



*Joseph A. Dorta*

ATTORNEY AT LAW  
79 OAK HILL RD., SUITE B  
MIDDLETOWN  
RED BANK, N.J. 07701

TEL (732) 741-5005  
FAX (732) 741-9331

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The Honorable Linda R. Feinberg, A.J.S.C.  
New Jersey Superior Court, Law Division  
Mercer County Civil Courts Building  
175 South Broad Street, P.O. Box 8068  
Trenton, New Jersey 08650-0068

Docket No. MER-L - 00- 4233 -02

Re: MARK LEWIS and DENIS WINSLOW, et. al. v. GWENDOLYN L. HARRIS, in her official capacity as Commissioner of the New Jersey Department of Human Services, et. al., and NEW JERSEY FAMILY POLICY COUNCIL, et. al.

Dear Judge Feinberg :

On behalf of our clients, three non-profit groups and two opposite-sex married couples, we request that your Honor accept this letter brief in lieu of a more formal one in support of the Attorney General's ( hereafter "AG") Motion For Summary Judgment Pursuant to R.4: 46-2 and to oppose Defendant's Cross- Motion For Summary Judgment.

The daunting task before this court should be ameliorated by privacy right standards articulated by the Supreme Court in Washington v. Glucksberg 521 U.S. 702 (1997). Said standards limited its due process analysis by "emphasiz[ing] the importance of examining our nation's history and tradition in determining fundamental rights." See also Lynn Marie Kohm, Liberty and Marriage—Baehr and Beyond: Due Process in 1998, 12 BYUJ. PUB. L. 253, 273 (1998). Accordingly in light of the history and tradition of marriage, it is respectfully submitted Plaintiff's so-called arguments of a fundamental right of privacy claims must resoundingly fail under this two-prong test.

Furthermore said standard is completely consistent with the arguments set forth in our Brief dated May 30, 2003. That Brief encapsulates in one document several important academic and historical references. It contains a breath-taking and panoramic view of the history of opposite-sex marriage in New Jersey from colonial days. It also strikingly details the high esteem in which opposite-sex marriage couples are held and attempts to record the

laws starting from New Jersey's colonial times to the culmination of the passage of similar marriage laws in the 20<sup>th</sup> Century.

Therefore the inescapable conclusion reached after a review our New Jersey Constitution coupled with the treasure trove of laws and customs, rightfully bestows the right of marriage to opposite- sex couples and does not metastasize said rights to so-called personal preference same-sex couples.

### INTEREST OF AMICI

As your Honor is aware our firm represents **AMICI**, ( NJFPC, NJ Coalition and UFI; Individuals I & II ) collectively referred to hereinafter as Non-Profit Family **AMICI** and Individuals I in the above-captioned matter.

Russell S. Tompkins & Jamie L. Tompkins are an opposite-sex married couple who reside in New Jersey. They were married under the laws of the State of New Jersey 1981. They are also members of the NJ Coalition in good standing, and have been associated with this organization for several years. See previously submitted Cert. In Support of Intervention Application Individuals I at ¶ 5. Similarly David C. Heslington and Linda K. Heslington are an opposite-sex married couple, married in 1974 and reside in New Jersey. They are also members of the UFI and David Heslington is President of the New Jersey branch called United Families New Jersey. See Cert. In Support of See previously submitted Cert. In Support of Intervention Application Individuals at ¶¶ 1-3.

We wrote to the court on February 25, 2003 to request to hold the impending Scheduling Conference listed for Friday February 28, 2003 in open court or in chambers. The Attorney General ( hereafter "AG" ) opposed our observing and/or attending the Scheduling Conference conducted on February 28, 2003 even though both Plaintiff's counsel and the court did not. We submitted to the court a request via the 'five day' rule to amend its Order but same was denied.

Additionally, per the court's Order dated March 31, 2003 the Plaintiff's and AG were deemed to be the only parties to the within matter and therefore were permitted to argue at the June 27, 2003 hearing. Our client's

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1 The New Jersey Family Policy Council (hereinafter referred to as the "NJFPC"); the New Jersey Coalition for Traditional Marriage (hereinafter referred to as the "NJ Coalition"); Russell S. Tompkins & Jamie L. Tompkins, husband and wife (hereinafter referred to as the "Individuals I"); United Families International/United Families New Jersey (hereinafter referred to as the "UFI"); David C. Heslington and Linda K. Heslington, husband and wife (hereinafter referred to as the "Individuals II") collectively referred to hereinafter as Non-Profit Family Intervenor and Individuals.

were permitted to participate in this matter by submission of *Amicus* Briefs. One was filed dated May 30, 2003 in support of the AG's Motion To Dismiss.

### SUMMARY OF ARGUMENT

In the event the Court finds itself in equipoise, when juxtaposed by the plethora of public interest issues evoked by this lawsuit both the facts and the law fully embrace the AG's application Motion For Summary Judgment Pursuant to R. 4: 46-2 ( hereafter Motion ) and does not support Defendant's Cross-Motion For Summary Judgment. We therefore join the AG and other *Amicus* for the proposition that this court respectfully should grant the AG's Motion and deny Plaintiff's application.

Concomitantly Plaintiffs instant challenges are without merit. This obvious conclusion is quite evident from the proceeding. The instant Plaintiffs serendipitously appeared throughout the state in June 2002 to request marriage licenses from government officials and were denied same. They allege, *inter alia*, denial of equal protection under Article I, paragraph 1 of the New Jersey Constitution. In 1997 the equal protection clause was unsuccessfully assailed on similar grounds in the case of Rutgers Council of AAUP Chapters v. Rutgers, The State University, 689 A.2d 828 (App. Div. 1997), *cert. denied*, 707 A.2d 151 ( N.J. 1998) ( hereafter Rutgers). There too our Appellate Court was confronted by allegations of equal protection violations by personal preference same-sex Plaintiffs. The Appellate Court issued the following ruling. The university's refusal to extend spousal benefits to so-called same-sex partners of university employees did not constitute marital status discrimination, or a violation of the equal protection clause of the New Jersey Constitution.

See also the Appellate Court's recent opinion in the case of Lee v. Gen. Acc. Ins. Co., 337 N.J. Super. 509, 767 A.2d 985 (App. Div. 2001). There in March 2, 2001 our Appellate Court confirmed once again in "... [t]he commonplace meaning of marriage envisions a man and a woman lawfully joined in wedlock." ( Citations omitted, emphasis supplied).

Finally an expansive reading of the so-called right of privacy is neither supported by decisional law nor the underpinnings of the New Jersey Constitution.

### AG's Motion For Summary Judgment Must Be Granted

It is respectfully submitted that in the instant case not only do Plaintiff's fail to present cognizable due

process claims, but they also singularly fail to present valid constitutional or statutory violations. More to the point there are no genuine issues of material fact precluding the grant of summary judgment in favor of the AG. Therefore it is abundantly clear Plaintiff's Cross-Motion must be denied and the AG's Motion should be granted in light of the reasons expressed by our Supreme Court under the new standard announced in Brill v. Guardian Life Ins. Co., 142 N. J. 520 (1995) for granting a summary judgment. This is especially so since the court in Brill, explained our state would adhere to the summary judgment under federal case law such as Anderson v. Liberty Lobby Inc., 106 S. Ct. 2505, 2511 (1986).

Under the new standard :

The judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient: there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed'. Brill, 142 N.J. at 532 citing [Improvement Co. v. Munson, 14 Wall. 442, 448, 20 L. Ed. 867 (1872).]

The springboard for a courts summary judgment analysis is described as :

"...under R. 4:46-2 when deciding summary judgment motions trial courts are required to engage in the same type of evaluation, analysis or sifting of evidential materials as required by R. 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Id. at 540.

Moreover the court said :

"The thrust of today's decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541.

The Brill court finally holds that summary judgment should be granted if the evidence "is so one-sided that one party must prevail as a matter of law.". Accordingly, if *assuming arguendo*, Plaintiff's establish what the Brill court says " ... a single, unavoidable resolution of the alleged disputed issue of material fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact ...". Id. at 536, 540.

The philosophical underpinnings in Brill are also instructive for the present applications before this court since New Jersey's history and its Constitution support for opposite-sex couples :

We live in what is widely perceived as a time of great increase in litigation ... vastly increasing the dockets before our trial judges. As a result, the courts of this country have been urged to liberalize the standards so as to permit summary judgment in a larger number of cases. Brill, 142 N.J. at 539 (citations omitted).

Furthermore the court in Brill noted that summary judgment continues to uphold the principle espoused in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954) i.e., :

"... [it] is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial." (Judson at 74) at 531.

Therefore the cumulative effect of the preceding is for the court to rule the application is entirely appropriate especially if, as here, there are no 'genuine issue of material fact'. Certainly Judge Pressler's comments are helpful in sifting through the analysis as to the issue of what is a 'genuine issue of material fact', Judge Pressler explains, "[w]ith respect to the motion standard, paragraph ( c ) retains the familiar rubric of a genuine issue of material fact as the showing that must be made in order to defeat the motion. The innovation of the rule is the definition expressly accorded by paragraph ( c ) to the concept of a genuine dispute. The rule now defines a dispute in terms of the prima facie case standard prescribed by R. 4:37-2 (b) ... and R. 4:40-1 ... [i.e.,] whether the party resisting the motion has made a sufficient showing, based on the evidence submitted by both parties on the motion and all legitimate inferences permissible therefrom, to require submission of the issue to the finder of fact. Obviously that showing requires more than a scintilla of evidence in favor of the party resisting the motion. See S. Pressler, Current N.J. Court Rules, R. 4:46-2 comment ( 2003).

Except for anticipated *ipse dixit* Certifications and/or Affidavits proffered by Plaintiffs and alleged expert opinions, the within case has failed to present 'genuine issue of material fact' precluding the granting of the AG's Motion.

### Another Jurisdictional Decision Applying Summary Judgment Motion Addressing Same-Sex Marriage Favors AG's Motion

This court should also grant the AG's Motion because another jurisdictional decision addressing same-sex marriage concurs with the AG's position and accordingly, the Motion For Summary Judgment Must Be Granted.

For example under a summary judgment motion the court in Dean v. District of Columbia, et al., No. 92-CV-737, D.C. Court of Appeals, 653 A.2d 307; 1995 D.C. App. 1995 in a majority opinion ruled against opposite-sex couples alleging, *inter alia*, there as here, violations of equal protection. The court stated: "... [\*321] The parties here do not dispute the basic, historical facts giving rise to the claim: [ Plaintiffs applied for a marriage license; if they had been an opposite-sex couple they would have been given a license ] under the marriage statute; the clerk denied their application because they both are [ same-sex . ] No party, [\*322] moreover, has asked for a trial. Thus, the only question the parties present is whether, on the undisputed facts of record, the [ parties ] should be "entitled to a judgment as a matter of law," Super. Ct. Civ. R. 56 (c) (1993) – i.e., of constitutional law". Moreover, as to the standard of review: "A motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Kurth v. Dobricky, 487 A.2d 220, 224 (D.C. 1985) (quoting Super. Ct. Civ. R. 56 (c)). see also generally 6 Part II JAMES WILLIAM MOORE, MOORE'S FEDERAL PRACTICE P 56.17 n10 (1988); 10A CHARLES ALLEN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2732.2 (1983). [\*\* 60].

### Other Jurisdictional Decisions Addressing Same-Sex Marriage Favor AG's Motion

In construing its marriage statute, the Minnesota court, examined its statute which, like New Jersey, did not expressly proscribe personal preference same- sex marriage. The court in Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), as should this honorable court, looked to that state's history as guideposts to reach its decision. ' Minn. St. c. 517, which governs "marriage," employs that term as one of common [\*\*186] usage, meaning the state of union between persons of the opposite sex. n1 It is unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would have used the term in any different sense. The term is of contemporary significance as well, for the [\*\*\*3] present statute is replete with words of heterosexual import such [\*312] as "husband and wife" and "bride and groom" (the latter words inserted by L. 1969, c. 1145, § 3, subd. 3). Id . 311-312. ( Emphasis and underlining supplied).

Similarly our marriage statutes are directly derived from both the customs and laws of the early New Jersey colonists. See also Jones v. Hallahan 501 S.W.2d 588, 63 A.L.R.3d 1195 (Ky. 1973), Kentucky statutes did not expressly prohibit marriage between persons of the personal preference same- sex, the court said, the statutes did not authorize marriage licenses to such persons. Marriage was a custom long before the state began to issue licenses

for that purpose. The court there highlighted the fact that marriage had 'always been considered as the union of a man and a woman'.

Additional Materials Commended for the Court's Consideration

In addition to the materials contained in our earlier Briefs we respectfully commend for the court's consideration the following reference material. The first is a study conducted by the distinguished Dr. Unwin from a presentation he conducted given to Medical Section of British Psychological Society, March 27, 1935 which was thereafter published. He was a noted British social anthropologist who lived from 1895 to 1936 and studied civilization and culture. As the 'Introduction' notes, 'he spent 7 years doing research on 80 primitive tribes and on ancient and modern civilizations, before publishing his findings and conclusions. See Sexual Regulations and Cultural Behavior. With an Introduction by Frank M. Darrow. Pgs. 2-4, © 1969 Frank M. Darrow, PO 305, Trona, California 93562. Among the significant conclusions related to the instant litigation is where people are sexually free and permissive, their culture deteriorates.

Finally to the extent it support's our contention that marriage is limited to opposite-sex couple we submit for the court's consideration a recent poll wherein Americans state they do not favor marriage extended to personal preference same -sex couples. 'Americans do not favor personal preference same-sex couples. - A majority of Americans oppose allowing homosexual couples to marry legally ...'. 'In the poll, ... 55 percent say [ same-sex marriages] ... should be illegal. See ABC poll AT&T Worldnet Top News - Poll Most Oppose Same-Sex Marriage.htm. Poll: Most Oppose Same-Sex Marriage Updated 10:23 AM ET September 22, 2003

CONCLUSION

For the foregoing reasons, it is respectfully requested that summary judgment be entered in favor of Attorney General and the cross-motion should be denied.

Very truly yours,

~~Joseph A. Dorn~~

cc: Lawrence S. Lustberg, Esq. and/or Jennifer Ching, Esq. and via fax 1 973 596-0545  
David S. Buckel, Esq. 1 212 809-0055  
Patrick DelAmeida, Esq., DAG via fax 1 609 777-3120  
Greg Sullivan, Esq. via fax 1 609 588-0588  
Demetrios K. Stratis via fax 1 973 256-3570  
David Oakley, Esq. 1 732 324-8908

Attorneys for Amici, New Jersey Family Policy Council, a New Jersey Non-Profit Corporation, the New Jersey Marriage Coalition, a New Jersey Non-Profit Corporation, United Family International dba United Families New Jersey, an Arizona Non-Profit Corporation, Russell S. Tompkins & Jamie L. Tompkins, husband and wife, David C. Heslington and Linda K. Heslington, husband and wife.