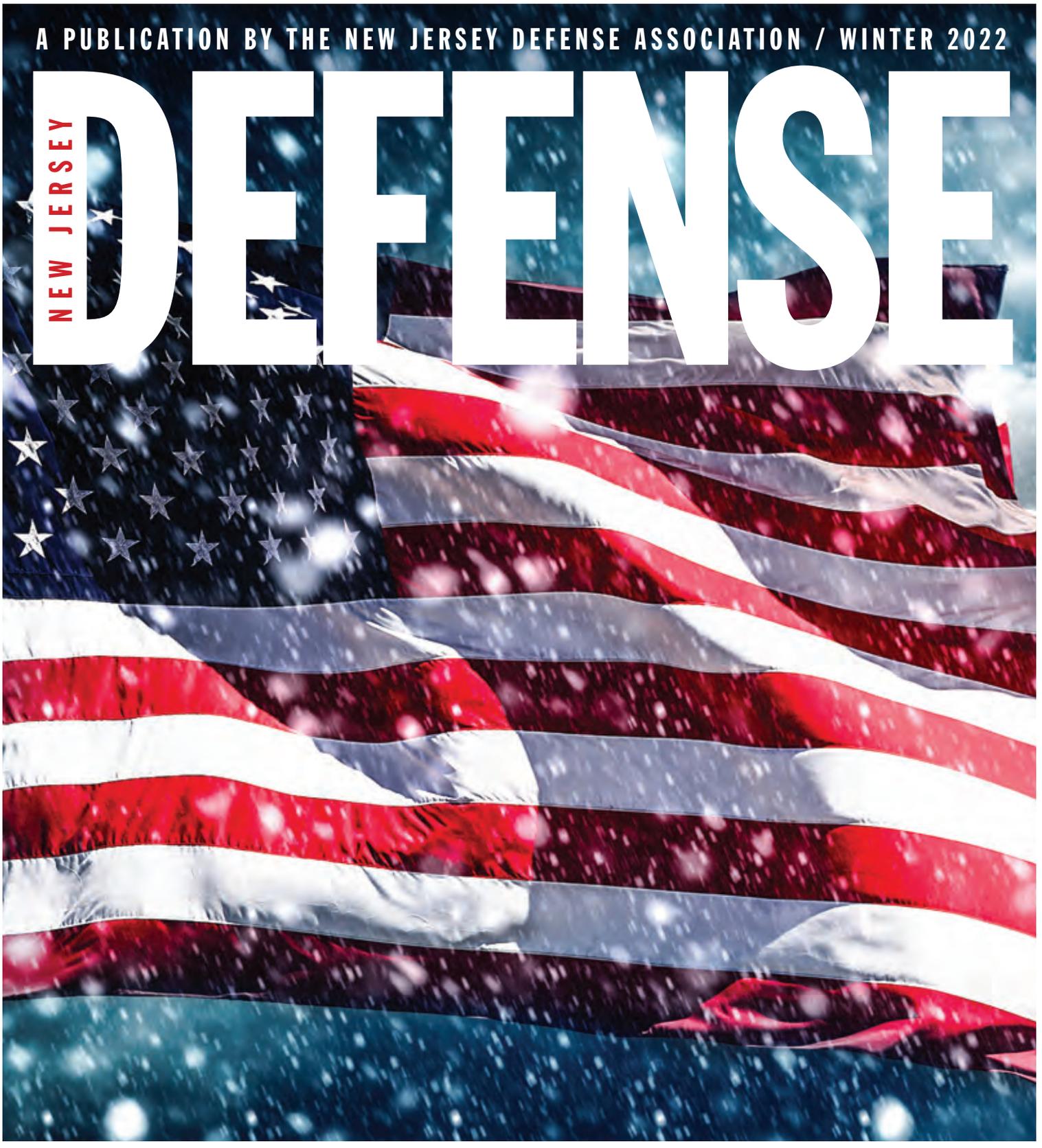
A PUBLICATION BY THE NEW JERSEY DEFENSE ASSOCIATION / WINTER 2022

NEW JERSEY DEFENSE



PRESIDENT'S LETTER

Holiday greetings and happy new year to all of our members and New Jersey's esteemed Judiciary. I sincerely hope that everyone is staying safe and healthy as the Omicron variant surges across New Jersey.

It is moving to see the support by our membership for our annual virtual food drive to benefit the Community Food Bank of New Jersey. As I write this letter, we have raised over $2,000 dollars, which will assist many New Jersey residents who are suffering. For those of you who still wish to donate, the drive is open through January and you can donate here - https://give.cfbnj.org/fundraiser/3588661

The NJDA had a very successful fall, with a mix of in-person and virtual events. I am pleased to report that the NJDA's annual holiday party returned this year at Spring Lake Golf Club after a one-year hiatus due to the pandemic. I would like to thank all of our members and sponsors who attended and supported the event, and Joe Garvey for his coordination of this special event. We also raised approximately $1,000 to support the New Jersey Special Olympics at the holiday party. A special thanks to Denise Luckenbach for organizing and donating of the beautiful wine baskets for the fundraiser.

In November, we saw over one hundred attendees at the annual Women and Law Seminar. As always, a big thank you to Marie Carey and her committee for continuing this annual seminar, which has proven once again to be one of the best CLE seminars across the entire State, year in and year out. Thank you also to all of the members of our Judiciary and other presenters that made this such a memorable seminar. Also in November, our annual Auto Liability seminar returned as an in-person seminar, which saw four very informative presentations. Thank you to Juliann Alicino for her organizing and moderating this event, and to all of our sponsors who attended. I would be remiss if I did not recognize our Executive Director, Maryanne Steedle, for all of her tireless work behind the scenes to make all of this happen.

The NJDA also continues to represent the interests of our members to the Supreme Court and AOC. I gave testimony on behalf of the NJDA at the two-day Judicial Conference on Jury Selection that was held at the Law Center on November 10 and 12. The theme of my testimony was that the NJDA believes that implicit bias and preventing discrimination in the way we select juries is of the upmost importance and we have a deep commitment to the elimination of implicit bias in the jury selection process, that preemptory challenges in civil matters should be preserved and we should strive to improve the voir dire system to be more attorney involved. The Association also supported and endorsed the New Jersey State Bar Association's Working Group on Jury Selection Interim Report, which examines the role bias plays in the jury selection process. You can read my full remarks here - https://www.njcourts.gov/courts/supreme/judconfjury.html#comments or watch them here - https://www.youtube.com/watch?v=0nS2AvKJvlw

Thank you for your continued support of our organization. I very much look forward to seeing you at our upcoming events, including our Civil Trial Seminar that will be held virtually on February 17th. Please do not hesitate to reach out to me with any suggestions for the NJDA or if you would like to become more involved substantively at: rrichman@mccarter.com. I also encourage all of you to get your young lawyers involved in the NJDA. There are many opportunities for our young lawyer members to advance, network and be mentored by participation in our Association. Please reach out to the Young Lawyers Committee Chair, Samuel James, at sjames@mccarter.com, or contact me with any questions you may have. I look forward to hearing from you and your young lawyers!

And finally, a thank you to our President Elect, Michelle O'Brien, for her efforts in putting together the last two issues of New Jersey Defense. I implore all to write an article for the New Jersey Defense, which can be submitted to Michelle (MOBrien@fbolawfirm.com).

Ryan Richman

RYAN RICHMAN, ESQ.

ARE RELEVANT SOCIAL MEDIA POSTS DISCOVERABLE?

BY DAN SCHWARTZ, BRIAN CARROLL AND RYAN RICHMAN, MCCARTER & ENGLISH, LLP

Of course. Social media deserves no special evidential treatment: the scope of discovery into social media websites requires the application of basic discovery principles in a novel context. Indeed, discovery demands for social media must be (1) reasonably calculated to lead to the discovery of admissible evidence, (2) limited in time and scope, according to the needs of the case, and (3) described with sufficient particularity for the responding party to understand what is called for in response.

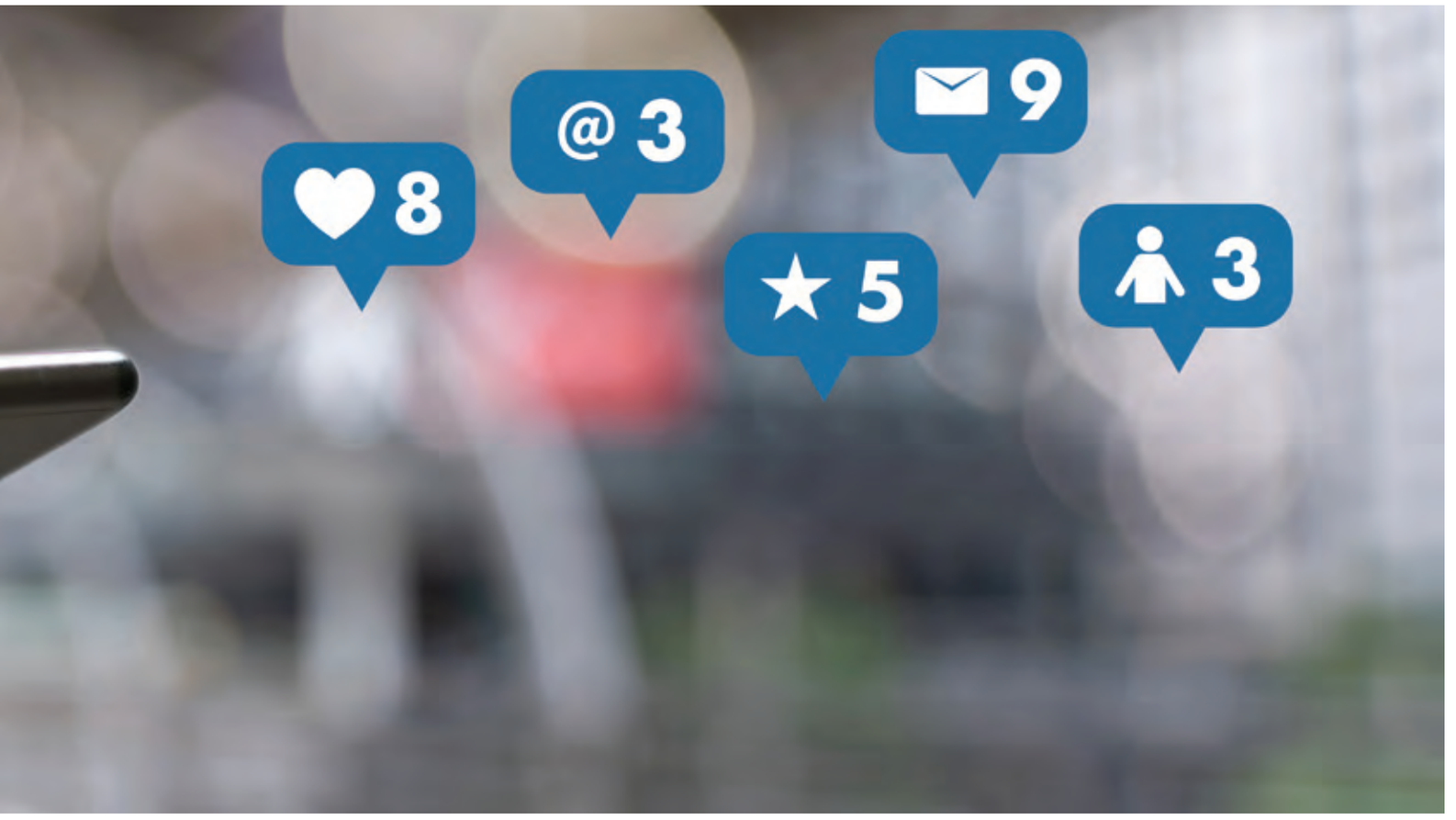
While many states—like New York, Maryland, Nevada, and Florida, to name a few—have well-developed jurisprudence on social media discovery, New Jersey's case law is more limited. However, under New Jersey law, social media content is discoverable. What remains unclear in New Jersey is whether the proponent is required to show a "factual predicate" (*i.e.*, a threshold evidentiary showing that the requested social media content contains information that will reasonably lead to the discovery of admissible evidence) in making her demand.

New Jersey's early decisions on social media discoverability, T.V. v. Union Twp. Bd. of Educ., No. UNN-L-4479-04, 2007 N.J. Super. Unpub. LEXIS 3005 (N.J. Super. Ct. June 8, 2007) and Beye v. Horizon Blue Cross Blue Shield of New Jersey, No. CIV.A. 06-5337-FSH, 2007 WL 7393489 (D.N.J. Dec. 14, 2007), stand for the proposition that discoverable social media content must have been shared with some other third-party, must be related to the litigation claims and defenses, and may require a factual predicate.

Similarly, the next social media decision, the 2010 Monmouth County Superior Court decision in Krawchuk v. Bachman, No. MON-L-902-08, 2010 WL 9044940 (N.J. Super. Ct. Law Div. May 10, 2010), also required the defendant to "provide justification," *i.e.*, a factual predicate, for seeking social media content. And, the Krawchuck Court reasoned that "unfettered" access to social media content was overly broad and would not be allowed.

In 2011, New Jersey's federal court addressed a social media spoliation issue in the context of a trademark infringement lawsuit, in Katiroll Company, Inc. v. Kati Roll and Platters, Inc., No. 10-cv-3620, 2011 WL 3583408, at *4, *7 (D.N.J. Aug. 3, 2011). There, Chief Judge Garrett Brown, Jr. opined that even an "unintentional" failure to preserve social media, which was "somewhat prejudicial," constituted spoliation. Thus, based on the court's holding in Katiroll, social media content must be preserved because it may be relevant and discoverable, depending on the nature of the claims involved in a lawsuit.

In 2013, in Gatto v. United Air Lines, Inc., the defendants sought discovery related to the plaintiff's physical limitations and social



activities, including a request for documents and information related to the plaintiff's social media accounts. No. 10-CV-1090- ES-SCM, 2013 WL 1285285, at *1 (D.N.J. Mar. 25, 2013). After the parties reached an agreement to allow the defendants to access the Facebook account, but before its contents were retrieved, the plaintiff deactivated and deleted his Facebook account. As a result, the Gatto court held that the plaintiff failed to preserve relevant evidence (which related to the plaintiff's damages and credibility) and that therefore a spoliation inference was appropriate.

In State v. Hannah, 448 N.J. Super. 78 (App. Div. 2016)—notably, a published decision—the court addressed an issue of authentication, involving certain social media content. Relevant to the discoverability of social media is the court's treatment of Twitter content, which the Appellate Division reasoned still constitutes a "writing" under N.J.R.E. 801(e), "[d]espite the seeming novelty of social network-generated documents." In essence, the Court explained that existing concepts of evidence and traditional rules apply to social media—no new tests are necessary for social media postings.

In another somewhat instructive decision, Archer v. Cape Regional Medical Center, et al., CPM-L-565-15 (N.J. Sup. Ct. Law Div. Feb. 6, 2018), the defendants sought all of the plaintiff's Facebook content. The only basis in asking for all of the plaintiff's Facebook content was that she had Facebook and likely shared content that may be admissible, bearing on her claims of physical injury. After considering the parties' positions, the court denied the defendants' motion for failing to "articulate[ ] any justification," *i.e.*, a factual predicate, for the broad discovery into the plaintiff's Facebook content.

More recently, Presiding Judge Clarkson S. Fisher, Jr., considered social media evidence relevant and helpful in establishing evidence of cohabitation, in a Family Court dispute. Temple v. Temple, 468 N.J. Super. 364, 371-76 (App. Div. 2021).

In Matter of Robertelli, 248 N.J. 293 (Sept. 21, 2021), the Supreme Court weighed in on a social media issue—albeit in the context of an ethics complaint—explaining that it is "fair game for the adversary lawyer to gather information from the public realm, such as information that a party exposes to the public online, [but] it is not ethical for the lawyer—through a communication—to coax, cajole, or charm an adverse represented party into revealing what the person has chosen to keep private." But, because Facebook posts were disclosed after the close of discovery, the Court did not consider what was and what was not discoverable. Instead, the Court explained that it was permissible to monitor an individual's public Facebook for discovery purposes, but "friending" the individual to gain access to "private" content crossed the line.

In sum, New Jersey's body of case law provides that the same rules that govern the discovery of information in hard copy documents apply to electronic files. Indeed, what an individual or business shares on its social media platforms, though electronic, must still be viewed through a traditional lens. Requests for social media content must be limited in time and scope, seek information or content relevant to a claim or defense, and cannot create a proverbial "fishing expedition." But, there is no consensus in New Jersey on the need for a factual predicate. This is very much still a developing area of law that does not have as much published case law as neighboring states.

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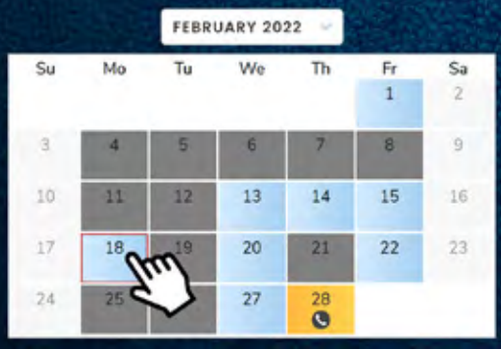

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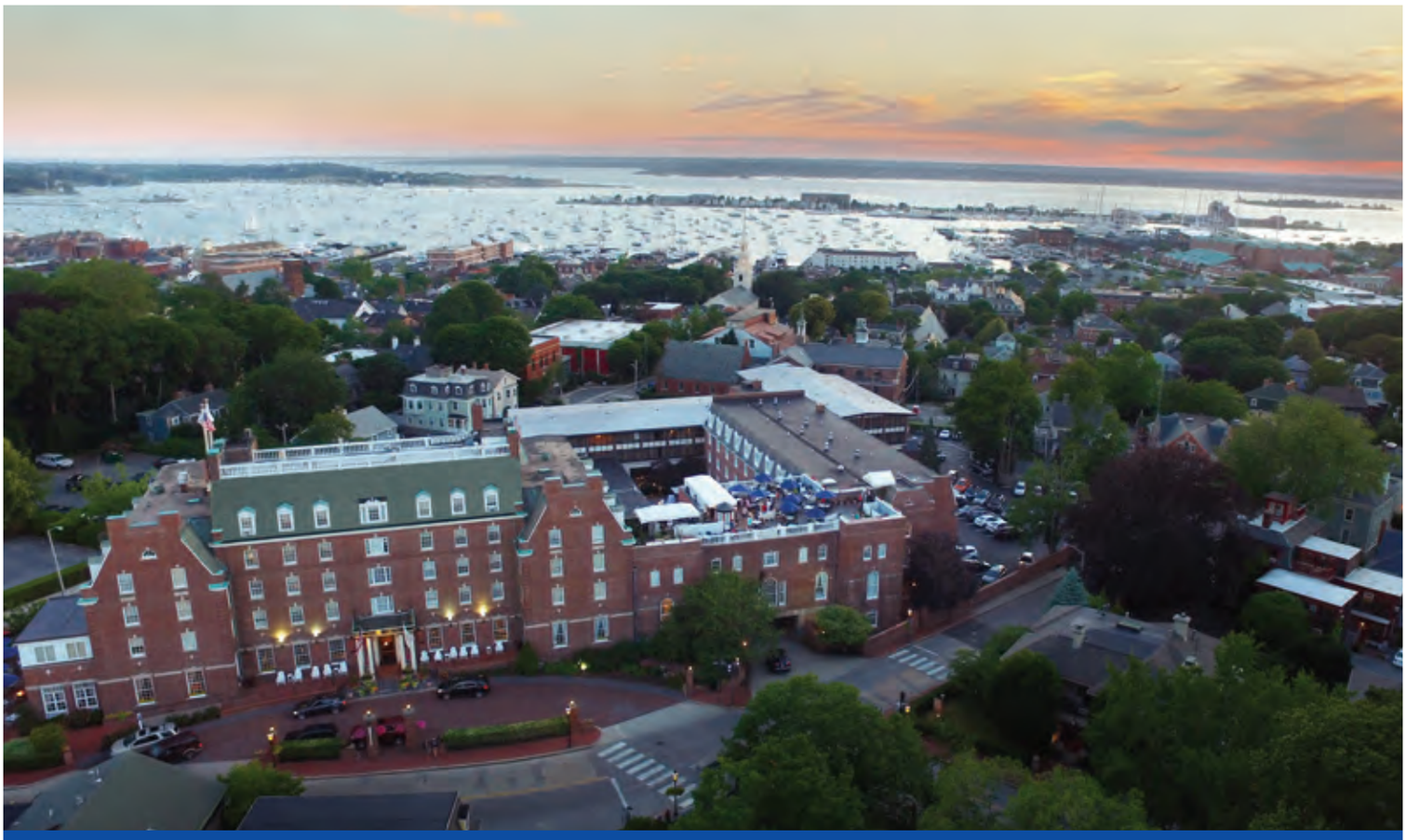

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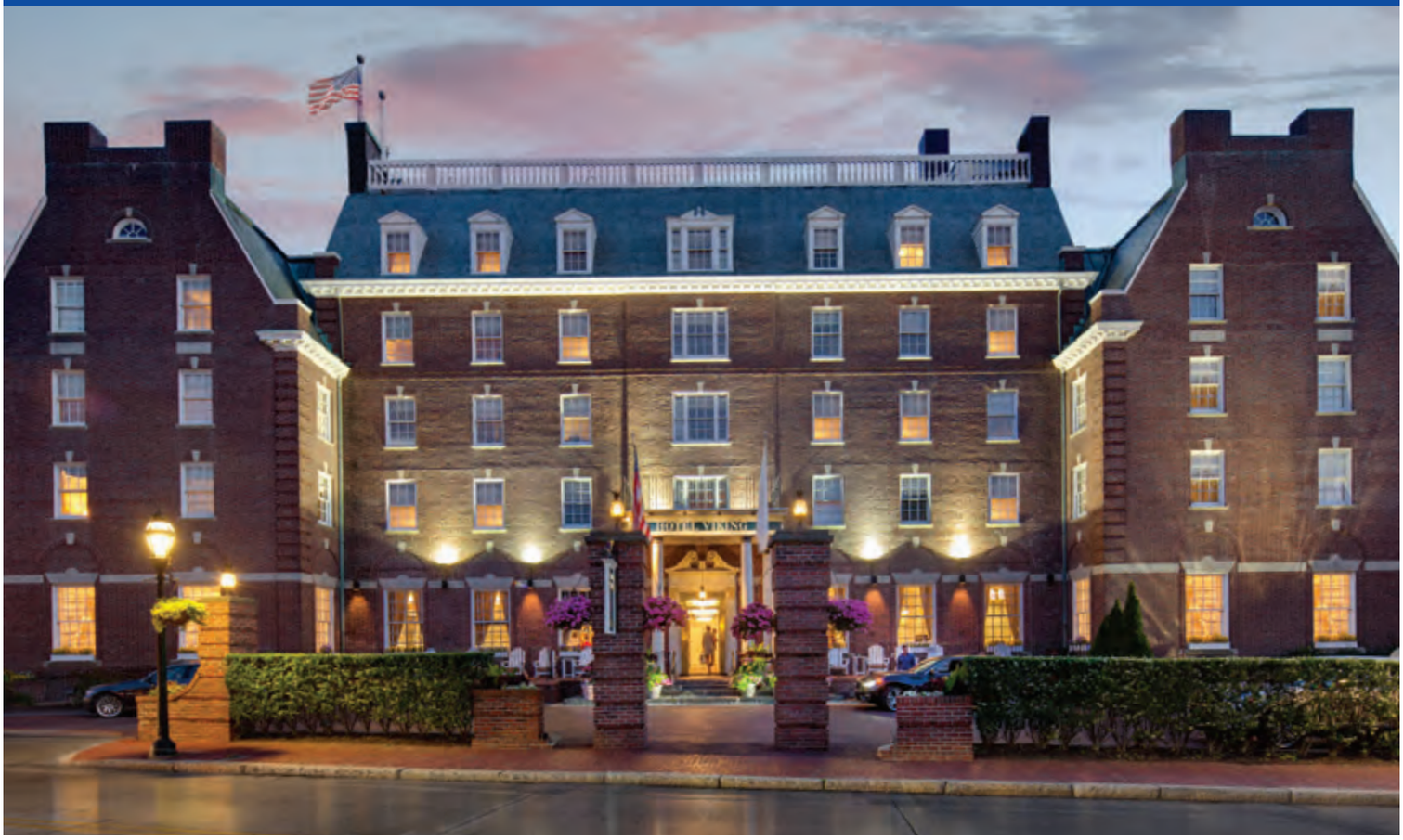

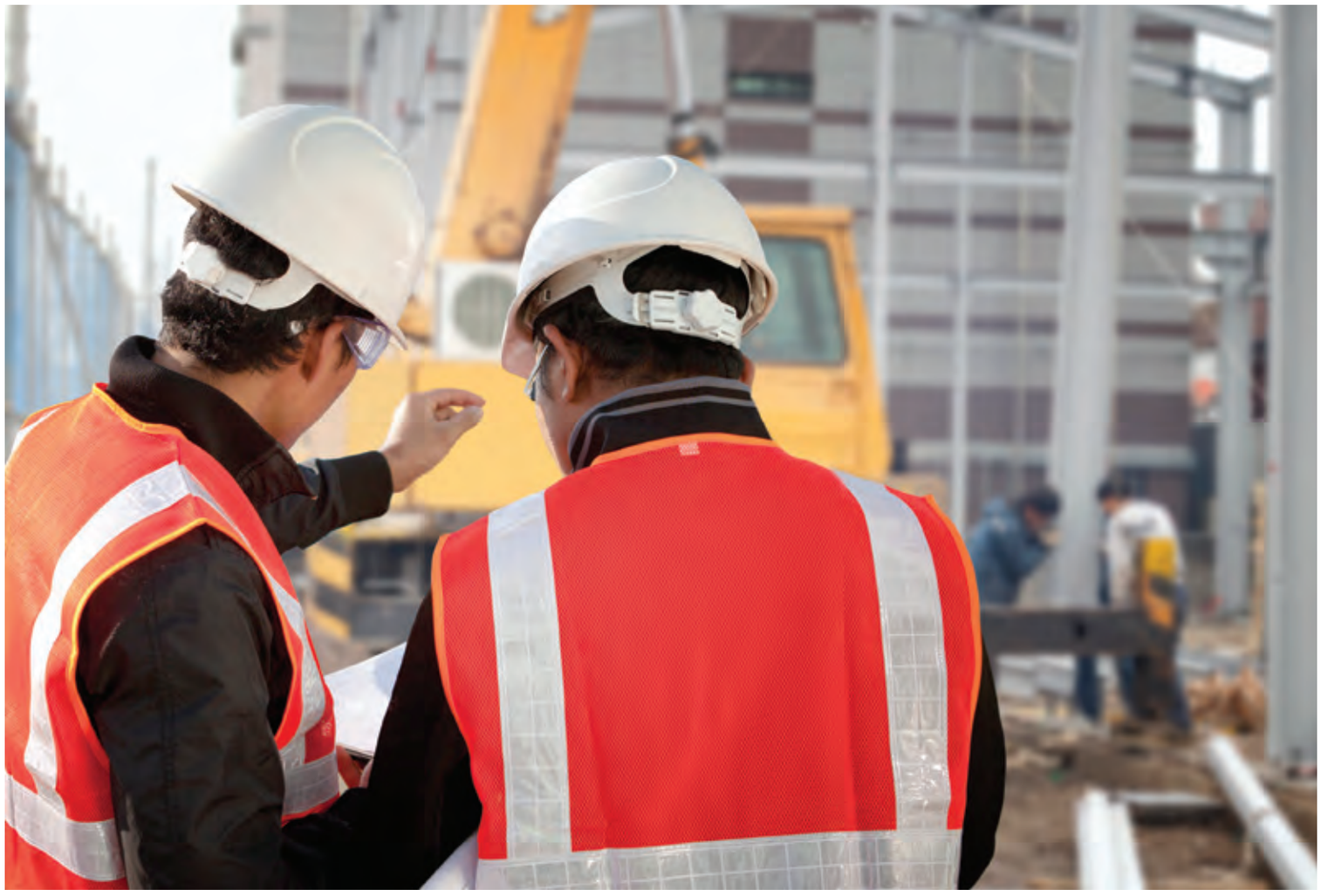

WHOSE DUTY IS IT? CRAFTING A DEFENSE IN A CONSTRUCTION SITE ACCIDENT CASE

BY TERESA CINNAMOND AND TYLER PIERSON

Taking the laws of three major jurisdictions into account, consider how landowners, property managers, general contractors, and their insurers can best proceed with construction site injury claims.

It is a scenario that arises every day: a subcontractor's employee injures themselves on a job site and is out of work for an extended period of time. Under negligence principles, who had the duty to ensure employee safety, and can thus be potentially liable for the employee's injuries and damages, including perhaps decades of future lost earnings?

The obvious answer is the subcontractor, but in most instances a state workers' compensation act will bar the employee from pursuing a cause of action directly against their employer. Instead, an employee seeking recovery beyond workers' compensation benefits directs their claim against other entities involved in the construction project, such as the property owner or general contractor. The employee's first hurdle in establishing a claim against these entities is whether a "duty of care" is owed.

RELEVANT LAW

Whether a duty of care is owed in connection with construction site accidents is not as straightforward as it may seem. On the one hand, the general common law principle, reiterated in the Restatement Second of Torts, is that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." *Restatement (Second) of Torts* §409. Pursuant to this principle, the only entity with any duty to ensure the safety of an independent contractor's employees is the independent contractor itself—property owners and general contractors owe no duty other than in the case of select exceptions.

On the other hand, some courts are hesitant to base a holding regarding the duty of care solely on an entity's alleged status as an independent contractor. Instead, courts look to a variety of factors or exceptions before determining whether a duty exists.

This threshold issue is critical because, unlike other defenses to negligence, whether and what duty of care is owed generally is a *legal issue* to be decided by the court—not a jury. As such, evidence that no duty was owed to

an injured employee can support a summary judgment motion, early case disposition, and significant savings for the parties or their insurer.

Below we summarize the law from three major U.S. jurisdictions on this issue and address case strategy that can be used to resolve construction site injury cases when the "no duty owed" legal principle weighs in the defendant's favor.

NEW JERSEY

New Jersey courts recognize the legal principle that a landowner or general contractor does not owe a duty of care to the employee of an independent contractor. Under this principle, "the party contracting out the work, be it a landowner or a general contractor, is not liable for injuries to employees of the [sub]contractor resulting from either the condition to the premises or the manner in which the work is performed." *Muhammad v. New Jersey Transit*, 176 N.J. 185, 199 (2003). See also *Tarabokia v. Structure Tone*, 429 N.J. Super. 103, 113 (App. Div. 2012) (a landowner or general contractor "may assume that the independent contractor and [its] employees are sufficiently skilled to recognize the dangers associated with their task and adjust their methods accordingly to ensure their own safety.")

Applying this principle, the New Jersey Appellate Division held that no duty of care was owed by a landowner when a portion of a roof collapsed injuring a roofer, reasoning that the landowner had no control over the roof during its repair. *Rigatti v. Reddy*, 318 N.J. Super. 537 (App. Div. 1999). Similarly, a defendant landowner and its facilities manager had no duty of care to a roofing company employee who stepped backwards and fell through a skylight where the roofing company, not the defendant, had supplied the personnel and tools and directed the work. *Olivo v. Woodhaven Lumber & Millwork, Inc.*, 2016 WL 3189664 (N.J. Super. Ct. App. Div. June 9, 2016).

While the "no duty" legal principle is good law, it is not absolute. For one, New Jersey courts will look to whether the risk that injured the employee was inherent to the work being performed. *Sanna v. Nat'l Sponge Co.*, 209 N.J. Super. 60, 67 (App. Div. 1986). Landowners still may have the duty to make premises safe of dangerous conditions unrelated to the work performed. *E.g. Zentz v. Toop*, 92 N.J. Super. 105 (App. Div. 1966) (landowner owed duty to protect roofing contractor from wire left out on a roof).

Additionally, this "no duty" principle is universally held by New Jersey courts to be inapplicable in the case of three exceptions: (1) where the party contracting out work, "retains control of the manner and means of doing the work contracted for;" (2) "when the party knowingly engage[s] an incompetent subcontractor" and (3) when the "activity contracted for constitutes a nuisance per se [*i.e.*, is unusually dangerous]." *Tarabokia*, 29 N.J. Super. 103, 113.

Specifically with respect to general contractors, New Jersey courts have tended to analyze the issue of duty by addressing a number of factors. See *Alloway v. Bradlees*, *Inc.*, 157 N.J. 221, 229 (1999). Under these factors, a general contractor (but not a property owner) may owe a duty if the risk that caused injury was foreseeable to the general contractor (among other factors). Even so, New Jersey courts have recognized that lack of control over the means and methods of work is dispositive. Most recently, in *Sutuj v. Louis Gargiulo Co., Inc.*, 2021 WL 48228 at * 2 (N.J. Super. Ct. App. Div. Jan. 6, 2021), New Jersey's Appellate Division, in a case where the general contractor exercised no control, and a subcontractor's employee was injured solely by virtue of a subcontractor's failure to provide safety goggles, noted that "a general contractor is not liable for injuries to employees of the [sub]contractor resulting from either the condition to the premises or the manner in which the work is performed." See also, *Gomez v. Cumberland USA, Inc.*, 2015 WL 4742919 (N.J. Super. Ct. App. Div. Aug. 12, 2015) (granting leave for interlocutory appeal and entering summary judgment in favour of the defendant finding that: (1) the project to install snow guards on roof inherently involved dangerous work on the roof and (2) contrary to plaintiff's assertions, defendant had no right to control or direct the day-to-day operation of the work and, therefore, owed no duty to make the roof safe for plaintiff).

In sum, an argument that no duty was owed to the employee of an independent contractor is sustainable under New Jersey law, but tread carefully when making the argument and develop factual evidence through discovery that distinguishes your case from the exceptions noted above. Keep in mind that success should depend upon establishing (1) lack of control over the means and method of work, (2) no knowing hiring of an incompetent subcontractor, and (3) no nuisance per se.

CALIFORNIA

Similar to New Jersey, California recognizes the common law doctrine "that when a hirer [has] delegated a task to an independent contractor, it [has] in effect delegated responsibility for performing that task safely, and assignment of liability to the contractor followed that delegation[.]" *Kinsman v. Unocal Corp.*, 123 P.3d 931, 937 (2005). *See also Tverberg v. Fillner Constr., Inc.*, 232 P.3d 656, 661 (2010) ("an injured independent contractor hired by a subcontractor cannot hold the general contractor vicariously liable for those jobsite injuries [.]")

However, the immunity of a "hirer" for jobsite injuries is not without limitations. First, this immunity will not apply if the hirer controls the work being performed when the injury occurs. The rationale for this principle is that its basis under California law is that the hired subcontractor "receives authority to determine how the work is to be performed and assumes a corresponding responsibility to see that the work is performed safely." *Id*.

Another exception is recognized by California law in the form of a doctrine called "peculiar risk." Under this doctrine, a landowner who chooses to undertake inherently dangerous activity on his or her land cannot escape liability for injuries to others simply by hiring an independent contractor to do the work. *Privette v. Superior Court*, 854 P.2d 721, 724 (1993). Accordingly, if the work being performed is "inherently dangerous" the hiring party may be held liable for injuries that occur.

Moreover, in recent years, the California Supreme Court has recognized a limit on hirer immunity in the form of basic common law principles of premises liability. In particular, the California Supreme Court has stated that a landowner will be held liable if "(1) it knows or reasonably should know of a concealed, pre-existing hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." *Kinsman*, 123 P.3d 931, 940.

Overall, the fact that California law still recognizes the principle of no duty of care is helpful to defendants, but hirer immunity has been substantially scaled back by the Kinsman decision. Indeed, the theory of landowner liability stated by *Kinsman* is very similar to traditional common law principles of premises liability.

NEW YORK

Similar to courts in New Jersey and California, New York courts recognize that "[t]he general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts." *Kleeman v. Rheingold*, 81 N.Y.2d 270, 273 (1993). *See also Mojica v. Gannett Co.*, 71 A.D.3d 963, 965 (2d Dep't 2010) ("One who hires an independent contractor is not liable for the independent contractor's negligent acts because the employer has no right to control the manner in which the work is to be done.")

Notably, however, New York has limited this principle of no liability for a hiring party in ways that are more severe than New Jersey or California. First, like the other states, New York recognizes that a hiring party may owe a duty to a contractor's employee when it controls the work being performed. *Id.* A hiring party may also owe a duty to a contractor's employee when it is negligent in selecting, instructing or supervising the contractor; or the contractor has been employed for work that is especially or "inherently" dangerous. *Rheingold*, 81 N.Y.2d 270, 274.

In addition, New York also does not recognize the immunity of a hiring party when the hiring party "is under a specific non-delegable duty." This is the most important limitation on the rule in New York, because the list of non-delegable duties under New York law is extensive and includes non-delegable duties created by both statute and the common law. *E.g., Allen v. Cloutier Const. Corp.*, 44 N.Y.2d 290, 300 (1978) (By statute, New York "places ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor"); *Rheingold*, 81 N.Y.2d 270, 275 (duty owed by attorney to client is non-delegable under common law.)

Accordingly, while New York recognizes a general immunity for the party hiring an independent contractor, the extensive list of non-delegable duties under New York law severely limits the application of this principle; particularly in the context of construction site safety. *Allen,* 44 N.Y.2d 290, 300.

STRATEGIES TO MITIGATE RISK FOR CONSTRUCTION SITE INJURIES

Taking the above law into account, how can landowners, property managers, general contractors, and their insurers best proceed with construction site injury claims?

First, efforts at risk transfer should begin early and continue in earnest during the discovery phase of litigation. All contractors, construction managers, and design professionals involved in the project should be identified; all written contracts thoroughly reviewed; and key personnel interviewed as to the details of how work proceeded on the project. Whenever viable, defendants should seek a defense and indemnification pursuant to an indemnity agreement contained in a written contract. All insurers of potentially responsible parties should be placed on notice of the claim. In addition, copies of insurance policies should be obtained and reviewed to identify whether the defendant landowner, property manager or general contractor qualifies as an "additional insured" under relevant endorsements.

Second, when handling a claim involving the defense of a landowner, property manager, or general contractor in a suit seeking damages for a construction site accident, look for facts relevant to the "no duty owed" defense in case analyses and reports from appointed counsel. Ask appointed counsel to conduct specific discovery on this issue and to analyze facts related to whether the defendant "controlled the means and methods" of the work, knowingly hired an incompetent subcontractor, or was performing work that would constitute a nuisance per se. And consider whether, going forward, there are ways that landowners, property managers, and general contractors may strengthen their contracts with independent contractors, and each other, to minimize or eliminate, to the extent practicable, the defendant's control over a subcontractor's work and maximize their right to indemnification. A diligent and successful pursuit of a "no duty" argument and other risk transfer efforts can save significant defense and indemnity costs.

Teresa Cinnamond is a partner in Kennedys Law LLP's Basking Ridge, New Jersey, office. She has over 25 years of experience as a litigator defending developers, property owners, general contractors, subcontractors, and construction managers in a wide array of general liability and construction defect cases.

Tyler Pierson is an associate in Kennedys Law LLP's Basking Ridge, New Jersey, office. His practice focuses on insurance coverage and defense litigation. Prior to joining the firm, Tyler served as a law clerk for the Honorable Robert J. Brennan (retired), and the Honorable Maritza Berdote-Byrne, presiding judges of the Chancery Division, General Equity Part, Morris County, New Jersey Superior Court.

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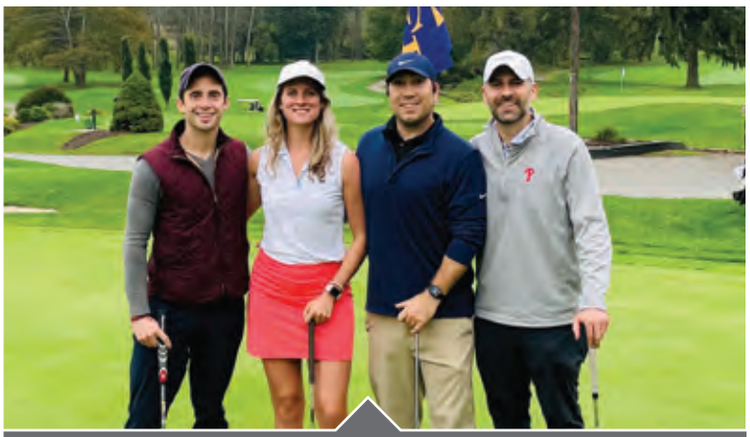

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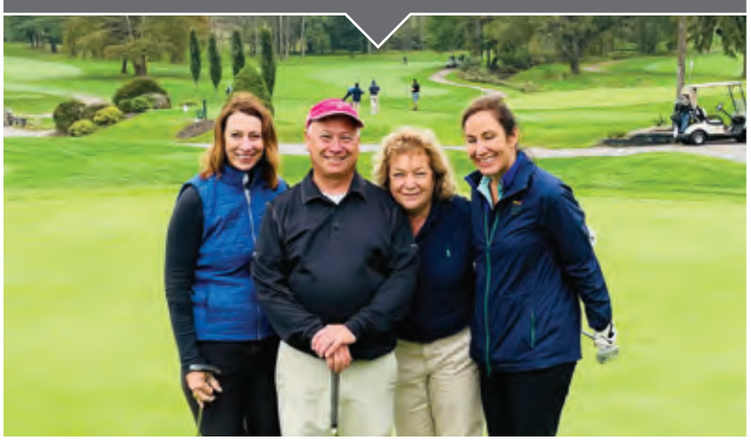

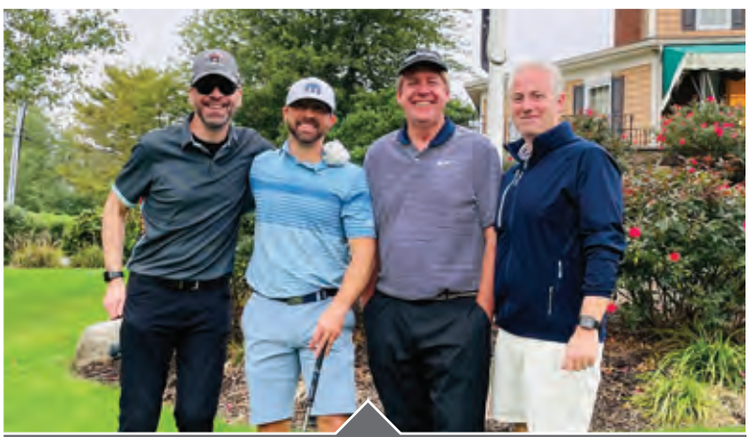

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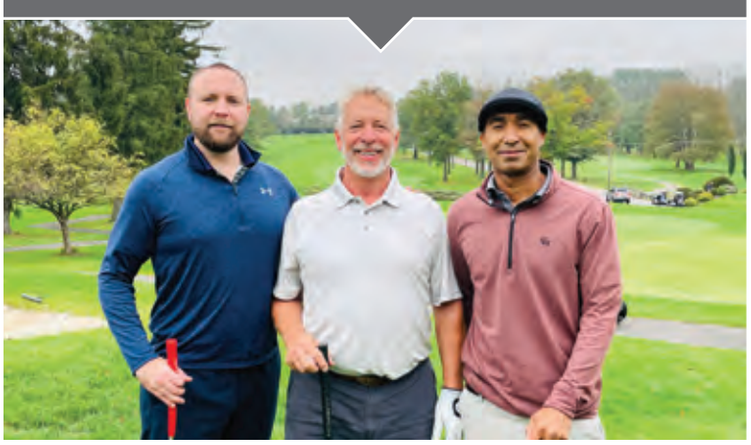

Left to Right: Phil Lundell, Ryan Richman, Jason Hupp , Chad Moore, Jeff Bell

ALICE THROUGH THE LOOKING GLASSMAN V. FRIEDEL, ET. AL.

BY HERBERT KRUTTSCHNITT III, ESQ.

In medical malpractice litigation, there is an issue that occasionally arises; and for the past 44 years one case has essentially controlled how that issue is handled. The issue arises when there have been successive torts – alleged medical malpractice following a general liability (slip & fall, auto, etc.) injury. We know that traditionally the initial tortfeasor can be held responsible for the subsequent malpractice damages because medical malpractice is considered a foreseeable consequence of the initial tort. Thus, the medical malpractice damages are part of the claim against the initial tortfeasor as well as the subsequent malpractice defendants. When there is a settlement by the initial tortfeasor, the issue that follows the settlement is how to account for it in the remaining part of the case. If the initial tortfeasor can be held responsible for the subsequent malpractice damages, how have we been preventing a double recovery. The 44 year old case, elegant in its simplicity, is Ciluffo v Middlesex General Hospital, 146 N.J. Super 476 (App Div 1977).

Prior to Ciluffo the law had been that the malpractice case could not go forward at all if the plaintiff had claimed malpractice damages against the initial tortfeasor. Ciluffo recognized that simply because malpractice damages had been claimed against the initial tortfeasor does not mean that the plaintiff had been fully compensated for the malpractice damages by a settlement with the initial tortfeasor. Why should the malpractice defendants be completely off the hook as a matter of law simply because there was a claim against the initial tortfeasor for the subsequent malpractice damages. However, the plaintiff should also not be entitled to double or duplicate compensation. Or so, one would think.

In setting the stage for this discussion, I have thus far mentioned two legal principles that are so age old they don't even require citations. The first, the initial tortfeasor is responsible for the foreseeable consequences of his negligent conduct, even subsequent malpractice. And the second, if a plaintiff has more than one party who is responsible for his injuries, he can sue both, but he can only be fully compensated once.

The second of these concepts has very recently been called into question by the case of Glassman v. Friedel, id. In the end, I will suggest that maybe an intellectually honest reading of Glassman has set the stage for the first of these concepts to be in play as well. The initial tortfeasor – general liability defendant – may finally be able to catch a break.

We will come back to Glassman in a minute. But first, we need to fully understand Ciluffo to grasp what has been lost; and what may also be gained.

For 44 years, since Ciluffo, when there had been a settlement with the initial tortfeasor, and the case proceeded against the malpractice defendants, it was a matter of simple math to figure out the net amount of any malpractice verdict. The malpractice jury would render a verdict for all damages, both the initial injury and the subsequent malpractice.[i] If that verdict in the malpractice case was less than the amount of the settlement with the initial tortfeasor, the malpractice defendants did not pay anything. The amount of the verdict told us that the plaintiff had already been fully compensated for the consequences of both torts. On the other hand, if the verdict was more than the settlement, the malpractice defendants paid the difference. Elegant, simple math, not at all complicated. It worked for 44 years – until Glassman recently overruled it.

On March 25, 2017, Jennifer Glassman was exiting Juanito's Mexican Restaurant when she fell, allegedly due to a defective step. She suffered a fractured left ankle and was admitted to Riverview Medical Center. On March 30, 2017, Mrs. Glassman underwent surgery for the fractured left ankle and following that surgery, she experienced a nerve injury to her right leg. On April 26, 2017 Mrs. Glassman died as a result of a pulmonary embolism; allegedly due to a combination of the left ankle fracture and the right leg nerve injury.

Suit was filed on July 2, 2018 against only Juanito's Restaurant. The lawsuit included claims for all conscious pain and suffering up to the time of Ms. Gassman's death; and also included a wrongful death claim. In discovery between plaintiff and Juanito's the injury claims clearly encompassed both the initial ankle fracture, as well as all injuries that flowed from the surgery, and also included Mrs. Glassman's wrongful death. Following extensive discovery, plaintiff reached an agreement to settle with Juanito's in the amount of $1,150,000. The Complaint was then amended to add the physicians and nurses who had participated in the March 30, 2017 surgery.

The claims against the malpractice defendants encompassed the same injuries, with the exception of the ankle fracture, as had been claimed in the suit against Juanito's. Can anyone suggest with a straight face that $1,150,000 does not include damages far in excess of an ankle fracture? Clearly, Juanito's had paid substantial money for the subsequent injuries. That settlement is consistent with the legal concept that the initial tortfeasor can be held responsible for subsequent medical malpractice. We will now discuss the procedural machinations that followed in an effort to collect those same damages all over again from the malpractice defendants.

In the medical malpractice litigation that followed the Juanito's settlement, the malpractice defendants made a motion for an Order consistent with the principles of Ciluffo. The motion was granted. The argument in opposition to the Ciluffo motion was that Juanito's and the malpractice defendants should be treated as joint tortfeasors and that Juanito's should be treated as a typical settling codefendant. Thus, any credit that the malpractice defendants would be entitled to from the settlement should be limited to the percentage of any negligence apportioned to Juanito's by the jury. Said simply, the plaintiff argued that the Comparative Negligence Act should govern the trial and that the malpractice defendants should only be entitled to a credit if they convince a jury of Juanito's negligence, and then only to the percentage attributed to Juanito's by the jury.

If that argument sounds even the least bit logical, remember that the lawsuit against Juanito's was not only for the direct consequences of Juanito's negligence, but also for the indirect consequences, which are the self same damages now being claimed against the malpractice defendants. Aren't we mixing oranges and apples then to limit the malpractice defendants' credit to the direct consequences of Juanito's negligence, when it is clear that Juanito's paid a settlement far in excess of the direct consequences of the slip and fall? Said in another way, how can you compare the negligence of two parties when the negligence of one of them is subsumed into the negligence of the other. I found that argument curious.

What followed was a Motion by plaintiff to the Appellate Division for interlocutory relief. That Motion was granted and an appeal (read: trip through the looking glass) followed. Since Ciluffo had also been an Appellate Division decision, to arrive at a different result than that case would have required distinguishing Ciluffo unless it was going to be followed. The Glassman appellate division, in reversing the trial court's Ciluffo Order, did not reverse Ciluffo, but instead noted that Ciluffo had actually been decided prior to the Comparative Negligence Act. The court reasoned that the Comparative Negligence Act had implicitly overruled Ciluffo back when the Act had been passed. So, for 40(+) years, we were all applying a case that nobody noticed was no longer good law (question mark).

In a lengthy opinion the Glassman appellate division analyzed the Comparative Negligence Act, and concluded that it, and not Ciluffo, should govern the Glassman case, and all successive tortfeasor cases going forward. To add insult to injury, the opinion also concludes that the Glassman jury will not actually compare the *negligence* of Juanito's to the *negligence* of the malpractice defendants. That would be confusing and impracticable. So, the Comparative Negligence Act governs, but does not actually apply. The Court held that the malpractice jury would instead compare the damages as between the successive tortfeasors; and the malpractice defendants would only be entitled to a credit for the damages directly attributable to the slip and fall. But, didn't the claim against Juanito's, and the resulting settlement, include damages far beyond the original ankle fracture. What about those claims? What about those damages? Isn't that simply allowing plaintiff a second bite at the same apple (or orange). Defendants Moved for Certification to the Supreme Court, which was granted.

I have been practicing law almost as long as Ciluffo has been the leading successive tortfeasor case involving subsequent malpractice. This is the only time I have ever argued an interlocutory appeal before the New Jersey Supreme Court. The argument was spirited, and focused almost entirely on the Comparative Negligence Act. I called it 'curious' that plaintiff had raised the argument in opposition to the original motion. Even more curious was the fact that the appellate division agreed with it.

"Curiouser and curiouser" (cried Alice) is that the Supreme Court hung its hat on it as well. In all due respect, the Supreme Court is not final because they are always right. They are simply right because they are final. Said the Court, "the Ciluffo pro tanto credit does not further the legislative intent expressed in the Comparative Negligence Act". Which presupposes that the Comparative Negligence Act was ever intended to apply to successive tortfeasors, as opposed to just joint tortfeasors. In quoting the case of Rogers v. Spady, 147 N.J. Super 274 (App Div 1977) the Court commented, "if [a] plaintiff makes a particularly good bargain in settlement and the ultimate negligence found attributable to the settling defendant would have resulted in a judgment for less that the amount of [the] settlement, plaintiff will benefit by the excess amount".

Rogers v. Spady, however, was a case involving joint tortfeasors, not successive tortfeasors. In Rogers v Spady, each defendant was only responsible as a matter of law for the direct consequences of his own negligence. In Rogers v Spady, the settling defendant was not legally responsible for the consequences of the non-settling defendant's negligence. In Rogers v Spady, it was conceivable that the plaintiff could have made a bargain that did not result in an "excess amount", but in fact, could have resulted in a deficit amount. Plaintiff could have made a bad bargain, and would have had to suffer its consequences. Rogers v Spady is not analogous to our situation at all.

In the trial of the Glassman malpractice case, the non-settling defendants will be entitled to a credit which does not recognize, and in fact expressly ignores, the fact that Juanito's already compensated the plaintiff for malpractice damages. Juanito's did not pay a settlement based on its best analysis of its own portion of the injury claim. That was not the damages claim it was facing. Juanito's paid a settlement based on the fact that, legally speaking, they were not only responsible for the direct consequences of the slip and fall, but the subsequent malpractice as well. Juanito's paid a settlement which unquestionably included substantial malpractice damages. In retrospect, the settlement was not just a "particularly good bargain" (as in Rogers). Holding the initial tortfeasor responsible for the subsequent tortfeasors' damages is not, in retrospect, a "particularly good bargain". It is a windfall 100% of the time if the non-settling defendants only receive a credit for the fractured ankle.

To illustrate the point, and at the same time point up the Court's misunderstanding of the issue, it only takes to quote one sentence of the entire decision. "To prevent a double recovery, the damages that the jury attributes to the first causative event – here, the plaintiff's accident at Juanito's – should not be included in any judgment entered against the Medical Defendants." In all due respect, plaintiff's double recovery is not the ankle fracture damages. The double recovery is in being able to claim the malpractice damages in full against both the restaurant and also against the medical defendants. The double recovery is the fact that whatever malpractice damages Juanito's paid in the settlement are completely disregarded in the malpractice trial.

That is not just a "particularly good bargain". It is a double dip; and there is no other way to see it. The medical defendants would never have had to pay for the ankle injuries that occurred prior to the hospital admission. Those injuries are a preexisting condition plain and simple. That credit does not "prevent a double recovery". The double recovery is being able to claim, and collect, malpractice damages from two sources. That is the double recovery, and the Glassman decision implicitly endorses it. Malpractice defendants never had to pay for the injury that brought the patient to the hospital in the first place. That's not new.

If the case had been tried against all parties, a jury would have been told that even if they were only to find against Juanito's they

should still include the malpractice damages in their verdict. But, what if the jury were to find against all defendants? And, what if the jury were to find that the value of the ankle fracture is $150,000 and the value of the malpractice damages is $1,000,000? Pop quiz. How would the verdict be molded. Probably everyone reading this would say it would be $150,000 against Juanito's and the $1,000,000 malpractice damages would be apportioned among the malpractice defendants according to each defendant's percentage of negligence. To follow the logic of the Glassman decisions, one could argue that the verdict should be molded to $1,150,000 against Juanito's and another $1,000,000 apportioned amongst the malpractice defendants. The initial tortfeasor pays it all and the subsequent tortfeasor still pays the malpractice damages all over again, minus only the ankle fracture. "That makes no sense", said Alice. To which the Hatter replies, "Well it makes perfect sense to me". So, how do we get back to the reality side of the looking glass?

In the beginning of this article I suggested that there might be an outcome in successive tortfeasor cases, going forward, that would be consistent with an intellectually honest approach to the Glassman decision, and would also prevent a double recovery. The benefit would be to the general liability defendants who are also faced with the claim for subsequent malpractice damages. Remember, Juanito's was the only defendant until it agreed to a settlement which unquestionably included substantial malpractice damages.

In successive tortfeasor cases going forward, the initial tortfeasor defendant should logically be able to develop a case against the subsequent tortfeasor, codefendant or not, and truly "prevent a double recovery". If Juanito's had foreseen that the Court would apply the Comparative Negligence Act to successive tortfeasor cases, they should have been able to try the case, as the only defendant, and prove that all of the damages but for the ankle fracture were due to the fault of subsequent actors. Juanito's should have been able to ask for the subsequent actors to be put on the verdict sheet, even if they were not codefendants. [See ex.: Burt v. West Jersey Health Systems, 339 N.J. Super. 296 (App. Div. 2001)]. And, it should have had a pathway to only have to pay the damages directly attributable to the slip and fall. Juanito's should not have had to litigate the case as the only defendant, facing the real possibility of paying the 'whole enchilada'. Not if the Comparative Negligence Act was the guiding principle. If the Comparative Negligence Act is to control successive tortfeasor cases, it should apply to the initial tortfeasor as well as the subsequent tortfeasor. If Ciluffo is gone, something fair and just has to take its place. Glassman can't be the end game in successive tortfeasor cases.

For 44 years, malpractice defendants in successive tortfeasor cases have been able to receive a "Ciluffo credit", and occasionally not have to pay anything over and above what had already been paid by the initial tortfeasor. That was not based on the malpractice defendants being found not negligent. To get to the Ciluffo credit, it presupposes that the malpractice defendants had been found negligent. The Ciluffo credit was based on the fact that the initial tortfeasor had already paid the plaintiff at least a portion, if not all, of the malpractice damages. Ciluffo was based on the age old concept that a plaintiff may have more than one source of recompense, but is only entitle to be compensated once. If Glassman really does seek "to prevent a double recovery", then currently, the balance sheet is out of balance.

If Glassman ends the "Ciluffo credit", and yet really does (as stated in the decision) preserve the notion "to prevent a double recovery" then the logical conclusion is that the initial tortfeasor should no longer pay any malpractice damages. And this should be the case whether the medical providers are codefendants or not. Non-parties can be placed on a verdict sheet for allocation purposes.

If we step back and take a look at the bigger picture of what went on in Glassman, the medical malpractice defendants are in no different a position than they would have been if Mrs. Glassman fell in her own home and had nobody to blame. It is the restaurant that was victimized by the procedural hocus-pocus that occurred. With a little ingenuity on the part of initial tortfeasors, and a Court that really does want "to prevent a double recovery", the final chapter must still be written.

An intellectually honest takeaway of the Glassman decision is that the initial tortfeasor should be able to receive a credit for any damages that they can prove were the consequences of the subsequent malpractice. If the Glassman Appellate Courts did not like the fact that Ciluffo may have given subsequent tortfeasors a break, it is hoped that, given the opportunity, they will also not like seeing the initial tortfeasors held up for the whole ball of wax, only to have the plaintiff start another case and collect the exact same damages all over again.

Plaintiff attorneys in successive tortfeasor cases should have to sue all potentially culpable parties at the same time, deal with both the general liability case and the subsequent medical malpractice case, and actually have to take the straight road to but one full recovery. Going forward, if they only sue the restaurant, than that general liability defendant, in dealing with successive tortfeasor damages, should end up with a "Glassman credit"; and not be held responsible for any damages that were the fault of the successive tortfeasor. At this point, with Ciluffo out of the picture, that is the only way "to prevent a double recovery". And, maybe it would be the better way. As they say, inside every cloud there could be a silver lining.

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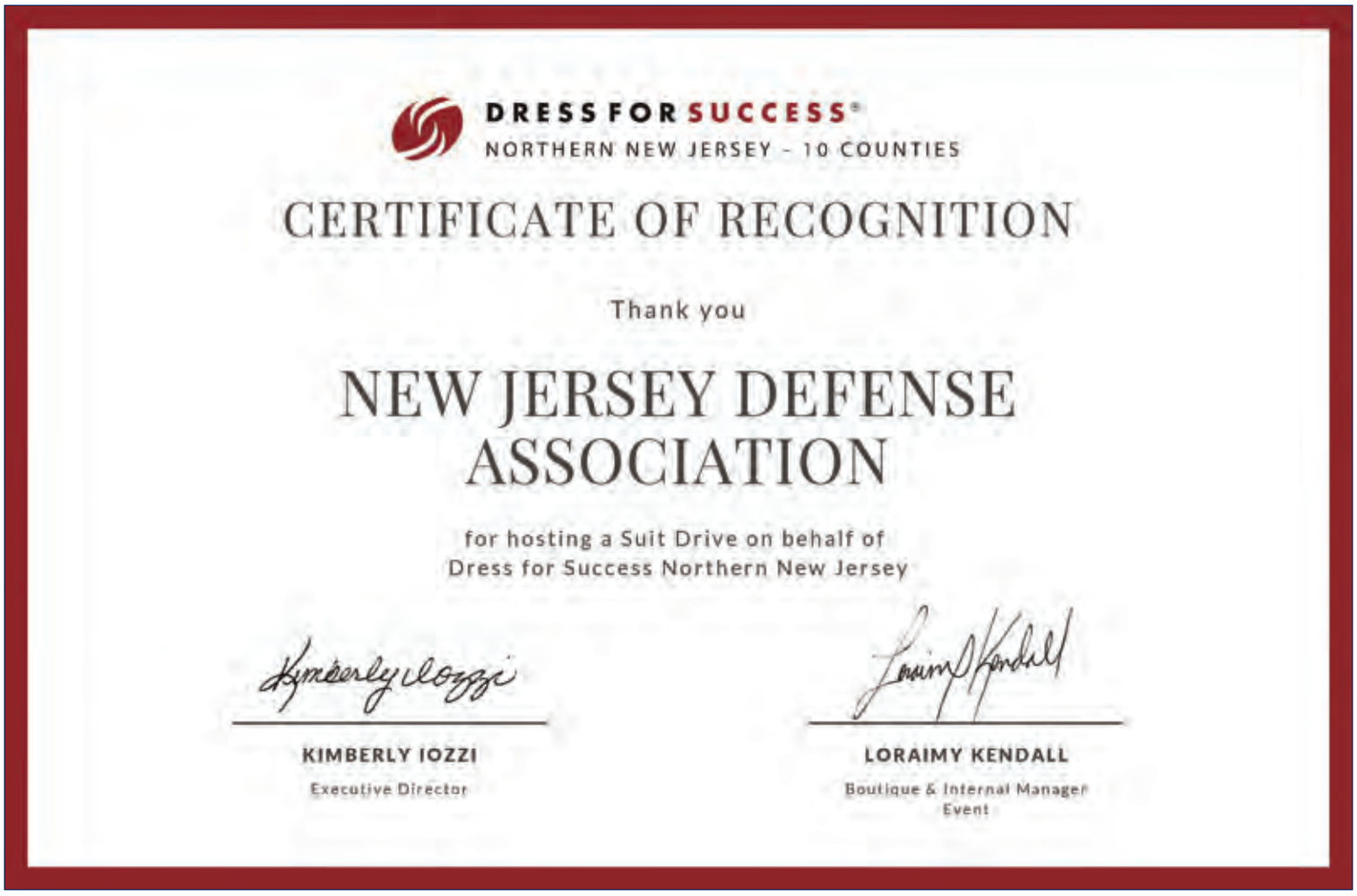
[i] It is tempting to ask the question of why the initial injury should be included int the malpractice verdict. Tempting, but incorrect. If the initial injury is not part of the malpractice verdict, the Ciluffo math does not work.



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O'TOOLE'S COUCH: DANCE FEVER

Growing up in a three-family home in Irvington was quite an experience. My brother Joe and I lived on the first floor with our parents. My cousins, Lee and Mary, lived on the second floor with their parents. Our 85-year old Grandmother, a true saint, lived on the third floor. We all shared the basement, which was extremely large and contained all of the laundry facilities and the coal storage. (Yes, "the coal storage.")

Every Sunday afternoon my 16-year old cousin, Mary, would invite a couple of her girlfriends for a dance lesson with Joe and his friends. Mary had a gigantic collection of 45 records so they could always dance to the current top hits. Of course, the basement was off limits to me and Lee, a couple of 10 year olds. The temptation was too great for us to resist, so we would hide in the coal bin where we had front row seats to all the dance moves. Unfortunately, eventually one of us would sneeze or make some other noise, resulting in us quickly being evicted and scolded by my Mother. Lee and I both agreed, however, that the dance lessons were no big deal, except for "The Stroll" by the Diamonds. If you could count to four, even we 10 year olds could master this dance. (Although I never told my brother, he really was a pretty good dancer. My father would always tease us and say it was in Joe's genes. I wondered if I would inherit this same affliction.) Eventually the girls said that they could teach us younger kids the Jitterbug, the Cha Cha, and the Waltz.

Around this time, Joe and his friends started attending the Friday night canteen. On Saturday morning my Mother would ask Joe if he danced with anyone. Joe's answer was always noncommittal. From eavesdropping on him and his friends, however, I knew that he never asked anyone to dance. The boys would stand on one side of the dance floor, and the girls were on the other side. There was one notable exception, however, Victor Labozo. He had a girlfriend from the time he was ten years old, and could do the Latin Hustle with her at the dances. We all thought that Victor must really have been 21. No one ever questioned Victor because he was the toughest kid in the school, and that included the senior class. Despite of the fact that I was six years younger. I guess there is some substance to the maxim that "Opposites attract."

Fast forward, when I became 16, I really didn't have a social calendar any better than my brother at that age. "American Bandstand" was the big teen attraction and everyone liked the father figure projected by the Host, Dick Clark. We also loved the band "Sha-na-na," and their base man, Bowser. Back then there were many other shows that utilized the "top 10 hits." Hey, this was as good as it got!

Talk about "fast forwarding," about twenty years later, my wife Sunny and I decided to expand our lives and take dance lessons at Arthur Murray's Dance Studio in Chatham. The quality of instruction was outstanding and we attended each week for several months. We actually got pretty good at the Swing, Cha Cha, Rhumba, and of course, The Stroll. (However, don't ever ask me to demonstrate for you.)

Many years ago we enjoyed Friday nights at the Black Bull in Mountain Lakes where they had a trio playing after dinner. Unfortunately, this restaurant closed over 20 years ago and we haven't found any nearby restaurants offering live music since then. There are several at the Jersey Shore, but we are not their target audience. Consequently, we do wish the Black Bull and their band were still around.

Although we are not big cruise people, every ship we have ever been on had nightly dance music, usually playing until midnight. We became friendly with several cruise band leaders and have continued to enjoy their CDs and the memories they bring back.

Probably the best advice I can give you is to never pass up an opportunity to enhance your dancing skills. Who knows, if you've been good this year, maybe Santa will bring you some dancing shoes. Have a safe, healthy and happy Holiday Season. See you next year!

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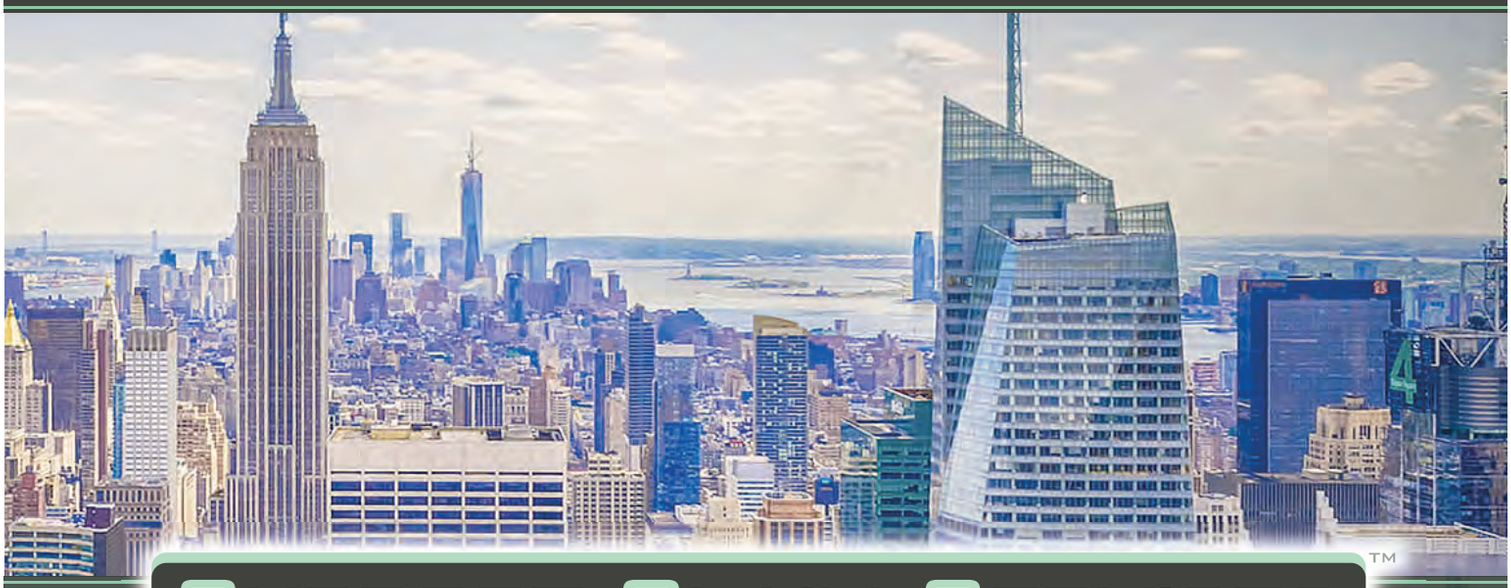

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FEBRUARY 17, 2022

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9:00 a.m. – 12:30 p.m.

JUNE 23-26, 2022

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