WARREN COUNTY BAR ASSOCIATION, INC.

TIPSTAFF

FALL 2020 Volume II Issue 1

IN THIS ISSUE

President's Page	1
Welcome Back!	2-3
Deceased Members Plaque	4
Accredited!	5-7
James Cooper	8-10
From Judge's Chamber	11-13
Judge Auffredou's Term	14
Torts & Civil Practice	15-18
Practice Page	19-20
In Memoriam	21-24
Bulletin Board	25

Dear Sisters and Brothers of the Bar:

It is with great enthusiasm that I welcome you to the 2020 Fall edition of the *Tipstaff*. It is my hope that you and your families are safe and healthy in these troubling times. In the midst of this pandemic and the hostile political environment, I believe that practices and activities, such as the *Tipstaff,* which we are able to continue and enjoy from the past, are more important than ever.

Since taking the reins in June, Kate and the Board have been working diligently to prepare for the upcoming year in a way and format that has never been done before. We were able to meet in person, with proper masks and semi-social distancing, on the lawn of Morgan & Co. in September. This event was enjoyed by all who attended as we were finally able to have a bit of normalcy and see each other in person. On October 29, 2020, Kate and Maria Nowotny arranged to have Attorney James Long present a CLE on the topic of the New York Shield Act, which was attended by 20 of our members. Maria and Kate are busy preparing a CLE for December discussing the re-opening of the courts to be presented by our local justices and judges and other court staff. Upon the idea of Judge Kershko, Kate and I have worked with the Legal Aid Society of Northeastern New York to partner in the presentation of a CLE for volunteer assistance to pro-se litigants in foreclosure actions. This is anticipated to be held in December, as well.

We are excited to announce that we have established a committee to prepare the Warren County Legal History for the Historical Society of the New York Courts. We have committee members from the Chapman Historical Museum and the Warren County Historical Society, including the retired records manager for Warren County and the Warren County Historian. Combined with members of our local judiciary and Bar members, we have an excellent committee, excited to tackle this project. If you have any interest in joining this committee or any other Bar committee, please contact Kate or myself.

While the way we do things may have changed, we are on our way to a productive year. Please enjoy the rest of the Fall edition, as there are several interesting and informative articles that are of importance to all of us. Thank you to all our contributors! Until I "see" you again, stay safe and stay healthy.

Sincerely,

Jessica Hugabone Vinson
President WCBA

WCBA 2020 SEPTEMBER WELCOME BACK!

On a warm September evening, members of the WCBA met to listen to music, and to share stories, refreshments, and hors d'oeuvres on the lawn at Morgan & Co.
After a very long spring, in which many events had been canceled due to COVID-19, it was wonderful to meet and greet one another once again! As always, the company was terrific, the food delicious and, thankfully, the summer weather lingered!

A Note from Hon. Robert J. Muller, J.S.C.
In Memory of Departed Members of the Warren County Bar Association

On behalf of the Warren County Bar Foundation, I write to advise that, through the generous gift of an anonymous donor, a plaque memorializing deceased members of the Warren County Bar Association has been completed and is now displayed alongside the plaque honoring past Warren County Liberty Bell recipients. Both commemorations are located at the new courthouse main entrance.

When conditions permit, I look forward to welcoming you all to a suitable ceremony for members of the Bar, the public, and, particularly, family members of those whose names appear.

I also would like to take this opportunity to offer the Foundation's deepest appreciation to Thomas J. McDonough, who gave so much of his time to see this project come to fruition.

WARREN COUNTY BAR ASSOCIATION ACCREDITED AS CLE PROVIDER

By: Maria G. Nowotny, Esq.

Early September 2020 brought much anticipated exciting news to the Warren County Bar Association. By letter dated September 2, 2020 we were advised New York State CLE Accredited Provider status was conferred upon the Warren County Bar Association by The New York State Continuing Legal Education Board (the "Board"). This status was granted for the time period of August 6, 2020 through August 5, 2023.

The approval enables us to provide "traditional live classroom-format" presentations. Under current Changes to CLE Program Format Restrictions in Response to Coronavirus "traditional live classroom-format" providers may offer live, nontraditional formats, where questions are allowed during the program. The formats include: webconference, teleconference, and videoconference. Currently, nontraditional formats presentations by "traditional live classroom-format providers" are approved through January 31, 2021. Based on earlier extensions, it is reasonable to expect that as long as Coronavirus restrictions are in place, the date will be extended. When the day comes when we can resume in-person meetings, it will be wonderful to share camaraderie at a CLE presented in the traditional live classroom-format. The option of presenting nontraditional format CLEs will still exist. It merely will require submission of an application for each such program.

Initial investigation into the approval process indicated approval could be obtained within a 3-year period. Steady progress was made toward this goal over the first 2 ½ years. Following the February 2020 real estate CLE, it seemed like we were gliding into approval status. The third CLE of the 2019-2020 year was already planned for April. This was the program which would enable us to apply for accredited provider status. Hiccup. The now all too familiar gathering restrictions forced an adjournment of the scheduled CLE. Thanks to the commitment of scheduled speaker, Evelyn Kinnah, Esq., Director at the Regional Immigration Assistance Center for Region 3 in New York State, we were able to offer the CLE as a webconference using Zoom. With a slight change to our application, we proceeded to offer "The Intersection of Immigration, Criminal and Family Law in New York, An Overview." Upon completion of this presentation we achieved the required number of CLE presentations to apply for accredited provider status. Yes, Kate Fowler and I high-fived at the conclusion of Attorney Kinnah's program!

Over the three-year process, we offered the following CLEs to our membership free of charge:

October 2017 The Ethics of Emails – 1 credit hour

February 2018	Real Estate Update: Corporate Entities and Holding Title; Title Clearance and Survey Readings; and Claims Litigation – 3 credit hours
October 2018	The ABC's of Escrow Accounts – 2 credit hours
February 2019	Real Estate Update: Lender's Perspective on Short Sales and Foreclosures; Umpteenth Annual Real Estate Practice Update; Tenants & Persons in Possession-Exceptions and Coverage – 3 credit hours
April 2019	Social Networking, The Law and Other Modern Phenomena – 1 credit hour
October 2019	Criminal Law Update: Bail and Discovery Reform - 1.5 credit hours
February 2020	Real Estate Update: New Warren County Real Estate Contract; Title Underwriter Defense of Claims Litigation; Impact of Solar Power in Real Estate Transactions – 3 credit hours
June 2020	The Intersection of Immigration, Criminal and Family Law in New York: An Overview – 2 credit hours

The first CLE OF 2020-21 has already been offered carrying 2 credit hours. A timely and critically important presentation on the NY SHIELD Act was offered on October 29, 2020. This was a notable event as it was the first time Warren County Bar Association issued CLE credit as the accredited provider.

It's been an exciting venture to achieve accredited provider status. As with all worthy projects, teamwork was essential to its success. Many thanks to the Warren County Bar Association Board of Directors and Officers for three years of support and encouragement. A genuine thank you to James R. Burkett, Esq. for invaluable assistance in preparing and submitting the initial application. Michele Battle, former Executive Director, laid solid groundwork in creating systems to facilitate application submission and logistics at presentations, including the critical attendance procedures. Kathryn M. Fowler has been a true linchpin in preparing application packages and ensuring their timely submittal, as well as handling the logistics at the presentations. Further, she assumed a very active role in interfacing with the speakers, especially with the two most recent presentations. Thanks also to New York State Board of Continuing Legal Education for their guidance and support provided throughout the period of qualification. Special thanks to our member speakers: Matthew F. Fuller, Esq., Monica A. Duffy, Esq., Hon. Robert J. Muller, JSC, Hon. Martin D. Auffredou, JSC, District Attorney Jason Carusone, Esq., Hon. John S. Hall, Jr., JSC and Jeffrey R. Meyer, Esq.

We look forward to continuing to offer dynamic CLE presentations on relevant topics. Two CLE presentations are currently being prepared. On December 10, 2020, the Justices of the Supreme, County, Surrogate's, and Family Court will be providing insights and guidance to practicing in the respective Courts during the pandemic. We offer sincere gratitude to the Justices for the selfless giving of their time in providing the bar with this essential, timely and ever changing information. Continuing the tradition of the annual Real Estate Update offered in February, members of our Real Estate Committee are in the initial planning phase of constructing a 2 or 3 hour CLE. As both are in the formative stages, details will be forthcoming. Additionally, we will be serving as a co-sponsor on a mortgage foreclosure CLE presentation of the Legal Aid Society of Northeastern New York.

Warren County: Two Murders, The Electric Chair, First State Police Manhunt

By: James Cooper, Esq.

Imagine the film *'Sergeant York'* as a disturbing film noir, Gary Cooper as an unredeemed villain rather than a national war hero. Alvin York in his era, 1918, had a local contemporary of a similar background who took a different life path. Alvin Sam Pasco stood a lanky six foot five inches, had a flash temper and could be irrationally violent, frightening and intimidating to local residents of Thurman and those nearby parts of grossly rural Warren County. If he was unable to come to terms with a property owner about a prime saw log, he later cut it anyway and challenged the owner to prove it was from his land. Serious disagreement resulted in unlucky coincidences for the land owner, like having his barn burn, sometimes assault. Like the character in *Sergeant York,* he was a rough cut figure in bib overalls and like Alvin York, always carried his rifle with him. In local vernacular he would have been described as somebody who still had the bark on. He served two terms in prison and once shot and wounded a constable trying to serve a warrant. His family had ties to Stony Creek. A farmer shot Pasco's uncle in the act of stealing chickens there.

Sam Pasco's father, Leander Pasco, had a running feud with his son-in-law, Cal Wood. From our perspective, what started out as malicious petty pranks, spiraled into murder. In their time, the theft of eggs from under a sitting goose was equivalent today to stealing food from your neighbor's pantry. The removal of the hub nuts from the axles of a wagon was the equivalent today of slashing all the tires on one's car. Cal Wood ambushed Leander Pasco and killed him with a muzzle loading shotgun. When the body was discovered on a Stony Creek roadway, word was sent to Glens Falls. The District Attorney gathered up the coroner and drove a buggy for the twelve hour journey to Stony Creek where they were joined by the Sheriff traveling from Pottersville. At the crime scene, strips of cloth with a distinctive pattern were found hanging on brush near the body. Authorities assumed that the cloth had been used as wadding to hold in the charge of a muzzle loading weapon, and as suspicions turned to Cal Wood, he was found wearing a coat that had its lining of the same fabric partly torn out. Photographic forensic work, impressive for 1890, established evidence that the cloth was mated to that which lined the coat. Other strong circumstantial evidence, casts of muddy footprints matching Wood's boots and Wood's freshly cleaned muzzle loading shotgun, proved to be evidence sufficient for the jury to convict him for the murder. Cal Wood was the second New York convict executed in an electric chair, in his case in Clinton Prison at Dannemora.

Sam did time in Dannemora having been finally convicted of a timber trespass and theft and sentenced to ten years. When in 1918 he was discharged early after serving four, he expected to resume residence in a home in Thurman but found it occupied by the other co-tenant of a one-half interest, his first cousin, Orley Eldridge, his wife and seven children. He appeared some weeks later with a rifle and told Eldridge to leave immediately or die. Eldridge believed Pasco would kill him and complied, running down the back road as soon as he was out of range to a deputy sheriff's residence. The deputy contacted the State Police HQ in Troy which circuitously resulted in two Troopers showing up around midnight. They corralled their horses and settled in for the night. The next morning they accompanied Eldridge and located Pasco in a neighbor's house. Pasco agreed to return to the co-owned house to discuss resolution of the dispute. Pasco and Eldridge walked up the road and were conversing when Pasco raised the rifle he was holding and without any warning indications shot Eldridge. The Troopers had been walking close enough behind to catch Eldridge as he collapsed and died. Pasco covered the Troopers with his rifle as he backed up the road until he made a break for the woods. The Troopers got off some snap shots from their .45 caliber revolvers and thought they saw Pasco

react as if hit when he scampered into the woods. He shot at them once and put a bullet hole through one Trooper's coat. There followed the first manhunt conducted by the New York State Police.

Trooper Pasco detail

The manhunt lasted ten days during which reinforcements arrived from Troop G including the Troop Commander, then ranked Captain, now Major. Bloodhounds from Great Meadows prison proved ineffective due to recent heavy rains. The search involved canvassing known relatives and friends of Pasco but without any good leads as his relatives and friends furnished him with food, bandages and clothing, including a heavy coat as the April nights were very cold. They lied to State Police and harbored him off and on, but later he effectively held a family living a couple of miles from The Glen hostage in their own home where he related that previously he had found a small cave or ledge overhang where he had hidden and a fire would not be seen, and that he had been bathing his bullet wound with bog water, (nearly sterile due to high acidity). He helped milk their cows and probably was something between a captor and a self-invited guest there. The wife found the situation intolerable and smuggled out a note with a relative's child who had shown up to borrow salt. The house was surrounded secretly by the reinforced State Police and the Warren County Sheriff and his deputies. When Pasco stepped outside to get some air and was followed by the husband carrying a lantern, Pasco was clearly visible in the lantern light. An order was issued from the dark to put up his hands and surrender. When he lunged toward the house, he was struck by bullets and dropped. He shouted to stop shooting, that he was done for. He died the next morning, attended by Dr. Goodman from Warrensburg who found that his earlier wound had nearly healed in the ten days since sustained. He had bullied his way around Thurman, Athol and Stony Creek from his teen years until he died at age forty six.

Up until the formation of the NYSP by legislative act in 1917, there was practically no law and order presence in rural areas of New York. Such counties had a sheriff and if the budget allowed, a deputy or two to aid him. Law enforcement was entirely reactive. In 1913 a particularly heinous crime occurred in Westchester county when a payroll clerk was torturously shot seven times by four men when he wouldn't give up a construction site payroll. He identified them before he died. Their whereabouts as transients was known to be in a wooded area near the scene of the crime, but armed as they were, the local sheriff and constables refused to try to apprehend them, and they escaped and were never captured. The outrage at this cowardice and the agitation by two local women caused the legislature and governor to create a statewide police force to prevent and detect crime and to apprehend criminals.

The concept of a rural police force was novel in America. Dispatched marshals and rangers were used in the West, but the closest thing to a police presence in the rural parts of the East was the Pennsylvania constabulary. The New York State Police was created from whole cloth by a friend of the Governor, a Kingston physician, George Chandler.

Chandler had no policing experience, but was a gifted organizer and administrator. He had served as an officer in the National Guard when it was deployed to secure the border while the army pursued Pancho Villa in Mexico after his murderous invasion of New Mexico. He understandably used the military model to structure the new entity and gave the officers the name, "Troopers", which had never been used before. His other historical options were, 'Mounties, Constables, and Privates.' He was sensitive to the concept of a police presence to the prickly, suspicious, and clannish, rural culture that was instinctively disinclined to be receptive to outsiders asserting authority over them. His first general order as Superintendent to his

subordinates was to view their roles as to be of service to the public, specifically to render assistance of any kind, to be helpful and friendly to win the confidence of the people and above all, to use common sense, to put themselves in the other fellow's place as if he was a member of their own family. It could be argued that he was the father of community policing philosophy. Chandler was replaced in 1923 at his request in order for him to return to his surgical practice.

State Police patrols of two men originated out of Troop Headquarters. Staged horse patrols originating from Troop G at Troy traveled through the southern Adirondacks. Troopers called in or sent postcards from their lodgings to advise where they would be patrolling and lodging in the coming days. If it was known where they were overnighting, someone might call them directly there, or the alternative was to call Troy Troop G and have them call hotels and boarding houses until the patrol was found or flagged down and instructed. In the 1920s, houses began to be rented as outposts and Model T Fords and motorcycles replaced the horse patrols.

Gradually, the public began to view the Troopers favorably and to give up intelligence about crimes committed and the whereabouts of criminals. In those early years twenty Troopers were killed in the line of duty. Thereafter, up to the centennial anniversary of creation of the State Police, the tally of those killed was another one hundred four.

The circumstance of Troopers being there when Orley Eldridge was shot in their presence is more readily understood considering that the event happened less than a year after Chandler gave his first general order to be helpful and friendly and of service to the general public. We can't know what the Troopers there thought. Given the chronology and proximity to Chandler's general order, it is not unreasonable to speculate that the Troopers were trying to implement it. In hindsight, they could have been more cautious of the ex-con, Pasco, if they were aware of his violent propensities. It can be assumed that they were required to file a report of the incident and possibly faced some disciplinary action. It is easy to imagine how shocked and stunned they were as Pasco dodged off into the forest. They regained their composure sufficiently to bring their sidearms to bear and put a .45 bullet through Pasco's side before he disappeared. A possible conclusion about the event is that Chandler's good intentions created the opportunity for unintended consequences.

Since those times, Chandler's general order has been followed by the State Police as best as circumstances allowed. Troopers enjoy stories of quirky experiences helping the public, other aid being assumed to be routine, but their PR doesn't keep pace as the public is generally ignorant of the charitable work they participate in for children, participation in events to fund disease research and the like. Chandler's general order runs up against the absolute necessity for a policeman to establish 'officer presence' in interactions with the public in law enforcement, to control and if necessary, to dominate interactions so that they don't escalate out of control and jeopardize themselves or the safety of the public with whom they are interacting. Thus, the public's quickest recollection of an interaction with State Police is not likely to be about a friendly gray helper, but to remember that first flat tone, "License and registration." The recurrent dilemma for every Trooper is to find the proper balance in his response to a dispatch or traffic stop.

Jim Cooper

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I wish to express my appreciation to Cindy Cameron, a local historian, for her assistance in finding and delivering research materials for preparation of this article. The New York State Police website was the source of some history. Early history of the NYSP was furnished by an authoritative source who disagrees with the speculations and conclusions of the article and wishes to remain anonymous. The *Adirondack Life* article 'The Saga of Sam Pasco' of Kathryn O'Brien, (summer 1976) is also acknowledged.

2020 WL 5937554
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
This opinion is uncorrected and will not be published in the printed Official Reports.
Supreme Court, New York, Warren County.

In the Matter of the Application of Aislinn Smith as Designee for CLR Glens Falls LLC d/b/a Glens Falls Center for Rehabilitation and Nursing, As, PETITIONER pursuant to Article 81 of the Mental Hygiene Law for the Appointment of a Guardian of the Person and Property of "GF", an ALLEGED INCAPACITATED PERSON. (Proceeding No. 1)
v.
ANDREW KELLY, in his capacity as Guardian of the Person and Property of "GF",Petitioner-Plaintiff, WILLIAM FELTT,Respondent-Defendant. (Proceeding No. 2)

2018-66246

Decided on October 5, 2020

Attorneys and Law Firms

Whiteman, Osterman & Hanna LLP, Albany (Christopher M. McDonald of counsel), for Andrew Kelly.

John J. Cromie, Ballston Spa, for William Feltt.

Opinion

Robert J. Muller, J.

*1 On June 22, 2018, GF (hereinafter decedent) — then 71 years of age and suffering from Huntington's Disease with dementia — was admitted to the Glens Falls Center for Rehabilitation and Nursing (hereinafter the Glens Falls Center). He was then discharged on July 27, 2018 to William Feltt (hereinafter respondent) — his nephew and power of attorney —but was returned to the Glens Falls Center by respondent on August 8, 2018. Both prior to his admission and during his 11-day discharge, decedent resided in his home — located at 6073 Dean Lung Road in the Town of Galway, Saratoga County — with respondent.

On December 28, 2018, the Administrator of the Glens Falls Center commenced proceeding No. 1 pursuant to Mental Hygiene Law article 81 (hereinafter the guardianship proceeding), seeking the appointment of a guardian for decedent's person and property. The petition alleged, in pertinent part:

"[Decedent's] gross monthly income from Social Security is $1594.90 and his monthly income from a GE pension is $1228.00. [Decedent] has a bank account with Bank of America that had a balance of $5848.1 1 in August. On information and belief,

[For Full Decision Click Here]

68 Misc.3d 1219(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Supreme Court, New York, Warren County.

Mary K. BRADLEY, Plaintiff,
v.
Elizabeth D. COLE, Defendant.

56826
|
Decided on September 2, 2020

Attorneys and Law Firms

DeLorenzo, Grasso & Dalmata, LLP, Schenectady (Paul E. DeLorenzo of counsel), for plaintiff.

Stockton, Barker & Mead, LLP, Troy (John B. Paniccia of counsel), for the Golub Corporation.

Opinion

Robert J. Muller, J.

*1 On August 9, 2009, plaintiff — an employee of the Golub Corporation (hereinafter Golub) — was working as a cart attendant in the parking lot of the Price Chopper supermarket located in the Village of Lake George, Warren County. Defendant was attempting to park her car when she backed into plaintiff, pinning her against another vehicle. Plaintiff suffered several injuries as a result of the accident and was out of work until December 2, 2009, when she returned on a part-time basis with disability restrictions. She was then "pulled out of work" by Golub in September 2011 because of these restrictions but returned with accommodations in September 2012, continuing to work on a part-time basis until July 17, 2019. She has not worked since that time. Martin, Harding & Mazzotti, LLP filed a claim for workers' compensation benefits on plaintiff's behalf on September 11, 2009, which benefits were awarded. DeLorenzo, Grasso & Dalmata, LLP then commenced this third-party action on plaintiff's behalf on June 26, 2012, with plaintiff ultimately agreeing to a settlement of $20,000.00 with defendant's insurance carrier — State Farm Mutual Automobile Insurance Company (hereinafter State Farm). This settlement was placed on the record on October 21, 2015 and a stipulation of discontinuance was then filed on November 6, 2015. At the time of the settlement, Golub — which is self-insured with respect to workers' compensation benefits — had paid a total of $38,927.40 in combined indemnity and medical expenses. It is undisputed that plaintiff neither obtained the written consent of Golub nor judicial approval of the settlement within three months, as required under Workers' Compensation Law § 29 (5). Presently before the Court is plaintiff's motion for judicial approval of the settlement nunc pro tunc.

"[A] plaintiff seeking a nunc pro tunc order must establish the reasonableness of the settlement, the lack of any fault or neglect in

[FOR FULL DECISION CLICK HERE]

68 Misc.3d 875
Supreme Court, New York,
Warren County.

Tiffany Anne SWEET-MARTINEZ,
Plaintiff,
v.
Florencio Hernandez MARTINEZ,
Defendant.

EF2019-67605
|
Decided on August 10, 2020

Synopsis

Background: Wife filed motion for permission to serve husband with papers pertaining to no-fault divorce action via alternative method of international mail carrier to husband's last known address in foreign country.

The Supreme Court, Robert J. Muller, J., held that foreign country was party to Hague Convention and had not objected to sending of judicial documents to persons abroad, and thus wife could serve husband via alternative method.

Motion granted.

Attorneys and Law Firms

For Plaintiff: Law Office of Martin and Martin, Glens Falls (Trinidad M. Martin of counsel), for plaintiff.

Opinion

Robert J. Muller, J.

***1** Presently before the Court is plaintiff's Order to Show Cause which, in lieu of signing, was accepted as an ex parte motion for permission to serve defendant via an alternative method (see CPLR 308 [5]), namely FedEx International Economy mail to his last known address in Mexico.

Plaintiff Tiffany Anne Sweet-Martinez and defendant Florencio Hernandez Martinez were married on November 17, 2007. Defendant was thereafter deported to Mexico on March 8, 2011. Plaintiff commenced this action for a no-fault divorce on December 28, 2019 (*see* Domestic Relations Law § 170 [7]). There are no children of the marriage and, according to plaintiff, "all property has been equitably distributed, all debt has been allocated, [and] no maintenance is warranted."

In support of the motion, counsel for plaintiff states in pertinent part:

> "I called defendant at his working telephone number... and spoke with him regarding sending him the papers to sign accepting service and consenting to the divorce.
>
> Defendant confirmed his address for my mailings, consistent with an address plaintiff had on file for [him], written [in his] handwriting [on a] return label ....

[FOR FULL DECISION CLICK HERE]

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MEMORANDUM

To: All Attorneys and Self Represented Litigants
From: Hon. Martin D. Auffredou, Supreme Court Justice
Re: 2021 Special Term Dates
Date: November 4, 2020

For cases to which I am assigned in Warren and Washington Counties, **except in foreclosure actions**, all motions should be made returnable on the dates listed below. Motions made returnable on other dates will automatically be adjourned by the Court to the next Special Term date.

Kindly refer to my Court Rules (http://www.nycourts.gov/courts/4jd/motion-terms-rules.shtml) for further information concerning motion practice in cases assigned to me, including information concerning oral argument.

SPECIAL TERM – WASHINGTON COUNTY

JANUARY	15
FEBRUARY	19
MARCH	19
APRIL	16
MAY	21
JUNE	18
JULY	16
AUGUST	20
SEPTEMBER	17
OCTOBER	15
NOVEMBER	19
DECEMBER	17

SPECIAL TERM – WARREN COUNTY

JANUARY	22
FEBRUARY	26
MARCH	26
APRIL	23
MAY	28
JUNE	25
JULY	23
AUGUST	27
SEPTEMBER	24
OCTOBER	22
NOVEMBER	23
DECEMBER	15

Torts and Civil Practice: Selected Cases from the Appellate Division, 3rd Department

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Article 31 discovery in the pandemic.

Jones v. Memorial Sloan Kettering Cancer Ctr. (Reynolds Fitzgerald, J., 9/24/20)

Plaintiffs commenced this medical malpractice action in Franklin County, alleging surgical negligence at the defendant hospital (located in New York County). Defendants moved, pursuant to CPLR § 3103(a) 3110(1), for a protective order directing plaintiffs to conduct the depositions of four witnesses – including two doctors and physician's assistant - in New York County. Absent a showing of "undue hardship", CPLR 3110(1) calls for depositions to take place within the county where the action is pending. Supreme Court (Ellis, J., Franklin Co.) granted defendants' motion – and the Third Department affirmed, noting proof in the record that conducting the depositions over three days, and 350 miles away from New York County, would likely cause the cancellation and/or rescheduling of patient appointments at the defendant hospital. The Appellate Division also noted that "if the COVID-19 pandemic has proved anything, it is the usefulness (if not preferability) of conducting matters via video".

Plaintiffs (except for one) survive summary judgment motions.

O'Keefe v. Wohl (Garry, P.J., 6/25/20)

The plaintiff motorcyclist, injured in a collision with a car at an intersection, sued the other driver and the Town of Northumberland, alleging the municipality negligently constructed and maintained the roadway. The Town, relying on both drivers' familiarity with the intersection, opposed plaintiff's claim that more devices, signs or road markings were needed to warn of the intersection. Supreme Court (Nolan, J., Saratoga Co.) agreed with the Town and granted summary judgment but the Third Department reversed and reinstated the municipal claim, concluding that the conflicting opinions offered by expert

witnesses "creates a question of credibility to be resolved by the finder of fact", and that the drivers' familiarity with the intersection does not preclude liability as a matter of law.

Cole v. Chun (Colangelo, J., 7/9/20)

The plaintiff alleged causes of action for lack of informed consent and medical malpractice after ophthalmology treatment for vision changes in his left eye – a corneal transplant that later "fell apart" – left him with a retinal detachment and a significant, permanent loss of vision. Supreme Court (Cahill, J., Ulster Co.) denied the ophthalmology defendants' motion for summary judgment and the Third Department affirmed. Defendants did not dispute the existence of a triable issue of fact regarding malpractice; but argued that the plaintiff could not prove a causal connection to his injuries. The Appellate Division rejected the argument, noting plaintiff's expert witness opined that the defendants' failure to prescribe antibiotic therapy led to an infection which caused plaintiff's vision loss.

Macumber v. South New Berlin Library (Devine, J., 9/24/20)

Plaintiff's action for defamation arose out of an email - sent to the New York State Education Department - by a fellow member of the defendant library's board of trustees claiming to have proof that the plaintiff had "misappropriated over $20,000 of taxpayer money". Plaintiff eventually resigned from the library board although a criminal investigation found no evidence of wrongdoing on her part. Supreme Court (Burns, J., Chenango Co.) found the emailed statement protected by a qualified (good faith communication) privilege and granted the defendant's motion for summary judgment. Affirming, the Third Department agreed that after the defendant's prima facie showing of conditional privilege, the burden shifted to plaintiff, who "failed to make an evidentiary showing that [the trustee was] motivated by malice *alone* in making the statement".

Summary judgment in death cases.

Damphier v. Brasmeister (Aarons, J., 7/16/20)

Plaintiffs were the mothers of two teenagers who were shot and killed in 2012, and brought this action against the grandparents/parent of the shooters; alleging claims for negligent supervision and negligent entrustment of the rifles used in the killings. Supreme Court (Aulisi, J., Montgomery Co.) granted the defendants' motions for summary judgment which the Third Department found was proper as the record evidence established that the rifle in the grandparents' home was kept under lock and key and they did not consent to or permit its use by their grandson, and the second rifle (used by Defendant Brasmeister) was stolen from a third party, a fact unknown to the shooter's father. Affirming the trial court,

the Appellate Division found the plaintiffs failed to raise a triable issue of fact on either cause of action, including its reliance (on the negligent supervision claim) on one of the shooter's social media postings or text messages which discussed guns and songs with violent-themed lyrics.

Smith v. Park (Devine, J., 6/25/20)

This death action, by the mother of a 14-year old killed in an accident while operating a skid steer owned by the defendant Park Family Farm, was dismissed by Supreme Court (Guy, J., Cortland Co.), which found the suit was prohibited by the "exclusive remedy" provision of Workers' Compensation ("WC") Law § 11. Plaintiff admittedly received accidental injury and death benefits in the WC claim but premised her opposition to the summary judgment motion on her 8th cause of action – an exception to the § 11 bar - alleging the defendant engaged in criminal conduct which led to the boy's death. The Third Department affirmed the trial court's dismissal of the action, concluding that the defendant's guilty pleas to child endangerment and prohibited employment of a minor might infer negligence or recklessness by the defendant but not a "willful intent to harm" the decedent, as required to show an exception under § 11.

Post-settlement proceedings.

DeLap v. Serseloudi (Per Curiam, 6/18/20)

The plaintiffs (wife and husband) agreed to settle their dental malpractice action for $150,000 and their attorney agreed to reduce the fee to which he was entitled. But when they later refused to sign the settlement documents, their attorney moved for confirmation of the settlement and leave to withdraw as counsel (which relief was "So Ordered" by Supreme Court after the attorney reduced his fee even further). Plaintiffs later failed to sign the $150K settlement check, after which counsel moved for an order directing that the defendants' malpractice insurer issue separate checks to plaintiffs and the attorney. Supreme Court (Hartman, J., Albany Co.) denied counsel's motion and permitted plaintiffs to vacate the settlement agreement. On counsel's appeal, the Third Department ruled that the filing of a stipulation of discontinuance of the malpractice action (after the revised settlement was "So Ordered") removed Supreme Court's authority to decide the motions that followed and "a plenary action was required…to enforce (or set aside) the settlement".

Lamela v. Verticon, Ltd. (Pritzker, J., 7/23/20)

Plaintiff's multi-defendant construction site accident-injury action premised on a violation of Labor Law §240(1) was settled for $3.2-million; with payments split (but not evenly) amongst the defendants. Plaintiff's employer (Lamela), brought

into the action as a third-party defendant, did not contribute to the settlement and objected to its terms. Post-settlement, two defendants filed an amended third-party complaint seeking contractual indemnity from Lamela, which cross-claimed seeking common-law indemnity and contribution. Motion practice by all parties followed and on this appeal, Lamela sought to reverse the ruling by Supreme Court (Gilpatric, J., Ulster Co.) dismissing Lamela's cross-claims. The Third Department, recognizing that Lamela's cross-claims "stems from its belief that the insurance carrier [for the defendants who contracted with Lamela] acted in bad faith by apportioning the larger share of the settlement" to the defendant who was only vicariously liable under §240(1), affirmed the lower court and noted that "we cannot fashion a common-law indemnity right where none exists".

THE PRACTICE PAGE
UNPACKING THE "BORROWING STATUTE," CPLR 202
Hon. Mark C. Dillon*

Litigators recite statutes of limitations in their sleep. Attorneys representing plaintiffs are keenly aware that claims must be timely brought to be entertained on the merits. Conversely, defense attorneys savor a good statute of limitations defense, as such defenses are objective in nature whenever the date of accrual, the nature of the claim, and the absence of a toll, are known.

The "borrowing statute" of CPLR 202 can trip up plaintiffs. It is one of those poorly-worded statutes that we see from time to time, which must be read two or three times to absorb its true meaning. It provides that if a non-New York plaintiff sues a New York defendant, and the cause of action accrued outside of New York, our courts must apply either the statute of limitations of New York *or* the state of accrual, whichever is *shorter* (*GML, Inc. v Cinque & Cinque, P.C.*, 35 AD3d 195, *aff'd*., 9 NY3d 949). CPLR 202 will have no effect if New York's statute of limitations is the same as that of the state of accrual. Its impact is felt if the foreign state has a limitations period shorter than New York's. CPLR 202 represents a statutory version of "choice of law," but is limited by definition to the statute of limitations. Its purpose is to discourage forum shopping in New York (*Eaton v Keyser*, 53 AD3d 640, 641-42).

A simple example is where a Connecticut plaintiff incurs personal injury as a result of an unfortunate encounter with a defective premises condition at a Connecticut premises. The Connecticut premises is owned by a New York corporation. The statute of limitations in New York for negligence is three years (CPLR 214[5]), but under Connecticut law, is only two years (C.G.S. 52-584). Let us further suppose that the plaintiff brings the personal injury action in New York, in the creditable belief that verdict values in New York are generally higher than those of Connecticut. If the action is commenced in New York during year 1 or 2 from its accrual, there is no problem as it is clearly timely. However, if the action is commenced in New York in year 3, the borrowing statute would require that the timeliness of the action be measured against the shorter foreign statute of limitations, in this instance, Connecticut's statute. A New York court "borrowing" Connecticut's 2 year limitations period would be required to dismiss the action as untimely, even though the action would be otherwise timely under New York's own statute of limitations.

New Jersey is another state in the northeast region that also has a two year statute of limitations for negligence, and where the same scenario described above could play out in a given case (N.J.S.A. 2A:14-2).

CPLR 202 only applies if the *plaintiff* is a non-New Yorker, as it does not apply in reverse where the defendant is the non-New Yorker party subject to our state's

jurisdiction (*Insurance Co. of North America v ABB Power Generation, Inc*., 91 NY2d 180, 186). Also, CPLR 202 only applies if the cause of action accrued outside of New York. There is no requirement that the plaintiff's state of residence and the accrual state be the same — New York must use the statute of limitations of the foreign state where the cause accrued.

Application of a foreign statute of limitation includes application of that state's tolling provisions as well (*Childs v Brandon*, 60 NY2d 927, 929). Therefore, it is actually the "net" statute of limitations of the foreign state that must be compared to the "net" of New York. It should be pleaded by defendants as an affirmative defense in their answers so that it is not waived (CPLR 3018; 3211[a][5]).

The borrowing statute raises its head more often in the federal courts sitting in our state than it does in our state courts, as federal litigations based on diversity of citizenship involve, by definition, a plaintiff and a defendant from different states, and at least one of them is from New York (28 U.S.C. 1332). In some percentager of those actions, the plaintiff is the out-of-state party and the cause of action accrued outside New York as well.

The borrowing statute applies to all causes of action, and a review of Westlaw reveals its relevance over the years to actions sounding in negligence, intentional torts, wrongful death, contract, fraud, breach of warranty, divorce, conversion, real property disputes, and accounting proceedings. It is an issue that attorneys should red flag whenever plaintiffs and defendants are from different states and the cause of action accrued outside of New York. The courts have no discretion to ignore the borrowing statute when it applies. For plaintiffs, non-sensitivity to the borrowing statute can lead to a fateful doom. For defendants, it may provide a knock-out blow against those plaintiffs' complaints without having to even reach their merits.

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* Mark C. Dillon is a Justice of the Appellate Division, Second Department, an Adjunct Professor of New York Practice at Fordham Law School, and an author of CPLR Practice Commentaries in McKinney's.

IN MEMORIAM

Hon. Dominick J. Viscardi
(March 23, 1924-June 15, 2020)

The Honorable (ret.) Dominick J. Viscardi died peacefully in Glens Falls on June 15, 2020 at the age of 96. He is survived by his loving wife of 71 years, Rose Marie Coveney Viscardi and his beloved children, Michael, Mary Kathleen, John, Rose Marie, Theresa and Patrick and several grandchildren and great grandchildren. He was preceded in death by his oldest son, Dominick J. Viscardi, Jr.

Judge Viscardi graduated from Lafayette College, where he received his B.A. in 1946. His legal education was at Cornell Law School, where he received his J.D. in 1948, and he was admitted to the New York State Bar in 1950. He began his legal career in Ticonderoga in 1950, following discharge from the U.S. Army, where he served on the U.S. Army Signal Corps legal staff. He conducted an active trial practice for 28 years before being elected to the Supreme Court in 1978 and re-elected in 1992, serving until 2000. During his tenure as a Supreme Court Justice, he served in each of the counties of the 4th Judicial District, and he served 28 terms in New York City.

He was a communicant of St. Mary's Church of Ticonderoga, past Grand Knight and most senior member of the Knights of Columbus, Council 333 having been a member for 70 years. He was a trustee of St. Mary's Catholic Church for 22 years and was awarded the St. Mary's Centennial Award in 1992. He is past President of the Essex County Bar and the Federation of Bar Associations, Judicial District.

Edward M. Bartholomew Jr.
(October 21, 1949-July 21, 2020)

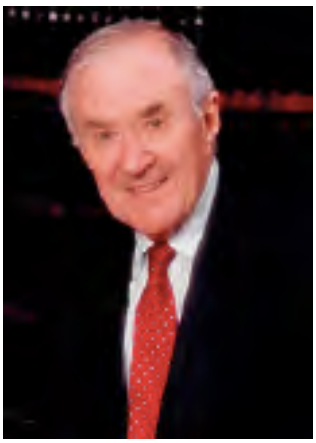
Edward McIntyre Bartholomew Jr. passed away on July 21, 2020. At the age of seven months, Ed moved with his parents to Glens Falls where he would spend the rest of his life in "his" beloved city and surrounding Warren County in public service as mayor for two terms and current president and CEO of Economic Development for Glens Falls and Warren County. He was a proud 1967 graduate of Glens Falls High School..

Ed then went on to complete his collegiate education at Union College and Albany Law School and would enter his first position as an attorney in the Law office of Ronald Stafford. Early professional mentors in his life that would guide his career path included House of Representative Congressman Carleton King, New York State Senator Ronald Stafford, Warren County Judge Charles Ringwood, and the honorable New York State Supreme Court Justice and Dean of Albany Law School, Richard J. Bartlett.

Throughout his life, Ed's passion was serving the people of Glens Falls and the surrounding communities in Warren County for over five decades with a profound impact that would extend beyond our region. He served two terms as mayor from 1978 to 1985; during that time, he was most proud of the success in building the Civic Center, bringing the hockey franchise the Adirondack Red Wings and later the minor league White (Glen) Sox baseball team to East Field. From 1999 to 2010 he served in Albany and across New York State as senior advisor on multiple state issues including the role of chief counsel for Labor in the New York State Senate in the Offices of former Majority Leaders Senators Dean Skelos and Joe Bruno.

In 2010, he was excited to return to Glens Falls in the role of director of Economic Development for the city, and then in 2013 until present he served as president and CEO of the Warren County Economic Development Corporation. He worked tirelessly to bring new economic growth to the region to provide jobs, housing, public transportation that would assist in the revitalization of downtown Glens Falls and the surrounding communities.

Ed was a strong advocate for the less fortunate. Through his fellow members of Christ Church, he was instrumental in starting monthly "Saturday Night Suppers," and the annual Thanksgiving and Christmas breakfasts for children and families in the community. He never said "no" to anyone who needed legal advice and often conducted pro bono work that only the client would know about. He had a very special interest in promoting and supporting the work of the veterans because of the influence of his father and grandfather who were Army veterans. Ed was also very proud to be a trustee, supporter and advisor to the Whitehall Brick Church Cemetery Association in Whitehall, NY.



The Honorable Lawrence E. Corbett, Jr.,
(May 11, 1921 — Oct. 20, 2020)

The Honorable Lawrence E. Corbett, Jr., a decorated Navy veteran of five invasions, former New York State Assemblyman, attorney for 60 years, a proud native of Fort Edward, passed away peacefully on Tuesday, October 20, 2020. Mr. Corbett married Joan V. (Burns) Corbett on June 25, 1955, in Troy, NY. The couple spent 59 years together before her passing on Feb. 13, 2015. During a decade of service in the state Assembly, Mr. Corbett distinguished himself as a tireless advocate on statewide and local issues.

As chairman of the Assembly Social Services Committee, he became an outspoken champion for vulnerable children in adoption and foster care and overcame opposition from many in his own Republican Party to win a statewide battle to preserve Aid Dependent Children. He introduced and won passage of legislation designating Prospect Mountain Road in Lake George as the “Prospect Mountain Veterans Memorial Highway."

He graduated from Fort Edward High School in 1939 and entered Siena College in 1940, but World War II soon intervened. In March 1942, his was the 13th name drawn in the draft nationally. At 21 years old, he enlisted in the Navy and rose through the ranks, serving as Quartermaster First- Class prior to his placement on inactive duty in 1945. He remained in the Naval Reserve and commissioned an Ensign, and later promoted to Lieutenant J.G. before retiring in 1958 after 16 years of service.

During World War II, Mr. Corbett served abroad the attack transport ship U.S.S. William P. Biddle and took part in five invasions, including Tarawa, where the United State lost approximately 2,000 Marines in 72 hours, as well as invasions of Sicily, Kwajalein, Luzon, and Okinawa. Mr. Corbett earned five battle stars.

Following the war, he resumed his studies at Siena, taking night classes while working during the day in the records room at the state Legislature to pay his tuition. His work passing out bills to the legislators kindled a passion for law and government that remained with him the rest of his life.

After Siena, he worked summer at Scott Paper Co. in Fort Edward to save money for law school. Upon his acceptance in New York Law School in 1950, he studied year-round to complete his degree in just two years, graduating in 1952, and passing his bar exam the same year. He was hired by the Hon. J. Clarence Herlihy, the Warren County District Attorney at the time and later the presiding judge of the Appellate Division of State Supreme Court.

During his time in the Assembly, Mr. Corbett was a majority Republican in a house then controlled by Republicans, serving alongside his longtime friend, then-Assemblyman Richard J. Bartlett of Glens Falls. In 1972, he left Albany when he was defeated in a Republican primary by Gerald B. Solomon of Queensbury, who went on to win three terms in the Assembly before being elected to Congress.

At home in Fort Edward, Mr. Corbett became the lead attorney in the formation of the Washington County Sewer Agency that established municipal sewer service in his community and Hudson Falls in the 1970s. His close relationship with Mayor "Muff" Nassivera of Hudson Falls assured the construction of 18 million-dollar Washington County Sewer District. He served as Fort Edward Village Attorney for 11 years in the 1970s and early 1980s.

Aside from his public responsibilities, he maintained a private law practice for more than half a century. A member of the Warren County Bar Association for 60 years, he was honored in 2004 with the distinguished Charles Evans Hughes Award. In 2010, his colleagues on the Washington County Bar Association honored Mr. Corbett, their former president, with the Albert J. Berkowitz Award for his lifetime service and dedication to the law and citizens of Washington County.

As a lawyer and civic leader, Mr. Corbett was instrumental in many major projects in the region, including the building of the Fort Hudson Nursing Home. He served as Fort Hudson's attorney for 16 years. He was a tenured member of the board of the Washington County home for Aged Women, an organization he served 41 years. He took particular pride in having worked with Thomas Hoy, chairman of Glens Falls National Bank and Trust Co., to preserve the Home's continuing trust and ensure its financial security for the future.

Mr. Corbett, who was admitted to practice before the U.S. District Court, Northern District of New York, and the U.S. Tax Court, continued to practice laws after closing his Fort Edward office with Hinman, Straub, Pigors & Manning then served as counsel to the McPhillips, Fitzgerald & Cullum law firm in Glens Falls from 1996 until 2012. He had a wide and robust circle of friends and associates, and was a 55-year member of the Fort Edward Lions Club, a Fourth Degree member of the Knights of Columbus and the Ancient Order of Hibernians, and a member of Fort Edward Idle Hour Club. A devout Catholic, Mr. Corbett served as Trustee, Lector and Eucharistic Minister at Sacred Heart Church in Lake George for 10 years.

The Bulletin Board

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