with

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

282

Colloquy

282

specific regulations. I can recall a ladder case some

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

283

Colloquy

283

years ago where the jury was charged the applicable

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

284

Colloquy

284

ladder statute. As long as the qualifying language is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

285

Colloquy

285

in there -- and I believe it is -- as it also is in the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

286

Colloquy

286

model jury charge that the jury may consider it and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

287

Colloquy

287

it's put in its proper light, I think the jury would

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

288

Colloquy

288

actually be more confused having heard things about

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

289

Colloquy

289

OSHA but then they're not charged, you know, the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

290

Colloquy

290

controlling statute.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

291

Colloquy

291

I'll read from 5.30D, Violation of Traffic

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

292

Colloquy

292

Act, citing to EWING V. BURKE, 316 Super., Appellate

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

293

Colloquy

293

Division '98. The Appellate Division held that the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

294

Colloquy

294

trial Court committed plain error in failing to modify

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

295

Colloquy

295

the model charges to include reference to a relevant

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

296

Colloquy

296

motor vehicle statute that was applicable to the facts

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

297

Colloquy

297

and circumstances of the particular case.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

298

Colloquy

298

The Appellate Division stated, ordinarily,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

299

Colloquy

299

therefore, if there is evidence tending to establish

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

300

Colloquy

300

that a vehicle was operated in violation of a motor

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

301

Colloquy

301

vehicle statute, the statutory duties should be charged

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

302

Colloquy

302

to the jury in order to assist the jury in arriving at

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

303

Colloquy

303

the appropriate verdict.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

304

Colloquy

304

Of course, there's no private right of action

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

305

Colloquy

305

under the motor vehicle statute as there is no private

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

306

Colloquy

306

right of statute under the OSHA statute. However, when

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

307

Colloquy

307

a statute -- and I think the charge says this -- when

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

308

Colloquy

308

the statute establishes an acceptable standard of care

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

309

Colloquy

309

in society and it is alleged that that has been

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

310

Colloquy

310

violated and the Court finds that there's sufficient

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

311

Colloquy

311

evidence, a jury could reasonably conclude such a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

312

Colloquy

312

statute has been violated. I think the law is clear

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

313

Colloquy

313

under the model jury charge and as stated in the EWING

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

314

Colloquy

314

case, for example, that it would be plain error to not

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

315

Colloquy

315

charge the jury that.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

316

Colloquy

316

And some of the language in this model jury

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

317

Colloquy

317

charge -- because it's very analogous, a violation of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

318

Colloquy

318

the Traffic Act, it's very analogous to this situation

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

319

Colloquy

319

as to whether or not they get charged the applicable

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

320

Colloquy

320

statute. It says, if you find that the defendant has

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

321

Colloquy

321

violated that standard of conduct, -- I'm sorry. In

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

322

Colloquy

322

this case, in support of the charge of negligence made,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

323

Colloquy

323

it is asserted that the defendant violated a provision

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

324

Colloquy

324

of the motor vehicle laws. That provision is referred

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

325

Colloquy

325

to, is known as N.J.S.A. blank and reads as follows,

NEW JERSEY

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SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

326

Colloquy

326

blank, and they quote the statute as we did in our

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

327

Colloquy

327
case.

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

328

Colloquy

328

The statute has set up a standard of conduct

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

329

Colloquy

329

for the users of our streets and highways. If you find

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

330

Colloquy

330

that the defendant has violated that standard of

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

331

Colloquy

331

conduct, such a violation is evidence to be considered

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

332

Colloquy

332

by you in determining whether negligence, as I have

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

333

Colloquy

333

defined to you, has been established. It's the same

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

334

Colloquy

334

under ALLOWAY and the other cases. If you find that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

335

Colloquy

335

they have violated an OSHA regulation, it is evidence

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

336

Colloquy

336

they can consider and it charge was on to say, you may

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

337

Colloquy

337

find that such violation constituted negligence on the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

338

Colloquy

338

part of the defendant or you may find that it did not

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

339

Colloquy

339

constitute such negligence, and I believe that same

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

340

Colloquy

340

sort of qualifying language is in there in the charge

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

341

Colloquy

341

that we have submitted dealing with the applicable

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

342

Colloquy

342

statute in this case.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

343

Colloquy

343

Your finding on this issue may be based on

NEW JERSEY

PART

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LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

344

Colloquy

344

such violation alone, but in the event that there is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

345

Colloquy

345

other additional evidence bearing on the issue, you

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

346

Colloquy

346

will consider such violation, together with all such

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

347

Colloquy

347

additional evidence in arriving as to your ultimate

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

348

Colloquy

348

decision.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

349

Colloquy

349

And it says in the case, it says PHILLIPS V.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

350

Colloquy

350

GREMENTE (phonetic). It's at the bottom of the model

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

351

Colloquy

351

jury charge. The above may be modified to cover

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

352

Colloquy

352

violations of certain other statutes or ordinances,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

353

Colloquy

353

which set up a standard of conduct to be observed in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

354

Colloquy

354

given circumstances for the benefit of the Class 2,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

355

Colloquy

355

which plaintiff belongs. Defense expert agreed that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

356

Colloquy

356

OSHA was set up to protect workers and preserve our

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

357

Colloquy

357

natural resources -- our human resources. I don't

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

358

Colloquy

358

think there's any dispute that plaintiff falls within

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

359

Colloquy

359

the class of persons to benefit from the OSHA Act.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

360

Colloquy

360

I think it's clear. I think the Court will

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

361

Colloquy

361

be correct. It's plain error to not charge it and to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

362

Colloquy

362

read it and, as I said, in other similar cases, I have

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

363

Colloquy

363

found that that has been done in at least two other

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

364

Colloquy

364

cases that went to verdict in this context. Thank you,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

365

Colloquy

365

Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

366

Colloquy

366

MR. COBUZIO: Judge, may I respond?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

367

Colloquy

367

THE COURT: Yes.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

368

Colloquy

368

MR. COBUZIO: Briefly, Judge. First of all,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

369

Colloquy

369

I wasn't involved in those other cases. I have no idea

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

370

Colloquy

370

what the evidence was. I have no idea whether it was

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

371

Colloquy

371

even challenged. So to suggest that because it

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

372

Colloquy

372

happened somewhere else, it should happen here, I don't

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

373

Colloquy

373

think, is something the Court can rely on.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

374

Colloquy

374

Secondly is the motor vehicle model jury

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

375

Colloquy

375

charge, I haven't seen one in a while, I haven't tried

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

376

Colloquy

376

an auto case in a while, but as I recall it, the model

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

377

Colloquy

377

charge as developed by the Supreme Court committee on

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

378

Colloquy

378

model jury charges actually gives you a line where it

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

379

Colloquy

379

says, if you -- a plug-in where they say that you're

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

380

Colloquy

380

supposed to plug in the actual statute.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

381

Colloquy

381

The model jury charge I have given you, which

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

382

Colloquy

382

is the charge adopted by the Supreme Court is fair to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

383

Colloquy

383

both parties, 5.10H, and nowhere in there does it say

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

384

Colloquy

384

to you or provide you instruction where you're supposed

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

385

Colloquy

385

to plug in the OSHA citations that are being alleged to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

386

Colloquy

386

have been violated.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

387

Colloquy

387

Now, that said, Judge, if you were to do

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

388

Colloquy

388

that, my suggestion to you is, Judge, you're restating

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

389

Colloquy

389

the plaintiff's case as closing argument from the bench

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

390

Colloquy

390

in a charge and I think that the jury is going to infer

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

391

Colloquy

391

that, therefore, it must be. And in that regard, I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

392

Colloquy

392

think the charge that we have as our model where the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

393

Colloquy

393

Court does -- the Supreme Court does not tell us where

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

394

Colloquy

394

to plug in the OSHA violations or the OSHA citations, I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

395

Colloquy

395

think that's the appropriate charge, the fair charge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

396

Colloquy

396

Mr. Clark is going to be able to close

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

397

Colloquy

397

talking all about that stuff. We do know Gallagher

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

398

Colloquy

398

talked about it on the stand and now you're plugging it

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

399

Colloquy

399

into a charge and Your Honor is going to say it to the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

400

Colloquy

400

jury and I think that's prejudicial to the defendant.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

401

Colloquy

401

So, therefore, I would rely on the model charge as

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

402

Colloquy

402

adopted by our Supreme Court rules committee or model

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

403

Colloquy

403

jury -- what's the proper term there, Judge? Model

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

404

Colloquy

404

jury charge committee. There we go. Thanks, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

405

Colloquy

405

THE COURT: Right. Civil.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

406

Colloquy

406

MR. COBUZIO: Thank you, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

407

Colloquy

407

THE COURT: Do you have that cite, Charity,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

408

Colloquy

408

because I can't find it anywhere, the cite that we were

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

409

Colloquy

409

talking about.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

410

Colloquy

410

LAW CLERK: Yes. It's the case that I --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

411

Colloquy

411

this is the part that --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

412

Colloquy

412

(Tape Off - Tape On)

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

413

Colloquy

413

MR. CLARK: May I briefly respond or --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

414

Colloquy

414

THE COURT: Go ahead.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

415

Colloquy

415

MR. CLARK: We're not asking the Court to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

416

Colloquy

416

sort of bolster our case. We're following the model

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

417

Colloquy

417

jury charge. As, again, the Court in EWING said, it

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

418

Colloquy

418

would be plain error to not charge the applicable

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

419

Colloquy

419

statute and the jury -- Mr. Cobuzio's argument that he

NEW JERSEY

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SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

420

Colloquy

420

just made would equally apply to the model jury charge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

421

Colloquy

421

It says, in this case, in support of the negligence

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

422

Colloquy

422

made, it is asserted that the defendant violated a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

423

Colloquy

423

provision of the motor vehicle laws.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

424

Colloquy

424

The same argument could be made there in a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

425

Colloquy

425

motor vehicle case. Judge, don't say that because

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

426

Colloquy

426

you're just supporting the plaintiff's claim that they

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

427

Colloquy

427

violated the motor vehicle law and the charge goes onto

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

428

Colloquy

428

cite the applicable statute. It says, it -- the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

429

Colloquy

429

standard of conduct.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

430

Colloquy

430

Mr. Cobuzio is incorrect to say that the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

431

Colloquy

431

Judge is just sort of bolstering the plaintiff's case

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

432

Colloquy

432

because the same argument could be made there and the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

433

Colloquy

433

qualifying language is in the charge. If you find the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

434

Colloquy

434

defendant has violated the standard of conduct, such

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

435

Colloquy

435

violation is evidence to be considered by you. You may

NEW JERSEY

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I N D E X²

436

Colloquy

436

find that such violation constituted negligence on the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

437

Colloquy

437

part of the defendant or you may find that it did not

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

438

Colloquy

438

constitute such negligence.

NEW JERSEY

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SUPERIOR COURT OF

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I N D E X²

439

Colloquy

439

So the qualifying language is in the model

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

440

Colloquy

440

jury charge. It should be in the charge I submitted,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

441

Colloquy

441

and Mr. Cobuzio's argument that by stating the

NEW JERSEY

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SUPERIOR COURT OF

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I N D E X²

442

Colloquy

442

applicable statute and citing it as it's cited in the

NEW JERSEY

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SUPERIOR COURT OF

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I N D E X²

443

Colloquy

443

statute would bolster plaintiff's case is incorrect

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

444

Colloquy

444

because the model jury charge provides that it's not

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

445

Colloquy

445

bolstering it and the plain language is in there that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

446

Colloquy

446

says, you may consider it and you may find or you may

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

447

Colloquy

447

not find, and as you continue down the model jury

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

448

Colloquy

448

charge, it specifically cites to it and, again, the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

449

Colloquy

449

notes to the model jury charge cite to PHILLIPS V.

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

450

Colloquy

450

GREMENTE, that the above may be modified to cover

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

451

Colloquy

451

violations of certain other statutes or ordinances,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

452

Colloquy

452

which was done in this case.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

453

Colloquy

453

The other form charge there, it actually

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

454

Colloquy

454

cites it. In this case, plaintiff argues that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

455

Colloquy

455

defendant was negligent because it violated provision

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

456

Colloquy

456

of the motor vehicle laws. The provisions referred to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

457

Colloquy

457

as N.J.S.A. 39:4-89, and then it quotes it, driver of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

458

Colloquy

458

vehicle shall not follow vehicle more closely, et

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

459

Colloquy

459

cetera, et cetera, and as the Court held in the EWING

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

460

Colloquy

460

case, I think it would be plain error in this case to

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

461

Colloquy

461

now charge the jury the applicable statutes and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

462

Colloquy

462

regulations, which is not only the OSHA regulation but,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

463

Colloquy

463

also, the New Jersey Administrative Code that's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

464

Colloquy

464

referenced in our papers and the building permit is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

465

Colloquy

465

entered in as evidence. Thank you, Judge.

NEW JERSEY

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SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

466

Colloquy

466

THE COURT: Thank you. All right. As the

NEW JERSEY

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SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

467

Colloquy

467

Supreme Court said in ALLOWAY and I quote, "Moreover,

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

468

Colloquy

468

in the area of workplace safety, the common law

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

469

Colloquy

469

provides ample remedial relief that is flexible and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

470

Colloquy

470

adaptive of changing circumstances." Further, the

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

471

Colloquy

471

ALLOWAY Court noted that in cases dealing with OSHA

NEW JERSEY

PART

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I N D E X²

472

Colloquy

472

violations and its predecessor the Construction Safety

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

473

Colloquy

473

Act, view regulatory enforcement and not independent

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

474

Colloquy

474

civil remedial action as the central means to achieve

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

475

Colloquy

475

workplace safety, citing CAINE, which is at 278 N.J.

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

476

Colloquy

476

Super. at 143.

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

477

Colloquy

477

The Court recognized in that case it was --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

478

Colloquy

478

the Court recognized that while it might be feasible to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

479

Colloquy

479

make liability turn -- quoting from ALLOWAY -- "turn on

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

480

Colloquy

480

the violation of an OSHA regulation, a sounder approach

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

481

Colloquy

481

accords the violation relevance but not dispositive

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

482

Colloquy

482

weight."

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

483

Colloquy

483

To the degree to which we cite the regulation

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

484

Colloquy

484

in its specific language, not only does it serve to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

485

Colloquy

485

potentially confuse the jury, but it may cause that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

486

Colloquy

486

confusion in this Court's view to rise to the level

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

487

Colloquy

487

whereby the liability question turns upon the violation

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

488

Colloquy

488

as opposed to -- the violation of the OSHA statute as

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

489

Colloquy

489

opposed -- OSHA regulation as opposed to the common law

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

490

Colloquy

490

standard, which is the concept under which this case is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

491

Colloquy

491

being tried.

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

492

Colloquy

492

The Court will certainly charge the jury with

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

493

Colloquy

493

regard to the relevance -- which is what ALLOWAY stands

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

494

Colloquy

494

for -- the relevance of a violation of an OSHA statute

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

495

Colloquy

495

and for them to determine whether or not there has been

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

496

Colloquy

496

a violation and whether there has been or hasn't been,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

497

Colloquy

497

whether or not the common law duty, which will be

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

498

Colloquy

498

explained to them, has been breached.

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

499

Colloquy

499

So I'm going to read a somewhat modified

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

500

Colloquy

500

5.10H with an insertion of the OSHA reference without

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

501

Colloquy

501

specifically quoting verbatim the OSHA regulations.

NEW JERSEY

PART

SUPERIOR COURT OF

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A.D.# _____

I N D E X²

502

Colloquy

502

Okay.

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

503

Colloquy

503

MR. COBUZIO: Thank you, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

504

Colloquy

504

MR. CLARK: Judge, the other important part

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

505

Colloquy

505

about this -- and I think it would confuse the jury is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

506

Colloquy

506

-- and I think it's critical to charge the jury the

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

507

Colloquy

507

OSHA regulation in this case. They're going to make

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

508

Colloquy

508

arguments that, if it's less than five feet deep, it

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

509

Colloquy

509

doesn't require suring and they're going to make

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

510

Colloquy

510

arguments that it wasn't less than five feet deep and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

511

Colloquy

511

-- it was less than five feet deep and, therefore, it

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

512

Colloquy

512

didn't -- I think it's critical in this case to charge

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

513

Colloquy

513

the applicable OSHA regulation in that regard because

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

514

Colloquy

514

that's not the law. The law is if it's less than five

NEW JERSEY

PART

SUPERIOR COURT OF

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ESSEX COUNTY

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I N D E X²

515

Colloquy

515

feet deep, a competent person has to inspect it and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

516

Colloquy

516

conclude it's not likely to collapse. If the jury is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

517

Colloquy

517

not charged that, they're going to -- they're going

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

518

Colloquy

518

to --

NEW JERSEY

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SUPERIOR COURT OF

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I N D E X²

519

Colloquy

519

THE COURT: But that makes your point, Mr.

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

520

Colloquy

520

Clark, and that makes a point that I made and that is,

NEW JERSEY

PART

SUPERIOR COURT OF

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A.D.# _____

I N D E X²

521

Colloquy

521

it could be a breach and, therefore, negligence if the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

522

Colloquy

522

pit -- if the trench was less than five feet and it

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

523

Colloquy

523

could be not negligence if it was more than five feet.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

524

Colloquy

524

Now, it would be unlikely but, you know, who is to say?

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

525

Colloquy

525

NEW JERSEY

PART

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I N D E X²

526

Colloquy

526

The standard is not in and of itself the OSHA

NEW JERSEY

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SUPERIOR COURT OF

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I N D E X²

527

Colloquy

527

regulation. It is evidence of negligence, not per se

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

528

Colloquy

528

negligence. So just like you're free to argue and not

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

529

Colloquy

529

just because it's in the OSHA regulations, you're free

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

530

Colloquy

530

to argue that nobody -- that even if it was less than

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

531

Colloquy

531

five feet, they should have had trench boxes because

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

532

Colloquy

532

the need was there and there has been testimony to that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

533

Colloquy

533

effect. Similarly, Mr. Cobuzio is free to argue that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

534

Colloquy

534

it wasn't and if he wanted to, he would be free to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

535

Colloquy

535

argue that, even if it was deeper than five feet, it is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

536

Colloquy

536

not necessarily a breach of a duty of care, depending

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

537

Colloquy

537

upon the circumstances.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

538

Colloquy

538

MR. CLARK: But that would -- Your Honor made

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

539

Colloquy

539

a good point. You said, who is to say? The Court is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

540

Colloquy

540

to say. The Court has to correctly recite the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

541

Colloquy

541

applicable statute and it's true that violation of the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

542

Colloquy

542

statute doesn't make -- render liability. The traffic

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

543

Colloquy

543

accident is the exact same thing, and the Court in the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

544

Colloquy

544

CONSTANTINO case said, the actual jury instructions may

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

545

Colloquy

545

have prevented the jury from considering the OSHA

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

546

Colloquy

546

safety standards relied upon by plaintiff's expert to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

547

Colloquy

547

establish the standard of care.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

548

Colloquy

548

New Jersey laws consistently allowed OSHA

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

549

Colloquy

549

standards to be considered for that purpose, even where

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

550

Colloquy

550

the allegedly negligent party is not subject to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

551

Colloquy

551

regulation or enforcement by OSHA. Because the case

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

552

Colloquy

552

must be retried, we observed that the federal OSHA

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

553

Colloquy

553

safety regulations may have been relevant and, perhaps,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

554

Colloquy

554

violated in this situation, even if not applicable to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

555

Colloquy

555

the statute.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

556

Colloquy

556

And the standards expressed in the OSHA

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

557

Colloquy

557

regulations may be recognized and accepted as -- and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

558

Colloquy

558

the failure to charge them in that case was reversible

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

559

Colloquy

559

error. I think, Judge, it's going to confuse the jury

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

560

Colloquy

560

even more and it's to Your Honor to say based upon the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

561

Colloquy

561

law as to what that statute says. It would be no

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

562

Colloquy

562

different than having a left turn case and the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

563

Colloquy

563

defendant getting up and saying, well, under the left

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

564

Colloquy

564

turn statute, it says, A, B, and C, and then the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

565

Colloquy

565

plaintiff gets up and says, well, no, under the left

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

566

Colloquy

566

turn statute, it says C, D, and F, and now the jury is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

567

Colloquy

567

left to go nowhere without the Court bringing it back

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

568

Colloquy

568

to the -- where it should be, which is what the Court

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

569

Colloquy

569

says.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

570

Colloquy

570

I think in this case, with so much discussion

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

571

Colloquy

571

of these OSHA regulations, I think that it would be --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

572

Colloquy

572

it would cause the jury to go off, to wander far as to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

573

Colloquy

573

what that regulation says and rely on the jury's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

574

Colloquy

574

recollection of what the regulation says. I mean,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

575

Colloquy

575

clearly, the Court should charge the jury the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

576

Colloquy

576

applicable statute. I mean, there's no -- you know,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

577

Colloquy

577

the Appellate Division held that the Court committed

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

578

Colloquy

578

plain error in failing to modify the charges to include

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

579

Colloquy

579

reference to the relevant motor vehicle statutes

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

580

Colloquy

580

because, if Your Honor doesn't, the jury is going to be

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

581

Colloquy

581

left to remember, wait, what did that statute -- wait,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

582

Colloquy

582

who is right about what the statute says, Cobuzio or

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

583

Colloquy

583

Clark, and I think that would be a worse case and I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

584

Colloquy

584

think it would be against -- and I know the ALLOWAY

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

585

Colloquy

585

case does have language that says, the common law has

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

586

Colloquy

586

ample remedial relief and it does and that's why the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

587

Colloquy

587

negligence charge is in there.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

588

Colloquy

588

But you can't just leave it at the negligence

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

589

Colloquy

589

charge. That's what they did in the CONSTANTINO case.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

590

Colloquy

590

They left it at the regular negligence charge, didn't

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

591

Colloquy

591

charge them the OSHA violation, and it was a reversible

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

592

Colloquy

592

error because the jury was left to speculate, wait,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

593

Colloquy

593

maybe I can't consider that OSHA and, wait, is Clark

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

594

Colloquy

594

right about it or is Cobuzio right about it?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

595

Colloquy

595

In our charge, we don't misstate what the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

596

Colloquy

596

statute says. It's quoted verbatim. And we're not

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

597

Colloquy

597

giving them a book. It's about maybe two or three

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

598

Colloquy

598

pages of applicable controlling statutes on it. I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

599

Colloquy

599

think that, you know, this trial has been, I have to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

600

Colloquy

600

say, quite clean and to -- you know, I think it would

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

601

Colloquy

601

be respect-- you know, I think it would be plain error

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

602

Colloquy

602

to not charge the applicable statute.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

603

Colloquy

603

If this was a case where it was passing

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

604

Colloquy

604

reference to OSHA, but the whole case was about OSHA

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

605

Colloquy

605

and other things. That's --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

606

Colloquy

606

THE COURT: Well, you know, I didn't have in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

607

Colloquy

607

front of me and I do want to take a look at it, do you

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

608

Colloquy

608

have the cite for CONSTANTINO? Oh, you have the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

609

Colloquy

609

actual --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

610

Colloquy

610

MR. CLARK: We said in this -- I said, it's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

611

Colloquy

611

modeled after model jury charge 5.10H and 5.30D, which

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

612

Colloquy

612

is the model jury charge when you have a statute and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

613

Colloquy

613

it's very clear in there. The jury is going to be left

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

614

Colloquy

614

to speculate and wonder as to what the applicable

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

615

Colloquy

615

statute is and what it says, if the Court doesn't

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

616

Colloquy

616

charge it.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

617

Colloquy

617

MR. COBUZIO: Judge, that's the whole case.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

618

Colloquy

618

I mean, the jury is -- Your Honor ruled, if the jury

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

619

Colloquy

619

doesn't like -- if Mr. Clark doesn't like the ruling

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

620

Colloquy

620

and we're rehashing it again, but you know, the jury

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

621

Colloquy

621

heard the evidence, the jury heard the testimony and,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

622

Colloquy

622

now, you're being asked to read a seven-page charge to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

623

Colloquy

623

the jury with regard to one issue.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

624

Colloquy

624

I mean, I would just point out, Judge, the

NEW JERSEY

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SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

625

Colloquy

625

first paragraph of the charge is one of the issues that

NEW JERSEY

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SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

626

Colloquy

626

came up on a motion in limine and that is whether or

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

627

Colloquy

627

not those provisions even applied. So it just seems to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

628

Colloquy

628

me that the better course of prudence in this matter

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

629

Colloquy

629

would be to read the Supreme Court model charge as Your

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

630

Colloquy

630

Honor indicated earlier based on your review of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

631

Colloquy

631

ALLOWAY.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

632

Colloquy

632

MR. CLARK: And I agree with Mr. Cobuzio.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

633

Colloquy

633

The Supreme Court model charge is 5.30D. It would be

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

634

Colloquy

634

plain error to not charge the applicable statute.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

635

Colloquy

635

MR. COBUZIO: That's the auto charge, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

636

Colloquy

636

That's the charge where the Supreme Court tells you to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

637

Colloquy

637

plug in the statute. Nowhere in this charge the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

638

Colloquy

638

Supreme Court has approved and they tell you to plug in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

639

Colloquy

639

a statute.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

640

Colloquy

640

MR. CLARK: Page 2 of the model charge that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

641

Colloquy

641

Mr. Cobuzio refers to, PHILLIPS V. GREMENTE, the above

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

642

Colloquy

642

may be modified to cover violations of certain other

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

643

Colloquy

643

statutes or ordinances, which set up a standard of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

644

Colloquy

644

conduct to be observed in given circumstances for the

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

645

Colloquy

645

benefit of the class to which the plaintiff belongs.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

646

Colloquy

646

MR. COBUZIO: That's the auto charge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

647

Colloquy

647

THE COURT: Okay. Everybody be quite for a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

648

Colloquy

648

minute, please.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

649

Colloquy

649

(Tape Off - Tape On)

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

650

Colloquy

650

THE COURT: I mean, I'm -- the old -- is, I

NEW JERSEY

PART

SUPERIOR COURT OF

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ESSEX COUNTY

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A.D.# _____

I N D E X²

651

Colloquy

651

may not always be right, but I'm always sure. Because

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

652

Colloquy

652

I'm not always right, I can recognize, while I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

653

Colloquy

653

certainly don't encourage lawyers to object to a ruling

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

654

Colloquy

654

once it's been made, I do believe that, without having

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

655

Colloquy

655

previously read the CONSTANTINO case, I read it as

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

656

Colloquy

656

consistent with ALLOWAY and it is, but when looked at

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

657

Colloquy

657

even more closely, it says, while certainly not

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

658

Colloquy

658

suggesting that there's anything incorrect in ALLOWAY,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

659

Colloquy

659

the Court in CONSTANTINO, which is cited as 324 N.J.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

660

Colloquy

660

Super. 437, the Appellate Division noted that when

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

661

Colloquy

661

circumstances arise wherein as I believe it was the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

662

Colloquy

662

defendant's expert made clear -- at least clear to me

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

663

Colloquy

663

in a way that was understandable to me and the jury,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

664

Colloquy

664

the crux of this case really factually is whether or

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

665

Colloquy

665

not the -- how close to the house was the trench and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

666

Colloquy

666

how deep was the trench.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

667

Colloquy

667

A standard that both parties are relying on

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

668

Colloquy

668

is the standard set in the OSHA regulation. If there's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

669

Colloquy

669

something specific in the regulation that you object

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

670

Colloquy

670

to, Mr. Cobuzio, I'll hear you and if you don't want to

NEW JERSEY

PART

SUPERIOR COURT OF

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ESSEX COUNTY

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A.D.# _____

I N D E X²

671

Colloquy

671

do that, you know, you want to --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

672

Colloquy

672

MR. COBUZIO: No, Your Honor, because you may

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

673

Colloquy

673

recall the motions in limine that were filed in this

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

674

Colloquy

674

case with regard to the OSHA standards, my expert is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

675

Colloquy

675

saying that certain OSHA standards did not apply. For

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

676

Colloquy

676

example, the first two pages of Mr. Clark's proposed

NEW JERSEY

PART

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I N D E X²

677

Colloquy

677

charge dealing with the joint responsibility --

NEW JERSEY

PART

SUPERIOR COURT OF

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A.D.# _____

I N D E X²

678

Colloquy

678

remember, we're talking about 1916 and the grafting of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

679

Colloquy

679

responsibilities to the general contractor in a non-

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

680

Colloquy

680

federally financed case, you know, construction case

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

681

Colloquy

681

and --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

682

Colloquy

682

THE COURT: And that's all to -- and I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

683

Colloquy

683

understand that it's all too vague with regard to the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

684

Colloquy

684

applicability of standards and determination the Court

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

685

Colloquy

685

has made with regard to duty. That decision has been

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

686

Colloquy

686

made. But with regard to specifics, for instance, 29

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

687

Colloquy

687

CFR 1926.652.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

688

Colloquy

688

MR. COBUZIO: Judge, I have no objection to

NEW JERSEY

PART

SUPERIOR COURT OF

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ESSEX COUNTY

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A.D.# _____

I N D E X²

689

Colloquy

689

652 and the competent person definition. I would

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

690

Colloquy

690

object to all other references to the standards. I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

691

Colloquy

691

mean, Your Honor could very easily charge the jury with

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

692

Colloquy

692

the model charge approved by the Supreme Court and you

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

693

Colloquy

693

could say, you have heard the various OSHA regulations

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

694

Colloquy

694

dealing with the issue of the trench, the trench depth,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

695

Colloquy

695

and competent person. OSHA says this and then, you

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

696

Colloquy

696

know, go on with your curative instruction as to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

697

Colloquy

697

whether or not there's been a breach of that, it's not

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

698

Colloquy

698

evidence of negligence, that kind of thing.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

699

Colloquy

699

But to cite all seven pages of OSHA

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

700

Colloquy

700

regulations to this jury would likely confuse them,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

701

Colloquy

701

doesn't provide any applicable -- any appropriate

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

702

Colloquy

702

standard. I think that the 652 reference in Mr.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

703

Colloquy

703

Clark's Page 5, competent person definition provided

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

704

Colloquy

704

that it's -- I'm sure it's the complete definition, I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

705

Colloquy

705

just don't know, would be appropriate.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

706

Colloquy

706

But there's also -- I mean, to charge them

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

707

Colloquy

707

like for example, with the aluminum hydraulic suring

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

708

Colloquy

708

for trenches, Subpart G, I mean, you've got testimony

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

709

Colloquy

709

that it was OSHA compliant. You have testimony from

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

710

Colloquy

710

the expert that it was --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

711

Colloquy

711

MR. CLARK: Testimony from Fritas that it was

NEW JERSEY

PART

SUPERIOR COURT OF

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A.D.# _____

I N D E X²

712

Colloquy

712

OSHA compliant.

NEW JERSEY

PART

SUPERIOR COURT OF

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I N D E X²

713

Colloquy

713

MR. COBUZIO: And you have testimony -- and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

714

Colloquy

714

you have testimony from the defense expert that it's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

715

Colloquy

715

OSHA compliant. So to say -- and that -- if you were

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

716

Colloquy

716

to charge from the bench that, please note that plywood

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

717

Colloquy

717

is not intended, you know, we've got to read all the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

718

Colloquy

718

rules. I mean, we've got the technical manual for

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

719

Colloquy

719

OSHA, so I don't think that's appropriate.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

720

Colloquy

720

Counsel can argue it. I'm not saying Counsel

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

721

Colloquy

721

can't argue it in closing, but if you want to give the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

722

Colloquy

722

jury some guidance, I can short circuit this argument

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

723

Colloquy

723

and just tell you that I would agree to those two

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

724

Colloquy

724

citations.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

725

Colloquy

725

MR. CLARK: Well, I would agree to take out

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

726

Colloquy

726

Subpart -- I would agree that we're at the proposed

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

727

Colloquy

727

jury charge, Page 6. I would definitely agree to take

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

728

Colloquy

728

out the hydraulic suring.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

729

Colloquy

729

MR. COBUZIO: Well, I don't agree to his

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

730

Colloquy

730

charge, Judge. I agree to the model charge set forth

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

731

Colloquy

731

by the Supreme Court 5.10H --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

732

Colloquy

732

MR. CLARK: All right. So, look, --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

733

Colloquy

733

MR. COBUZIO: And then if Your Honor needs to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

734

Colloquy

734

make a reference to -- if Your Honor needs to make a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

735

Colloquy

735

reference to OSHA, I would agree for purposes of moving

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

736

Colloquy

736

this along to 652, the definition of a competent

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

737

Colloquy

737

person, and that's it.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

738

Colloquy

738

MR. CLARK: Wait. So we're just going to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

739

Colloquy

739

charge the part that the defendant wants to rely on,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

740

Colloquy

740

but we're not going to charge the part that the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

741

Colloquy

741

plaintiff wants to rely on? See, that's --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

742

Colloquy

742

MR. COBUZIO: No. For purposes of the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

743

Colloquy

743

charge. Your Honor is going to say, there has been

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

744

Colloquy

744

testimony with regard to OSHA violations in this matter

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

745

Colloquy

745

and, of course, Mr. Clark is going to argue those to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

746

Colloquy

746

the jury.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

747

Colloquy

747

But for purposes of providing instruction

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

748

Colloquy

748

with regard to the relevant issue in this case and that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

749

Colloquy

749

is the trench depth, the trench location, that kind of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

750

Colloquy

750

thing, I'll consent to that provision on the model jury

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

751

Colloquy

751

charge, not on Mr. Clark's charge because the first

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

752

Colloquy

752

part -- let me just finish, Jerry -- on the first part,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

753

Colloquy

753

Page 3, all that, Judge, is really in the model jury

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

754

Colloquy

754

charge and, frankly, our expert disagrees with the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

755

Colloquy

755

second paragraph as to the grafting of those

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

756

Colloquy

756

responsibilities on a general contractor in this

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

757

Colloquy

757

particular type of setting. I mean, we actually have a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

758

Colloquy

758

letter of interpretation, which says it doesn't include

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

759

Colloquy

759

that. We argued all that in the motion in limine in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

760

Colloquy

760

the beginning and Your Honor said, all OSHA regulations

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

761

Colloquy

761

can go in and be considered.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

762

Colloquy

762

MR. CLARK: Yes. And I want to bring that up

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

763

Colloquy

763

because the interpretation letter that you used was a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

764

Colloquy

764

guided OSHA, take some federal court cases out of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

765

Colloquy

765

another jurisdiction and says, this is what OSHA needs.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

766

Colloquy

766

Defense Counsel -- those regulations in ALLOWAY are

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

767

Colloquy

767

clear. The Court was clear that, pursuant to the plain

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

768

Colloquy

768

terms of 1926.16, the contractor, the prime contractor

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

769

Colloquy

769

has all the obligations referenced as employer

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

770

Colloquy

770

obligations under this part. It's clear under ALLOWAY

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

771

Colloquy

771

that they apply.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

772

Colloquy

772

So the fact that, you know, the defense

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

773

Colloquy

773

expert gets up and says, well, that doesn't apply,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

774

Colloquy

774

meaning he's going against what the Supreme Court says

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

775

Colloquy

775

in ALLOWAY, 1926.16, the non-delegable duty under OSHA,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

776

Colloquy

776

it's directly in ALLOWAY.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

777

Colloquy

777

And, Judge, I appreciate Counsel's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

778

Colloquy

778

willingness to move this along and say, well, I'll

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

779

Colloquy

779

agree to you know charge the jury 1926.652, but you

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

780

Colloquy

780

can't charge part of an applicable regulation and not

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

781

Colloquy

781

the other part, specifically, the part about 1926.16 as

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

782

Colloquy

782

to what ALLOWAY talks about that the prime contractor

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

783

Colloquy

783

has all the duties and responsibilities that are

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

784

Colloquy

784

referenced as employer obligations and that employer as

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

785

Colloquy

785

contractor/subcontractor has to be charged, if the jury

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

786

Colloquy

786

is going to be charged the specific regulation of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

787

Colloquy

787

1926.652 because that speaks in terms of employer

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

788

Colloquy

788

obligation and the employer obligation under the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

789

Colloquy

789

statute is non-delegable. It's the prime contractor.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

790

Colloquy

790

It has all the employer obligations, so it has to be

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

791

Colloquy

791

told to the jury. We're going to tell them the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

792

Colloquy

792

specific statute.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

793

Colloquy

793

THE COURT: All right. I'm going to craft

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

794

Colloquy

794

something that's going to include the specific -- that,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

795

Colloquy

795

at a minimum, is going to include, Mr. Clark, 1926.652

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

796

Colloquy

796

as cited by you in your proposed charge, as well as the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

797

Colloquy

797

definition of competent person. Whether I add anything

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

798

Colloquy

798

else, --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

799

Colloquy

799

MR. CLARK: Judge, if I would just -- if I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

800

Colloquy

800

would just implore upon the Court to the extent I can,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

801

Colloquy

801

1926.16 is critical and it is in the ALLOWAY case,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

802

Colloquy

802

specifically referred to in there.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

803

Colloquy

803

THE COURT: Well, you know, the law that that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

804

Colloquy

804

proposition that that stands for can be --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

805

Colloquy

805

MR. CLARK: That is the non-delegable duty.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

806

Colloquy

806

That is the -- that's the -- 1926.16 is the non-

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

807

Colloquy

807

delegable duty.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

808

Colloquy

808

THE COURT: Yes. But I can tell them it's a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

809

Colloquy

809

non-delegable duty without citing the specific language

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

810

Colloquy

810

in the -- in the regulation.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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I N D E X²

811

Colloquy

811

MR. CLARK: But if we --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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A.D.# _____

I N D E X²

812

Colloquy

812

MR. COBUZIO: Thank you, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

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I N D E X²

813

Colloquy

813

MR. CLARK: But if we read to them the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

814

Colloquy

814

specific trench regulation, which says, employer does

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

815

Colloquy

815

this or employer does that but not tell them employer

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

816

Colloquy

816

means prime contractor and the prime contractor has all

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

817

Colloquy

817

the obligations listed as employer obligations under

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

818

Colloquy

818

the statute, they're going to be left adrift and it's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

819

Colloquy

819

going to be confusing. And ALLOWAY is --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

820

Colloquy

820

MR. COBUZIO: Judge, --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

821

Colloquy

821

MR. CLARK: And ALLOWAY is very clear. It

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

822

Colloquy

822

cites 1926.16. It says, as prime contractor, Pat

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

823

Colloquy

823

Pavers may be liable for any of its subcontractor's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

824

Colloquy

824

violations, as well as its own, by the terms of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

825

Colloquy

825

1926.16. That regulation states, by contracting for

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

826

Colloquy

826

full performance of the work, the prime contractor

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

827

Colloquy

827

assumes all obligations prescribed as employer

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

828

Colloquy

828

obligations under the standards. And if we're going to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

829

Colloquy

829

read to the jury the employer obligations under the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

830

Colloquy

830

statute, under the trench depth statute, you've got to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

831

Colloquy

831

tell them 1926.16, which is that the prime contractor

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

832

Colloquy

832

has the employer obligations because, otherwise, Mr.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

833

Colloquy

833

Cobuzio is going to get up in closing and say, you're

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

834

Colloquy

834

going to hear the Judge say what the employer has to do

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

835

Colloquy

835

and he's not the employer. The employer is Fritas and,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

836

Colloquy

836

if we don't charge them the non-delegable duty, which

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

837

Colloquy

837

is derived from 1926.16, they're going to be left to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

838

Colloquy

838
drift.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

839

Colloquy

839

THE COURT: Well, look, the final word on

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

840

Colloquy

840

this is -- at least until you hear the charge is,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

841

Colloquy

841

there's nothing in 1926.652 that provides for what an

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

842

Colloquy

842

employer has to do or not do. It describes at least

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

843

Colloquy

843

the way you cited it, only describes the protection

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

844

Colloquy

844

that needs to be afforded. So that's -- I certainly

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

845

Colloquy

845

intend to charge -- I intend to charge that and the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

846

Colloquy

846

specific language with that with regard to the trench.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

847

Colloquy

847

Whether I specify any specific ones or not, I have to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

848

Colloquy

848

yet decide, but I certainly intend to define for the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

849

Colloquy

849

jury what the duty is of general contractors.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

850

Colloquy

850

MR. CLARK: Just the only thing I would say,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

851

Colloquy

851

Judge, is, if we only read them 1926.652, the jury is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

852

Colloquy

852

going to say -- it says, each employee shall be

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

853

Colloquy

853

protected. Okay. But who is supposed to protect them?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

854

Colloquy

854

THE COURT: I'm going to tell them -- I'm

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

855

Colloquy

855

going to tell them that.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

856

Colloquy

856

MR. CLARK: And that's in 1926.16.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

857

Colloquy

857

THE COURT: I'm going to tell them that,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

858

Colloquy

858

whether I say that specific or not.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

859

Colloquy

859

MR. CLARK: Right. Sure. Thank you, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

860

Colloquy

860

MR. DU VOISIN: I have to say this. You

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

861

Colloquy

861

know, you've got the controlling employer in the multi-

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

862

Colloquy

862

citation policy where it defines, you know, that this

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

863

Colloquy

863

means the controlling employer is not normally required

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

864

Colloquy

864

to inspect for hazards that's -- You've got a slippery

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

865

Colloquy

865

slope going there.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

866

Colloquy

866

Both experts testified that the controlling

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

867

Colloquy

867

employer in this case would be the general contractor

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

868

Colloquy

868

and, again, you know, they don't have to have the same

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

869

Colloquy

869

level of knowledge. It's in the statute. So once you

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

870

Colloquy

870

start going down that slippery road, you're cracking

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

871

Colloquy

871

the charge that I think was going to be overburdening

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

872

Colloquy

872

this jury and repeating really the evidence from the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

873

Colloquy

873

bench.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

874

Colloquy

874

THE COURT: Well, I'm going to try not to.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

875

Colloquy

875

MR. DU VOISIN: Thank you, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

876

Colloquy

876

THE COURT: All right. Next thing we have to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

877

Colloquy

877

do is -- Charity, take this and write down the cite and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

878

Colloquy

878

just print out a copy, so we have it. You can return

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

879

Colloquy

879

that to Mr. Clark. We have to talk about comparative

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

880

Colloquy

880

negligence. Mr. Clark says there isn't any in this

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

881

Colloquy

881

case. Mr. Cobuzio, you say there is?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

882

Colloquy

882

MR. COBUZIO: Well, isn't that -- isn't that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

883

Colloquy

883

the CAINE case, Judge, that Your Honor already cited,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

884

Colloquy

884

CAINE V. HARTZ MOUNTAIN, which deals with comparative

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

885

Colloquy

885

negligence, comparative negligence of the plaintiff in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

886

Colloquy

886

this particular case, Judge? We have a man who is the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

887

Colloquy

887

plumber for 19 years. He's the fellow who testified

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

888

Colloquy

888

that he knew and recognized hazards associated with

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

889

Colloquy

889

trench excavation.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

890

Colloquy

890

He had been doing it in Portugal for a number

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

891

Colloquy

891

of years in trenches. He was the fellow on site the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

892

Colloquy

892

day before the -- the four days before the accident

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

893

Colloquy

893

digging the trench and, in fact, digging the trench in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

894

Colloquy

894

locations which there's been testimony that they're

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

895

Colloquy

895

greater than five feet and, now, he's the fellow who is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

896

Colloquy

896

in the trench for the last day of excavation and,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

897

Colloquy

897

again, because he knew or should have known that there

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

898

Colloquy

898

is a possibility, if the argument is going to be

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

899

Colloquy

899

believed by the plaintiff, is comparative negligence

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

900

Colloquy

900

should be charged to the jury.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

901

Colloquy

901

I would also point out, Judge, that in the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

902

Colloquy

902

brief that Mr. Clark submitted, he's relying on the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

903

Colloquy

903

Suter doctrine from machine cases. Now, I'm familiar

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

904

Colloquy

904

with the Suter doctrine and, essentially, that deals

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

905

Colloquy

905

with, you know, the assigned risk, no meaningful task

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

906

Colloquy

906

-- no meaningful choice, excuse me, and in that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

907

Colloquy

907

particular case, you're holding the manufacturer of a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

908

Colloquy

908

machine strictly liable for the injury of an employee.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

909

Colloquy

909

This is not a strict liability setting. This is a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

910

Colloquy

910

negligence case and, therefore, the jury should be

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

911

Colloquy

911

charge with comparative negligence.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

912

Colloquy

912

Just, I would just point out, just for the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

913

Colloquy

913

Court's edification the multi-citation policy for the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

914

Colloquy

914

prior motion we argued where I talked about the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

915

Colloquy

915

controlling employer. I just wanted to give you the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

916

Colloquy

916

cite for that. If I could just hand something up to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

917

Colloquy

917

you, so you can see it, just to have in your repertoire

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

918

Colloquy

918

of information because that deals with the controlling

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

919

Colloquy

919

employer, how it's defined. Thank you, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

920

Colloquy

920

THE COURT: Thanks.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

921

Colloquy

921

MR. CLARK: Judge, on the controlling

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

922

Colloquy

922

employer, I'll just say this. 1926.16 is clear that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

923

Colloquy

923

the prime contractor -- and let's just right off

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

924

Colloquy

924

ALLOWAY, the prime contractor has all the obligations

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

925

Colloquy

925

defined as employer obligations under the Act. Whether

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

926

Colloquy

926

it's a controlling employer or this employer, that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

927

Colloquy

927

employer doesn't matter. The fact is clear that they

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

928

Colloquy

928

have the obligation and if we're going to read one

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

929

Colloquy

929

part, and at that point, I'm repeating myself.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

930

Colloquy

930

THE COURT: Let's get back to comparative

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

931

Colloquy

931

negligence.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

932

Colloquy

932

MR. CLARK: On comparative negligence, Judge,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

933

Colloquy

933

I'll put my briefs away. I'll put all my stuff away.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

934

Colloquy

934

The gentleman goes to work. His job is a plumber.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

935

Colloquy

935

He's not a foreman. He's not a boss. He's a plumber.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

936

Colloquy

936

He digs the trenches, he hooks up the pipes, and the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

937

Colloquy

937

trench caves in on him. I just -- he's going to work.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

938

Colloquy

938

His choice is, dig the trench and do the job or, I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

939

Colloquy

939

guess, go somewhere else.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

940

Colloquy

940

I don't -- I just don't see if this were just

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

941

Colloquy

941

a plain old negligence case, the comparative negligence

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

942

Colloquy

942

is knowing and unreasonably encountering a known risk.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

943

Colloquy

943

Would it have been unreasonable for him to stay at work

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

944

Colloquy

944

and do the job his boss told him to do? There's no --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

945

Colloquy

945

you know, he wasn't horsing around. He wasn't

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

946

Colloquy

946

wrestling next to the trench. He's in the trenching

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

947

Colloquy

947

hooking up the pipe and, without warning, the thing

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

948

Colloquy

948

caves in. Even the defendant said, we looked at it and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

949

Colloquy

949

there was no indication of a potential cave in. It was

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

950

Colloquy

950

cross-examination of the plaintiff.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

951

Colloquy

951

There was no indication of a potential cave

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

952

Colloquy

952

in. The last thing defense rested their case with was

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

953

Colloquy

953

a quote from the plaintiff. There was no prior

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

954

Colloquy

954

problems with that trench, right? So how could we say

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

955

Colloquy

955

that he knowingly and unreasonably encountered a known

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

956

Colloquy

956

risk, putting aside all the whether SUTER applies or

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

957

Colloquy

957

whether the GREEN case, which was a hoist, was not a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

958

Colloquy

958

products liability case although a workplace setting

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

959

Colloquy

959

case. Just under plain old restatement of torts law, I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

960

Colloquy

960

don't think there's anything upon which a jury could

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

961

Colloquy

961

conclude that he knowingly and unreasonably had a known

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

962

Colloquy

962

risk. He's at his job. The trench caves in without

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

963

Colloquy

963

warning.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

964

Colloquy

964

THE COURT: All right. It is without doubt

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

965

Colloquy

965

that in and of itself, a workplace safety case is not

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

966

Colloquy

966

-- does not automatically bar the introduction of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

967

Colloquy

967

comparative negligence on the part of the plaintiff.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

968

Colloquy

968

Like any other case, because there is no workers'

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

969

Colloquy

969

compensation bar, the relative negligence of the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

970

Colloquy

970

parties is clearly admissible.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

971

Colloquy

971

It's another example of what's good for the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

972

Colloquy

972

goose is good for the gander scenario where, if the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

973

Colloquy

973

general contractor is going to be held liable in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

974

Colloquy

974

negligence as opposed to enjoying the benefit of the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

975

Colloquy

975

workers' compensation law, well, then similarly, when

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

976

Colloquy

976

negligence becomes a issue, everyone's issue becomes at

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

977

Colloquy

977
issue.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

978

Colloquy

978

However, -- and to the degree to which there

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

979

Colloquy

979

is any evidence of negligence, comparative negligence

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

980

Colloquy

980

will be charged, which is exactly what happened in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

981

Colloquy

981

CAINE. In CAINE, the factual scenario was not at all

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

982

Colloquy

982

like what was the situation in this case. Yes. It's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

983

Colloquy

983

true that the workers' compensation scenario doesn't

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

984

Colloquy

984

apply. The SUTER scenario doesn't apply. You can't

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

985

Colloquy

985

simply say that an employee has no real choice. It has

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

986

Colloquy

986

to -- that the employee has no option other than to go

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

987

Colloquy

987

where there is danger or risk losing their job. That's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

988

Colloquy

988

the benefit that the workers' compensation statute

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

989

Colloquy

989

provides because they have no meaningful choice.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

990

Colloquy

990

But in CAINE, the Court made clear that there

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

991

Colloquy

991

are circumstances in an employment or construction

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

992

Colloquy

992

safety or construction injury setting where there may

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

993

Colloquy

993

very well be evidence of comparative negligence. In

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

994

Colloquy

994

CAINE, it was a situation where the -- where the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

995

Colloquy

995

employee was assuming risks not specifically intended

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

996

Colloquy

996

to assume as part of his employment. He acted in a way

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

997

Colloquy

997

in which the Court permitted and, in fact, compelled a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

998

Colloquy

998

comparative negligence scenario.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

999

Colloquy

999

Here, nobody has been presented -- there has

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1000

Colloquy

1000

been absolutely no evidence that the plaintiff did or

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1001

Colloquy

1001

didn't do anything that he should or shouldn't have

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1002

Colloquy

1002

done. Reasonable minds cannot differ with regard to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1003

Colloquy

1003

what the plaintiff did or didn't do. There is, in this

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1004

Colloquy

1004

Court's view, not a scintilla of evidence to the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1005

Colloquy

1005

contrary. Plaintiff, Mr. Fernandes, -- the only

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1006

Colloquy

1006

evidence there is -- well, what did he do? He got into

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1007

Colloquy

1007

the trench where his boss told him to go. Yes. He

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1008

Colloquy

1008

knew there was risks, but he didn't necessarily know

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1009

Colloquy

1009

specifically what the risk was or why there was a risk

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1010

Colloquy

1010

and whether or not actions were taken to protect him or

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1011

Colloquy

1011

not protect him or whether they were sufficient or not.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1012

Colloquy

1012

That wasn't for him to decide, and they have no

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1013

Colloquy

1013

evidence of the fact that it was for him to decide, and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1014

Colloquy

1014

there was no evidence that he concluded that it was

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1015

Colloquy

1015

unsafe and got into the trench anyway or let's put it

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1016

Colloquy

1016

this way, improperly unsafe. No comparative negligence

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1017

Colloquy

1017

in this case.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1018

Colloquy

1018

Life expectancy. You didn't ask for that.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1019

Colloquy

1019

Do you want a charge, Mr. Clark?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1020

Colloquy

1020

MR. CLARK: Yes, Your Honor. I believe it's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1021

Colloquy

1021

25.2 years.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1022

Colloquy

1022

THE COURT: 25.2?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1023

Colloquy

1023

MR. CLARK: I believe so. Let me just --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1024

Colloquy

1024

THE COURT: I'll take your word for it. Mr.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1025

Colloquy

1025

Cobuzio, if you want to double check that, you are free

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1026

Colloquy

1026

to. You've just got to get the guy's date of birth and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1027

Colloquy

1027

look in the Lawyer's Diary. Okay. Tax consequences of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1028

Colloquy

1028

personal injury award, you want that in there, right?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1029

Colloquy

1029

MR. CLARK: No. Because we stipulated that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1030

Colloquy

1030

it's a net number. We've got to talk about that,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1031

Colloquy

1031

Judge, but let me just --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1032

Colloquy

1032

THE COURT: Well, pain and suffering is not a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1033

Colloquy

1033

net number.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1034

Colloquy

1034

MR. COBUZIO: Not pain and suffering, but,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1035

Colloquy

1035

Judge, just on Your Honor's ruling before, I do intend

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1036

Colloquy

1036

to close to the jury with the plaintiff's conduct

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1037

Colloquy

1037

because it goes to the issue of proximate cause of the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1038

Colloquy

1038
injury.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1039

Colloquy

1039

THE COURT: Okay.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1040

Colloquy

1040

MR. COBUZIO: Okay.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1041

Colloquy

1041

THE COURT: That's certainly permissible in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1042

Colloquy

1042

terms of proximate cause.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1043

Colloquy

1043

MR. CLARK: And, Judge, while we're at --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1044

Colloquy

1044

we're shadowing our closings, I do intend to reserve

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1045

Colloquy

1045

the right to use a time unit analysis.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1046

Colloquy

1046

THE COURT: Well, you were supposed to tell

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1047

Colloquy

1047

me that before now.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1048

Colloquy

1048

MR. CLARK: I'm sorry. And it's 25.1 years.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1049

Colloquy

1049

THE COURT: 25.?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1050

Colloquy

1050

MR. CLARK: .1.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1051

Colloquy

1051

THE COURT: Charity, we have on the computer

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1052

Colloquy

1052

a -- because there is no model charge on time unit, we

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1053

Colloquy

1053

have on the computer a charge. Would you print that up

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1054

Colloquy

1054

for me? You don't have to do it right now, just as

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1055

Colloquy

1055

soon as we get done here. Okay. Tax consequences.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1056

Colloquy

1056

Medical expenses, non-auto payment, the amount of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1057

Colloquy

1057

payment is fair and reasonable.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1058

Colloquy

1058

MR. COBUZIO: Judge, yes. I've got to talk

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1059

Colloquy

1059

to you on that one, Judge. Let me just get to that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1060

Colloquy

1060
charge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1061

Colloquy

1061

MR. CLARK: What number is it?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1062

Colloquy

1062

MR. COBUZIO: Let's see. The problem we have

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1063

Colloquy

1063

on that is that there has to be something because we're

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1064

Colloquy

1064

stipulating to past medical of \$75,000. Is that where

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1065

Colloquy

1065

we're at?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1066

Colloquy

1066

THE COURT: Right.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1067

Colloquy

1067

MR. COBUZIO: Let's see. Comparative

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1068

Colloquy

1068

negligence. Let me just get to it, Judge. Damages.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1069

Colloquy

1069

MR. CLARK: 8.11A.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1070

Colloquy

1070

MR. COBUZIO: Yes. Well, see, that's just

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1071

Colloquy

1071

it, Judge. You've got to back up because you've got to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1072

Colloquy

1072

go to 8.1, which is damages, effective instructions.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1073

Colloquy

1073

You have to take out B, which is future lost wages.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1074

Colloquy

1074

THE COURT: Yes. So that's obvious.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1075

Colloquy

1075

MR. COBUZIO: Okay. And then you would have

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1076

Colloquy

1076

to take out Number 2 because there is no wife, no per

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1077

Colloquy

1077

quod claim.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1078

Colloquy

1078

THE COURT: Right.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1079

Colloquy

1079

MR. COBUZIO: Okay. I just want to make sure

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1080

Colloquy

1080

we're clear.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1081

Colloquy

1081

THE COURT: Yes.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1082

Colloquy

1082

MR. COBUZIO: Then we have to have some

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1083

Colloquy

1083

language in here to make this fair, if we're talking

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1084

Colloquy

1084

about future medical. Did we pass -- did we pass up

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1085

Colloquy

1085

past lost earnings because that charge comes next in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1086

Colloquy

1086

the sequence before you get to medical. So we'll work

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1087

Colloquy

1087

them backwards.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1088

Colloquy

1088

THE COURT: I don't think so. Past --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1089

Colloquy

1089

MR. COBUZIO: 8.11 is damages, past lost

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1090

Colloquy

1090

earnings, and then there's future lost earnings, which

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1091

Colloquy

1091

is out and then you go to medical, which is -- let me

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1092

Colloquy

1092

get to it -- medical is 8.11A. So they're both 8.11.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1093

Colloquy

1093

THE COURT: A comes before --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1094

Colloquy

1094

MR. COBUZIO: Yes, Judge. I have them out of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1095

Colloquy

1095

order, so I'm just trying to follow, right? But we're

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1096

Colloquy

1096

stipulating to \$75,000 in medical expenses, but there

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1097

Colloquy

1097

has to be some language in there to state that the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1098

Colloquy

1098

stipulation of past medical expenses is not a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1099

Colloquy

1099

concession by the defendants that they're causally

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1100

Colloquy

1100

related to the accident. I mean, I don't want the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1101

Colloquy

1101

stipulation to have an adverse inference to the jury

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1102

Colloquy

1102

that we agree that everything is related,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1103

Colloquy

1103

notwithstanding of the fact that we've agreed to the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1104

Colloquy

1104
number.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1105

Colloquy

1105

So they'll hear the number, but I don't want

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1106

Colloquy

1106

the stipulation to be an inference that, hey, look, if

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1107

Colloquy

1107

they agreed to the medical, what's the deal here? So

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1108

Colloquy

1108

there has to be some sort of qualification, qualifying

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1109

Colloquy

1109

remarks that it's not a concession by the defendants

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1110

Colloquy

1110

that they were causally related, and that was the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1111

Colloquy

1111

stipulation Mr. Clark and I had.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1112

Colloquy

1112

So how you craft that, you know, it would

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1113

Colloquy

1113

just have to include that. I had a proposal to put it

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1114

Colloquy

1114

in midway through the charge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1115

Colloquy

1115

THE COURT: Well, right from the beginning,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1116

Colloquy

1116

we say, the fact I instruct you on damages should not

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1117

Colloquy

1117

be considered as any suggestion of mine about which

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1118

Colloquy

1118

party is entitled to prevail. Instructions on damages

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1119

Colloquy

1119

are given for guidance in the event you find plaintiff

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1120

Colloquy

1120

is entitled to a verdict. I'm required to provide

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1121

Colloquy

1121

instructions on damages in all cases where the trial

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1122

Colloquy

1122

includes a claim for damages.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1123

Colloquy

1123

MR. COBUZIO: But, Judge, the charge goes on.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1124

Colloquy

1124

If you determine that any of these bills were not fair

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1125

Colloquy

1125

and reasonable to any extent, that's what we've kind of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1126

Colloquy

1126

taken away from the jury with regard to the 75,000 and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1127

Colloquy

1127

that's where -- unless the Judge just molds the verdict

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1128

Colloquy

1128

for the 75,000 at the end and not even charge it.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1129

Colloquy

1129

(End of Tape 2)

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1130

Colloquy

1130

MR. CLARK: -- you're not stipulating it's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1131

Colloquy

1131

recoverable. You're disputing it's related.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1132

Colloquy

1132

MR. COBUZIO: Well, no. What I'm saying is,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1133

Colloquy

1133

you can mold the verdict for the 75,000 after -- you

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1134

Colloquy

1134

don't have to charge this because we've stipulated the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1135

Colloquy

1135

75,000 being the medical and mold it. But if you don't

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1136

Colloquy

1136

do that and you put it in the charge -- it goes on, if

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1137

Colloquy

1137

you determine that any of these bills were not fair and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1138

Colloquy

1138

reasonable to any extent or necessary, you can deduct

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1139

Colloquy

1139

from that and that goes against the stipulation. I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1140

Colloquy

1140

mean, the jury then is going to say, well, it's really

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1141

Colloquy

1141

not 75. It could be 65, and that's not what we

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1142

Colloquy

1142
stipulated to.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1143

Colloquy

1143

MR. CLARK: I mean, I agree with Mr. Cobuzio.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1144

Colloquy

1144

There should be something in there that it says, the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1145

Colloquy

1145

parties have stipulated to 75,000, you know, however

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1146

Colloquy

1146

the -- there should be something in there to show

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1147

Colloquy

1147

because he's -- but so there should be something. But,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1148

Colloquy

1148

also, again, just keep in mind there is the plaintiff's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1149

Colloquy

1149

Exhibit 34 as past meds from Dr. Wu, \$11,070.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1150

Colloquy

1150

And I want to make clear on the record here,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1151

Colloquy

1151

so that there's no misunderstanding. I just want to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1152

Colloquy

1152

alert everyone to Dr. Wu's testimony that he billed

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1153

Colloquy

1153

\$11,070, but he said, you know, he gave the plaintiff a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1154

Colloquy

1154

break because he couldn't fully pay. So I just want

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1155

Colloquy

1155

everyone to alert to that, but we do claim because I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1156

Colloquy

1156

suppose he wouldn't be expected to be paid, you know,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1157

Colloquy

1157

if he had the money.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1158

Colloquy

1158

MR. COBUZIO: Yes. I mean, but that's a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1159

Colloquy

1159

separate item within that charge, Judge, because that's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1160

Colloquy

1160

where the jury will actually be left to determine

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1161

Colloquy

1161

whether it's related. We give that to them and then

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1162

Colloquy

1162

they can discount that bill or not award that bill, so

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1163

Colloquy

1163

it's really a two-part charge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1164

Colloquy

1164

THE COURT: Well, I don't see how you can

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1165

Colloquy

1165

have it both ways. Explain to me why, Mr. Cobuzio,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1166

Colloquy

1166

you're not stipulating as to the fair and reasonable

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1167

Colloquy

1167

value of Dr. Wu's --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1168

Colloquy

1168

MR. COBUZIO: Simply, Judge, based on Dr.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1169

Colloquy

1169

Wu's testimony alone, we believe that there is a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1170

Colloquy

1170

cognizable challenge to the fact that the erectile

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1171

Colloquy

1171

dysfunction and urological disabilities are related to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1172

Colloquy

1172

the cause of action based on his testimony. So --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1173

Colloquy

1173

so --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1174

Colloquy

1174

THE COURT: Right. But aren't you saying the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1175

Colloquy

1175

same thing about the \$75,000?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1176

Colloquy

1176

MR. COBUZIO: No. The \$75,000, I have

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1177

Colloquy

1177

stipulated to be reasonable and customary. In other

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1178

Colloquy

1178

words, I'm not challenging the \$75,000 and, therefore,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1179

Colloquy

1179

the jury doesn't have to really consider it. But with

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1180

Colloquy

1180

Dr. Wu's \$11,000, the jury needs to consider it because

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1181

Colloquy

1181

the charge goes on. If you find it's not related, in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1182

Colloquy

1182

other words, in other words, if you believe Cobuzio

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1183

Colloquy

1183

that it's not related, then they don't have to award

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1184

Colloquy

1184

it. If you believe that some of it's related, then

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1185

Colloquy

1185

they would have to award it. You're giving them the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1186

Colloquy

1186

ability to challenge that number. The \$75,000 by

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1187

Colloquy

1187

stipulation, they can't challenge because it's a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1188

Colloquy

1188

stipulation. And if -- because we're stipulating to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1189

Colloquy

1189

it, there has to be something in there to say, the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1190

Colloquy

1190

defendants, however, by stipulation do not concede that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1191

Colloquy

1191

it's causally related, just so -- the idea of a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1192

Colloquy

1192

stipulation doesn't mean that we think everything is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1193

Colloquy

1193
related.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1194

Colloquy

1194

THE COURT: I still don't see the difference

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1195

Colloquy

1195

-- maybe it's just me -- between \$75,000 and the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1196

Colloquy

1196
\$11,000.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1197

Colloquy

1197

MR. CLARK: The testimony -- I brought this

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1198

Colloquy

1198

out with Dr. Reber. I said, Dr. Reber, there's a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1199

Colloquy

1199

stipulation that there was \$75,000 in medical bills

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1200

Colloquy

1200

related to all this treatment you've talked about and I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1201

Colloquy

1201

said, you know, -- he testified that, yes, that's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1202

Colloquy

1202

reasonable, necessary, and related. He said, in fact,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1203

Colloquy

1203

I think it's even low. So that's the testimony on

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1204

Colloquy

1204

that. And then as to the \$11,070, there's testimony

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1205

Colloquy

1205

from Dr. Wu, same effect.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1206

Colloquy

1206

Judge, there's one thing I just do want to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1207

Colloquy

1207

note for the record here. Plaintiff had another IME

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1208

Colloquy

1208

with Dr. Siegal (phonetic) in December. We have been

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1209

Colloquy

1209

waiting and waiting for the report. Plaintiff told me

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1210

Colloquy

1210

that Dr. Siegal told him that all your stuff is related

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1211

Colloquy

1211

to the accident and we haven't gotten a report from Dr.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1212

Colloquy

1212

Siegal and Dr. Siegal hasn't been called.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1213

Colloquy

1213

I just think I should bring that out because

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1214

Colloquy

1214

I think it somewhat relates to the strength of the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1215

Colloquy

1215

evidence against Dr. Wu's bill of \$11,070 because Dr.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1216

Colloquy

1216

Wu testified it's all related and I don't see where the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1217

Colloquy

1217

evidence from the defendant is in this case that it's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1218

Colloquy

1218

not related because they never called Dr. Siegal and I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1219

Colloquy

1219

just note parenthetically as to the history of the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1220

Colloquy

1220

recent IME and waiting for the report that never came,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1221

Colloquy

1221

and my representation to the Court as to what the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1222

Colloquy

1222

plaintiff told me Dr. Siegal told him about relation.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1223

Colloquy

1223

I think it's relevant to whether or not there's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1224

Colloquy

1224

evidence to contest that \$11,000 bill.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1225

Colloquy

1225

MR. COBUZIO: Judge, without giving up my

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1226

Colloquy

1226

closing argument, obviously, that's an issue that we

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1227

Colloquy

1227

don't concede. We had effective cross-examination and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1228

Colloquy

1228

the concessions made on direct examination of Wu that I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1229

Colloquy

1229

can argue to the jury to put that at issue. The

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1230

Colloquy

1230

\$75,000 is the stipulated amount for the medical care

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1231

Colloquy

1231

that we agreed to, so that we didn't have to go through

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1232

Colloquy

1232

the bills and all the testimony.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1233

Colloquy

1233

And all I'm saying, Judge, is that the two

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1234

Colloquy

1234

are separate because the jury doesn't have to consider

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1235

Colloquy

1235

the \$75,000. It's stipulated. The \$11,000, they have

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1236

Colloquy

1236

to consider because we're challenging causation. But

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1237

Colloquy

1237

the fact that we stipulated could be interpreted by the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1238

Colloquy

1238

jury as negative against the defendant. Hey, the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1239

Colloquy

1239

stipulated to it, so why are they bothering? That's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1240

Colloquy

1240

all I'm asking, just a qualifying remark saying, hey,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1241

Colloquy

1241

look, we stipulate to that amount, it's fair and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1242

Colloquy

1242

reasonable, but a stipulation is not a concession on

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1243

Colloquy

1243

liability.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1244

Colloquy

1244

MR. CLARK: I think we can craft something

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1245

Colloquy

1245

that says, the parties have stipulated as to \$75,000.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1246

Colloquy

1246

However, there's an additional exhibit in evidence and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1247

Colloquy

1247

you've heard testimony about an additional bill from

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1248

Colloquy

1248

Dr. Wu, and the parties do not stipulate about that,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1249

Colloquy

1249

however, plaintiff claims that. I think something to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1250

Colloquy

1250

that effect would satisfy these concerns.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1251

Colloquy

1251

THE COURT: Okay. You're the one that has

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1252

Colloquy

1252

the concerns. Why didn't you write it?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1253

Colloquy

1253

MR. COBUZIO: I do. What do you mean, why

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1254

Colloquy

1254

did I write it? I'm sorry, Judge?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1255

Colloquy

1255

THE COURT: Why didn't you give me a --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1256

Colloquy

1256

MR. COBUZIO: Okay. Yes, Judge. If you have

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1257

Colloquy

1257

the model jury charge in front of you, one, two, three,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1258

Colloquy

1258

four, about five lines down, it says, the amount of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1259

Colloquy

1259

payment is the fair and reasonable value of such

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1260

Colloquy

1260

medical expenses. Do you see that?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1261

Colloquy

1261

THE COURT: Yes.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1262

Colloquy

1262

MR. COBUZIO: I add at that point, here, it

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1263

Colloquy

1263

is stipulated that \$75,000 of past -- and I pick up,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1264

Colloquy

1264

medical expenses were fair and reasonable, however,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1265

Colloquy

1265

defendant does not concede that these expenses are

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1266

Colloquy

1266

causally related to the accident. And then you take

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1267

Colloquy

1267

out the rest of the sentence from, you know, where it

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1268

Colloquy

1268

says, you have heard testimony because it's stipulated.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1269

Colloquy

1269

MR. CLARK: Then we should insert a sentence

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1270

Colloquy

1270

after that that says, in addition, an address of the --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1271

Colloquy

1271

I don't know if you put the dollar amount. There's an

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1272

Colloquy

1272

additional bill of \$11,070 --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1273

Colloquy

1273

MR. COBUZIO: Right.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1274

Colloquy

1274

MR. CLARK: -- from Dr. Wu, which plaintiff

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1275

Colloquy

1275

claims is reasonable, necessary, related and defendant

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1276

Colloquy

1276

does not stipulate to that, something to that effect.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1277

Colloquy

1277

MR. COBUZIO: And then you would just pick up

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1278

Colloquy

1278

the charge. If you determine that any of these bills

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1279

Colloquy

1279

-- meaning Dr. Wu's bills -- were not fair and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1280

Colloquy

1280

reasonable to any extent and then they can discount

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

1281

Colloquy

1281

them. And then the last two sentences of the charge,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1282

Colloquy

1282

you can strike because you've already said it up at the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1283

Colloquy

1283

top.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1284

Colloquy

1284

THE COURT: The amount of payment that's a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1285

Colloquy

1285

fair and reasonable value of such medical expenses,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1286

Colloquy

1286

which the parties have stipulated is \$75,000. However,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

1287

Colloquy

1287

the defendant does not concede that the bills were

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1288

Colloquy

1288

causally related. As to Dr. Wu, -- or as to the bills

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1289

Colloquy

1289

of Dr. Wu, which -- and I say, the bills of Dr. Wu, of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1290

Colloquy

1290

if you determine that any of these bills were not fair

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1291

Colloquy

1291

and reasonable or that any of these services could not

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1292

Colloquy

1292

reasonably and necessary -- is that what we're doing?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1293

Colloquy

1293

MR. CLARK: Can we say, the dollar amount of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1294

Colloquy

1294

the Dr. Wu bills, it's \$11,070 just because I think if

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1295

Colloquy

1295

you're putting the \$75,000, I just don't want the jury

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1296

Colloquy

1296

to confuse that. It's only \$75,000, not the additional

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1297

Colloquy

1297

\$11,070.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1298

Colloquy

1298

THE COURT: Okay. Any future medical

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1299

Colloquy

1299

expenses? Are we conceding that inflation and interest

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1300

Colloquy

1300

offset each other?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1301

Colloquy

1301

MR. COBUZIO: I agree to the model charge,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1302

Colloquy

1302

Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1303

Colloquy

1303

THE COURT: Well, the model charge has -- all

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1304

Colloquy

1304

that, must consider the effects of inflation and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1305

Colloquy

1305

interest.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1306

Colloquy

1306

MR. CLARK: Inflation is low right now and so

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1307

Colloquy

1307

are interest rates.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1308

Colloquy

1308

MR. COBUZIO: Judge, I concede to the model

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1309

Colloquy

1309

-- I'll concede to the model charge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1310

Colloquy

1310

THE COURT: Okay. That means they consider

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1311

Colloquy

1311

inflation and interest.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1312

Colloquy

1312

MR. COBUZIO: Oh, wait a minute. I'd just

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1313

Colloquy

1313

let them wipe each other out, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1314

Colloquy

1314

THE COURT: That's what I'm asking.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1315

Colloquy

1315

MR. COBUZIO: Yes. That's it, Judge. I'm

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1316

Colloquy

1316

sorry. I didn't understand the charge, frankly. My

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1317

Colloquy

1317

associate explained it to me. I didn't read it.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1318

Colloquy

1318

THE COURT: Okay. That's what we have

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1319

Colloquy

1319

associates for, right? Somebody has to know what's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1320

Colloquy

1320
going on.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1321

Colloquy

1321

MR. COBUZIO: I'm still -- Judge, by the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1322

Colloquy

1322

comparative negligence ruling, Judge, and I just --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1323

Colloquy

1323

I've got to be reheard on that, just like Mr. Clark was

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1324

Colloquy

1324

able to be reheard because, you know, the voluntarily

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1325

Colloquy

1325

-- and known risk, understanding the hazards of the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1326

Colloquy

1326

situation, this is an experienced plumber who got into

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1327

Colloquy

1327

a trench, had the ability to tell his employer. At

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1328

Colloquy

1328

least his employer said, Mr. Fritas that, if he wanted

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1329

Colloquy

1329

to use a trench box, if he felt it was necessary, I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1330

Colloquy

1330

wouldn't have fired him and it's the actual excavation

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1331

Colloquy

1331

of the trench that's at issue and to suggest that his

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1332

Colloquy

1332

comparative negligence, knowing that he could have done

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1333

Colloquy

1333

something, knowing what he was getting into being an

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1334

Colloquy

1334

experienced person doesn't get before a jury on

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1335

Colloquy

1335

comparative negligence. I think that, Judge, there's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1336

Colloquy

1336

certainly that evidence that the jury can infer whether

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1337

Colloquy

1337

they agree or not.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1338

Colloquy

1338

But for Your Honor to make a ruling that you

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1339

Colloquy

1339

find there's no evidence, that's for the fact finder.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1340

Colloquy

1340

That's not for, respectfully, Your Honor to conclude

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1341

Colloquy

1341

that based on the plaintiff's case and the defense

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1342

Colloquy

1342

case, which are really different, that there's nothing

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1343

Colloquy

1343

that the jury can consider. I mean, you're allowing me

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1344

Colloquy

1344

put it in on proximate cause. The jury should be able

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1345

Colloquy

1345

to hear that on comparative negligence.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1346

Colloquy

1346

And I think, Judge, in the CAINE case, it's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1347

Colloquy

1347

almost the exact same situation. I mean, I said in my

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1348

Colloquy

1348

proposed jury instructions -- and I apologize for the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1349

Colloquy

1349

lateness of the hour, but this is too critical -- the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1350

Colloquy

1350

motion to bar lacks merit. I mean, the SUTER case is a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1351

Colloquy

1351

machine case. It's strictly products liability. The

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1352

Colloquy

1352

Appellate Division in CAINE concluded that the trial

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1353

Colloquy

1353

Judge had properly submitted the issue of plaintiff's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1354

Colloquy

1354

fault to the jury.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1355

Colloquy

1355

The fault here, Judge, that the plaintiff can

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1356

Colloquy

1356

be charged with is his failure to do something, knowing

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1357

Colloquy

1357

that there's risk associated with trench collapses.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1358

Colloquy

1358

The position of the defendant is, hey, look, he could

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1359

Colloquy

1359

have -- he could have said something to his employer.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1360

Colloquy

1360

He didn't have a fear of retribution. The plaintiff

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1361

Colloquy

1361

says otherwise. That's for the jury to consider based

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1362

Colloquy

1362

on the credibility of the witnesses. So I would ask

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1363

Colloquy

1363

Your Honor to reconsider that ruling on comparative

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1364

Colloquy

1364

negligence.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1365

Colloquy

1365

THE COURT: Well, you haven't really offered

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1366

Colloquy

1366

me anything that convinces me to differ from my prior

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1367

Colloquy

1367

ruling. I think if you look at CAINE, I mean, my job

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1368

Colloquy

1368

is not to convince you, I understand that, but perhaps

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1369

Colloquy

1369

before we continue this, let's go back to -- so my

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1370

Colloquy

1370

ruling stands on the comparative negligence.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1371

Colloquy

1371

But since I was -- with regard to Mr. Clark's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1372

Colloquy

1372

second section, do you wish to -- I assume you wish to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1373

Colloquy

1373

be heard on that wherein he seeks jury charge that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1374

Colloquy

1374

instructs the jury with regard to negligent hiring of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1375

Colloquy

1375

an incompetent contractor. That's on Pages 8 and 9 and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1376

Colloquy

1376

so on -- 8 and 9, principally. Mr. Cobuzio?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1377

Colloquy

1377

MR. COBUZIO: Yes, Judge. The plaintiff in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1378

Colloquy

1378

this case has failed to establish that DAR had any

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1379

Colloquy

1379

knowledge of Fritas' prior conduct. The incompetent

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1380

Colloquy

1380

contractor charge, I would think, is essentially an

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1381

Colloquy

1381

improper charge because you're only charging with

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1382

Colloquy

1382

regard to OSHA violations and negligence, but in terms

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1383

Colloquy

1383

of allegations about hiring independent -- an

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1384

Colloquy

1384

incompetent contractor, there's no testimony that DAR

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1385

Colloquy

1385

knew. We had Mr. Fritas here, who testified that they

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1386

Colloquy

1386

utilized trench boxes in prior cases. We know that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1387

Colloquy

1387

they utilized it on that day and -- or that -- with

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1388

Colloquy

1388

regard to the connection by the road. In this

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1389

Colloquy

1389

particular case, Norberto never conceded that he knew

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1390

Colloquy

1390

anything about Mr. Fritas' prior conduct and, for that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1391

Colloquy

1391

reason, Judge, I would suggest that that charge not be

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1392

Colloquy

1392
given.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1393

Colloquy

1393

THE COURT: Okay. This is similar goose and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1394

Colloquy

1394

gander arguments, which was what made me think of it.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1395

Colloquy

1395

Mr. Clark, I need your response.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1396

Colloquy

1396

MR. CLARK: Yes.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1397

Colloquy

1397

THE COURT: Let me simply add that Mr.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1398

Colloquy

1398

Cobuzio argues that, regardless of the fact that I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1399

Colloquy

1399

don't perceive there to have been any evidence of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1400

Colloquy

1400

negligence on the part of the plaintiff is not enough

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1401

Colloquy

1401

to justify not charging comparative negligence on the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1402

Colloquy

1402

one side of his mouth.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1403

Colloquy

1403

On the other side of his mouth, he says that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1404

Colloquy

1404

I should exercise my judgment and examine whether or

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1405

Colloquy

1405

not I've seen any evidence of the hiring of incompetent

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1406

Colloquy

1406

subcontractor and toss that claim. So I tossed the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1407

Colloquy

1407

comparative claim. Why shouldn't I toss the negligent

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1408

Colloquy

1408

retention of incompetent subcontract claim?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1409

Colloquy

1409

MR. CLARK: Because the comparative

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1410

Colloquy

1410

negligence claim is vis-à-vis the plaintiff himself.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1411

Colloquy

1411

The hiring of the incompetent contractor claim is the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1412

Colloquy

1412

principal with the contractor, the DAR vis-à-vis

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1413

Colloquy

1413

Fritas.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1414

Colloquy

1414

THE COURT: The defendant itself.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1415

Colloquy

1415

MR. CLARK: I'm sorry?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1416

Colloquy

1416

THE COURT: The defendant itself. There's no

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1417

Colloquy

1417

respondeat superior here. It's got to be the conduct

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1418

Colloquy

1418

of the defendant. So you're alleging that the conduct

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1419

Colloquy

1419

of the defendant in hiring repeatedly over a 20-year

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1420

Colloquy

1420

period an incompetent contractor justifies a charge

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1421

Colloquy

1421

wherein the jury can find liability based upon that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1422

Colloquy

1422

fact alone, not that -- not a finding that Fritas is

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1423

Colloquy

1423

incompetent and, therefore, DAR is responsible. That's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1424

Colloquy

1424

not in this case. It can't be. There's no respondeat

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1425

Colloquy

1425

superior. The question is whether or not there's any

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1426

Colloquy

1426

evidence of DAR having hired an incompetent contractor.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1427

Colloquy

1427

MR. CLARK: I -- the second -- the second

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1428

Colloquy

1428

point on this and it is squarely within this -- and I'm

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1429

Colloquy

1429

looking at my thing and it should have been double

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1430

Colloquy

1430

indented. The second thing, it's the main defense in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1431

Colloquy

1431

the case that Fritas was a competent contractor and the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1432

Colloquy

1432

standard is on Page 9 and it cites to PUKRENE

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1433

Colloquy

1433

(phonetic) and the Restatement Second of Torts. It's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1434

Colloquy

1434

footnote 18, but the body of it is, the employer of a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1435

Colloquy

1435

negligently selected contractor may be subject to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1436

Colloquy

1436

liability for physical harm caused by its failure to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1437

Colloquy

1437

exercise reasonable care to select a competent care for

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1438

Colloquy

1438

contractor and it goes on a little bit, but --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1439

Colloquy

1439

THE COURT: I didn't say that they're -- you

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1440

Colloquy

1440

know, I have to cut this short. We've got to go. But

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1441

Colloquy

1441

the question -- I didn't say that there isn't potential

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1442

Colloquy

1442

for a cause of action. I'm simply saying much like the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1443

Colloquy

1443

point I made with regard to comparative negligence,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1444

Colloquy

1444

which inured to your benefit, I'm making the same point

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1445

Colloquy

1445

with regard to an incompetent contractor and the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1446

Colloquy

1446

defendant's knowledge thereof. What evidence is there

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1447

Colloquy

1447
of that?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1448

Colloquy

1448

MR. CLARK: Okay. In other words, for the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1449

Colloquy

1449

plaintiff to prevail -- and this is right from the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1450

Colloquy

1450

Restatement of Torts, for hiring, plaintiff must show

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1451

Colloquy

1451

that Fritas was, in fact, incompetent or unskilled to

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1452

Colloquy

1452

safely perform the job for which it was hired, that the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1453

Colloquy

1453

harm that resulted or rose out of that safety and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1454

Colloquy

1454

competence, and that the principal knew or should have

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1455

Colloquy

1455

known -- knew or should have known, and there was

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1456

Colloquy

1456

testimony in this case that on hundreds of DAR/Fritas

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1457

Colloquy

1457

jobs, they knew Fritas didn't use -- that the trench

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1458

Colloquy

1458

protection was never used. There was testimony from

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1459

Colloquy

1459

DAR that they were on site every day, certainly over

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1460

Colloquy

1460

the ten-year period and over hundreds of trenches, if

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1461

Colloquy

1461

you believe some -- if you believe the testimony of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1462

Colloquy

1462

some of the witnesses. They should have known that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1463

Colloquy

1463

Fritas doesn't do anything to comply with the safety

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1464

Colloquy

1464
regulations.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1465

Colloquy

1465

THE COURT: I haven't heard anybody but you

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1466

Colloquy

1466

say that. I didn't hear a single witness say that over

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1467

Colloquy

1467

-- there are hundreds -- hundreds examples of them not

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1468

Colloquy

1468

using -- I just don't see --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1469

Colloquy

1469

MR. CLARK: We read in the testimony from

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

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A.D.# _____

I N D E X²

1470

Colloquy

1470

Samuel Matteuz (phonetic). I believe his testimony was

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1471

Colloquy

1471

100 trenches, DAR/Fritas jobs all over five feet, no

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1472

Colloquy

1472

protection. There's the testimony from Norberto. I

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1473

Colloquy

1473

was on site every day. I'm the project manager. I go

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1474

Colloquy

1474

to the site every day. There was testimony from

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1475

Colloquy

1475

Horvath (phonetic) that on all those many, many

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1476

Colloquy

1476

trenches, I think his was 20 trenches or 30 DAR/Fritas

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1477

Colloquy

1477

trenches over five feet, less than five are protected

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1478

Colloquy

1478

and it's only when it's like the county roads and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1479

Colloquy

1479

they're on the street. There was testimony from Andre

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1480

Colloquy

1480

Fernandes to that effect.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1481

Colloquy

1481

THE COURT: All right. I'm simply indicating

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1482

Colloquy

1482

that I do not find that that testimony rises to the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1483

Colloquy

1483

level wherein the jury could reasonably find that (a)

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1484

Colloquy

1484

Fritas was incompetent, and that's different from being

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1485

Colloquy

1485

negligent, okay, it's -- that rises to the level of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1486

Colloquy

1486

incompetent, and (b) that DAR knew or should have known

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1487

Colloquy

1487

that they were incompetent. It's not the cases that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1488

Colloquy

1488

talk about that, incompetence, negligence, retention of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1489

Colloquy

1489

a subcontractor require much more than that to even

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1490

Colloquy

1490

make a prima facie showing.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1491

Colloquy

1491

MR. COBUZIO: Thank you, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1492

Colloquy

1492

MR. CLARK: Thank you, Your Honor.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1493

Colloquy

1493

THE COURT: All right? Past lost wages, we

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1494

Colloquy

1494

know what we're doing with that.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1495

Colloquy

1495

MR. COBUZIO: Judge, you just need to craft

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1496

Colloquy

1496

that exception, the caveat that it's stipulated,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1497

Colloquy

1497

however, this is not a concession of liability or not a

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1498

Colloquy

1498

concession that it's causally related to the accident,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1499

Colloquy

1499

just so they don't infer -- have an adverse inference

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1500

Colloquy

1500

from that stipulation.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1501

Colloquy

1501

THE COURT: Well, we say that in the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1502

Colloquy

1502

beginning. I think that covers it.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1503

Colloquy

1503

MR. CLARK: And that it's a net number.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1504

Colloquy

1504

Which one --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1505

Colloquy

1505

MR. COBUZIO: Just take out that paragraph

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1506

Colloquy

1506

regarding take home and taxes and just call it, the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1507

Colloquy

1507

plaintiff has a right to be compensated for any

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1508

Colloquy

1508

earnings lost as a result of injuries caused by

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1509

Colloquy

1509

defendant's negligence. In this matter, it's been

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1510

Colloquy

1510

stipulated, it's \$100,000.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1511

Colloquy

1511

MR. CLARK: But it's net. That is a net.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1512

Colloquy

1512

MR. COBUZIO: No. Take out everything else.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1513

Colloquy

1513

MR. CLARK: It has to be net because the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1514

Colloquy

1514

regular personal injury charge talks about taxes.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1515

Colloquy

1515

MR. COBUZIO: Well, that's why I'm saying,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1516

Colloquy

1516

take that out.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1517

Colloquy

1517

MR. CLARK: Okay. Whatever. I don't have

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1518

Colloquy

1518

it.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1519

Colloquy

1519

MR. COBUZIO: Judge, just take it out and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1520

Colloquy

1520

then just add, the stipulation is not a concession of

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1521

Colloquy

1521

liability. Defendant still challenges causation. And

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1522

Colloquy

1522

then just take everything out about taxes and net.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1523

Colloquy

1523

That's the number. They can't deviate from the number.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1524

Colloquy

1524

THE COURT: Well, if it can't go up and it

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1525

Colloquy

1525

can't go down, why are we charging it at all?

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1526

Colloquy

1526

MR. COBUZIO: That's -- I would agree, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1527

Colloquy

1527

THE COURT: Let's just mold the verdict in

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1528

Colloquy

1528

that one.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1529

Colloquy

1529

MR. COBUZIO: I think that's easier, Judge.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1530

Colloquy

1530

THE COURT: Can't go up, can't go down, can't

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1531

Colloquy

1531
change.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1532

Colloquy

1532

MR. COBUZIO: Just add it.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1533

Colloquy

1533

MR. CLARK: All right. Then there should be

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1534

Colloquy

1534

no discussion at all in this case about lost wages.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1535

Colloquy

1535

There shouldn't be any -- there shouldn't be any --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1536

Colloquy

1536

there shouldn't be any closing or anything about he's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1537

Colloquy

1537

making a claim or he's not making a claim.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1538

Colloquy

1538

MR. COBUZIO: I don't have a problem on the

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1539

Colloquy

1539

-- there should be -- but I have -- we have to add

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1540

Colloquy

1540

somewhere that there's no claim in this case being made

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1541

Colloquy

1541

for future earnings lost, and we'll mold the verdict

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1542

Colloquy

1542
for 100,000.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1543

Colloquy

1543

MR. CLARK: See, --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1544

Colloquy

1544

MR. COBUZIO: But they have to know there's

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1545

Colloquy

1545

no claim for the future.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1546

Colloquy

1546

MR. CLARK: See, here -- just -- but just so

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1547

Colloquy

1547

it's clear. A component of the damages in this case,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1548

Colloquy

1548

he liked to work. He worked every day.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1549

Colloquy

1549

MR. COBUZIO: I understand.

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1550

Colloquy

1550

MR. CLARK: It is part in parcel of the case

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1551

Colloquy

1551

and, now, he's been held up in his apartment building

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1552

Colloquy

1552

without --

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1553

Colloquy

1553

MR. COBUZIO: I have no problem with that,

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1554

Colloquy

1554

but the jury has to know if they're going to hear that

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1555

Colloquy

1555

and some instruction that there's no claim being made

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1556

Colloquy

1556

for future earnings loss. Otherwise, they'll factor

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1557

Colloquy

1557

that in that he can't work for the rest of his life and

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1558

Colloquy

1558

to some component of damages. You're taking the past

NEW JERSEY

PART

SUPERIOR COURT OF

LAW DIVISION, CIVIL

ESSEX COUNTY

DOCKET NO. L-7138-06

A.D.# _____

I N D E X²

1559

Colloquy

1559

earnings away from them, but they may factor it in in

NEW JERSEY

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I N D E X²

1560

Colloquy

1560

the non-economic loss claim. That's all I'm saying.

NEW JERSEY

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LAW DIVISION, CIVIL

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I N D E X²

1561

Colloquy

1561

MR. CLARK: And I'm just requesting, if the

NEW JERSEY

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I N D E X²

1562

Colloquy

1562

Court can just say, the parties have resolved or

NEW JERSEY

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I N D E X²

1563

Colloquy

1563

something along the lines that any wage claim has been

NEW JERSEY

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I N D E X²

1564

Colloquy

1564

resolved by the parties and, therefore, it's not to be

NEW JERSEY

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I N D E X²

1565

Colloquy

1565

considered or something like that. But --

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I N D E X²

1566

Colloquy

1566

THE COURT: All right. And how many jurors

NEW JERSEY

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I N D E X²

1567

Colloquy

1567

are going to deliberate? Do we agree?

NEW JERSEY

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I N D E X²

1568

Colloquy

1568

MR. COBUZIO: I'd like all -- Judge, half of

NEW JERSEY

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I N D E X²

1569

Colloquy

1569

them are asleep. I think it's -- and it's always been

NEW JERSEY

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SUPERIOR COURT OF

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I N D E X²

1570

Colloquy

1570

my practice, let them all deliberate. They sat here

NEW JERSEY

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I N D E X²

1571

Colloquy

1571

through this tortured testimony for eight days. Kathy

NEW JERSEY

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I N D E X²

1572

Colloquy

1572

has sat here for eight days. Maybe we can let her

NEW JERSEY

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I N D E X²

1573

Colloquy

1573

deliberate. But it's --

NEW JERSEY

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I N D E X²

1574

Colloquy

1574

COURT CLERK: I can give you a verdict right

NEW JERSEY

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I N D E X²

1575

Colloquy

1575

now.

NEW JERSEY

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I N D E X²

1576

Colloquy

1576

MR. COBUZIO: I prefer that all eight because

NEW JERSEY

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I N D E X²

1577

Colloquy

1577

all eight may not have been listening all at the same

NEW JERSEY

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I N D E X²

1578

Colloquy

1578

time, and I would agree to a seven/eight. I think it's

NEW JERSEY

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I N D E X²

1579

Colloquy

1579

five/six, the --

NEW JERSEY

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I N D E X²

1580

Colloquy

1580

THE COURT: My position always is, if you can

NEW JERSEY

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I N D E X²

1581

Colloquy

1581

agree with that, I think that that's a good -- that's

NEW JERSEY

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I N D E X²

1582

Colloquy

1582

good for the jurors considering the amount of time they

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I N D E X²

1583

Colloquy

1583

had to spend, but if you can't agree, I don't think I

NEW JERSEY

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I N D E X²

1584

Colloquy

1584

can impose that.

NEW JERSEY

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I N D E X²

1585

Colloquy

1585

MR. CLARK: What is the -- what is it, if

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I N D E X²

1586

Colloquy

1586

it's -- it's seven to one is the -- okay. Yes. We'll

NEW JERSEY

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I N D E X²

1587

Colloquy

1587

agree to eight. That's fine, Judge. Thank you.

NEW JERSEY

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I N D E X²

1588

Colloquy

1588

THE COURT: Okay.

NEW JERSEY

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I N D E X²

1589

Colloquy

1589

MR. COBUZIO: Thank you, Judge.

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I N D E X²

1590

Colloquy

1590

(Day's Proceedings Concluded)

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I N D E X²

1591

Colloquy

1591

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I N D E X²

1592

Colloquy

1592

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I N D E X²

1593

Colloquy

1593

NEW JERSEY

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I N D E X²

1594

Colloquy

1594

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I N D E X²

1595

Colloquy

1595

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I N D E X²

1596

Colloquy

1596

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I N D E X²

1597

Colloquy

1597

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I N D E X²

1598

Colloquy

1598

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I N D E X²

1599

Colloquy

1599

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I N D E X²

1600

Colloquy

1600

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I N D E X²

1601

Colloquy

1601

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I N D E X²

1602

Colloquy

1602

NEW JERSEY

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I N D E X²

1603

Colloquy

1603

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I N D E X²

1604

Colloquy

1604

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I N D E X²

1605

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1605

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I N D E X²

1606

Colloquy

1606

CERTIFICATION

I, SHERRY M. BACHMANN, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number 1, index number from 0001 to end; tape number 2, index number from 0000 to end; and tape number 3, index number from 0001 to 1484, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

SHERRY M. BACHMANN AOC #454
G&L TRANSCRIPTION OF NJ

Date: May 2, 2011