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PRESIDENT'S LETTER

To all NJDA Members and to New Jersey's esteemed Judiciary:

Thank you to those who responded to my last President's Letter with great ideas for raising NJDA's profile. We are planning several events based on your feedback. Please continue to contact me or other Board members with your ideas. We want to hear from you!

Throughout the year, we will continue to increase NJDA's profile by advertising our seminars and their speakers, increasing our social media presence, partnering with other bar associations, and hosting networking and charitable events.

Our flagship seminars always discuss cutting edge legal issues, while making sure everyone has an opportunity to earn needed CLE credits before the end of the year. This year is no exception.

A 2016 Acritas Research Ltd. report found that more diverse legal teams perform at a higher level, receive an increased share of legal spending, and experience a higher client recommendation rate. We are honored that our 8th Annual Women and the Law Seminar, entitled, *"Women and Men: We're All In This Together – Diversity and Inclusion Strategies for Everyone,"* will feature panels of Superior Court Judges, in-house counsel from major US companies, and plaintiff and defense attorneys. Please join us on November 10 for an informative and practical discussion about this important topic.

In addition, on November 21, several top-notch speakers will present at our Auto Liability Seminar on various topics, including strategies for addressing recent, unusually high plaintiff verdicts. We are also hosting our Annual Golf Outing on October 17. Take a break from the office and join us for a half-day of good food, great networking, and maybe a little golf.

Details about these events, including online registration, and more can be found on our website, www.njdefenseassoc.com. Please take these opportunities to engage with NJDA. I look forward to seeing you there!

Natalie H. Mantell

NATALIE H. MANTELL, ESQ.


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SHOULD YOU FEAR LIABILITY IN NEW JERSEY YOUTH AND ADULT RECREATIONAL SPORTS? – AN ANALYSIS OF NEW JERSEY LAW AND THE PROTECTIONS CONTAINED THEREIN

BY JOHN C. MACCE, ESQ., MACCE & CRESTI, P.C.

New Jersey courts have vigorously enforced its Legislature's clear intent to encourage people, particularly our youth, to engage in organized sports by limiting exposure to liability. New Jersey has enacted multiple laws that immunize volunteers in youth sports leagues, as well as the organizations themselves, from acts of ordinary negligence. Additionally, the relatively limited reported judicial treatment of these statutes has confirmed that the legislative goal of limiting liability to only those instances of reckless, willful or intentional conduct that produces injury, has been successful. Citizens of this state should never refrain from volunteering their time to local youth sports leagues, either as a coach or administrator, for fear of personal exposure to liability due to a participant's injury. Strong legislative pronouncements, strict judicial adherence to the law and the availability of affordable insurance all contribute to creating a safe environment for all to lend their assistance to their local youth sports organizations.

A. STATUTORY PROTECTIONS

1. The "Rutgers" Statute

In 1986 the New Jersey State Legislature adopted a statute that is officially entitled "Athletic Officials' Immunity". The concept of immunity in New Jersey jurisprudence is limited. Stated otherwise, the general rule is that all individuals in New Jersey are responsible for their conduct. If one can prove that another's conduct was negligent, then the negligent party is required to be held accountable for their actions. In very limited circumstances the Legislature has enacted laws which either partially or completely immunize a select group of individuals. In response to what were apparently concerns about the dwindling participation of volunteers in youth sports organizations, as well as a means to attract volunteer administrators to sit on athletic boards, the Legislature adopted what we will call the "Coaches' Statute". The following is a thorough analysis of the statutory language.

The statute applies to persons who provide services or assistance free of charge except for the reimbursement of expenses in the following capacities (1) an athletic coach (2) manager or (3) official (this does not apply to sports umpires or referees). The above persons must be engaged with a non-profit or "similar charter" or be a league organized or affiliated within a County of Municipal Recreation Department.

Assuming these conditions are met, no such person will be liable in any civil action for damages sustained by a player, participant or spectator as a result of "his acts of commission or omission arising out of in the course of his rendering that service or assistance". Subsection B of the Statute is clear that the above immunity from negligent conduct applies not only to organized games, but also to practices as well.

The statute does contain some limitations. First there is no immunity for willful, wanton or grossly negligent acts of commission or omission. This is consistent with most statutes that provide tort immunity. Second, the protections do not attach unless the volunteer has participated in a safety orientation program that meets the minimum standards established by the Governor's Council on Physical Fitness and Sports (the Rutgers Certification).

The statute then sets forth three (3) separate exclusions.

1. The statutory immunity does not apply if the volunteer is using a motor vehicle in the course of his service.
2. The statutory immunity does not apply if the volunteer permits a competition or practice "to be conducted without supervision".
3. The statutory immunity does not apply to those persons who service part of a public or private educational institution's athletic program.

Since its adoption there has been only one reported decision in New Jersey which directly discussed the "Rutgers" statute. In Byrne v. Fords-Clara Barton Boys Baseball League, Inc.[2] George Byrne, a minor and participant in the Defendant's Little League baseball program, was warming up a pitcher. George was wearing all of his equipment with one notable exception - his mask. It was a violation of league rules to allow a player to warm up a pitcher without wearing all of his catcher's equipment. In the course of warming up the pitcher, George was hit in the eye and sustained an injury.

George's parents filed a lawsuit against the League, as well as George's Manager, Dennis Bonk. In the Complaint the Plaintiffs allege negligence, as well as willful, wanton, reckless and grossly negligent conduct.

The Defendants filed a Motion seeking to dismiss the Plaintiffs' Complaint. They relied on two separate statutes, the Charitable Immunity Statute, N.J.S.A. 2A:53A-7, as well as the Coaches Immunity Statute, N.J.S.A. 2A:62A-6. The trial court found that the Charitable Immunity Statute was not applicable to individual Defendants, only the league. The court then moved to the Coaches Immunity Statute and specifically looked at subsection (c) which provides no immunity for wanton, willful or grossly negligent conduct AND that "any coach, manager, or official who has not participated in a safety orientation and training program established by the league or team with which he is affiliated" will not be granted immunity from acts of negligence. Mr. Bonk admitted that he did not participate in the safety program. His excuse for not doing so was that the League did not provide one. In dismissing the Plaintiffs' Complaint, the trial judge held that the Coaches' Statute absolved Manager Bonk from any liability. The court did not read the statute to require that organizations are to actually establish a

safety program, but rather that if there was one in effect that volunteer managers and coaches must complete it in order to enjoy the benefits of statutory immunity.

The Plaintiffs appealed. The Appellate Division reversed. The Appellate Division looked at the legislative history behind the Coaches' Statute. They noted that one key component was to ensure that all coaches, managers and volunteers are educated in the areas of injury prevention, coaching and first aid. To that end, the Legislature, which infrequently adopts statutes that provide immunity from civil torts, agreed to do so with multiple conditions, one of them being that in order to enjoy the benefit of this immunity, the benefactor must actually participate in a safety program that meets the minimum standards required by the Governor's Council on Physical Fitness. Because Coach Bonk failed to do so, despite the fact that his own league did not have such a program, the court held that he would not be entitled to the protections of the statute.

As stated above, this is the only reported decision in New Jersey that examined the Coaches' Statute. I interpret this to mean that the statute has been extremely effective in limiting **compensable** lawsuits for those volunteers who have had claims made against them for personal injuries. Assuming one meets the requirements of the statute, primarily taking the appropriate certification course, outside of willful, wanton or grossly negligent conduct, they will be afforded the utmost protection.

B. Charitable Immunity Statute

In addition to the protection afforded under the Athletics Officials Immunity Act, New Jersey has also adopted a more global protection for charitable, non-profit societies and organizations. N.J.S.A. 2A:53A-7, commonly referred to as the Charitable Immunity Act ("CIA"), was enacted to relieve qualifying organizations and volunteers affiliated with those groups from liability for certain negligent acts. N.J.S.A. 2A:53A-7.1(a) states in pertinent part:

> No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees, agents, servants or volunteers shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society or association; provided, however, that such immunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society, or association or of its agents or servants where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association.

There are two general conditions contained in the above cited statute. First, in order to qualify for the protections under the CIA, the youth sports organization must be organized for "religious, charitable or educational purposes…" Fortunately, if a youth sports organization has the appropriate language in its constitution and bylaws it will meet this requirement. Additionally, the claimant had to have been a "beneficiary, to whatever degree, of the works of such non-profit corporation" and the immunity will not apply to one who is "unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association."

Both of these conditions were examined in the context of a youth sports organization in Pomeroy v. Little League Baseball of Collingswood, 142 N.J. Super. 471 (App. Div. 1976).

In this case the Plaintiff, Sarah Jo Pomeroy, claimed that she was injured when the bleachers collapsed while she was watching a Little League game. Her husband, Richard Pomeroy, also brought a per quod claim. The Pomeroys filed suit against the league and Edward C. Knight Park, the owner of the field where the incident occurred. The league moved for Summary Judgment based on the Charitable Immunity Statute. The trial court granted the league's Motion for Summary Judgment and the Plaintiffs filed an appeal.

On appeal the Plaintiffs raised two issues. They first questioned whether the League had been organized exclusively for educational purposes and whether the Plaintiff was a beneficiary of the Defendant's works.

The court cited the league's Certificate of Incorporation which included the following language,

> To give the boys of the Borough of Collingswood an opportunity to learn the rules of baseball and play the game under organized supervision; to inculcate to players that spirit of fair play, sportsmanship and discipline, which is the foundation of American character.

They also cited the league's Constitution which stated, inter alia, that "the objective of the Little League shall be to firmly implant in the boys of the community the ideals of good sportsmanship, honesty, loyalty, courage and reverence, so that they may be finer, stronger and happier boys and will grow to be good, clean, healthy men."[3] The court then looked at the term "educational" in the statute and noted that it has been liberally interpreted. Specifically, in Leeds v. Harrison, 7 N.J. Super. 558 (Ch. Div. 1950), the court concluded that the Young Women's Christian Association qualified as a charitable organization as did organizations such as the Boy Scouts. The Appellate Division concluded in Pomeroy that the language contained in the league's Certificate of Incorporation, as well as in their Constitution, clearly indicated that the underlying purpose of the organization qualified as "educational", thus placing the league under the ambit of the charitable immunity statute.

Plaintiffs' second argument was that even if the organization did qualify as "charitable", she was not a beneficiary of the league's works. The statute requires that prior to immunity being granted the claimant, at the time of the injury, must have been a "beneficiary to whatever degree" of the charitable organization's works. The statute further defines this issue in the negative by stating that the statute will **not** apply to one "unconcerned in and unrelated to and outside of the benefactions of such

corporation". In finding that Mrs. Pomeroy was a beneficiary the Appellate Division held that "clearly a spectator at a Little League baseball game is a beneficiary of Defendant's works since it was not necessary to show that she personally received a benefit from the works of the Defendant. It is only essential that it be shown that at the time the Plaintiff was injured Defendant was engaged in the performance of the charitable objectives it was organized to advance."[4]

There have been no reported decisions since Pomeroy to disturb this holding. Thus, it appears that as long as the youth sports organization is engaged in an activity related to its underlying purpose (a practice, game, etc.), a spectator who is injured may not maintain a cause of action sounding in negligence provided that the organization is qualified as "charitable" under N.J.S.A. 2A:53A-7. It would be wise for any youth organization to include in either their Certificate of Incorporation and/or Constitution and Bylaws the precise language found in Pomeroy as the court found it satisfied the requirements of an "educational" purpose under the Charitable Immunity statute.

The Charitable Immunity Act specifically states with respect to individual volunteers, nothing contained in the Act shall "supersede or modify any provisions of [the Athletics Officials Immunity Act] dealing with civil liability of persons involved with non-profit sports teams." N.J.S.A. 2A:53A-7.1(c). Thus, the CIA, in the context of most youth sports organizations, will provide protection to the organization only. These protections are subject to certain exclusions that are similar to those contained in the Athletics Officials Immunity Act. Under the CIA, no immunity will be afforded to any volunteer "causing damage by a willful, wanton or grossly negligent act of commission or omission including sexual assault and other crimes of a sexual nature". Additionally, there is no immunity for claims arising out of the negligent operation of a vehicle, nor does it extend to the acts of any independent contractors. N.J.S.A. 2A:53-7.1(c)

C. PARTICIPANT LIABILITY

1. Adults

Crawn v. Campo

The New Jersey Supreme Court in 1994 addressed which was then a novel issue: what is the duty of care that one adult participant in a recreational sports activity owes to another?

In Crawn v. Campo[5] the Plaintiff Michael Crawn was playing in a recreational softball game. The game being played was a "pick up" type of game. The teams were not affiliated with any league and the game was not being officiated by umpires. The Plaintiff testified that the group played under a "no slide" rule.

During a game on May 1, 1988, the Defendant John Campo was on first base. A ground ball was hit to the shortstop who flipped the ball to the second baseman to force out the Defendant. Mr. Campo slid into second base and took the legs out from under the second baseman. There was testimony that following the incident the Defendant was advised of the no slide rule. The Defendant disputed this version of the events saying that his slide into second did not result in any warnings whatsoever.

Mr. Campo was now on second base and the next batter hit a ball into the outfield. Mr. Campo attempted to score. The Plaintiff, Mr. Crawn, was playing catcher. He claimed that his left foot was on the first base side of home plate and his right foot was extending beyond the first base line. The Plaintiff claimed that the way he was set up to receive the throw provided ample room for the Defendant to avoid hitting him. As Mr. Campo approached home plate "he lowered his body and barreled into Plaintiff's left side. Plaintiff reeled backwards and Defendant ended up on top of the Plaintiff's lower leg."[6]

The Defendant testified that the Plaintiff was straddling the plate with a foot on either side and he believed that the only way to successfully reach home plate in order to avoid a tag was to slide. He claims he slid feet first into the Plaintiff's left leg. The Plaintiff was removed from the field where it was determined that he suffered a torn knee ligament.

The Plaintiff filed a lawsuit against the Defendant claiming that his conduct had been alternatively "negligent, reckless or intentional."[7] Before the trial began he voluntarily dismissed the intentional conduct claim. A jury returned a verdict in favor of the Plaintiff finding that the Defendant's conduct had been reckless and that the Plaintiff had not assumed the risk of reckless conduct.[8]

The Plaintiff filed a Motion for a New Trial that was granted on evidentiary grounds.

Before the new trial commenced, both parties filed appeals. The Appellate Division in a reported decision affirmed the trial court's grant of a new trial and further held that expert testimony with respect to the duty of care owed in a recreational softball game was not required. The panel did reverse the trial court on the proper standard required to establish liability. It ruled that the proper standard was "reasonableness under the circumstances". This is simply another term for an ordinary negligence standard.

The Defendant filed a Motion before the Supreme Court for leave to appeal the Appellate Division's decision as to the standard of care issue and the need for expert testimony. The Supreme Court granted the motion.[10]

The Court began its decision by canvassing the judicial treatment of this issue in other jurisdictions. Its research revealed that the general standard in these circumstances requires the claimant to show conduct exceeding that of ordinary negligence. In sum, it stated, "[m]ost courts have determined that the appropriate duty players owe to one another is not to engage in conduct that is reckless or intentional." The Court noted that the reason for this heightened standard was to support participation in athletic activities and to avoid excessive litigation. In rejecting the Appellate Division's acceptance of the ordinary negligence standard, the Supreme Court took exception to its finding that the two aforementioned public policy reasons were outweighed by "New Jersey's well established reliance on

the ordinary negligence standard and its consequent aversion to tort immunity."[12]

Whether a duty of care exists is a matter of law to be established by the court. In doing so the Supreme Court engaged in an analysis considering "the relationship of the parties, the nature of the risk, that is, its foreseeability and severity and the impact the imposition of a duty would have on public policy."[13] In adopting the refraining from recklessness standard, the Court reasoned it would reduce any future claims to conduct that is clearly outside the well understood rules of engagement in recreational sports activities that could be easily identified as unreasonable and unacceptable.[14]

The Crawn decision is now nearly a quarter century old. Since that time there has been little reported judicial activity with respect to the same factual scenario, specifically an adult who is injured during an active recreational activity due to the alleged conduct of another adult participant. The adoption of the "refrain from recklessness" standard has no doubt limited the amount of claims brought under this scenario. While it is impossible to quantify the effectiveness of this decision as there may have been claims that have settled for a compromised sum, the more vigorous standard adopted by the Crawn Court strikes the appropriate balance between providing an avenue for recovery in egregious circumstances while not discouraging participation in recreational sports activities. Citing Dunphy v. Gregor, 136 N.J. 99 (1994).[15]

Schick v. Ferolito, 167 N.J. 7 (2001)

In another "adult" case, the New Jersey Supreme Court in Schick v. Ferolito[16] was confronted with an injury that occurred during a game of golf. In Shick, the Plaintiff, Jeffrey Shick, and his father Wolfgang Shick, met the Defendant, John Ferolito and Tom Ganella on the 10th hole of the East Orange Golf Course. Up to that time the Plaintiffs and Defendants were playing as separate twosomes. In order to speed up play they decided to play as a foursome.

The Plaintiff testified that it was around dusk when the participants still had nine holes remaining to play. They played without any issue until the 16th hole. At that time the Plaintiff and his father teed off. The Plaintiff and this father then left the tee box, returned to their golf cart and proceeded to sit in the cart. The Plaintiff described his cart as being located ahead of the tee box at a 45-degree angle to the left. The Plaintiff was in the driver's seat of the golf cart and he looked over his right shoulder and saw the Defendant about to strike the ball off the tee. He claimed that the Defendant and Ganella had both hit their tee shots and that the Defendant was then hitting an unannounced second shot, known as a "mulligan". The Plaintiff claimed that Defendant's first ball had been "sliced" toward a series of trees along the right side of the fairway, but in an area that was not marked out-of-bounds. Although he did claim to see the Defendant tee off the second time, the Plaintiff did not have time to move out of the way. He stated he had only "a few seconds to think about what was happening when Defendant commenced his swing and hit his second tee shot. The ball struck Plaintiff in the right eye socket, rendering him temporarily unconscious."

The Defendant gave a different version. He did not recall whether the shot that struck the Plaintiff was either his first or second tee shot. He stated that he had made "eye contact" with the Plaintiff before he teed off and that he gave a hand warning for the Plaintiff to move aside. The Defendant claimed that when he hit his shot he was attempting to hit the ball down the middle and never intended to hit it in the Plaintiff's direction. His partner, Mr. Ganella, also testified that he did not recall if the ball that struck the Plaintiff was Mr. Ferolito's first or second tee shot. Mr. Ganella also claimed that there was a period of "one to two minutes" between the time the Defendant had motioned to the Plaintiff and the time he actually struck the ball.

The Defendant moved for Summary Judgment claiming that the standard of care previously enunciated in Crawn v. Campo "to avoid the infliction of injury caused by reckless or intentional conduct" should apply to this activity (golf) which was.[17] The trial court agreed and dismissed the Plaintiff's Complaint.

The Appellate Division reversed. In doing so it found that this case was distinguishable in Crawn and that the ordinary negligence standard of care should apply.[18] The Appellate Division in Schick based its decision on the difference between the sports involved, labeling softball as a "rough-and-tumble sport" which has inherent risks versus golf which they claimed would only require a heightened standard "for anticipated risks of the game such as errant or shanked balls, but not for unanticipated risks, such as an "unexpected Mulligan".

The Supreme Court in a 6-1 decision modified the Appellate Division's ruling and remanded the case back to the trial court. The Supreme Court reached the conclusion that the recklessness or intentional conduct standard, the one adopted initially by the trial court, should apply. The court remanded the matter because the majority believed that a question of fact existed for the jury's consideration as to whether or not that standard was reached in this particular case.

In arriving at this conclusion, the Court engaged in a thorough analysis of the Crawn decision. Crawn adopted the standard that a participant must avoid the infliction of injury caused by reckless or intentional conduct when involved in a recreational sport. In doing so the Court noted that New Jersey fell in line with what was the majority of jurisdictions by adopting this heightened standard. Applying the standard to the facts of the present case, the majority in Schick held that issue of recklessness would be open to the jury and not amenable to summary disposition.

Justice Verniero concurred with the result but filed a lengthy dissent. In Justice Verniero's opinion the facts in this case did not warrant a trial and that only the most "egregious acts of golfers should give rise to liability in this setting".

2. Youth Participants

There has only been one reported judicial opinion which examined the duty of care owed by participants in a youth sports setting. In C.J.R. V. G.A., et. al.[20] the Plaintiff C.J.R. and the Defendant G.A. were on competing teams in a youth lacrosse game. The two boys were

assigned to the 5/6 "combination" league, meaning that they were participants from both the 5th and 6th grades. The level of play was commonly known as a "B" team separating it from the more advanced players who would play at the "A"..

Toward the end of the game the Plaintiff's team was in the lead and the Plaintiff received the ball at mid-field with less than 20 seconds remaining. The Plaintiff's coach testified that the Plaintiff was running toward the sideline trying to keep possession of the ball until time expired. The Plaintiff's mother, who had been watching the game as well, testified that she saw the minor Defendant running "full force" diagonally across the field and "roaring unintelligibly". She also claimed that the Defendant had his head tucked down with arms at his side. Despite witnessing this unusual event, the Plaintiff's mother then testified that she did not see the moment of the collision because "she had averted her attention to pick up some empty cups on the sideline".[21] The Plaintiff's coach claimed that the Defendant "left his feet" and hit the Plaintiff with either his helmet or stick across the mid-section causing the Plaintiff to fall to the ground.[22]

The collision resulted in a penalty and the Defendant being removed from the game. An ambulance was called and it was later revealed that the Plaintiff had suffered a fractured left arm that required surgery.

As a result of this incident the Plaintiff's father, on his son's behalf and individually, filed a lawsuit against the minor Defendant and the minor Defendant's father. The Plaintiff asserted claims of negligence and recklessness against the minor, as well as a claim of negligent parental supervision against the minor's father.

The Defendants moved for Summary Judgment. According to the Motion Judge, after having a chance to engage in complete discovery the Plaintiff failed to establish a question of fact that the Defendant engaged in "a reckless form of conduct of a degree or nature sufficient to justify imposing liability upon a minor of his age in this sports-related setting".[23] The trial court stated that the minor Defendant's age was critical to its analysis and noted that the outcome might have been different if the Defendant, who was 11 years of age, had been in fact 17 years old at the time of the accident.[24] An appeal of the Judge's decision ensued.

The Appellate Division affirmed. In doing so it viewed the issue on two fronts. First, the court considered whether to apply the heightened standard of conduct found in the adult recreational cases. The second issue was whether the particular age of the participants involved should be taken into consideration.

In addressing the liability standard, the court reviewed two cases - Crawn, and Schick, supra.. After doing so the court distilled from those two opinions the "recklessness" standard of conduct that is to be applied to recreational sports activities. In doing so it defined recklessness as follows:

> An actor acts recklessly when he or she intentionally commits an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually

> accompanied by a conscious indifference to the consequences… Reckless conduct is an extreme departure from ordinary care, in a situation in which a high degree of danger is apparent. Reckless behavior must be more than any mere mistake resulting from inexperience, excitement or confusion, and more than mere thoughtlessness or inadvertent or simply inattention.[25]

The court then turned its attention to question of liability being imposed upon minors in general. The Appellate Division referenced that minors under the age of 7 in New Jersey have a rebuttable presumption that they are not capable of being negligent. Above the age of 7 the court is to engage in a "fact sensitive and context-specific approach, examining the age and other characteristics of the Defendant minor, and the surrounding circumstances".[26]

From these two issues the court enunciated the standard that should be adopted in addressing youth sports cases where one participant has brought a claim against another participant for personal injuries. The questions to be answered are (1) whether the opposing player's injurious conduct would be actionable if it were committed by an adult, evaluating whether there is sufficient proof of the Defendant player's intent to inflict bodily injury or recklessness; AND (2) if so, whether it would be reasonable in the particular youth sports setting to expect a minor of the same age and characteristics as the Defendant to refrain from the injurious physical contact.

Applying this two-step analysis, noting that both questions must be answered in the affirmative in order to permit he Plaintiff to present their case to the trier-of-fact, the Appellate Division affirmed the trial court's grant of Summary Judgment. In doing so, the court concluded that children ages 10 and 11 simply do not have the necessary years of training, coaching and experience in order to completely understand and comprehend the rules of the game. The court noted that "children will inevitably commit fouls in sporting activities out of inexperience, youthful exuberance, lack of self-discipline, clumsiness, immaturity, frustration, or some combination of those traits. Their propensity to make physical and mental errors is compounded in sports such as lacrosse, which have complicated rules in which inherently involve a high degree of physical contact with opposing players. It would be unfair to hold children who engage in such sporting activities to the same expectations and s tandards of conduct as adult athletes."[27]

The court was also wary of adopting a potentially more liberal standard for minors noting that "the prospect of a lawsuit could crop up every time a referee calls a foul on a child who is learning how to play the game". Finally, the court also touched on one of the major concerns in youth sports today, that is the fear of concussions. The court took notice of the many new rules and procedures that had been put in place with respect to preventing concussions. The court indicated that while it was cognizant that it had crafted a new standard to be applied prospectively, it reminded the reader that if more elaborate standards are needed from a public policy standpoint, that the "Legislature is free, of course, to enact them".

The standard enunciated by the panel in C.J.R., appears to be the same heightened standard of conduct originally enunciated 25 years ago in the Crawn case. Now if the trier-of-fact can conclude that the minor had the requisite intent to harm so as to meet the Crawn recklessness standard the case would then proceed to a jury unless the facts of the case, primarily the ages of participants, would require a different conclusion. In the C.J.R. case the court, after adopting this new standard, really did not answer those questions separately, but rather based its conclusion on a finding that because the Defendant was so young and inexperienced (the age analysis) he could not have formed the requisite intent to injure (the recklessness standard).

[1] The caption calls this the "Rutgers" statute. The recognized course that all volunteers must take to satisfy the statutory requirement providing immunity is the Rutgers S.A.F.E.T.Y Clinic.
[2] 236 N.J. Super. 185 (App. Div. 1989).
[3] Pomeroy, 142 N.J. Super. at 474-475.
[4] Citing Peacock v. Burlington City Historical Society, 95 N.J. Super. 205 (App. Div. 1967); Anasiewicz v. Sacred Heart Church, 74 N.J. Super. 532 (App. Div. 1962).
[5] 136 N.J. 494 (1994).
[6] Crawn, 136 N.J. at 498.
[7] Id. at 499.
[8] Id.
[9] Id.
[10] Crawn v. Campo, 134 N.J. 557 (1984).
[11] Id.
[12] Crawn v. Campo, 266 N.J. Super. 599, 609-611 (App. Div. 1993).
[13] Citing Dunphy v. Gregor, 136 N.J. 99 (1994).
[14] The second portion of the Court's opinion in Crawn concluded that a claimant who brings a claim for injury suffered due to the conduct of a fellow participant in an adult recreational activity does not need to provide expert testimony regarding the applicable standard of care.
[15] In 1999 the Appellate Division in Obert v. Baratta, 321 N.J. Super. 356 (App. Div. 1999) affirmed the trial court's granting of summary judgment in an adult softball game where the Plaintiff (a female) was injured colliding with a teammate (a male). The Plaintiff attempted to argue that the Defendant was a "chauvinistic pig". The Appellate Division, applying the Crawn rationale rejected Plaintiff's argument.
[16] 167 N.J. 7 (2001).
[17] Crawn, 136 N.J. at 497.
[18] Schick v. Ferolito, 327 N.J. Super. 530 (App. Div. 2000).
[19] Id. at 534.
[20] 438 N.J. Super. 387 (App. Div. 2014).
[21] Id. at 391.
[22] Id. at 391-392.
[23] Id. at 394
[24] Id.
[25] Citing Schick, 167 N.J. at 19.
[26] C.J.R., 438 N.J. Super. at 397.
[27] Id. at 401.

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NL INDUSTRIES, INC. v. STATE OF NEW JERSEY

BY JOANNE VOS, ESQ. AND NATHAN ORR

In a case of first impression, a March 2017 New Jersey Supreme Court opinion held that the State cannot be held liable in a suit for contribution under the New Jersey Spill Compensation & Control Act (the "Act") for actions that it took prior to the 1977 passage of the Act.

The pertinent facts are as follows: In 1968, after obtaining a riparian grant and building permit from the State, Sea-Land Development Corporation built a sea wall in the Lawrence Harbor in Old Bridge in order to protect it from further erosion. The wall was partially built on a jetty that was owned by the State and was constructed, in part, with slag from the NL Industries, Inc. plant which was located in Perth Amboy. The project was completed in the 1970s. In 2007, the New Jersey Department of Environmental Protection (NJDEP) notified the United States Environmental Protection Agency (USEPA) of certain contamination that it had detected along the sea wall. Upon review, the USEPA demanded that NL Industries, as the generator of the slag material, remediate the site. NL Industries asserted a contribution claim against the State, alleging that the State should be partially responsible for remediation costs under the Act which was passed in 1977. The contribution claim asserted that: (1) the sea wall was built upon land that was owned, in part, by the State and as such, the State is a party that is "responsible" under the Act; and (2) the State approved the construction of the sea wall as well as the slag materials from which it was to be built.

The State filed a Motion to Dismiss based, in part, upon the sovereign immunity that it is entitled to; also noting that the acts it took which formulated the basis for the Spill Act contribution claims were taken prior to the passage of the Act and as such, should not be permitted to stand. The Trial Court denied the Motion to Dismiss finding that: (1) the State is included in the Act's definition of "person" and thus, is not entitled to immunity; and (2) in Ventron, a Spill Act contribution action was sustained against other parties whose acts which formulated the basis for a Spill Act contribution claim were similarly taken prior to the passage of the law. On appeal, the denial was affirmed. The State appealed to the Supreme Court.

The issue on appeal was whether the Spill Act retroactively strips the State of its immunity for pre-Spill Act activities? The Supreme Court responded in the negative, holding that the State is entitled to immunity for pre-Spill Act activities since the statute does not expressly waive the State's immunity for those activities. The court reasoned that it will not infer retroactive waivers of immunity especially since the legislature had opportunities to so indicate a waiver of immunity when it amended the Spill Act in 1979 (allowing for retroactive liability generally) and in 1991. The court reiterated that the "State may not be sued in its own court without its consent." Due to the absence of an express waiver of immunity, and the significant financial burden that a retroactive waiver would expose the State to, the Supreme Court ultimately reversed the Appellate Division and granted the State's Motion to Dismiss.

This is an interesting outcome because (1) the State is clearly liable under the Spill Act for post-Spill Act activities; and (2) private parties may be held responsible for their pre-Spill Act activities.

AVAILABLE DOESN'T MEAN ADMISSIBILE: DISPELLING COMMON MISCONCEPTIONS ABOUT HEARSAY

BY CORY J. ROTHBORT*

A common misconception is that the "out-of-court" statement of a testifying witness is not subject to the hearsay prohibition. This incorrect interpretation of the hearsay rule is premised upon the faulty rationale that a testifying declarant is subject to cross-examination. This article is written to dispel that misconception and to provide suggestions on arguments to advance when seeking to bar admission of a testifying witness' own "hearsay" statements.

The New Jersey Rules of Evidence, specifically N.J.R.E. 801(c), defines hearsay as follows:

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

All out-of-court statements are hearsay – whether made by a "testifying" or "non-testifying" declarant. Thus, based upon a simple reading of the hearsay definition, a declarant's own out-of-court statement, whether offered by the declarant himself or through the testimony of another witness, is still hearsay.
The Federal Rules of Evidence, specifically Fed.R.Evid. 801(d)(1)(B), also dictate that

> "...aside from the relatively small number of prior statements that are admissible as being within the dispensation conferred by Fed.R.Evid. 801(d)(1)(B), a witness's prior statements offered to prove the truth of the matters asserted therein are not immunized from the proscriptive effect of the hearsay rule."

U.S. v. Check, 582 F.2d 668, 681 (2d Cir. 1978). The NJ hearsay rule, including the definition of hearsay, is identical to that of its Federal counterpart. Biunno, Current New Jersey Rules of Evidence, 1991 Supreme Court Committee Comment on N.J.R.E. 801 (2014).

Interpreting the definition of hearsay to exclude a witness's own out-of-court statement from the hearsay prohibition would render a number of the hearsay exceptions superfluous. For example: N.J.R.E. 803(a), which excludes Prior Inconsistent & Consistent Statements from the hearsay rule, N.J.R.E. 803(b), which excludes Statements of a Party-Opponent from the hearsay rule, N.J.R.E. 803(c), which excludes specifically defined "Statements Not Dependent on Declarant's Unavailability," and N.J.R.E. 804 which excludes Statements of an Unavailable Declarant.

If a witness's own out of court statement is not hearsay there would be no need for the "party–opponent rule" because any party could admit their own out-of-court statement. This incorrect interpretation of the hearsay rule would include a party's own statements as well their party-opponent's. Accordingly, there would be no need for the inclusion of N.J.R.E. 803(b), which excludes Statements of a Party-Opponent from the hearsay rule. Stated differently, those out-of-court statements would already be excluded from the hearsay prohibition because the party-opponent is an available witness subject to cross-examination and thus there would no reason for the exemption contained in 803(b).

Likewise, the distinction between N.J.R.E. 803(c) and N.J.R.E. 804 exemplifies the fallacy that a testifying declarant's out-of-court statement is, on its face, not hearsay. These two rules proscribe two separate forms of exception

to hearsay. N.J.R.E. 803(c), contains "Hearsay Exceptions Not Dependent on Declarant's Unavailability." In contrast, the exceptions proscribed by N.J.R.E. 804 apply only when the Declarant is "unavailable." Unavailability is defined within subsection (a).

The two separate and distinct exceptions in the Rules of Evidence are a clear expression of our Supreme Court's directive that a testifying declarant's out-of-court statement is hearsay. If the statements of a testifying witness are not hearsay, it would be unnecessary for our Supreme Court to proscribe a category of exceptions to hearsay where the declarant's unavailability is irrelevant. Rather, the only necessary exclusion would be those dependent on the witnesses' unavailability. There would also be no need to distinguish between exceptions premised upon a declarant's unavailability and those premised on the declarant's availability.

N.J.R.E. 803(a), Prior Statements of Witnesses, would likewise be unnecessary. Under this exception, some, but not all, "statement[s] previously made by a person who is a witness at a trial or hearing . . ." are excluded from the hearsay rule, i.e. certain prior inconsistent and consistent statements of a testifying witness. Inclusion of this rule, distinguishing between admissible and non-admissible prior statements of a testifying declarant, confirms that there is not a "catch-all" exception or exclusion to the hearsay rule for all statements of a testifying declarant. Rather, only those prior statements which fall within the narrowly tailored exclusions under N.J.R.E. 803(a) are admissible.

In contrast, other states contain a provision excluding or exempting any and all prior statements of testifying witnesses. For example, Kansas Rule of Evidence 60-460 reads in part:

> **60-460. Hearsay evidence excluded; exceptions**. Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:
>
> **(a) Previous statements of persons present.** A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness.

The Kansas rule explicitly exempts from hearsay any and all out-of-court statements of a declarant "who is present at the hearing and available for cross examination." There is no analogous exception contained within the New Jersey Rules of Evidence.

Defense attorneys are routinely confronted at trial with attempts to admit an out-of-court statement of party or a witness who is available in court and subject to cross examination. A couple of examples frequently encountered are discussed herein.

In a personal injury case the plaintiff calls a friend or family member to testify on their behalf. The witness permissibly testifies to their personal observations of the plaintiff (i.e. limitations). The witness is then asked to relate out-of-court statements made by the plaintiff to that witness about the plaintiff's complaints of pain and/or limitations. The defense is often grounded on plaintiff's medical records or deposition testimony, wherein plaintiff's "complaints" were not reported to demonstrate that the plaintiff is misrepresenting the significance of their injury. If a plaintiff were permitted to substitute a friend's testimony of plaintiff's out-of-court statements to substantiate their pain or limitations it would adversely impact on usually indisputable evidence of no injury or exaggeration. Thus, it is critical that the defense limit a plaintiff's witness to their personal observations. This goal can be achieved through a motion *in limine* containing the proper analysis of the definition of hearsay, as discussed earlier.

The plaintiff's out-of-court statements to that witness are inadmissible hearsay. Here, because the plaintiff is the proponent of the evidence, the "Party-Opponent" Rule is inapplicable. Unless the plaintiff can identify an applicable hearsay exception, his or her prior statements to the testifying witness are inadmissible.

The police report is another example of a frequently used source of out-of-court statements plaintiffs and defendants alike utilize to admit, without regard for the Rules of Evidence, otherwise inadmissible hearsay. A police report is "hearsay within hearsay." The report itself likely satisfies the business records exception so long as the authoring officer or Custodian of Records testifies and authenticates the report. See Manata v. Pereira, 436 N.J. Super. 330, 346 (App. Div. 2014). However, the statement(s) contained therein are out-of-court statements and thus require an applicable hearsay exception of their own before admission (alternatively, the proponent of the evidence must be using the statement for a non-hearsay purpose, i.e. impeachment). See Biunno, Current New Jersey Rules of Evidence, comment 1 on N.J.R.E. 805 (2014).

Assuming that the plaintiff calls the authoring officer or Custodian of Records to testify, the plaintiff may introduce statements of the defendant into evidence under the "Party-Opponent" Rule. However, the plaintiff cannot utilize this same exclusion to admit his or her own statements contained within the police report. For instance, the plaintiff cannot introduce his or her own statement to the police that he or she complained of pain or the version of the accident that he or she offered to the investigating officer, unless there is an otherwise applicable hearsay exclusion or exception.

In sum, the mere fact that a declarant is available to testify does not render their out-of-court statements admissible – the statements are still hearsay. It is a common misconception that any statement of a testifying witness is admissible merely because that individual is subject to cross-examination. Availability does not equate to Admissibility. It is upon that misconception that testimony which is otherwise inadmissible is often introduced into evidence without any objection.

It is therefore important to understand the "hearsay rule" so that as a defense practitioner the issues can be identified, properly argued and disposed of prior to trial. We as defense attorneys, can further our position at trial through advocacy to ensure the proper enforcement of the hearsay rule. Moreover, when the tables are turned and we are the proponents of the evidence, proper understanding of the hearsay rule will allow us to anticipate the prospective hearsay issues and lay the proper foundation for a necessary and applicable exception.

***Cory J. Rothbort is an Associate with Sellar Richardson, P.C. in Livingston. He is a member of the NJDA Philanthropy Committee.**

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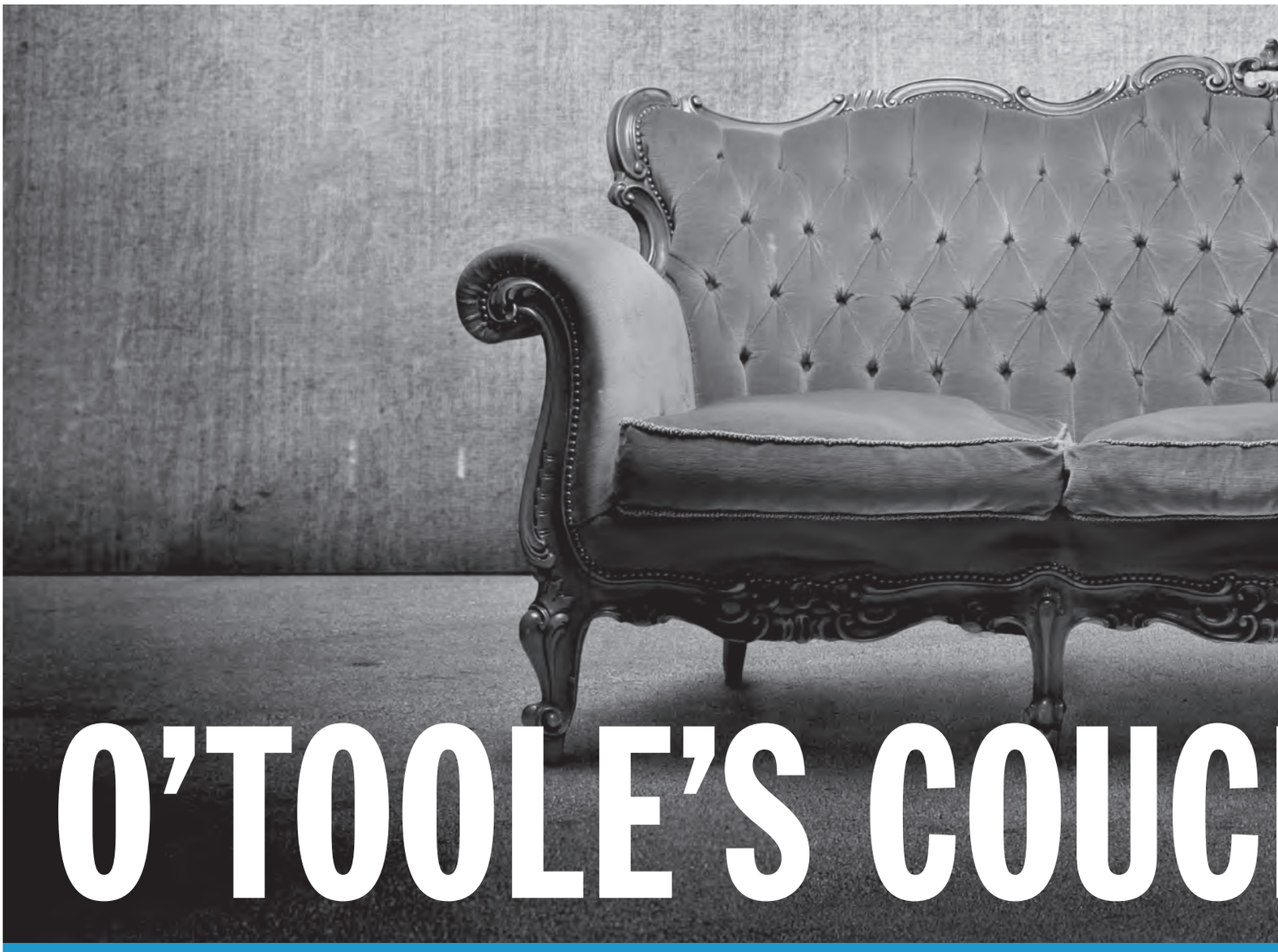

O'TOOLE'S COUC

IF NOT WORK OR GOLF, WHAT?

After 43 years in the trial pits, I finally made the decision to cut back on my case load. While I still wanted to help the firm with motions, arbitrations and depositions, I no longer wanted an active caseload. I knew I could walk away knowing the firm was in capable hands. Mike Della Rovere has been an integral part of the practice for over 25 years; and my nephew, Joe O'Toole, was ready to step in with almost 20 years of experience. There was no doubt about it, O'Toole, Couch & Della Rovere would do just fine. However, that raised an interesting question as to what does an extremely active trial lawyer with a totally structured environment do in an essentially unstructured environment (if he doesn't play golf?) I made the decision a long time ago that I would not totally retire. Thus, I am still Municipal Judge for Hanover Township sitting on the bench weekly. I also serve as a court arbitrator in several counties and am a frequent participant in three-man arbitration panels. Having said all of that, I knew I wanted to give back in some way.

I have always felt deeply for the veterans' population and signed up as a volunteer at the Lyons Veterans' Hospital working with the residents on a weekly basis. Initially, I was assigned to help the wheel-chair population get around the enormous complex. After a few weeks, I thought my time could be better spent talking and interacting with the veterans, utilizing my biggest asset, the gift of gab.

Over time I have gotten close to several residents and try to spread myself around to as many as possible. Keith, a navy boiler room technician (E4) on a landing ship tank (LST), is my regular chess opponent. Initially, I was tutoring him, but (you guessed it,) now he almost always wins. Keith has some fantastic stories about his combat experience in the South Pacific. He fought at Okinawa, Tulagi and Guadalcanal, to name a few. Luckily, his ship never sustained serious damage, but he saw several US ships sink from enemy fire.

George, an infantryman, was truly a decorated war hero being awarded the Bronze Star and two Purple Hearts. He participated in the Battle of the Bulge for which he was awarded a battlefield promotion to Staff Sergeant. Although reluctant to talk about his combat experience, I did discover he was the only survivor of his platoon, and wound up being responsible for three platoons because all of the officers had been killed. A war correspondent, Imogene Woods,

H VOLUNTEERING

devoted an entire chapter of the book, "Heroes Then, Heroes Again" to George and his extraordinary accomplishments.

Joe was an infantryman and a member of the Third Army, which was commanded by General George S. Patton. He fought at Bastogne where he was wounded and decorated with the Distinguished Service Cross for Valor. He told me the men worshiped Patton and would stand in line just for the chance to shake his hand.

All of these gallant veterans have stories to tell, and my favorite lead-in line has been, "Tell me about the battles you were in." This has consistently been an easy way to get them started. My job is just to talk with them, read the newspaper to them, play chess or checkers, ask about their families, talk about politics and current events – anything to keep their minds active and let them know someone cares about them and is interested in what they have to say.

Sadly, the majority of these vets have no visitors. One of these fine men once said to me, "I sit in my doorway and people walk by my room without even saying hello." These men are combat heroes, yet no one seems to care about them. The hospital staff is extremely compassionate and attentive, but there are many vets and few staff members. I cannot think of a better way to spend my time than to volunteer a few hours a week with these men and women to whom we owe so much. ("Home of the free, because of the brave.") This time with them is truly a humbling experience.

The Morris Food Pantry is another area I volunteer in. They serve two meals a day, 365 days a year to people who are so grateful. (I frequently get in trouble because we are told how big a portion to serve and I always slip in a little bit more – I have never seen them run out of food, so why not?)

My wife, Sunny, has her own area of volunteerism. For 14 years she has worked at P.G. Chambers School for children with special needs, whose mission is " Discovering the unique potential within every child." The children love her so, and I know this is the most rewarding thing in Sunny's week (except, maybe taking care of me!). The point of this article is to relate my positive experiences as a volunteer and to encourage others to get involved. There are so many worthwhile charities out there, you need to just pick one and you'll quickly become addicted. So, take one out of my playbook and sign up to help. The possibilities are endless and I guarantee you will get back more than you give!

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UPCOMING EVENTS

OCTOBER 17

NJDA ANNUAL GOLF CLASSIC

7:00 a.m.
Jumping Brook Country Club
2010 Jumping Brook Rd
Neptune, NJ 07753

NOVEMBER 10

WOMEN AND THE LAW

8:30 a.m. – 12:30 p.m.
APA Hotel Woodbridge
Woodbridge, NJ

NOVEMBER 21

AUTO LIABILITY SEMINAR

8:30 a.m. – 1:00 p.m.
APA Hotel Woodbridge
Woodbridge, NJ

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