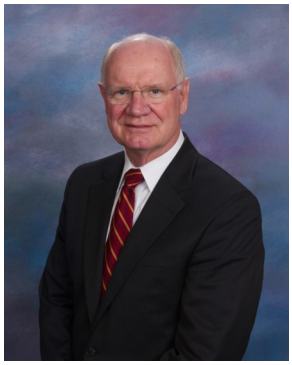
NEW JERSEY DEFENSE

NEW JERSEY DEFENSE ASSOCIATION

SPRING 2011

PRESIDENT'S MESSAGE
BY JOSEPH J. GARVEY, ESQ.



As my term as president is coming to a rapid close, I can only reflect upon the friendships and relationships that I have made during my involvement with the defense association. During our many meetings and continuing legal education courses, there have been great conversations, good laughs and genuine good times with my colleagues. As I reflect over my 35 years, I remember the calendar calls with hundreds of lawyers gathering before the almighty assignment judge, who would decree whether your matter would be conferenced, adjourned or tried. We waited patiently as our fate would be determined by the assignment judge and the equally dogmatic assignment clerk. With perceived fear in our hearts, we would wait in the courtrooms, corridors and maybe even a lawyers' lounge for the final decision. During this time, there would be extensive discussions about cases, participation in settlement panels and settlement conferences. The gathering would result in the adjournment to a coffee shop, discussing the previous weekend, sporting events, family and vacations. Just being around the courthouse with the exchange of stories and experiences was simply fun. One lawyer described the happenings at the courthouse as a "cocktail hour with coffee." In addition to the calendar calls, appearances were required for all motions. This provided attorneys with the opportunity to meet each other and to work things out. As a result, many of us have established long standing friendships with our fellow attorneys. As young attorneys, we had the opportunity of discussing cases and the law with more seasoned attorneys. Such opportunities were unique. Attorneys would exchange ideas and educate each other. We would learn a lot from the counsel of our fellow attorneys. Unfortunately, our young attorneys do not have as many of these opportunities. That is clearly a loss. They do not meet their adversaries face to face. It's easy to write a nasty letter to a faceless adversary. It's hard to do that to someone, who has shared a cup of coffee and discussed your son's little league game with you. Some may say that things changed for the better, but I always will miss those days at the courthouse.

Joseph J. Garvey, Esq.

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INDOOR AIR QUALITY: BASIS FOR CONSTRUCTIVE EVICTION?[1]

BY JOANNE VOS, ESQ., CHAIRMAN OF THE BOARD

The New Jersey Department of Health & Senior Services ("DOH") maintains that if mold is found inside any building, corrective action must be taken immediately to prevent any further exposure by humans and damage to the property. However, the DOH correctly points out that "there are no standards, regulations, or [State] guidelines upon which to base a health determination for exposure." *Mold Advisory Bulletin, Issue ADV-02-04, September 2004*. The potential for the establishment of standards pertaining to mold in indoor air was first presented in 2008 when Senator Anthony Bucco introduced the Toxic Mold Protection Act of 2008 to the New Jersey Legislature. Not having been passed since its introduction, the bill was recently reintroduced as the Toxic Mold Protection Act of 2010. Passage of the bill as written would require the Department of Community Affairs ("DCA") to establish standards for levels of mold in indoor air. Standards for indoor air would subject landlords of residential, commercial, and industrial properties to certain affirmative disclosure and remediation obligations. Although the establishment of such standards would place an additional onus on property owners, the current lack of guidance leads to uncertainty surrounding certain disclosure and remediation obligations which can ultimately land a property owner in court.

Although mold has been the subject of many personal injury and construction defect lawsuits over the years, it has never served as a basis for constructive eviction in a landlord/tenant action, until recently. In *Marusiak v. McCall*, A-1529-09T3 (App. Div. Sept. 7, 2010), the Appellate Division upheld a ruling from the Special Civil Part of the Law Division where the visual observance of mold in an apartment was deemed a valid ground for a constructive eviction action by a tenant against a landlord. The facts of the case are as follows: On or around April 19, 2009, plaintiff entered into a one-year lease for an apartment in Ringoes, New Jersey. Thereafter, plaintiff observed mold on the bottom of the furniture, in her daughter's room, and on her daughter's toys. Plaintiff notified the defendant about the mold who, after observing it himself, provided plaintiff with a dehumidifier. A lab report obtained by defendant shortly thereafter confirmed that a mold condition existed in the apartment. On or around August 18, 2009, plaintiff vacated the apartment and demanded the return of her security deposit in the amount of $1800. Defendant refused to return the deposit and held it as rent since plaintiff failed to provide the requisite thirty (30) day notice to vacate, pursuant to the terms of the Lease Agreement. Plaintiff then filed a lawsuit for $3600, double the amount of her security deposit, as permitted by law. At trial, defendant did not dispute the presence of mold in the apartment but he maintained that he had corrected the problem with the dehumidifier. Plaintiff relied upon a provision in the Lease Agreement that stated, "[i]f in any event...damage suffered to the premises results in that the premises is not suitable for the purpose for which it has been leased, it shall constitute a ground for the tenant or the landlord to cancel this lease." The court interpreted the cause of action as constructive eviction, and the ultimate issue to be decided was whether the tenant was entitled to vacate and/or make the necessary repairs and with-

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INDOOR AIR QUALITY

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hold the costs of the repairs from the rent. The court opined that:

> present day demands of fair treatment for tenants with respect to latent defects remediable by the landlord...require imposition on him of an implied warranty against such defects...where...there is such a covenant, whether express or implied, and it is breached substantially by the landlord, the courts have applied the doctrine of constructive eviction as a remedy for the tenant. Under this rule any act or omission of the landlord...which renders the premises substantially unsuitable for the purpose for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises, is a breach of the covenant of quiet enjoyment and constitutes a constructive eviction of the tenant.

Marusiak v. McCall, A-1529-09T3 (App. Div. Sept. 7, 2010). A judgment for double damages was rendered in favor of plaintiff, less certain costs for refrigerator cleaning. Defendant appealed, arguing that he was not given ample opportunity to fully remediate the mold condition in the apartment. The Appellate Division affirmed the lower court's ruling.

Since *Marusiak* is unreported, it could not bind another court but it could potentially be used to persuade. However, the facts and the outcome of the case raise questions about its potential reach. For example, the opinion specifically references covenants pertaining to "habitability" and as such, it is unknown whether this case could persuade another court considering a commercial or industrial landlord/tenant action (i.e. non-residential where "habitability" is not an issue) where a mold condition negatively impacts the purpose for which the property is leased. Additionally, specific terms of a Lease Agreement are critical. In this case, whether and how the Lease Agreement at issue specifically addressed notices to cure and/or maintenance responsibilities is unknown. Finally, if the presence of mold can serve as adequate grounds for constructive eviction, can other environmental problems do the same? And if so, which ones and to what degree? The answers to these questions are as yet to be determined. Nevertheless, this case highlights the importance of a landlord's obligations with respect to mold and indoor air quality overall and also, the need for careful lease drafting.

[1] A version of this article was previously published by Greenbaum, Rowe, Smith & Davis, LLP.

IN MEMORIAM: MIKE CERNIGLIARO

BY STEPHEN J. FOLEY, JR., ESQ.

With the impact of a falling Redwood, Mike Cernigliaro passed away on Thursday, January 27, 2011. One of the Association's original giants, his passing has left us all profoundly saddened. The following memorial is based upon remarks I was privileged to make on Mike's behalf during his funeral service.

Mike was in his fiftieth year with the Asbury Park firm which, as Campbell, Foley, Lee, Murphy & Cernigliaro, established itself during the 1960s and 70s as one of the preeminent defense firms in central New Jersey. During his time, Mike mentored innumerable young attorneys who cut their teeth with the firm on their way to their own successful practices and, in four instances, the Superior Court bench. As Honorable Ira Kreizman, J.S.C. (ret.) remarked, "Ralph Campbell hired me, but it was my job to follow Mike around and learn what to do." For the past 29 years, it was my privilege to follow Mike around, to learn from him and to become his partner.

Forged in the 1960s and carried forward into the 21st century, the bond Mike developed with his partners was one of committed loyalty to each other and to the representation of their clients. The firm was founded by Ralph Campbell in 1958. Mike was hired as a summer law clerk in June 1961. Upon his graduation from Rutgers in June 1963, he joined the firm as an associate. He was made partner in 1969, and a named partner in 1974 when the names Ralph Campbell, Steve Foley, Sr., Jack Lee, Frank Murphy and Mike Cernigliaro were linked inseparably. Mike became managing partner upon Ralph's retirement in 1989 and served as counsel to the firm following his own retirement at the end of 2008. Aside from being a skilled trial attorney and an expert on insurance coverage issues, Mike served for nearly thirty years as Judge of the Municipal Courts of Ocean Township and Interlaken. From 1966 until 2011, a period of forty-five years, he also served as the attorney for the Eatontown Board of Adjustment developing an expertise in zoning and planning, a small portion of which he somehow managed to pass on to me.

As devoted as he was to his partners and his many clients, Mike was equally committed to the New Jersey Defense Association. One of the Association's original members, Mike served as President from 1976 to 1977 and was the recipient of the Association's Outstanding Service Award in 1998. A Board member for over 40 years, he lectured frequently, knowledgably and entertainingly on trial and coverage related issues. With his beloved wife Pat, Mike attended nearly every one of the Association's annual conventions and for decades shared chairmanship of the convention's golf tournament with his great friend, George Meyers. Mike's connection to the Association's earliest days remains an invaluable resource for those of us who more recently have become its standard bearers.

I do not remember whether it was Mike or Ralph, Jack or Frank or my father, but sometime very early on in my career, I was told that as a defense attorney, I would not amass a great fortune. Instead, I was told that if I worked hard, if I took pride in what I did, and if I earned the respect of my peers, I would provide a good life for myself and my family. True to that principle, Mike shared a life of profound love and devotion with his wife Pat, his daughters Allison and Nicole, their husbands Brian and Dave and his much loved grandchildren, Colleen, the apple of his eye, Michael, his hunting part-

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MIKE CERNIGLIARO

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ner, and Max, his flea market buddy. Unselfish and sharing, true to his family, partners and friends, Mike added something good to the lives of those who knew him.

I am proud to have known Mike, to have followed him around and to have learned from him how to do my job. Judging from the heartfelt outpouring of support from the Association's Board and membership, I know that Mike touched many of us. He also left me with partners equally committed to carrying forward the work of the firm that is, heart and soul, Campbell, Foley, Lee, Murphy and Cernigliaro.

Mike Cernigliaro, Nicole Cernigliaro, Allison Cernigliaro and Patricia Cernigliaro at the 1998 NJDA Convention in Hershey, Pennsylvania

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OVERCOMING REASONABLE EXPECTATION OF PRIVACY RIGHTS TO DISCOVER POSTINGS ON SOCIAL NETWORKING SITES

BY ERIC L. PROBST, ESQ.

"New technologies create interesting challenges to long established legal concepts." Written over fourteen years ago in a court martial decision involving the electronic transmission of pornography, *United States v. Maxwell, Jr.*, 45 M.J. 406 (CAAF 1996), this statement has never been more relevant than it is today in the social networking era of Facebook, MySpace, Twitter, LinkedIn, and other social networking sites ("SNS").

When Congress enacted the Stored Wire and Electronics Communications Privacy Act in 1986, 18 U.S.C. §§ 2701 – 2711 ("SCA"), to regulate how and under what circumstances electronic information providers could produce electronic information to third parties, Mark Zuckerberg, Facebook's co-founder, was only two years old. Now, there are more than 500 million active users of Facebook spending over 700 billion minutes per month on the site, posting information about their lives, displaying photographs from recent vacations and emailing friends. *See* Facebook Statistics, http://www.facebook.com/press/info.php?statistics. In 2010, there was potentially more "relevant" information about a case available through SNS than there was through any other source. The flexibility of the *Federal Rules of Civil Procedure* and their state analogs often support the discovery of the electronically stored information contained on these sites.

However, as the *Maxwell* Court forecast, the presumed availability of SNS postings challenges the SNS user's expected right to privacy in the communications. Though few reported decisions exist, the courts that have considered the issue have required the production of SNS posts after examining the nature and scope of the SNS discovery requests, the sites, the type of messages posted on the sites, third party access to the postings, and the legal claims at issue. Stated differently, the courts have applied "long established legal concepts" – traditional discovery principles – to determine whether a party has to produce SNS postings.

Discovering Social Networking Postings – Public v. Private Postings

No party can dispute that SNS may contain relevant information to a claim or defense. The challenge for defendants is to discover this information over plaintiffs' right to privacy objections, the threshold issue courts address when determining whether defendants are entitled to SNS postings. *See EEOC v. Simply Storage Mgmt.*, 2010 U.S. Dist. LEXIS 52766, **8-9 (S.D. Ind. May 11, 2010) (privacy issue is "threshold point" for court's analysis). The privacy interest discovery dispute closely resembles traditional, discovery arguments. The dispute is fact-sensitive, and defendants should recognize that narrowly tailored SNS discovery requests are judicially favored. While federal and state discovery standards are liberal, they are not without limit. *Fed. Rv. Civ. P.* 26(b)(2)(c) (a court can limit discovery if the requests offend, harass or are "unnecessarily cumulative or duplicative."). In certain cases, most notably when a plaintiff's mental health is at issue, courts have recognized the need to

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impose limits on SNS discovery. *See generally Simply Storage Mgmt.*, 2010 U.S.Dist. LEXIS 52766. Defendants must understand when drafting discovery requests, especially in personal-injury cases, that though "anything that a person says or does might in some theoretical sense be reflective of her emotional state[,]… that is hardly justification for requiring the production of every thought she may have reduced to writing or, indeed, the deposition of everyone she may have talked to." *Rozell v. Ross-Holst*, 2006 U.S.Dist. LEXIS 2277, *11 (S.D.N.Y. Jan. 20, 2006). Thus, just because a plaintiff has posted information on Facebook or MySpace does not mean that it is discoverable.

From this jumping off point, courts examine the communication in light of the sliding scale of a person's privacy interests in electronic communications. Courts have recognized that "[e]xpectations of privacy in e-mail transmissions depend, in large part, on the type of e-mail involved and the intended recipient." *Maxwell*, 45 M.J. at 419. Chat room communications and e-mails forwarded to several recipients "lose any semblance of privacy." *Id.* Therefore, defendants first need to determine which types of SNS plaintiffs use, where on those sites messages have been posted and the nature of the communication at issue. The location of the SNS postings considerably influences the right to privacy argument.

Publicly posted SNS messages relevant or potentially relevant to the issue in dispute are discoverable. *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. Ct. Common Pleas Sept. 9, 2010) (it would be unrealistic for a Facebook user to expect that his disclosures on site would be considered confidential); *Dexter v. Dexter*, 2007 Ohio App. LEXIS 2388, **19, n4 (Ohio Ct. App. May 25, 2007) (custody-seeking parent could "hardly claim an expectation of privacy" in publicly accessible writings on MySpace detailing her intent to commence using drugs after completion of custody proceedings). Posters should expect a wide audience to view SNS postings, all but eliminating their right to privacy in the posting. *See Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App. 4th 1125, 1130 (Ct. App. 2009) (plaintiff's "affirmative act" of posting note on "hugely popular Internet site MySpace.com" exposed note to a vast audience). However, defendants will have little, if any, success subpoenaing Facebook and MySpace for the production of posted information without the consent of the plaintiff. The SCA prohibits electronic communication providers from disclosing their subscribers' communications absent subscriber consent or a federal criminal warrant. *See Crispin v. Christian Audigier, Inc.*, 2010 U.S.Dist. LEXIS 52832 (C.D.Cal. May 26, 2010); *see also Burke*, *Social Networking Discovery: Get Used To It*, DRI, Strictly Speaking, Vol. 7 Issue 3, September 14, 2010. However, the *Crispin* court remanded the case to the magistrate to determine whether the public had access to plaintiff's postings or plaintiff had restricted access to them, potentially allowing defendants to subpoena a plaintiff's public Facebook or MySpace postings.

A unique feature of SNS is that they allow their subscribers to restrict access to their posts to designated "friends." However, a plaintiff cannot prevent discovery of potentially relevant information by unilaterally limiting access to SNS posts. *See Simply Storage Mgmt.*, 2010 U.S.Dist. LEXIS 52766, *9 ("merely locking a profile from public access does not prevent discovery[.]"); *see also Romano v. Steelcase, Inc.*, 2010 N.Y. Misc. LEXIS 4538 (S.Ct. N.Y. Sept. 21, 2010). In *Romano*, the first reported decision of its kind in New York State Court, the New York Supreme Court, Suffolk County, ordered the production of a personal-injury plaintiff's Facebook and MySpace historical and current postings over her right to privacy arguments. In *Romano*, defendant Steelcase questioned plaintiff about her Facebook and MySpace public postings that revealed she traveled to Florida and Pennsylvania and had an active lifestyle despite her claims of permanent bodily injury and loss of enjoyment of life. When plaintiff refused to answer the questions, or provide defendant written authorization to subpoena the postings from Facebook and MySpace,

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defendant filed an Order to Show Cause to compel production of her current and deleted Facebook and MySpace postings. The court first focused on New York State's liberal discovery rules and the relevance and materiality of the public postings to defendant's defense. Next, it found that there was a reasonable likelihood that plaintiff's private postings contained relevant information, increasing the defendant's need for the information. Importantly, the trial judge found that plaintiff's "self-regulated privacy settings" should not prevent defendant from obtaining information that could be used to dispute her personal injury claims. *Id.* at *12.

The *Romano* court also recognized that the SNS' "privacy policies" undermined plaintiff's privacy arguments. Facebook advises its users that they post information at their own risk and that personal information may become publicly available. *Id.* at **15-17 ("Please keep in mind that if you disclose personal information in your profile or when posting comments, messages, photos, videos, Marketplace listing or other items, this information may become publicly available"). MySpace has a similar policy. *Id.* ("Although we allow you to set privacy options that limit access to your pages, please be aware that no security measures are perfect or impenetrable."). The court concluded that despite her privacy settings plaintiff consented to the public dissemination of her personal information and all but waived any claim to privacy in the posts. *Id.* at *16.

Further, the Court of Common Pleas in Pennsylvania recently held that Facebook's access to a subscriber's posts negates a claim that private posts are confidential:

> Facebook users are thus put on notice that regardless of their subjective intentions when sharing information, their communications could nonetheless be disseminated by the friends with whom they share it, or even by Facebook at its discretion. Implicit in those disclaimers, moreover, is that whomever else a user may or may not share certain information with, Facebook's operators have access to every post.

See McMillen, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, **7-8.

The *Romano* decision is sound and consistent with United States Supreme Court precedent that has "consistently held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743 -44 (1979); *see also McMillen*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, **9-10 ("[I]t is clear that no person choosing MySpace or Facebook as a communications forum could reasonably expect that his communications would remain confidential, as both sites clearly express the possibility of disclosure"). In fact, several circuits have held that a person lacks a legitimate expectation of privacy in Internet subscriber information. *See*, *e.g.*, *Rehberg v. Paulk*, 611 F.3d 828, 843 (11th Cir. 2010) (citations omitted). Other courts have held that a person's expectation of privacy decreases when information is posted or transmitted on-line because the person cannot prevent the recipient of the communication from forwarding the message to third parties. *See Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001). Some of these cases implicate the Fourth Amendment, and, as a result, courts have refrained from addressing the reach of the Fourth Amendment to e-mail content and emerging technology, as evidenced by the Supreme Court in *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010); *see also Rehberg*, 611 F.3d at 843-844.

Going Forward

Several guiding principles emerge from the few reported decisions on the discoverability of SNS postings. Defendants do not have unfettered access to a plaintiff's private SNS postings. *Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*, 2007 U.S. Dist. LEXIS 2379, *21 (D.Nev. Jan. 9, 2007)

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(defendant's request for plaintiff's private email messages on MySpace.com "cast too wide a net for any information that might be relevant and discoverable"). Courts have cautioned that such access would allow defendants to discover potentially embarrassing information communicated to third parties that is not relevant, discoverable or admissible. *See id.* However, *Romano* and other decisions are encouraging despite the absence of a broad-based appellate pronouncement about the extent of a person's reasonable expectation of privacy in private SNS posts. They recognize, especially when plaintiffs raise pain and suffering and emotional distress/mental anguish claims, that the basis for plaintiffs' claims "will manifest itself in some SNS content, and an examination of that content might reveal" when the claim arose and the extent of the plaintiffs' injuries. *Simply Storage*, 2010 U.S.Dist. LEXIS 52766, *13. At the same time, the decisions advise that narrowly tailored written discovery requests, focused deposition questioning and stipulated protective orders, rather than *in camera* reviews of SNS posts, are the preferred methods for counsel to secure information and resolve disagreements over the discoverability and relevancy of private SNS postings. Indeed, a more recent New York State Appellate Division decision denied a defendant's motion to compel plaintiff's Facebook posts because defendant was engaging in a fishing expedition, having not established the relevance of the alleged SNS posts to the case's disputed facts. *McCann v. Harleysville Ins. Co.*, 2010 N.Y.App. Div. LEXIS 8396 (N.Y. App. Div. 4th Div., November 12, 2010) (the court denied motion without prejudice to allow defendant to seek disclosure of posts in the future). Finally, when faced with a privacy challenge, defendants should not lose sight that the essence of SNS is to exchange thoughts, ideas and messages with the "public," no matter how "public" may be defined, regardless of the ability of a user to restrict access to the information, and that no privacy argument should be able to withstand the public nature of the sites. With Facebook's recent announcement that it will offer subscribers an e-mail address to expand their communication capabilities, the potential sources of discoverable information on SNS will only increase, thereby simultaneously raising the need for defendants to challenge a plaintiff's right to privacy arguments.

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DEAN v. BARRETT HOMES—IS YOUR PRODUCT INTEGRATED?

BY JOSH ABRAMSON, ESQ. AND ERIC PROBST, ESQ.

In a recent decision that impacts building product manufacturers, the New Jersey Supreme Court ruled that a homeowner's product liability claim against a manufacturer of stucco siding is not barred by the economic loss rule or integrated product doctrine. The Court found that the economic loss rule did not apply because the stucco siding was not an "integral" part of the plaintiffs' home, but rather, was a separate and distinct product that could have caused structural damage to the home. To find otherwise, said the Court, "would be to preclude these plaintiffs, and any other similarly situated home purchaser, from pursuing products liability relief against the manufacturer of an allegedly defective product affixed or adhered to the outside of the home for damage done by the product to the home." *Dean v. Barrett Homes, Inc.*, 204 N.J. 286, 289 (2010).

In *Dean v. Barrett Homes, Inc.*, the plaintiffs purchased a home that, several years earlier, had been built with an Exterior Insulation and Finish System ("EIFS") manufactured by defendant Sto Corporation. An EIFS, often called synthetic stucco, is affixed to the exterior of a building and operates as a combined insulation and wall finish system. *Id*. at 290. The Court described, "[a]s we understand it, the EIFS was affixed to the exterior walls to create a moisture barrier, much like exterior vinyl siding." *Id*. at 303. Approximately one year after purchasing the home, the plaintiffs detected black lines on their home's exterior. They blamed this on toxic mold that had allegedly developed due to moisture that had penetrated the EIFS. *Id* at 290. Plaintiffs ultimately removed and replaced the EIFS and sued defendant Sto Corporation for strict products liability under New Jersey's Product Liability Act ("NJPLA"). *Id*. at 291.

The NJPLA permits a plaintiff to recover for "harm," which it defines as certain personal injuries and "physical damage to property, other than the product itself." *See* N.J.S.A. 2A:58C-1(b)(2). This is a codification of the economic loss rule, which bars tort recovery when a plaintiff's claim only involves damage to the product itself. The *Dean* Court noted that the Third Circuit has used the integrated product doctrine to "extend the economic loss rule to preclude tort-based recovery when a defective product is incorporated into another product which the defective product then damages." *Id.* at 298. The federal court's view, said the *Dean* Court, is that "harm to the product itself" means "harm to whatever else the defective product became integrated into." *Id*.

Acknowledging the interplay between the economic loss doctrine and the integrated product doctrine, the *Dean* Court framed the issue before it as "whether the EIFS was sufficiently integrated into the [plaintiffs'] home to become a part of the structure for purposes of broadly applying the economic loss rule." *Id.* at 302. This was not a novel question, as the New Jersey Appellate Division already had decided the exact same issue. In *Marrone v. Greer & Polman Construction Inc.,* 405 N.J. Super. 288 (App. Div. 2009), the plaintiff alleged that a defective EIFS caused structural damage to his home and asserted a NJPLA claim against the same EIFS manufacturer named in the *Dean* case. The court dismissed the claim, concluding that "the house is the 'product,' and it cannot be subdivided into its

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component parts for purposes of supporting a PLA cause of action." *Id*. at 297. It further remarked that allowing a tort remedy under those circumstances "would subject component manufacturers to potentially unlimited liability." *Id*. at 303. Therefore, the *Marrone* Court used the integrated product doctrine to bar plaintiff's product liability claim under the codified economic loss rule.

Consistent with this approach, the trial court in *Dean* dismissed the plaintiffs' NJPLA claim against the EIFS manufacturer. The Appellate Division affirmed and followed *Marrone* in concluding that the EIFS "was an integrated component of the finished product of that house." *Dean v. Barrett Homes, Inc.*, 406 N.J. Super. 453, 470 (App. Div. 2009), *rev'd in part*, 204 N.J. 286 (2010). The Supreme Court, however, did not follow suit and instead cast significant doubt upon the developing precedent that favored component part manufacturers.

The *Dean* Court opined that a product, like an EIFS, that is attached to or included as part of the structure of a house is "not necessarily considered to be an integrated part thereof." *Dean*, 204 N.J. at 302. The Court gave as an example, asbestos, which has not been deemed to be integrated into buildings where it is found. *Id*. It also noted the significance of two rulings in California where the courts declined to find that certain building products were "integrated" into the overall structure of a house. In *Jimenez v. Superior Court*, 58 P.3d 450 (Cal. 2002), the California Supreme Court allowed home buyers to recover in strict liability for damage that their windows caused to other parts of the home, and in *Stearman v. Centex Homes*, 92 Cal Rptr. 2d 761 (Cal Ct. App. 2000), the appellate court permitted plaintiffs to recover in tort for damages to their home caused by a defective foundation. *Dean*, 206 N.J. at 302-03.

Following the lead of these two California rulings, the *Dean* Court held that the plaintiffs' EIFS "did not become an integral part of the structure itself, but was at all times distinct from the house." *Id*. at 303 (emphasis added). Viewing the EIFS and the house as separate products, the Court ruled that the plaintiffs could proceed with their strict liability claim against the EIFS manufacturer for damages that the EIFS allegedly caused to the structure of plaintiffs' house. It also held, however, that the plaintiffs could not recover the costs of removing and replacing the EIFS under the NJPLA because those damages constituted harm to the product itself, and thus, were barred by the economic loss rule. *Id*. at 303-05.

In New Jersey, plaintiffs likely will jump on the opportunity to test the limits of the *Dean* decision, with the hopes that they too will be allowed to assert statutory product liability claims against various types of building product manufacturers. However, efforts to extend that ruling may be met with resistance within the Supreme Court itself. Justice Rivera-Soto issued a scathing dissent in *Dean*, stating that the majority court's conclusion that the EIFS is a separate and distinct product from the house "defies basic common sense." *Id*. at 307. Justice Rivera-Soto further articulated that "[t]he notion that an exterior finish that can only be removed by extensive demolition work is not 'integrated' into the structure to which it is attached is so fanciful, so nonsensical, that it beggars the imagination. It is a conclusion that can germinate only in the minds of lawyers and can find root only in the rarified environment of this Court's decisions; it cannot, however, long survive in the atmosphere of the real world." *Id*. at 308. The dissenting Justice also cited cases from twenty different jurisdictions that, in his view, support the proposition that an EIFS system is

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integrated into a building and, thus, subject to the economic loss rule. The majority of states that have analyzed EIFS systems have, indeed, reached that conclusion. *See Keck v. Dryvit Sys.*, 830 So. 2d 1, 6-7 (Ala. 2002); *Pro Con, Inc. v. J&B Drywall, Inc.*, 20 Mass. L. Rep. 466 (Mass. Super. Ct. 2006); *Wilson v. Dryvit Sys.*, 206 F. Supp.2d 749, 753-54 (E.D.N.C. 2002); *Pugh v. Gen. Terrazzo Supplies, Inc.*, 243 S.W.3d 84, 92 (Tex. App. 2007); *Mequon Med. Assocs. v. S.T.O. Indus.*, 2003 WI App 225, 267 Wis. 2d 961, 671 N.W.2d 717 (Wis. Ct. App. 2003).

It will be interesting to see if courts in other jurisdictions become hesitant, as did the New Jersey Supreme Court, to find that component building products are "integral" to the structure of a home, and thus, subject to the economic loss rule. It is undoubtedly an issue worth tracking. Certainly in New Jersey, building product manufacturers whose products are considered components of a larger product or structure should expect to be the target of an increasing number of claims under New Jersey's Product Liability Act.

NJDA Seminar

November 11, 2011

Women and the Law

Hilton Woodbridge

8:30 am — 12:30 pm

NJDA EVENTS

NJDA TRIAL COLLEGE
FEBRUARY 11, 2011
AT THE UNION COUNTY COURT HOUSE

Left to Right: 1st Row: Brian O'Toole, Chad Moore, Eleanore Rogalski, Marie Carey, Bruce Helies, Kim Mento, Kevin DeCoursey

2nd Row: Joseph Garvey, Peter Spaeth, Steven Isaacson, Thomas Hight, Philip Lezenby, Arthur Leydon, Herbert Kruttschnitt

HOME COOKING

By Brian O'Toole, Esq.

All of my childhood memories of the holidays are punctuated by the smells of the wonderful cooking my mother and grandmother would undertake as part of their holiday ritual. You should understand that I grew up in Irvington in a large three-family house that my grandfather built with his four brothers. My family (mother, father and brother) lived on the first floor, my aunt and uncle and their two children on the second floor, and my grandfather and grandmother on the third floor. Unfortunately, my grandfather died just after I was born, but I had the privilege of growing up with my grandmother and being with her every day.

Christmas Eve was a very special day in our house because that is when my mother and grandmother made the Christmas stollen. The night before, my mother would have all the ingredients spread out on the kitchen table, and on Christmas Eve morning, at about 6:00 a.m., they would start their work. It always took several hours because they would have to kick my brother Joe and me out of the kitchen several times. The last time, however, we were permitted to lick the luscious dough off the mixing bowls and utensils. I always enjoyed watching them put in a pinch of this and a dash of that, nothing you could measure, other than with their taste buds. When they finished we had three huge Christmas stollens, one for each family. My wife, Sunny, claims that I exaggerate their size, but, no kidding, these babies were ten inches wide and over three feet long. You should also understand that no one, and I absolutely mean no one, was permitted to cut into them until after Christmas Eve dinner. We alternated houses, but the family would gather for dinner about 5:30 p.m. and we would be joined by several more aunts, uncles and cousins, all of whom lived within walking distance. We kids all knew that you didn't want to eat too much at dinner because you needed room for the delicacy that followed as dessert. My grandmother always had the honor of cutting the first slice which she would then present to one of the kids. Somehow I always thought I should be first, but Grandma would remind me that I had been first last year. The situation reminded me of the famous line from *A Christmas Carol*: "All of the children were chomping at the bit for Christmas to begin." After dinner we had our traditional parade around the dining room table with my Uncle Leo leading the way, banging on a big bass drum. Again my wife, Sunny, claims I exaggerate the size of the drum, but as God is my judge, it certainly was bigger than any drum in the Macy's parade. We would also remember to leave a slice of stollen for Santa and my father would always emphasize that Santa was a very big man, so he needed a very big slice. Now I know why he had such a big smile on his face when Joe and I went to bed.

Our bill of fare was the usual for Thanksgiving, with the exception of my mom's Apple-Brown-Betty, which supplemented the homemade pumpkin and mince pies. For Easter, we always had lamb with mint sauce and my mother's lyonnaise potatoes. For dessert we had a selection of homemade fruit pies; apple, cherry, peach and plum. But that brings us to mom's *piece de resistance*, sauerbraten for my father's birthday in July.

Her preparation, with the able assistance of my grandmother, took almost all week. She would purchase about twenty pounds of top round beef, which she would pickle in two gigantic crock pots for four days. The day before the feast she would make the kartoffel out of several dozen potatoes,

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HOME COOKING

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which I described as dough balls. But the most important part of the meal was her thick, brown, pickled gravy. She would put the remnants from the crocks into the gravy, which gave it that indescribably delicious taste. All of this would be served with red cabbage and homemade hot biscuits, topped off with her applesauce raisin cake with lemon icing for dessert. As you may guess, we always had a cavalry charge for dad's birthday, but one of his birthday gifts was that there were enough leftovers for at least two more meals for him. Even though he threatened to eat all the leftovers himself, he was a softy and always shared.

Unfortunately, I don't have sauerbraten as much as I would like, because after my mom's, I can't order it at a restaurant. But the food gods have smiled on me because my wife, Sunny, has recently picked up the fallen standard and has made sauerbraten twice in the past six months, using my mother's recipe. As my waistline might attest, I have been blessed by being fed by two of the world's greatest cooks. I try to explain to Sunny why I'm not interested in going out to dinner when I have a chef of her caliber right in our own kitchen. I really don't understand why she isn't smiling when I say this. But really folks, we do get out to Billy's Red Room once in awhile!

I hope my tale rekindles fond memories of your own childhood and loved ones gathered around the dinner table.

Have a great Easter and spring season.

MARK YOUR CALENDAR

NJDA Seminar

Auto Liability

November 22, 2011

Hilton Woodbridge 8:30 am — 12:30 pm

New Jersey Defense Association

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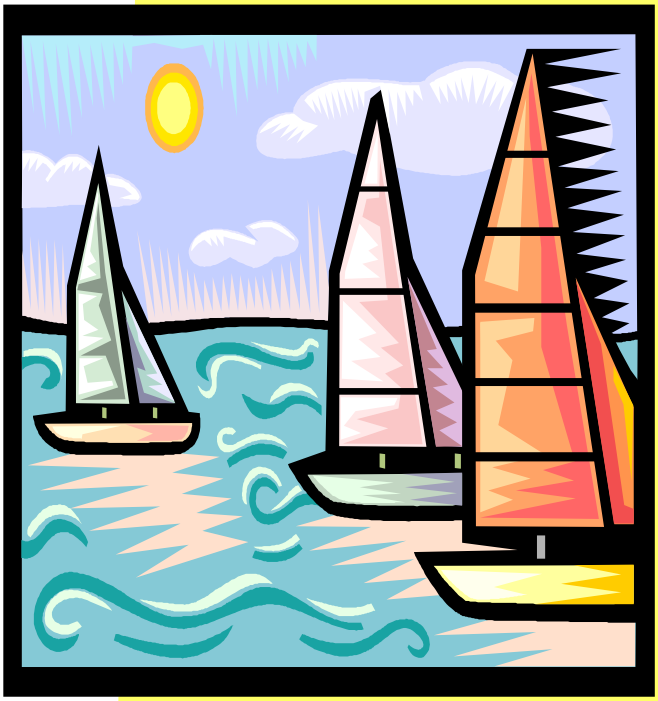

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