A PUBLICATION BY THE NEW JERSEY DEFENSE ASSOCIATION / FALL 2022

NEW JERSEY DEFENSE

PRESIDENT'S LETTER

Summer days may be drifting away, but things are just gearing up for the NJDA with our fall events. Just around the corner are the annual Golf Outing at Copper Hill Country Club on October 4, 2022, the 13th Annual Women and the Law Seminar (back in person this year) on November 11, 2022 and our Auto Liability Seminar on November 22, 2022.

As an initial matter, I want to thank Ryan Richman for a successful and forward-moving year as President, particularly with regard to his efforts with the AOC and representing the NJDA before the NJ State Bar Association's Working Group on Jury Selection, as well as the Judicial Conference on Jury Selection. Further, I'd like to congratulate Ryan on a spectacular convention in Newport, Rhode Island.

Ryan and his predecessors have set the bar high, but I am confident that alongside the dedicated and talented pool of Officers and Directors (and of course our most valuable Executive Director, Maryanne) this will be a great year for the organization!

I am truly humbled and honored to serve as your President and am committed to the continued growth and expansion of the NJDA. As an initial step, we are leading a membership drive not only to rally new members to join our association, but also to promote our current members to more active roles. I encourage each of you to assist in these efforts by calling upon colleagues and associates to attend meetings, events, volunteer opportunities and seminars. Help us draw attention to pivotal cases and issues facing defense attorneys across the state. It is essential that our organization be at the forefront of addressing controversial issues and spearheading efforts to have the voice of the defense bar heard, but we can only do this successfully through our talented and diverse members. Please consider joining a committee, contributing an article or fulfilling the role of *amici* on behalf of the NJDA.

Thank you for your continued support of our organization. I very much look forward to seeing you at our upcoming events. 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: mobrien@fbolawfirm.com. I also implore all to write an article for the New Jersey Defense, which can be submitted to our new editor, Rob Luthman at: rluthman@weirattorneys.com.

Michelle O'Brien

MICHELLE O'BRIEN, ESQ.

FORTHRIGHT AMENDS ITS RULES TO ELIMINATE HEARING REGIONS AND SET VIDEO-CONFERENCE AS THE DEFAULT FOR APPEARANCES

BY ROBERT A. CAPPUZZO, ESQ./CHASAN LAMPARELLO MALLON & CAPPUZZO, PC

Effective, August 1, 2022, Forthright's Rules were amended with input from the NJ No-Fault Advisory Council and the approval of the Department of Banking and Insurance. The two substantive changes go hand-in-hand as Forthright's rules now: (1) require in-person PIP hearings to be conducted via Forthright's Videoconference Program; and (2) eliminate regions.

As most are aware, the COVID-19 Pandemic caused disruptions to how most attorneys practiced law, and PIP Arbitrations were no exception. However, unlike most other practice areas, PIP Arbitrations pivoted quickly and seamlessly from in-person hearings (which were conducted at various offices around New Jersey) to virtual hearings on Zoom. After conducting virtual hearings for the better part of a year, Forthright and the NJ No-Fault Advisory Council began discussing possible rule changes to make this permanent. To pave the way for this change, the first thing to be done was to eliminate regions as required by Forthright's Rule 31 which stated:

> **31. Fixing of Region [In-Person]**
> There shall be 3 regions for conducting in-person arbitrations – North, Central and South. At the time of the filing of the *Demand for Arbitration* the filing party may designate the region in which the arbitration will be conducted except that the region selection is subject to the assignment of DRP set forth in Rule 12.

Next, the discussion focused on how and whether to keep some form of physical in-person hearing available, if necessary. The consensus was that the PIP arbitration process was functioning as well as, if not better than before. PIP practitioners were no longer required to drive between hearing locations and could attend hearings remotely

online. It also became evident that witness participation was easier via videoconference, when necessary. Therefore, it was acknowledged that physical, in-person participation should be the exception – not the norm. It was agreed that attendance at hearings via videoconference would equate to appearing "in-person" for the purpose of these rules. The revised version of Forthright Rule 42 below highlights new language in bold and reflects removed language via strikethrough:

> **42. Attendance at Hearing [In-Person]**
> Persons having a direct interest in the arbitration are entitled to attend the hearing. The DRP shall otherwise have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the DRP to determine the propriety of the attendance of any other persons.
>
> **Parties and/or their representatives are encouraged to appear at all arbitration hearings using the videoconference information provided by Forthright. Any party or representative who cannot access the hearing by videoconference shall appear by telephone using the telephone number provided with the Forthright videoconference information. After the assignment of a DRP, a party may request a non-video hearing to be conducted at the DRP's designated office. Such request shall be submitted to Forthright on the Request for Non-Video Hearing form clearly setting forth the circumstances meriting a non-video hearing. The request must be received by Forthright no less than 45 days prior to the scheduled hearing date. The other parties will have 10 days from Forthright's acknowledgement of receipt of the non-video hearing request to submit comments or objections. Forthright will submit timely requests and responses to the DRP for a determination. The DRP shall have 5 days to rule on the request. The DRP may grant the request only upon a finding of extraordinary circumstances. The granting of a non-video hearing request will result in the scheduled hearing being postponed and the rescheduling by Forthright of the non-video hearing to be conducted at the DRP's designated office. The party representative making the request for a non-video hearing shall attend the hearing in-person at the location of the hearing. Any other parties or representatives may appear in-person or by using the videoconference information provided by Forthright. {The language of this Rule was amended and is effective on August 1, 2022}** ~~Parties and/or their representatives are encouraged to personally appear at all arbitration hearings. Any party or representative who intends to appear by telephone shall use best efforts to notify the other parties and Forthright in advance of the hearing. Any party or representative appearing by telephone, or who has a witness appearing by telephone, must arrange for and bear the cost of teleconferencing for the DRP and all other parties.~~

The net effect of this change is that the majority of cases will proceed (as they have since March 2020) via online videoconferencing at no additional cost to the participants. Forthright's August 2022 Rule Amendment FAQs highlight the practical benefits of committing the PIP Arbitration system to an online virtual process:

- Elimination of waste in time and cost associated with parties traveling throughout the state.
- Ease of access for witnesses, medical practitioners, insurance adjusters, et cetera, in attending or observing proceedings with minimal disruption to schedules.
- Increased ability of DRPs to exercise appropriate control over hearings, including the elimination of potential for ex parte communications as all parties are admitted to hearings simultaneously.
- Reduction in exposure to COVID-19, its variants, and any future threats to health.

By including an option to proceed physically in-person, Amended Rule 42 preserves that opportunity for cases that meet the extraordinary circumstance threshold. Ultimately, this issue will be submitted to the assigned DRP for a ruling in accordance with the rule. Such a request will postpone any currently scheduled hearing. If granted, the non-videoconference hearing will be held at the assigned arbitrator (DRP's) office – which may not be near the requesting party's locale.

The granting of a non-videoconference hearing does not require the non-requesting party to participate in person at that DRP's office. Rather, the non-requesting party may participate in the hearing via videoconference if they prefer. Notably, these rule amendments do not have any impact on OTP cases and apply only to cases initiated after August 1, 2022.

To recap - all hearings will now proceed via the online (presently Zoom) videoconference platform unless: (1) a party prefers to appear via phone or (2) a party's Request for Non-Video hearing is granted by the assigned DRP. Audio and / or video recording of hearings is prohibited, so that Zoom feature is disabled by Forthright on its platform. Any party seeking to create a formal, stenographic record of a hearing is reminded to consult and comply with Forthright Rule 46 which states:

> **46. Stenographic Record of Hearing [In-Person]**
> Any party wishing a stenographic record shall make such arrangements and payment with the stenographer directly and shall notify the other parties and Forthright of such arrangements in advance of the hearing. The party arranging for the stenographic record shall provide a copy of the transcript to Forthright upon the request of the DRP and shall provide a copy to all other parties upon request.

This technological advancement in how PIP hearings are conducted was forced upon the user community and upon Forthright as a result of COVID-19. Admittedly, there is little dispute that the use of videoconferencing in place of physical attendance at hearings has benefited medical providers, insurance carriers and practitioners alike in keeping the PIP Arbitration system running efficiently and effectively in the wake of the pandemic.

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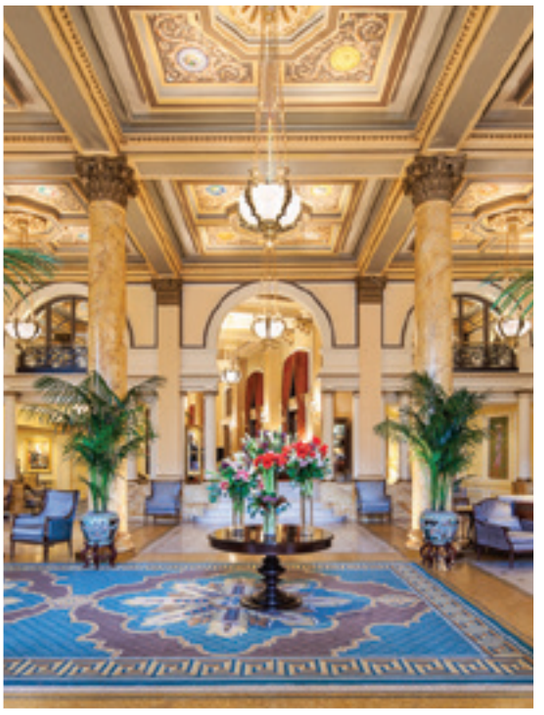

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CHALLENGES TO THE ONGOING STORM RULE: AVOIDING THE "UNUSUAL CIRCUMSTANCE" OF A PRE-EXISTING RISK

BY: KELLY J. COZZA, ESQ./TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP.

THE ONGOING STORM RULE

In June 2021, the New Jersey Supreme Court re-affirmed the "ongoing storm rule" in Pareja v. Intern. Props. 246 N.J. 546 (2021). Pursuant to the rule, commercial landowners do not have a duty to remove snow or ice from sidewalks until a "reasonable time " after the cessation of precipitation." Justice Fernandez-Vina, writing for the Court, reasoned there could be no duty on commercial landowners during ongoing precipitation as the imposition of such a duty would be "categorically inexpedient," impractical, futile, and would result in potential danger to those attempting to perform remediation efforts.

The plaintiff in Pareja fell at 8:00 a.m. Significantly, there was no snow event on the date of the fall. Instead, the meteorological data reflected precipitation in the form of a "wintry mix," consisting of light rain, freezing rain, and sleet. Precipitation began approximately 6 hours prior the plaintiff's fall. Light rain and pockets of freezing rain were falling at the time the plaintiff's incident occurred. While the record included a reference to snow from a prior storm piled up along the edges of the sidewalk, the plaintiff fell on an ice condition which he was unable to see due to the ongoing rain. The Court adopted the ongoing storm rule and held no duty was owed to plaintiff at the time of the fall.

EXCEPTIONS TO THE RULE

The Court carved out two exceptions to the rule which apply when "unusual circumstances" are present. First, the ongoing storm does not exonerate commercial landowners whose actions increase or exacerbate the risk to pedestrians. By way of example, the Court cited a Rhode Island decision in which a commercial property owner removed the plaintiff's vehicle to the rear of the property and directed her to retrieve it, requiring her to walk one hundred feet over an unknown and difficult terrain. See Terry v. Cent. Auto Radiators, Inc., 732 A.2d 713, 717-18 (R.I. 1999).

The second "unusual circumstance" which would render a commercial property owner liable is when there is a "pre-existing risk" on the premises, such as improperly removed or remediated snow and ice from a prior storm. Pareja, supra, 246 N.J. at 559.

EXPANSION OF THE RULE POST-PAREJA

Following the Pareja decision, the Appellate Division expanded the ongoing storm rule beyond commercial property owners. Youssef v. Shri-Ram Donuts #3 LLC, 2021 N.J. Super. Unpub. LEXIS 2546 (decided Oct. 22, 2021). In Youssef, the plaintiff slipped on a sidewalk covered with ice and snow outside of a donut shop. The named defendants included a commercial tenant which operated the donut shop and the snow removal contractor hired by the tenant. While the record contained conflicting testimony as to the amount of snow that fell on the date in question before the fall, it was undisputed that there was an ongoing snow event at the time the plaintiff fell.

In determining whether or not the ongoing storm rule should apply to the tenant and the snow removal contractor, the Appellate Division looked to the rationale behind Pareja – specifically, how the New Jersey Supreme Court categorized how "inexpedient and impractical" it would be to impose a duty requiring the remediation of snow and ice hazards during an ongoing storm. The Appellate Division in the Youssef matter concluded that this rationale applies equally to both commercial tenants and snow removal contractors and not just property owners. The court noted that snow removal contractors are in no better position than a commercial landlord to remediate snow and ice hazards during ongoing storms. Imposing such a duty on a contractor would result in a duty which would be "impossible to satisfy."

AVOIDING THE EXCEPTIONS TO THE ONGOING STORM RULE IN PRACTICE

While duty is a legal question to be decided by the Court, the Pareja opinion explicitly states that the decision does *not* preclude a jury from hearing questions of fact including, but not limited to, when the storm concluded and whether the hazard which caused the injury was from a previous storm. As we saw in Youssef, there still may be remaining questions of fact regarding a defendants' breach with respect to pre-existing conditions.

The plaintiff in Youssef attempted to avoid dismissal of his claims by arguing that, even if there were no duty owed at the time of the fall, the defendants were in breach for allowing a hazardous preexisting condition. Based on this argument, the plaintiff claimed the second exception outlined in Pareja should apply. The Youssef plaintiff pointed to his testimony that there was a prior snow condition in front of the store two days prior and that the sidewalk remained "unchanged" from that time until the time of the fall. The Appellate Division rejected this argument, finding the plaintiff's claim was not supported by competent evidence as there was no support establishing the prior accumulation in the plaintiff's Rule 4:46-2 statement. Again, the Pareja opinion also contained a brief reference to the presence of snow cleared from an earlier storm piled along the edges of the sidewalks. Obviously, the Court did not find that the mere existence of these snow piles created the type of "unusual circumstance" of a pre-existing risk which would hinder the application of the ongoing storm rule.

In future practice, it is reasonable to anticipate that any claim resulting from a fall during an ongoing storm will inevitably include an argument that one of the two defined exceptions apply; either that defendants' conduct exacerbated the risk to plaintiff or that there was a pre-existing risk on the premises prior to the weather event which was occurring at the time of the fall. With respect to the latter, one can anticipate that plaintiffs will attempt to develop testimony regarding the presence of snow from prior weather events. It is important to remember that the Pareja Court categorized the exceptions to the ongoing storm rule as "unusual circumstances." Certainly, the mere presence of snow from prior storms during the winter in a northeastern state like New Jersey is not "unusual" and

on its face, is not enough to automatically invoke the exception to the rule. Despite reference to pre-existing snow from prior storms in both the Pareja and Youssef matters, there was no credible evidence in either matter that the pre-existing snow created or contributed to the hazard which caused the fall.

CONCLUSION

It cannot be disputed that it is the plaintiff's burden to prove causation. In the context of the ongoing storm exception, the plaintiff must prove that the hazard which caused the fall was the result of the *prior* snow and/or ice accumulations as opposed to the ongoing storm. The Youssef opinion confirms such a claim must be supported by credible evidence and not simply bald-faced assertions. While the burden is on the plaintiff, evidence of the sidewalk conditions prior to the ongoing storm could be critical in what will certainly be a fact-specific analysis in future ongoing storm cases. Defendants should look for evidence such witness testimony, photographs, or video surveillance establishing the sidewalks were properly cleared and remediated of snow and ice from prior storms in order to eliminate a question of fact as to the pre-existing condition.

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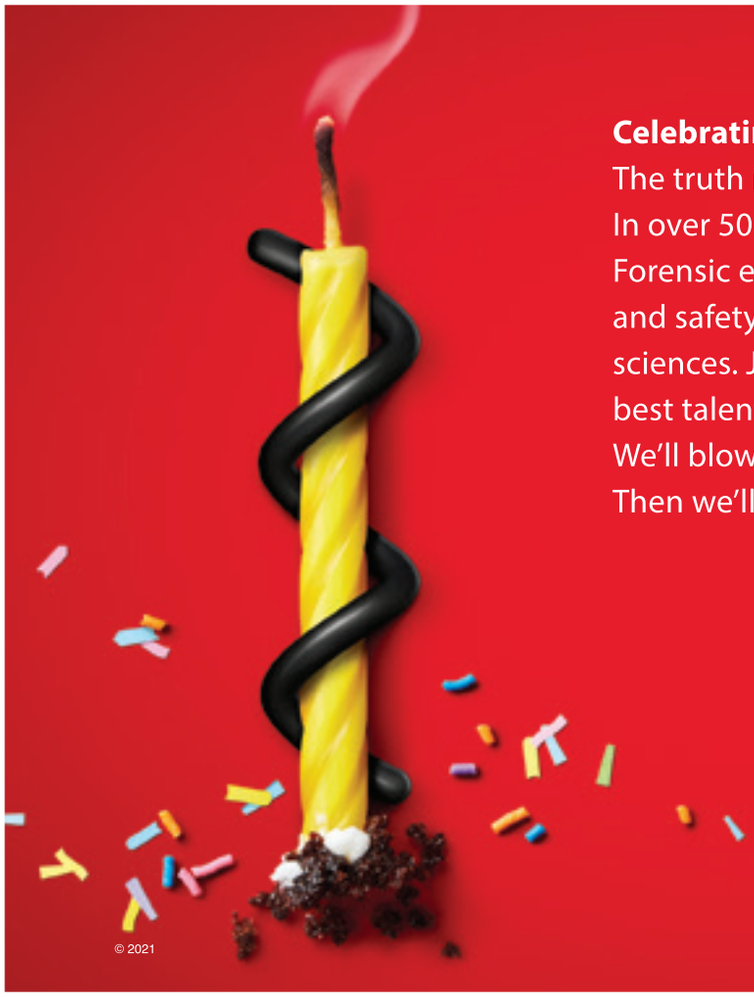

BUYERS BEWARE: PIERCING THE CORPORATE VEIL IN THE ENVIRONMENTAL CONTEXT*

BY: ROBERT MELLINGER, ESQ. AND JOANNE VOS, ESQ.

Coty US LLC v. 680 S. 17th Street LLC clarifies the willingness of New Jersey courts to pierce the corporate veil in the environmental context. 2015 WL 1011664 (2015). Though unpublished, Coty packed a potentially strong punch to Buyers of contaminated property. Because sole member LLCs (or sole shareholder corporations) like the one in this case are regularly used to purchase real property, the people behind those entities should take note.

As set forth in the seminal case State Dept. of Env. Protection v. Ventron Corp., piercing the corporate veil is an extraordinary remedy utilized by courts only to prevent the corporate form from being used as an alter ego of the shareholders or members to perpetrate fraud and injustice or defeat public policy. 94 N.J. 473, 500 (1983). However, as exemplified by Coty, the risk of piercing is higher in the environmental context where public policy in favor of successful remediation is strong and strict and joint and several liability apply.

In Coty, a sole member LLC ("680 LLC") purchased contaminated property. Although 680 LLC had not contaminated the property, it agreed in the purchase and sale agreement ("PSA") to assume all environmental remediation responsibilities. 680 LLC also agreed to indemnify the seller for the same. Coty, 2015 WL 1011664 at *1-2. 680 LLC had no assets yet repeatedly represented in negotiations, the PSA, and later to the court, that it could fulfill its obligations. When 680 LLC failed to meet its remediation obligations and could not be reached by NJDEP, NJDEP contacted Coty US LLC ("Coty US") (purchaser of the seller corporation) with a directive at which point Coty US hired an LSRP and took the actions necessary to avoid the assessment of penalties by NJDEP. Coty US then brought an action for indemnification and to pierce 680 LLC's corporate veil in order to reach the assets of the sole shareholder, Airaj Hasan. Id. at *2-5.

Litigation revealed that 680 LLC's assurances that it could meet its remediation obligations were based on the *personal assets* of Hasan and the value of the other companies in which Hasan was also sole shareholder (as opposed to the assets or value of 680 LLC itself). 680 LLC was created for the sole purpose of acquiring and holding the real property at issue and notably, had no other assets, cash flow, or income, nor had it posted any financial assurances to assure its remediation obligations. The court found it appropriate to pierce 680 LLC's veil because if it had not, Hasan would have been able to use the LLC form "to evade the obligations and liabilities he repeatedly promised his company would satisfy and which he represented…that [680 LLC] would undertake." Id. at *16. Accordingly, Hasan was personally responsible for indemnifying Coty US pursuant to the terms of the PSA to "prevent the fraud and injustice" which would have resulted from shielding the personal assets, which assets formed the basis of his remediation commitments. Id. at *15-16.

Coty can be contrasted with Interfaith Comm. Org. v. Honeywell Intern. Inc., which involved crossclaims by responsible parties under CERCLA regarding liability for contaminated sites owned by Ecarg, Inc. 215 F.Supp.2d 482, 499-501 (2002). Honeywell sought, and failed, to pierce the corporate veil of Ecarg to hold its parent corporation, Grace-USA, personally liable under the theory that Ecarg was Grace-USA's alter ego. Similar to 680 LLC in Coty, Ecarg was used to purchase and hold a contaminated property, was undercapitalized, and generated no income. However, unlike in 680 LLC, Ecarg had been formed for the legitimate business purpose of holding property for relocating employees and had a plan to develop the contaminated property for residential purposes. Importantly, transactions between Grace-USA and Ecarg were debited as intercorporate debts that Ecarg was required to repay, a fact which the court ultimately weighed against piercing. Id. at 499.

The key lesson here is that corporate buyers of contaminated property, especially sole member LLCs (and sole shareholder corporations), should assume an elevated level of care due to the higher exposure to piercing the corporate veil in the environmental context. Such buyers of contaminated real property must be meticulous in maintaining the corporate entity as wholly separate in purpose and form from the personal assets of the member or shareholder. Piercing the corporate veil primarily happens where an individual abuses the corporate form for personal ends or neglects the formalities of the corporate form while personally dominating or directing operations in a situation which results in violation of law or public policy. Considerable care should be taken to ensure that personal accounts are entirely separate from corporate accounts and that the corporation assuming environmental liabilities strictly adheres to corporate formalities, has a legitimate, income-generating business purpose, and that any external financial support is provided as a formal business arrangement (like the intercorporate loans in Interfaith). Finally corporate Buyers of contaminated property should strongly vet the representations made in the contractual context and the ability of the corporate buyer to satisfy them.

A version of this article was previously published in The Middlesex Advocate, Vol. 37, No. 1

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O'TOOLE'S COUCH: CALL TO POST

One of the enjoyable things about the coming of Spring is the start of horse racing. Sunny and I look forward to the Triple Crown, starting with the Kentucky Derby the first Saturday of May. Two weeks after that, comes the Preakness, and three weeks after the Preakness is the Belmont Stakes. If a horse can win all three of these big events, he has won the coveted Triple Crown. We have been to the Preakness several times and to the Belmont Stakes twice. Although we have never been to the Kentucky Derby, this is definitely on our bucket list.

After becoming Triple Crown junkies, we started having private horse racing parties. This required perfecting the making of Mint Juleps for the Kentucky Derby. Plus, you had to be careful with the consumption of the Juleps so you could tell the jockey from the horse. A requirement of these parties was that the attendees had to dress the part. Ladies had to wear large hats and the men had to wear sport jackets. We tried our best to look like Derby attendees.

Now to the real world. Although we enjoy watching the Triple Crown races on television, our favorite track has, for years, been Monmouth Park in Oceanport. Whenever the weather permits, we sit in the outdoor dining area. The atmosphere is so enjoyable. There is a huge paddock area where the horses warm up before each race. It isn't uncommon for the jockeys to greet the people waiting at the rails. In order to take advantage of some of the amenities, I recently became a racehorse "owner." That's right, I now own one percent of the horse, "A Case of You." Now I can officially walk into the paddock area and act like I belong.

Where the day begins – From the moment I enter the track area, the only thing I can think about is what the odds are on each race. It is enjoyable to handicap the race with our friends. I am not the most knowledgeable of our gang, so I listen to all the advice and make my bet. Rarely do I bet on more than one horse in each race; sometimes I'll bet an exacta box, which requires picking the first and second horses in that order. My big betting output is rarely more than $100 for the day. OK, nobody calls me a High Roller (my biggest hit ever was at the Belmont Stakes, where I pocketed $500).

At this point, I'm going to leave you with my wealth of knowledge about racehorses:

1. Slow horses eat just as much as fast horses.
2. In order for a horse to be a good mudder (a horse who runs well on a sloppy track), it must eat its fodder (high protein horse food.)
3. When all is said and done, bet on the horse based on name and color. Now that is advice from a real pro!

SEE YOU AT THE BETTING WINDOW!

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NJDA CALENDAR OF EVENTS

NOVEMBER 11, 2022

13TH ANNUAL WOMEN & THE LAW
Hilton East Brunswick
& Virtual by Zoom
8:00 a.m. – 12:00 p.m.
4.0 CLE Credits Including
1.0 D/E/I Credit

NOVEMBER 22, 2022

NJDA/ICNJ AUTO LIABILITY SEMINAR
APA Hotel Woodbridge
8:30 a.m. – 1:00 p.m.
4.7 CLE Credits Including
1.0 Ethics Credit

DECEMBER 2, 2022

NJDA ANNUAL HOLIDAY PARTY
Spring Lake Golf Club
7:00 p.m.

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