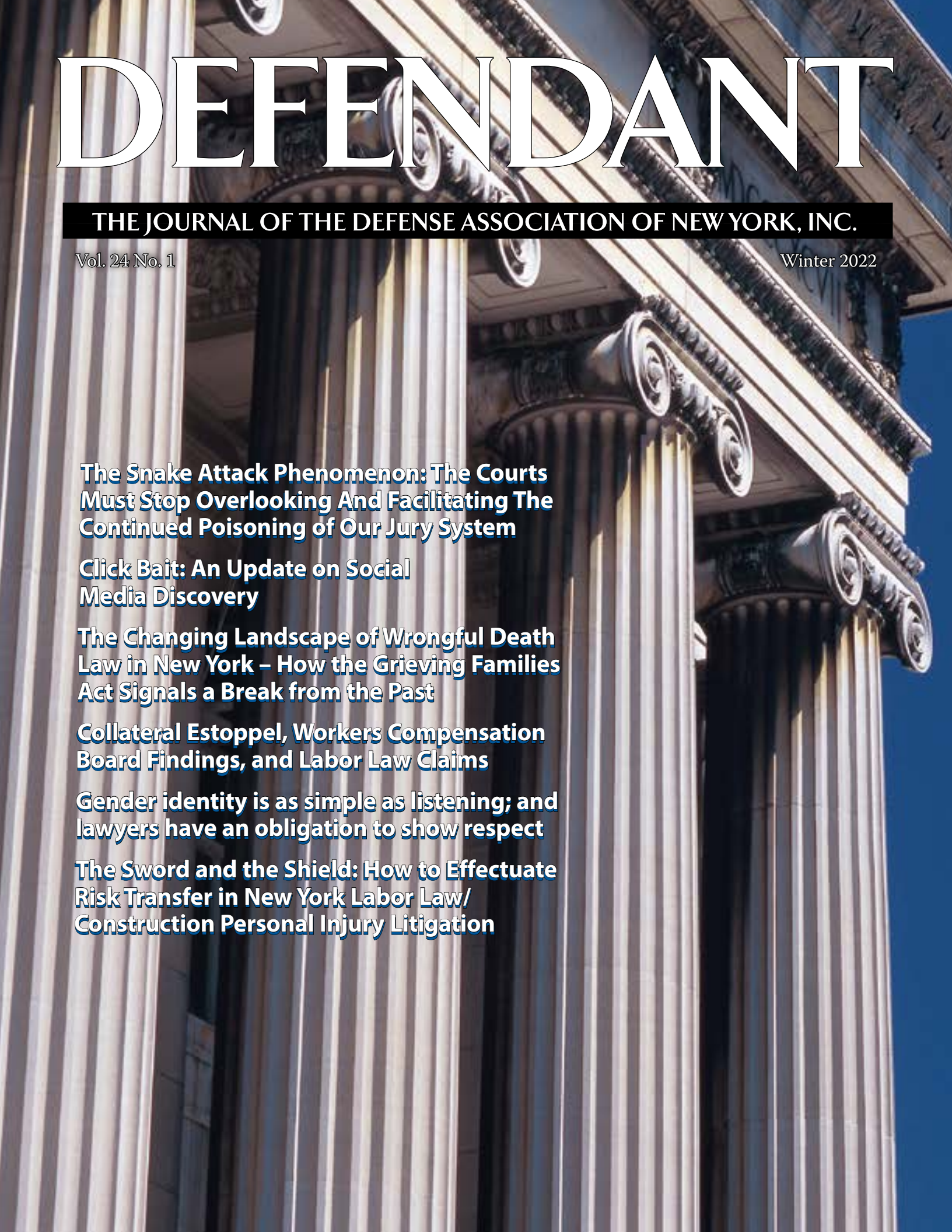

DEFENDANT

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Incoming President's Column:

CLAIRE RUSH*

It is an honor to be serving as President of DANY at this critical juncture in our practice. As we emerge from the trials of Covid, I would like to acknowledge the outstanding work done by my predecessors, Terry Klaum and Brad Corsair, in keeping our ship afloat during these very difficult times. Special thanks should also be given to our board members, our Executive Director, Connie McClenin, and our sponsors and contributors for helping us to continue our mission of providing timely and important information to the Defense Bar.

DANY's first big event this year will be our annual awards dinner which is scheduled for November 1, 2022, from 5:30-9:30 at The View at Battery Park in downtown Manhattan. Our honorees this year will include the Hon. Anthony Cannataro, Acting Chief Judge of the New York Court of Appeals , the Hon. Adam Silvera, Administrative Judge, Supreme Court-Civil Term, New York County, the Hon. Sylvia Hinds-Radix (ret.) , Corporation Counsel for the City of New York and James Fiedler, Acting General Attorney for the New York State Insurance Fund. We hope to see all of our members there for an awesome night of networking and comradery.

Due to the pressing necessity to fill open Board positions caused by COVID -19, there will be a Special Meeting of the Corporation at the Annual Awards Banquet to elect 6 new Board members and a new assistant treasurer. The persons unanimously recommended by the Nominating Committee and DANY's Board of Directors to join the Board as Directors are Florina Altshiler-Russo & Gould ;Jeannine Gerrard- Lewis Brisbois Smith and Bisgaard; Sherri Holland -Fleishner Potash;

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* *Claire Rush is a partner at the law firm of Barry, McTiernan & Moore.*

Immediate President's Column:

BRADLEY J. CORSAIR*

Dear Members and Other Valued Readers,

Thank you for your interest in Defense Association of New York, as demonstrated by your review of this journal. It is a tradition for each DANY president to contribute an article concerning the bar association - and my privilege to write to you as DANY's immediate past president and current board chair. The presidency is now in the excellent hands of Claire Rush, who has a column here as well.

I am pleased to update you about DANY accomplishments, and opportunities for the bar association and its members. Initially, I wish to discuss some of my personal experience with DANY over the years. The purpose of this short story is to exemplify ways for members to become leaders or integral participants - you are welcomed and encouraged to do so.

At the outset of this century, I joined a law firm that's long been part of the DANY community. I soon started accompanying colleague attorneys to DANY events such as CLE courses and banquet dinners, at fine establishments like the Down Town Association. It felt wonderful to be among industry leadership and other attorneys outside of court, in such elegant settings.

That kind of event attendance comprised my DANY involvement for about a dozen years. At that point, I began considering how I might evolve my professional development beyond my daily law practice. I decided to author my first ever law journal article. But where might I become published? After noticing a stack of DANY journals in an office reception area, a potential answer had come to light.

Conveniently, I was playing golf at times with

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* *Bradley J. Corsair is a trial attorney with Kowalski & DeVito in New York, New York. He is DANY's immediate past president and current chair of its board of directors, and contributes to its publications, CLE, membership, technology and golf outing committees.*

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DEFENDANT

VOL. 24 NO. 1

Vincent P. Pozzuto
EDITOR IN CHIEF

STAFF
Ellen Cuccio and Antoinette Delio

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Incoming President's Column

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Leigh Katz – The Law Offices of Leigh J. Katz & Associates; Brian F. Mark – Hurwitz and Fine ,and ; Stephen Toner – McGivney , Kluger Clark & Intoccia. In recognition of his outstanding service to the organization the Nominating Committee and DANY's Board of Directors have unanimously recommended that our present Board Member Patrick Kenny be elevated to the role of Corporate Officer and fill the Assistant Treasurer's position which is currently vacant.

As we enter this new year and return to courthouses, our mission is clear. We need to train a new generation of lawyers and expand our pool of defense lawyers to better reflect our communities. I propose that we offer another iteration of the DANY trial academy in the spring. As many of us on the front lines know, judges are under a mandate to push cases and many of our colleagues have retired from the business. Mid-level associates who would normally have received opportunities to go to Court and argue and try cases have been unable to receive this training because of Covid. We owe it to the next generation of defense lawyers to share our knowledge with them and help them bridge this learning gap that Covid has created.

It is also important that DANY continue to strive to open the ranks of the Defense Bar to a more diverse group of attorneys. We need to continue to cultivate interest in law as an attainable career among first generation college students. The Brooklyn Pipeline Program that DANY co-sponsors with the Brooklyn Bar Association and the Brooklyn Women's Bar Association has mentored over fifty (50) young people and, of those fifty (50) students, ten (10) are attending law school. Should business and COVID permit, we should consider offering our professionally moderated leadership program this spring to mid-level partner track associates to help them learn the ins and outs of how to develop a book of business and position themselves to assume leadership responsibilities in their firms and companies.

Another important initiative is to continue to expand the geographical reach of DANY. I have asked Florina Altshiler of Russo & Gould, who is a member of the Defense Trial Lawyers Association of Western New York to help facilitate a partnership with this organization which operates in the Buffalo area. In a similar vein , I have asked Leigh Katz, who is based on Long Island, to help us reach out to our fellow defense attorneys in Nassau and Suffolk Counties.

In addition to geographic expansion DANY needs to reach out to members of the medical malpractice and products liability bars. To that end Jennine Gerrard and Stephen Toner have graciously agreed to lead our malpractice committee and we are looking forward to a CLE and Defendant articles dealing with pressing issues in the world of medical malpractice. So too we are looking towards Brian Marks to create interest in DANY among members of the products liability bar.

Central to the success of our expansion efforts is our ability to become a nontraditional CLE provider (think self-study videos). Terry Klaum and Connie McClenin are working hard to insure that DANY becomes an accredited provider of CLE's via prerecorded videos. Our CLE Committee ably chaired by past Presidents, Terry Klaum and Bradley Corsair, continues to offer timely and important CLE's to the bar. In addition to our traditional CLE's for experienced attorneys we hope to offer CLE classes on reading medical charts to our younger members so that they can familiarize themselves with the typical injury patterns that we see and be better able to defend these cases.

DANY continues to be involved with the screening process for the New York State Court of Appeals. Our judicial screening committee ably led by Andy Zajac, appellate attorney extraordinaire expects that the nominees will be announced around Thanksgiving and that the Governor will announce her selection by mid-December.

Our Amicus Committee led by Brendan Fitzpatrick continues to submit cutting edge amicus curiae briefs to the New York Court of Appeals on issues of vital concern to the Defense Bar. The committee has prepared and submitted a brief in collaboration with DRI (a first), in a matter entitled State of Murphy v. New York City Housing Authority, 193 A.D.3d 503 (1st Dept 2021) which involved a claim of negligent security where the tenant was the target of a pre-planned attack. This case portends

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Incoming President's Column

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to be a major pronouncement by the Court on issues pertaining to superseding intervening causes in the area of negligent security claims.

The Defendant, DANY's substantive journal, continues to publish cutting edge information of special interest to the defense bar. Vincent Pozzuto of Cozen O'Connor steadily steers this important publication and should be commended for his long and successful service in this capacity.

Finally, it is clear that many of our members and clients have significant concerns about the increasing number of ill-conceived bills that have been passed by the New York State Legislature. The Grieved Families Act and Insurance Disclosure Law will clearly radically impact the practice of law . Steve Dyki is chairing our legislative committee and will share with our membership proposed legislation that will adversely affect our ability to defend our clients before matters are put for a vote in Albany. NYSTLA does a lobby day every year and it would be terrific if the rank and file of DANY could find time to go to Albany this spring and share with our legislators the reasons why we think so many of the bills that are presently being bandied about are poorly thought out and drafted.

There is clearly a lot to do as we emerge from the pandemic. I hope that many of our midlevel associates and junior partners will become actively involved with DANY through providing CLE programs and writing for the Defendant. DANY has provided all of our Board members with a critically important professional and business network. As many of us reach the twilight of our careers we would love to see our younger members pick up the torch of DANY and insure that civil defendant continue to have access to equal and quality justice thanks to the efforts of the Defense Association of New York!

Be well,

Claire

Immediate President's Column

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DANY's notable president of 2010-2011, Julian Ehrlich. I told Julian of my interest in writing about CPLR Article 16, believing it to be an underutilized foundation for defense, with quirky aspects worthy of discussion. I asked if this would be a suitable subject for DANY's journal, and Julian encouraged the idea. With the fine guidance also of past president Andy Zajac, my debut article came to exist as part of the Summer 2013 Defendant.

Bar associations must periodically fill positions on their boards of directors. This honor may become available to members who have supported association objectives, and demonstrated interest in involvement. I was pleased to commence service with DANY's Board in 2013.

As a new Board member, I was advised to engage with at least one DANY committee, in addition to supporting the Defendant with future articles. I then became part of the CLE committee, ably led then and now by Terry Klaum, DANY president of 2020-2021. We carry on as chairs of this fundamental committee, mainly by bringing proposed programs to fruition. If you are interested in presenting CLE, feel free to contact us.

I continued to author substantive articles for the Defendant, and joined the committee which develops DANY's website. I've also been an organizer of DANY's annual golf outings. Such worthwhile efforts eventually led to becoming a DANY officer, and ultimately president.

DANY members are perpetually invited to become more involved with our bar association, and committee participation is a great way to do so. The website's "Committees" page within the "About" tab indicates the numerous opportunities to immerse in the mission and activities of DANY. Collectively, the committees fulfill objectives such as judicial screening, amicus curiae briefs, court practice improvement, CLE, diversity, bar association alliances, banquets, golf outings, Yankees game, young lawyer events, by-laws, sponsorship, the website, and publications. Committee work supports our legal community, and could translate to becoming a director or officer.

On a related note, it's as important as ever for

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DANY membership to grow, and its membership and student outreach committees would welcome further support. These days, several DANY membership categories exist, including for law students. There are both individual and group membership categories, with component levels based on years of practice (for individuals) and firm size (for groups). For very reasonable pricing, group membership enables all attorneys of the group to be considered members.[i] Please visit the "Join DANY" tab of the website for details, and embrace DANY as part of your professional family.

Much good has occurred with DANY in the past couple of years, despite the COVID-19 pandemic, and there's plenty to look forward to. In Spring 2021, DANY became among the select number of bar associations which screen and rate candidates for appointment to the New York Court of Appeals. That momentous process continued in Fall 2021, and is in progress as of this writing, with thanks to the judicial screening committee.

Numerous other core DANY functions have been happening or soon will. The annual Virtual 4K Run initiative was successfully completed in February 2022. This event arose during the pandemic as a way to encourage exercise while raising funds for a good cause. In the latest sequel of this past winter, participants ran or walked five kilometers of their choosing, and generated proceeds for The Food Bank of New York City and the DANY Scholarship Fund.

CLE courses have continued unabated, with compelling subject matter such as defending bad faith claims (January 2022), combating anchoring (February 2022), interrupting implicit bias (March 2022), labor law update (June 2022), and insurance coverage (September 2022). In Spring 2022, DANY started its ambitious trial academy program, originated and led by Claire Rush, which is ongoing at this time.

DANY has continued engaging members and guests with in-person events. In June 2022, the Young Lawyers Committee again presented its golf and networking event at Chelsea Piers. DANY had its latest exhilarating golf outing in July 2022, at Inwood Country Club. And we went to the Bronx in August 2022 for our annual Yankees Game.

Everything I've mentioned would not be possible without the tremendous support of members, guests and sponsors. The sponsors stand ready to enhance your professional practices, and are typically identified on DANY's website under the "Sponsors" tab and in event recaps on the main page.

During the evening festivities of our last golf outing, Judge Christopher Chin graciously presided over an installation ceremony, since most DANY officers assume new roles annually. We thereby recognized, among other things, Claire's new term as president, and mine as board chair, with my presidency having concluded. It has truly been an honor and privilege to fulfill that position, and thank you past presidents for your counsel and efforts; please see who they are via the link at the website's "about" / "leadership" tabs. Today's DANY is largely the by-product of their efforts, for which I am forever grateful.

I wrote this column days before the DANY Awards Banquet of November 1, 2022. Pre-pandemic, DANY would present two banquets annually, one to recognize outstanding judges and practitioners for their service, and the other to honor the past presidents. COVID-19 had interrupted this cherished tradition, but it now resumes magnificently at The View at Battery Park, with superlative honorees, and an installation of new esteemed Board members. I express my appreciation to everyone who made this happen, including past presidents Heather Wiltshire Clement and Jim Begley, and our excellent executive director, Connie McClenin.

Finally, I wish to thank the Board, the membership, and the sponsors and other supporters, who make the total DANY experience so exceptional - let's keep it going, as great as ever.

Very Truly Yours, Bradley J. Corsair

* Bradley J. Corsair is a trial attorney with Kowalski & DeVito in New York, New York. He is DANY's immediate past president and current chair of its board of directors, and contributes to its publications, CLE, membership, technology and golf outing committees.

[i] The main distinction between individual and group membership concerns voting, i.e. an individual member has one vote, and a group membership likewise has one rather than a multitude of votes.

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The Snake Attack Phenomenon: The Courts Must Stop Overlooking And Facilitating The Continued Poisoning of Our Jury System

BY: TIMOTHY R. CAPOWSKI, JOHN F. WATKINS AND SOFYA UVAYDOV*

Our jury system has been under assault from an ever-growing tidal wave of improper trial tactics that have no place in our court rooms, but have directly triggered the last decade's cascade of nuclear verdicts.[i] These tactics began two decades ago, but mushroomed into prominence in 2009, when, in a remarkably successful marketing scheme in the form of a book, they were re-branded as the "Reptile Theory".[ii] While the so called Reptile book (now selling on Amazon in paperback for $1,683.99) is not the only how-to or Bible for these tactics, its vivid imagery stands out forefront, making it the byname and catchall for this breed of improper tactics. In keeping with the plaintiff bar's apparent rejection of mammalian trademarks, from this point onward we will refer to the entire swath of these improper tactics as the "Snake Attack Phenomenon" or "Snake Attacks" (except when specifically discussing a reptile-based item). We call it a phenomenon simply because of the remarkable fact that it should never have existed in the first place.

In a nutshell, the Snake Attack Phenomenon is this: enterprising members of the personal injury bar took a variety of tactics and themes designed to poison the sanctity of the jury box with improper and punitive considerations that Courts had long precluded from the courthouse – on the combined bases of relevancy and prejudice – and successfully re-marketed and re-branded many of them with a new pseudo-scientific label to provide them with an unwarranted patina of propriety. Even more importantly, this brilliant re-marketing phenomenon was formalized and undertaken in plain sight in a 2009 how-to booklet[iii], along with subsequent seminars and pamphlets, published to (a) maintain the pretext of legitimacy, and (b) ensure that it would be available to, and utilized by, plaintiff attorneys nationwide.

**By formalizing this strategy, and explicitly encouraging its use to elicit sustained objections on the basis that sustained objections further the strategy[iv], its proponents laid bare their true purpose – they had identified a flaw, a blind spot in the judicial system that they were determined to exploit, and if it was going to work it needed to be undertaken on a coordinated national level.*

The Snake Attack is strategic, targeted, and, most importantly, *intentional* in seeking to get away with behavior traditionally labeled as misconduct with a gloss of deniability. It is unabashedly and explicitly intended to displace jurors from their roles as dispassionate, objective and unbiased factfinders rendering fair liability verdicts and fair compensation, and to inflame, prejudice and frighten jurors into a mindset of punishing defendants and sending messages to defendants and society using the tools of liability and outsized damages verdicts – while skirting the letter of the law prohibiting such conduct. This how-to program for breaking well-established rules to obtain specific outrageous results is the functional equivalent – using the criminal law context – of teaching prosecutors "*How To Get Away With Brady Violations To Keep Bad People Off Our Streets*".

Nevertheless, due to a combination of factors discussed below, the Snake Attack was not immediately laughed at, looked down upon, rebuffed, chastised, and eliminated from our courts.[v] Instead, through the application of outdated judicial norms, our courts have essentially accepted that one can flout the spirit of the law freely, as long as some argument tethers you to the letter. In other words, the engineers behind these tactics were proven fundamentally correct: courts will

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* *Timothy R. Capowski, John F. Watkins and Sofya Uvaydov are appellate partners at Coffey Modica O'Meara Capowski, LLP.*

The Snake Attack Phenomenon: The Courts Must Stop Overlooking And Facilitating The Continued Poisoning of Our Jury System

not chastise, but reward, attorneys who press the edge between zealous advocacy and misconduct.

Unfortunately, this boundary-pushing has an erosive and corrosive effect. As the Snake Attack has steadily grown in usage over the last decade to the point that it has become the ubiquitous accepted norm of tactics presided over by our judiciary, it is no longer even seen by many as boundary-pushing. This is shocking given that the tactics in question cannot seriously withstand the scrutiny of a proper relevancy and unfair prejudice objection. When objections are raised mid-trial, the judicial analysis is frequently either inadequate or consists of an exasperated overruled objection on the basis of "*C'mon-counselor-I-hear-that-comment-all-the-time*", rather than a cogent dissection of the objected-to content under the microscope of relevance and prejudice. Even worse, this facile analysis utterly ignores the significantly more important barometer of intent.

Put simply, Snake Attack practitioners have successfully moved the bar of acceptable conduct to include tactics that were previously unthinkable. They have done this through concerted pressure on the courts. We consider that it is high time to push back, and hereby invite the reader to our dissection of the Snake Attack, so that the process of cleaning up our jury trials and restoring the sanctity of the jury can start immediately.

The Ten Most Common & Objectionable Snake Attacks (aka "Hitting Below the Belt")

What are Snake Attacks? They are any tool in the plaintiff attorney's arsenal that motivates a juror to return a verdict based on improper considerations and contrary to their well-settled role. The juror's role description always includes the descriptive terms "objective", "dispassionate" and "fair". Conversely, the role description always specifically excludes "passion", "prejudice", "anger", "fear" and "subjectivity".

Of course, "[t]he law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury." Martinez v. State, 238 Cal.App.4th 559, 566, 189 Cal.Rptr.3d 325 (2015). Remarkably, hitting below the belt is the defining goal of Snake Attacks. These attacks include:

(1) invocation of the "golden rule";

(2) "send a message" or deterrence attacks;

(3) "failure to take responsibility" attacks and "HDTD" (aka "how-dare-they-defend"[vi] or "full justice" or "100% justice") attacks on defendant;

(4) reptile attacks, or more specifically, references to nebulous "safety rules" and "isn't safety good?" and "isn't safer better?",[vii] the jury's ostensible role as the "conscience of the community", and/or allusions to the risk of an accident similar to plaintiff's occurring in the future or to the jurors or their loved ones, or to "full measure of justice" or "100% justice" attacks;[viii]

(5) "hired gun" or "dream team" attacks on defendant's experts;

(6) "anti-corporate animus" attacks, or wealth or insurance-based attacks, postulating regarding defendant's state of mind or motivations, including casting aspersions at defendant for seeking a "discount" or that defendant's position seeks to "cheap out" on plaintiff's recovery, or personal expressions of counsel's personal emotional response or "disgust", or that a defense is "insulting" or that the jury should be "insulted" or "disgusted" or "angered" or "saddened" by the defendant or its defenses;

(7) personal "vouching" for facts, testimony or witness credibility, "info-questions", and speaking objections;

(8) improper "unit of time" or mathematical guides for fixing damages for pain and suffering;

(9) *ad hominem* attacks on opposing counsel; and

(10) "improper anchoring" and related vouching commentary for the anchor.

Without belaboring the point, none of the foregoing themes or comments can withstand a simple relevancy or unfair prejudice objection. Indeed, same is self-proving, as the continued pressing by an advocate of an irrelevant or inflammatory topic or question is necessarily undertaken by that advocate precisely because it is obviously prejudicial to their adversary's cause. More importantly, since there is ample settled law excluding all of the foregoing misconduct from the courthouse[ix], a reader would be well within their

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The Snake Attack Phenomenon: The Courts Must Stop Overlooking And Facilitating The Continued Poisoning of Our Jury System

rights to query why it has been growing pervasively worse in our jury trials, and why it is tolerated by our courts. The answer is not really all that complicated, and is familiar to anyone who follows politics: the unthinkable, when made commonplace, can become the accepted – especially if no one fights back.

Reasons Why Courts Have Failed To Eliminate And, In Fact, Have Facilitated Snake Attacks: Deferred Rulings And The Five Horsemen Of The Apocalypse

Our court system remains stuck in a rigid mindset that carries a number of outdated assumptions. One of them is that attorneys are automatically assumed – as officers of the court – to have a good-faith basis for their words and actions. A corollary to this is that trial and summation excesses carry with them a presumption of unintentionality, and are a product of an advocate's passion and emotion toward the conclusion of their client's case. Snake Attacks have only survived this long by taking unfair advantage of that presumption. Each Snake Attack attorney is awarded a fresh, clean slate by our judges, concealing the fact that the attorney is advancing a repeated, pre-planned and coordinated strategy designed to exploit weaknesses in the trial system. This is wrong.

Deferred Rulings: Defendants around the country have in recent years begun successfully pre-objecting in pre-trial motions *in limine* to the intentional Snake Attack (or Reptile) misconduct that they know they will be confronting at trial.[x] Even though they cannot deny that such tactics or themes constitute irrelevant and unfairly prejudicial misconduct, responding plaintiff counsel invoke the "broad latitude" doctrine and argue that such objections are premature, overbroad, too vague and ill-defined, and should instead be handled on an "as-it-happens-basis" during trial. Surprisingly far too many courts agree, and remain inexplicably reluctant to instruct counsel to follow settled law of trial conduct or face consequences, and merely offer to rule contemporaneously. This is an outright win for the counsel utilizing Snake Attacks, as a trial court's delayed/deferred decision is a ruling to allow the poison to enter the jury box. Don't take our word for it; the Reptile how-to pamphlet specifically advocates for this and acknowledges that a sustained objection to a loaded Snake Attack question is a win for the plaintiff counsel who asks it.[xi] That does not, however, mean that such *in limine* motions are useless if denied, as they do serve to educate the court, and courts are in a better position to rule on subsequent contemporaneous objections.[xii]

The Five Horsemen of the Apocalypse: Defendants' attempts at relief from Snake Attacks have been routinely defeated for more than a decade by the misapplication of what we call the "Five Horsemen of the Apocalypse": the doctrines of harmless error, broad latitude, appellate preservation, curative charges, and, the fifth and latecoming Horseman, the Pandemic backlog (which renders courts less inclined to order new trials that will add to it).[xiii] These factors have undermined individualized efforts to combat Snake Attack misconduct. It is especially noteworthy that these doctrines (except for the backlog) were born of a far different and more genteel age of litigation, and are routinely misapplied in modern practice to forgive and overlook this particular misconduct.

What the courts fail to recognize is that this misconduct is strategic, repetitive and undeniably *intentional*, thereby rendering these doctrines a poor tool to restrain it. For example, courts routinely deny relief from this particular misconduct due to lack of sufficient preservation for appellate review. By doing so, the courts are affirmatively choosing to punish for a procedural omission (lack of an objection) while rewarding for – and perpetuating – the undeniably vastly greater crime of intentional attorney misconduct.[xiv] The rote elevation of form over substance could not be more stark – or more damaging to our institutions and society.

The same obtains for the sister doctrines of harmless error and broad latitude, as each in modern application ignores the undeniable intentionality of the misconduct that they routinely forgive.[xv] While, of course, improper summation comments are frequently found in all areas of the law, and emanate from both the plaintiffs' and the defendants' bar with too-frequent regularity, the Snake Attack misconduct is nevertheless a unique species. When counsel elects to pursue Snake Attack summation style, how can it be remotely fair or equitable for a

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court to apply harmless error analysis, which places the burden of proving harm or prejudice from an improper comment on the movant, when it is unmistakably obvious that the improper comment had no other (let alone legitimate) intent but to cause harm or prejudice?

Think for instance of a police shooting case in the Bronx where plaintiff counsel on summation tells the jury that through the verdict "you will speak for the community", if the City "get[s] a pass, it will send the wrong message . . . to all the police officials", "there will be no incentive to avoid shooting as a first resort" and to "think of a friend or family member pulled over, panicking, because an officer is intimidating, reaching for a document or something." If these comments had been made by a prosecutor seeking a criminal conviction, the impropriety would be self-evident and a mistrial all but certain – yet the identical comments in a personal injury case were sanctified by the Court as being, at most, harmless error.[xvi]

Wouldn't the sanctity of our jury system be better and more fairly upheld by placing the burden on the party uttering the improper comment to *disprove* a presumption of prejudice? The answer is obvious – of course it would. It would also make our system more efficient, reduce motion practice and appeals, and sanctify and declutter our courts. It will also make our system more accessible to those plaintiff-litigants who properly refrain from Snake Attacks as a practice model.

The same obtains for curative charges, given that "if you throw a skunk into a jury box, you can't instruct the jury not to smell it." Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962); see also Bagailuk v. Weiss, 110 A.D.2d 284 (3d Dep't 1985). Modern empirical research shows that instructions to disregard an improper remark are of a doubtful utility at best.[xvii] Their utility is doubly doubtful where the intentional nature of the prejudicial remark is ignored by the court. Furthermore, many practitioners believe that the curative charge only works to increase the unfair prejudice by reminding and focusing the jury on a remark that may resonate with the lay jury on a visceral level but be completely improper for them to consider on a legal level.

For these reasons, the intentionality must be emphasized and documented in every instance if there is to be any chance of eliminating it from our jury system. But clearly, the long-overlooked key to both sets of reasons is intentionality.

The Ten Most Common & Objectionable Snake Attacks (aka "Hitting Below the Belt")

Flush from their successes in the last decade attributable to Snake Attacks (see fn. i), the plaintiff bar has not been sitting still during the pandemic slowdown in our courts. To the contrary, they have been re-tooling and more extensively distributing their strategies to inject the Snake Attack poison at earlier phases of litigation than just summation, including during witness and party depositions, jury *voir dire*, and even opening statements. There have also been recent reports of Snake Attack "checklists" shared between various plaintiff firms to assist in the deposition and trial phases and ensure that these ever-so-valuable tactics are not overlooked or underutilized. In short, the re-opening of our courts will usher in an even darker day until and unless the Snake Attack is finally stopped in its tracks by attorneys forcefully arguing that these attacks cross the line and cannot be permitted.

The Path Forward

Our proposals for the path forward are simple and will work if undertaken by our courts. Defendants need to object relentlessly (before, during and after) and the courts need to take control of the trials before them, and demand that the attorneys before them honor strict adherence to the rules of decorum and relevance.[xviii] The courts need to additionally issue sanctions with teeth to discourage recurrence of Snake Attacks. Ordering a single mistrial and sanctioning a plaintiff counsel with his adversaries' attorneys' fees and costs arising from a several week trial, post-trial motions and appeals, will immediately tone down, if not eliminate, the cacophony of nonsense that currently pervades our courts.

Should this occur, we can all get back to good old-fashioned lawyering without the Snake Attacks, and have our duly sanctified juries return actual jury verdicts on liability and just and fair compensation

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that are not the product of improper misleading comments or unfair manipulation. The efficiencies to be gained include verdicts consistent with the underlying goal of the search for truth, necessitating less motion and appeal practice clogging up our courts, which will further help our courts in getting out from under the pandemic backlog.

Or we can all continue allowing a very clever marketing scheme to poison and ruin our jury and court system.

[i] Research detailing the last decade's nuclear verdicts (2010-present) in New York is set forth in an Excel spreadsheet that we have previously made available publicly in the NYLJ and multiple other forums and is now updated periodically on our firm's and our prior firm's website. See Timothy R. Capowski, Jonathan P. Shaub, "Improper Summation Anchoring Is Turning The New York Court System On Its Head And Contributing To The Demise Of New York State", NYLJ (April 28, 2020). https://www.law.com/ newyorklawjournal/2020/04/28/improper-summation-anchoring-is-turning-the-new-york-court-system-on-its-head-and-contributing-to-the-demise-of-new-york-state/ (analyzing nuclear verdicts in New York from 2010-present and providing statistical research chart). Up-to-date copies will also be provided upon request. This research project was conceptualized and primarily undertaken and compiled by Tim Capowski. Special thanks are in order, however, for the hard work put in by our colleagues Jack Watkins, Jennifer Graw and Kharis Lund, and for the able assistance of former colleagues Jon Shaub and Katy Papa. Please note that our office is currently researching and finalizing a spreadsheet containing the summation remarks underlying each nuclear verdict (to the extent transcripts are available) that will also be made publicly available. If you have access to the transcripts of any of the nuclear verdicts listed, please feel free to forward to us to make our job easier.

[ii] See David Ball & Don Keenan, Reptile: The 2009 Manual Of The Plaintiff's Revolution (2009) (currently listed on Amazon.com in paperback for $1,683.99) - https://www.amazon.com/David-Ball-Reptile-Plantiffs-Revolution/ dp/B00N4FOKZ4/ ref=monarch_sidesheet; David Ball & Don Keenan, Reptile In The Mist And Beyond (2013) (last listed on Amazon.com for $985.00 but currently unavailable) – https://www.amazon.com/REPTILEMistBeyond DavidBall/dp/0977442578/ref=sr_1_3? dchild=1&keywords=reptile+theory+book&qid=1622037604&sr=8-3

[iii] id.

[iv] Plaintiff counsel are expressly taught by the book to start the process during voir dire (id. at pp. 102-108, 258, 67, 80, 95, 99, 121, 139, 158) and openings (id. at pp. 129-137 [entire chapter 11], 108-109) and to press for deferred rulings on the Snake Attacks as they occur, and that forcing defense counsel to object before the jury is part and parcel of the Reptile strategy, which specifically intends to draw objections on the theory that "[a] defense objection will imply there's something to hide" (id. at p. 58).

[v] Troublingly, we have spoken with experienced and recently-retired judges who have no idea what Reptile tactics are, despite that they have been repeatedly used in front of them for over a decade.

[vi] The "how-dare-they-defend" and "refusal to accept responsibility" Snake Attacks are examples of a prototypical sales technique oft associated with former President Donald Trump known as "selling past the sale" or "thinking past the sale" that raises grave constitutional concerns (by denigrating defendant's right to recourse to the courts to contest plaintiff's claims). It is a variation of a psychological tactic dubbed by psychiatrist Jennifer Freyd "DARVO" – "deny, attack, reverse victim and offender." A person accused, for example, of using a racial slur might say "I'm not a racist, it's terrible people like you who make those kind of accusations, if anything, you're the racist for accusing me of racism." A famous example of DARVO in action was then-candidate Donald Trump eloquently responding to Hillary Clinton's statement that he was Vladimir Putin's "puppet" by saying "*No puppet, no puppet, you're the puppet.*"
In the context of "how dare they defend", DARVO takes the form of accusing the defense of lying, then expressing disgust that the defense would say anything, and painting the very act of defense as an act of aggression. "I couldn't believe it when they told you plaintiff exaggerated his injuries. The arrogance – the gall of it, to do that instead of taking responsibility. It's big corporations like this that are ruining America by accusing hard-working men like my client of exaggerating their injuries."

[vii] The familiar "priming" Reptile terms inevitably invoke commonsense lay notions intended to have the jury circumvent, enlarge or ignore the applicable and controlling legal duties, and include: "always", "never", "risk", "danger", "community", "safety", "public safety", "needlessly endanger"; "safety is always the top priority", "danger is never appropriate", protection is always a top priority", reducing risk is always a top priority", "sooner is always better", "more is always better".

[viii] The oft-repeated attack that the jury needs to award "full justice", "full measure of justice" or "100% justice" is a subversive theme and comment that must be precluded as well. This is the quintessential Reptile remark that is repeated throughout trial, and is always tethered to ensuring "safety", plus defendant's "failure to take full responsibility" and lack of "accountability", which can only be ensured through "full liability" and a "substantial" damages award. The Reptile book specifically lays this out and directs plaintiff counsel to utilize "justice" as code

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representing all of these improper themes: "In trial, 'justice' helps mainly when you show that justice equates with safety for the juror's Reptile. **** You will bring jurors to figure out that community safety is enhanced by means of justice. You are not asking jurors to sacrifice justice for the sake of safety. You instead show that justice creates safety." See David Ball & Don Keenan, *Reptile: The 2009 Manual Of The Plaintiff's Revolution* (2009), p. 19.

[ix] We are happy to provide string cites of case authorities chastening litigants and awarding relief from these tactics upon request, but we have also previously written extensively on the subject of these Snake Attacks, and provided helpful lists of case authorities for excluding same from the courtroom. See Timothy R. Capowski, Jonathan P. Shaub, Joseph J. Beglane, Jennifer A. Graw, "The Punitive "Failure To Take Responsibility" Trope Must Be Entirely Policed Out Of Tort Actions For Compensatory Damages", N.Y.L.J (November 13, 2020), https://www.law.com/newyorklawjournal/2020/11/13/the-punitive-failure-to-take-responsibility-trope-must-be-entirely-policed-out-of-tort-actions-for-compensatory-damages/.

Timothy R. Capowski, John (Jack) Watkins, Jonathan Shaub, "Ahead to the Past (A Three-Part Series): The Evolution of New Rules of Engagement in the Age of Social Inflation and Nuclear Verdicts", NYLJ (July 13, 20 and 27, 2020), https://www.law.com/newyorklawjournal/2020/07/13/ahead-to-the-past-the-evolution-of-new-rules-of-engagement-in-the-age-of-social-inflation-and-nuclear-verdicts/ https://www.law.com/newyorklawjournal/2020/07/20/ahead-to-the-past-part-ii-of-iii-the-evolution-of-new-rules-of-engagement-in-the-age-of-social-inflation-and-nuclear-verdicts-currently-existing-tools-for-the-new-york-bench-and-bar-to-repair-the/ https://www.law.com/newyorklawjournal/2020/07/27/ahead-to-the-past-part-iii-of-iii-the-evolution-of-new-rules-of-engagement-in-the-age-of-social-inflation-and-nuclear-verdicts-course-correcting-the-culture-of-civil-litigation-away-from-punishmen/

Timothy R. Capowski, Jonathan P. Shaub, "Improper Summation Anchoring Is Turning The New York Court System On Its Head And Contributing To The Demise Of New York State", NYLJ (April 28, 2020). https://www.law.com/newyorklawjournal/2020/04/28/improper-summation-anchoring-is-turning-the-new-york-court-system-on-its-head-and-contributing-to-the-demise-of-new-york-state/ (analyzing nuclear verdicts in New York from 2010-2020 and providing statistical research chart).

Michael Hoenig, "Attorney Misconduct In Opening Statements", https://www.herzfeld-rubin.com/blog/attorney-misconduct-in-opening-statements/

[x] Courts have begun more regularly precluding efforts to inject Snake Attacks as improper and irrelevant, having no probative value as weighed against the substantial danger of unfair prejudice, misleading the jury, confusing the issues, and as diverting the jury from its proper purpose. See Russell v. Dep't of Corr. & Rehab., 72 Cal. App. 5th 916 (2021); Garth v. RAC Acceptance E., LLC, No. 1:19-CV-192-DMB-RP, 2021 WL 4860466 (N.D. Miss. Oct. 18, 2021); Retamosa v. Target Corp., No. CV 19-5797 DSF (JCX), 2021 WL 4499236 (C.D. Cal. May 4, 2021); Doe v. Bridges to Recovery, LLC, No. 2:20-CV-348-SVW, 2021 WL 4690830 (C.D. Cal. May 19, 2021); Jackson v. Low Constr. Grp., LLC, No. 2:19-CV-130-KS-MTP, 2021 WL 1030995 (S.D. Miss. Mar. 17, 2021); Est. of McNamara v. Navar, No. 2:19-CV-109, 2020 WL 1934175 (N.D. Ind. Apr. 22, 2020), reconsideration denied, No. 2:19-CV-109, 2020 WL 2214569 (N.D. Ind. May 7, 2020) McClain v. Torres, 2020 Colo. Dist. LEXIS 2492, at *1, and 2134 (Dist.Ct., La Plata Co. 2020); Goodreau v. Hines, 2020 Colo. Dist. LEXIS 2560, *1 (Dist.Ct., Denver Co. 2020); Martinez v. Catholic Health Initiatives Colo., 2020 Colo. Dist. LEXIS 2977, *1, and 2247 (Dist.Ct., Adams Co. 2020) ("finding that Plaintiff could not offer golden rule or reptile theory arguments at trial because such arguments would incorrectly instruct the jury as to its role in this case"); Cox v. Swift Transp.

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Co. of Arizona, 2019 US Dist LEXIS 132115, at *31 (N.D. Okla. Aug. 7, 2019); Williams v. Lawrence & Mem. Hosp., Inc., 2020 Conn. Super. LEXIS 491, *18 (Conn. Super. Ct. 2020) (precluding reptile theory efforts, holding that "[t]he strategy attempts to invoke a juror's survival instinct and in so doing, create safety rules, invite the jury to use common sense to determine the standard of care, and instill a belief in the jurors that they are the 'conscience of the community.' All of these improperly state the law regarding a physician's duty of care, and the prevailing standard of care."); Biglow v. Eidenberg, 369 P.3d 341 (Kan. Ct. App. 2016); Boyer v. Knudsen, 2020 Colo. Dist. LEXIS 779, *2 (Dist. Ct. Denver Co. 2020) (precluding reptile theory arguments on basis that "[a]ppeals to emotion, fear, or personal safety are improper. Defendant has admitted liability. The only issue for the jury is to determine what, if any, damages are appropriate based on the evidence presented at trial."); Wertheimer H., Inc. v. Ridley USA, Inc., 2020 U.S. Dist. LEXIS 34846, at *8 (D. Mont. 2020); Estate of Reaves v. Behari, 2019 Fla. Cir. LEXIS 9605, *1 (Fla. Cir. Ct., 2019); Cox v Swift Transp. Co. of Arizona, 2019 U.S. Dist. LEXIS 132115, at *31 (N.D. Okla. Aug. 7, 2019) ("Plaintiffs are cautioned that any argument that asks the jurors to reach a verdict solely on their emotional response to the evidence will be prohibited, and plaintiffs' arguments should be focused on the facts that are admissible at trial and the law applicable to their claims."); McComb v. C G & B Enters., 2019 Nev. Dist. LEXIS 2157, at *2 (D. Nev. 2019); Brantley v. UPS Ground Frgt., Inc., 2019 U.S. Dist. LEXIS 234231, at *4 (E.D. Ark. July 3, 2019); Maher v. Locality Llc, 2019 Colo. Dist. LEXIS 410, at *13 (Dist.Ct., Larimer Co. May 17, 2019); Roman v. Msl Capital, LLC, 2019 U.S. Dist. LEXIS 64984, at *15 (C.D. Cal., 2019); Woulard v. Greenwood Motor Lines, Inc., 2019 U.S. Dist. LEXIS 131701, at *20 (S.D. Miss., Feb. 4, 2019); Navab v. Young Choi, 2018 Cal. Super. LEXIS 24820, at *2 (Cal. Super. Ct. Nov. 7, 2018); J.B., 2018 U.S. Dist. LEXIS 19689, at *6-7; Perez v. Ramos, 429 P.3d 254 (Kan. Ct. App. 2018); Higbee v. Anesthesia Servs. Assocs., P.C., 2018 Mich. Cir. LEXIS 1648, at *1 (Mich.Cir.Ct. Sept. 26, 2018); Everett v. Oakland, 2018 Mich. Cir. LEXIS 2517, at *1 (Mich.Cir.Ct. Aug. 8, 2018); Ramirez v. Welch, 2018 Tex. App. LEXIS 6101, at *43 (Tex. Ct. App. Aug. 6, 2018) (rejecting plaintiff's objection to defendant's closing argument accusing his counsel of attempting to manipulate the jury through the reptile theory); Brooks v. Caterpillar Global Mining Am., 2017 U.S. Dist. LEXIS 125095, *24 (W.D. Ky. 2017) (granting defendant's motion in limine to preclude plaintiff from introducing Reptile Theory at trial and to preclude plaintiff from asking the jury to act as the conscience of the community and "send a message" with its verdict); Tristan v. Bayada Home Health Care, Inc., 2017 Colo. Dist. LEXIS 28, at *2 (Dist.Ct., Denver Co. Feb. 1, 2017); Pracht v. Saga Frgt. Logistics, LLC, 2015 U.S. Dist. LEXIS 149775, at *4 (W.D.N.C. Oct. 30, 2015); Hopper v. Obergfell, 2013 Colo. Dist. LEXIS 249, at *1 (Dist.Ct., El Paso Co. Oct. 29, 2013).

[xi] See fn. iv.

However, one court would have none of this claptrap and granted the defendant's motion to preclude in an altogether classic manner: " 'Golden Rule' and 'Reptile Complex' theories aside, what Interstate is asking for in its motion in limine is an order precluding Aspen American from making comments or statements to the jury, explicit or implied, that are intended to appeal to the jury's fear or emotion as outlined in Interstate's memorandum. Such statements or comments are wholly inappropriate and improper and the Court will not tolerate them, whether they are called 'Golden Rule' arguments or 'Reptilian Complex' arguments or 'Please Find in Our Favor Because Defendant is Mean' arguments." Aspen Am. Ins. Co. v. Interstate Warehousing, Inc., 1:14-CV-383, 2021 WL 3616161, at *17 (N.D. Ind. Aug. 14, 2021).

[xii] The Motion in Limine, 21 Fed. Prac. & Proc. Evid. § 5037.10 (2d ed.) ("the motion [in limine] furthers 'growth and development' of the law of evidence by allowing the parties to more thoroughly brief the law and the court to consider the arguments more thoroughly than would be possible in the heat of trial thus producing better rulings and a record for appeal that will permit better exploration and resolution of subtle points.").

[xiii] See also https://www.law.com/newyorklawjournal/almID/1202778764118/Improper-Argument-at-Trial-Scrutinizing-Counsels-Conduct/?mcode=1380566174563&curindex=47&curpage=1

[xiv] For example, in Perez v. Live Nation, 193 A.D.3d 517 (1st Dep't 2021), AD E-Courts Dkt. No.: 2020-03237, the defendant provided a lengthy written motion in limine pre-objecting to the improper and inflammatory summation that it knew would be given by plaintiff's counsel, and providing extensive supporting case precedent. Defendant even provided specific examples from an improper summation that the same plaintiff counsel had delivered in a similar damages-only trial involving analogous injuries. The trial court denied defendant's motion to instruct the plaintiff to refrain from such misconduct and instead demanded contemporaneous objections. The plaintiff attorney proceeded to give the exact improper summation predicted, and the defense attorney failed to contemporaneously object. However, counsel for the defendant did so following the summation, and further submitted a written motion for a mistrial based on the summation misconduct. The trial court found the objections unpreserved by contemporaneous objection, and the First Department affirmed, even though the precise misconduct had been predicted and objected to

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Click Bait: An Update on Social Media Discovery

BY: BRIAN MARK*

Imagine unearthing a TikTok of the plaintiff in your personal injury lawsuit dancing at a costume party in a Manhattan nightclub within six months following her accident. Or uncovering a private Facebook message by the alleged permanently injured plaintiff reveling in the condition of the slopes during a recent ski trip to the Catskills.

Social media is a dominant force in our lives today, and that desire for likes and followers can have a drastically negative impact on a plaintiff's claim (despite their counsel's dire warning to stay off social media).

A properly tailored social media discovery can yield tremendous results for the defense of your claim. In New York, discovery rules are broad and provide for full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of burden of proof. CPLR 3101(a). In general, a public social media account is discoverable. But what about private messages or posts?

The Court of Appeals laid the groundwork for broader acceptance of the disclosure of private social media messages in Forman v. Henkin, 30 N.Y.3d 656 (2018). In Forman, plaintiff stated that she previously had a Facebook account on which she posted a bevy of photographs showing her pre-accident active lifestyle, but that she deactivated the account about six months after the accident and could not recall whether any post-accident photographs were posted. Defendant sought an unlimited authorization to obtain plaintiff's entire "private" Facebook account. Plaintiff opposed the motion arguing that defendant failed to establish a basis for access to the "private" portion of her Facebook account because, among other things, the "public" portion contained only a single photograph that did not contradict plaintiff's claims or deposition testimony.

The Court ruled that given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations.

There are two key takeaways from this decision. Firstly, after much back and forth up to the Court of Appeals, the Court did not simply allow for unrestricted access to the entirety of a private social media account, but specifically limited the inquiry to the period of six months following the accident in which plaintiff's social media account was active. Second, the Court required only disclosure of photographs which could depict her lifestyle following the accident, which plaintiff had placed in issue. The significance of the decision is that a request for these photographs was *reasonably calculated to yield evidence material and necessary* to the litigation, specifically, plaintiff's assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become a recluse.

The Court in Forman also provided a road map with three guidelines for future decisions in determining the scope of social media disclosure: (1) Take into account the character of the incident causing the lawsuit and the damages claimed to evaluate whether relevant material is likely to be found on social media; (2) Weigh the possible utility of the information requested against specific concerns, including privacy; (3) Tailored the request by identifying materials to be disclosed while avoiding disclosure of irrelevant information.

In Doyle v. Temco Service Industries, Inc., 172 A.D.3d 554, 98 N.Y.S3d 746 (1st. Dept., 2019), the Appellate Division, First Department unanimously overturned a lower court order denying defendants access to plaintiff's social media accounts. The Court stated that private social media information can be discoverable if it contradicts plaintiff's alleged

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* *TBD*

Click Bait: An Update on Social Media Discovery

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restrictions, disabilities, losses, and other claims. As plaintiff in Doyle alleged loss of enjoyment of life as a result of a slip and fall at work, defendants were entitled to social media discovery to rebut her claims. Smartly, defendants/appellants' counsel in their reply brief limited their demand to seek only plaintiff's post-accident social media records regarding social and recreational activities that plaintiff claims have been limited by her accident. The Appellate Division adopted this language and indicated its consistency with the principles of Forman.

A subsequent decision from the Appellate Division in Abedin v. Palominos Osorio, 188 A.D.3d 764, 136 N.Y.S.3d 92 (2d. Dept., 2020) illustrates the Court's continued broad discretion and liberal viewpoint on social media discovery. In Abedin, a zone of danger claim was presented in which the infant plaintiff witnessed her brother's tragic death when he was struck by a tractor-trailer as the pair was walking across a street. There were allegations of psychological, mental, and emotional trauma, as well as evidence that the infant plaintiff became socially withdrawn and isolated. Defendant eventually demanded authorizations to obtain plaintiff's records from Facebook, Snapchat, and Instagram, which the plaintiffs objected to. The Court ruled that the defendant demonstrated that records from the infant plaintiff's Facebook, Snapchat, and Instagram accounts were reasonably likely to yield relevant evidence regarding the alleged emotional and mental trauma that the infant plaintiff suffered from as a result of the subject accident, which allegedly was, in part, evidenced by her social isolation and withdrawal. The Court cited to Forman in its decision.

To successfully use social media to defend your claim, it is vital not to rely on a simply blanket social media demand at the beginning stages of litigation served along with your Answer. Instead, attempt to tailor your demands in both time and topic, which should lead to a more favorable decision from the Court if the issue needs to be litigated. Prior to a deposition, do a public social media search of the plaintiff to see what he or she has posted publicly. Questions at deposition regarding ownership of social media accounts, activity levels, usage and habits will also play a crucial role in obtaining social media discovery and in turn finding potentially damaging content that the plaintiff may have innocuously decided to share. Skilled technical experts can also conduct social media searches yielding potentially relevant information and help to narrow the scope of your demands. Experts in the use of geosocial data can track movements such as how often a person checks in at the gym, travels outside of their residential county or even runs at their local high school track.

With a variety of potential tools at your disposal, put social media to use in your practice in addition to your daily dose of baby photos and funny cat videos.

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The Changing Landscape of Wrongful Death Law in New York – How the Grieving Families Act Signals a Break from the Past

BY: LEON R. KOWALSKI, ESQ.*

The legal landscape of wrongful death cases in New York is about to significantly transform. There is a developing change in the Wrongful Death Law[1] that anyone litigating wrongful death cases needs to be aware. The changes that potentially could be brought about by the probable new law are momentous. *The Grieving Families Act*[2] has been passed by both the New York State Assembly as well as the New York State Senate and now, at the time of this writing, awaits the governor's signature[3]. The proposed new law brings with it several major changes, three to be exact. Firstly, the newly passed legislation expands the recoverable damages in a case involving an alleged wrongful death to include emotional damages signaling a key change to a law that is 175 years old. Secondly, the much-debated new law also broadens the potential class of those surviving the decedent who may be eligible to recover for a wrongful death as it, in essence, redefines and modernizes what constitutes "family" under the wrongful death law. Lastly, it also enlarges the statute of limitations period for wrongful death cases.

However, first and foremost, if a negligent party is found to be liable for causing a death, the new proposed law will now allow for the recovery of emotional damages, which is something for which the prior version did not allow. The prior version did not allow for any recovery for the emotional loss close surviving family members might experience when a loved one is killed (due to the negligence of another) as it did not permit any award of damages for grief, sympathy, and loss of companionship or consortium[4].

The "old" (and still current as of this writing) wrongful death law awarded compensation for pecuniary loss only. This "past" version of EPTL §5-4.3[5] dictated that a "distributee" can recover compensation for pecuniary injuries resulting from the decedent's death. EPTL §5-4.4(a)[6] currently specifies that the damages as prescribed by EPTL §5-4.3 are "exclusively" for the benefit of the decedent's distributees. The term "distributee" is used specifically in the prior statute. The prior law restricted recovery to what the victim would have financially contributed to certain surviving family members. The newly passed bill allows the "close family members" of wrongful death victims to recover compensation for their emotional anguish. The new law provides compensation for "grief or anguish caused by the decedent's death, and for any disorder caused by such grief or anguish."[7] The prior law was enacted in 1847 and, as will be explained, has remained largely unchanged since shortly thereafter. Proponents of the new bill argue that the 1847 Wrongful Death Law does not place value on the loss of love, affection, companionship, and comfort that a person is deprived of when a loved one dies, and the new law is believed to correct that injustice. The advocates of *The Grieving Families Act* contend that because the current law is restricted to what the victim would have financially contributed to certain family members left behind, that means current retirees, disabled individuals, children and stay at home parents that do not have the benefit of a big salary are unconscionably classified as worthless in the event of a tragedy.[8] They argue that the failure to fix this will "perpetuate a two-system of justice that blatantly favors high-wage earners while neglecting everyone else".[9]

Specifically, the new version of EPTL §5-4.3(a) provides that compensation for the following damages may be recovered:

1. Reasonable funeral expenses of the decedent paid by the persons for whose benefit the action is brought, or for the payment of which any persons for

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whose benefit the action is brought is responsible;

2. Reasonable expenses for medical care incident to the injury causing death, including but not limited to doctors, nursing, attendant care, treatment, hospitalization of the decedent, and medicines;

3. Grief or anguish caused by the decedent's death, and for any disorder caused by such grief or anguish;

4. Loss of love, society, protection, comfort, companionship, and consortium resulting from the decedent's death;

5. Pecuniary injuries, including loss of services, support, assistance, and loss or diminishment of inheritance, resulting from the decedent's death;

6. Loss of nurture, guidance, counsel, advice, training, and education resulting from the decedent's death.

It is important to note that EPTL §5-4.3(a)(3) not only provides recovery for grief or anguish caused by the death of a loved one, but it also provides that compensation may be recovered for "any disorder caused by such grief or anguish". Therefore, it can be anticipated that not only will the level of grief or anguish be the subject of a suit for wrongful death, but also the causation of any disorder that is alleged to be caused by the grief or anguish. Therefore, a surviving close family member who qualifies to recover under the new law may become somewhat of a more traditional plaintiff in a personal injury lawsuit (as opposed to a survivor of the decedent) depending on whether there is a "disorder" alleged under EPTL §5-4.3(a)(3). With that comes a host of legal issues, such as whether the plaintiff is now putting their physical or mental condition "in issue" in the suit. Questions arise such as: Is it a psychological claim? Is there a physical manifestation? What is the burden of proof of such a disorder? Is it within a reasonable degree of medical certainty? What type of experts will be required to prove a "disorder" under the law? Obvious issues will also arise such as to what discovery in such a case will include and what the extent of disclosure there needs to be where there is such an allegation of a "disorder", and whether the defendants in such a case are entitled to authorizations for treatment records, and whether there is entitlement to a physical or psychological examination of the plaintiff by the defendant by an expert depending on the alleged disorder. There is much on the horizon regarding claims of "disorder" under EPTL §5-4.3(a)(3).

The supporters of the new law point to the historical development of the wrongful death statute (or actually, the lack thereof as there has been little change in the law over the last 175 years) and assert that the current law is rooted in antiquated principles and outdated definitions of family, whereas the new law reforms and is consistent with the modern meaning of family. Simply put, the argument for change is that the existing law is outdated and out of touch with current societal norms. The new law is said to bring New York up to speed with the majority of other states in terms of wrongful death recovery. A review of the laws of 50 states finds that 47 states allow wrongful death claims forthe loss of the relationship with a loved one (i.e., claims for loss of consortium and/or loss of society) and 20 states recognize claims for the grief and mental anguish experienced resulting from a wrongful death (i.e., emotional loss). Alabama and New York are the only states that allow neither.[10]

Proponents of the new law argue that when loved ones are lost as the result of an accident, New York law needs to "recognize the emotional suffering of those who loved them most.[11]" They reason that while often that might mean a spouse or a child, there are many surviving close family members who are left out of New York's antiquated wrongful death statute since not every family is built the same way and those surviving deserve compensation based on "bonds of love, not on arbitrary legal designations."[12] Supporters of the newly-passed legislation staunchly argue that the vast majority of other states have amended their wrongful death laws to include emotional loss, yet New York remains tethered to anachronistic language written in 1847.[13] Based upon the survey cited to above, there is support for that argument as New York is one of only two states that do not allow recovery for the loss of companionship or recovery for emotional damages in a wrongful death case.[14] They argue "the current law harshly impacts children, seniors, women, and people of color who are already systemically undervalued in our society" and that "in 2021, nobody's grief should be measured by archaic notions of family breadwinners and their dependents."[15]

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The Changing Landscape of Wrongful Death Law in New York – How the Grieving Families Act Signals a Break from the Past

A look at the history and foundation of the wrongful death law in New York and there is ample ammunition for the arguments for change. What's past is prologue, as they say, and reviewing the wrongful death law's history establishes the context of the debate today. In the case of *Grant v. Guidotti*[16], the history of the New York wrongful death law was adeptly described by the court. The court explained that under the English common law there was no right to recover damages for wrongful death and noted how a cause of action for personal injuries did not survive the death of the injured person or of the tort-feasor.[17] In the nonindustrial society of medieval England, the death of one at the hands of another was usually the result of a homicide for which the defendant was executed and all his property confiscated by the Crown, thus leaving no assets from which the deceased's dependent family could receive compensation for the tort.[18] In 1808, in the case *Baker v. Bolton*, the English court held that a death of a man caused by negligence of another did not give rise to a civil action against the wrongdoer by the dependent members of his family. The court noted that although no reason was given for this conclusion, it was accepted as representing the English common law and was not presented for reconsideration before the English courts until 1873, however by that time it became largely moot with the enactment in 1846 of Lord Campbell's Act (known in England as The Fatal Accidents Act and later in this country as the wrongful death statute).

In the first half of the 19th century (1800's), courts throughout the United States generally followed the *Baker* rule even though it was not clearly part of the English common law at the time of America's independence. There were only a few holdings both before and after *Baker* to the contrary.[19] One belief about why such a rule of law was adopted was that it embodied the ancient common law ideal that "the value of life was so great, as to be incapable of being estimated by money"[20] Another belief was that it was important to ensure the cooperation of the next of kin in a criminal prosecution of the party responsible for the death and by allowing civil recovery that cooperation would somehow be compromised and the compromising of a "vigorous" prosecution of the offending party would be prevented since under the English common law rule of felony-merger, all negligent or intentional homicide was felonious.[21] In modern society, outdated legal ideals such as these are obviously faulty.

The court opined in Grant, that at that time, in the 1800's, the American courts generally adopted the English rule as the common law of this country, even though the courts failed to produce any satisfactory justification for applying the rule here in the United States.[22] They noted that the American courts never made the inquiry whether this particular English rule, which was bitterly criticized in England was applicable to our situation here.[23] By the middle of the 1800's, rapid industrialization along with the growth of the steam railway systems throughout both England and the United States resulted in a large increase in the number of accidents and deaths.[24] Even before the enactment of Lord Campbell's Act in 1846, the State Legislatures of the United States "moved into action in this single field with surprising promptness and often with but little notion of what legal theory, if any, would be appropriate to meet the needs of bereaved families clamoring for assistance".[25] These statutes singled out railroads and other carriers as the entities that would be held responsible for the payment of damages in civil actions where there had been an accidental death.

Gradually, and more particularly after the passage of Lord Campbell's Act, this concentrated attack on railroads and public carriers was transferred into general statutes permitting recovery for wrongful death against any defendant responsible for the deaths.[26] Lord Campbell's Act[27] was also known as the fatal Accidents Act of 1846 and for the first time gave personal representatives the right to bring a legal action for damages, but only where the deceased person had such a right at the time of their death and compensation was restricted to the spouse, parent or child of the deceased. Just one year later, in 1847, New York enacted its first Wrongful Death Statute. An examination of that first New York statute shows that the statute has virtually remained the same since 1847.[28]

Moreover, the law also potentially expands the class of those surviving the decedent who may be eligible to recover for wrongful death. The current (or

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soon to be prior) version of EPTL §5-4.4(a) stated that the damages prescribed by §5-4.3, whether recovered in an action or by settlement without an action, were exclusively for the benefit of the decedent's "distributees". The "distributees" of a decedent are those who can take, per the statute, of the decedent's estate when the decedent dies without a will. Under the new law, surviving close family members, may include, but are not limited to, spouse or domestic partner, issue, parents, grandparents, stepparents, and siblings. It must be emphasized that the new law does away with the use of the term "distributees", which was a more strictly defined class of persons and instead uses the term "surviving close family members" as those of the class of survivors who may be able to recover. The use of the term "surviving close family member" signals a major change. Furthermore, the law specifically states that the finder of fact shall determine which persons are close family members of the decedent based upon the specific circumstances relating to the person's relationship with the decedent. The newly passed bill therefore expands the list of persons entitled to recover beyond the traditional "distributees" as defined by the intestacy law. The legislative intent is clearly to make the class of those able to recover more fluid and more in line with modern societal norms as to what a "family" may be.

The definition and view of "family" today is much different than it was in 1847. That much is obvious as society and the courts have come to recognize "family" as being much broader and much more diverse over the last 175 years. Back then, the New York statute was less protective of surviving "family" in a substantive manner than the English statute, but more protective in that it doubled the limitation period.[29] It should be noted that in the New York statute: (1) the damages were limited to the "pecuniary injury resulting from such death" (while the English statute had no such limitation); (2) the action was only for the benefit of the wife and next of kin (while the English statute included the surviving husband as well[30]); and (3) the statute stated its own limitation period, i.e., "two years after the death of such deceased person" (while the English limitation period was just one year). Moreover, on the heels of the statute being enacted in 1847 came the landmark case of *Green v. Hudson Riv. R.R. Co.*[31] decided by the Court of Appeals 1866, which held that there is no common-law action for wrongful death and that the sole remedy is that which is provided by the New York wrongful death statue. Green has been consistently followed in New York since then32. With the narrowly drawn statute only allowing for pecuniary loss to be awarded to "distributees" and the holding of *Green* handcuffing the court from making changes, wrongful death jurisprudence in New York remained virtually stagnant until now, with the Courts ruling continuously that a wrongful death cause of action could only be bestowed upon survivors or amended by the Legislature.

The Grieving Families Act is the Legislature's way of staying consistent with the Court's intent on expanding damages in wrongful death cases. It is a tearing away from the long history that narrowed recovery in this state to pecuniary loss being the only measure of damages in a wrongful death case. This intent of the court was seen clearly, very recently, in the Court of Appeals decision in *Greene v. Esplanade*[33]. In Greene, the Court of Appeals expanded the right of a bystander to recover under the "zone of danger" theory in a wrongful death case. At the heart of the matter was the issue of whether a grandparent was immediate family or not. The court concluded that a grandparent is the immediate family of a grandchild. As such, the Court held that a grandparent is entitled to recover under the "zone of danger" theory.

The case involved the terrible death of a 2-year-old child resulting from pieces of a building facade that had broken off and fallen onto her. As debris suddenly fell from the building, the child's grandmother, the plaintiff in the suit, was standing next to her and was herself struck by falling debris. Unfortunately, the child was killed as result of the injuries she sustained. The grandmother had initially filed a lawsuit based on two causes of action for negligence and wrongful death. However, the grandmother then moved to amend the complaint to add another cause of action based on negligent infliction of emotional distress pursuant to the "zone of danger" doctrine. [34] Before *Greene*, the "zone of danger" rule was applied to allow one who is "threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress flowing only from the viewing

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of the death or serious physical injury of a member of that person's immediate family". The term "immediate family" was at the center of the legal dispute in the *Greene* case. The court noted that they were not being asked to "fix permanent boundaries of the immediate family." But, instead, their task simply was to determine "whether a grandchild may come within the limits of her grandparent's immediate family, as that phrase is used in zone of danger jurisprudence."[35] In *Greene*, the court held that the grandchild comes within those parameters (of immediate family).

The court further noted that consistent with their historically circumspect approach expanding liability for emotional damages within zone of danger jurisprudence, the increasing legal recognition of the special status of grandparents, shifting societal norms, and common sense, they concluded that plaintiff's grandchild is "immediate family" for the purpose of applying the zone of danger rule.[36]

The Court of Appeals decision in *Greene* is important in that the court is willing to open the class of family members who may be eligible for emotional damages to judicial interpretation. The new law follows suit. The new law specifically states that the finder of fact shall determine which persons are close family members of the decedent based upon the specific circumstances relating to the person's relationship with the decedent. Interestingly, acting almost as a precursor to the new law, in *Greene*, the court seemed to move away from the idea of a fixed definition of "immediate family" as it emphasized that they were "not being asked to fix permanent boundaries of the "immediate family,"[37] After emphasizing a desire to go away from drawing a line or enumerating specific class that would make up an immediate family[38], the court then stated that "our evolving zone of danger field jurisprudence is not the only development in the law relevant to our analysis.[39] The court then pointed out in recent years they have concluded that an unmarried, same sex partner could adopt the partner's biological child[40] and acknowledged that the definition of parent, which previously excluded a partner without a biological or adoptive relation to the subject child had "become unworkable when applied to increasingly varied familial relationships".[41]

While it can be argued that the *Greene* decision would apply only to "zone of danger cases" and not all wrongful death cases, the court's philosophical change in broadening the class of those who can recover damages in a wrongful death case is apparent in their refusal to establish an outer boundary for the definition of immediate family and providing precedent for that ideal to be applied in other areas of law. Granted, the court could have done away with the "immediate family" standard altogether, considering that the "zone of danger" rule is rooted in common law and not statutory, however bearing in mind the long history as described earlier and the long-followed *Green*[42] decision that the sole remedy in wrongful death is that which is provided by the New York wrongful death statue, it is understandable that the court would only go so far. The court largely acknowledges that New York law is behind the times with respect to societal norms in defining family. Interestingly, the new law gets away from use of the term "immediate" family altogether and utilizes the term "close" family, seemingly taking the cues from the court in *Greene* that the definition of the class that should be allowed to recover should be somewhat fluid and, on a case-by-case basis. It should be expected that plaintiffs will seek to test the limits of the definition of close family.

Lastly, but just as important, as far as the procedural aspect of wrongful death practice, the new law also makes a very significant change. The new law also extends the statute of limitation for wrongful death from 2 to 3 ½ years from the date of the fatality. Clearly, anyone whose practice encompasses personal injury needs to be aware of this important change. Additionally, please note that the new law states: "This act shall take effect immediately and shall apply to all pending actions and actions commenced on or after such date." Therefore, once signed by the governor, this new law will be a profound transformation.

1 *Estates, Powers, and Trusts Law* (EPTL) §5-4.*1 et seq.*

2 Senate Bill S74A

3 As of the date of publication, the Bill (Senate Bill S74A) is awaiting to be delivered to the Governor of the State of New York. In 2022, the New York State Legislature was scheduled to convene on January 5, 2022 and adjourn on June 4, 2022. Therefore, the legislature has adjourned for the year as of the date of publication, thus the bill will not be delivered to the

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Governor unless and until she asks that it be sent to her.

[4] *See, Liff v. Schildkrout*, 49 N.Y.2d 622 (1980). In *Liff*, the decedent was alleged to have died as a result of the medical malpractice of the defendant. The plaintiffs, executors of decedent's estate, served a complaint setting forth two causes of action. The first cause of action sought to recover damages for pain and suffering by the decedent prior to his death, whereas the second cause of action sought to recover damages for the wrongful death of decedent. After issue was joined, the plaintiffs then made a motion seeking leave to serve an amended complaint which would set forth an additional cause of action on behalf of the decedent's widow for damages for loss of consortium or, in the alternative, deeming the original complaint and bill of particulars amended to include a claim for the widow's loss of consortium. The motion was granted only to the limited extent of permitting plaintiffs to set forth "a third cause of action on behalf of the widow for loss of consortium during the period of the decedent's conscious pain and suffering" and ordered that the bill of particulars be amended accordingly. On appeal, the Appellate Division, Second Department, unanimously affirmed the order of Special Term, and the plaintiffs appealed on a certified question. The court found that a spouse's cause of action for loss of consortium is a derivative one and does not exist "independent of the injured spouse's right to maintain an action for injuries sustained." The court also reaffirmed the fact that a claim for loss of consortium will not be recognized within a wrongful death action in this State by court decision or by caselaw, but rather, if a change should be made, it is for the Legislature, and not the courts, to make. *See also, Bumpurs v. New York City Hous. Auth.*, 139 A.D.2d 438, 439 (1st Dept. 1988). In *Bumpurs*, the decedent was shot and killed by the police during an eviction. Her administrators asserted three causes of action related to the wrongful death. The defendant, New York City Housing Authority, moved to dismiss that portion of the second cause of action which sought recovery on behalf of the decedent's adult children for their loss of "companionship, comfort and assistance" arguing it was barred by as barred by EPTL §5-4.3. The court reasoned that EPTL §5-4.3(a), which sets forth the recovery permitted in a wrongful death action, provides, in relevant part, that damages to a plaintiff in a wrongful death action be awarded as "compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought." In analyzing the "pecuniary injuries" within the context of whether loss of consortium could be claimed as damages in a wrongful death action, the court noted that the Court of Appeals has stated that the phrase "has been consistently construed by the courts as excluding recovery for grief, and loss of society, affection and conjugal fellowship" (*See, Liff v Schildkrout*, 49 N.Y.2d 622, 633). The court found that the damages plaintiff seeks for loss of companionship, comfort and assistance fall within this nonpecuniary area typical of a loss of consortium claim and are not recoverable in a wrongful death action. The court went on to explain that to be distinguished are damages awarded to minor children for the economically recognized and calculable losses of the household management services of a mother. (*See, De Long v County of Erie*, 60 N.Y.2d 296, 307.) The court noted that the instant claim is being brought on behalf of adult children who, as adults, will not incur this type of pecuniary loss. The court also noted that the plaintiff fares no better in terming this a "loss of nurture" claim, in reliance on *Tilley v. Hudson Riv. R.R. Co.*, 24 N.Y. 471, because in that case, the court ruled that affectional injuries of grief and deprivation of society and companionship are not compensable in a wrongful death action, as they are not pecuniary injuries. (*Supra*, at 476.) However, the court also stated that minor children could allege a pecuniary injury from the premature loss of the educational training, instruction, and guidance they would have received from their now-deceased parent, because that loss could affect their "future well-being in a worldly point of view and is distinguished from injuries to the feelings and sentiments" finding that recovery of this sort, however, is tied to the parental role of providing minor children with educational and intellectual nurturing and the financial effect this particular loss of nurturing could have on the future of the infant. The court determined that because the children in that case were already adults, the plaintiffs cannot make this claim. Accordingly, the court dismissed the second cause of action, to the extent it seeks recovery for the loss of companionship, comfort and assistance arising from Eleanor Bumpurs' alleged wrongful death.)

[5] §5-4.3 Amount of recovery. (a) The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper elements of damage. Interest upon the principal sum recovered by the plaintiff from the date of the decedent's death shall be added to and be a part of the total sum awarded. (b) Where the death of the decedent occurs on or after September first, nineteen hundred eighty-two, in addition to damages and expenses recoverable under paragraph (a) above, punitive damages may be awarded if such damages would have been recoverable had the decedent survived. (c)(I) In any action in which the wrongful conduct is medical malpractice or dental malpractice, evidence shall be admissible to establish the federal, state, and local personal income taxes which the decedent would have been

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obligated by law to pay. (ii) In any such action tried by a jury, the court shall instruct the jury to consider the amount of federal, state, and local personal income taxes which the jury finds, with reasonable certainty, that the decedent would have been obligated by law to pay in determining the sum that would otherwise be available for the support of persons for whom the action is brought. (iii) In any such action tried without a jury, the court shall consider the amount of federal, state, and local personal income taxes which the court finds, with reasonable certainty, that the decedent would have been obligated by law to pay in determining the sum that would otherwise be available for the support of persons for whom the action is brought.

[6] §5-4.4 Distribution of damages recovered. (a) The damages, as prescribed by 5-4.3, whether recovered in an action or by settlement without an action, are exclusively for the benefit of the decedent's distributees and, when collected, shall be distributed to the persons entitled thereto under 4-1.1 and 5-4.5 except that where the decedent is survived by a parent or parents and a spouse and no issue, the parent or parents will be deemed to be distributees for purposes of this section. The damages shall be distributed subject to the following: (1) Such damages shall be distributed by the personal representative to the persons entitled thereto in proportion to the pecuniary injuries suffered by them, such proportions to be determined after a hearing, on application of the personal representative or any distribute, at such time and on notice to all interested persons in such manner as the court may direct. If no action is brought, such determination shall be made by the surrogate of the county in which letters were issued to the plaintiff; if an action is brought, by the court having jurisdiction of the action or by the surrogate of the county in which letters were issued. (2) The court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), shall also decide any question concerning the disqualification of a parent, under 4-1.4, or a surviving spouse, under 5-1.2, to share in the damages recovered. (b) The reasonable expenses of the action or settlement and, if included in the damages recovered, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent may be fixed by the court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), upon notice given in such manner and to such persons as the court may direct, and such expenses may be deducted from the damages recovered. The commissions of the personal representative upon the residue may be fixed by the surrogate, upon notice given in such manner and to such persons as the surrogate may direct or upon the judicial settlement of the account of the personal representative, and such commissions may be deducted from the damages recovered. (c) In the event that an action is brought, as authorized in this part, and there is no recovery or settlement, the reasonable expenses of such unsuccessful action, excluding counsel fees, shall be payable out of the assets of the decedent's estate.

[7] Senate Bill S74A

[8] Weinstein, Helene and Brad Holman, "Grieving Families Act Would Bring Long Overdue Reform" *The New York Times*, 10 May 2021, Op-ed.

[9] Weinstein, Helene and Brad Hoylman, "Grieving Families Act Would Bring Long Overdue Reform" *The New York Times*, 10 May 2021, Op-ed.

[10] "50-State Survey Shows New York in the Bottom of the Barrel When it Comes to Justice for Grieving Families", New York Public Interest Research Group Fund, 3 May 2022, *NYPIRG News Release – Families From Across the State Call on Lawmakers to Pass the Grieving Families Act Now"*, https://www.nypirg.org/pubs/202205/final-media-packet.pdf. Press release, PDF download.

[11] https://hopefornyfamilies.com

[12] https://hopefornyfamilies.com

[13] https://hopefornyfamilies.com

[14] "50-State Survey Shows New York in the Bottom of the Barrel When it Comes to Justice for Grieving Families", New York Public Interest Research Group Fund, 3 May 2022, *NYPIRG News Release – Families From Across the State Call on Lawmakers to Pass the Grieving Families Act Now"*, https://www.nypirg.org/pubs/202205/final-media-packet.pdf. Press release, PDF download.

[15] https://hopefornyfamilies.com

[16] *Grant v. Guidotti* , 66 A.D.2d 545, 414 N.Y.S.2d 171 (2d Dep't 1979)

[17] *Grant v. Guidotti*, 66 A.D.2d at 547-48.

[18] *See, id*. at 548

[19] *See, id*. at 548

[20] *See, id*. at 549

[21] *See, id*. at 549

[22] *See, id*. at 549

[23] *See, id*. at 549

[24] *See, id*. at 550

[25] *See, id.* at 550 citing Malone, *American Fatal Accident Statutes — Part I: The Legislative Birth Pains*, Duke LJ (1965), pp 673, 678.

[26] *See, id.* at 550 citing Malone, *American Fatal Accident Statutes — Part I: The Legislative Birth Pains*, Duke LJ (1965), pp 682.

[27] This statute was entitled "An Act for compensating the Families of Persons killed by Accidents." Sections I to III inclusive read: I. WHEREAS no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages

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for the Injury so caused by him: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, by the Authority of the same, That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony. II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought; and the Amount so recovered, after deducting the Cost not recovered from the Defendant, shall be divided amongst the beforementioned Parties in such Shares as the Jury by their Verdict shall find and direct. III. Provided always, and be it enacted, that not more than One Action shall lie for and in respect of the same Subject Matter of Complaint, and that every such Action shall be commenced within Twelve Calendar Months after the Death of such deceased Person.

[28] §1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. §2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property, left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person: provided that every such action shall be commenced within two years after the death of such deceased person.

[29] *Grant v. Guidotti*, 66 A.D.2d at 552.

[30] It was not until 1870 that the statute was amended to include the husband as one of the persons for whose benefit the action could be maintained. *Grant v. Guidotti*, 66 A.D.2d 545, 553 (2d Dep't 1979)

[31] *Green v. Hudson River Railroad*, 2 Abb. Ct. App. 277 (1866)

[32] *See, Ratka v. St. Francis Hosp.*, 44 N.Y.2d 604, 407 N.Y.S.2d 458, 378 N.E.2d 1027 (1978)

[33] *Greene v. Esplanade*, 36 N.Y.3d 513, 144 N.Y.S.3d 654, 168 N.E.3d 827 (2021)

[34] *Greene v. Esplanade*, 36 N.Y.3d at 517.

[35] *See, id.* at 525.

[36] *See, id.* at 517.

[37] *See, id.* at 516.

[38] *See, id.* at 518 citing *Bovsun v Sanperi*, 61 NY2d 219, 228 [1984]. In Greene, the court noted that *Bovsun* was not an exercise in line-drawing. Although it identified certain relationships that come within the class of "immediate family members," *Bovsun* did not establish exhaustive boundaries with respect to the universe of "immediate family members." *See, Greene v. Esplanade*, 36 N.Y.3d at 517.

[39] *See, Greene v. Esplanade*, 36 N.Y.3d at 523.

[40] *See, Matter of Jacob*, 86 NY2d 651, 655-56 (1995)

[41] *See, Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 14 (2016)

[42] *Green v. Hudson River Railroad*, 2 Abb. Ct. App. 277 (1866)

Any views and opinions expressed in this article are solely those of the authors. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

Collateral Estoppel, Workers Compensation Board Findings, and Labor Law Claims

BY: JULIAN D. EHRLICH*

Note: At the time of writing, there is a pending bill entitled the "Justice for Injured Workers Act" A10349 (nysenate.gov) *before Gov. Hocul, which would prohibit collateral estoppel effect of any Workers Compensation board, judge or other arbiter other than a determination of existence of an employer employee relationship. Should the Governor sign that bill into law, that would end the collateral estoppel defense to Labor Law claims subject of this article.*

In New York, workers injured at construction sites are permitted to bring lawsuits under Labor Law §§ 241(6) and 240(1) while simultaneously claiming first party Workers Compensation (WC) benefits for the same accident.

Thus, an injured claimant can bring a Labor Law case seeking damages against a jobsite owner and general contractor, who are typically covered by GL policies, while concurrently seeking WC benefits payable by employers' WC insurers. However, there are instances where parties overlap and issues decided by the Workers Compensation Board (WCB), can impact the related Labor Law case.

This discussion will examine the collateral estoppel effect of WCB findings on Labor Law cases.

Parallel Proceedings

Typically, Labor Law and WC claims relating to the same loss proceed independently but have some overlapping recoverable elements of damages such as lost earnings and medical expenses. A notable difference is pain and suffering which is not compensable under WC.

Double recoveries are prevented by Workers Compensation Law § 29 [1] and [4] which set forth the WC insurers' right to credit, or lien, claimants' recovery in their third-party actions as to first party indemnity and medical expense payments. Thus, injured workers must pay back at least a portion of their WC benefits to satisfy the WC insurer's lien.

Because of the relatively specialized rules for each avenue of recovery, WC claims and Labor Law cases have traditionally had separate attorneys who may have only a passing awareness of the progress in the other claim, usually mindful that the lien satisfaction will become a point of mutual interest.

However, parties in both proceedings would be well served to keep a watchful eye for developments that can have crossover impact beyond the lien.

Tracks Intersect

Because WC is a no-fault recovery scheme, liability is not an issue so often the WC claim progresses faster than the related Labor Law claim. Accordingly, injured workers can have their medical bills paid and collect lost wages long before their Labor Law claim resolves.

On the WC side, the WCB may make findings on issues including the causal relation of the loss and the damages, or the identity of the employer well before those issues are decided in the Labor Law action.

At times, these WCB findings can be binding pursuant to the collateral estoppel doctrine in the tandem Labor Law case even when not all parties in the two proceedings are identical.

Estoppel

The rule on collateral estoppel in Labor Law cases was recently articulated in this context in *Denisco v. 405 Lexington Ave. LLC*, 2022 NY App. Div. LEXIS 1912 (2d Dept. 2022), where the Court stated:

> "The quasi-judicial determinations of administrative agencies are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there

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was a full and fair opportunity to litigate before that tribunal."

In Denisco, the Court found the Labor Law § 240 claim was properly barred by collateral estoppel because the WCB found that the claimant's injuries were not work related.

The First Department recently gave the same collateral estoppel effect to a WC finding which barred a Labor Law § 240 claim in *Valverde v. Occam Suy LLC*, 2022 NY Slip Op 02887 (1st Dep't 2022).

Similarly, in *Lennon v. 56th and Park (NY) Owner, LLC*, 199 A.D.3d 64 (2d Dept. 2021), the Court further explained that:

> There must be "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling." *Id.* at 69.

In *Lennon*, the Court found that the WCB's finding that the incident either did not occur or did not occur in a manner that caused any injury was binding on the claimant and thus, dismissed the plaintiff's Labor Law claim.

'Parting the Red Sea'

More instructively, the Court in *Lennon* surveyed the line of cases considering the collateral estoppel effect of WCB decisions in Labor Law claims. Memorably, the Court compared the application of the different outcomes to the parting the Red Sea.

> The purpose of this opinion is to define how to part the Red Sea in litigation, between circumstances where certain actions are collaterally estopped by prior administrative determinations and other circumstances where they are not estopped. *Id.* at 74.

The Court noted that sometimes, common issues arise in both proceedings but are not necessarily decided or fully decided in the WC forum making it difficult to discern broad rules. However, the Court ultimately did divine a 'central inquiry,' finding harmony in the sea of cacophony.

> In reconciling the various cases where collateral estoppel has or has not been applied as a result of workers' compensation findings, the central inquiry, regarding the identity of issue, is whether the board evaluated an issue on its merits which, by its nature and scope, then prevents the plaintiff from establishing one or more elements for a viable personal injury action, whether as to liability or damages. *Id.* at 77.

The Court also considered the question whether the claimant had a full and fair opportunity to be heard before the Board to be a "separate issue," but which was satisfied in that case by numerous factors including a personal appearance, representation by counsel and the foreseeability of future litigation. *Id.* at 78.

Other Parties

In cases discussed above, the Courts applied WCB findings against the plaintiff. However, the employer is also represented before the WCB often through counsel assigned through the employers' insurer. Thus, the employer can also be subject to collateral estoppel when impleaded as a third party into Labor Law cases.

For example, in *Sheppard v. Blitman/Atlas Bldg. Corp.*, 288 A.D.2d 33 (1st Dept. 2001), the Court found the WCB decision causally relating the plaintiff's injury to the accident to be binding on the employer third-party defendant in the Labor Law action.

However, the direct and statutory Labor Law defendants are owners and general contractors who do not participate in WCB hearings and thus, these defendants should be able to contest WCB findings which the employer is estopped from contesting.

For example, in *Torres v. Perry Street Development Corp*, 104 A.D.3d 672 (2d Dept. 2013), the Court held that the WCB compensability finding did not collaterally estop the owner or general contractor from arguing that the worker was not employed for Labor Law purposes.

However, there are different statutory definitions of "employment" in the Workers Compensation Law and the Labor Law which refers to whether a worker was suffered and permitted to work at a jobsite.

Thus, for example, in *Vera v. Low Income Mtkg.*

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Corp., 145 A.D.3d 509 (1st Dept. 2016) the WCB finding that the plaintiff was not an employee of the general contractor entitled to first party benefits did not preclude his Labor Law claim.

Conclusion

As this discussion has highlighted, the collateral estoppel bar lessens the chance of inconsistent results between WCB and Labor Law case findings on the same loss. However, because direct owner and contractor defendants are not parties to the WC proceeding, they may be able to revisit issues previously decided by the WCB resulting different outcomes on liability and damage causation issues, and employment status questions.

In addition to keeping abreast of developments in caselaw, defense attorneys should timely plead affirmative defenses to preempt plaintiff's objections to amending pleadings after discovery reveals favorable WCB rulings. Moreover, authorizations for both the WCB records and WC insurer files should be timely obtained and reviewed for favorable WCB decisions.

The WCB does not often make finding unfavorable the claimant but given the volume of Labor Law activity in New York, it can happen. However relatively rare it is that the WCB finds a loss non-compensable, it is important for counsel defending the tandem Labor Law claim to leverage collateral estoppel to obtain a dismissal.

The bottom line is that the critical inquiry for the application collateral estoppel to WCB rulings may turn on the nature of the finding and the identity of the parties before the Board.

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in advance. The Court unfortunately ignored the fact that the misconduct in Perez was intentional. Thus, it decided to punish defendant for not objecting more, rather than to address plaintiff's predicted intentional misconduct that generated a $102 million nuclear verdict and fostered years of post-trial motions and appeals.

[xv] Counsel engaging in summation misconduct invariably trot out the quote that "broad latitude" is afforded them during summation. However, the "broad latitude" referred to in the decisional law is a latitude of discussion of relevant evidence and reasonable inferences to be drawn therefrom. It is not, though it has been wrongly interpreted to be by many plaintiffs, a general "latitude" to discuss pretty much everything under the sun, that is to say, completely untethered. See Cherry Creek Nat'l Bank v. Fidelity & Casualty Co., 207 A.D. 787, 790-791 (4th Dep't 1924); Selzer v. New York City Transit Authority, 100 A.D.3d 157 (1st Dep't 2012).

[xvi] This summation is quoted from Lopez v. City of New York, AD1D Docket No. 2020-00966, NYSCEF Doc. No. 6, JR 880-881. The First Department ultimately affirmed the liability verdict based on broad latitude and harmless error principles. See 192 A.D.3d 634 (1st Dep't 2021).

[xvii] See Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV.U. L. REV. 47, 66 (2011), citing Lisa Eichhorn, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 L. & CONTEMP. PROBS. 341, 345 (1989); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & HUM. BEHAV. 37, 37 (1985); *see also* RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 384 (2001) ("Empirical evidence as well as common sense suggests that courts greatly exaggerate the efficacy of limiting instructions."); Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of the Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCH., PUB. POL'Y, & L. 677, 677 (2000); Deidre M. Smith, *The Disordered and Discredited Plaintiff Psychiatric Evidence in Civil Litigation*, 31 CARDOZO L. REV. 749, 819 (2010) (discussing how distinctions between appropriate and non-appropriate uses of evidence are likely to be "utterly meaningless in the minds of jurors" and emotionally arousing testimony may be particularly "immune to such limiting instructions"); Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and*

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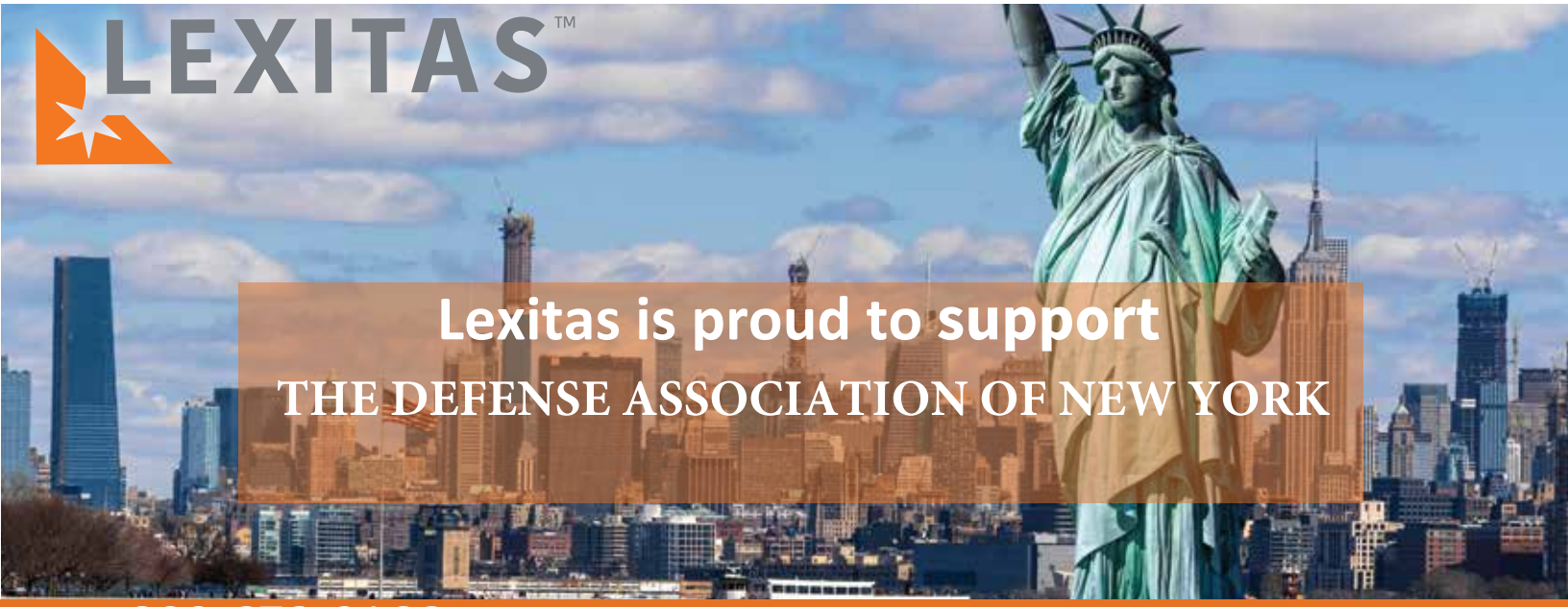

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Gender identity is as simple as listening; and lawyers have an obligation to show respect

BY: MELISSA RYAN REITBERG, ESQ.*

This Article is intended to be an informative reflection of "gender identity" as it has become a re-occurring topic of discussion that has been coming up more and more in professional conversations; and what this vocal shift means for the practice of law.

The purpose of this article is not to provide you with a laundry list of new vocabulary words to memorize; and in fact, the single most important word to highlight in this discussion is "listen." Listen to how those around you identify- whether gender, gender expression, sexual identity, etc. If you have follow-up questions, it is okay to ask them in most contexts and within reason, of course. But really listen to the responses to your questions, and incorporate them in how you interact with the individual delivering said responses by using identifying language that reflects that individual's preferences. This is a matter of respect, like calling someone by a nick name they prefer, as opposed to using a birth or legal name.

This year's New Jersey State Bar Association Annual Meeting and Convention successfully addressed ethics obligations with regard to gender-nonconforming individuals

I had the pleasure of attending this year's New Jersey State Bar Association's Annual Meeting and Convention in person last month, after having attended virtually over the past two years. Some of the benefits of this particular Conference include that attendees can choose which courses they want to take; and CLE credit counts for multiple states (including New York). It is a great opportunity to meet your ethics and diversity requirements; and also to keep up-to-date with current law within your practice area; and/or to branch outside of it. There are occasional celebrity sightings and special guests, and the courses include current and interesting references to pop culture and current events, and reflections on what these mean for the practice of law. There were also wellness opportunities, like yoga and meditation; and there was an acknowledgment of life outside of work, which is a topic often missed at these kinds of events and professional gatherings.

One of perhaps the most unique (and often overlooked) topics covered in various ethics and diversity courses at the Conference was the use of proper pronouns and identity when referring to a client. It was stressed through many of these courses how important it is to listen to your client when she/he/they identifies how she/he/they want to be referred, including any name or nickname, gender identity, etc. It was presented that *lawyers have an ethical obligation to make our clients feel welcome, respected, safe, and accepted*, including an obligation to correct opposing counsel, the Court, etc. if named or identified inaccurately according to our clients' preferences.

This point was illustrated by the example that if a client's name is pronounced incorrectly, or if she/he/they prefer a nickname, an attorney would have no problem correcting this improper identification to the Court. The same attention and level of comfort should be given when correcting client preferences with regard to any client's self-identity, including preferred gender pronouns.

Beyond the conference and recent historical context

We have seen this addressed in other areas of the law, beyond ethics. For example, some states, including Colorado, Iowa, Oregon, and Washington; and some cities, for example New York City and San Francisco, specifically grant transgender people the right to use gender identity-preferred restrooms in public spaces; and Austin, Texas, New York City,

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Philadelphia, and West Hollywood all require that single-stall public restrooms must be labeled as all-gender. Some cities, like Chicago leave it up to individual businesses to decide what restroom a transgender patron may use.

Some states in the United States, including New York explicitly prohibit discrimination on the basis of gender identity. The Gender Expression Non-Discrimination Act (GENDA) is a 2019 New York law which added gender identity and gender expression to New York State's human rights and hate crimes laws as protected classes.[1] And prior thereto, in 2018, the New York City Council amended the definition of "gender" in the New York City Commission on Human Rights Legal ("NYCHRL") Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression to reflect a broader and inclusive understanding of gender.[2]

In fact, sixteen years prior, in 2002, the New York City Council passed a Transgender Rights Bill to expand gender-based protections guaranteed under the NYCHRL to include protection for people whose gender and self-image do not fully accord with the legal sex assigned to them at birth[3], which was specifically intended to clarify and make it explicit that the law prohibits discrimination against people based on gender identity.[4] And there are civil penalties associated with violations thereof, which are increased if there is evidence of willful, wanton, or malicious conduct, in addition to the other remedies, for example, back and front pay, along with other compensatory and punitive damages.[5] It is additionally worth highlighting that the lack of an adequate anti-discrimination policy may be considered as a factor in determining liability, assessing damages, and mandating certain affirmative remedies.[6]

Several other states, besides New York have adopted similar statutes and penalties for violations of their respective laws. Moreover, the United States Supreme Court has addressed this topic on multiple occasions. For example, Title VII of the Civil Rights Act of 1964's proscription of discrimination because of sex has been interpreted by the Supreme Court to mean that gender must be irrelevant to employment decisions.[7] Congress has even supplemented Title VII in 1991 to allow a plaintiff to prevail in a sexual discrimination claim in an employment context merely by showing that a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice.[8] Under this broader standard, liability can sometimes follow with a showing that sex may have been a contributing factor, even if sex was not a direct or "but-for" cause of the employer's alleged discriminatory decision. Still, in so-called "disparate treatment" cases, the Supreme Court has long held that the difference in treatment based on being a member of a protected class must be intentional in order for a plaintiff to prevail.[9]

Often discussed in these kinds of decisions was the definition of the term "discriminate," which was defined as "to make a difference in treatment or favor (of one as compared with others)"[10]; and therefore to "discriminate against" a person, would mean treating that individual worse than others who are similarly situated.[11]

Recent changes you have or will see in day-to-day life

Many companies are requiring employees to include their preferred pronouns in their professional email signature lines. Some employers are leaving this option open to their employees. Regardless, this practice has been discovered to be helpful even for gender-conforming individuals, who may have names not traditionally associated with any gender; or names not common to the country in which they are working, as it continues to be common in professional practice to address a colleague as "Mr." or "Ms." in a professional setting. The term "Mx." (pronounced "mix" or "mux"), which is a gender-neutral honorific used as early as 1977 has also become more popular.[12]

Last year, gender non-conforming individuals were no longer required to show medical documentation to establish or update the gender designation on his/her/their US passport; and today, on the Form DS-11 application, there

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Group Decision Making, 12 L. & HUM. BEHAV. 477, 477 (1988). Brown did also note a United Kingdom study to the contrary. Id. (citing Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial* Outcomes, 94 CORNELL. L. REV. 1353, 1358-59 (2009), citing a study by British researchers A.P. Scaly and W.R. Cornish in which mock jurors were able to take account of an instruction to disregard similar convictions as evidence of criminal propensity).

[xviii] "'The judge who presides over a cause is not a mere umpire; he may not sit by and allow the grossest injustice to be perpetrated without interference. It is his duty in the executive control of the trial to see that counsel do not create an atmosphere which is surcharged with passion or prejudice and in which the fair and impartial administration of justice cannot be accomplished. It was the duty of the trial court to stop argument and require counsel to proceed in an orderly and lawyer-like manner.'" Pesek v Univ. Neurologists Assn., 87 Ohio St 3d 495, 501, 721 NE2d 1011, 1016-1017, 2000-Ohio-483 (2000) (citation omitted).

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are three options provided, "M", "F", and "X", and the instructions for this form provide that an individual should use "X" to indicate an "unspecified or other gender identity." There is a further warning that there is no guarantee that other countries will recognize the gender marker provided.[13]

By no longer requiring any medical proof of a gender identity, there is a possibility that an individual may have inconsistent gender markers on various documents. Obviously, different gender markers on documents may cause administrative confusion, and may lead to denied access to further identification, until documents are consistent, just like if an individual has different names or addresses on various identification documents.

Juror questionnaires may feature an "other" or similar option for jurors to write in their own gender identities, or to opt to be referred to simply as "juror." It can be of great importance to pay close attention to how members of your jury identify, and it can help your engagement with them if you address them accordingly and avoid offending them. It can be particularly worthwhile to avoid ignoring jurors' self-identification, as assigning your own pre-determined associations could adversely influence outcomes.

Conclusion

Analogous to how one learns in law school to never to assume any fact not provided, one should never assume anything about your client that has not been explicitly told to you by your client. The same holds true for any adversary, member of the Court, or juror. An obligation to listen and show respect has material advantages, and therefore goes beyond its important role in the ethical practice of law. It could importantly influence the outcomes of negotiations and legal proceedings. By analogy, as one would listen to and refer to someone by a name he/she/they prefer, one would also ethically and advantageously listen to and refer to that person by the identification that he/she/they prefers. Otherwise, a client who you are addressing could be left feeling unsafe or not accepted by their own representation, or a juror may be less inclined to agree with your arguments no matter how compelling.

1 See The Gender Expression Non-Discrimination Act (GENDA) (2019).

2 See Local Law 38 (2018)("'gender' shall include actual or perceived sex, gender identity, and gender expression including a person's actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth").

3 See The Sexual Orientation Non-Discrimination Act ("SONDA")(2002); see also See Local Law No. 3 (2002).

4 See Id.; see also Report of the Governmental Affairs Division, Committee on General Welfare, Intro. No. 24, to amend the administrative code of the city of New York in relation to gender-based discrimination (April 24, 2002).

5 See Local Law No. 3 (2002); see also N.Y.C. Admin. Code § 8-102(23).

6 See Gender Identity/Gender Expression - CCHR (nyc.gov) < https://www1.nyc.gov/site/cchr/law/legal-guidances-gender-identity-expression.page>.

7 See R.G. & G.R. Funeral Homes v. EEOC, 139 S. Ct. 1599 (2019) a case that addressed whether Title VII of the Civil Rights Act of 1964, which prohibits discrimination "on the basis of sex," includes discrimination on the basis of sexual orientation and gender identity; see also referenced Title VII of the Civil Rights Act of 1964.

8 See Civil Rights Act of 1991, §107, 105 Stat. 1075, codified at 42 U. S. C. §2000e-2(m).

9 See, e.g., Watson v. Fort Worth Bank & Trust, 487 U. S. 977, 986, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988).

10 Webster's New International Dictionary 745 (2d ed. 1954)

11 See Burlington N. & S. F. R. Co. v. White, 548 U. S. 53, 59, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006), interpreting an alleged violation of Title VII of the 1964 Civil Rights Act; see also Bostock v. Clayton Cty., 140 S. Ct. 1731, 1740 (2020).

12 See Merriam-Webster: Mx. - A Gender-Neutral Honorific <https://www.merriam-webster.com/words-at-play/mx-gender-neutral-title>.

13 See US Passport Form DS-11 application.

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The Sword and the Shield: How to Effectuate Risk Transfer in New York Labor Law/Construction Personal Injury Litigation

BY: SAMANTHA V. CATONE*

While our legal system largely aims to compensate an injured party for the wrongs of another, the concept of "strict liability" – particularly in the context of personal injury claims arising from construction projects – can result in an "innocent" party, such as an owner or general contractor who does not supervise or control the injured party's work, being held liable for another contractor's negligence. New York's Labor Law §§ 240(1) (the "scaffold law") and 241(6) impose certain non-delegable duties on owners and general contractors of construction projects to provide workers with a safe work environment[1], and provide an avenue for injured workers to collect workers' compensation benefits from their employer and sue other potential statutorily responsible parties, even where those parties did not direct, control or supervise the injured party's work. This is contrary to the common law rule that a party cannot be held liable for another party's negligence.

A finding of a Labor Law §§ 240(1) or 241(6) violation, because they are statutory (or "purely vicarious"), does not in and of itself establish active negligence on the party who has been charged with violating it. Owners and general contractors who find themselves in this position may have risk-transfer opportunities at their disposal.

What is contractual indemnification and how can a party use it to execute risk transfer?

Indemnification is the shifting of a loss from an "innocent" party to the legally responsible party. Parties are free to contract for whatever terms they see fit, and courts will generally enforce a contractual indemnification provision according to its terms so long as the terms can be clearly implied from the language and purpose of the entire agreement, and the surrounding facts and circumstances.[2] In New York, parties are free to enter into contractual agreements indemnifying them for their own negligence unless there is a statutory prohibition.

General Obligations Law § 5-322.1 is that prohibition for parties involved in the construction, alteration, maintenance or repair of a building or structure (New York Labor Law claims). Such agreements will be deemed void and unenforceable as against public policy where they purport to provide a party with full indemnification for an accident caused by the promisee's own negligence.[3] For example, in *Itri Brick & Concrete Corp. v. Aetna Casualty & Surety CO.*, the following at-issue indemnity agreement was found unenforceable:

This point was illustrated by the example that if a client's name is pronounced incorrectly, or if she/he/they prefer a nickname, an attorney would have no problem correcting this improper identification to the Court. The same attention and level of comfort should be given when correcting client preferences with regard to any client's self-identity, including preferred gender pronouns.

> "…Itri shall hold MNT harmless from all liability, loss, cost or damage from claims for injuries or death from any cause…occasioned in whole or in part by any act or omission of the second party…whether or not it was contended that the first party contributed thereto in whole or in part…"[4]

Beyond the conference and recent historical context

Parties may avoid this pitfall by including include a savings clause, "to the fullest extent permitted by law." Where the provision contains this savings

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clause, courts will generally interpret the provision as providing for partial indemnification (which is the essentially the same as contribution) and thus find it enforceable.[5] This savings clause requires the factfinder to determine the active negligence of the purported indemnitee,[6] and, if there is a negligence finding, no indemnity right will exist for that portion of liability attributable to the negligent conduct of the proposed indemnitee.[7] By the same token, an indemnification provision which lacks the savings clause may nevertheless be enforceable where the proposed indemnitee establishes it was free from active negligence.[8]

Thus, a defendant who is found liable due solely to its status as an owner or general contractor will have a valid contractual indemnification claim against the injured worker's employer so long as the owner was not actively negligent, and where the indemnification provision in the contract is otherwise enforceable.[9] A purported indemnitee may also be entitled to a conditional order of contractual indemnification pending the determination of the indemnitor's degree of negligence, where the purported indemnitee establishes it was free from negligence and may only be held liable by virtue of statutory/vicarious liability.[10]

Contractual Indemnity vs. Additional Insured Status

Practitioners often confuse the right to contractual indemnification with additional insured status. A contractual indemnitee has no direct relationship with the indemnitor's insurance company and is only in privity of contract with the indemnitor. An additional insured stands in the same shoes as the named insured and is therefore entitled to the same rights, which includes the right to a defense and indemnification.[11] However, indemnity provisions may be enforceable even where there is no additional insured coverage, and there does not necessarily need to be privity of contract for there to be additional insured coverage. To be entitled to additional insured status, the contract must contain "express and specific language requiring the [party] to be named as an additional insured."[12]

It is always prudent to pursue an additional insured tender irrespective of a potential right to contractual indemnification because the standard for additional insured coverage could be lower than for indemnification against the named insured, and the rights afforded may be broader. The duty to defend is triggered by the allegations in the complaint, which need only establish a reasonable possibility of coverage irrespective of merit.[13] An insurer may be obligated to provide a defense even if they are not ultimately required to pay a judgment once litigation has concluded.[14] Additionally, defense costs via additional insured coverage are unlikely to erode policy limits, whereas they will erode policy limits through a contractual indemnification claim.

Defense costs to an additional insured are owed early, whereas obtaining them through an indemnification claim against the named insured requires a liability determination. In practice, who is currently paying defense costs can improve settlement posture.

Tenders

1) When? Immediately. Additional insureds have an implied duty to provide notice of an occurrence or claim as soon as practicable.[15] Failure to do so may result in a disclaimer. Generally, an additional insured may not rely on the named insured's notice, unless it can be shown that the named insured, being united in interest with the additional insured, provided timely notice on behalf of the additional insured.[16] An insurer's obligation to defend an additional insured is broader than the duty to indemnify, and runs from the date of the tender.[17] In contrast to the duty to indemnify, a liability finding is not a prerequisite to an insurer's duty to defend. Rather, an insurer will be obligated to provide a defense whenever the allegations in the complaint suggest a reasonable possibility of coverage, irrespective of merit.[18] Defense costs are recoverable from the date of the tender.[19]

2) For and to whom? Everyone. Because it is generally impossible to know at the outset who could ultimately owe coverage, it is best practice to tender to every viable insurance company. Do not fall into the trap of assuming coverage from any

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one insurance company is a slam dunk. Regarding who to tender on behalf of, the answer is the same: everyone. You should tender on behalf of any party asserting cross-claims, counter-claims, or third-party claims against your client who could plausibly be an additional insured under another entity's policy.

3) What?

a) State precisely who you represent and the basis of the tender.

b) Demand defense and indemnification as an additional insured on a primary and non-contributory basis.

c) Demand contractual indemnity, if applicable.

d) Attach any supporting documents (generally, the complaint, contract documents, accident reports, and certificate of insurance).

4) Where? The insurer from whom coverage is sought. Sending the tender to the named insured, its attorney, broker, etc. is generally not considered sufficient notice to the insurer.[20] If you are unsure where to send the tender, check the policy itself, the insurer's website, and DSF (Google "New York Insurance Company Search"). If possible, send the tender via email in addition to certified mail. The tender should also be sent to the named insured if contractual indemnification is sought. If contact information for the insurer is unavailable or suspect, send the tender to the named insured and its broker with instructions to forward to the insurer. Then, work on obtaining the policy, through discovery if necessary.

1 *Ross v. Curtis-Palmer Hydro-Electric Company et al.*, 81 N.Y.2d 494 (1993).

2 *Bradley v. Earl B. Feiden, Inc.*, 8 N.Y.3d 265 (2007).

3 *See Brooks v. Judlau Contracting, Inc.*, 11 N.Y.3d 204 (2008).

4 *Itri Brick & Concrete Corp. v. Aetna Casualty & Surety Co.*, 89 N.Y.2d 786 (1997).

5 *See Williams v. City of New York*, 74 A.D.3d 479 (1st Dept. 2010).

6 *See Charney v. LeChase Construction*, 90 A.D.3d 1477 (4th Dept. 2011).

7 *Divens v. Finger Lakes Gaming and Racing Ass'n, Inc.*, 151 A.D.3d 1640 (4th Dept. 2017).

8 *Brown v. Two Exch. Plaza Partners*, 76 N.Y.2d 172 (1990).

9 *Canka v. Coalition for the Homeless*, 240 A.D.2d 355 (2d Dept. 1997) (quoting *McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369 (2011)).

10 *Jardin v. A Very Special Place, Inc.*, 138 A.D.3d 927 (2d Dept. 2016).

11 *Mack-Cali Realty Corp. v. NGM Ins. Co.*, 119 A.D.3d 905 (2d Dept. 2014) citing *BP A.C. Corp. v. One Beacon Ins. Group.*, 8 N.Y.3d 708 (2007).

12 *Lexington Insurance Company v. Kiska Development Group LLC*, 182 A.D.3d 462 (1st Dept. 2020).

13 *BP A.C. Corp.*, 8 N.Y.3d 708.

14 *Id.*

15 *23-08-18 Jackson Realty Associates v. Nationwide Mut. Ins. Co.*, 53 A.D.3d 541 (2d Dept. 2008).

16 *New York Tel. Co. v. Travelers Cas. & Sur. Co. of Am.*, 280 A.D.2d 268 (1st Dept. 2001).

17 *BP Air Conditioning Corp. v. One Beacon Ins. Group*, 8 N.Y.3d 708 (2007).

18 *Id.*

19 *See Dynatec Contracting, Inc. v. Burlington Insurance Company*, 184 A.D.3d 475 (1st Dept. 2020.

20 *Strauss Painting, Inc. v. Mt. Hawley ins. Co.*, 24 N.Y.3d 578 (2014).

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