A. NOTWITHSTANDING THE TRIAL COURT'S ERRORS, THE JURY PROPERLY FOUND THAT HADDONFIELD WAS LIABLE TO THE PLAINTIFF UNDER THE LAD, AND THE APPELLATE DVISION ERRED IN REVERSING

1. The Jury is the Finder of Fact, and There was Sufficient Presentation of Facts to the Jury to Support the Plaintiff's Claims

Appellate Division's Role

The standard for overturning a jury verdict is firmly set. The New Jersey Supreme Court in Hager v. Weber, 7 N.J. 201, 209 (N.J. 1951) underwent an exhaustive review of case law on the issue of the importance of upholding a jury's finding of fact. The Court found that the, "appellate tribunal cannot invade the constitutional office of the jury; it may not merely weigh the evidence where it is fairly susceptible of divergent inferences and substitute its own judgment for that of the jury." Hager v. Weber, 7 N.J. 201, 210 (N.J. 1951).

Our Supreme Court, in Kassick v. Milwaukee Elec. Tool Corp., 120 N.J. 130, 134 (N.J. 1990), made clear the importance of the role of the jury as fact finder:

> On this appeal, we are bound by the deference to be accorded to jury verdicts. An appellate court may overturn a jury verdict "only if [that] verdict is so far contrary to the weight of the evidence as to give rise to the inescapable conclusion of mistake, passion, prejudice, or partiality." Wytupeck v. City of Camden, 25 N.J. 450, 466, 136 A.2d 887 (1957); Hager v. Weber, 7 N.J. 201, 210, 81 A.2d 155 (1951); see also Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98, 379 A.2d 225 (1977) (concluding a jury verdict should not be set aside unless "the continued viability of the judgment would constitute a manifest denial of justice"); Kulbacki v. Sobchinsky, 38 N.J. 435, 444-45, 185 A.2d 835 (1962) (trial court cannot displace jury verdict merely because in its view outcome should have been different).
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> Kassick v. Milwaukee Elec. Tool Corp., 120 N.J. 130, 134 (N.J. 1990)

The Court also discussed this issue in Hager v. Weber, 7 N.J. 201, 210-211 (N.J. 1951):

> The court may not set aside a verdict merely because, in its opinion, the jury upon the evidence might well have found otherwise. Knickerbocker Ice Co. v. Anderson, 31 N.J.L. 333 (Sup. Ct. 1865). This conception of the weight of the evidence governs

> the trial court as well as the appellate court; and it applies to civil and criminal causes. State v. Karpowitz, 98 N.J.L. 546 (E. & A. 1923); Boesch v. Kick, 97 N.J.L. 92 (Sup. Ct. 1922), affirmed 98 N.J.L. 183 (E. & A. 1922); Queen v. Jennings, 93 N.J.L. 353 (Sup. Ct. 1919); Floersch v. Donnell, 82 N.J.L. 357 (Sup. Ct. (1912)); Juliano v. Abeles, 114 N.J.L. 510 (Sup. Ct. 1935).
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> Hager v. Weber, 7 N.J. 201, 210-211 (N.J. 1951)

The Appellate Division here overstepped its bounds, by substituting its own opinion for that of the jury. In considering whether to reverse the trial court's denial of defendant's motion for judgment notwithstanding the verdict, the Appellate Division had the duty of applying the proper standard. The Appellate Division did recite the standard for granting a trial nov:

> A motion for involuntary dismissal shall be "denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor." R. 4:37-2. The oft-cited test set forth by the Supreme Court in Dolson v. Anastasia, 55 N.J. 2, 5-6, 258 A.2d 706 (1969) [***15] (citations omitted), is that
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> > accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. The point is that the judicial function here is quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion.
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> The test applicable to involuntary dismissal motions is similarly applicable to judgment nov motions. Dolson, supra, 55 N.J. at 5, 258 A.2d 706.
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> Cutler v. Dorn, 390 N.J. Super. 238, 250 (App. Div. 2007)

Unfortunately, the Court did not apply that standard after reciting it. If it had, it would have found that there was more than "a scintilla" of evidence to support the jury's verdict. In fact, the Appellate Division did not even discuss this standard, after stating it. Simply put, the Appellate Division did not do its job. It should have taken a lesson from our Supreme Court, which further discussed the appellate court's duty in Kassick v. Milwaukee Elec. Tool Corp., 120 N.J. 130, 134 (N.J. 1990):

> Although an appellate court has a duty to canvass the record to determine whether a

> jury verdict was incorrect, that verdict should be considered "impregnable unless so distorted and wrong, in the objective and articulated view of a judge, as to manifest with utmost certainty a plain miscarriage of justice." Carrino v. Novotny, 78 N.J. 355, 360, 396 A.2d 561 (1979).
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> Kassick v. Milwaukee Elec. Tool Corp., 120 N.J. 130, 135 (N.J. 1990)

The Court in Dolson, the case cited by the Appellate Division, agreed, stating, "[t]he standard governing an appellate tribunal's review of a trial court's action on a new trial motion is essentially the same as that controlling the trial judge." Dolson v. Anastasia, 55 N.J. 2, 7 (N.J. 1969), citing Hager v. Weber, 7 N.J. 201, 212 (1951).

Jury's Role

As the finder of fact, the jury had the duty of weighing the evidence put before it. In performing this duty, the jury reasonably found that the anti-Semitic comments and conduct to which Cutler was subjected were severe or pervasive, and thus created a hostile work environment.

Cutler testified at trial, and , and the jury believed him. In fact, much of Cutler's testimony was uncontroverted. Given this, it was quite reasonable for the jury to find that the conduct and comments created a hostile work environment.

While the Appellate Division's weighing of the evidence differed from that of the jury, it erred in substituting its determination of the facts for the jury's findings.

a. The Appellate Division did not accurately recite the facts that were before the jury

b. Based upon the facts before the jury, the Paintiff demonstrated a cause of action under the Law Against Discrimination, which should not have been reversed by the Appellate Division

History of Lehmann (taken from Claudia's article, slightly adpated)

In Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993), the pre-eminent New Jersey case on hostile work environment claims, our Supreme Court emphasized that the efficacy of the LAD and furtherance of its underlying policy required "intelligible legal standards." Accordingly, the court articulated the following four-prong test by which to test the sufficiency of a hostile work environment claim:

1. whether the complained-of conduct would not have occurred but for the employee's participation in a protected class;

2. whether the conduct was sufficiently "severe or pervasive" to lead a

3. reasonable person in the same protected classification to believe that

4. the conditions of employment are altered and the working environment is hostile or abusive.

The U.S. Supreme Court provided further guidance regarding the standards by which to adjudge the "severe or pervasive" prong, in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). Specifically, in making this determination, courts must analyze (1) the frequency of the complained-of conduct; (2) the severity of the conduct; (3) whether the complained-of actions are simply offensive or more egregious such as threatening or humiliating; and (4) whether the conduct unreasonably interferes with the terms and conditions of employment. Notably, the severe or pervasive test does not require evidence of an actual change in working conditions to establish the existence of a hostile working environment.

In 1998, the Supreme Court of New Jersey considered all these standards and held that one

comment, without more, was sufficiently severe to give rise to an actionable hostile work environment claim. In Taylor v. Metzger, 152 N.J. 490, 505 (1998) the plaintiff, a female African-American police officer, filed suit after the sheriff referred to her as a "jungle bunny" in front of the undersheriff. After the incident, the sheriff's supervisor reluctantly apologized. However, the plaintiff (1) was not subjected to any other racially charged comments or conduct during her 20 years of employment with the police force; (2) did not suffer a change in compensation or job duties; (3) did not lose time from work as a result of the incident; and (4) was not threatened in any manner. Notwithstanding the above, the court held the racial slur directed at plaintiff, "in and of itself, [was] capable of contaminating the workplace." More important, the court clarified that, "[t]he test of 'severity' ... does not in all cases require evidence of an actual change in working conditions in order for there to be a hostile work environment."

Rather, the purpose of the LAD is to rid workplaces of discrimination and harassment by targeting the offender's conduct. Further, the Metzger court emphasized the egregious nature of racial epithets and the deleterious effect of such comments on individuals and workplaces. Specifically, the court noted that racial epithets are "capable of engendering a severe impact" because such comments, even in the absence of additional wrongful conduct or comments, are "a form of vilification that harms the people at whom they are directed."

In a well-reasoned and researched opinion, the Court recognized that discriminatory comments persist because of the existence of immutable characteristics as well as a historical intolerance to those characteristics. For this reason, insults based on a protected characteristic carry a greater likelihood of causing harm than other insults. For example, "[t]he experience of being called nigger, spic, Jap or kike is like receiving a slap in the face. The injury is instantaneous." Metzger at

503, quoting Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 452 (1990). There is no question but that the use of racial or religious slurs and derogatory characterizations about an entire ethnic, racial or religious group are bigoted and hurtful, and that the employer may be held responsible for discrimination if it condones or acquiesces in discriminatory language uttered by an employee out of personal pique.

Unfortunately, in Cutler v. Dorn, the Appellate Division gave credence to the proposition set forth in Heitzman v. Monmouth Cty., 321 N.J. Super. 133, 728 A.2d 297 (App. Div. 1999), that comments based on religion or religious ancestry are less harmful than those based on race. The Court in Heitzman held that, "a derogatory comment about another person generally does not have the same sting as an ethnic slur directed at a minority group member." Id., at 148.

If allowed to stand, Cutler v. Dorn would eviscerate Lehmann and its progeny, creating various standards for a finding of discrimination for various protected groups. Mario A. Iavicoli, Esq., counsel for the Township of Haddonfield in this matter, dismisses the idea that the Cutler v. Dorn opinion allows a double standard for Blacks and other ethnic groups. He suggests that the Appellate Division's decision would have been no different if the slurs in question hand been anti-Black, rather thananti-Jewish: "I'm of Italian heritage. My father was born in Italy. Suppose I'm a policeman and a black officer kids about that and calls me a 'wop' or a 'dago' and I kid back with him and call him a 'black Sambo.' If I did that with him, that's joking, that's kidding around, that's not creating a hostile work environment." Thus, according to Mr. Iavicoli, harassment in the workplace is just fine, as long as everyone is harassed.

Contrary to Mr. Iavicoli's view, it cannot be the law that an employer discriminating against everyone is the same as that employer discriminating against no one. This standard would render the

Law Against Discrimination unenforceable.

Courts have long held that the proper and relevant standard for finding a hostile work environment is the effect of the conduct and comments on their subject, rather than on the intent of the perpetrator. This is as it should be.

If the Appellate Division's ruling in Cutler v. Dorn is allowed to stand, this standard will be turned on its head, with discrimination being found only where wrongdoers can be found to have meant to harm their victims. A recent well-publicized example of this is the situation of Don Imus and the Rutgers University women's basketball team. Mr. Imus, apparently thinking himself to be funny, referred to the basketball players as "nappy-headed hos." While Mr. Imus claims to have intended no harm by this, he did in fact cause harm. The basketball players were harmed by his comments and suffered the indignities of responding to them publicly. The public's attention, which should have been on their oustanding achievements on the basketball court, was shifted to their race and gender.

Mr. Imus, fortunately, was not the employer of these young women. However, if he were, the standard for judging his behavior would – and should – be on the impact of his comment, not on his intent in making them. However, it seems that, according to the Appellate Division, it would have been fine for these women's employer to make such comments, as long as he was only joking.

i. Shreve's comment was severe

Officer Shreve's comment, "let's get rid of all the dirty Jews," was quite severe, and meets the standard set forth in both Lehmann, *supra*, and further defined in Taylor, *supra*. The comment made here is comparable to, if not worse than, the comment made in Taylor. Shreve, in his comment, advocates the annihilation of all Jewish people, and is strongly reminiscent of the

holocaust. In fact, even the defendant in this matter could see the severity of the comment. Dorn admitted (at trial?) that this comment was as bad as using the "n" word. Dorn further stated, (regarding this comment?), that "[i]t is as bad as workplace harassment gets." (is this an accurate description of what's in the transcript?) Given this, it is clear that a jury could find that a reasonable Jewish person could find this comment sufficiently severe to alter the conditions of employment and create a hostile work environment.

ii. Anti-Semitic incidents were pervasive

The anti-Semitic comments and conduct to which Cutler was subjected were also pervasive. The Chief of Police admitted making comments to Cutler, regarding Cutler being Jewish, twice a month. The evidence showed that Cutler's Captain and the Chief of Police constantly made comments to Plaintiff, referring to his "Jewish nose," and saying things such as, "give it to the Jew," and "why didn't you go into the family business," commenting that Jews are good with numbers, etc. Such comments, directed to Cutler at least twice a month, that being well over one hundred times during his employment, certainly pervaded the workplace. As discussed above, over a 44-month period, Cutler was subjected to between 132 and 176 separate derogatory comments aimed at the Plaintiff's Jewish ancestry/religion/ethnicity on an almost weekly basis, these comments being made by the number one and number two managers of the Police Department.

Citing Ellison v. Brady, 924 *F.*2d 872, 878 (9th Cir.1991), the Court in Lehmann discussed the importance of the frequency of incidents of discrimination:

> The fact patterns of many reported cases suggest . . . that most plaintiffs claiming hostile work environment sexual harassment allege numerous incidents that, if considered individually, would be insufficiently severe to state a claim, but considered together are sufficiently pervasive to make the work environment intimidating or hostile. "[T]he required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." *Ellison, supra,* 924 *F.*2d at 878.
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> Lehmann v. Toys 'R' Us, Inc., *supra,* at 607.

Thus, even though some of the individual comments made to Cutler might not be terribly

severe, it is quite reasonable that the jury found the huge number of comments, when considered together, be "sufficiently pervasive to make the work environment intimidating or hostile." Id.

The Lehmann Court further explained that a greater frequency of incidents has a more detrimental effect on the victim:

> Rather than considering each incident in isolation, courts must consider the cumulative effect of the various incidents, bearing in mind "'that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes.'" *Burns v. McGregor Elec. Indus.*, 955 *F.*2d 559, 564 (8th Cir.1992) (quoting *Robinson v. Jacksonville Shipyards*, 760 *F.Supp.* 1486, 1524 (M.D.Fla.1991)). "A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents but on the overall scenario." *Andrews, supra*, 895 *F.*2d at 1484.
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> Lehmann v. Toys 'R' Us, Inc., *supra*, at 607.

This point is particularly relevant here, where Cutler described the cumulative effective the continuous comments had on him, as discussed above: "By the thousandth time, you know, a slight tap would be like a baseball bat. (2/10/2003 T132:9-15)."

Beyond this, a sticker depicting the Israeli flag was anonymously placed on Cutler's locker. This action was followed by a sticker of the German flag being placed above the first sticker. The Appellate Division dismissed this, somehow concluding that it "was likely a prank concocted by plaintiff's friends." Cutler v. Dorn, *supra*, at 255. How the Court reached this conclusion is unclear, as it does not explain its reasoning on this. Further, the Court was nonplussed by the placing of the second sticker, because it depicted a German flag, rather than a Nazi flag. *Id.*

Given the constant comments regarding Jewish people directed toward Cutler, the sticker incidents and the numerous other derogatory comments regarding Jewish people, it is clear that a jury could find that a reasonable Jewish person could find that the comments and conduct to which Cutler was subjected were so pervasive that they altered the conditions of employment and created a hostile work environment.

As Lehmann requires that the conduct or comments be severe or pervasive, this standard is

met here, even if the Court finds that Shreve's comment alone was not severe enough to form the basis for a hostile work environment claim.

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