

# CASE IN POINT

APRIL 2008

THE NEWSLETTER OF VENTANTONIO & WILDENHAIN PC

VENTANTONIO  
& WILDENHAIN

COUNSELLORS-AT-LAW

*If you have any questions or would like to schedule a consultation on the matters discussed in this publication, please contact the attorneys at Ventantonio & Wildenhain at 908.757.3900 or lawoffice@vwlaw.com.*

*This publication is intended to provide information on recent legal developments. It should not be construed as legal advice on any matter, nor is it intended to create an attorney/client relationship.*

## Ventantonio & Wildenhain Public Policy Forum

**DATE:**  
May 13, 2008

**TIME:**  
8:00 am - 9:30 am

**LOCATION:**  
Inn at Somerset Hills  
Basking Ridge

## Ventantonio & Wildenhain Celebrates 15th Anniversary

by James B. Ventantonio, Esq.

In January, 1993, the firm of Ventantonio & Wildenhain opened its doors at 95 Mt. Bethel Road in Warren. Since Ernie Wildenhain and I started the firm, with Tom Lattanze as our claims director and sole support staff, we have grown to nine attorneys and eight staff supporting our endeavor in two states.

We continue to serve our first client, a Fortune 50 international telecommunications corporation, and we have expanded to include a major focus in the practice areas of litigation and public entity and government law.

Our practice has grown and evolved, and the practice of law has changed as well. Technology that didn't exist 15 years ago is now a routine element of research and

communication with clients and among the attorneys.

What hasn't changed is the philosophy that Ernie and I brought to this venture in 1993. Respect for our clients and their concerns is our guiding principle. We continue to believe that the best client/attorney relationships are based on honesty, openness, and ethical behavior, and we have never wavered from these standards.

We're proud of the representation we give our clients, as well as our active involvement in the social and civic life of Somerset County. On our 15th anniversary, we'd like to say "thank you" to all our clients and friends for letting us serve you.



James Ventantonio and Ernest Wildenhain in January 1993.



Ventantonio & Wildenhain partners Thomas Crino, James Ventantonio, and Ernest Wildenhain (seated) with firm attorneys and staff.

## NEW JERSEY SUPREME COURT REVIEW



### Whistle Blower Statutes

#### Municipal Independent Contractors May File Claims

by Debra A. Sahler, Esq.

**R**ecent rulings of the New Jersey Supreme Court seem to expand upon who may bring a whistleblower claim, including those who are not traditionally thought of as employees. In this article in *Case in Point*, we highlight several decisions that may have an impact on the practices of New Jersey's municipalities.

The Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 to -8, (CEPA) protects employees from retaliation for engaging in protected activity. This is known as the "whistle blower statute." As discussed more fully below, the Supreme Court made it clear that, **under CEPA, an independent contractor, under certain circumstances, may be an "employee" and, therefore, have standing to sue for CEPA claims.**

#### NJ Supreme Court Sets Standards

In *D'Annunzio v. Prudential Insurance Co.*, 192 *N.J.* 110 (2007), the plaintiff was a physician retained by Prudential Insurance as an "independent contractor." Plaintiff complained to supervisors of Prudential's perceived insurance

violations, Prudential's failure to pay claims, its hiring of non-medical vendors to perform independent medical evaluations, and the improper use of nurse case managers in the approval of medical care. After Plaintiff's termination, Plaintiff brought suit and alleged that his employment contract was terminated because he had complained about Prudential and that the termination was in violation of CEPA.

In his claim for a retaliatory firing, Plaintiff was considered an employee for CEPA purposes, with status to bring a claim against Prudential Insurance Company.

The Court reasoned that the most important factor in determining Plaintiff's employee status was the level of integration in the employer's business. The Court reasoned that workers who perform their duties independently may still require CEPA's protection against retaliatory action when they speak against or refuse to participate in illegal or otherwise wrongful actions by their employer.

#### Job Category Not the Determining Factor

The level of control the employer exercises over a worker is a determining factor as to whether Plaintiff can maintain a CEPA claim, not their job category of independent contractor or employee.

In *Stomel v. City of Camden*, 192 *N.J.* 137 (2007), the Supreme Court ruled that a part time municipal public defender, appointed under the Municipal Public Defender Act (MPDA), *N.J.S.A.* 2B:24-1 to -17, was an employee for the purposes of bringing a claim under CEPA. Further, the Court determined that the City of Camden could be held vicariously liable under the Civil Rights Act, 42 U.S.C.A. § 1983, for the illegal action of the city in removing the Plaintiff. With regard to CEPA, the Court determined that the municipal public defender position was in fact an employee position, allowing for the assertion of a CEPA claim. The Supreme Court ruled that the plaintiff's "work as an attorney representing the City's indigent defendants required that he exercise independent professional judgment

for his clients without City supervision." The Court found it significant that Plaintiff Stomel's work was a regular and continuous function of the municipality; that he fulfilled the city's obligations under the municipal Public Defender Act; that he was paid a set monthly amount; that he could not select his clients on behalf of the city; and payment to him was contingent on the approval of his work by the city law department.

Plaintiff's claims were permitted to stand, even though he was not considered an employee in the traditional sense.

#### Important Precedents for Municipalities

We view these cases as important to your municipality. The category of the plaintiff, be it an independent contractor or employee, is not relevant to CEPA claims. Courts in evaluating CEPA claims will now analyze the degree of control and direction exercised by the employer over the worker and the integration of the individual's services with the employer, not just the worker's job title.



## Shade Tree Commissions – An Important Source of Immunity

by Thomas M. Crino, Esq.

In seeking to limit municipal liability, a review of existing commissions can be helpful. Does your municipality have a shade tree commission? According to New Jersey law (N.J.S.A. 59:4-10), if a municipality establishes a shade tree commission, the commission and its members are immune from liability for any accidents, injuries or death caused directly or indirectly by a tree or shrub, or any part thereof.

Shade tree commissions have specific responsibilities:

1. exercise full and exclusive control over the regulation, planting and care of shade trees on public property;
2. regulate and control the use of the ground surrounding shade trees as necessary for their proper growth, care and protection;

3. move or require the removal of any tree or part thereof dangerous to public safety;
4. care for and control parks and parkways; and
5. administer treatment to, or remove, any infected tree situated on private property. (See N.J.S.A. 40:64-5.)

It should be noted, however, that the mere establishment of a shade tree commission is not enough to be entitled to immunity. (See *Wilson v. Beekman, et al.*, 198 Fed. Appx. 239 3rd Cir. 2006 Unpublished). In order for the shade tree commission and its members to be immune from liability, two conditions *must* be met: (1) the tree or shrub, or pertinent part thereof, is on public property or on a public easement or right-of-way, or the tree or shrub, regard-

less of its location is regulated, planted, cared for, controlled, or maintained by the shade tree commission; and (2) the local government or the shade tree commission has participated in and successfully completed a training skills and accreditation program established pursuant to New Jersey law (N.J.S.A. 13:1L-17.6) and has a comprehensive community forestry plan approved pursuant to N.J.S.A. 13:1L-17.7.

Therefore, any municipality that establishes a shade tree commission must ensure that it meets these two required conditions. Otherwise, it will not be entitled to immunity. Still, with the many benefits that can be obtained by establishing a shade tree commission, it would be a wise choice for all municipalities to have a shade tree commission.

### FOCUS ON MUNICIPAL GOVERNMENT



## Bail Forfeiture – Are Municipalities Entitled to the Money?

by David Minchello, Esq. and Debra A. Sahler, Esq.

Defendant Joe Doe is arrested for a municipal offense and bail is posted in the amount of \$10,000. The defendant is released, the trial is scheduled – and the defendant fails to appear. Is the municipality entitled to the bail forfeiture?

While the municipality is not automatically entitled to the money, bail forfeitures are a potential – often overlooked – revenue source.

The New Jersey Rules of Court provide that upon a breach of a condition of bail, the court *sua sponte* shall declare forfeiture. Absent an objection by the surety seeking to set the forfeiture aside, a judgment of forfeiture shall be entered within 75 days after the declaration of forfeiture. The amount of forfeiture is

subject to the judge's discretion with certain new guidelines established in the end of 2007 by Acting Administrative Director of the Courts Philip S. Carchman, P.J.A.D.

The Court is to consider the degree of supervision by the surety, the substantial efforts to recapture the defendant, the length of time the defendant is a fugitive, the amount of the bond, whether the non –appearing defendant is imprisoned out of state, and the state's knowledge of a defendant's imprisonment.

A careful review of bail records can determine how best to recover what is rightfully due to the municipality.

## People in the News

*Ventantonio & Wildenhain PC is pleased to announce:*

**Thomas Crino**, a resident of South Plainfield, has been appointed to a four-year term on the Borough's Zoning Board of Adjustment. He concentrates his practice in personal injury defense litigation, property damage recovery litigation, and contract litigation.

**David Minchello** recently won two significant decisions on behalf of a municipality. Both cases involved claims on behalf of Plaintiff for injuries they allegedly sustained due to the municipality's negligence. Two Union County Judges dismissed Plaintiffs' complaints as Plaintiffs had failed to meet the threshold pursuant to the Tort Claims Act.

**Elia Pelios** has been appointed Prosecutor in Somerville. Pelios, who is of counsel to the firm, concentrates his practice in governmental entity and municipal law.

**Debra Sahler** recently won two significant cases on behalf of a New Jersey-based public utility. After a Bergen County trial, the Court ruled in favor of the utility against a Plaintiff who claimed losses and damages as a result of his failure to have telephone service. In a second case, a Superior Court judge in Morris County granted a motion for dismissal on behalf of the utility after an argument that, pursuant to a Joint Use Agreement, the firm's client had no liability for alleged damages.

**Debra Sahler** was a Judge for the National Appellate Advocacy Competition (NAAC) in Brooklyn's United States District Court for the Eastern District of New York.

## Assembly Deputy Speaker Addresses V&W Policy Forum



**N**ew Jersey Assembly Deputy Speaker John Wisniewski of Sayreville was the guest speaker at a breakfast hosted by Ventantonio & Wildenhain on March 25 at the Inn at Somerset Hills in Basking Ridge. He addressed budget issues and spoke about the state's transportation and infrastructure agenda to an audience of elected officials, business leaders, and municipal officials.

The breakfast is one of a series of public policy forums sponsored by the firm throughout the year. If you would like to be added to the invitation list for the next forum, please email **Sally Davidson**, Ventantonio & Wildenhain office manager, at [sdavidson@vwlaw.com](mailto:sdavidson@vwlaw.com).

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