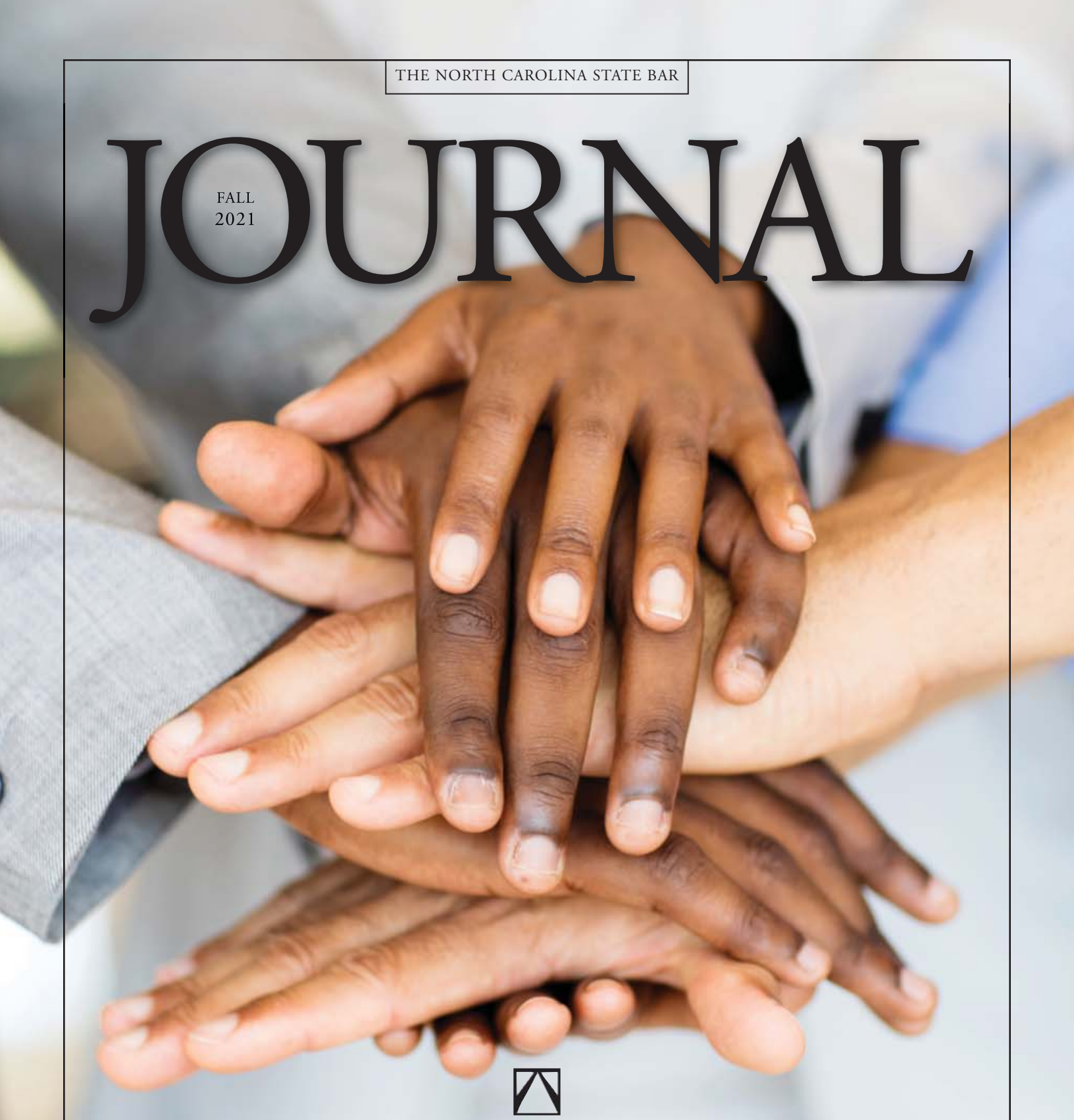
THE NORTH CAROLINA STATE BAR

JOURNAL

FALL
2021



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THE
NORTH CAROLINA
STATE BAR
JOURNAL

Fall 2021
Volume 26, Number 3

Editor
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 Periodicals postage paid at Raleigh, NC, and additional offices. POSTMASTER: Send address changes to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The *North Carolina Bar Journal* invites the submission of unsolicited, original articles, essays, and book reviews. Submissions may be made by mail or email (jduncan@ ncbar.gov) to the editor. Publishing and editorial decisions are based on the Publications Committee's and the editor's judgment of the quality of the writing, the timeliness of the article, and the potential interest to the readers of the *Journal*. The *Journal* reserves the right to edit all manuscripts. The *North Carolina State Bar Journal* (ISSN 10928626) is published four times per year in March, June, September, and December under the direction and supervision of the council of the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. Member rate of $6.00 per year is included in dues. Nonmember rates $10.73 per year. Single copies $5.36. The *Lawyer's Handbook* $16.09. Advertising rates available upon request. Direct inquiries to Director of Communications, the North Carolina State Bar, PO Box 25908, Raleigh, North Carolina 27611, tel. (919) 828-4620.

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FEATURES

Doctors vs. the Dead Man

The Problem with Application of North Carolina Rule of Evidence 601(c) in Wrongful Death Suits Arising from Alleged Medical Malpractice

By Adam Peoples and Taylor Belknap

The purpose of the dead man statute is to protect the estate from fraudulent claims by survivors that are often made in contractual disputes and will proceedings. It serves as a remedy for situations in which, "[t]he survivor c[an] testify though the adverse party's lips would be sealed in death."[1] However, these statutes have been substantially criticized, and as a result only a handful of states have retained them.[2]

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Limiting our thoughts strictly to contractual transactions or will proceedings, the application of the rule seems straightforward.[3] Often in these scenarios, an interested party claims that contractual obligations accepted by the decedent have not been fulfilled or that they were promised some asset of the estate, thus the estate must perform or be held liable for breach. North Carolina Rule of Evidence 601 § (c) prohibits testimony that recounts oral communications with the decedent, which prevents a fraudulent claim of this nature against the estate. However, in wrongful death suits arising from alleged medical malpractice (WDMM suits), the application of Rule 601 § (c) proves problematic and confusing for lawyers and litigants alike.

Imagine a scenario in which prior to surgery, a doctor and patient discuss the operative plan, the expected results, and other pre-procedure plans via phone call. There are no other individuals on the call, just the doctor and the patient having a final conversation prior to surgery in which they agree that the doctor will perform the surgery on her own. During surgery, complications arise, and the patient dies. Years after the operation, the decedent's estate files a wrongful death suit against the doctor, alleging that she negligently performed the surgery because her decision to operate alone did not meet the standard of care. While testifying, the doctor attempts to discuss the conversation in which she and the patient agreed that the doctor would proceed alone. However, when the doctor attempts to deliver this testimony, plaintiff's counsel objects and the doctor is prohibited from mentioning the phone call under 601 § (c). Not only is the doctor subjected to a lawsuit that requires her to recall the emotional experience of losing a patient, one that questions her professional judgment while her career hangs in the balance, but during that lawsuit, the doctor is unable to defend herself by recounting private conversations which ultimately led to the course of action.

As this example illustrates, although the

dead man statute serves a noble purpose, in WDMM suits, application of these statutes is counter-intuitive.

North Carolina's Former Dead Man Statute and Rule of Evidence 601 § (c)

North Carolina's former dead man statute, originally codified in N.C. Gen. Stat. § 8-51, has since been repealed, and was replaced by its substantive equivalent, Rule of Evidence 601 § (c).[4] The rule provides that, "a party shall not be examined as a witness in his or her own behalf or interest...against the executor, administrator, or survivor of a deceased person...concerning any oral communication between the witness and the deceased..."[5] Rule 601 § (c) also names three exceptions in which the rule does not apply. The first is when the executor herself is examined on her own behalf regarding the subject matter of the oral communication. The second is when the testimony of the decedent is given in evidence concerning the oral communication. The third is when "[e]vidence of the subject matter of the oral communication is offered by the executor..."[6] The first and third exceptions are commonly referred to as the plaintiff "opening the door" to otherwise incompetent testimony. Thus, if the plaintiff estate first opens the door to incompetent testimony by testifying on their own behalf about the subject matter of the oral communication, or by offering evidence about the subject matter of the communication, any protection afforded to the estate by Rule 601 § (c) is waived.

The Problem with Application of Rule 601(c) in WDMM Suits

A. The application of Rule 601(c) in WDMM actions is inconsistent with the stated purpose of the rule.

Rule 601 § (c) was included in the North Carolina Rules of Evidence because of a concern that "fraud and hardship could result if an interested party could testify concerning an oral communication with the deceased[.]"[8] The Supreme Court of North Carolina further detailed the purpose of Rule 601(c) in *Carswell v. Greene*.[9]

In *Carswell*, the Court discussed the dead man statute at length, ultimately issuing an opinion that is widely quoted throughout North Carolina case law.[10]

> [The dead man statute] is intended as a shield to protect against fraudulent and unfounded claims. It is not intended as a sword with which the estate may attack the survivor...In offering evidence of [the decedent] and objecting to the evidence of [the defendant] the plaintiff sought to pick up the shield, having first used the sword. This the law does not permit.[11]

Similarly, in *Smith v. Dean*,[12] the Court stated that

> [t]he plaintiff used the defendant's words as a sword and then attempts to use the shield of the statute to prevent the defendant from [testifying]...[s]uch a construction of the statute would permit the plaintiff to open the door...wide enough for him to enter but deny the defendant the right to enter at the same door.[13]

WDMM actions are unique because by nature they are suits in which the plaintiff is the estate or some representative of the decedent, and the doctor or hospital is the defendant. In other words, WDMM suits by necessity are cases where the deceased patient is suing some medical professional for improper care. As such, there will never be a counterclaim by the defendant doctor or hospital that can affect the rights or the value of the estate. Instead, any defense used by the doctor will simply diminish the extra gain available to the estate because of a finding of negligence, but will not take from the assets originally included in that estate. Thus, the doctor will not have a stake in the litigation aside from avoiding liability. In other words, any defense will likely be some version of comparative fault, which is merely a defense (or shield) to the claim brought against them, not a counterclaim that functions like a sword.[14] Consequently, any WDMM suit will necessarily be an instance of the estate first seeking to use the rule as a sword rather than a shield, running contrary to the rule's stated purpose, and presenting a unique scenario that remains unconsidered by North Carolina courts.

This argument also holds up in North Carolina case law for wrongful death actions generally, not only WDMM actions. In these cases, testimony has been rejected on the basis of rule 601 § (c) only when there is a counterclaim by the defendant.[15]

In *Redden*, a wife sued by her husband's estate for constructive fraud, conversion, and breach of fiduciary duty testified about a conversation between herself and the decedent in which the decedent told her to move the money at issue. This testimony was found incompetent when the defendant wife had filed a counterclaim against the estate.[16] Because the wife had filed a counterclaim, the purpose of the rule—namely, to protect estates from fraudulent and unfounded claims—is pertinent, and effectively justified the application of the rule to the testimony in this case.

Similarly, in *Weeks v. Jackson*,[17] interrogatory responses by defendant debtors recalling oral communications with decedent about the terms of a loan were rejected where defendant debtors had filed a counterclaim against the estate.[18] Because of the counterclaim, the rights of the estate were vulnerable to a judgment, thereby invoking the underlying purpose of 601 § (c).

In WDMM suits doctors and hospitals merely defend using claims of comparative fault, as noted previously. Comparative fault simply prevents a finding of negligence on the part of the defendant. The filing of a counterclaim is distinct because a counterclaim affects the rights of the estate and its assets. A counterclaim creates a possibility of the defendant obtaining a judgment against the estate, thereby diminishing it. In short, a counterclaim results in the defendant having a stake in the proceeding, justifying application of 601 § (c) on the basis of its stated purpose—to protect the estate.

As a result of the foregoing analysis, it is clear that WDMM actions pose a unique problem for Rule 601 § (c). North Carolina case law essentially leaves unanswered the question of how Rule 601 § (c) should apply in WDMM actions. This gap in precedent not only makes defending these actions difficult, but it also means that with respect to an entire category of actions, application of Rule 601 § (c) is largely discretionary.

B. North Carolina case law is silent regarding the application of North Carolina Rule of Evidence 601 § (c) to WDMM suits.

The principal case in North Carolina that applies the former dead man statute to a WDMM suit is *Spillman v. Forsyth Mem'l Hosp.*[19] In *Spillman*, the facts are markedly different from a typical WDMM action, diminishing its precedential value in the context of this analysis. In *Spillman*, the plaintiff brought a WDMM action on behalf of her deceased son, but the defendant doctor was also deceased.[20] The court admitted the testimony largely because the witness's account was the only one available, thus the witness could recount what she had observed as a third party.[21]

No North Carolina cases specifically

address the unique issues associated with the application of the former dead man statute, nor Rule 601 § (c), in a WDMM suit. There is, however, a plethora of wrongful death suits generally (outside the realm of medical malpractice) in North Carolina where testimony has been admitted following a waiver by the plaintiff.[22]

North Carolina courts depend heavily on facts and circumstances in their application of waiver of Rule 601 § (c). This mode of analysis has resulted in a body of case law that stretches to its limits in order to ultimately allow the testimony at issue. Because of these supererogatory efforts by courts to ultimately admit testimony, the purpose of the rule is diminished. What good is a rule that limits testimony if courts are eager to apply exceptions and will stretch their reasoning to do it?

Additionally, the frequency of unintentional waivers by plaintiffs, and the fierce litigation that ensues, indicates that parties often lack an understanding of the rule in the first place. The facts and circumstances analysis required to discern a waiver is unpredictable, making the issue difficult for parties to litigate. Finally, the facts and circumstances approach is cumbersome and inefficient.[23]

Although courts are receptive to arguments by defendants that Rule 601 § (c) has been waived, it is unwise for doctors in WDMM suits to rely on this defense because of the court's discretion in applying it. The question arises, what options do doctors have to defend themselves in a WDMM suit when the estate seeks to bar their testimony about their oral communications with the decedent? As the rule stands now, not many.

What Have Other States Done?

In *Hicks v. Ghaphery*,[24] West Virginia's Supreme Court held that its dead man statute did not bar any party in a WDMM suit from testifying about conversations with a deceased patient.[25] West Virginia's statute is comparable to Rule 601 § (c) as it reads, "[n]o party...shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased..."[26] In finding the rule inapplicable, the *Ghaphery* court reasoned that

> the focus of a medical malpractice case is the care and treatment of the patient. In the instance where the patient is deceased, it would be patently unfair to exclude evidence of a patient's complaints...[i]n some cases, a patient's subjective description of their ailments may be the sole basis for a physician's diagnosis and treatment.

The Court also noted that "justice ordinarily will not prevail where only a part of the available evidence affords the only support for the judgment rendered."[28]

Another West Virginia court later rejected the dead man statute entirely, holding that the statute inaptly presumed that witnesses would commit perjury when asked to testify about communications with a decedent and "presumes that oath, cross-examination, and witness' demeanor will be insufficient to enable the trier of facts to detect the insincerity of the survivor witness."[29] The court's reasoning imparts the idea that doctors as witnesses and defendants in WDMM suits are under oath, cross examined, and scrutinized by a jury. These measures have effectively ensured truthful testimony for years, thus there is no need for a rule to serve an identical purpose, especially when doctors in these cases have nothing to gain from fraudulent testimony and there are often medical records that would support their account. Thus, in accordance with the reasoning employed by other jurisdictions, a categorical rejection of application of Rule 601 § (c) in WDMM actions could be warranted.

Conclusion

Although North Carolina has repealed their former dead man statute in accordance with a number of jurisdictions, Rule 601 § (c) is functionally the same. Application of Rule 601 § (c) in WDMM actions has not been considered by North Carolina courts, and is inconsistent with the Rule's purpose. WDMM suits are distinguishable from case law in which 601 § (c) has previously been applied, which illustrates the turbidity of the rule and the problems it poses for prospective litigants in WDMM suits. As such, a categorical rejection of application of Rule 601 § (c) in WDMM suits may be warranted. ■

Adam Peoples is a partner with Hall Booth Smith, PC, and he primarily defends doctors, lawyers, accountants, and engineers in negligence and ethics matters. His Asheville practice also includes defending claims regarding general liability, governmental liability, civil rights, and products liability.

Taylor Belknap is a 3L at UNC School of Law, a contributing editor to Volume 100 of the North Carolina Law Review, and will practice in Charlotte, NC, upon graduation. During her 1L summer, Taylor was inspired by the work she did with Hall Booth Smith, PC, which culminated in this collaboration with Adam Peoples.

Endnotes

1. Kenneth S. Broun, George E. Dix, Michael H. Graham, D.H. Kaye, Robert R. Mosteller, and E. F. Roberts, *McCormick on Evidence* 250 (John W. Strong ed., 4th ed. 1992) [hereinafter Broun].
2. *See* J. Wigmore, *Evidence* § 578 at 822-23 (1979); *See also* Broun, *supra* note 1, at 250¬-51; *See also* Ed Wallis, *Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and a Proposal for Change*, 53 Cleveland St. L. Rev. 75, 82 (2005).
3. *See* N.C. Gen. Stat. § 8C-1 § 4-6A.
4. N.C. Gen. Stat. § 8C-1, 601(c) (2019).
5. § 8C-1, 601(c).
6. § 8C-1, 601(c).
7. *See* Breedlove ex rel. *Howard v. Aerotrim*, USA, Inc., 142 N.C. App. 447, 452, 543 S.E.2d 213, 216 (2001).
8. § 8C-1, 601(c).
9. 253 N.C. 266, 116 S.E.2d 801 (1960).
10. *See Id.*
11. *Id.*
12. 2 N.C. App. 553, 163 S.E.2d 551 (1968).
13. *Id.* at 559-60, 163 S.E.2d at 555.
14. To avoid or limit liability on the basis of a patient's negligence, a physician sued for malpractice must show that the patient failed to adhere to the appropriate standard of care and that the patient's negligence was a proximate or contributing cause of his or her injury. With respect to a defense of assumption of the risk, the patient's knowledge or awareness of the adverse consequences of his or her action must be shown. 108 A.L.R.5th 385 (2003).
15. *See, e.g. Estate of Redden ex rel. Morley v. Redden*, 194 N.C. App. 806, 670 S.E.2d 586 (2009); *see also, e.g. Weeks v. Jackson* 207 N.C. App. 242, 700 S.E.2d 45 (2010).
16. *Id.* at 807, 670 S.E.2d at 587.
17. 207 N.C. App. 242, 700 S.E.2d 45 (2010).
18. *Id.* at 249, 700 S.E.2d at 50.
19. 30 N.C. App. 406, 227 S.E.2d 292 (1976).
20. *Id.*
21. *Id.*
22. *Bryant v. Balance*, 13 N.C. App. 181, S.E.2d 315 (1971), *Brown v. Moore*, 286 N.C. 664, 213, S.E.2d 342 (1975), *Hayes v. Ricard*, 244 N.C. 313, 93 S.E.2d 540 (1956).
23. Oftentimes, individual lines of deposition transcripts or a single interrogatory response result in an entire proceeding to determine whether there was a waiver. *See Redden*, *supra* note 21.
24. 212 W.Va. 327, 340, 571 S.E.2d 317, 330 (2002) (applying W. Va. Code § 57-3-1).
25. *Id.*
26. *Id.* at 338, 571 S.E.2d at 328.
27. *Id.* at 340, 571 S.E.2d at 330.
28. *Id.* at 339-40, 571 S.E.2d at 329-30.
29. *See State Farm Fire & Cas. Co. v. Prinz*, 231 W.Va. 96, 104 743 S.E.2d 907, 915 (2013).

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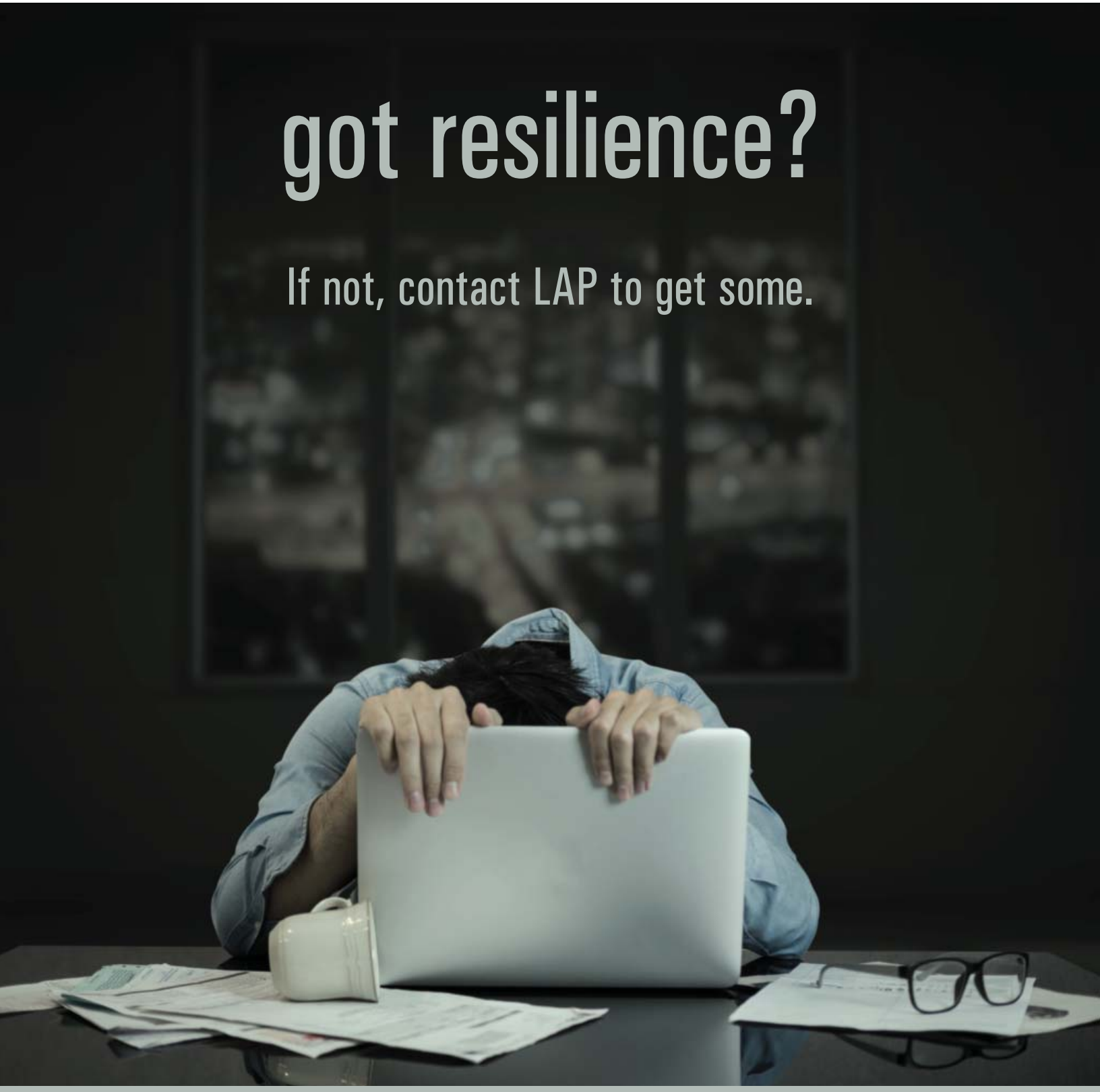

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