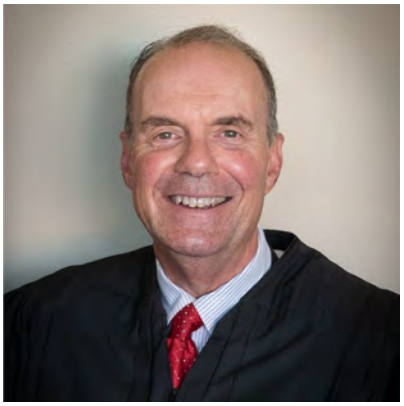
WARREN COUNTY BAR ASSOCIATION, INC.

SUMMER 2024

TIPSTAFF

Volume V Issue 3



IN THIS ISSUE
President's Letter 1
March Mixer 2-3
James Cooper 4-8
Law Day 9-10
From the Judge's Chambers 11-23
Annual Dinner 24-26
Practice Page 27-29
Mock Trial 30
Torts & Civil Practice 31-36
Welcome Friends 37
Bulletin Board 38

Dear Colleagues,

I hope you are enjoying these long-awaited summer days! Although I don't wish to rush the summer along, I am looking forward to the coming year because I know that we have great things in store.

.

During a very busy spring, we shared many memorable evenings, beginning with the March Mixer. Chaired by Dennis Tarantino, this very successful event raised $18,000. for community grants and scholarships. In May, we shared our annual Law Day celebration, in which we recognized the work of Liberty Bell recipient, Mr. Frank Munoff. And, later that month, we enjoyed a lovely night at the Lake George Club as we met for the Annual Meeting.

I would like to recognize the success of this year's Mock Trial Program. Thanks to the work of Hon. Glen T. Bruening, Chair, as well as several judges and attorneys, 6 schools were able to compete throughout the spring.

The summer is always a good season to catch up on CLE credits. Maria Nowotny, Esq., our CLE coordinator, has once again organized and planned a timely and informative two session, lunch hour ZOOM CLE program. This time the topic is *1031 Like-Kind Exchanges*. Each session is presented by leading authority on the topic, Eric Brecher, Esq. CES.

Session 1, entitled *Nuts & Bolts of 1031 Exchanges,* was presented on June 25, 2024.
Session 2, *Ethics of 1031 Exchanges*, will be held on July 30, 2024.

Attorney Brecher holds the designation of Certified Exchange Specialist and is one of only 120 nationwide to have earned this esteemed designation. Thank you, Maria for putting this CLE program together. Working with you is such a great pleasure.

Of course, all the usual social events are being planned as we speak! Our Welcome Back gathering will take place this year on Thursday, September 26th at the Bull Pen. Please mark your calendars. Further details of the event are forthcoming.

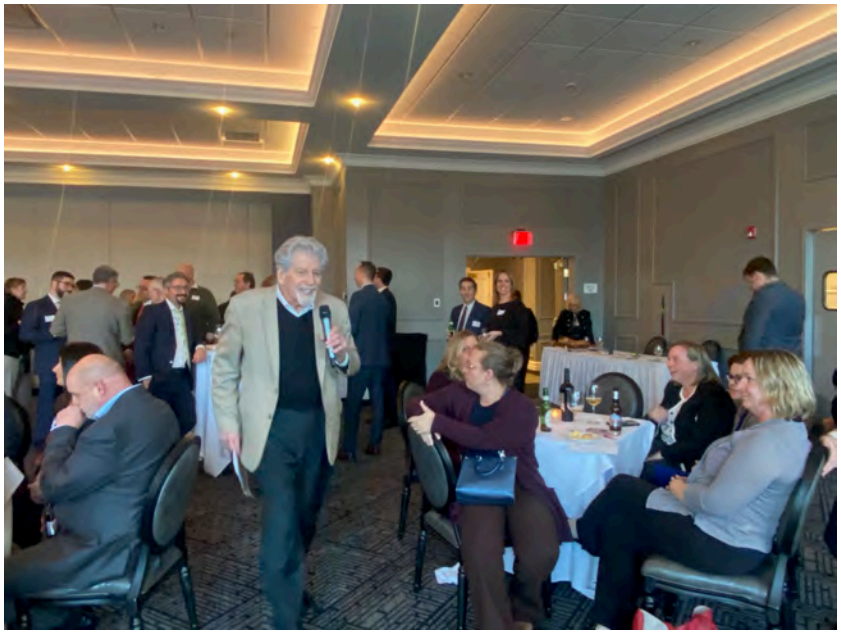
And please join me in thanking our Immediate Past President, Hon. Eric Schwenker for his work over the course of the last year in guiding us to this point. Thanks to his efforts, our membership is strong, our gatherings have been memorable, and our collegiality remains enviable!

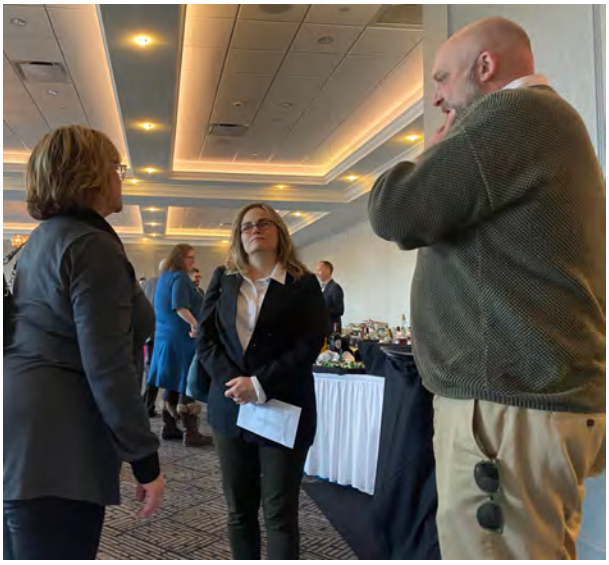
Finally, I would like to recognize the people who so generously give their time to the Warren County Bar Association, the Officers and Board of Directors. The 2024-2025 officers are: President: Hon. Martin D. Auffredou; President-elect: Nicole C. Fish, Esq.; Vice President: Vanessa Hutton, Esq.; Treasurer: Hon. Glen T. Bruening; Secretary: Alexandra C. Rozell, Esq.; NYSBA Delegate: Dennis J. O'Connor, Esq.; Immediate Past President: Hon. Eric C. Schwenker. Our directors are: Gordon Eddy, Esq.; Lawrence Elmen, Esq.; Kathleen J. Fahrer, Esq.; Brian D. Pilatzke, Esq.; Rose T. Place, Esq., and Matthew T. Skinner, Esq.

I wish you good health and happiness and look forward to gathering with you again when the season changes! As always, if you have any questions or concerns, please do not hesitate to reach out!

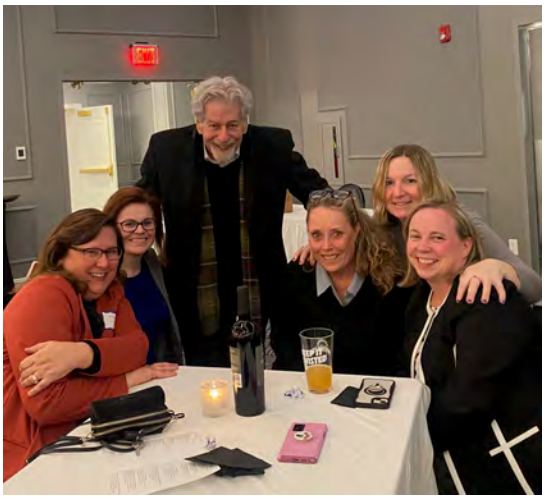
Hon. Martin D. Auffredou
Supreme Court Justice

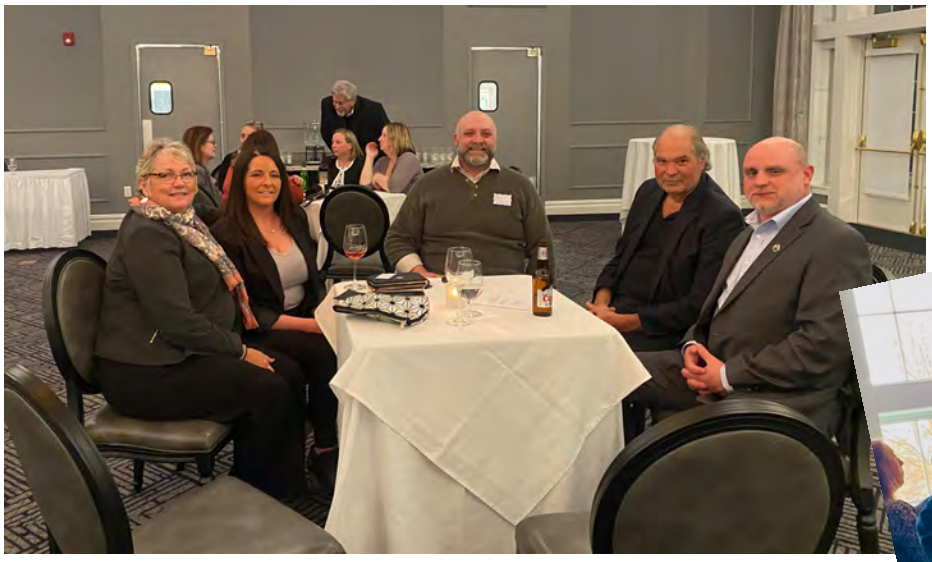
2024 Annual March Mixer ~ March 22, 2024
Queensbury Hotel

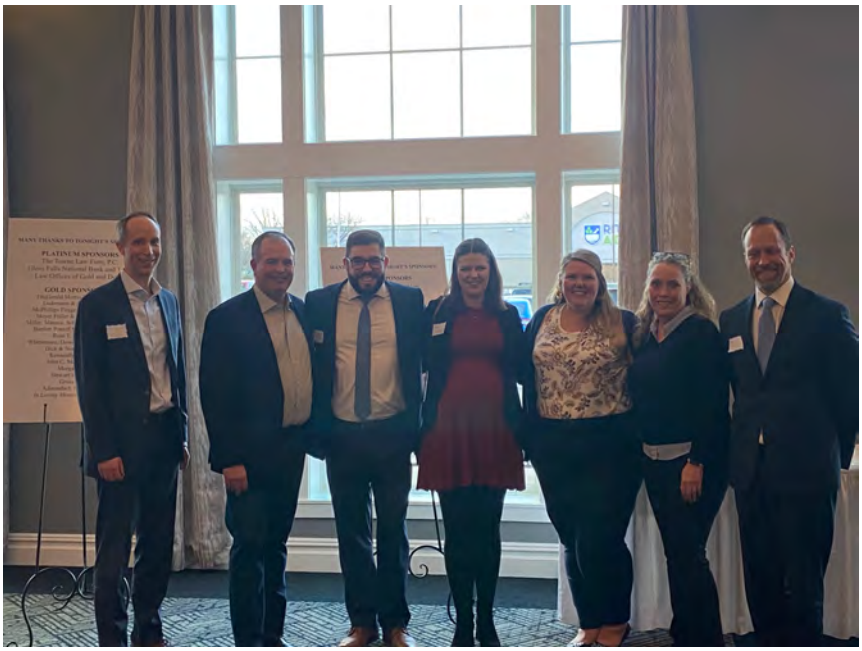




Meeting Old Friends and Honoring Past Scholarship Recipients!







Past Scholarship Recipients!
Left to Right:
Edward P. Fitzgerald, Esq.
Kenneth M. Schwartz, Esq.
Kevin G. Murphy, Esq.
Madeline G. Murphy, Esq.
Mary-Ellen Stockwell Capasso, Esq.
Kristine K. Flower, Esq.
Patrick Sorsby, Esq.

by James Cooper, Esq.

James Cooper is a frequent contributor to the *Tipstaff*.

In correspondence with President Taft and in private conversation Taft expressed his frustration with the Supreme Court's four elderly members, all in their seventies and displaying their age without the interventions of our era's medicine, diet and lifestyle that generally makes for more vigor in lawyers lucky enough to attain those years. The Court was terribly behind in its work. Taft saw in Hughes the antidote. He did everything but promise to Hughes that he would be appointed Chief Justice when the position opened. Hughes, too mature in the ways of politics to count on that, was not crushed when Taft reneged and appointed Justice White of Louisiana. He understood and thought it a good choice.

Hughes was forty-eight and had only been on the Court as its junior justice for a brief period of time. He was still learning the job and settling into the realities of Washington. He was not naive and already understood the difference between advocate and jurist. He was surprised to find that the Court's facilities in the Capitol building were cramped and Spartan. His salary was $14,500. He was allowed only $2,000 for a secretary. As a private lawyer of his status he would have earned one hundred to four hundred thousand dollars a year which he did after leaving the bench later. He had no room for an office in the cramped residence he had rented for his seven member family. He had to spend the balance of his life savings to purchase a lot and build a four story brick residence.

He found surprising that relationships between the justices could be acrimonious and, that Court practice gave the justices only a short time after argument to conference and decide cases. He found himself *simpatico* with Justice Oliver Wendell Holmes.

Justice Holmes was charismatic and a larger than life personality. He and Hughes formed a close friendship and teased each other when they disagreed, (e.g., "wrong again" penciled on a circulated draft opinion). Holmes was inclined to defer to legislative prerogatives where Hughes was not reluctant to view the effects of legislation regardless of how carefully state lawyers had word smithed statutes to avoid unconstitutionality. In one such instance Alabama had enacted a penal statute to punish laborers who had contracted for services over a period of time and then quit the job without returning prepayments. The statute provided that such conduct created an irrebuttable presumption of fraud disallowing testimony of the accused that he had other reasons and had no fraudulent intent. Hughes' opinion invoked the Thirteenth Amendment:

> Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question, and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based. The provisions designed to secure it would soon become a barren form if it were possible to establish a statutory presumption of this sort and hold over the heads of the laborers the threat of punishment for crime under the name of fraud but merely upon evidence of failure to work out their debts.[1]

[1] Bailey v. Alabama, 219 U.S. 219

Holmes joined Hughes in dissent in the notorious case of Frank v. Magnum[2] in which Frank, a young New York Jew working in a Georgia pencil factory as a manager, was convicted of murder of a girl who worked there. His trial was an antisemitic raucous mob scene in which the gallery clapped and stomped their feet such that the judge had difficulty poling the jury. The Georgia Supreme Court gave no weight to the appellant's argument of "mob influence on the jury." On a writ of habeas corpus the US District Court presumed that Georgia's Court had conducted a proper judicial review. Holmes and Hughes joined in a dissent when the Supreme Court majority voted to let the District Court's action stand. Hughes words:

> This is not a matter for polite presumptions ... we must look facts in the face ...we think the presumption overwhelming that the jury responded to the passions of the mob ... it is our duty ... to declare lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by mob intent on death.

After the federal Courts turned their backs on Frank, he was taken from a prison farm by a mob and lynched. Years later Hughes' dissent was adopted as the law by a unanimous Court.

Hughes' life in Washington was compounded by the stresses of social obligations cutting into his time for his duties at Court. His wife managed to limit dinner attendance to two nights a week from a regular flood on invitations. Hughes would strategically excuse himself at ten to return home to work into the night. In this context, a request by President Taft for him to be a commissioner on a committee to figure out postal rates for periodicals and newspapers, although declined, could not be refused as Taft justified the choice from Hughes' history as an investigator in the gas and life insurance hearings. Hughes felt that the independence of the Court should prevent such non-judicial involvements. Characteristically he refused a salary bump for this non-Court work. At that time other Justices took honorariums to do public speaking. His committee was required to redo the work of the Postal Department and conduct time consuming hearings. The frustration over Congress doing nothing with the commission's work only reinforced Hughes' feelings in this regard, something that strengthened into Court tradition until the exceptions of Justice Jackson at the Nuremberg war crimes trials and later when Chief Justice Earl Warren headed the President's Commission on the Assassination of President Kennedy.

Hughes continued to display an unusual ability to integrate components of a case as he dictated opinions to his secretary, including calling up facts and cases from a nearly photographic memory or simultaneously resolving two disparate concepts. When unable to resolve issues, Hughes would often go for long walks to clear his mind. He found when he gave up his customary nightcap of whiskey and water and morning cigar and gave up smoking completely, which had become a habit since passing the bar, that his health improved 25% in his estimation. He still maintained a clock-like regimen in his daily activities that his family joked about. He couldn't afford to vacation in Europe on his judge's salary, but Hughes continued to vacation in the Adirondacks at camp Abenaki on Lake Placid where he regularly punished the lake with vigorous, choppy rowing. Inconsistent with his cautious personality, he uncharacteristically rowed with his wife in rough conditions despite neither of them knowing how to swim.

---

[2] Frank v. Magnum, 237 U.S. 309

Taft and Roosevelt, former friends and colleagues, fell out with each other in a personal way, putting the Republican party and Hughes in an awkward position, as he was friends with both. When it came time to choose between Taft and Roosevelt as the Republican Presidential nomination approached again in 1912, there was a groundswell for Hughes to be the compromise choice, but he flatly refused to permit his name to be put forward because he believed that for a Justice to run to be President would compromise the Court, actually, or by allowing the public to speculate that the Court's rulings were affected by political ambitions. When pressed that emergency conditions could surely create an exception he responded, "... no man is as essential to his country's well being as is the unstained integrity of the Courts." The Republican schism resulted in the election of Democrat Woodrow Wilson as President.

Hughes served as an associate Justice on the Court for six years. That relatively brief tenure produced a remarkable record of 150 opinions for the Court, so convincing that there were only nine dissents recorded, and all but one of those by a lone Justice.

It was an era in which state and federal power had to be reconciled, defining due process of law, the scope of the Interstate Commerce Commission's power, and the concept of 'freedom of contract.' The resolution of these issues was profoundly important for the Constitution and the country. Hughes' record in dozens of opinions and numerous dissents was generally that the Constitution required deference to the acts of Congress and support for the administrative actions of the executive branch to account for progress in a technologically changing society. However, unlike most of the Court, he was inclined to look through the language of the statutes to analyze their effect on personal liberty.

He was more than respected by other members of the Court. They had thrown up their hands in frustration over the complexities of the ICC and state regulations of railroad commercial rate charges, deferring decision repeatedly in the Minnesota Rate Cases.[3] Twenty-one states intervened as the outcome of the appeal would affect their rate charging laws. Later to become a Justice himself, Pierce Butler wrote a 900 page brief for the railroads. CJ White assigned the case to Hughes because of his demonstrated history of amassing and understanding facts and then to logically organize and apply the law. He delayed his draft opinion for more than a year during which he wrote twenty-one other opinions and an important dissent while he researched what portended to be the most important decision affecting the relative power of Congress or the states to control the national economy. Ultimately he found what we take for granted today, that the Constitution relegated absolute authority for Congress through the ICC to classify what commerce is interstate and to regulate it. His fellow justices thought the decision as important as Marbury v. Madison and had the clerk pass notes to that effect to Justice Hughes' wife sitting in the gallery as Hughes read his 102 page decision which included references to the Articles of Confederation as an example of the depth of his research.

Justice Day:

Your husband has done a great work this day—the effects of which will be beneficially felt for generations to come.

Justice Lurton:

The subject is not interesting to you and is very complex. But I want to say to you what I have already said to Judge Hughes that his opinion now being delivered is as able and important as any opinion from this Bench since the foundation of this Court.

---

[3] Minnesota Rate Cases, 230 U.S. 352

Justice Holmes energetically endorsed it. Justice Pitney commented on the opinion proof sheets that, "To my mind [the opinions] far outclass any of the previous opinions of the Court upon subjects of this character." Chief Justice White: "Yes. Admirably well done. The country and Court owe you a debt they would have to go into bankruptcy if called upon to pay."

Hughes was not a knee jerk nationalist. He wanted government to work, but not at the expense of the basic rights of the individual. He was in opposition to government exercising purely arbitrary power. He had a long record of upholding the police power of the states, but to him and to Justice Holmes the "indefinite content " of the due process clause in the 14th Amendment, "...was intended to be a protection against tyranny, wherever and however it might hit."[4]

Hughes and Holmes were in the Court minority in several 'freedom of contract' cases. Hughes' opinion was initially successful in Chicago, B. & Q. Ry. Co. v. McGuire[5] where employees were required to agree in writing never to join a union in order to gain benefits if injured, and a state statute absolved workers from such agreements:

> Freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community... It is subject also, in the field of State action to the essential authority of government to maintain peace and security and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction.

Thereafter Hughes found himself in the minority as "freedom of contract " cases came before the Court which applied an ossified arms length view and strayed from their prior McGuire decision.

His tenure on the Court can be summarized as a strong supporter of expansive police powers to promote the health and welfare of citizens. He was the justice most inclined to look through statutes to see their realistic effect on civil liberties. The Minnesota Rate Cases established the mechanism and limits for government administration of a modern commercial economy. Arthur M. Allen in the Columbia Law Review opined that Hughes' opinions ranked "among the most important and able pronouncements upon the principals of constitutional law that have come from the Supreme Court during its entire history."[6]

Fate or destiny then intervened for Hughes.

(End of chapter three, credits to be listed at the conclusion of the articles)

Jim Cooper
November 11, 2023

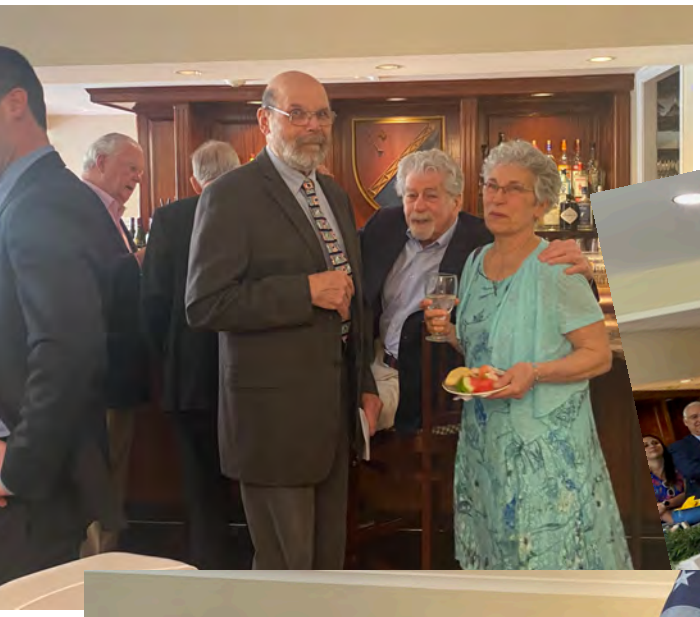
---

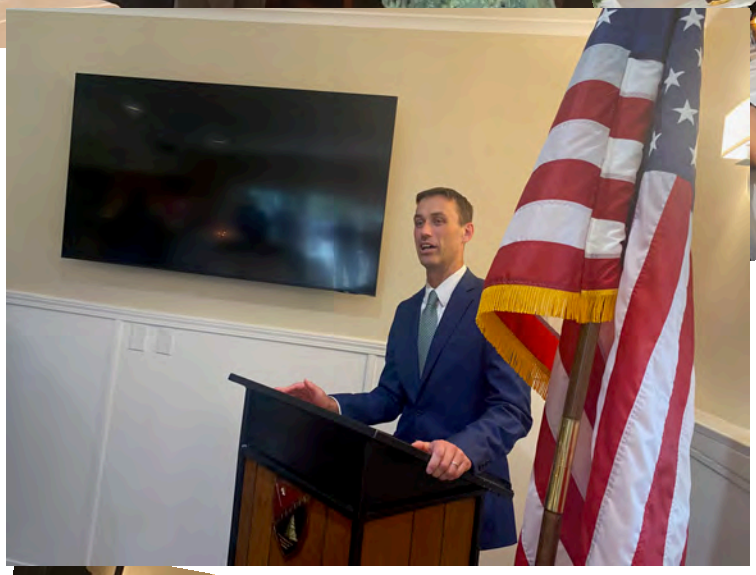
[4]*The Supreme Court of the United States* (New York, Columbia University Press, 1928)*;* Chicago, Milwaukee & St. Paul Ry. Company v. Polt, 232 U.S. 165

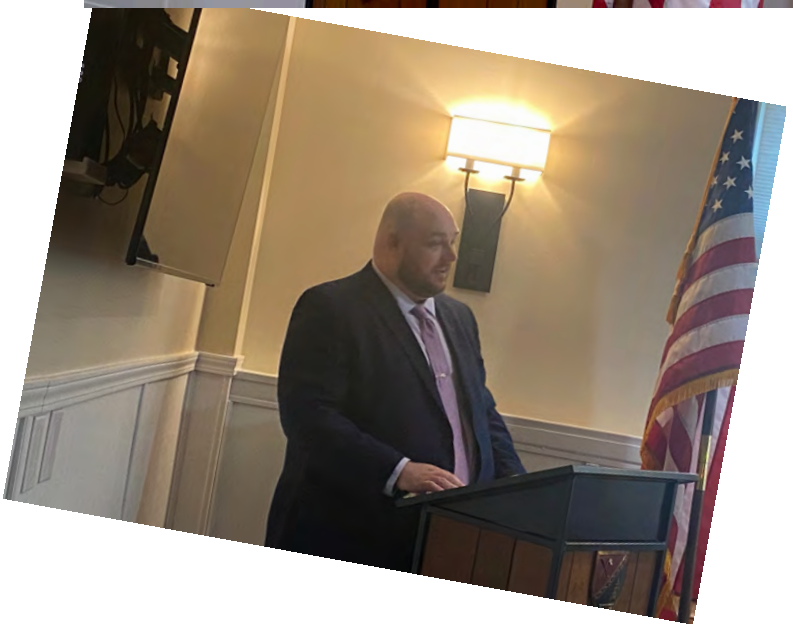
[5] Chicago, B. & Q. Ry. Co. v. McGuire 219 U.S. 549

[6]Arthur M. Allen, Columbia Law Review, Nov. 1916, p. 566.

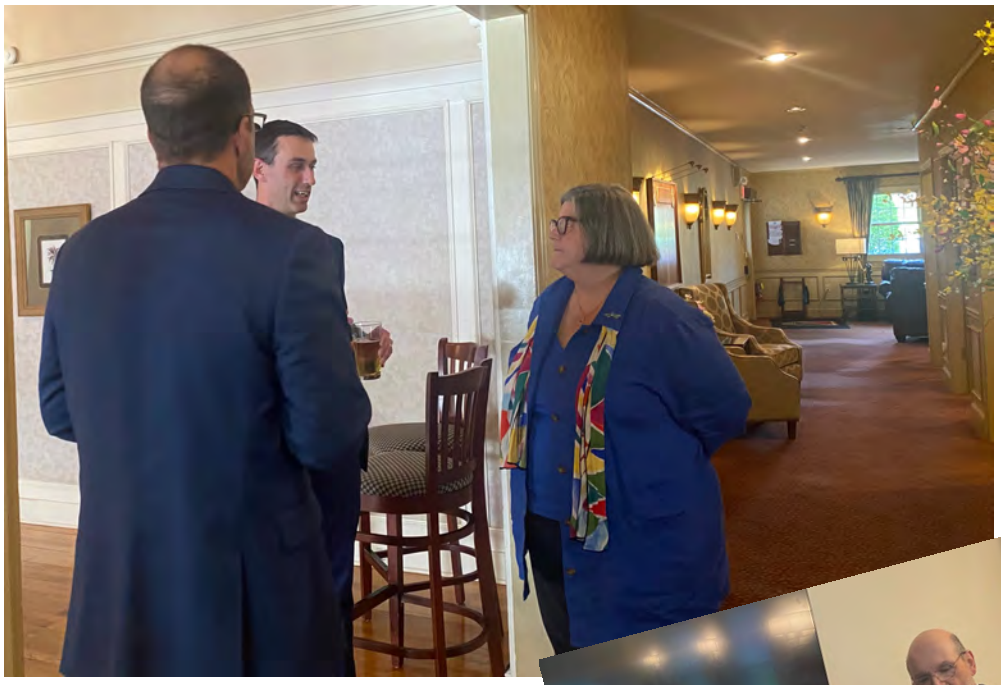
WCBA LAW DAY~MAY 2, 2024
GLENS FALLS COUNTRY CLUB

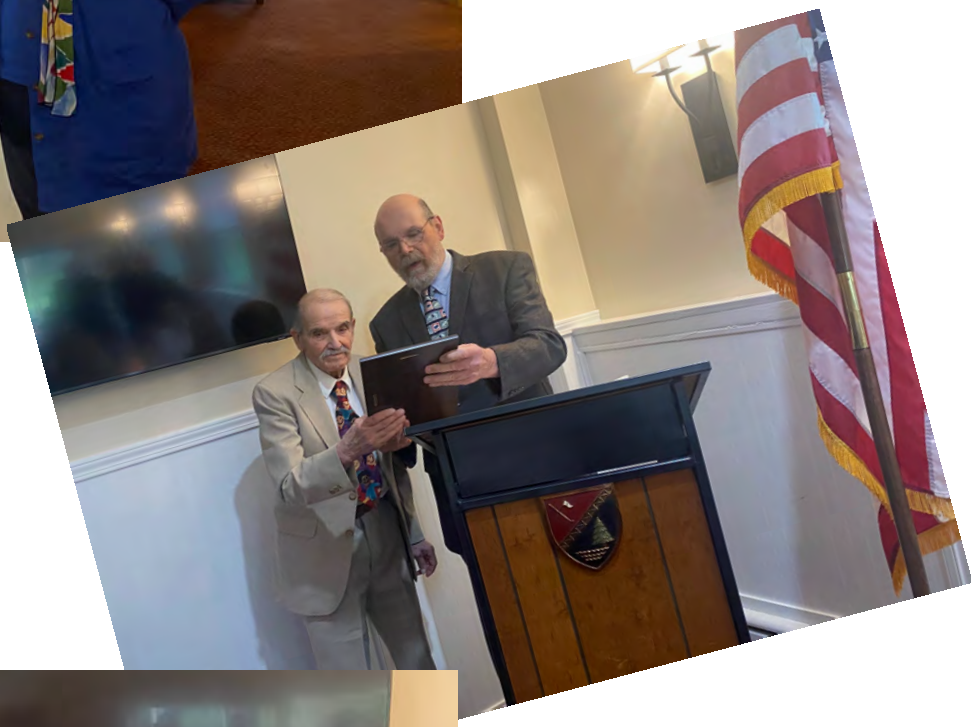


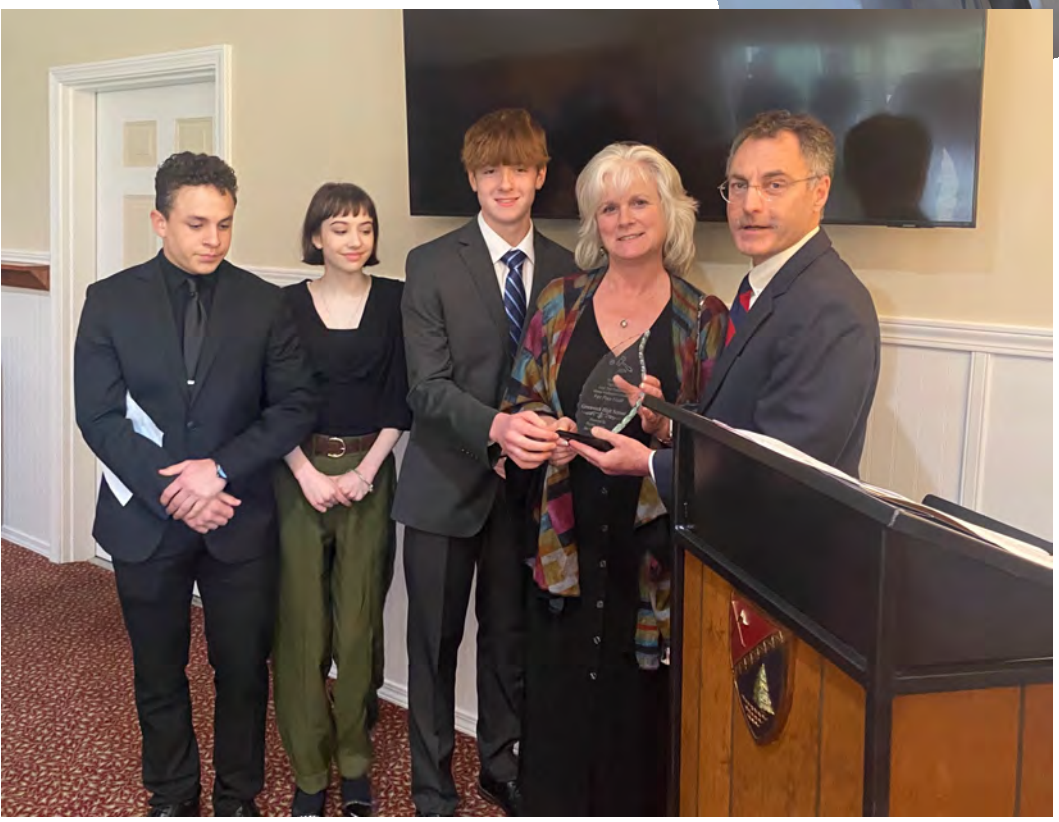




PHOTOS: Top left: WCBA Immediate Past President, Dennis Tarantino, greets Hon. Michael Muller and his wife, Linda. **Top right:** Guests listen to several presentations while enjoying an array of hors d'oeuvres and cocktails. **Middle left:** Hon. Eric Schwenker delivers opening remarks. **Bottom left:** 2024 Law Day Chair, Matthew Skinner, shares information regarding this year's event.







PHOTOS: Top left: Assemblywoman Carrie Woerner chats with WCBA President, Hon. Eric Schwenker and Hon. Robert Smith. **Top right:** Hon. Michael Muller presents the 2024 Liberty Bell Award to Mr. Frank Munoff. **Bottom left:** Hon. Glen Bruening presents members of the Greenwich High School Mock Trial team the trophy for their first-place finish in the local competition.

2024 NEW YORK STATE HIGH SCHOOL MOCK TRIAL TOURNAMENT

This year was the 42st year of the New York State Bar Association's High School Mock Trial Tournament. Since 2009, the Warren County Bar Association (WCBA) and Warren County Bar Foundation (WCBF) together sponsor the local Tournament competition for Warren-Washington Counties. Winners of the local competitions advance to a Regional Tournament, and winners of the Regional Tournaments advance to the State Finals.

This year, high school teams from Glens Falls, Greenwich, Hudson Falls, Lake George, Queensbury and Salem participated in our local competition. We congratulate all the students for another excellent Tournament, and recognize the Greenwich High School team for its first-place finish which qualified the team to compete at the Regional Tournament held at the Federal Courthouse in Albany.

The WCBA Mock Trial Committee coordinates the local Warren-Washington competition and wishes to express our appreciation to the many who help offer this excellent opportunity to our local high school students. We would like to thank the faculty advisors, attorney advisors, and families who support our student competitors throughout the Tournament. We greatly appreciate the support of our Administrative Judge, Hon. Kris Singh, and the entire Fourth Judicial District team for their continued support, including the use of the County Courthouses and assistance from our Court Officers. We thank WCBA immediate Past President Hon. Eric Schwenker and Executive Director Kate Fowler, and WCBF President Hon. Robert Muller for their unwavering support.

The Mock Trial Committee is especially grateful to the local judges, attorneys and court staff who presided over and helped us hold 13 trials in three courthouses and one school over five weeks: Supreme Court Justice Martin Auffredou, Court of Claims Judge Kate Hogan, Warren County Court Judge Robert Smith, Glens Falls City Court Judge Gary Hobbs, Warren County District Attorney Jason Carusone, Washington County District Attorney Tony Jordan, Support Magistrate Philip Perry, attorneys Travis Brown, Karen Judd, Nicole Fish, Malcom O'Hara, James Burkett, Rose Place, Matthew McAuliffe, Washington County Assistant Public Defender Taylor Boucher, Warren County Surrogate Court Chief Clerk Deborah Ricci, Washington County Supreme and County Court Chief Clerk Lindsay Gillingham and Deputy Clerk Kate Thompson, Warren County Supreme and County Court Chief Clerk Sheila Kent and Warren County Family Court Chief Clerk Scott Fitzsimmons, and Secretary to Judge Mary Beth O'Hearn.

It is truly rewarding to watch the students develop their communication and advocacy skills and sharpen their ability to think and respond on their feet. What a difference even five weeks makes. Our Tournament concluded at the Law Day reception where we presented the Tournament trophy to the Greenwich High School Team who was represented by Senior Olive Magowan, Junior Wyatt Cary, Freshman Gabe McFarren, and Faculty Advisor Brenda Saunders.

WCBA Mock Trial Committee
Hon. Glen T. Bruening (ret.), Chair, Hon. Martin Auffredou, Karen Judd, Esq., and Nicole Fish, Esq.

From The Judge's Chambers

Martin D. Auffredou, JSC
Warren County Supreme Court
Warren County Municipal Center
1340 State Route 9, Lake George, NY 12845

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

In the Matter of

DECISION AND ORDER

PROTECT THE ADIRONDACKS! INC.,
Petitioner/Plaintiff,
- against -

ADIRONDACK PARK AGENCY and LS MARINA, LLC,
Respondents/Defendants.

Index No. EF-2023-71671
RJI No. 56-1-2023-0355

In the Matter of

ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE, INC. and THOMAS JORLING,
Petitioners/Plaintiffs,
- against –

ADIRONDACK PARK AGENCY and LS MARINA, LLC,
Respondents/Defendants.

Index No. EF2023-71676
RJI No. 56-1-2023-0353

Appearances:

Protect the Adirondacks! Inc., Johnsburg (*Christopher A. Amato* and *Claudia K. Braymer* of counsel), for Protect the Adirondacks! Inc., petitioner/plaintiff.

Whiteman Osterman & Hanna LLP, Albany (*Philip H. Gitlen*, *Paul Van Cott*, *Anna V. Seitelman* and *Molly D. Parlin* of counsel), for Adirondack Wild: Friends of the Forest Preserve, Inc. and Thomas Jorling, petitioners/plaintiffs.

Norfolk Beier PLLC, Lake Placid (*Matthew D. Norfolk* of counsel), for LS Marina, LLC, respondent/defendant.

AUFFREDOU, J.

Motion by respondent/defendant LS Marina, LLC (hereinafter LSM) to dismiss the petitions/complaints.

LSM is the operator of a marina situated on two sites on Lower Saranac Lake in Franklin County, New York---one on the shores of Crescent Bay, which the parties have dubbed "the Main

Marina," and another on the shores of Ampersand Bay, which the parties call "the Annex"—which was first established in 1924. Both sites are in an area classified as a "hamlet" under the Adirondack Park Agency Act (APAA) (Executive Law art 27). As a consequence, construction within 50 feet of the mean high-water mark on the shore of the lake, also known as the "shoreline setback," is restricted (*see* Executive Law § 806). The two consolidated combined proceedings pursuant to CPLR article 78 and actions for declaratory judgment herein relate to an order of respondent/defendant Adirondack Park Agency (APA), denominated "APA Order 2016-0029A," issued June 15, 2023 (hereinafter "the 2023 Order"), in which it conditionally approved a variance allowing LSM to construct open-sided covers over 134 existing boat slips and an upgraded boat launch at the Main Marina in place of certain existing, lawfully nonconforming structures on the shore of the lake (hereinafter "the project").

The lengthy proceedings before the APA that resulted in the 2023 Order began in 2013 with LSM's submission to the APA of a jurisdictional inquiry for the project as it was then designed. LSM first applied for a variance in 2014, seeking permission to build covered boat berths, retaining walls, walkways and other structures on the shore at both sites. In 2015, amidst the variance application process, LSM removed a series of preexisting nonconforming structures from within the shoreline setback at both sites, including boat storage buildings, staircases, decks, walkways and ramps. In 2016, the APA determined that the project would also require a permit for construction in wetlands under the Freshwater Wetlands Act (FWA) (Environmental Conservation Law art 24) because the project as then proposed involved construction in more wetland areas than had previously existed and dredging of road sediment from within wetlands at the Annex. LSM applied for that permit in 2016. At times throughout the process, the APA requested and LSM supplied additional information in support of the application, which, on several

occasions, prompted LSM to revise the project proposal to reduce its size and include mitigating measures and information.

In 2020, the APA deemed the application complete and submitted it to its board for final approval, which was granted in APA Permit and Order 2016-0029, issued on September 14, 2020 (hereinafter "the 2020 Permit"), which authorized, among other things, the construction of covered and uncovered boat berths at both sites, some of which would be situated in wetlands, and the dredging of road sediment from wetlands at the Annex. Petitioner-plaintiff Thomas Jorling, the owner of property that is situated across Ampersand Bay from the Annex, sued for the annulment of the 2020 Permit. The resulting judgment of Supreme Court (Meyer, J.), entered in Essex County, found that the APA's issuance of the 2020 Permit did not violate lawful procedure, was not affected by an error of law and was not arbitrary and capricious, and Jorling's combined proceeding and action was therefore dismissed (*see Matter of Jorling v Adirondack Park Agency*, 76 Misc 3d 1204 [A], 2021 NY Slip Op 51305 [U], *15 [Sup Ct, Essex County 2021], *revd* 214 AD3d 98 [3d Dept 2023]). On appeal, however, the Third Department reversed the judgment, granted Jorling's petition and annulled the 2020 Permit, finding that the APA had misapplied its wetlands classification regulations and wrongly classified the affected wetlands (*see Matter of Jorling v Adirondack Park Agency*, 214 AD3d 98, 103, 106 [3d Dept 2023], *supra*). The Court also held, as is most relevant to this motion, that Jorling had standing to bring that combined proceeding and action (*id.* at 102-103).

On September 21, 2021, a date that followed Supreme Court's dismissal of Jorling's prior petition but preceded the Third Department's hearing of Jorling's appeal, LSM submitted a jurisdictional inquiry to the APA for the construction of uncovered docks at both sites.[1] The docks

[1] The Third Department's online records reflect that it heard oral argument on Jorling's appeal on December 15, 2022 but such records do not reveal, and the record before this court does not reflect, whether Jorling had taken his

were proposed to be constructed in the same footprints as the covered and uncovered docks that were approved in the 2020 Permit, and also overlapped the footprint of lawfully preexisting structures. The APA determined that the proposed uncovered docks were permissible without a wetland permit because they were in-kind replacements of the preexisting structures, to be installed in the same locations and would not present any increased adverse impacts to wetlands. It also determined that no variance from the shoreline setback restrictions was required because docks are exempt from such. The APA reported this determination to LSM on September 28, 2021, with an admonition that the docks were to be installed in compliance with the 2020 Permit.

In early 2022, LSM installed the proposed uncovered docks pursuant to the APA's September 28, 2021 letter. At some point prior to the reversal, it also performed dredging and filling at the Annex, apparently pursuant to the 2020 Permit. Following reversal, LSM submitted a new proposal for the construction of covers over a portion of the existing docks at both sites. The APA determined that no wetlands permit was required for the proposal at either site and no variance was required at the Annex, but a variance from the shoreline setback was necessary at the Main Marina. It reached those determinations and conditionally granted such variance in the 2023 Order now challenged herein.

Petitioner/plaintiff Protect the Adirondacks! Inc. (hereinafter Protect) is an environmental interest group dedicated to the protection and stewardship of the lands in the Adirondack Park, interests that it pursues through various activities, including oversight of regulatory action, scientific research and legal action. Its petition/complaint alleges three causes of action. In the first, it asserts that LSM's 2022 construction of the uncovered docks and dredging and filling at the Annex required permits under the APAA and FWA and were thus in violation thereof; and that

---

appeal prior to September 21, 2021 or September 28, 2021, the date on which the APA responded to LSM's jurisdictional inquiry. The Court's decision on the appeal is dated and entered March 2, 2023.

the APA's determination that no permit was required for the dock construction was arbitrary and capricious. In the second, it alleges that the "new nonconforming structures" at the Annex required a variance from the shoreline setback requirement and the APA's determination to the contrary was arbitrary and capricious. And, in the third cause of action, Protect alleges that the APA's determination to grant a variance to LSM for its proposed activities at the Main Marina was arbitrary and capricious. Protect seeks the annulment of the 2023 Order; a declaration that the uncovered docks at both sites and the dredging and filling at the Annex required permits and variances; a declaration that the new nonconforming structures at the Annex are not replacements in kind; a declaration that the installation of the uncovered docks at both sites and the dredging and filling at the Annex without permits and variances were violations of the FWA and APAA; and an injunction requiring LSM to remove the uncovered docks. It does not request that LSM remove fill, replace dredged material, or otherwise remediate the dredging and filling at the Annex.

Petitioner/plaintiff Adirondack Wild: Friends of the Forest Preserve, Inc. (hereinafter Wild) is another environmental interest group whose mission is to safeguard the legal protections granted to the forest preserve lands in our state, including those in the Adirondack Park, and to promote land stewardship therein through education, advocacy and research. Its petition/complaint, filed jointly with Jorling, also alleges three causes of action that are similar to but not the same as Protect's. In the first, they assert that the APA's determination that construction of the uncovered docks did not require a wetlands permit was arbitrary and capricious. In the second, they assert that the APA's determination that the installation of covers over the docks at the Annex did not require a variance from the shoreline setback requirement was arbitrary and capricious. And in their third cause of action, Wild and Jorling assert that the presence of the uncovered docks that LSM installed in 2022 is illegal. They seek annulment of the 2023 Order, a

declaration that the uncovered docks are illegal, and an injunction requiring LSM to remove them. They do not seek any relief relative to the dredging and filling activities at the Annex that LSM had conducted in or around early 2022.

By letter order of this court (Auffredou, J.) dated and entered on September 11, 2023, issued on the consent of all parties, the two combined proceedings and actions were consolidated. LSM thereafter moved as aforesaid. On the same day, the APA filed their answers to the petitions/complaints and the certified administrative record of the proceedings that gave rise to the 2023 Order. Protect has responded to the motion in defense of its claims, and Wild and Jorling have done the same.[2]

Upon consideration of the petitions/complaints and the documents filed therewith; the affirmation of Matthew D. Norfolk, Esq., dated October 26, 2023, with exhibits; LSM's memorandum of law in support of the motion, dated October 26, 2023; the affidavit of David H. Gibson, sworn to November 10, 2023; Wild and Jorling's memorandum of law in opposition to the motion, dated November 13, 2023; the affirmation of Christopher Amato, Esq., dated November 10, 2023, with exhibit; the affidavit of John K. Drury, sworn to November 9, 2023, with exhibit; the affidavit of Roger Marshall, sworn to November 10, 2023, with exhibit; the affidavit of Walt Linck, sworn to November 9, 2023; Protect's memorandum of law in opposition to the motion, dated November 13, 2023; the supplemental affidavit of Thomas Jorling, sworn to December 1, 2023; the supplemental affidavit of Peter Bauer, sworn to December 6, 2023; LSM's memorandum of law in reply, dated December 20, 2023; Protect's surreply memorandum of law, dated January 3, 2024; the surreply affirmation of Philip H. Gitlen, Esq., dated January 4, 2024; and the affidavit of John Burth, sworn to October 26, 2023, with exhibits, decision is hereby rendered as follows.[3]

---

[2] Wild and Jorling's opposition is in one set of papers, which set is separate and distinct from Protect's papers.
[3] The Burth affidavit was submitted by the APA along with its answer.

LSM first argues that none of the petitioners/plaintiffs herein has standing to bring these combined proceedings and actions (*see* CPLR 3211 [a] [3]). The court has little trouble concluding that Jorling has pleaded "'an actual stake in the controversy by establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by'" the APAA and FWA (*Matter of Jorling*, 214 AD3d at 102, quoting *Matter of Town of Waterford v New York State Dept. of Envtl. Conservation*, 187 AD3d 1437, 1439 [3d Dept 2020] [internal quotation marks and citations omitted]). His allegations in this regard mirror those made in his challenge to a prior iteration of the project as approved in the 2020 Permit, which the Third Department has already held "'sufficiently alleged direct harm to [his] aesthetic and environmental well-being'" (*Matter of Jorling*, 214 AD3d at 102, quoting *Matter of Protect the Adirondacks! Inc. v Adirondack Park Agency*, 121 AD3d 63, 69 n 3 [3d Dept 2014] [internal quotation marks, brackets and citation omitted], *lv dismissed & denied* 24 NY3d 1065 [2014]; *accord Sierra Club v Morton*, 405 US 727, 734 [1972]).

Further, the court rejects LSM's attempt to parse Jorling's standing to challenge some parts of the 2023 Order and not others—i.e., only those affecting the Annex—as the Third Department also appears to have done (*see Matter of Jorling*, 214 AD3d at 103 n 3). Said Court acknowledged that Supreme Court (Meyer, J.) found in the prior proceeding that Jorling lacked standing to challenge the project relative to the Main Marina but noted that the 2020 Permit "encompasse[d] both the Annex and the Main Marina locations" and stated that his "standing relative to the Annex suffice[d] for [him] to move forward" (*id.*). The Court then proceeded to adjudicate his claim that the APA acted arbitrarily and capriciously by granting the 2020 Permit without conducting a carrying capacity study of Lower Saranac Lake, a claim that ostensibly involved the project at both

locations that should not have been reached as to the Main Marina if it were nonjusticiable to that extent due to the lone petitioner/plaintiff's lack of standing.

Turning to Wild's and Protect's standing, organizational standing may be "'established by proof that agency action will directly harm association members in their use and enjoyment of the affected natural resources'" (*Matter of Save the Pine Bush, Inc. v Common Council of the City of Albany*, 13 NY3d 297, 304-305 [2009], quoting *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 775 [1991]). Wild's standing thus flows from Jorling's allegations and their demonstration that Jorling was its member at the time that they commenced their combined proceeding and action.

Protect's petition/complaint, as supplemented by the affidavits of three of its members, in particular, that of John K. Drury, also adequately alleges standing (*see Matter of Ken Mar Dev. Inc. v Department of Public Works of City of Saratoga Springs*, 53 AD3d 1020, 1023 [3d Dept 2008]). Like Jorling, Drury owns property on the shore of Lower Saranac Lake. He pleads his regular use of the environmental resources that the lake presents—for such things as boating, fishing, hunting and observing nature—that exceeds a mere "generalized 'interest' in the environment" (*see Matter of Save the Pine Bush*, 13 NY3d at 305, quoting *Sierra Club v Morton*, 405 US 727, 734 [1972]). While Drury, unlike Jorling, does not appear to have a line of sight to either marina site from his property, his property is nearby the Annex, situated such that boats traveling to the main area of the lake from the Annex, or vice versa, would motor past it. The increased boat and road traffic arising from the project would, he pleads, negatively impact his enjoyment of his property and his ability to use the lake's environmental resources as he has been accustomed, which interests are within the zone of interests that the APAA and FWA are meant to protect (*see Matter of Save the Pine Bush*, 13 NY3d at 305; *Matter of Jorling*, 214 AD3d at 102-

103). As Wild's standing flows from Jorlings, so does Protect's flow from Drury's, insofar as it has established that Drury was its member at the time that its combined proceeding and action was commenced (*see Matter of Save the Pine Bush*, 13 NY3d at 305).[4]

LSM next argues that the time in which to challenge its 2022 installation of uncovered docks at both sites and the APA determination to allow it without a permit or variance has elapsed. A party seeking judicial review of a determination of the APA must do so within 60 days thereof (*see* Executive Law § 818 [1]). The determination challenged must be final (*see* CPLR 7801 [1]). At issue here is the September 28, 2021 letter. LSM characterizes it as a final and binding jurisdictional determination—which, though related to the 2020 Permit, is distinct from it—of which petitioners/plaintiffs should have sought judicial review if they sought to challenge the determinations made in it. Petitioners/plaintiffs assert, essentially, that the determination reported in the September 28, 2021 letter was part and parcel or an extension of the determinations made in the 2020 Permit, and was vitiated when the 2020 Permit was annulled. The installations, they continue, were done pursuant to the 2020 Permit, were rendered unlawful upon its annulment and then ratified by the 2023 Order, to which their challenge is timely.

The court finds that the September 28, 2021 letter was an independent, though related, final determination of the APA (*see* 9 NYCRR § 571.5 [b]). The proposal that triggered the September 28, 2021 letter was characterized by LSM as a separate and distinct jurisdictional inquiry, and it was treated that way by the APA. John Burth, the APA Environmental Program Specialist who authored the letter, states as much in his explanatory affidavit that accompanies the APA's answer and certified administrative record. The 2023 Order twice recites that the docks were installed

[4] The other two member affidavits that Protect has submitted present closer questions as to their individual standing but the court needs not decide that issue. They are not petitioners/plaintiffs herein and Drury's affidavit presents allegations sufficient to confer organizational standing on Protect.

"pursuant to [the] letter." Indeed, it would make little sense for the APA to countenance a jurisdictional inquiry regarding matters over which it was already exercising jurisdiction, or for LSM to seek permission to do something that the APA had already permitted in the 2020 Permit.

Alternatively, the issue of whether the docks are lawfully installed or should be removed is moot (*see Matter of Grand Jury Subpoenas for Locals 17, 135, 257 and 608 of United Bhd. Of Carpenters & Joiners of Am., AFL-CIO*, 72 NY2d 307, 311 [1988] ["mootness is a doctrine related to subject matter jurisdiction and thus must be considered by the court *sua sponte*"]; *Gabriel v Prime*, 30 AD3d 955, 956 [3d Dept 2006] ["mootness is an issue that can be raised at anytime and, '[i]n fact, it is incumbent upon counsel to inform the court of changed circumstances which render a matter moot,'" quoting *Matter of Cerniglia v Ambach*, 145 AD2d 893, 894 (3d Dept 1988), *lv denied* 74 NY2d 603 (1989)]). The docks were installed in early 2022 and in use during the 2022 and 2023 boating seasons; LSM constructed them in good faith upon the APA's authority as communicated to it in the September 28, 2021 letter; and their removal would present a significant hardship to LSM, which expended large sums of money to put them in and relies upon their use for its core business (*see Matter of Kern v Adirondack Park Agency*, 223 AD3d 990, 991-992 [3d Dept 2024]). Notably, none of the petitioners/plaintiffs herein took any steps to prevent or halt the installation, notwithstanding that they believed it to be pursuant to the 2020 Permit that was then challenged or imminently to be challenged by Jorling (*see id.*).[5]

The same may be said of the dredging and filling that LSM performed at the Annex in or around early 2022. It, too, is complete, was done in reliance on the then-valid 2020 Permit, and

[5] The court notes that counsel for petitioners/plaintiffs herein represented litigants in *Matter of Kern* (223 AD3d at 990), upon which this court relies in holding the issues surrounding the dock installation moot, but did not bring it to the court's attention (*see Gabriel v Prime*, 30 AD3d at 956). To be fair, however, the court also notes that that case is of relatively recent vintage and was not released by the Third Department until approximately a week after the final submissions herein—i.e., petitioners/plaintiffs' surreplies—were filed.

neither Jorling nor any of the other petitioners/plaintiffs did anything to prevent LSM from moving forward with the work authorized therein. Petitioners/plaintiffs do not request that the work be undone, likely because such would appear to require refilling dredged material and the dredging of fill that LSM had put in place, implicating the very same environmental concerns that brings petitioners/plaintiffs to court in the first place. Thus, even if the court were to rule that the dredging and filling was unlawfully undertaken, it could not afford meaningful relief to petitioners/plaintiffs on this claim (*see Matter of Kern*, 223 AD3d at 991-992; *Matter of Victor v New York City Off. of Trials & Hearings*, 174 AD3d 455, 455 [1st Dept 2019]).

Any of LSM's arguments that are not specifically addressed herein have been examined and determined to be without merit or academic in light of the foregoing holdings. In particular, the court finds that petitioners/plaintiffs have stated claims that the determinations made by the APA in the 2023 Order were affected by an error of law, arbitrary and capricious, or abuses of discretion and for a related declaratory judgment (*see* CPLR 3001, 7803 [3]; *Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]). Based upon the foregoing it is hereby

ORDERED that LSM's motion is granted to the extent stated herein and otherwise denied; and it is further

ORDERED that the first cause of action in Protect's petition/complaint is dismissed, and the second cause of action therein is dismissed to the extent that the "new nonconforming structures" at the Annex that it addresses refers to the uncovered docks installed by LSM in early 2022;[6] and it is further

[6] The second cause of action in Protect's complaint refers somewhat vaguely to "new nonconforming structures" at the Annex, sometimes in terms suggesting that they are already in place—which suggests that the phrase refers to the uncovered docks installed in 2022; and other times in terms suggesting that they have yet to be installed—which suggests that the phrase refers to those structures that the 2023 Order purports to allow pursuant to one of the several determinations reached by the APA therein. To the extent that the latter is the case, the cause of action survives.

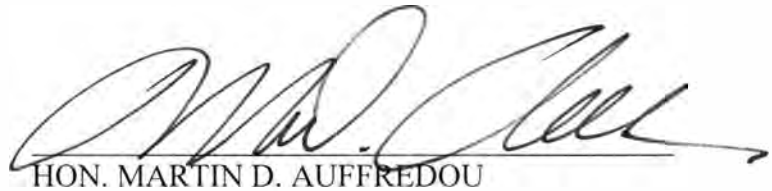
ORDERED that the first and third causes of action in the Wild/Jorling petition/complaint are dismissed; and it is further

ORDERED that LSM shall serve a copy of this order with notice of entry upon all parties to these consolidated combined proceedings and actions and, pursuant to the court's September 11, 2023 letter order, LSM's answers to the petitions/complaints shall be due five days after it effects such service; the court will thereafter schedule oral argument on the petitions/complaints at a date and time that is convenient to all parties.

The within constitutes the decision and order of this court.

Signed this 16th day of April 2024, at Lake George, New York.

ENTER.

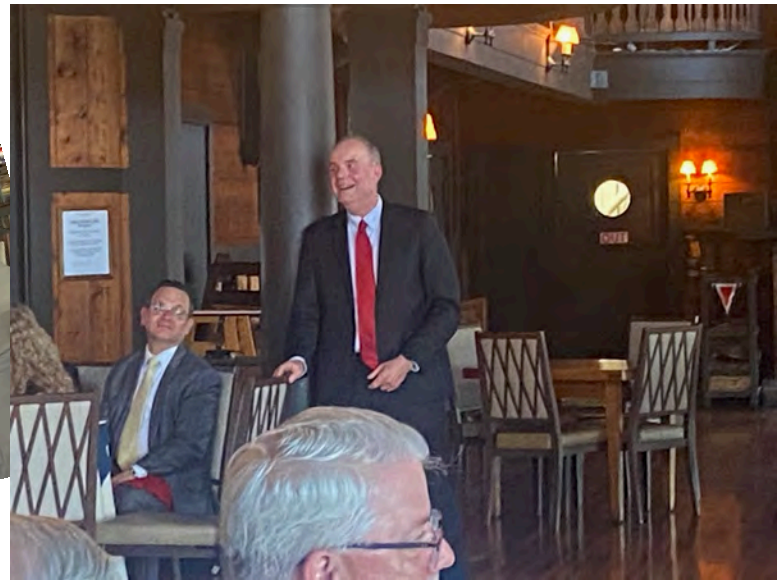


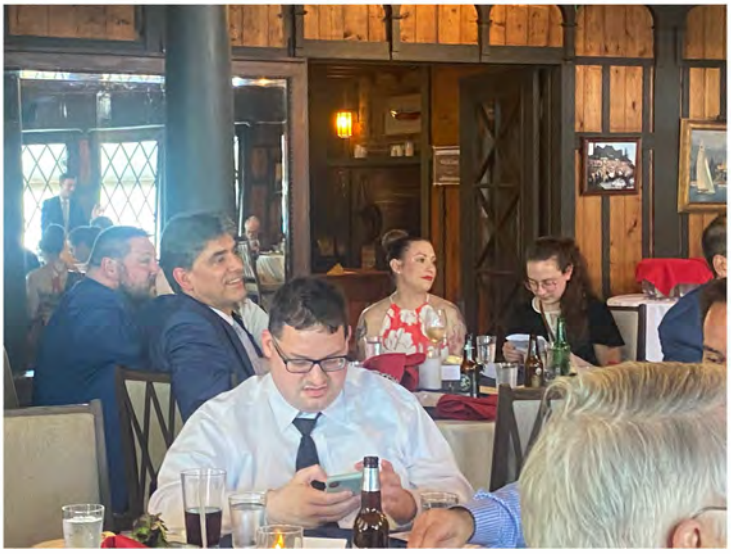
HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

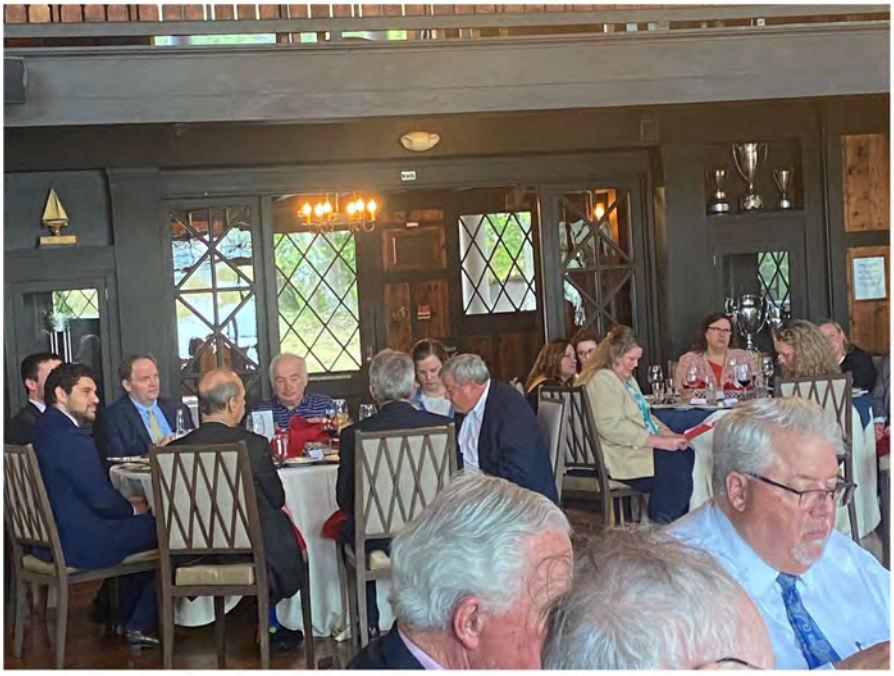
The court is uploading the decision and order to the New York State Courts Electronic Filing System (NYSCEF). Such uploading does not constitute service with notice of entry (*see* 22 NYCRR 202.5-b [h] [2]).

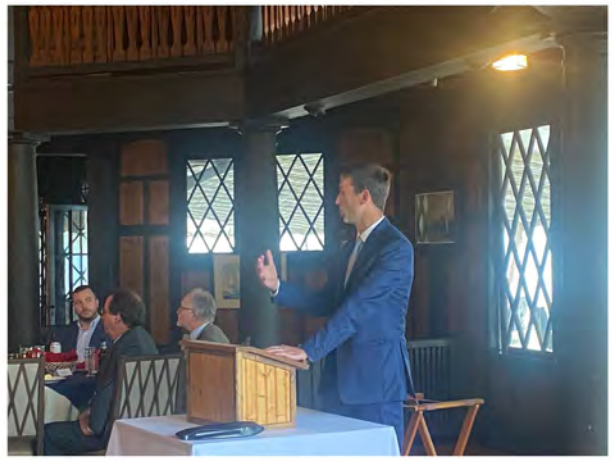
Distribution:
Christopher A. Amato, Esq.
Claudia K. Braymer, Esq.
Philip H. Gitlen, Esq.
Paul Van Cott, Esq.
Anna V. Seitelman, Esq.
Molly D. Parlin, Esq.
Matthew D. Norfolk, Esq.
Joshua M. Tallent, Esq.

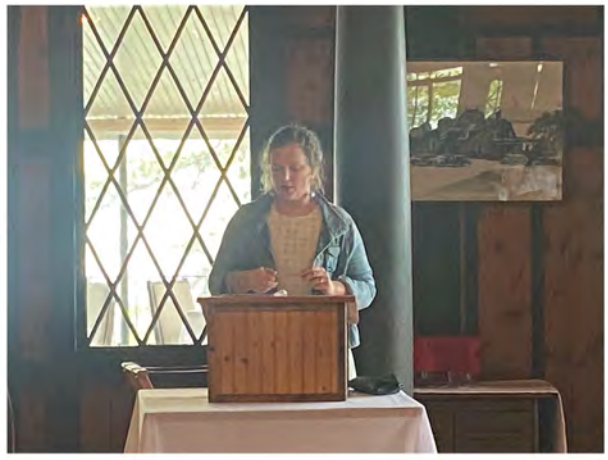
2024 Annual Meeting ~ May 14, 2024
The Lake George Club

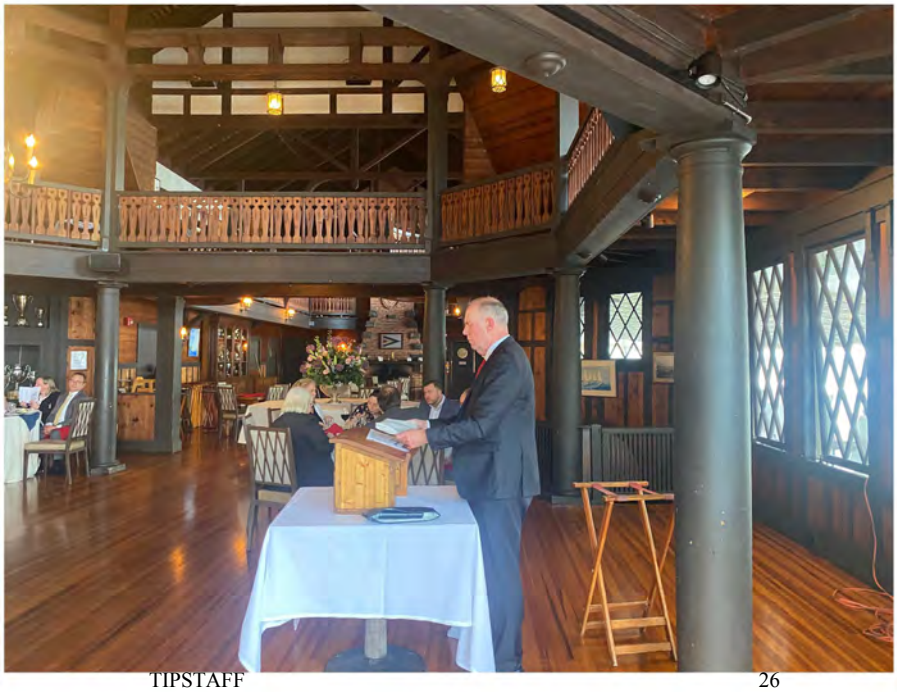


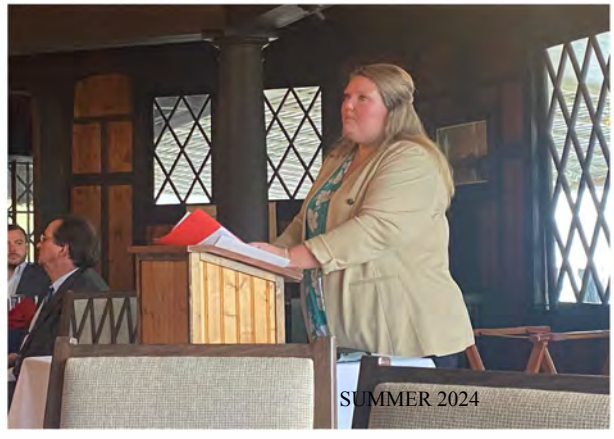


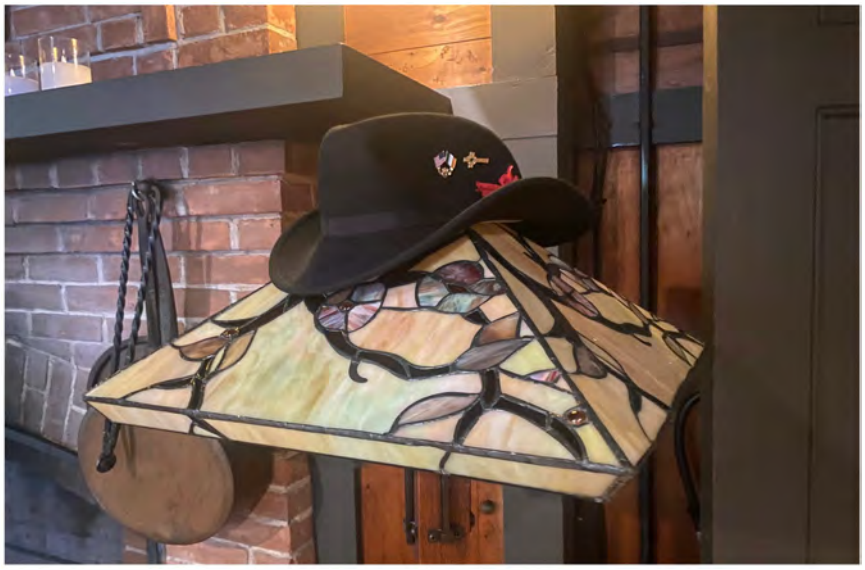


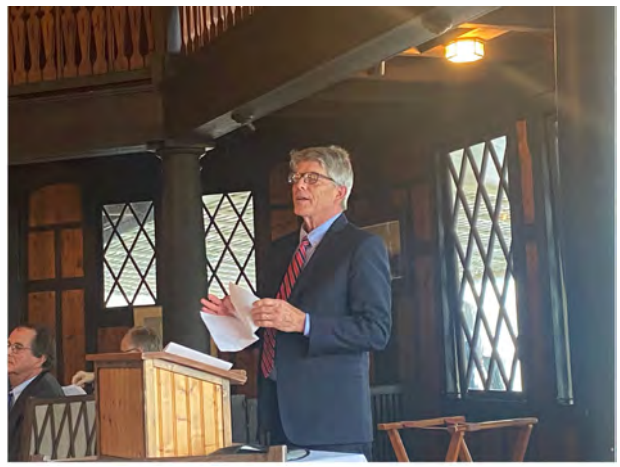


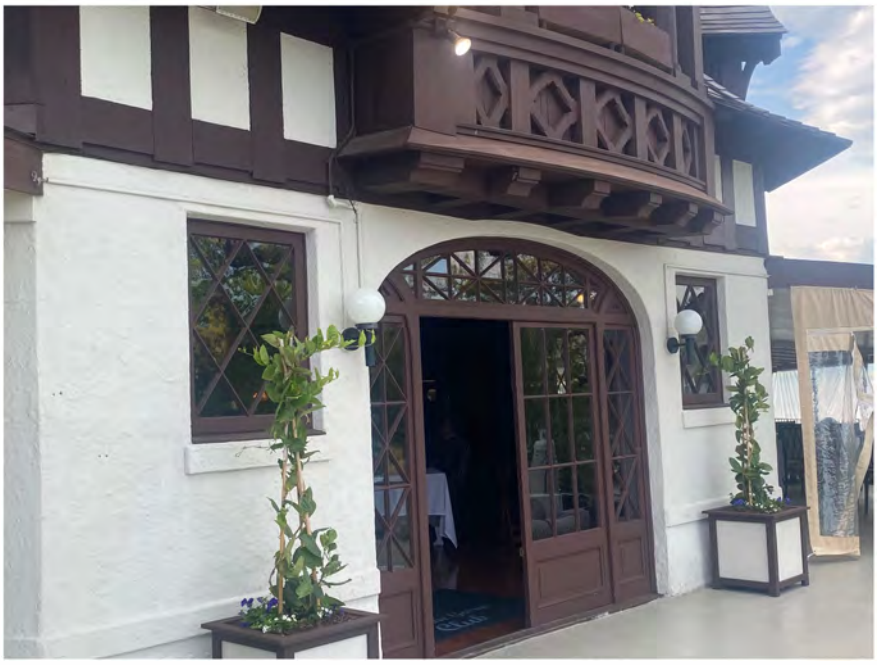


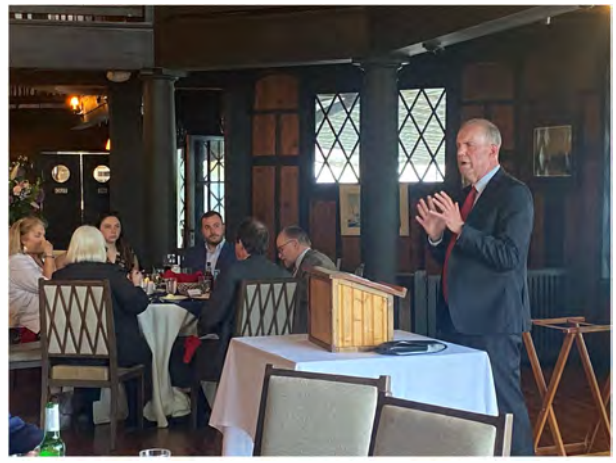


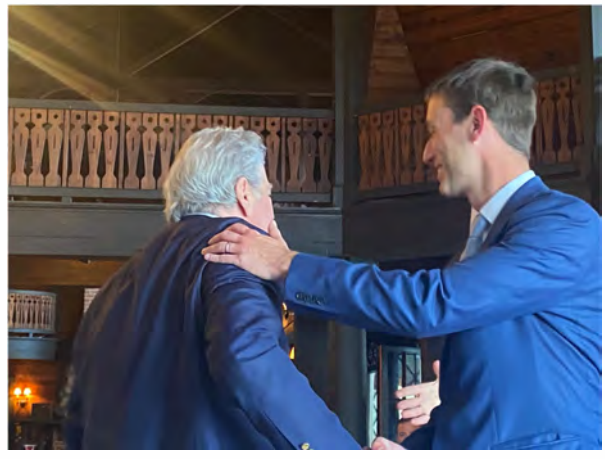


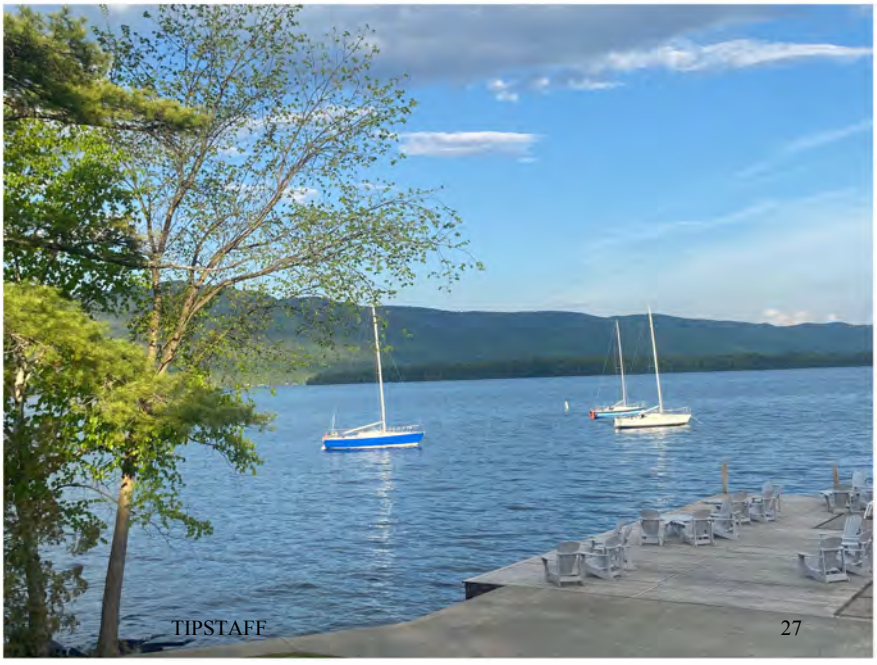


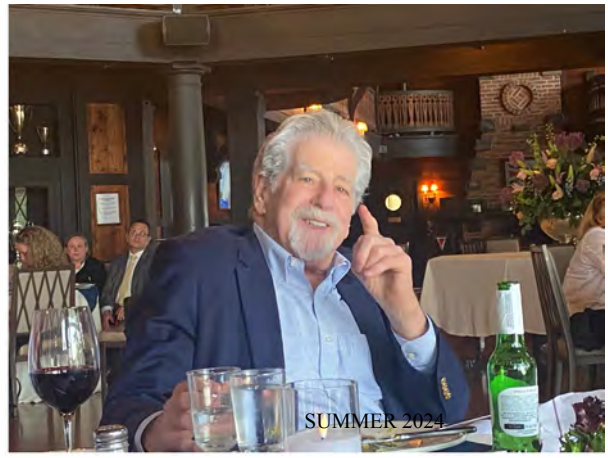












The Practice Page

Mark C. Dillon is a Justice at the Appellate Division, 2nd Dept., an adjunct professor of New York Practice at Fordham Law School, and an author of CPLR Practice Commentaries in McKinney's.

THE PRACTICE PAGE

WHEN A DOG'S BITE IS WORSE THAN ITS BARK

Hon. Mark C. Dillon *

Do you like dogs? I do. They like taking walks. They enjoy riding shotgun in the car with their heads out the open window, taking in scents along the route. They are loyal. They enjoy playing Fetch. They obey the leash. They even smile for photographs (even better than some of us humans, myself included). And for our single readers, they may even be a magnet for other singles that helps break the proverbial ice.

For all animal lovers, we'll focus on the case of *Cantore v Costantine*, 221 AD3d 56 (2023). The case addresses the very small percentage of dogs which … well, bite humans. Go figure. Those bites may be relatively minor, but on other occasions, they may be quite serious and, in the event of a full-on attack, even fatal (*e.g. Sutton v City of New York*, 119 AD3d 851 [2014]). For every tort-infused dog with a good set of teeth, there is a corresponding plaintiff's attorney who can take the matter into the dog-eat-dog world of litigation.

But first let's touch upon the basics of dog bite liability law. Since 1816, the law of this state has been that the owner of a domestic animal who either knows or should have known of an animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities (*Vrooman v Lawyer*, 13 Johns 339 [1816]; *see also Collier v Zambito*, 1 NY3d 444, 446). "Vicious propensities" include the propensity to do any act that might endanger the safety of the persons or property of others in a given situation (*Dickson v McCoy*, 39 NY 400, 403 [1868]). Knowledge of vicious propensities may be shown by proof of prior acts of a similar kind of which the owner had notice (*Benoit v Troy & Lansingburgh R.R. Co*., 154 NY 223, 225 [1897]). Vicious propensities include a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm (*Bard v Jahnke*, 6 NY3d 592, 597 [2006]). The vicious propensities rule displaces the standard elements of negligence, and imposes strict liability upon an animal's owner when prior actual or constructive knowledge of vicious propensities is established (*Hastings v Suave*, 21 NY3d 122, 125 [2013]), *Collier v Zambito*, 1 NY3d at 448). Additionally, an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but which nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities — albeit only when such proclivity results in the injury giving rise to the lawsuit (*Bard v Jahnke,* 6 NY3d at 597). The reader will note the advanced age of some of the cases cited here, reflecting the long-standing law that has defined the concepts governing animal liability law for several generations. Including many generations of dogs.

Liability is not limited to the actual owners of the animal, but extends to those who harbor or exercise dominion or control over it (*Molloy v Strain,* 191 NY 21, 21 [1908]; *Matthew H. v County of Nassau*, 131 AD3d 135, 144 [2015]). The Court of Appeals recognized a special rule for veterinarians and

other animal specialists in *Hewitt v Palmer Veterinary Clinic, PC*, 35 NY3d 541 (2020), where it was held that a patron of a veterinary clinic who was attacked in a waiting room by another patron's dog possessed a cause of action against the clinic, even though the clinic did not have prior notice of the dog's vicious propensities. The reason veterinary clinics can potentially be held liable in such instances, on a premises liability theory, was that veterinarians have specialized knowledge of animal behavior and can foresee that within their waiting rooms, dogs there may experience pain, stressors, and unfamiliar people, animals, and surroundings, creating a heightened and foreseeable risk of aggressive behavior at the facility (*Id.*, at 548).

With that all said, in *Cantore v Costantine, supra*, the defendant, Daikers Restaurant, was a dog-friendly restaurant which posted a sign at its entrance announcing that it was a pet-friendly establishment, and that animals there must be kept on a leash. On a day in 2019, the 3-year old infant plaintiff was bitten by a dog owned by two of the restaurant's patrons, the Costantine defendants. The plaintiff's complaint alleged *inter alia* that the restaurant had permitted the dog in question to freely roam the premises without a leash. Cross-claims between the restaurant and the dog owners flew like fur. The restaurant moved for summary judgment arguing that it had no prior knowledge of the dog's vicious propensities, that it had posted a requirement that dogs be kept leashed, and that contrary to the allegations of the plaintiff's complaint, the dog in question had actually been leashed at the time of the occurrence. The plaintiff opposed the restaurant's motion for summary judgment and cross-moved for partial summary judgment, arguing *inter alia* that despite the restaurant's lack of knowledge of vicious propensities, the restaurant could nevertheless be held strictly liable under the *Hewitt* standard, given that the restaurant was pet-friendly and had failed to assess whether any of the animals invited onto the premises posed a risk of injury to patrons. Which party was barking up the wrong tree?

The Appellate Division in *Cantore* determined that the *Hewitt* standard was not applicable to the restaurant, and therefore, the restaurant was entitled to summary judgment by virtue of it not having notice of the dog's vicious propensities. The court held, in effect, that the restaurant here, unlike the veterinary clinic in *Hewitt*, did not possess specialized knowledge of animal behavior as to exempt it from the vicious propensities standard for liability. The result reached in *Cantore* appears to be on all fours. A contrary result would have meant that all property owners who generally permit animals upon their premises would become subject to a general premises negligence standard, rather than be subject to the vicious propensities standard that has governed animal liability actions since 1816. In other words, *in Cantore*, the *Hewitt* tail was not permitted to wag the strict liability dog.

Hopefully for all of us going forward, only dogs' barks will be worse than their bites.

*Mark C. Dillon is a justice of the Appellate Division, 2nd Dep't., an Adjunct Professor of New York Practice at Fordham Law School, and a contributing author to the CPLR Practice Commentaries in McKinney's.

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

Tim Higgins, Esq.
Lemire & Higgins, LLC 2534
Rt. 9 Malta, N.Y. 12020
(518) 899-5700
tjh@lemirelawyers.com

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

Tim Higgins, Esq.
Lemire & Higgins, LLC
2534 Rt. 9
Malta, N.Y. 12020
(518) 899-5700
tjh@lemirelawyers.com

Fore!

Katleski v. Cazenovia Golf Club, Inc. (Lynch, J., 3/14/24)

Even a novice golfer would concede, as noted here by the Appellate Division in another analysis of primary assumption of risk in sporting/recreational activities, that "being hit without warning by a shanked shot is a commonly appreciated risk of participating in the sport". This plaintiff, an experienced golfer and member of the defendant golf club, was struck in the eye while riding in a golf cart on the 7th hole fairway – the ball having been launched from the 3rd hole tee box. The 3rd and 7th fairways ran roughly parallel (in opposite directions) and eventually intersect at the 7th green and 3rd tee box. Plaintiff alleged the defendant course was dangerously designed in a way that unreasonably enhanced the risk of being struck by a golf ball. Supreme Court (McBride, J., Madison Co.) denied defendant's motion for summary judgment which was supported by expert affidavits from a golf course architect and professional golfer/coach, one of whom noted that since plaintiff was not in the intended path of the shot, the golfer who hit the errant drive was "not obligated to attempt to observe if there were golfers on the 7th fairway before taking his tee shot". The Third Department (with two dissenters) reversed and dismissed plaintiff's complaint, concluding that "the determinative fact" was that plaintiff, as an experienced golfer, knew of the risk involved in playing on this course "and made an informed decision to keep doing so despite the lack of protective barriers".

Expert witness properly precluded at trial of Child Victims Act claim.

Vasaturo v. Vasaturo (Clark, J., 2/29/24)

Plaintiff filed suit pursuant to the Child Victims Act of 2019, alleging he had been sexually abused between the ages of 7-12 by the defendant (his uncle). Supreme Court (Schreibman, J., Ulster Co.) granted defendant's motion to bifurcate the trial and preclude testimony by plaintiff's mental health counselor during the liability phase. After a jury verdict for defendant, plaintiff appealed the decision to bar his counselor's testimony but the Third Department affirmed,

noting such expert testimony "is inadmissible when it inescapably bears solely on proving" that the alleged sexual abuse occurred. Testimonial evidence of the kind can be used to establish a claimant's symptoms and emotional presentation are consistent with an individual who suffered childhood sexual abuse, but is generally limited to child protective proceedings in Family Court.

Municipal liability claims.

Demarest v. Village of Greenwich (Fisher, J., 2/29/24)

Plaintiff's infant child died after he and another 7th grader, playing in a snowbank on private property used by the defendant Village to store excess snow, were trapped under the weight of snow dumped onto the snowbank by the operator of a public works department front-end loader. On a motion for summary judgment, the Village contended that under its oral agreement with the property owner to use the lot for snow storage, it did not owe a duty to decedent. Supreme Court (Bruening, J., Washington Co.) denied the motion and the Third Department affirmed, noting the "instrument of harm" exception to the general principle that a contractual obligation does not give rise to tort liability in favor of a non-contracting third party. While there was no dispute that the children were intentionally hiding from DPW employees in forts they dug into the snowbank, the Appellate Division found that the record also demonstrated that "DPW employees did not adhere to their safety training, establish a safe work zone or use the 'no trespassing' signs on the snowbank".

Wheat v. Town of Forestburgh (Pritzker, J., 12/14/23)

Plaintiff, hired by the defendant's highway superintendent to repair a damaged salt shed, was injured when the Genie lift he was operating drove off the edge of a loading dock and fell some 40 inches to the ground below. Wheat's motion for summary judgment on liability under Labor Law § 240(1) was denied by Supreme Court (Grandin, J., Sullivan Co.), as was the defendant's motion to dismiss the complaint. Affirming both rulings, the Third Department found questions of fact that precluded summary judgment for either party – including the defendant's contention that plaintiff was not its employee on the date of accident (Wheat was using the lift to measure the shed but had agreed that repair work would not begin until the following day).

Serba v. Town of Glenville (Mackey, J., 11/16/23)

Clute v. Town of Lisle (Egan, J., 3/14/24)

New York's Municipal Home Rule Law § 10 permits local governments to enact laws requiring prior written notice of a defect on their property as a condition precedent to filing suit for injuries allegedly caused by the defect.

The Serba plaintiff fell on ice in a Town parking lot but conceded there was no evidence of prior written notice to the defendant about the supposed hazard. Relying on the "affirmative act of negligence" exception to the prior written notice law, plaintiff opposed the Town's summary judgment motion, in part, with an expert affidavit opining that the defendant improperly paved the parking lot and created a seam in which water and snow "froze, causing ice to be formed in the seam". Supreme Court (Buchanan, J., Saratoga Co.) dismissed the case and the Third Department affirmed, rejecting the plaintiff's proof because such exception only applies where the municipality's conduct "immediately resulted in the existence of the dangerous condition" – the parking lot paving had occurred several years before the plaintiff's fall.

The Clute plaintiff, after crossing a small grassy area between a parking lot and concrete walkway leading to the front entrance of the defendant's highway department building, slipped and fell on what she described as ice on the walkway. The Town had a local law barring injury claims in the absence of prior written notice of the "particular place and condition" alleged to be hazardous and there was no dispute that no such notice had been received before plaintiff's fall. But Supreme Court (Faughnan, J., Broome Co.) denied defendant's motion for summary judgment and the Third Department affirmed, noting that the plaintiff's claim that the town failed to post needed signage (that the front entrance to the building was closed to the public) "is not a defective condition within the meaning of" prior notice laws permitted by Municipal Home Rule Law § 10.

Medical malpractice claims.

Kelly v. Herzog (Reynolds Fitzgerald, J., 2/29/24)

The defendant orthopedic surgeon repaired plaintiff's left knee injury but the plaintiff complained of post-operative pain, swelling and discoloration. Later diagnosed with reflex sympathetic dystrophy (RSD) and in pain management treatment, the plaintiff (4 months post-surgery) was eventually sent to an emergency room and diagnosed with septic arthritis in the knee. More medical care followed, ending with a total knee replacement. Her suit against the orthopedist and several subsequent medical providers was dismissed by Supreme Court (Farley, J., St. Lawrence Co.) which credited the defendants' 'medical

impossibility' argument – namely, that the plaintiff "could not have had an undiagnosed and untreated staph infection for months" without it causing a much worse outcome for her. The Third Department reversed and reinstated the complaint, finding the defendants' expert staph infection theories were not grounded in fact, speculative, conclusory and lacking in probative value.

Lindgren v. Anoia (Garry, P.J., 2/22/24)

The defendant dentist performed a root canal procedure on the plaintiff in 2012, and this malpractice action was filed over 4 years later. Almost 5 years later, plaintiff filed her Note of Issue ("NOI"), after which defendant sought summary judgment, contending the suit was time-barred. Plaintiff made a change of attorneys, and later moved to vacate the NOI and re-open discovery. Supreme Court (Auffredou, J., Washington Co.) denied plaintiff's motion and granted summary judgment to the defendants. Affirming, the Third Department found no abuse of discretion by the trial court in refusing to vacate the NOI ("plaintiff was afforded ample time – roughly five years – to complete discovery") and that plaintiff's suit was untimely, even considering the possibility that the one-year "foreign object" exception applied, given plaintiff's theory that metal filings had been left in one of the teeth involved in the original root canal procedure.

The "open and obvious" hazard.

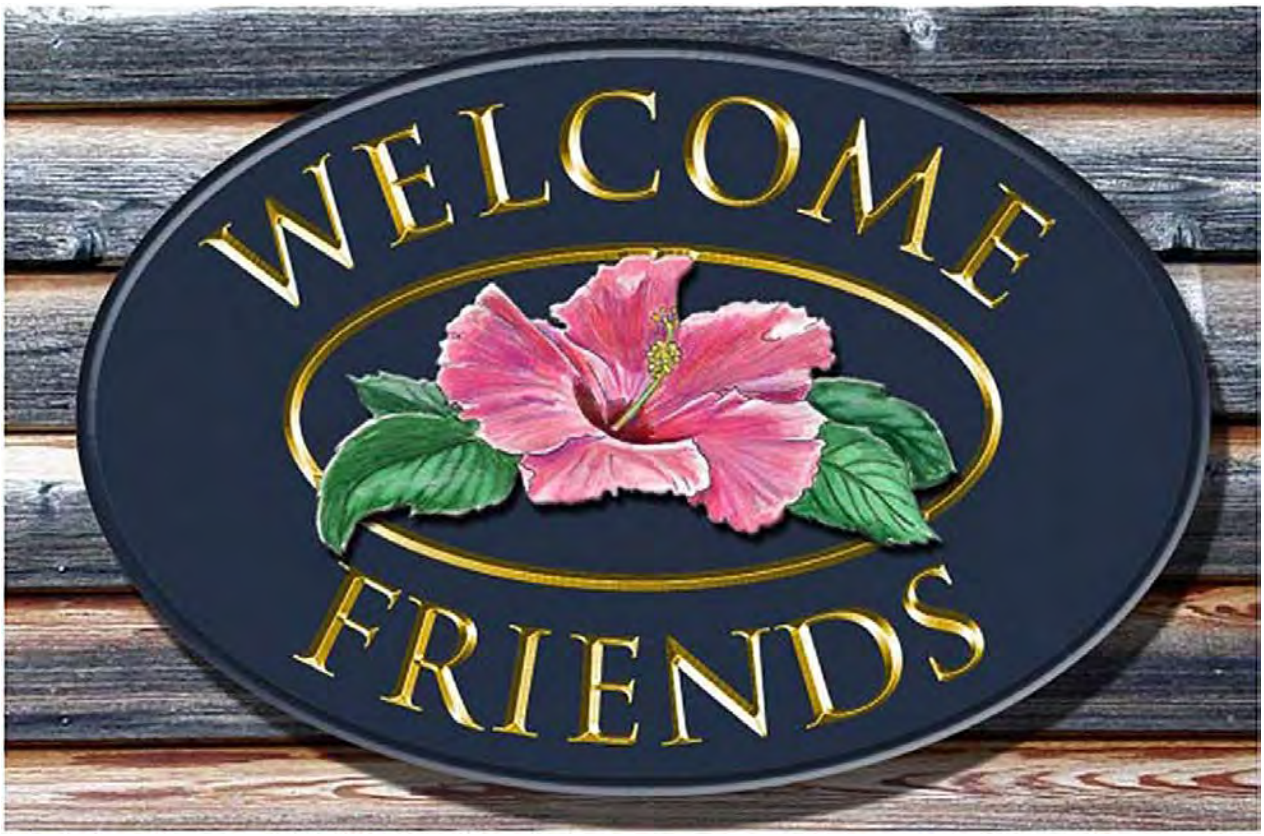
Catman v. Back Water Grille LLC (Reynolds Fitzgerald, J., 3/7/24)

Plaintiff was making a delivery to the defendant restaurant, an account he had serviced for 15 years and to which he'd made 200-300 deliveries. The restaurant allowed patrons to use its kayak paddles, which were stored in a hallway. Plaintiff, walking down the hallway prior to making his delivery, noticed a paddle on the floor near a cooler and as he reached down to move the paddle, lost his balance, fell and was injured. The Third Department, affirming Supreme Court's (Buchanan, J., Saratoga Co.) order granting summary judgment to the defendant, agreed that plaintiff did not raise an issue of fact to overcome defendant's prima facie evidence that the kayak paddle was "both open and obvious and not inherently dangerous".

Wolfe v. Staples, Inc. (Lynch, J., 2/22/24)

Shopping in the defendant's store, plaintiff selected an item off a shelf, stepped backwards, and as she turned, tripped over a stabilizer bar (brace) that was attached to a rolling metal ladder used by store employees. Supreme Court (Zwack, J., Columbia Co.), concluding that the stabilizer bar was readily observable and not inherently dangerous, granted defendants' motion for summary judgment. The Third Department reversed, noting that even if the

ladder (left in an aisle contrary to store policy) was readily observable, such fact would merely obviate the "defendants' duty to warn of the ladder's presence but not defendants' continuing obligation to maintain the property in a reasonably safe condition".



Bethany Van Pelt, Esq. ~ FitzGerald Morris Baker Firth, P.C.
Alexandra D. Finocchio, Esq. ~ Bartlett, Pontiff, Stewart & Rhodes, P.C.

****

WARREN COUNTY BAR ASSOCIATION
ADVERTISING OPPORTUNITIES

This publication is the Warren County Bar Association (WCBA) on-line newsletter, the *TIPSTAFF*, which is published several times per year. It is sent to the WCBA membership, as well as other bar associations in our area. In total, the *TIPSTAFF* reaches over 200 people in the legal community, including 150 attorneys. The WCBA is offering an opportunity for local businesses to advertise directly to the lawyers in the community in the *TIPSTAFF*.

The advertisement will include a hyperlink directly back to your business' website. In addition to being distributed via email, the *TIPSTAFF* will be posted on the WCBA website and will allow those who use the website easy access to the advertiser's information.

Prices for 2024-2025:
1/4 page $150.00
1/2 page $250.00

Specs: All art must be camera ready in .jpg or .gif format. The minimum dpi must be 72.

If interested, contact Kate Fowler: admin@wcbany.com

The Bulletin Board

TIPSTAFF **is a publication of the Warren County Bar Association, Inc. We encourage you to submit articles of interest, classified ads, and announcements to Kate via email at: admin@wcbany.com**

2024-2025 TIPSTAFF EDITORIAL STAFF

HON. MARTIN D. AUFFREDOU, President WCBA

KATE FOWLER, Executive Director WCBA

Deadline for submissions for next edition November 1, 2024