WARREN COUNTY BAR ASSOCIATION, INC.

FALL/WINTER 2025

TIPSTAFF

Volume VII Issue 1



Nicole Fish, Esq., President

IN THIS ISSUE

President's Letter 1
Mannix Dinner 2-3
James Cooper 4-9
From the Judge's Chambers 10-27
Practice Page 28-31
Torts & Civil Practice 32-37
Welcome Friends 38
Bulletin Board 39

OFFICERS
President: Nicole Fish, Esq.
President Elect: Vanessa Hutton, Esq.
Vice President: Kathleen Fraher, Esq.
Treasurer: Hon. Glen Bruening
Secretary: Alexandra Davis, Esq.
NYSBA Delegate: Dennis O'Connor, Esq.
Imm. Past Pres.: Hon. Martin Auffredou
Emeritus: Dennis Tarantino, Esq.

DIRECTORS
Gordon Eddy, Esq.
Lawrence Elmen, Esq.
Brian Pilatzke, Esq.
Rose Place, Esq.
Jeffrey Shapiro, Esq.
Matthew Skinner, Esq.

Dear Colleagues,

Happy New Year to all of you! As we look forward to the coming year, it's always fun to look back at the days that have led up to it. Please join me as I do just that!

The Warren County Bar Association's 113th "New Year" began back in June. After we had shared the "busy-ness" of our spring events, many of us settled in for, what we always think will be, a long and restful summertime, "when the living is easy." We all know that there's no such thing, and it went by in a snap!

However, we were so very happy to come back together for our annual *Welcome Back Party* in September. This year, the WCBA Board, working closely with Chairperson, Maria Nowotny, and the CLE Committee, decided to couple many of our CLEs with some of our social events. To that end, we invited Jim Long, Esq., to present our first CLE of the year, *Ethical Considerations re: Cybersecurity, Data Privacy Social, Media & A.I.*, at The Bullpen on September 25th. The very well-attended CLE then blended seamlessly into our first social gathering of the year.

In November, the Bar Foundation hosted its ever-popular *Mannix Dinner*; over 60 people attended! As is the custom, many judges and Bar members, along with Charlie Hoertkorn, met the night before to act as sous chefs and set-up crew for the delicious Italian dinner that would be served the following night. Prior to the dinner on November 13th, our own Gordon Eddy, Esq., presented his very informative CLE, entitled *Reviewability of Arguments on Appeal*.

And now, as we look toward 2026, there's much more "in the works!" On January 22nd, we will host our 2nd annual *Cabin Fever Party*. A great success last year, it will once again be held at 21 Ridge. What could possibly be better than an informal night of pizza and beer and the sharing of stories with our favorite colleagues? Please join us; you will not be disappointed!

On February 10th, Chicago Title and the WCBA will, once again, co-sponsor a breakfast CLE in Professional Practice, entitled *1031 Exchange Practices and Updates; Plotting Courses for Legal Descriptions and the Latest Global MLS Contract* at the Queensbury Hotel.

Other events to put in your date book continue. On March 19th, the *March Mixer* will take place at the Queensbury Hotel. On April 9th, we'll host a luncheon CLE, entitled: *Cybersecurity Ethics,* presented by Dr. Michael Fox (location to be determined). May 6th will bring us the *Law Day Celebration* at the Glens Falls Country Club. The *Annual Dinner* will take place later that month! So, as you can see, our work and planning have been on-going throughout the summer and fall!

This year, our membership has 130 attorneys, including several new colleagues. Please consider inviting others to join us. We are convinced that we are one of the most active Bar Associations around. Gaining education, sharing camaraderie, and receiving timely information through the *Weekly Digest* are just some of the benefits of membership!

I wish you and your family a happy and healthy New Year and hope to see you soon!

Sincerely,

Nicole

MANNIX DINNER
November 12 & 13, 2025

















The Judges and Their Helpers

















This year's Mannix Dinner was one of the largest ever! Many thanks to the wonderful judges who, the night before - along with our "ever-ready chef," Charlie Hoertkorn, prepared a delicious Italian dinner for many new and "seasoned" attorneys! Thank you to the young attorneys, who helped set up for the event and to Gordon Eddy, who presented an amazing CLE before the dinner. And congratulations, once again, to this year's dessert contest winner, Jason Carusone (and his daughter)! What a great night it was!

by James Cooper, Esq.



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

Purpose

After I retired, I was asked by some contemporary lawyers what it was like. They invited the answer, although as lawyers, you probably would say at trial that they opened the door. It would be silly to assume that my experience is universal, but I almost always answered that it was a surprise to stop thinking like a lawyer. I'm at a loss now to remember what that meant in 2016, but when you retire, you might find some meaning in it.

I was a sole practitioner, so my office closing was not complicated. I picked a date and began daily going through dead files to remove important client documents to be returned to them after notice. These mostly included wills, deeds, abstracts of title, and title polices. Social Security IDs had to be shredded.

Nature has ordained that we are social animals. I think that you'll miss the client contact. My advice is to use your skills and find a group and participate in what they do, whether it's pickle ball, a public benefit organization, or your religious institution. First you must identify what fits your temperament. Although I fully understand that the work is essential, I could not bring myself to deliver meals to the housebound and disabled. I continued to participate in bar association meetings and reached out to other retired lawyers, but have discovered that lawyers being who we are, are equally happy to be free of each other, even retreating into solitary hobbies like gardening. I found new friends unexpectedly, in the gym and a writing group where I am the only man. Take your parents advice that discussing politics in social venues is unwise.

My supposition is that when you retire, you'll want to find a purpose in your life after organizing the basement and attic. It's a hole that has to be filled. My grandchildren are in northwestern Colorado, so there never was the connection like I had with my children when they were in highschool. You may be luckier. I was the chairman of the Zoning Board of Appeals in Warrensburg for over twenty years. That was at the cost of never being able to litigate Article 78 proceedings arising from Board decisions. Steering the board in the lawful direction prevented us from being sued but once. The New York State Planning Federation gave me the David Alee award for that. A telecommunications company appeared before us regarding a variance to construct a "Cow", the communications patch for a dead phone spot on the Northway. I explained the federal aspects of the law to 'Nimby' participants using the government's treatment of railroads in the mid 1800s. At their final appearance the phone company agents said that our board was the most professional that they had experienced statewide. I'll take that 'attaboy' to my grave, but it all started out of a sense that as a lawyer I had something to give back to my community.

I felt an obligation to give something back to Stony Creek which had employed me as attorney for the town, again for more than twenty years. On Memorial Day I made a speech both there and a couple of years later in Warrensburg. (See below) As a lawyer, like you, I learned to organize my thoughts and to speak persuasively. You have similar talents to utilize in helping your community, use them, it's a 'two-fer'. Carrots and dahlias don't enrich your retirement, they just mitigate loneliness.

Jim Cooper , October 2025

MEMORIAL DAY SPEECH 2016, 2018

SUPERVISOR THOMAS, MEMBERS OF THE TOWN BOARD, HONORED COLOR GUARD, MY FELLOW AMERICANS THANK YOU FOR COMING.

WE ARE HERE TODAY TO HONOR AND RESPECT THOSE WHO DIED WHILE IN MILITARY SERVICE TO OUR COUNTRY. OVERWHELMINGLY THESE AMERICANS DIED IN WARFARE. VETERANS HAVE THEIR DAY OF HONOR IN NOVEMBER, BUT TODAY IS TO HONOR AND REMEMBER THOSE KILLED IN UNIFORM.

IT IS MY OPINION THAT WE HAVE ALWAYS ENDEAVORED TO DEPLOY MILITARY FORCES FOR HONORABLE AND NOBLE PURPOSES.

THERE ARE THOSE, PERHAPS SOME HERE TODAY, WHO WOULD DISAGREE AND HOLD THE OPINION THAT WE FOUGHT AND ARE FIGHTING WARS FOR RESOURCES AND SELFISH MOTIVES. I WOULD SAY TO THEM THAT THESE HONORED DEAD DIED SO THAT EVEN THEY COULD HOLD AND EXPRESS SUCH AN OPINION.

GREAT PATRIOTS HAVE, IN THE FACE OF SUCH CYNICISM, ISSUED SPONTANEOUS AND ELOQUENT RESPONSES, SOME OF WHICH I WILL SHARE WITH YOU:

> JFK'S SECRETARY OF STATE, DEAN RUSK, WAS IN FRANCE IN THE EARLY 1960S WHEN DeGAULE DECIDED TO PULL OUT OF NATO. DeGAULE SAID HE WANTED ALL US MILITARY OUT OF FRANCE AS SOON AS POSSIBLE. RUSK RESPONDED, "DOES THAT INCLUDE THOSE WHO ARE BURIED HERE?"
>
> WHEN IN ENGLAND AT A FAIRLY LARGE CONFERENCE, COLIN POWELL WAS ASKED BY THE ARCHBISHOP OF CANTERBURY IF OUR PLANS FOR IRAQ WERE JUST AN EXAMPLE OF 'EMPIRE BUILDING' BY GEORGE BUSH. HE ANSWERED SAYING, "OVER THE YEARS , THE UNITED STATES HAS SENT MANY OF ITS FINE YOUNG MEN AND WOMEN INTO GREAT PERIL TO FIGHT FOR FREEDOM BEYOND OUR BORDERS. THE ONLY AMOUNT OF LAND WE HAVE EVER ASKED FOR IN RETURN IS ENOUGH TO BURY THOSE THAT DID NOT RETURN."
>
> THERE WAS A CONFERENCE IN FRANCE WHERE A NUMBER OF INTERNATIONAL ENGINEERS WERE TAKING PART, INCLUDING FRENCH AND AMERICAN. DURING A BREAK ONE OF THE FRENCH ENGINEERS CAME BACK INTO THE ROOM SAYING,"HAVE YOU HEARD THE LATEST DUMB STUNT BUSH HAS DONE? HE HAS SENT AN AIRCRAFT CARRIER TO INDONESIA TO HELP THE TSUNAMI VICTIMS. WHAT DOES HE INTEND TO DO, BOMB THEM?"... A BOEING ENGINEER STOOD UP AND REPLIED QUIETLY: "OUR CARRIERS HAVE THREE HOSPITALS ON BOARD THAT CAN

TREAT SEVERAL HUNDRED PEOPLE; THEY ARE NUCLEAR POWERED AND CAN SUPPLY EMERGENCY ELECTRICAL POWER TO SHORE FACILITIES; THEY HAVE THREE CAFETERIAS WITH THE CAPACITY TO FEED 3,000 PEOPLE THREE MEALS A DAY. THEY CAN PRODUCE SEVERAL THOUSAND GALLONS OF FRESH WATER FROM SEA WATER EACH DAY, AND THEY CARRY HALF A DOZEN HELICOPTERS FOR USE IN TRANSPORTING VICTIMS AND INJURED TO AND FROM THEIR FLIGHT DECK. WE HAVE ELEVEN SUCH SHIPS; HOW MANY DO THE FRENCH HAVE?"

A U.S. NAVY ADMIRAL WAS ATTENDING A NAVAL CONFERENCE THAT INCLUDED ADMIRALS FROM THE U.S., ENGLISH, CANADIAN, AUSTRALIAN AND FRENCH NAVIES. AT A COCKTAIL RECEPTION HE FOUND HIMSELF STANDING WITH A LARGE GROUP OF OFFICERS THAT INCLUDED PERSONNEL FROM MOST OF THOSE COUNTRIES. EVERYONE WAS CHATTING AWAY IN ENGLISH AS THEY SIPPED THEIR DRINKS BUT A FRENCH ADMIRAL SUDDENLY COMPLAINED THAT, WHEREAS EUROPEANS LEARN MANY LANGUAGES, AMERICANS LEARN ONLY ENGLISH. HE THEN ASKED , 'WHY IS IT THAT WE ALWAYS HAVE TO SPEAK ENGLISH IN THESE CONFERENCES RATHER THAN SPEAKING FRENCH?" ... WITHOUT HESITATING, THE AMERICAN ADMIRAL REPLIED, "MAYBE IT'S BECAUSE THE BRITS, CANADIANS, AUSSIE'S AND AMERICANS ARRANGED IT SO YOU WOULDN'T HAVE TO SPEAK GERMAN."

I WAS THE ATTORNEY FOR THE TOWN OF STONY CREEK FOR 23 YEARS UNTIL I RETIRED. I WAS GRATEFUL FOR MY PAYCHECK AND TRIED TO GIVE BACK TO THE COMMUNITY, BUT IT WAS HARD BECAUSE THEY ARE SUCH A SMALL TOWN AND HAVE FEW BUSINESSES OVER THERE. I DID GO WITH SOME FREQUENCY TO A CAFÉ IN THE TOWN AND PAY FOR BREAKFAST WHERE ONCE I MET A LITTLE OLD MAN, FRANK BEELER, WHO WAS SEATED AT A TABLE THERE. HE HAD ONE OF THOSE BLUE CAPS ON WITH THE LETTERS, "USS SAVANNAH' ACROSS THE TOP AND A GRAY SHIP EMBROIDERED IN THE MIDDLE WITH "WW II' UNDERNEATH. I ASKED IF I COULD SIT WITH HIM AND HE INVITED ME TO. I ASKED HIM WHAT KIND OF SHIP THE SAVANNAH WAS, A STUPID QUESTION, BECAUSE IN WORLD WAR TWO ALL CRUISERS WERE NAMED AFTER CITIES. YOU WILL REMEMBER THE UNFORTUNATE INDIANAPOLIS.

HE SAID THAT SHE WAS A LIGHT CRUISER, SIX HUNDRED FEET LONG WITH OFFICERS AND CREW OF 868 AND EXPLAINED THAT A HEAVY CRUISER WAS SLIGHTLY LARGER WITH EIGHT INCH GUNS WHILE SAVANNAH HAD SIX INCH GUNS. I ASKED HIM WHAT HIS DUTY STATION WAS ON BOARD AND HE REPLIED THAT HE WAS THE NON-COM IN GUN TURRET NUMBER TWO WHO RELAYED COMMANDS FROM THE GUNNERY OFFICER ON THE BRIDGE TO THE SAILORS LOADING THE GUNS. HE SAID THAT THE FIRING SOLUTION WAS PLOTTED ON THE BRIDGE BY USE OF AN ANALOG COMPUTER ABOUT THE SIZE OF A SMALL KITCHEN AND THAT FIRING INSTRUCTIONS WERE RELAYED BY RADIO TO HIS GUN TURRET WHERE HE WOULD ENTER DATA INTO A CONTROL MOTOR WHICH WOULD TURN THE TURRET AND ELEVATE THE GUNS TO A FIRING POSITION. THE

GUNS WERE ELECTRONICALLY FIRED.

I ASKED HIM WHAT ACTION THE SAVANNAH HAD SEEN AND, HE WAS APPARENTLY DELIGHTED TO RECOUNT THAT SHE HAD BEEN INVOLVED IN THE INVASION OF NORTH AFRICA. THE SAVANNAH DESTROYED ENEMY ARTILLERY EMPLACEMENTS THAT HAD BEEN SHELLING AMERICAN LANDING CRAFT. THEY USED THEIR NAVAL GUNFIRE TO BREAK UP AN ENEMY ATTACK OF 21 TANKS AGAINST JUST SEVEN AMERICAN LIGHT TANKS. SAVANNAH HAD TWO SCOUT PLANES THAT WERE LAUNCHED BY CATAPULT OFF THE STERN OF THE SHIP USED TO TARGET ITS GUNS AND TO ATTACK SUBMARINES WITH DEPTH CHARGES. FRANK WAS PARTICULARLY DELIGHTED TO RECOUNT A PORTION OF THE BATTLE WHEN A COLUMN OF ENEMY TANKS WAS HIDING BEHIND A RIDGE AND SHELTERED FROM NAVAL GUNFIRE. SAVANNAH'S OFFICERS FIGURED OUT AN ATTACK BY LAUNCHING ITS SCOUT PLANE WITH DEPTH CHARGES SET TO EXPLODE ON CONTACT. THIS WAS THE FIRST TIME IN WARFARE THAT TACTIC WAS EMPLOYED.

HE SAID THAT SAVANNAH HAD SUPPORTED GENERAL PATTON AND AMERICAN LANDINGS ON SICILY AND AT SALERNO BY SHELLING SHORE BATTERIES AND ENEMY TANK FORMATIONS, BUT THAT SHE WAS ATTACKED BY A GERMAN DORNIER BOMBER FLYING AT EIGHTEEN THOUSAND FEET THAT HAD EVADED ANTI-AIRCRAFT FIRE AND P-38 FIGHTERS TO DROP THE FIRST GUIDED BOMB, A FRITZ-X. THE BOMB TRAILED SMOKE AND ITS FINS WERE STEERED BY A RADIO CONTROL DEVICE OPERATED BY THE BOMBARDIER. UNFORTUNATELY FOR SAVANNAH, THIS BOMBARDIER WAS VERY SKILLED AND FLEW THE BOMB RIGHT THROUGH THE ROOF OF GUN TURRET NUMBER 3, IMMEDIATELY BEHIND FRANK'S GUN TURRET NUMBER TWO, AND CLOSER TO THE SUPERSTRUCTURE OF THE SHIP. THE BOMB PENETRATED THREE DECKS AND EXPLODED IN AN AMMUNITION HANDLING COMPARTMENT RIGHT OVER THE KEEL, BREAKING THE KEEL AND BLOWING A HOLE IN THE BOTTOM OF THE SHIP. A SEAM WAS OPENED IN THE SIDE OF THE SHIP'S HULL. SECONDARY EXPLOSIONS IN THE TURRET AND AMMUNITION ROOM PREVENTED FIGHTING THE FIRE FOR HALF AN HOUR, BUT THE SHIP DID NOT SINK BECAUSE WATER TIGHT HATCHES WERE CLOSED. ALL THAT WAS HOLDING HER TOGETHER WAS THE COMPROMISED SKIN OF THE SHIP AND A SIX INCH ARMORED DECK THAT RAN ITS LENGTH.

THE BRITISH LIAISON OFFICER ON BOARD RECOMMENDED TO THE CAPTAIN THAT HE ORDER 'ABANDON SHIP'. THE CAPTAIN, ROBERT CAREY, HAD BEEN AWARDED THE CONGRESSIONAL MEDAL OF HONOR BETWEEN WORLD WAR I AND WORLD WAR II FOR ENTERING A BURNING BOILER ROOM TO RESCUE SAILORS DESPITE THE RISK THAT A SECOND BOILER WOULD EXPLODE AND KILL HIM. HE WAS A MAN OF COURAGE AND VALOR. HE WEIGHED THE RISK THAT THE SHIP WOULD BREAK APART AND SINK IN ROUGH SEAS WITH THE RAPID LOSS OF ALL HANDS IF HE TRIED TO SAIL TO DRY DOCK IN MALTA AGAINST THE CERTAIN DEATH OF THE MEN IN SEALED COMPARTMENTS IF SHE WERE ALLOWED TO SINK. HE ORDERED THAT SHE MAKE WAY FOR MALTA AND ARRIVED TWO DAYS LATER.

MALTA WAS A BRITISH COLONY OF VITAL STRATEGIC IMPORTANCE TO THEIR CONTROL OF THE MEDITERRANEAN SEA. UNLIKE CRETE, THE GERMANS WERE UNABLE TO CONQUER IT AFTER CONTINUOUS AERIAL BOMBARDMENT BY THE ITALIAN AIR FORCE AND THE LUFTWAFFE FOR SEVENTEEN MONTHS. TWO SQUADRONS OF SPITFIRE FIGHTERS FOUGHT OFF THESE ATTACKS. A CANADIAN PILOT SHOT DOWN 29 GERMAN AND ITALIAN PLANES, MOSTLY FIGHTERS. THE GERMANS AND ITALIANS WERE MORE SUCCESSFUL ATTACKING THE CONVOYS ATTEMPTING TO RESUPPLY MALTA, TO THE EXTENT THAT THE MALTESE WERE STARVING, NOT JUST HUNGRY, **STARVING**! ONE CONVOY OF MORE THAN A DOZEN SHIPS HAD ALL BUT TWO SUNK BY WAY OF EXAMPLE.

WHEN SAVANNAH MADE DRY DOCK IN MALTA AND WATER WAS DRAINED OUT OF HER SEALED COMPARTMENTS, SAILORS WERE FOUND ALIVE AND WOUNDED.. THE COUNT OF THE DEAD WAS 197.

THE THING THAT STOOD OUT IN FRANK'S MIND WHILE SAVANNAH SAT IN DRY DOCK WAS THAT SHORTLY AFTER ARRIVAL, THE MALTESE BEGAN TO LINE UP ALONG SIDE THE SHIP FOUR OR FIVE DEEP WITH THEIR HANDS IN THE AIR BEGGING FOR FOOD.

SAVANNAH UNDERWENT REPAIRS SUFFICIENT FOR HER TO SAIL BACK ACROSS THE ATLANTIC AND HAVE PERMANENT REPAIRS AND REFITTING ACCOMPLISHED AT THE PHILADELPHIA NAVAL YARD. SHE NEVER SAW ACTION AGAIN, ALTHOUGH SHE DID ACCOMPANY A HEAVY CRUISER THAT CARRIED PRESIDENT ROOSEVELT TO THE BIG THREE CONFERENCE AT YALTA.

THE 197 SAILORS WHO DIED ON THE SAVANNAH JOINED HUNDREDS OF THOUSANDS OF THEIR COUNTRYMEN AND WOMEN WHO DIED FIGHTING GERMAN IMPERIALISM, ...JAPANESE IMPERIALISM...FASCISM...COMMUNISM... AND NOW ARE DYING FIGHTING ISLAMISM. THEY GAVE UP THE CHANCE TO LOVE A WOMAN, THE CHANCE TO BE LOVED BY A WOMAN, THE CHANCE TO HAVE CHILDREN, THE CHANCE TO BE AN AID AND COMFORT TO ELDERLY PARENTS. THEY GAVE UP EVERYTHING.

SO WE GATHER HERE TODAY TO HONOR THE MEMORY OF THESE HUNDREDS OF THOUSANDS OF MEN AND WOMEN, BUT I CAN'T HELP BEING MINDFUL OF THOSE 197 SAILORS WHO DIED ON THE SAVANNAH WHOSE SURVIVING SHIPMATES WATCHED BEING CARRIED OFF THE SHIP ONE BY ONE TO BE BURIED IN MALTA. FOR THE SURVIVING SHIPMATES THE REASON THEY WERE FIGHTING THE NAZIS WAS MORE PROXIMATE AND IMMEDIATE, THAT BEING SO THAT AMERICANS WILL NEVER HAVE TO STAND ON A DOCK...ALONG SIDE A FOREIGN SHIP...WITH THEIR HANDS IN THE AIR BEGGING FOR FOOD.

GOD BLESS THEM AND GOD BLESS AMERICA. THANK YOU.

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

DECISION & ORDER
Index No. EF2021-09327
RJI No. 17-1-2022-0077

STATE OF NEW YORK
SUPREME COURT COUNTY OF FULTON

KARRIANN RUGGIERO, KRISTI RUGGIERO CAST, and ROBERT M. RUGGIERO,

Plaintiffs,

-against-

LAKESIDE CONDOMINIUM ASSOCIATION, INC.; DAVID J. KELLY; JANE R. KELLY; GABRIEL E. DELLAVENTURA; CLAUDIA L. DELLAVENTURA; CHRIS BULLIS, JOLENE BULLIS; PAUL R. JANKOWSKI, COURTNEY A. JANKOWSKI; ASBJORG S. BROWN, or Current Trustee of the ASBJORG S. BROWN REVOCABLE TRUST, Dated 3/18/04; KENNETH ARDUINO; NANCY ARDUINO; JOHN A. GRAHAM; JOAN M. GRAHAM; EUGENE D. DeSANTIS; STEPHANIE C. DeSANTIS; THOMAS A. MIRANDA; MELISSA L. WYANT; KENNETH T. WEYRAUCH; CHARLES S. OWENS; JANE E. COYLE; LAURIE CERASIA; EDISON PFAFF; and JOANN PFAFF,

Defendants.

DECISION AND ORDER

Index No. EF2021-09327
RJI No. 17-1-2022-0077

Appearances:

Wood, Seward & McGuire, LLP, Gloversville (*Jeremiah Wood* of counsel), for plaintiffs.

Burke, Scolamiero & Hurd, LLP, Albany (*Andrea P. Demers* of counsel), for defendants Lakeside Condominium Association, Inc.; David J. Kelly; Jane R. Kelly; Chris Bullis, Jolene Bullis; Paul R. Jankowski, Courtney A. Jankowski; Asbjorg S. Brown, or Current Trustee of the Asbjorg S. Brown Revocable Trust, Dated 3/18/04; Kenneth Arduino; Nancy Arduino; John A. Graham; Joan M. Graham; Eugene D. Desantis; Stephanie C. Desantis; Thomas A. Miranda; Melissa L. Wyant; Kenneth T. Weyrauch; Charles S. Owens; Jane E. Coyle; Laurie Cerasia; Edison Pfaff; and Joann Pfaff.

Rupp Pfalzgraf LLC, Saratoga Springs (*Taylor M. Way* of counsel), for defendants Gabriel E. Dellaventura and Claudia L. Dellaventura.

AUFFREDOU, J.

Motions (1) by plaintiff for summary judgment establishing the causes of action in the complaint (motion sequence No. 2); (2) by defendants Lakeside Condominium Association, Inc. (hereinafter "Lakeside"); David J. Kelly; Jane R. Kelly; Chris Bullis, Jolene Bullis; Paul R. Jankowski, Courtney A. Jankowski; Asbjorg S. Brown, or Current Trustee of the Asbjorg S. Brown Revocable Trust, Dated 3/18/04; Kenneth Arduino; Nancy Arduino; John A. Graham; Joan M. Graham; Eugene D. Desantis; Stephanie C. Desantis; Thomas A. Miranda; Melissa L. Wyant; Kenneth T. Weyrauch; Charles S. Owens; Jane E. Coyle; Laurie Cerasia; Edison Pfaff; and Joann Pfaff (hereinafter, collectively, "the Lakeside defendants") for summary judgment dismissing the complaint as against them (motion sequence No. 3); and (3) by defendants Gabriel E. Dellaventura and Claudia L. Dellaventura (hereinafter, collectively, "the Dellaventuras") for summary judgment dismissing the complaint as against them (motion sequence No. 4).

Plaintiffs are the sibling owners of a certain property in the Town of Northampton, Fulton County, New York State, known as 239 County Highway 152, which is improved with a single-family residence. Lakeside is the managing entity of a set of 14 condominiums and associated common areas that are situated on property that lies to the east of plaintiffs' property. The individual defendants comprise Lakeside's membership and are the owners of the individual condominiums on Lakeside's property. Ownership of each condominium comes with a 1/14 ownership interest in Lakeside's common areas. At all times relevant, a stockade fence, installed by Lakeside, has divided Lakeside's premises from the ostensible property of plaintiffs. However, according to the deeded boundaries of plaintiffs' land and certain surveys that had been performed during the relevant history of these parcels, the fence runs through Lakeside's land,

dividing some of its deeded premises from that portion that is commonly occupied and used by the condominium owners.[1]

At issue in this action are two areas of land of which plaintiffs claim ownership by adverse possession against defendants. The first disputed parcel is a triangular piece of land that lies generally to the east of plaintiffs' deeded premises and to the west of Lakeside's stockade fence, and is ostensibly part of plaintiffs' backyard (hereinafter "the backyard parcel"). The second disputed parcel lies to the south of plaintiffs' deeded premises and west of the stockade fence (hereinafter "the driveway parcel"). It is roughly in the shape of a parallelogram, the southern boundary of which is a ravine or deep drainage ditch that runs east and west. This parcel is also ostensibly appurtenant to plaintiff's property, in that it contains the driveway that has historically been associated with the home built on plaintiff's property, which runs from County Highway 152, over a paper street known as North Woodside Terrace that lies in defendants' deeded premises, then turns to the north and proceeds onto plaintiffs' deeded premises, wrapping around to the back of the house thereon. The driveway does not occupy the full width of the second disputed parcel. Grassy areas lie between the northern edge of the driveway and plaintiffs' deeded southerly boundary, and between the southern edge of the driveway and the ravine.

Plaintiffs claim that they or their predecessors in title have maintained and used the backyard parcel for gatherings, private leisure and otherwise in the manner that a homeowner uses their backyard; and have maintained and used the driveway parcel for access to their premises from County Highway 152, parking on the grassy areas, and otherwise using the grassy

[1] Plaintiffs' parcel is an irregular quadrangle wherein the northern boundary is some 32 feet shorter than the southern boundary. Consequently, the eastern and southern boundaries do not run parallel to the western and northern boundaries. A map of the situation that the court attempts to describe here may be viewed at page 20 of 28 in NYSCEF Doc. No. 39.

areas as part of their yard, including maintaining a wood pile and firepit. They claim that these uses have been open, notorious, hostile to defendants' interests and under a claim of right for more than the 10-year prescriptive period for ejectment. They claim that they or their predecessors have never sought or received permission from Lakeside or any of its condominium owners to conduct or continue these uses and that, prior to 2019, no one from Lakeside had ever interfered with or taken issue with these uses. Indeed, there appears to be no dispute that this was the case. However, in 2019, defendants, or some of them, began to assert ownership of the disputed parcels by, among other things, making statements to that effect, using the driveway parcel to access Lakeside's property by foot from County Highway 152, and, ultimately, by erecting a fence that begins at the southernmost end of the aforementioned stockade fence and runs east to west, bisecting the driveway parcel along the southern edge of the driveway, effectively severing the driveway from the grassy parking area to its south and restricting plaintiffs' access thereto.

Plaintiffs therefore commenced this suit, seeking a declaration under RPAPL article 15 that they own the backyard and driveway parcels by adverse possession. They also assert related claims for trespass and nuisance related to the fence that runs through the driveway parcel. All defendants except one have joined issue in a single answer, in which they assert counterclaims for trespass and conversion that arise from their position that plaintiffs do not own the disputed parcels by adverse possession, stated in opposition to plaintiffs' RPAPL article 15 claims. After their joinder of issue, the Dellaventuras retained separate counsel. Plaintiffs now move for summary judgment on their claims, and all defendants—including the one that did not join issue—move for summary judgment dismissing the complaint, with the Dellaventuras moving separately from the Lakeside defendants.

All three motions are denied, as the court perceives questions of fact regarding whether plaintiffs' immediate predecessors in title were possessed of a bona fide claim of right to the disputed parcels and whether they could, therefore, have intended to convey the disputed parcels to plaintiffs. Before proceeding to discuss the rationale of this determination, the court must address certain procedural irregularities that permeate this case vis-à-vis the defendants named in the complaint.

The reader will note that the motions determined herein have been pending for well over a year. This is because the court's review of the pleadings upon its initially broaching the motions revealed that one of the Lakeside defendants—Asbjorg S. Brown, or Current Trustee of the Asbjorg S. Brown Revocable Trust, Dated 3/18/04—had never answered the complaint, said defendant having not been identified as an answering defendant in the answer or in the amended answer that was subsequently filed. The court's law clerk brought this to counsels' attention in hopes that they could remedy the matter without much ado. But, in a conference with the law clerk on the matter, the parties advised that at least one condominium had changed hands during the pendency of this action and that, therefore, not all necessary parties were party defendants.[2] Counsel further observed the possibility that other named-defendant condominium owners might also sell their units during the litigation.

The parties therefore opted to pursue a negotiated resolution. Many months of effort from the court and counsel ensued in this pursuit but negotiations ultimately failed. Moreover, counsel advised that their clients, or their clients' insurance carriers, had directed them to take no further action in the case until a decision on the motions was rendered. As such, the court finds itself in

[2] It appears that the party defendants who sold their condominium are still appropriately joined in the action, insofar as, according to the court's information, there is purchase money being held in escrow to be released to them, in whole or in part, or returned to their buyers, depending on the outcome of this litigation.

the somewhat untenable position of having to render a decision that does not bind one or more parties who have an interest in the subject matter of this action. Alas, we proceed.

Insofar as defendant Asbjorg S. Brown, or Current Trustee of the Asbjorg S. Brown Revocable Trust, Dated 3/18/04 has not joined issue, that defendant is entitled to summary judgment neither upon motion nor upon the court's own initiative (*see* CPLR 3212 [a], [b]; *Republic Natl. Bank v Luis Winston, Inc.*, 107 AD2d 581 [1st Dept 1985]). Nor may summary judgment be awarded against that defendant (*see* CPLR 3212 [a]; *Jennings v Chase Home Fin., LLC*, 12 AD3d 502, 502 [1st Dept 2014]). Thus, plaintiff's motion is denied to the extent that it seeks summary judgment as against defendant Asbjorg S. Brown, or Current Trustee of the Asbjorg S. Brown Revocable Trust, Dated 3/18/04 and the Lakeside defendants' motion is denied to the extent that it seeks summary judgment on behalf of said defendant, the basis for such denials being in addition to the other stated bases for denial that are further discussed below.

The relevant history of plaintiffs' title begins in 2006, with the conveyance of the parcel from Vincent DiMezza to Carol Marshall, who took title to the property in the name of her business, Carol's Abstracting. Tacking is not available beyond Marshall's assumption of title because the proof before the court shows that, upon discovering, in preparation for his sale of the property, that the driveway parcel did not belong to him and that a portion of his (now plaintiffs') home encroached on the unowned property, DiMezza offered to purchase, and did purchase, the land on which the structure encroached from defendants' predecessor in title (*see Larsen v Hansen*, 58 AD3d 1003, 1005 [3d Dept 2009]). Thus, and as plaintiffs assert, the prescriptive period commenced in 2006 and, assuming that the elements of adverse possession were met throughout the ensuing 10-year period, title vested in them in 2016, before defendants began to assert their interests in the property in 2019.

Marshall conveyed her interest in the property to Ed and Mary Halligan in 2012. In 2015, the Halligans conveyed to plaintiffs' parents, who transferred the property to plaintiffs in 2018. There is no evidence that DiMezza ever informed Marshall that the driveway that appeared to be appurtenant to the property was not being conveyed or that he ever understood the backyard parcel to belong to someone other than himself, and the evidence before the court tends to suggest that Marshall's use of the driveway and backyard were under a claim of right. It also appears that the Halligans used and allowed their tenants (they rented the property) to use the driveway, believing it to be theirs.[3]

However, before taking title to the property with her husband, plaintiffs' mother, Lana Ruggiero, a real estate agent by trade, procured a survey of the premises and learned that the disputed parcels were not in the deeded premises to be conveyed. She explained her decision to purchase the property anyway, and her belief that she had a rightful claim to those parcels, by noting the discrepancy between the survey and the circumstances of the premises as they appeared in fact and on site—to wit, the appurtenance of the driveway and backyard parcels to the property, the stockade fence that severed those parcels from defendants' property, the apparent lack of use of the disputed parcels by anyone other than the successive owners of plaintiffs' property or their tenants or guests, and the representations of the Halligans, the Halligans' realtor and other real estate and legal professionals in the area that those parcels were the Halligans' to convey.

[3] This opinion should not be read to hold that there are no questions of fact as to whether Marshall or the Halligan's had a claim of right in the disputed parcels. Nor should it be read to hold that there are such questions. The court makes no such determination of that issue insofar as it is unnecessary to the resolution of the motions, for the reasons that follow. Similarly, defendants have raised issues of whether plaintiffs' or their predecessors' uses of the disputed parcels were of such character as to give rise to the presumption of hostility, but, for the same reasons, these issues also require no resolution in the context of this motion (*see* RPAPL 543). All elements of all claims in the action must be proved at trial and are subject to dispute.

There is, therefore, a question of fact concerning whether Lana and her husband, Michael—plaintiffs' immediate predecessors in interest—had a bona fide claim of right to the disputed parcels (*see* RPAPL 501 [3]; *Lemquist v Araujo*, 50 AD3d 748, 748-749 [2d Dept 2008]). In the parlance of summary judgment, each set of movants carried their initial burden on their motion—plaintiffs by demonstrating their exclusive, open, notorious and hostile uses of the disputed parcels and explaining a reasonable basis for their claim of right, and defendants by presenting the survey showing that the disputed parcels were part of their property, and arguing that plaintiffs' and their predecessors' uses were de minimis (*see* RPAPL 543)—and the opponents of each motion carried their responsive burden to identify a question of fact for trial—plaintiffs by explaining the reasonable basis for their claim of right notwithstanding the survey and arguing that their uses exceeded the de minimis uses that do not give rise to a presumption of hostility, and defendants by producing the survey that tends to undermine plaintiffs' claim of right (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Stanhope v Burke*, 220 AD3d 1122, 1123 [3d Dept 2023]). With title to the disputed parcels remaining in dispute, judgment as a matter of law on the claims for trespass, nuisance and conversion is also not appropriate.

Arguments not expressly addressed herein have been examined and determined to be either without merit or academic in light of the court's holding. Accordingly, it is hereby,

ORDERED that the motions are denied; and it is further

ORDERED that the parties shall immediately take any necessary steps to identify necessary parties who have not been made parties to this action and add such parties to the action, either by stipulation or motion, which stipulation or motion shall be submitted on or before the date of the conference ordered below; and it is further

ORDERED that the court shall conduct a conference via Microsoft Teams at 9:30 a.m. on Wednesday, July 9, 2025, the purpose of which shall be for the parties to report on the status of the case, particularly with respect to the joinder of necessary parties, and for the court to establish dates for trial and a pretrial conference.

The within constitutes the decision and order of this court.

Signed this 9th day of June 2025, at Lake George, New York.

ENTER:

_____
HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

Papers Considered:

As to motion sequence No. 2: the papers in support of the motion (NYSCEF Doc. Nos. 52-64, 95-113), and the papers in opposition to the motion (NYSCEF Doc. Nos. 118-123).

As to motion sequence No. 3: the papers in support of the motion (NYSCEF Doc. Nos. 66-78), the papers in opposition to the motion (NYSCEF Doc. Nos. 114-115), and the papers in reply (NYSCEF Doc. No. 124).

As to motion sequence No. 4: the papers in support of the motion (NYSCEF Doc. Nos. 79-94), the papers in opposition to the motion (NYSCEF Doc. Nos. 116-117), and the papers in reply (NYSCEF Doc. No. 125).

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* Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b [h] [2]).

Distribution:
Jeremiah Wood, Esq.
Andrea P. Demers, Esq.
Taylor M. Way, Esq.

Ruggiero v Lakeside Condominium Assoc.
Fulton County
Index No. EF2021-09327

DECISION & ORDER
Index No. EF2022-69883
RJI No. 56-1-2022-0341

STATE OF NEW YORK COUNTY OF WARREN
SUPREME COURT

ANDREW H. BREW, JR.,

Plaintiff,

-against-

ROBERT D. BREW and JEAN M. BREW,

Defendants.

DECISION AND ORDER

Index No. EF2022-69883
RJI No. 56-1-2022-0341

Appearances:

Bartlett, Pontiff, Stewart & Rhodes, P.C., Glens Falls (*Mark E. Cerasano* of counsel), for plaintiffs.

Carusone & Carusone, Saratoga Springs (*John J. Carusone* of counsel), for defendants.

AUFFREDOU, J.

Motion for partial summary judgment dismissing the first, third and fourth causes of action in the complaint.

Plaintiff and defendants are the owners of neighboring properties on the west side of Lake Shore Drive in the Town of Bolton, Warren County, New York. The properties are situated on a steep, bedrock hillside that slopes downward in a generally easterly direction toward the road. Plaintiff's property is improved by two cabins. Defendants' property lies to the west of plaintiff's property and the cabin that is situated upon it sits some 35 feet higher in elevation than the cabins on plaintiff's property.

In 2019, defendants constructed an addition to their cabin, including additional living space and a covered, enclosed porch. Prior to construction, they obtained the necessary permits and variances from the Town of Bolton and received a certificate of occupancy upon completion. Beginning in late April or early May of 2020, plaintiff began noticing water flowing onto his property and under one of his cabins. At that same time of year in 2021, he noticed that the water flow had caused damage to one of the footings and piers that sustained that cabin, as well as

damage to a walkway, and vegetation and a rock garden that occupied the steep, rocky slope between the properties. In 2022, he commenced this action seeking damages and injunctive relief related to stormwater flowing off of defendants' property, which plaintiff alleges was exacerbated by the addition. He also seeks damages and injunctive relief related to a paved driveway that defendants installed on a slim stretch of their property that runs from their uphill cabin parcel to Lake Shore Drive.[1] He claims that a portion of the driveway straddles the line between the parties' properties and is partially situated on his land. He also appears to claim that the driveway contributes to the exacerbation of stormwater flowing from defendants' property onto his.

Issue has been joined, the parties have engaged in substantial discovery and defendants now seek summary judgment dismissing of the first, second and fourth causes of action, which respectively seek damages for the stormwater damage on a trespass theory, damages for the stormwater damage on a nuisance theory, and injunctive relief stemming from the liability alleged in the first three causes of action.[2] Upon the affirmation of Anthony P. Adang, Esq., dated August 25, 2023, with exhibits; the affidavit of Robert D. Brew, sworn to August 8, 2023, with exhibits; defendants' memorandum of law dated August 25, 2023; the affidavit of Erik C.F. Sandblom, sworn to September 27, 2023, with exhibits; the affidavit of Andrew Brew, Jr., sworn to September 27, 2023, with exhibits; plaintiff's memorandum of law dated September 29, 2023; the affirmation of Anthony P. Adang, Esq., dated October 12, 2023, with exhibits; and the

[1] Before the driveway was put in, defendants accessed Lake Shore Drive from their property over a macadam right of way that ran through plaintiff's property, which is now abandoned in favor of the new paving.
[2] The third cause of action, which seeks damages for the alleged driveway encroachment, is not at issue on this motion. It follows that, to the extent that the fourth cause of action seeks an injunction related to the driveway encroachment, it is also not at issue here.

affidavit of Robert D. Brew, sworn to October 12, 2023, with exhibits; and oral argument having been held before the court on September 13, 2024, decision is hereby rendered as follows.

On a motion for summary judgment, the movant bears the initial burden to demonstrate entitlement to judgment as a matter of law (*see Dibartolomeo v St. Peter's Hosp. of City of Albany*, 73 AD3d 1326, 1326 [3d Dept 2010]). If this burden is met, the burden shifts to the opponent of the motion to demonstrate that a triable issue of fact exists (*see id.*).

> "It is well-settled that '[l]andowners making improvements to their land are not liable for damage caused by any resulting flow of surface water onto abutting property as long as the improvements are made in a good faith effort to enhance the usefulness of the property and no artificial means, such as pipes and drains, are used to divert the water thereon'" (*517 Union St. Assoc. LLC v Town Homes of Union Sq. LLC*, 156 AD3d 1187, 1189 [3d Dept 2017], quoting *Baker v City of Plattsburgh*, 46 AD3d 1075, 1076 [3d Dept 2007]; *see Kossoff v Rathgeb-Walsh, Inc.*, 3 NY2d 583, 588 [1958]).

The parties agreed at oral argument that the issue to be decided in this case is whether defendants are using artificial means to divert water onto plaintiff's property and, indeed, the court perceives no ground for dispute over whether defendants' addition was made in a good faith effort to enhance the usefulness of their property. Defendants carried their initial burden by demonstrating that there were no artificial means employed to discharge water onto plaintiff's property—no pipe, drain or culvert, nor any material alteration to the natural surface of their land's contours, such as a berm, swale or altered slope, directs water onto plaintiff's property (*see 517 Union St. Assoc. LLC*, 156 AD3d at 1189-1191; *Burgher v AF III Props., LLC*, 80 AD3d 1055, 1057 [3d Dept 2011]; *Long v Sage Estate Homeowners Assn, Inc.*, 16 AD3d 963, 965 [3d Dept 2005], *lvs dismissed and denied* 5 NY3d 756 [2005]; *see also Bono v Town of Humphrey*, 188 AD3d 1744, 1745 [4th Dept 2020]).

In an attempt to raise a question of fact as to whether artificial means resulted in the water flow that caused the alleged damage to plaintiff's property, plaintiff points to the covering

over of permeable ground surface by blacktop and the rooftops of the addition structures, the removal of vegetation from the hillside and the presence of a gutter, downspout and leader on the side of defendants' cabin that faces the cabin on plaintiff's property that is alleged to have been damaged by the stormwater flow. These arguments fail.

Plaintiff proffers an engineer's report in which he asserts that the roof of one part of the addition covers over "trees, moss and duff that would render the surface as not completely impervious" and that, "by covering [that] pre-existing ground surface with a roof," defendants have materially altered the ground surface. In essence, the engineer asserts that the rooftops and, to the extent that he addresses it, the blacktop are, themselves, the artificial means by which defendants are diverting water onto plaintiff's property. To be sure, as plaintiff observes, the "artificial means" element of the test set forth by the Court of Appeals in *Kossoff* (3 NY3d at 588), "is not strictly limited to the use of pipes, drains and ditches and may otherwise be established where . . . the net effect of defendants' improvements 'so changed, channeled or increased the flow of surface water onto . . . plaintiff['s] land as to proximately cause damage[ ] to the property'" (*Long*, 16 AD3d at 965). However, this construction of the Court of Appeals' standard has never been applied so broadly as to include the "improvements [that] are made in a good faith effort to enhance the usefulness of the property," themselves, as opposed to other "artificial means . . . [that] are used to divert . . . water" (*517 Union St. Assoc. LLC*, 156 AD3d at 1189; *see Kossoff*, 3 NY3d at 588; *Baker*, 46 AD3d at 1076; *Cottrell v Hermon*, 170 AD2d 910, 911 [3d Dept 1991], *lv denied* 78 NY2d 853 [1991]). Indeed, in *Kossoff*, the structures that were alleged to be causing stormwater discharge onto the plaintiff's property were the same as those involved here—a new building and new blacktop surface on a neighboring property. Thus, the proposition that the rooftops and blacktop in this case are also the artificial means that

defendants are using to divert water onto plaintiff's property is directly contrary to controlling precedent. Indeed, it seems to the court that such a holding would do much to eliminate the "artificial means" element of the Court of Appeals' test altogether (*see Kossoff*, 3 NY3d at 588; *Baker*, 46 AD3d at 1076; *Cottrell*, 170 AD2d at 911 [3d Dept 1991]). This court lacks the authority to effect such a change in the law.

Turning to the other bases upon which plaintiff seeks a finding that defendants have employed artificial means to divert water onto his property and cause the damage that he alleges, there is no proof that there has been any change to the slope or grade of the hillside between the properties. To the extent that plaintiff asserts that the removal of vegetation from the hillside has exacerbated the flow of water onto his property, and thus constitutes a material alteration of the land, there is simply no proof of this. His expert limits his opinion to the covering over of the "trees, moss and duff" that are there. The expert identifies no removed vegetation except for two small trees that defendants, themselves, showed were removed for construction, and he makes no effort to demonstrate how the removal of these two small trees impacted the flow of water onto plaintiff's property. As for plaintiff, in his deposition, he could only identify "roots and stuff" as having been removed and, again, has presented no proof that could allow this court to conclude that whatever vegetation removal occurred caused the increased water flow that caused the damage alleged. Indeed, photographic evidence submitted by both parties shows the hillside in substantially the same state of vegetative growth before and after the construction of the addition. Finally, the presence of the gutter, downspout and leader on the side of defendants' cabin that faces plaintiff's cabin might have sufficed to create a question of fact here—even though they appear to discharge water to the north, away from plaintiff's cabin—except that defendants established that those structures were not yet installed

at the time when plaintiff claims to have sustained his damages and could therefore not be the cause thereof.

Arguments not specifically addressed have been examined and determined to be without merit or academic in light of the holdings herein. Based upon the foregoing it is hereby

ORDERED that defendants' motion is granted, the first and second causes of action are dismissed, and the fourth cause of action is dismissed to the extent that it seeks injunctive relief upon the liability alleged in the first and second causes of action, but remains viable to the extent that it seeks injunctive relief upon the liability alleged in the third cause of action; and it is further

ORDERED that a note of issue and certificate of readiness shall be served and filed on or before March 20, 2025.

The within constitutes the decision and order of this court. The court will convene a status conference by Microsoft Teams at 10:30 a.m. on Monday, March 17, 2025. An invitation to join the conference will follow.

Signed this 20th day of February 2025, at Lake George, New York.

ENTER:

_____
HON. MARTIN D. AUFFREDOU
SUPREME COURT JUSTICE

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* Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b [h] [2]).

Distribution:
Mark E. Cerasano, Esq.
John J. Carusone, Esq.

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

THE "ONE BITE RULE" MAY NOW BE THE "NO BITE RULE"

By Archer, as Guest Columnist *

My name is Archer. I am the grand dog of Justice Dillon and am your guest columnist for this edition of the Practice Page. I enjoy doing tricks, playing frisbee, tracking scents, swimming, taking walks, chasing squirrels, fetch, squeaky toys, and eating an occasional Puppuccino at Starbuck's. I place my head outside of the car window to track the scents to know the way home. I have my own page on Instagram. And I am part of a long-term study at the Canine Cognitive Center at the Veterinary College of the University of Arizona, where I periodically enjoy games and tests which track my vocabulary, memory, and reasoning as I get older and older. The school has awarded me a Barkelor's Degree and a Muttster's Degree for my efforts, and I am currently working toward my Dogtorate in Canine Cognition.

I live in a place called Tucson, Arizona. The dog days of summer are over. I frequently spend time at my living room window, guarding my humans and home from threatening people sent by the U.S. Postal Service, UPS, and Federal Express. Every other person who comes to the house is very welcome, with vigorous tail wags. I would even let a burglar into the home to loot my humans' valuables. But when I hear the distinct sound of the delivery trucks and see uniformed people from those trucks come to the front door, I bark my head off until they go back to their trucks, and have a 100% success rate of making them leave as a result of my persistent barking from within the house.

As a "collar scholar" at a university with ruffly 65 years of life experience (dog years), I have a special interest in animal liability law and can comment to human attorneys about a recent significant change on the subject from the Court of Appeals, including matters involving dog bites. Since year 1816, which is about 50 dog generations ago, the law of New York has been that the human companions of a domestic animals, who either know or should have known of vicious propensities, were liable for the harm the animals might cause as a result of those propensities (*Vrooman v Lawyer*, 13 Johns 339 [1816]; *see also Collier v Zambito*, 1 NY3d 444, 446 [2004]). "Vicious propensities" include any act that might endanger the safety of humans or their property in a given situation (*Dickson v McCoy*, 39 NY 400, 403 [1868]). Knowledge of vicious propensities could be shown by proof of prior acts of a similar kind of which the human had notice (*Benoit v Troy & Lansingburgh R.R. Co*., 154 NY 223, 225 [1897]). Those propensities could include not just dog bites, but a prior attack, the growling, snapping, or baring of teeth, the manner of prior restraints, or 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 common law negligence, and imposes strict liability upon humans only when prior actual or constructive knowledge of those propensities is established (*Hastings v Suave*, 21 NY3d 122, 125 [2013]; *Collier v Zambito*, 1 NY3d at 448).

Those strict liability rules date back to a time when your state was more agricultural than it is today, when humans and animals had more frequent and daily contact. Sometimes events would occur where humans would get injured from the shove of a bull, the back-kick of a horse, or from an understandable bite of a dangerous postal worker. The "one bite rule," which was always an oversimplification of strict liability law taught by your law schools, assumed that an animal owner could not know of vicious propensities until after the animal had taken its first bite. Absent a showing of the

prior notice elements of strict liability, humans would not be liable on that legal ground, or in common law negligence either.

The recent decision which fundamentally changed New York's animal liability law for us four-leggers was rendered by your Court of Appeals on April 17, 2025 in the case of *Flanders v Goodfellow*, 2025 WL 1127772 (2025). *Flanders* is a big doggone deal. It naturally involved a postal worker delivering a package to the home of the human defendants. As the dangerous postal worker was handing a package to a human, a large pooch bolted from the front door and bit the trespasser. The postal worker, not understanding the event from the dog's point of view, commenced a suit alleging two causes of action against the dog's humans, one being strict liability based on prior vicious propensities and the second being common law negligence. The human defendants in *Flanders* obtained summary judgment in their favor on the strict liability and negligence causes of action, which made its way to the Court of Appeals. The Court of Appeals not only reversed that determination, but used the occasion to greatly change the state's substantive law on domestic animal liability.

In *Flanders*, the Court of Appeals departed from two centuries of dogged precedent by holding that going forward, plaintiffs may hold owners of domestic animals liable under *either* a strict liability theory when it might factually apply, *or* in ordinary negligence upon proving that the owner failed to exercise due care under the circumstances toward persons who might be foreseeably injured (*Flanders v Goodfellow*, at 6-7). The court explained its reasonings. It noted that "the [strict liability] rule gives owners of domestic animals little reason to familiarize themselves with any potential proclivities that might lead the animal to cause harm, and in turn, to take reasonable steps to prevent any harm that may result" (*Flanders v Goodfellow*, at 5-6). It also noted that certain recent judicial decisions have somewhat narrowed and distinguished animal liability law, making it easier for the court to depart from its former general precedent. And the court noted that the change in the law aligned New York with the bulk of other states. As a result, the establishment of prior vicious propensities for the application of strict liability is no longer singularly necessary to a plaintiff's case. Liability may now alternatively be established under regular common law negligence principles, which depend on the *sui generis* circumstances of each case.

The new case law favors human plaintiffs at the expense of us canines and the humans who live with us. A natural outgrowth from the *Flanders* case is that humans with dogs and other domestic animals in New York can no longer rely on the "one bite rule" defense, as a common law degree of care has become relevant to animal-related negligence actions. The "one bite rule" might now be better described as the "no bite rule" for us dogs, even against dangerous postal, Fed Ex, and UPS workers who gravely and repeatedly menace the security of our homes. Go figure.

Fortunately, I have never bitten any person in 65 dog years and have no plans to ever actually do so, because as my human family knows, I am all bark and no bite.

*Archer is a DNA-examined mix, mainly Australian sheep dog and cattle dog, American shepherd, Staffordshire terrier, and boxer, and is the granddog of Justice Mark C. Dillon who is of the Appellate Division, Second Department, an Adjunct Professor of New York Practice at Fordham Law School, and a contributing author to the CPLR Practice Commentaries in McKinney's.



Guest Columnist
ARCHER

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

The Court of Appeals ends the "one free bite" rule in dog bite claims.

Flanders v. Goodfellow (Halligan, J., 4/17/25)

Plaintiff, a postal carrier, was bitten by defendants' dog while delivering a package to their residence. Plaintiff's complaint included causes of action sounding in strict liability and negligence, but both were dismissed on summary judgment and affirmed by the Appellate Division. The Court of Appeals found a triable issue of fact as to whether the defendants had constructive knowledge of their dog's vicious propensities and reinstated the strict liability claim. More significantly, the Court overruled its 2006 decision in *Bard v. Jahnke*, which held there can be no common-law negligence liability when a domestic animal causes harm, and reinstated the plaintiff's negligence cause of action, finding the *Bard* prohibition "in tension with ordinary tort principles, unworkable and, in some circumstances, unfair". Now, future plaintiffs with animal-induced injury claims can sue under strict liability or ordinary negligence or both theories of lability.

More from the Court of Appeals: reviewing the scope of the primary assumption of risk doctrine.

Katleski v. Cazenovia Golf Club, Inc. (Cannataro, J., 4/15/25)

In this combined appeal, the plaintiffs were injured (coincidentally on the same day in 2020) in separate and very different golf-related accidents. Katleski was struck by an errant golf ball while competing in a golf tournament, while Galante was struck by a car in the parking lot of a golf course before she could begin playing. The Court of Appeals affirmed the Third Department's dismissal of Katleski's negligence claim "because the risk of being struck by a mishit ball while golfing is inherent in the game". But Galante's claim (dismissal affirmed by the Fourth Department) was reinstated "because the primary assumption of risk doctrine has no application to a person who was not participating in a protected athletic or recreative activity at the time of their injury".

Gym class injury claim survives summary judgment motion.

Rozier v. Schenectady City School District (Lynch, J., 7/10/25)

New York school districts have a general duty to "adequately supervise the students in their charge" and can be held responsible for foreseeable injuries proximately caused by the absence of such supervision. In this claim brought for a fourth-grade student who broke her ankle in a fall during a game of "tag" during gym class (while wearing "ankle-length UGG boots instead of sneakers"), the defendant moved for summary judgment, contending that the accident occurred so suddenly that no measure of supervision could have prevented it from happening. Supreme Court (Buchanan, J., Schenectady Co.) denied the motion to dismiss, and the Third Department affirmed, finding triable issues of fact requiring resolution at a jury trial. The Appellate Division found merit to the claim for common-law negligent supervision, as deposition testimony revealed "that the teacher knew the child could potentially hurt herself wearing the UGG boots and yet allowed her to play with only a warning to be careful".

Slipping and tripping plaintiffs are dismissed.

Levitt v. Tops Markets, LLC (Reynolds Fitzgerald, J., 7/3/25)

Plaintiff slipped (on a cherry tomato) and fell in the defendant's market while grocery shopping. The defendant's produce manager testified that he had inspected the fall location about 40 minutes prior to the accident and did not see any produce on the floor. Supreme Court (Aherne, J., Tompkins Co.) denied the defendant's motion for summary judgment, but the Third Department reversed and dismissed the complaint. Plaintiff did not allege the defendant had actual notice of the dangerous condition alleged, and the Appellate Division found the defendant's "general knowledge" that customers occasionally spilled products in the produce aisle was legally insufficient to constitute constructive notice of the particular condition that caused the plaintiff to fall.

Schmid v. Town of Ausable (Ceresia, J., 7/17/25)

Visiting a relative who lived in an apartment building in the Town of Ausable, plaintiff sustained injuries when she tripped over a curb and caught her foot on the jagged edge of the pavement outside the property. The Town and the defendant owners of the apartment building both won summary judgment in Supreme Court (Davenport, J., Clinton Co.) which the Appellate Division affirmed. The plaintiff failed to raise a question of fact regarding her compliance with or an exception from the Town's prior written notice statute as to the location identified as hazardous by the plaintiff, and the owners of the rental property established (by a surveyor's expert witness affidavit) that the

curb/pavement where plaintiff tripped was outside the boundaries of their property.

Snow removal contractor's duty of care to injured party.

Butler v. Vestal Parkway Plaza, LLC (Mackey, J., 6/18/25)

Under New York law, a property owner's contract to provide snow and ice removal services will not generally give rise to tort liability in favor of a non-party to the contract. Exceptions to that rule include situations where the plaintiff detrimentally relies on the continued performance of the contracting party's duties or when the snow/ice contractor has entirely displaced the property owner's duty to maintain the premises in a safe condition. Those exceptions saved the plaintiff here on the defendant contractors' motions for summary judgment, which were denied by Supreme Court (McBride, J., Broome Co.) and affirmed by the Third Department. Plaintiff slipped and fell on an icy sidewalk outside her place of employment, and relied on contract language that made the snow/ice vendor responsible for removal (by 7:30 a.m.) of "any…ice that accumulates during non-business hours…such that the Site shall be ready for the arrival of the staff and customers at such time".

Subcontractor liability under Labor Law § 240(1).

Nusbaum v. 1455 Washington Ave., LLC (Mackey, J., 7/24/25)

Plaintiff was injured in a fall from a ladder during the installation of a convenience store sign. The defendant Stratus, a subcontractor that hired plaintiff's employer for the sign installation, moved for summary judgment, arguing that it was not an owner, general contractor or an agent under Labor Law § 240(1), and therefore not liable for plaintiff's injuries. Supreme Court (Kupferman, J., Saratoga Co.) denied the motion and the Third Department affirmed. The statute's nondelegable duty to provide workers with adequate safety devices attaches to a subcontractor where it acted as the agent of the owner or contractor by virtue of it having been given authority to supervise and control the work being performed at the time of the subject injury. While Stratus was not present on the property where the sign was installed, the Appellate Division found it significant that the defendant's service agreement with the plaintiff's employer required it to perform work according to Stratus' specifications and a purchase order between the parties called for the installation crew to "identify themselves upon arrival [at the project site] as representatives of Stratus".

Proximate cause issues deferred for jury determination.

Lans v. Farnam (Pritzker, J.P., 6/18/25)

Plaintiff was injured in a car-pedestrian accident that happened as she attempted to cross the street after getting off a bus operated by the defendant Capital District Transportation Authority. Supreme Court (Hartman, J., Albany Co.) denied CDTA's motion for summary judgment, and the Third Department affirmed. Noting that a "common carrier owes a duty to an alighting passenger to stop at a place where the passenger may safely disembark and leave the area", the Appellate Division agreed that plaintiff's opposition to the motion raised issues that should be decided by a jury, including (as opined by plaintiff's traffic safety expert) whether "the placement of the relevant bus stop was haphazard…given that it was located over 350 feet from the nearest marked crosswalk".

Medical malpractice claims.

Naylor v. Ellis Hospital (Clark, J., 2/20/25)

Plaintiff's decedent was admitted to the defendant's geriatric floor with fall prevention measures in place after he was assessed to be at high risk for a fall. Later that same day, a different nurse assessed the patient's fall risk as "low", and a day later, while walking to the nursing station, the patient suffered a neurological event, fell and struck his head, and remained comatose until his death five months later. On defendant's motion, Supreme Court (Cuevas, J., Schenectady Co.) dismissed the plaintiff's medical malpractice cause of action, but the Third Department reversed. While the defendant met its initial burden of establishing that hospital staff complied with the applicable standard of medical care, the plaintiff's expert witness affidavits raised triable issues of fact about defendant's alleged negligence, given evidence of decedent's "altered mental state and for his poor self-assessment about his ability to ambulate" that might have made preventive measures like one-on-one supervision appropriate.

Matney v. Boyle (Mackey, J., 4/17/25)

The defendant physician performed surgery on the plaintiff for his chronic diverticulitis, after which the patient was found to have damage to his right ureter, the tube that carries urine from the kidney to the bladder. A series of surgeries attempting to repair the ureter damage ultimately failed. Following suit and discovery, Supreme Court (Kupferman, J., Saratoga Co.) granted defendant's motion for summary judgement. Disagreeing that plaintiffs' expert affirmation was speculative or conclusory, the Third Department reinstated the plaintiff's complaint, concluding that the parties "competing expert affirmations present

triable issues of fact" on both the applicable standard of medical care and proximate cause.

<u>Schultz v. Albany Med. Ctr. Hospital</u> (Reynolds Fitzgerald, J., 5/8/25)

After completing discovery, deadlines for which having been extended multiple times by Supreme Court, plaintiff filed a note of issue and expert witness disclosure identifying one medical expert, a forensic pathologist. Defendant moved for summary judgement, which the plaintiff opposed while also making his own cross-motion to supplement his expert disclosure, offering an expert surgeon's affidavit rebutting the defendant's motion to dismiss. Supreme Court (O'Connor, J., Albany Co.) denied the cross-motion and granted the defendant's motion for summary judgment, and the Third Department affirmed. Noting the trial court's wide discretion to supervise discovery and impose deadlines, the Appellate Division emphasized that plaintiff "did not provide *any* excuse, much less good cause" for his expert witness nondisclosure and that the only admissible expert opinion in opposition to the summary judgment motion, by the forensic pathologist, failed to address the defendant's alleged deviations from the standard of care or any causal connection from the alleged negligence to the death of plaintiff's decedent.



Grant Jones, Esq., Warren County District Attorney's Office

Taylor Boucher, Esq., Boucher Law

Katherine E. Reid, Esq., Bartlett, Pontiff, Stewart & Rhodes, PC

Alexander P. McDonald Esq., McDonald Law, PLLC

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 2025-2026:
1/4 page $175.00
1/2 page $300.00

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**

2025-2026 TIPSTAFF EDITORIAL STAFF

Nicole Fish, Esq., President WCBA

Kate Fowler, Executive Director WCBA

Deadline for submissions for next edition March 1, 2026



2025-2026 WCBA BOARD OF DIRECTORS

(Front Row L-R): Gordon Eddy; Alexandra Rozell, Secretary; Nicole Fish, President; Vanessa Hutton, President-Elect. (Back Row L-R): Brian Pilatzke; Larry Elmen; Rose Place; Kathleen Fraher, Vice President; Hon. Glen Bruening, Treasurer; Hon. Martin Auffredou, Immediate Past President; Jeffrey Shapiro; Matthew Skinner. Absent: Dennis O'Connor, NYSBA Delegate; Dennis Tarantino, Emeritus.