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COURT OF APPEALS

STATE OF NEW YORK

RED ZONE LLC,

Respondent,

-against-

No. 5

CADWALADER, WICKERSHAM & TAFT LLP,

Appellant.

20 Eagle Street
Albany, New York 12207
April 27, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Meir Sabbah
Official Court Transcriber

1 JUDGE PIGOTT: Judges Fahey and the Chief
2 Judge have recused themselves from this case, so
3 you're stuck with us.

4 Mr. Marriott, welcome.

5 MR. MARRIOTT: Thank you, Your Honor.

6 Good afternoon, and may it please the court. My
7 name is David Marriott and I represent Cadwalader. With
8 the court's permission, I'd like to reserve if I may, two
9 minutes for rebuttal.

10 JUDGE PIGOTT: Yes, sir.

11 MR. MARRIOTT: The First Department here,
12 Your Honors, made three critical mistakes. First, it
13 used the wrong standards in evaluating a malpractice
14 claim at the summary judgment stage. Second, it
15 overextended the continuous representation doctrine.
16 And third, it esta - - - it rejected, as a matter of
17 law, a comparative negligence defense that is well
18 recognized. Let me, if I may, take each of those in
19 turn.

20 First, with respect to the summary judgment
21 standards, Your Honors, the court here did what frankly no
22 court, so far as I can tell, ever has. It entered a
23 summary judgment of legal malpractice against the
24 defendant law firm, where the firm was denied meaningful
25 discovery; where the court viewed the record in the light

1 most favorable to the moving party, not to the non-moving
2 party, where the plaintiff-client was allowed to use the
3 attorney-client privilege as both sword and shield.

4 JUDGE GARCIA: Can I interrupt you there?
5 I'm sorry, counsel, but on the sword and shield
6 argument, is there somewhere in the record where
7 there is any indication in this deposition of Mr.
8 Block, it is, right, where there is some assertion of
9 that privilege that would show that there was some
10 room for this defense to actually take place?

11 Because it seems to me there's one
12 completely different defense in the deposition, and
13 there's no assertion of that privilege or place for
14 that privilege could apply to shield this
15 conversation. And then later, at the summary judgment
16 stage, this affidavit comes flying in.

17 So I don't understand - - - I think it's a
18 great theory, but I don't understand, you know, your
19 sword and shield, but where is that in the record?

20 MR. MARRIOTT: Sure, Your Honor. It's at
21 page A91 of the record, which is the Block
22 deposition, and at page A92; those are two spots
23 where you'll find it.

24 And what happened, Your Honor, and this is
25 in the record, Mr. Block was advised in advance of

1 the deposition, in preparation for the deposition,
2 that he was not to reveal privileged communications,
3 conversations with Mr. Snyder.

4 JUDGE GARCIA: Fair enough.

5 MR. MARRIOTT: That then occurred on the
6 record at the deposition, and at no point at - - -
7 during the course of that deposition, did he reveal
8 any advice that he gave to Mr. Snyder. He wasn't
9 allowed - - - he was instructed not to do it, and
10 frankly, absent the instruction, the ethical rules
11 barred him from doing it.

12 JUDGE PIGOTT: Right, you're taking a
13 lawyer whose argument - - - or is being deposed for
14 and on behalf of his client, he can't - - - he can't
15 disclose what was going - - - you know, in this case,
16 he said, you know, I told the - - - the guy not to
17 sign it, but I can't tell that in the deposition.
18 I'm not going to, you know, I'm not going to reveal
19 what I said to my client.

20 That comes back to bite you later on when
21 you get sued, saying, you never brought this up.

22 MR. MARRIOTT: And that's exactly why we say,
23 Judge Pigott, that it's an effort here to use the
24 attorney-client privilege as a shield in the deposition,
25 and then as a sword by arguing that the silence in the

1 deposition prevents - - - permits an adverse inference
2 against Cadwalader.

3 JUDGE GARCIA: But it wasn't silence in the
4 deposition, right? Wasn't the point of the
5 deposition testimony that you were defending the
6 document itself as legitimate in that action so that
7 it was - - - it was effective in what it was intended
8 to do? But now, the theory is that, I never thought
9 it was effective in what it was intended to do, and
10 in fact, I told my client that. Isn't that
11 contradictory, in theory, not only in shield-sword
12 term?

13 MR. MARRIOTT: Your Honor, respectfully,
14 it's not contradictory. And that's the case for the
15 following reasons.

16 The - - - the deposition was not about the
17 advice given. There is nothing in the deposition about
18 advice being given. The affidavit which came later, when
19 Cadwalader had been sued, when the privil - - - when the
20 privilege was necessarily - - -

21 JUDGE GARCIA: It came a little later than
22 that, right? It came not in the answer, it came in
23 the summary judgment, right?

24 MR. MARRIOTT: In his particulars, Your
25 Honor, it came in opposition to the motion for

1 summary judgment, which was the first frankly real
2 opportunity, and certainly obligation we had to lay
3 out the defense.

4 JUDGE GARCIA: Um-hum.

5 MR. MARRIOTT: We mentioned specifically
6 advice hadn't been given, both in our motion to
7 dismiss, which is on a different account - - -
8 contract account, and we mentioned advice in the
9 answer, and we mentioned it in the bill of
10 particulars.

11 But the fundamental difference is that the
12 affidavit here was about advice. The deposition
13 wasn't about advice; it couldn't be about advice.
14 And at no point does Mr. Block say in his deposition
15 in the prior litigation, to which Cadwalader wasn't a
16 party, anything about that advice.

17 He speaks about the purpose of the
18 agreement. When he is asked, at page A96 of the
19 record, Your Honors, whether in his view the
20 agreement accurately reflects, right, his
21 understanding, the writing accur - - - accurately
22 reflects that oral understanding. What he does say
23 is not, it's absolutely abundantly clear, what he
24 says is, and this is at page 66 of the deposition at
25 A96 of the record. He says, I would have done this

1 differently.

2 And then he speaks about context. And he
3 speaks about - - - and he speaks about purpose. He
4 never reveals, Your Honors, the advice he was
5 ethically prohibited from doing that. And he had
6 been instructed not to do that. And it is true that
7 the court below found there to be a contradiction.

8 And respectfully, I - - - the court, I
9 believe, simply misread the deposition. The only
10 place in this deposition where Mr. Block says that
11 something was unambiguous, is a reference to the
12 original agreement. Mr. Block says with respect to
13 the original agreement, that so far as he was
14 concerned, the original agreement was clear, but the
15 parties, Red Zone and UBS, had a dispute as to
16 whether in fact it was clear.

17 And that's what led to the need to create
18 this side agreement that was an effort to cure it.
19 And Mr. Block's advice to Mr. Snyder was that this -
20 - - this has problems, you ought not sign this,
21 that's my advice to you.

22 But under all the circumstances and in
23 context, he felt that, nonetheless, as he says in
24 deposition, there is a sense in which it got the job
25 done. It got the job done because so far as - - - so

1 far as Red Zone was concerned, whether the additional
2 fee was due, was a function of what the meaning of
3 control was under New York Law. And that's what Mr.
4 Block was talking about when he said he thinks it
5 gets this job done. But at no point did he say, in
6 this deposition, that the side letter agreement was
7 unambiguous. The only reference there is to the
8 original agreement.

9 And what the court did here, Your Honors,
10 frankly is it looked at an affidavit, and it looked
11 at a deposition, and it - - - and it resolved the
12 conflict, a pers - - - an alleged conflict. I would
13 respectfully submit there is no conflict, Red Zone
14 argued there is one. The only way we believe that
15 you can find a conflict, is if you view the record,
16 not in the light most favorable to the non-moving
17 party, but instead, in the light most favorable to
18 the moving party, which is Red Zone.

19 And that of course is not the rule - - - that is
20 not the way the procedure works on a motion for summary
21 judgment. And independent of that, Your Honors,
22 Cadwalader was, and I think this is critically important
23 here, denied fundamental discovery. Repeatedly, we asked
24 to have an opportunity to discover the evidence, to
25 examine Mr. Snyder. Mr. Snyder's deposition - - - Mr.

1 Snyder's affidavit was taken at face value. The court
2 accepted it for what it was. We were not given an
3 opportunity for a single deposition of any of the
4 principals - - -

5 JUDGE STEIN: What - - - what would you
6 need that for?

7 MR. MARRIOTT: Your Honor, we would - - -
8 we wouldn't need it if the court, in the sense that
9 if court - - - if the court had taken Mr. Block's
10 affidavit at face value, we wouldn't have needed it
11 to avoid summary judgment. But instead, it was
12 discounted altogether. What the court said is, you
13 don't need discovery because you've got stuff in your
14 files. Well, the stuff in our files was the stuff we
15 put forward in the form of the affidavit of Mr.
16 Block, which the court then des - - -

17 JUDGE ABDUS-SALAAM: Was there something in
18 your files, counsel, that indicated that Mr. Block
19 had given that advice to Mr. Snyder? Was there some
20 notation or some - - -

21 MR. MARRIOTT: There is no contemporaneous
22 e-mail saying, I gave this advice on that date, in
23 our files. What of course we don't know, is what's
24 in the Red Zone files. And they have a privileged
25 log, which was about 1000 documents, withheld from us

1 on the grounds of attorney-client privilege. Despite
2 the fact that they waived the privilege in commencing
3 the lawsuit.

4 We were given no access to what might be in
5 their files. So that's one of the reasons why
6 discovery would be important. So we have some
7 insight into what they may have in their files about
8 the advice that we believe that was given.

9 JUDGE PIGOTT: Before you run out of time,
10 you had two other points you wanted to make.

11 MR. MARRIOTT: Briefly, Your Honor, yes,
12 with respect to the statute of limitations.

13 What the court did here with respect to the
14 statute of limitations is, it effectively ignored the
15 mutual understanding requirement. This court's cases
16 have been clear that you have to have a mutual
17 understanding in order for the continuous
18 representation doctrine to apply.

19 Not only did Red Zone not demonstrate that
20 there was a mutual understanding, as of the time that
21 Cadwalader advised with respect to this amendment
22 letter, but we offered unrebutted evidence from Mr.
23 Block that there in fact was no mutual understanding
24 as to the need for continued representation at that
25 time.

1 And that by itself, we submit, is fatal to
2 the argument that somehow the continuous
3 representation doctrine here saves them.

4 And entirely independent of that, the court here
5 effectively treated the initial work, the advice with
6 respect to the fee agreement in August of 2005, as if it
7 was the same representation as what Cadwalader was doing
8 in connection with the UBS litigation later. And we
9 frankly and respectfully submit that there is a difference
10 between - - -

11 JUDGE STEIN: But doesn't it - - - doesn't
12 it serv - - - doesn't that continuous representation
13 doctrine serve the - - - serve its purpose if it is
14 applied here where - - - where you - - - where you
15 apply it where the attorney is in effect representing
16 the client to try to correct some alleged
17 malpractice?

18 MR. MARRIOTT: No, Your Honor. And let me
19 explain why. The argument made here is that you
20 should forget about the mutual understanding
21 requirement because there is an effort to cure. I
22 find nowhere in this court's cases any principle that
23 says, you disregard mutual understanding requirements
24 simply because somebody undertakes to cure an alleged
25 act of malpractice.

1 JUDGE STEIN: Under your theory, so all the
2 attorney has to do is come in and say, well, we
3 didn't understand that we were - - - that we were
4 continuing to represent them in any way, and that
5 would be enough then to establish the statute of
6 limitations.

7 MR. MARRIOTT: Under my theory, Your Honor,
8 the statute of limitations accrues upon the
9 committing of the act of malpractice, and the only
10 thing that continues it is if there is a mutual
11 understanding that there is a need for future
12 representation. And that - - -

13 JUDGE STEIN: So your - - - so your answer
14 to my question is - - -

15 MR. MARRIOTT: Yes.

16 JUDGE STEIN: - - - yes - - -

17 MR. MARRIOTT: Yes.

18 JUDGE STEIN: - - - that's enough, anytime
19 the attorney comes in and says, well, we didn't
20 understand it to be that way, even if you sent a bill
21 in 2007, even if you were exchanging confidential
22 information with their other counsel in 2007, and
23 there on - - - that none of that matters because you
24 didn't understand that to be continuous - - -

25 MR. MARRIOTT: It doesn't matter to whether

1 there is a continuous representation. It might mean
2 there was a subsequent representation.

3 JUDGE STEIN: Well, how about, just to
4 compare it briefly to - - - to medical malpractice.

5 MR. MARRIOTT: Sure.

6 JUDGE STEIN: Okay. So a patient goes in
7 for a problem, problem solved, and then they go away.
8 And then they come back and say, you know, this
9 problem has come back, it's a little different, but
10 it's come back. And I think we say that that is
11 continuous - - -

12 MR. MARRIOTT: If it's a different problem,
13 Your Honor, I respectfully submit that it isn't the
14 same representation. That's more or less what the
15 Second Circuit said in the Offshore case, and what
16 other courts have said in the leg - - - not in the
17 malpractice, not in the medical malpractice context,
18 but in the legal malpractice context, I think that's
19 different.

20 And it really doesn't the serve the purpose
21 of the rule. If you allow any effort to cure to
22 rekindle the statute of limitations, what you
23 effectively do is disincen lawyers from helping out
24 the client at a point in time when you might argue
25 the client needs the help the most.

1 Right, if there is an issue with respect to
2 alleged malpractice, you want the lawyer reaching out
3 and helping you, not fearing that any effort to reach
4 out and be of assistance, which is what Cadwalader
5 endeavored to do here, somehow retriggers and
6 restarts the statute of limitations.

7 JUDGE RIVERA: But the only involvement is
8 based on that representation, right?

9 MR. MARRIOTT: I'm sorry.

10 JUDGE RIVERA: I mean, isn't - - - isn't
11 the cure based on whatever occurred in that
12 representation? Isn't it intimately connected - - -

13 MR. MARRIOTT: It - - -

14 JUDGE RIVERA: - - - can't do the
15 separation you are suggesting?

16 MR. MARRIOTT: Well, it can be, Your Honor,
17 but here it clearly isn't because there is nothing
18 here to cure. There was a fee agreement which was
19 negotiated and executed in August of 2005. It's a
20 fee agreement, it was done. It defined the party's
21 rights of that - - - as of that point in time.

22 There was nothing to monitor in that
23 regard. It was done and it was over with. It's not
24 a case in which it's susceptible to cure. Nor, by
25 the way, is there any evidence that Cadwalader was

1 doing anything to cure; that's an argument, that's a
2 construction in a label placed on conduct by Red
3 Zone.

4 So I would submit there was no effort here
5 to cure, and taking cure in that way, essentially as
6 creating an exception to the mutual understanding
7 requirement, basically invites disputes in case after
8 case as to whether there in fact is a cure.

9 JUDGE ABDUS-SALAAM: Counsel, is it your
10 firm's practice when a representation is over to
11 somehow record that either in your own files or send
12 to your client, or now your former client, some
13 communication that we're not representing you anymore
14 in that matter?

15 MR. MARRIOTT: Your Honor, I wish I could
16 say that we were entirely consistent in the matters
17 in which we open and close matters. What I can tell
18 you here is that the suppositing disengagement
19 letter, which counsel refers to, is not advice I've
20 ever in my careers, to my knowledge and recollection
21 ever used. What they point to as a disengagement
22 letter is not a disengagement letter; it is a draft
23 letter never sent, there is no record, we weren't
24 allowed to examine Mr. Snyder about what it - - -
25 about what it might have meant in those

1 circumstances, but there was no disengagement.

2 There was an effort in that draft letter,
3 apparently one can infer from the document itself, to
4 figure out whether there was a way that going
5 forward, Cadwalader could represent both Six Flags
6 and Red Zone. The letter wasn't about disengaging.

7 And I would submit to you, Your Honor, that
8 typically what happens is engagements end, and that's
9 the end of them. And then, you know, if there is a
10 reason to reengage the lawyers in a future matter,
11 they do that. Typically, law firms are not in the
12 habit of sending letters saying, we're done and over,
13 we're finished with you; they don't want to, in that
14 sense, send letters of that kind, and it's not a
15 practice that I have.

16 JUDGE PIGOTT: I think your time has
17 expired, we will pick up your third point - - -

18 MR. MARRIOTT: Thank you, Your Honor.

19 JUDGE PIGOTT: Mr. Jannuzzo, good - - -
20 welcome.

21 MR. JANNUZZO: May it please the court, I'm
22 Jefferey Jannuzzo, I represent Red Zone.

23 This is a case about a feigned issue of fact,
24 and everyone knows that a feigned issue of fact does not
25 defeat summary judgment.

1 JUDGE PIGOTT: Well, it seemed to me there
2 was a lot of facts. I - - - I thought first of all,
3 the fact that you - - - that - - - that they lost the
4 case, in other words, that UBS won, does not mean
5 it's malpractice. If that was true, I would've been
6 disbarred years ago.

7 MR. JANNUZZO: No, Your Honor.

8 JUDGE PIGOTT: I mean, the fact of the
9 matter is, there was litigation, there was dispute
10 with respect to that fee thing, they won; that's not
11 malpractice.

12 So then, there is this - - - there is this
13 lawsuit, and it gets all, I don't want to say messed
14 up, but only because I'm a state judge, your - - -
15 your - - - the pleadings are Federal in form, there's
16 all kinds of stuff within the - - - within the
17 complaint that attach to it, but it really boils down
18 to legal negligence, right?

19 MR. JANNUZZO: Your Honor, as both - - - as
20 both of the lower courts said, if Cadwalader had
21 drafted the letter correctly, there would have been
22 no UBS - - -

23 JUDGE PIGOTT: I didn't think that letter
24 was - - - I - - - I was surprised that UBS won
25 without the letter. I mean, I think a credible

1 argument can be made that - - - that the contract
2 itself was sufficient. I think a credible argument
3 could be made that the side agreement, however it
4 was, you know, was okay, and the fact that they won
5 does not mean that, A, the contract was bad, or B,
6 that the side letter was bad. And unless and until,
7 it seems to me, you get - - - you find out what was
8 said in the room, who said - - -

9 MR. JANNUZZO: Everybody agreed what was
10 said in the room, Your Honor, that it's - - -

11 JUDGE PIGOTT: - - - and who said what to
12 whom - - -

13 MR. JANNUZZO: - - - that it was fifty-one
14 percent or nothing.

15 But if I may, Judge, I want to go back to
16 Judge Garcia's question, and start with the pleadings
17 of that faint issue of fact. Because where Judge
18 Garcia starts is at the end of the process. In
19 Cadwalader's answer, we pleaded specifically that
20 Dennis Block reviewed the letter before it was
21 signed.

22 Record A139, paragraph 23. "Mr. Bloch
23 reviewed the August 17, 2005 written agreement before
24 it was signed." And we referred back to the page in
25 his transcript, A95, where he said, "Did you review

1 this document prior to its execution?" And he
2 answered, "I believe so, yes."

3 When Cadwalader answered in July 2011, nearly
4 six years ago - - - five years ago, they said, "We deny
5 the allegations in paragraph 23, except admit that
6 Cadwalader reviewed a draft of the August 27, 2004
7 letter."

8 JUDGE PIGOTT: It's a pleading. You have a
9 burden of proof, they're - - - they're - - - when
10 they deny - - - let me finish, when they deny
11 something, they're saying, we are putting you to your
12 proof. It's not necessarily denying that - - - that
13 you are a domestic corporation, that you are, you
14 know, that you had a contract or anything else, and
15 they are saying what they said.

16 MR. JANNUZZO: Your Honor, they did, but
17 they denied that Dennis Block reviewed the affidavit,
18 and now their defense is, Dennis Block reviewed the
19 affidavit. So we have - - -

20 JUDGE PIGOTT: Of course, why is that - - -
21 why is that surprising to you? I - - - I - - - there
22 are people that deny ownership of vehicles, all
23 right, and it doesn't mean they didn't own the
24 vehicles. They're saying, we are denying it at this
25 point, and unless and until it's proven, we're going,

1 you know, we're going forward.

2 You want to make it sound like, because they
3 said something in a pleading, that that's binding on
4 everybody, and anything else that comes out of this - - -
5 out of this litigation, it has to be measured against
6 that, this counts, that doesn't. And I don't see it.

7 MR. JANNUZZO: Then let me move on - - - I
8 know, I take Your Honor's point, but let me move on
9 to the bill of particulars. Because in light of that
10 denial, that Dennis Block reviewed the affidavit
11 before it was signed, we sent them a bill of
12 particulars.

13 JUDGE PIGOTT: A demand for a bill of
14 particulars.

15 MR. JANNUZZO: Pardon - - - a demand for a
16 bill of particulars. And the answer that we got, we
17 asked question - - -

18 JUDGE PIGOTT: But you are - - - you're the
19 plaintiff, and what - - - I assume you meant
20 interrogatories.

21 MR. JANNUZZO: No, bill of particulars,
22 Judge.

23 JUDGE PIGOTT: Why would you - - - why
24 would the plaintiffs demand a bill of particulars out
25 of the defendant?

1 MR. JANNUZZO: For the affirmative
2 defenses.

3 JUDGE PIGOTT: Okay.

4 MR. JANNUZZO: And the affirmative defenses
5 - - -

6 JUDGE PIGOTT: And the affirmative defenses
7 are eight of them?

8 MR. JANNUZZO: There were eight of them.

9 JUDGE PIGOTT: Okay.

10 MR. JANNUZZO: And the - - - our bill of
11 particulars required Cadwalader to answer - - - if
12 this theory was true, they had to put it into the
13 bill.

14 So for example, we asked them, you said you
15 did not breach any duty to Red Zone. We said, set
16 forth in the basis, the basis for that affirmative
17 defense. Not a word about we warned you, not a word.

18 We asked them for particulars about their
19 affirmative defense that - - - that they didn't cause
20 our damages. We said set forth, who did? And they
21 didn't say, because you disregarded our warning.

22 We asked them in number 6, for comparative
23 negligence - - - for equitable estoppel, we said,
24 what's the basis for your equitable estoppel defense?

25 JUDGE ABDUS-SALAAM: Counsel, we're not - -

1 - as I understood, the Appellate Division wasn't
2 measuring what was said in the pleadings against what
3 was said in the affidavit that Mr. Block provided.
4 It was what he said in the deposition versus what he
5 said - - -

6 MR. JANNUZZO: Well, then let's - - - let's
7 go right to that question, Your Honor, because that
8 really is the one thing.

9 First of all, to take Judge Garcia's point. All
10 this stuff about sword and shield and explanations, none
11 of that is in the appellate record of this case. Dennis
12 Block answered in his affidavit in January 2013, telling
13 his little story that he did review it and told not to
14 sign it; that was his story. There was not one word of
15 explanation of sword and shield or why he had - - -

16 JUDGE PIGOTT: Well, of course not. But -
17 - -

18 MR. JANNUZZO: Judge, I - - -

19 JUDGE PIGOTT: You know, when I read this,
20 I thought it was like a bad matrimonial. The
21 complaint read with cheap shots, and I thought, you
22 know, poorly chosen adjectives that the answer comes
23 back and, you know, loaded with stuff, and it's
24 exactly that.

25 If - - - if Mr. Snyder said something that

1 was detrimental to the lawsuit that UBS was bringing,
2 Block can't say anything about that. He can't say,
3 yeah, the bonehead, you know, signed it even though I
4 told him not to.

5 MR. JANNUZZO: Right.

6 JUDGE PIGOTT: So he can't say that. But
7 now, you sue them. And when you do that, you've
8 waived the attorney-client privilege, and he can say,
9 that's exactly what I told them.

10 MR. JANNUZZO: Then let me read to Your
11 Honor the testimony. Because that really is what it
12 comes down to. And that is the one thing that Block
13 nor anyone has ever explained in this case, not even
14 up to this day, is the testimony that I am about to
15 read to you.

16 It comes at page A96, he has just described
17 his view of - - - that we agreed we didn't need a
18 letter, the original agreement was clear. And so
19 it's: Question, "So it's just to clarify what the
20 understanding was of the original agreement."
21 Answer, "It was to make clear the party's agreement
22 that UBS would not get more than two million dollars,
23 unless fifty-one percent of the stock was acquired by
24 Red Zone."

25 JUDGE STEIN: Well, but that - - - that

1 says that that was the purpose. It doesn't, to me,
2 it doesn't say that it had accomplished that purpose.

3 MR. JANNUZZO: No, but he is saying they
4 didn't need the letter at all, Your Honor.

5 JUDGE STEIN: Well - - -

6 MR. JANNUZZO: Because he then continues in
7 the next line, which is, "Was that a new agreement,
8 or was that the agreement that was embodied in the
9 original engagement letter?" And the answer is, "I
10 believe it's the old agreement, and we're now making
11 it as clear as the parties can make it that that's
12 what the old agreement meant."

13 JUDGE PIGOTT: And that made sense to me
14 when I read it. I, you know, what UBS was entitled
15 to, you know, it didn't seem to me that it changed.
16 They were - - - they were - - - they got half a
17 million, and they wanted another million-and-a-half,
18 and they were going to get that for whatever was
19 going on.

20 That - - - that seemed to me that what was
21 going on, and apparently, you know, Mr. Snyder was
22 upset, you know, with the idea that there may be
23 more. I read the agreement in saying they weren't
24 going to get more, and the side agreement either said
25 or didn't say, whatever it was. But I go back to the

1 fact that it seems that the summary judgment is being
2 granted because they lost the lawsuit.

3 MR. JANNUZZO: Judge, it's been granted
4 because as - - - as the - - - as the First Department
5 said, if I can get the exact - - - the exact language
6 because it's pithy.

7 It said, "Defendant further argues that
8 plaintiff could have invested more resources to adequately
9 defending the UBS litigation, but it does not detail what
10 strategy should have been pursued to persuade the trial
11 court or this court to look beyond the plain and
12 unambiguous terms of the side agreement." The plain
13 language of the side agreement doesn't do the job. It
14 doesn't say what the oral agreement was, which is fifty-
15 one percent.

16 JUDGE STEIN: Yeah, but isn't - - - isn't
17 malpractice about whether counsel acted reasonably,
18 and - - - and counsel - - - and the defendant is now
19 saying, we have - - - we did - - - we talked about
20 this. Okay. And the client made a decision that - -
21 - that they wanted to go ahead with it anyway and
22 take their chances.

23 Now, it may or may not be true, maybe that
24 conversation never took place, but this is summary
25 judgment, and so - - - and they're saying that we

1 acted reasonably. We advised our client properly,
2 and the client decided to do something different and
3 - - - and, you know, and that was the client's
4 choice.

5 MR. JANNUZZO: Your Honor - - -

6 JUDGE STEIN: So to me, that would not be
7 malpractice. But what I am more concerned about here
8 is that - - - is taking this - - - this practice of
9 saying that conflicting affidavits, that they can't
10 prevent summary judgment, gets broadened so far,
11 okay, that where they're not directly conflicting,
12 but there are, you know, there may be inferences that
13 can be drawn or whatever, which is exactly what's not
14 supposed to take place on a summary judgment motion,
15 is that what's really going on here is that there is
16 a credibility determination being made, and that's
17 something that should not be done on a summary
18 judgment.

19 MR. JANNUZZO: Your Honor, your - - -

20 JUDGE STEIN: That's my concern.

21 MR. JANNUZZO: Your Honor's question
22 presumes that the Block affidavit could be received,
23 and the point of what - - -

24 JUDGE STEIN: That's right.

25 MR. JANNUZZO: - - - has happened below was

1 - - -

2 JUDGE STEIN: It does.

3 MR. JANNUZZO: - - - the Block affidavit
4 could not be received. It was basically not
5 admissible evidence. It would be analogous - - -

6 JUDGE STEIN: Only because the court - - -
7 as I understand it, the court found that it was
8 directly conflicting with the EBT testimony.

9 MR. JANNUZZO: That was one reason.

10 JUDGE STEIN: What I'm saying - - - oh,
11 what's the other reason then?

12 MR. JANNUZZO: That it was unpleaded; it
13 was unpleaded defense.

14 JUDGE PIGOTT: What - - - what defense was
15 supposed to be pleaded?

16 MR. JANNUZZO: Assumption of risk.

17 JUDGE PIGOTT: How do you have assumption
18 of risk in - - - in a medical - - - in a legal
19 malpractice case? The only way you would do it, you
20 would be saying, Red Zone assumed the risk of hiring
21 us.

22 MR. JANNUZZO: No, Your Honor, no, please.

23 JUDGE PIGOTT: Because if it's other than
24 that, then it's evidentiary.

25 MR. JANNUZZO: The - - - what they are

1 saying is, we told - - - the new Block affidavit,
2 which is not mentioned in the answer, doesn't mention
3 that theory, it's not mentioned anywhere in the bill
4 of particulars - - -

5 JUDGE STEIN: Well, what they do raise is
6 comparative negligence. And that's how I view their
7 allegation - - -

8 MR. JANNUZZO: And - - -

9 JUDGE STEIN: - - - is that we gave proper
10 advice, and the client was negligent in not following
11 our advice.

12 MR. JANNUZZO: Your Honor, that's not in
13 the bill of - - -

14 JUDGE STEIN: And that's pled.

15 MR. JANNUZZO: But that's not in the bill
16 of particulars. The only bill of particulars in the
17 summary judgment motion is the one that was decided
18 on by both courts.

19 JUDGE STEIN: Can't they move to amend
20 their bill of particulars?

21 MR. JANNUZZO: They threw it five months
22 later, after they'd lost a motion to amend, after the
23 courts below found that their amendment was about
24 assumption of risk, it was patently devoid of merit.

25 JUDGE PIGOTT: It is. I - - - I didn't

1 know why they brought it, frankly, but am I wrong in
2 saying if you - - - if I get sued in legal
3 malpractice, that I can say, you assumed the risk by
4 hiring me?

5 MR. JANNUZZO: No, no, no. The assumption
6 - - - Judge, believe me, it's upside down.

7 JUDGE PIGOTT: I know what you're going to
8 say it, but go ahead.

9 MR. JANNUZZO: You know what I'm going to
10 say.

11 JUDGE PIGOTT: Yeah.

12 MR. JANNUZZO: They're saying that
13 assumption of risk is, we told you not to sign that
14 letter.

15 JUDGE PIGOTT: You said, they didn't assu -
16 - - they didn't argue - - - they didn't - - - they
17 didn't include in their answer the defense of
18 assumption of risk.

19 MR. JANNUZZO: They did not.

20 JUDGE PIGOTT: There is no way in the world
21 that it should have been in there, because the
22 complaint is, you committed legal malpractice, and -
23 - - and the only way assumption of risk figures at
24 that point is, you hired us.

25 Now, you can't say, you assumed the risk by

1 hiring us.

2 MR. JANNUZZO: Judge - - -

3 JUDGE PIGOTT: The issue you're at is, what
4 was going on in terms of the side agreement. That's
5 evidentiary with respect to, you know, what happened,
6 and as Judge Stein is saying, that - - - that's not
7 assumption of risk either. That's - - - that's - - -

8 MR. JANNUZZO: They are pleading - - -

9 JUDGE PIGOTT: - - - comparative
10 negligence.

11 MR. JANNUZZO: Their now theory is not - -
12 - is that Dennis Block said, don't sign it - - -

13 JUDGE PIGOTT: Right.

14 MR. JANNUZZO: - - - and you intentionally
15 went ahead anyway.

16 JUDGE PIGOTT: Right.

17 MR. JANNUZZO: That's alleging an
18 intentional act.

19 JUDGE PIGOTT: It's what?

20 MR. JANNUZZO: It's alleging an intentional
21 act. We said don't do it. That's his new theory, we
22 said don't do it, and you went ahead and did it
23 anyway.

24 JUDGE PIGOTT: But now - - -

25 JUDGE GARCIA: Are they trying to plead

1 that defense? When they were trying to amend, are
2 they pleading an assumption of risk theory?

3 MR. JANNUZZO: They were trying to. Now -
4 - -

5 JUDGE GARCIA: But did they call it an
6 assumption of risk?

7 MR. JANNUZZO: Yes. And in fact, as we - -
8 - as we know in the Nomura case, which was before
9 this court last fall, they pled comparative
10 negligence, and they pled assumption of risk; two
11 separate defenses.

12 And it was a case pending before the very
13 same judge. They knew the difference, and they knew
14 how to plead them. They pleaded them in Nomura, they
15 didn't plead them here. Why? Because all the facts
16 scream that Mr. Block's new theory - - -

17 JUDGE GARCIA: But my question is, did they
18 later try to plead assumptions of risk - - -

19 MR. JANNUZZO: Yes.

20 JUDGE GARCIA: - - - under that title?
21 Assumption of risk. In this case, not the other one.

22 MR. JANNUZZO: In this case, we move for
23 summary judgment. They came in with a surprise Block
24 affidavit that knocked us on the floor.

25 JUDGE ABDUS-SALAAM: Well, in - - -

1 MR. JANNUZZO: We then said, you can't - -
2 - you can't do that, we've waived it.

3 JUDGE GARCIA: Now, you're saying that
4 later they tried to amend.

5 MR. JANNUZZO: Then they tried to amend,
6 then they lost, then they put in the supplemental
7 Block affidavit, which is not in the record of the
8 case, with all these explanations.

9 JUDGE GARCIA: But really my question is,
10 did at some point they try to amend - - - amend by
11 putting in an assumption of risk defense calling it
12 that?

13 MR. JANNUZZO: Yes.

14 JUDGE GARCIA: Okay.

15 MR. JANNUZZO: In fact, they copied their
16 supposed - - - what they tried to put in was lifted
17 word for word out of what they put in Nomura.

18 They took - - - they put in Nomura, and then put
19 it in, and that was found to be patently devoid with
20 merit.

21 JUDGE STEIN: And that was after you said
22 that they couldn't submit their affidavit because
23 they hadn't pled assumption of risk, right?

24 MR. JANNUZZO: Right.

25 JUDGE PIGOTT: And you are asserting - - -

1 MR. JANNUZZO: The question of whether the
2 court's denial - - -

3 JUDGE PIGOTT: Wait, wait, you're asserting
4 that they should have pled to assumption of risk.

5 MR. JANNUZZO: Yes. In fact, they said
6 that in the First Department - - -

7 JUDGE PIGOTT: Now, right.

8 MR. JANNUZZO: - - - in their brief in the
9 First Department, if I can get my finger on it, give
10 me a sec, it's tab 5, in their reply, where they save
11 their argument about amendment for reply, remember,
12 the decision to amend is in the discretion of the
13 trial court and the Appellate Division, reviewed here
14 only for - - -

15 JUDGE PIGOTT: To amend?

16 MR. JANNUZZO: To amend to assert
17 assumption of risk.

18 JUDGE PIGOTT: To amend the answer.

19 MR. JANNUZZO: To amend the answer to
20 assert assumption of risk.

21 JUDGE PIGOTT: Right, if you don't do it.

22 MR. JANNUZZO: And this court basically
23 doesn't look at those decisions except in extreme
24 cases. They didn't make that argument; they didn't
25 deal with that argument until the reply brief.

1 somebody get to the point, you know, of notice - - -
2 notice pleading state, and then after that comes
3 depositions, and exchange of documents, et cetera - -
4 -

5 MR. JANNUZZO: Well, at the time we moved -
6 - -

7 JUDGE PIGOTT: - - - and a summary
8 judgment.

9 MR. JANNUZZO: At the time we moved, in
10 April of 2012, after getting the court's permission,
11 we had finished document discovery, we had exchanged
12 privileged logs, we had answered interrogatories, and
13 we had gotten the bill of particulars, which I'd hope
14 the court could take a look at page - - - record page
15 202.

16 Because our bill of particulars required
17 them to tell us if they had this defense, that they -
18 - - that they warned us and we intentionally
19 disregarded their warning. At page 202 in brief what
20 - - - where they go through, that required them to
21 say that.

22 To answer Judge Abdus-Salaam's question, we
23 privilege logged our documents. In fact, it came about -
24 - - it's never been raised in five years of litigation. I
25 was in contact with the junior lawyer, and I said, look,

1 are you going to claim privilege for your internal stuff?
2 And he - - - he - - - I said, unless you tell me
3 absolutely no, I'm going to do the same.

4 He said, yes, we are. We did it. We filed our
5 privilege log for our internal stuff that wasn't exchanged
6 with them, they did the same. That was August 2011.

7 All they had to do if they ever had a problem
8 with that, and they thought we were withholding stuff, was
9 to make a three-page letter motion in the commercial
10 division. We were before the commercial division, in this
11 case, every two or three weeks for the better part of two
12 years. They didn't move against the interrogatories; they
13 didn't move against the privileged log. We produced
14 54,000 pages of documents; they didn't move against that.

15 By the time we moved, there was no deposition
16 notices pending, they had never served deposition notices,
17 all discovery was complete, no motions have been made. We
18 said, we have a prima facie case. Our cases, you knew
19 what the terms of the - - - of the agreement were, you
20 committed to write them down, and you failed. And there's
21 a case we cited, the Serhofer case, and the N&S Supply
22 case.

23 JUDGE PIGOTT: And they failed why?

24 MR. JANNUZZO: Failed to write it down.

25 They failed - - - they committed to get that contract

1 - - -

2 JUDGE PIGOTT: Okay, I thought you were
3 talking about they failed in their representation.

4 MR. JANNUZZO: No, no. The - - - what we
5 alleged for malpractice, is that we had a clear
6 handshake oral agreement. It was supposed - - -

7 JUDGE PIGOTT: We being - - - we being - -

8 -

9 MR. JANNUZZO: We being us and UBS, Red
10 Zone and UBS - - -

11 JUDGE PIGOTT: All right. Not - - -

12 MR. JANNUZZO: - - - with a handshake.

13 JUDGE PIGOTT: - - - not you and
14 Cadwalader.

15 MR. JANNUZZO: No, no. UBS - - - UBS and
16 Red Zone. Dennis Block was in attendance, and the
17 agreement was, fifty-one percent of the stock or you
18 get only two million dollars.

19 JUDGE PIGOTT: Right.

20 MR. JANNUZZO: Cadwalader undertook, they
21 do not dispute that they undertook that that was the
22 terms of the agreement, and that they undertook to
23 memorialize it. The court below found that they did
24 not properly do that. And frankly, you look at the
25 letter, it can't - - - the letter doesn't say that,

1 but Block told Red Zone that it did. And he
2 testified in the deposition that it did.

3 So the malpractice is not - - - is - - -

4 JUDGE PIGOTT: Right.

5 MR. JANNUZZO: I'm - - -

6 JUDGE PIGOTT: I know what you are going to
7 - - - I'm just - - - you're not distinguishing
8 between him properly defending his client, and not -
9 - - and not saying, I didn't, you know, of course I
10 told Mr. Snyder that this doesn't do it now that
11 you're suing me, and - - - or suing him, and I know
12 this really hurts him, because it's going to - - -
13 it's going to mean that you guys are going to win
14 this lawsuit, but I think I have to tell the truth
15 here, and tell you that I told Mr. Snyder, don't sign
16 that.

17 He - - - they would - - - they would have been
18 in front of the disciplinary board in a heartbeat. You
19 can't do that.

20 MR. JANNUZZO: Let me - - -

21 JUDGE PIGOTT: So - - - so they allege,
22 they say, we said what was necessary to say to defend
23 Red Zone.

24 MR. JANNUZZO: I am making a different
25 point, Judge. I really am. That their malpractice

1 was to draft a contract that included certain
2 protection, they don't dispute what the protection
3 was supposed to be, and the courts below found they
4 didn't do that. An example of that, the summary
5 judgment of Serhofer - - -

6 JUDGE PIGOTT: I don't meet to fence with
7 you on this, but I - - - it goes back to the fact
8 that UBS won the lawsuit. People win - - -

9 MR. JANNUZZO: Well - - -

10 JUDGE PIGOTT: People win lawsuits.

11 MR. JANNUZZO: Judge - - -

12 JUDGE PIGOTT: Why did they win the
13 lawsuit? Because this letter didn't say what it was
14 supposed to say.

15 MR. JANNUZZO: Yes.

16 JUDGE PIGOTT: They say it does.

17 MR. JANNUZZO: Well, it didn't, and that's
18 the prima facie case for malpractice. Now - - -

19 JUDGE PIGOTT: I don't - - - where is the -
20 - - where is the it didn't? You lost.

21 MR. JANNUZZO: Because - - -

22 JUDGE PIGOTT: I've lost - - - I've lost
23 perfect cases, I don't - - -

24 MR. JANNUZZO: The First - - - the First
25 Department ruled in UBS, and again in here, that the

1 side letter didn't do it. Let me ask Your Honor - -
2 - I know Your Honor is having trouble with my - - -
3 with the concept of why this is malpractice, and why
4 it's contradictory.

5 JUDGE PIGOTT: No, I get - - - I get that
6 it could be malpractice, I just don't - - - I can't
7 get summary judgment. You know, if you put - - - if
8 you put Block, you know, in a deposition and run all
9 of this through it, and put Snyder in a deposition
10 and run all of this through it, and for some reason,
11 you know, things turn out that, yeah, they really did
12 screw up, as opposed to, they did their job here,
13 unfortunate loss, and therefore there was no
14 malpractice. Or, exactly what you're saying
15 happened, and they don't have a rational explanation,
16 and that was the competent producing cause of the
17 damages that you did - - - that while you had an
18 opportunity or did not have an opportunity to
19 mitigate, you did or didn't, et cetera. I mean - - -

20 MR. JANNUZZO: Judge, let me ask you the
21 question. I'm really - - - I'm really speaking to
22 the other judges because I don't - - - I think I've
23 lost you.

24 But let me ask - - - let me ask the other
25 judges this question, and that is this. If this is

1 not a recent fabrication fabricated in July of 2013
2 in response to a prima facie case, if Dennis Block
3 really gave a whispered warning when no one else was
4 present, why was it never mentioned again for the
5 next eight years, when Red Zone called up and said,
6 we got demand from UBS for the ten million bucks.

7 The testimony is uncontradicted that Block
8 told them in profane language, which we can't use in
9 court, what UBS could be told to do to itself. And
10 continually told them the letter protected him.

11 JUDGE PIGOTT: Um-hum.

12 MR. JANNUZZO: If - - - if he had really
13 given a warning, don't sign this letter, wouldn't the
14 first words out of any human being's mouth go, you
15 moron, I told you not to sign that letter. Then UB -
16 - -

17 JUDGE PIGOTT: That's - - - that's what
18 you're basing summary judgment on, a phone call.

19 MR. JANNUZZO: Well, no, it - - - but
20 that's consistent with everything else in the record.
21 The answer, the failure to plead, the bill of
22 particulars that says nothing, which actually
23 contradicts it, the course of conduct before the - -
24 - before the commercial division, where they said we
25 can't possibly answer this from our own knowledge, we

1 have to have lots of discovery. Well, their own
2 knowledge was Dennis Block supposedly knew all of
3 this.

4 JUDGE PIGOTT: Um-hum.

5 MR. JANNUZZO: And how could it be that
6 someone in four years of litigation, not when they
7 were - - - not when their client was sued, not when
8 their client lost the appeal, not at any stage did
9 Dennis Block not say, I war - - - I told you.

10 The reason he didn't swear to that is, he
11 told multiple witnesses in profane language that this
12 letter protected Red Zone. And that is completely
13 different from saying, I warned you not to sign it.

14 What we have here, is a feigned issue of
15 fact. And really, if the court is looking for a
16 standard to apply, the standard here of whether this
17 is admissible evidence, as Judge Stein said, it's
18 whether he - - - was I said to Judge Stein is whether
19 you can receive it at all.

20 This is a decision like a trial judge,
21 someone coming into court in a trial with a surprise
22 witness, not identified on any witness list, nowhere,
23 anyplace, says, Judge, we have a new witness we'd
24 like to call, he's our key witness, he's going to
25 tell you something that changes the case.

1 The trial judge has discretion to say, hum,
2 tell me your explanation for why I'm just hearing for
3 this after four years. And if they go, homina homina
4 homina, the trial judge has the right to say, I'm
5 sorry, you're not putting that witness in.

6 JUDGE PIGOTT: See, I'm amazed at the way
7 you guys characterize each other, but I guess that's
8 okay.

9 MR. JANNUZZO: All right. Well, that's - -
10 - it's - - -

11 JUDGE PIGOTT: It's colorful.

12 MR. JANNUZZO: People of my ethnic group
13 are known for their emotionality and use of hand
14 gestures.

15 But that - - - that is - - - that is what
16 we have here. We have a court saying, we will not
17 accept your affidavit. And without that affidavit,
18 there is no issue of fact. The facts here, the
19 record here screams faint issue.

20 Let me talk about one thing for continuous
21 rep then I'll sit down. There are two cases of this
22 court which dispose of the continuous representation
23 argument just made. One of them is McDermott v.
24 Torre, which is the medical malpractice case that I
25 think Judge Stein referred to.

1 Lady went to her doctor and said, I had a
2 mole. And he said, it's fine, go away, you have no
3 problem. She come - - - coming back and said, the
4 mole is getting worse. As long as she went back to
5 him within the statute to treat the mole, it's
6 considered timely return, and it was continuous
7 treatment.

8 McDermott v. Torre was adopted into the law
9 of legal malpractice in Shumsky v. Eisenstein. Where
10 they cited McDermott v. Torre, this court did, and
11 then said, a timely return to treat the same problem
12 is continuous representation.

13 Here, Red Zone, Cadwalader's job, from the very
14 beginning, from that first night when they had the oral
15 handshake about fifty-one percent, Cadwalader's job was to
16 protect Red Zone against the ten-million dollar fee. That
17 continued straight through to when they got the call in
18 May saying, we just got a letter, we're going to get sued
19 for ten million, to the - - - to when they got sued, to
20 when they lost the appeal, their job was to protect Red
21 Zone from the ten-million dollar fee.

22 JUDGE PIGOTT: But - - - but if - - - if
23 you are representing somebody and they get sued, and
24 you're going to be the key witness in the trial. You
25 have a conflict, so you can't continue to represent -

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- -

MR. JANNUZZO: You can't be trial counsel.

JUDGE PIGOTT: - - - plaintiff.

MR. JANNUZZO: You can't be trial counsel, but you could still be counsel. And there is a case for that.

JUDGE PIGOTT: Well - - -

MR. JANNUZZO: N&S Supply. And - - - Second Department case in this case. In N&S Supply, the lawyer screwed up a transaction.

JUDGE PIGOTT: So - - - so I was going to finish my paragraph.

MR. JANNUZZO: Yes, Your Honor.

JUDGE PIGOTT: It's okay. So the - - - so they get out, they don't bill anymore, they, you know, obviously, they're witnesses. They're, you know, if Quinn Emanuel needs help, you know, they provide it, et cetera. But they're not billing, they're not - - - they're not doing anything on that case because they're going to testify.

MR. JANNUZZO: Well, actually that's not true, Judge; that's not the record. The record of what they did is, they advised Red Zone about the merits from the day that it came in. They advised Red Zone's - - - about what settlement position to

1 adopt - - -

2 JUDGE PIGOTT: About what - - -

3 MR. JANNUZZO: - - - including saying,
4 don't settle.

5 JUDGE PIGOTT: I'm sorry, what?

6 MR. JANNUZZO: They advised Red Zone that
7 this case is a - - - that this case should be
8 blopidiblop, so don't settle it, except for nuisance
9 value. The billed Red Zone for some of that advice,
10 they stopped after their client got sued, which is
11 consistent with finding a cure.

12 JUDGE PIGOTT: Right, so if - - - I guess
13 my question is, after 2005, when the lawsuit happened
14 and they say, we can't represent you anymore, they
15 didn't.

16 MR. JANNUZZO: No, they - - - well, what do
17 you call it when they gave advice about the answer,
18 they give advice about the court-ordered mediation
19 about settlement, they advised Red Zone about whether
20 to - - - how to avoid a fraudulent conveyance claim.

21 JUDGE PIGOTT: Well, is that - - - is that
22 - - - well, I guess there is a difference between Red
23 Zone and - - -

24 MR. JANNUZZO: No.

25 JUDGE PIGOTT: - - - Six Flags, right?

1 But - - -

2 MR. JANNUZZO: Six Flags would be distinct,
3 but they - - -

4 JUDGE PIGOTT: But is that a question of
5 fact, then? In other words, if - - - if I'm being
6 asked to testify as a witness in a case, and I give -
7 - - give whoever is calling me my opinion that, you
8 know, don't settle, have I now introduced myself into
9 the case such that I could be sued if they lose?

10 MR. JANNUZZO: No, no. But you are acting
11 as a lawyer.

12 JUDGE PIGOTT: Right.

13 MR. JANNUZZO: Someone who wasn't a lawyer,
14 who did the things that Cadwalader did, including
15 help writing the summary judgment papers, would be
16 arrested for the practice of law - - - for the
17 unauthorized practice of law.

18 The things which they did, which are
19 contradicted in the record, that they did all of
20 those things - - - you could look at our brief for a
21 summary at page 56 and 57, the citations are earlier
22 in the brief, they did a host of things that only a
23 lawyer could legally do, and that's what the effort
24 to cure is.

25 It would be like a physician in medical mal

1 case, where a doctor - - - a physician screws something
2 up, and then he has to have - - - there has to be surgery
3 as a result, which is not something that is infrequent.

4 That the fact that he - - - the doctor - - - if
5 the physician is still writing prescriptions, reading
6 charts, sitting the patient, palpating them, doing all the
7 things a doctor does, he can't later be here to say, I
8 wasn't acting as your doctor, I was just being helpful.

9 Thank you, Your Honor.

10 JUDGE PIGOTT: Thank you, sir.

11 MR. MARRIOTT: Thank you, Your Honors.

12 Let me take those, if I may, in reverse order
13 and begin with statute of limitations.

14 The problem here with respect to the statute of
15 limitations is that the court disregarded the mutual
16 understanding requirement. There is no question that
17 there was no mutual understanding. This courts have said
18 that - - - this court's cases say that requirement
19 applies. And to basically read in a cure exception,
20 invites in every case there then to be a dispute about
21 whether conduct qualifies as a cure or does not qualify as
22 a cure.

23 And it disincentivizes lawyers again to undertake, to
24 assist clients, in instances where cert - - - where
25 difficulties arise.

1 Furthermore, there is a fundamental difference
2 whatever, however you characterize what Cadwalader did or
3 didn't do in connection with the UBS litigation, where it
4 was clearly not counsel of record, where Cadwalader
5 declined to represent them, where they had three different
6 sets of lawyers, Quinn Emanuel, O'Melveny & Myers, and the
7 Law offices of Gregory Joseph, Cadwalader was not their
8 counsel in connection with that litigation.

9 But even if you characterize what they did as
10 representation, it was not, we submit, continuous of what
11 happened before. What happened before was giving advice
12 about a fee agreement with a banker in connection with a
13 proxy contest.

14 And what happened later in connection with
15 litigation was a different undertaking. That's the
16 distinction the Second Circuit drew - - -

17 JUDGE PIGOTT: Well, it all - - - it's all
18 the same. I mean, all the litigation is about the
19 letter.

20 MR. MARRIOTT: The litigation is about the
21 letter, Your Honor, but the Second Circuit, in the
22 Offshore case, the Southern District of New York case
23 characterizing this court's cases, describe that
24 distinction as sufficient to repre - - - to render
25 the subsequent activity as not continuous of what

1 came before. Right, and that's entire - - -

2 JUDGE RIVERA: Well, what - - - what about
3 the, generously call it, surprising and unexplained
4 delay in presenting Block's statement?

5 MR. MARRIOTT: Your Honor, I don't think,
6 despite the characterizations, with all respect, I
7 don't think there is any unsurpri - - - any great
8 surprise in what was revealed. And in any event - -
9 - and I'll come to why I say that's the case - - -

10 JUDGE RIVERA: Is it insignificant?

11 MR. MARRIOTT: It is - - - it is - - - it
12 is significant in the sense, Your Honor, that if
13 anything, it demonstrates there is a fact dispute.
14 What counsel basically has said is - - -

15 JUDGE RIVERA: It demonstrates - - - from
16 your side, you're demonstrating that there is no
17 malpractice. So why wouldn't you have put that
18 before - - -

19 MR. MARRIOTT: Well, Your Honor, from that
20 - - -

21 JUDGE RIVERA: - - - so early on, why are
22 you waiting years? Why are you waiting for summary
23 judgment?

24 MR. MARRIOTT: Well, as a practical matter,
25 Your Honor, what happened here is the advice was

1 given when it was given in 2005, and when the UBS
2 litigation was filed, and Mr. Block suggested that
3 Cadwalader would not represent them, and they should
4 get other counsel, apparently, according to the rec -
5 - - the limited record we have, since there had been
6 no depositions - - - since Mr. Block did not rub in
7 their face the fact that he had told them so. But I
8 would submit - - -

9 JUDGE PIGOTT: But doesn't - - - don't they
10 raise a point, I mean, there is no depositions, but
11 it's been years.

12 MR. MARRIOTT: It's been years, Your Honor,
13 but because it came up many years later, right, the
14 agreement was executed in 2005, right, then nothing
15 happened basically for two years. The UBS litigation
16 began two plus years after Cadwalader advised with
17 respect to that fee agreement.

18 JUDGE PIGOTT: But once you got sued, I
19 would have thought - - - I'm sorry.

20 MR. MARRIOTT: Once - - -

21 JUDGE ABDUS-SALAAM: No, I was going to say
22 the same thing. So - - -

23 MR. MARRIOTT: Once we got sued - - -

24 JUDGE PIGOTT: Once you get sued, your old.

25 MR. MARRIOTT: - - - it came up. In our

1 motion to dismiss, we denied that we had departed
2 from the standard of care, this is not enough sum - -
3 -

4 JUDGE PIGOTT: I realize maybe it's a
5 little bit of a different case - - -

6 MR. MARRIOTT: Yeah.

7 JUDGE PIGOTT: - - - but standard operating
8 procedure that I know is answer, demand for bill of
9 particulars on the plaintiff, notice to take
10 deposition of the plaintiff, and discovery of any and
11 all documents relevant to this cause. And that
12 didn't happen, I guess.

13 MR. MARRIOTT: Well, it - - - it certainly
14 happened that we asked for it, Your Honor. And we
15 asked for it repeatedly.

16 JUDGE PIGOTT: Very early - - -

17 MR. MARRIOTT: No less than sixteen times
18 by my count, and the trial court below, at page 45 of
19 the record, in his decision, expressly acknowledged
20 that we repeatedly asked for discovery. The court
21 didn't fault us in any sense below for not timely
22 asking for discovery; it was repeated.

23 We asked time and again, we - - - and we
24 laid it out in detail. What the court below said is,
25 he didn't think we really needed it, seemingly,

1 because from his perspective, we were there; we were
2 part of the negotiations. So what do we need
3 discovery for? That was the - - -

4 JUDGE ABDUS-SALAAM: You actually noticed
5 depositions?

6 MR. MARRIOTT: We did, Your Honor. We
7 noticed depositions.

8 JUDGE RIVERA: Well, why wasn't - - -

9 MR. MARRIOTT: We served their
10 interrogatories. The answer to the interrogatories
11 was, we aren't going to answer those interrogatories
12 for you, because we'll tell you that at depositions.
13 And then we noticed deposition, and we were told we
14 couldn't have depositions.

15 JUDGE RIVERA: Why - - - why wasn't it in
16 the answer? Why are you waiting years to try to
17 amend the answer to put him what, from your side
18 sounds like, the winning argument, the defense, why
19 not?

20 MR. MARRIOTT: Well, an answer, Your Honor,
21 as a practical matter is, by rule, I admit it, I deny
22 it, I say I lacked knowledge and information
23 sufficient to form belief. We not only said those
24 things, but in the answer, we in fact do say that we
25 believe we met the standard of care, that we acted

1 reasonably, and we make reference to our advice.

2 JUDGE PIGOTT: So Mr. Jannuzzo said there
3 were no deposition notices.

4 MR. MARRIOTT: That's - - - that's not
5 correct, Your Honor.

6 JUDGE PIGOTT: Right. Okay.

7 MR. MARRIOTT: Deposition notices can be
8 found, for example, at pages - - -

9 JUDGE PIGOTT: Well, they're in the rec - -
10 -

11 MR. MARRIOTT: Beginning at pages 433 of
12 the record, and running through 480.

13 The trial court here initially struck the
14 motion for summary judgment. They indicated they
15 were going to bring the motion informally. We met
16 with the law secretary, and we said, this motion is
17 way premature. They've just dumped 300,000 pages of
18 paper on us, but then withheld the stuff we really
19 wanted; the privileged internal communications.

20 They dump 300,000 pages of paper on us, not
21 ready for summary judgment. What they then
22 nevertheless did is they made a motion for summary
23 judgment. The court struck that motion when we
24 pointed out at length in various papers that we
25 needed discovery. Then there was, inexplicably

1 sometime later, after we had noticed the depositions
2 we've been told we could take, after we had served a
3 new set of interrogatories, the court then
4 inexplicably frankly undid its order, striking their
5 motion for summary judgment, and put it back on
6 calendar.

7 We sought the discovery, we sought it time
8 and we ti - - - we sought it time again, and we were
9 denied the opportunity to see what's in their files,
10 to see the documents as to which the privilege
11 plainly was waived. So the assertion that somehow
12 discovery was done and we were finished is simply not
13 true.

14 JUDGE PIGOTT: Okay.

15 MR. MARRIOTT: Right. Simply not true.

16 JUDGE PIGOTT: Did you have a third point?
17 I promised you we'd give you - - -

18 MR. MARRIOTT: Well, I had a - - - I had a
19 point about comparative negligence, Your Honor. I
20 will say that - - - that that defense is plainly well
21 recognized, it was dismissed here at the motion to
22 dismiss stage, not at the summary judgment stage. We
23 were given no discovery with respect to that
24 whatsoever. And advising the client as to the
25 shortcomings of an agreement, and urging them not to

1 sign that agreement, is plainly the makings of a
2 claim of - - - of comparative negligence.

3 And finally what I would just say is this.
4 Fundamentally below, if you look at what the First
5 Department did, rather than doing an analysis of whether
6 Cadwalader departed from the standard of care, what the
7 court below did is it simply substituted its judgment in
8 the UBS litigation for that analysis.

9 And that is precisely what a court may not do in
10 evaluating whether or not a claim of legal malpractice has
11 been asserted.

12 Thank you.

13 JUDGE PIGOTT: Thank you, sir.

14 Thank you, both.

15 MR. JANNUZZO: Your Honor, there is one
16 thing, because I was mentioned by name.

17 When I said that there would no depositions
18 noticed, that was correct. When we moved for summary
19 judgment, we were two years into the case, there were no
20 depositions noticed. The ones they noticed came six - - -
21 eight months later.

22 JUDGE PIGOTT: Okay.

23 MR. MARRIOTT: After the motion was
24 stricken, and the court told him - - -

25 JUDGE PIGOTT: You're turning this into

1 special term, and I'm going to get in trouble with
2 the Chief Judge.

3 MR. MARRIOTT: Thank you, Your Honor.

4 JUDGE PIGOTT: Thank you.

5 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Red Zone LLC v. Cadwalader, Wickersham & Taft LLP, No. 5 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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