NOTICE TO THE BAR

UPDATES TO MODEL CIVIL JURY CHARGES

The Supreme Court Committee on Model Civil Jury Charges (Committee) has approved the following list of revised Model Civil Jury Charges for use by the bar and trial courts. All approved Model Civil Jury Charges, including these revised charges, are available for downloading from the Judiciary's web site at http://www.judiciary.state.nj.us/civil/civindx.htm.

1.18 ***Witness — Failure Of A Party To Produce Adverse Inference (Approved 5/1970; Revised 8/2011)***

This charge was revised to:

- The words "Adverse Inference" were added to the title.
- A footnote reference to *Clawans*, at p. 173, and Justice Francis's dissenting opinion therein, at pp. 175-176 has been added noting that *In State v. Hill*, 199 *N.J.* 545, 566 (2009), the Court announced that a *Clawans* charge generally should no longer be given against a defendant in a criminal case.
- At the end of the Comments in Section A, a reference to *Litton Indus., Inc. v. IMO Indus., Inc.*, 200 *N.J.* 372 (2009); *State v. Wilson*, 128 *N.J.* 233, 244 (1992); *State v. Carter*, 91 *N.J.* 86, 127-28 (1982) has been added.
- The following paragraph was added to end of Note to the Judge stating that if the absent witness is a party to the action, there is a "stronger, more persuasive" reason for drawing it. *Maul v. Kirkman*, 270 *N.J. Super.* 596, 611 (App. Div. 1994); *see also Gonzalez v. Safe & Sound Security Co.*, 185 *N.J.* 100, 118 (2005).
- The following cite has been added to the end of Section (2): *See also State v. Irving*, 114. *N.J.* 427 (1989), along with the following paragraph. With regard to comments made during summation in the absence of an adverse inference charge, *see, e.g., Nisivoccia v. Ademhill Assocs.*, 286 *N.J. Super.* 419, 429 (App. Div. 1996) (collecting cases) (holding that defense counsel was not required to seek advance permission from the Court to comment during summation upon a witness's absence, where the comments were reasonably based upon the trial testimony and plaintiff's counsel had the "last word" and the opportunity to rebut defense counsel's comments, but noting that the "better practice" is to alert the judge and opposing counsel before doing so). The example was added to clarify a portion in Section (3), for example, a party may oppose an adverse inference instruction where he has testified that the witnesses were out of state, that he had asked them to appear at trial and testify as witnesses for him, but they had refused.
- The paragraph in the Comments Section at the end of the charge was rewritten to read more fluidly.

1.19 ***Burden of Proof — Clear And Convincing Evidence (Approved 4/1988; Revised 8/2011)***

A cite was added at the end of the charge referencing *Chance v. McCann*, 405 *N.J. Super.* 547, 574 (App. Div. 2009) requiring the trial charge to analyze the proofs and determine if a prima facie case of breach of contract has been presented based on a writing alone or if the prima facie case is dependent upon oral statements. If it is the former, the jury should only be charged that it must find clear and convincing evidence of statements or acts attributed to a party to the contract but that otherwise the preponderance of the evidence standard is applicable to the cause of action. If it is the latter, the jury must be charged that the entire cause of action must be proven by clear and convincing evidence.

5.10I ***Agency (Approved 4/2002; Revised 8/2011)***

This charge was rewritten to read more fluidly and adding reference to case *Frazier v. P.T.C. Excavations, et als.*, 2011 *N.J. Super.*, Unpub. LEXIS 1155 (App. Div., May 6, 2011), which notes that control by the master over the servant is the essence of the master-servant relationship on which the doctrine of respondeat superior is based. Also, a reference to *Carter v. Reynolds*, 175 *N.J.* 402, 410 (2003) (quoting *Wright v. State,* 169 *N.J.* 422, 436 (2001) was added, along with Frazier, *supra*, further cited *Galvao v. G.R. Robert Constr. Co.*, 179 *N.J.* 462 (2004), which notes that the traditional 'essence' of vicarious liability based on respondeat superior relies on the concept of employer 'control' over an employee." "Under the control test, 'the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.'"

The Committee reported that the use of "master and servant" is anachronistic and sees no reason to refrain from using "employer and employee" in lieu of the older expression.

5.40B ***Manufacturing Defect (Approved 10/1998; Revised 8/2011)***

This charge was revised to provide additional clarity by adding the word "harm" to the charge as a substantial factor.

Also, footnote 1 was added, "The Products Liability Act defines harm as "physical damage to property, other than to the product itself" and certain personal injuries. *N.J.S.A.* 2A:58C-1(b)(2). Where the claim is for damage to the product itself, the economic loss rule bars tort remedies in strict liability or negligence. *See Dean v. Barrett Homes, 204 N.J. 286, 305 (2010)* (economic loss rule bars plaintiffs from recovery under the PLA for damage that the Exterior Insulation and Finish System (EIFS) caused to itself, but not to damage caused by the EIFS to the house's structure or its immediate environs)."

Questions regarding any of these revised civil jury charges may be directed to Leslie Santora, Esq., Chief, Civil Court Programs, Administrative Office of the Courts, Hughes Justice Complex, P.O. Box 981, Trenton, New Jersey 08625-0981; telephone (609) 984-5431; e-mail leslie.santora@judiciary.state.nj.us.

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Court

Dated: August 2, 2011