WARREN COUNTY BAR ASSOCIATION, INC.

TIPSTAFF

FALL 2022

Volume IV Issue 1

IN THIS ISSUE

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Dear Colleagues,

I am pleased to share our Fall 2022 edition of the Warren County Bar Association's *Tipstaff*! As always, this issue is filled with some important information, several interesting articles, and lots of great photos of our fall events.

There is so much for which to be thankful, as we approach the Holidays. First, I am very thankful for the cadre of members, who continue to be the heart and soul of our organization.

I am especially thankful for our Board of Directors, who work tirelessly to give those members several opportunities to gather, to learn, and to contribute to meaningful causes throughout the year.

I am thankful for the Directors of the Warren County Bar Foundation, whose work, each year, provides local organizations and several law students with funds that allow their work to continue.

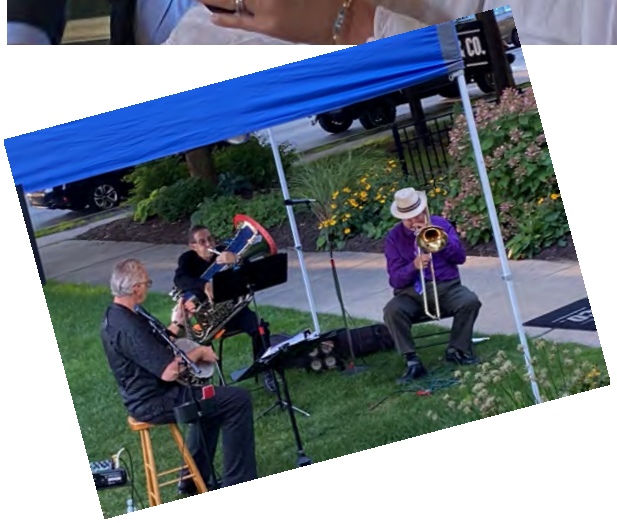
And finally, I am thankful that the month of December affords us the opportunity to gather twice. First, we will celebrate at the Holiday Party at the Glens Falls Country Club on December 1st. Then, on December 7th, we will "gather" virtually for an important ZOOM CLE, entitled "Lunch with the Attorney Grievance Committee: Current Ethical Topics." This informative CLE is being presented by Monica Duffy and several attorneys, who serve as Counsel for the Attorney Grievance Committee, NYS Supreme Court, Appellate Division, Third Judicial Department. Two hours of CLE credit may be awarded toward Ethics and Professionalism for those who attend the full program. The program is free to WCBA members and is $15.00 for non-members.

Please browse through our pages and see great photos of our *Welcome Back* gathering and the ever-popular *Mannix Dinner.* Read some great articles: "The Law and Fungi" from our own James Cooper and "Revisiting Venue Selection" by Judge Mark C. Dillon. Judge Martin D. Auffredou has provided us with a ruling regarding the distribution and acceptance of absentee ballots, and Timothy J. Higgins shares his always interesting "Torts and Civil Practices."

May the Holidays bring you and your family much happiness and good health!

Best wishes,
Dennis

WCBA WELCOME BACK GATHERING
Morgan & Co.
September 8, 2022



by James Cooper, Esq.

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

THE LAW AND FUNGI

Being old, retired and isolated by Covid and other excuses, I have watched a lot of YouTube. One presentation that I found interesting was a series of videos by professor Thomas Wessels of Antioch University. He is a particularly insightful observer of forests, able to look at a mature forest and identify how the land was used by earlier generations, distinguishing crops grown there, flax to hay from evidence of rock walls. He looks at the forest terrain and explains how it was impacted from weather events, for instance the 1938 New England hurricane, as distinguished from thunderstorm wind thrown trees. I found particularly fascinating his explanation of what goes on underground, the root grafting and nutrient sharing between even unrelated species of trees. He explains that the least understood ecosystem and presently the hottest area of study is the mycorrhizal interrelationships going on underground as fungi share nutrients and water with plants and appear to communicate information about changes in the environment. As a one time serious hiker, (I climbed 96 of the 100 highest Adirondack peaks), perhaps my interest in his videos was a distortion of how others would regard them. As a lawyer, I wonder if there is an underlying direction to the law that we overlook because our vision is obscured, like a hiker who only sees what is above ground and deludes himself that is all there is. The analytical thinking we were trained to apply in law schools disintegrates this whimsy, perhaps too quickly.

A hundred years ago decisions of the United States Supreme Court began to slowly evolve away from a strictly linear view of the law to a view that regulation of interstate commerce and the police power embraced broader societal considerations. It was a halting start featuring dissents in opinions by Justice Oliver Wendell Holmes. It evolved partly because Justice Brandeis brought his life experience to the court, the experience of intellectual Judaism incorporating the heritage of charity, generosity and benevolence toward his fellow man. The contest of world views manifested itself in what the Constitution authorized or prohibited as it related to commercial law. Then the liberals argued that the Constitution should be narrowly interpreted to uphold state statues while the conservatives argued that the Constitution created a “freedom of contract” with all the spinoff restrictions on state and federal legislative enactments analogous to what was later called in Griswold v. Connecticut, a ‘penumbral right’ of privacy to birth control. Professional historians would argue that this tension was there from the beginning of the Republic, Jefferson versus Hamilton and probably so in western society dating from the Greeks. The current manifestation of the argument is Dobbs v. Jackson involving abortion.

As I understand the rationale of the majority and the concurrence of Justice Thomas in overturning Roe v. Wade, the majority opinion was based on the narrow grounds that appellate subject area precedent and review were not followed in the original decision. Justice Thomas believes that the same analysis requires review of other Warren court legacy cases like Griswold in the sense that the constitutional framework requires that determination of socially regulated behavior or emancipated behavior be a legislative function. Judge Learned Hand believed, as noted in a prior *Tipstaff* article, that the judicial branch should not become the ultimate

legislative branch. These rationales understandably were too esoteric to be undertaken, much less analyzed, in the press, as the story for the media was the emotional reaction of the public to the consequences of the decision, pro or con. Seemingly overlooked was which branch of government should make the law.

New York Court of Appeals historians say that the issue is a hundred and twenty years old, starting in 1902 in a civil case in which the plaintiff was a teenage woman whose photograph was used for commercial purposes without her consent or compensation. Whether the invasion of her privacy and use of her image created a cause of action was resolved against her by a vote of four to three, the majority holding that they found no common law right, nor Constitutional right to privacy and that creation of such a right was a function for the legislative branch.[1] That is still New York's common law, although the national firestorm created as a result of the decision caused privacy protections to be enacted by the legislature the following year.

Lincoln technically had no right to emancipate the slaves by executive order, in the sense that the Constitution established no such power in the executive and there were no like precedents. His action was ratified by amendment of the Constitution, a legislative action. Without focusing on the consequences of Dobbs in isolation, it seems reasonable to inquire whether the ideological struggle is uniquely manifested in this case, whether precedent should have resulted in a different outcome in Roe originally, whether Dobbs was overreaching, whether the legislative process is safe to protect individual rights, whether abortion is a fundamental right or something else? Although criminal due process has had subject matter appellate review from colonial times and is therefore distinguished, would there have been a Miranda result if left to legislative action?

Whether law is made by the legislature or courts, or in reality both, there is a persistent motivating thread from the earlier twentieth century throughout and up to today of a societal direction. Ideological claims are to the high ground of promoting or protecting individual freedoms, for instance advancing the cause of homosexuals to marry or recognizing a religious right to refuse to make their wedding cake. Seemingly irreconcilable different claims historically are reconciled by one branch or the other. The Republic lumbers along. There is a common thread, at least from the time of the Civil War to advance individual human rights in ways that in aggregate seems an undeniable trend. We can't know how the future will resolve abortion rights with the right to life itself. History indicates that things will turn out alright even if we can't see that now. There's no analogy to fungi unless, like ignorance of what goes on underground, we overlook a persistent hunger for freedom that in retrospect seems to have directed the law.

Jim Cooper
September 27, 2022

[1]Roberson v. Rochester Folding Box Company 171 NY 538

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

RICHARD CAVALIER, ANTHONY MASSAR, CHRISTOPHER TAGUE and THE SCHOHARIE COUNTY REPUBLICAN COMMITTEE,

Plaintiffs,

-against-

WARREN COUNTY BOARD OF ELECTIONS, BROOME COUNTY BOARD OF ELECTIONS, SCHOHARIE COUNTY BOARD OF ELECTIONS, AND NEW YORK STATE BOARD OF ELECTIONS,

Defendants.

DECISION AND ORDER

Index No. EF2022-70359
RJI: 56-1-2022-0326

Appearances:
The Glennon Law Firm, P.C., Rochester (*Peter J. Glennon*, and *Daniel R. Suhr* of the Illinois bar, admitted pro hac vice, of counsel), for plaintiffs.
Kevin G. Murphy, Deputy Counsel, Albany, for defendant New York State Board of Elections.
Letitia James, Attorney General, Albany (*Sarah L. Rosenbluth* of counsel), in her statutory capacity under Executive Law § 71.
Barclay Damon LLP, Albany (*Thomas B. Cronmiller* and *Daniel J. Martucci* of counsel), for defendant Warren County Board of Elections.
Robert G. Behnke, County Attorney, Binghamton, for defendant Broome County Board of Elections.

AUFFREDOU, J.

Three motions are pending before the court: plaintiffs' order to show cause dated August 18, 2022, which seeks a preliminary injunction precluding defendants Warren County Board of Elections and New York State Board of Elections from distributing or accepting absentee ballots from voters who are unable to appear at their polling place due to the risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public; the pre-answer cross motion of defendant Warren County

Board of Elections, which seeks dismissal of plaintiffs' complaint; and the pre-answer cross motion of the Attorney General of the State of New York, as intervenor pursuant to Executive Law § 71, which also seeks dismissal of plaintiffs' complaint.

Plaintiffs commenced this action for declaratory judgment and injunctive relief by filing a summons and complaint on July 20, 2022. In essence, plaintiffs contend that the 2020 legislative amendments to Election Law § 8-400 to expand access to absentee voting due to the COVID-19 pandemic and the further legislative amendment in 2022 to extend the effectiveness of the 2020 amendment to December 31, 2022 are contrary to and violate New York Constitution, article II, § 2 and seek a declaration to that effect.

A list of the papers that the court has considered in deciding the pending motions is annexed hereto.[1] Oral argument on the motions was conducted on September 6, 2020.

By way of background, New York Constitution, article II, § 2 reads:

> "The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes."

In 2020, in response to the COVID-19 pandemic, the New York State Legislature enacted an amendment to Election Law § 8-400 (1) (b), which expanded the definition of "illness" therein. As relevant here, the statue reads as follows.

> "[F]or purposes of this paragraph, 'illness' shall include, but not be limited to, instances where a voter is unable to appear personally at the polling place of the election district in which they are a qualified voter because

[1] By letter dated August 25, 2022 from Kevin G. Murphy, Deputy Counsel for the New York State Board of Elections, the court was informed that the defendant New York State Board of Elections is not taking a position on the merits of this action. Defendant Schoharie County Board of Elections has not appeared in this action.

> there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public."

The legislation included a January 1, 2022, sunset provision. In 2022, the legislature extended the effectiveness of the 2020 amendment to Election Law § 8-400 (1) (b) to December 31, 2022. Plaintiff's claim that this expanded definition is inconsistent with the definition of the term "illness" in New York Constitution, article II, § 2, which they claim is more restricted.

Warren County Board of Elections and the Attorney General advance numerous arguments in opposition to plaintiffs' request for preliminary injunctive relief and in support of their motions to dismiss. Foremost among these arguments is that Election Law § 8-400 (1) (b) was previously ruled to be constitutional by the Appellate Division, Fourth Department in *Ross v State of New York*, 198 AD3d 1384 [4th Dept 2021]), in which the constitutionality of Election Law § 8-40 (1) (b) was challenged on substantially the same grounds that are presented here.[2] In *Ross*, the Fourth Department, "for reasons stated at Supreme Court," affirmed an amended judgment entered in Niagara County, which held that the 2020 amendments to Election Law § 8-400 are constitutional (*id.* at 1384, *affg Ross v State of New York*, Sup Ct, Niagara County, Sept. 6, 2021, Sedita, J., index No. E174521/2021). Defendants contend that *Ross* is binding precedent, which precludes this court from reaching a different outcome.

"The doctrine of *stare decisis* requires trial courts in [the Third Department] to follow precedents set by [other Departments of the Appellate Division] until the Court of Appeals or [the Third Department] pronounces a contrary rule" (*Mountainview Coach*

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[2] The other arguments advanced by defendants include that plaintiffs have failed to establish irreparable harm, Election Law § 8-400 is constitutional as a matter of first impression, plaintiffs lack standing, plaintiffs action is barred by the doctrine of latches, and plaintiffs have failed to present a judiciable claim.

Lines, Inc. v. Storms, 102 AD2d 663, 664 [2d Dept 1984]). Notwithstanding plaintiffs' arguments to the contrary, the court finds *Ross* to be binding precedent. Under the doctrine of stare decisis, the court is bound by the decision in *Ross*. The holding in *Ross* compels the dismissal of the instant complaint as against all defendants and the denial of plaintiffs' motion for a preliminary injunction.

Accordingly, it is hereby

ORDERED that plaintiffs' application for a preliminary injunction is denied; and it is further

ORDERED that the motions of defendant Warren County Board of Elections and intervenor Attorney General of the State of New York are granted, and the complaint is dismissed as against all defendants.

The within constitutes the decision and order of this court.

Dated September 19, 2022 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:
Peter J. Glennon, Esq.
Kevin G. Murphy, Esq.
Sarah L. Rosenbluth, Esq.
Thomas B. Cronmiller, Esq.
Daniel J. Martucci, Esq.
Robert G. Behnke, Esq.

Cavalier v Warren County Board of Elections
Warren County
Index No: EF2022-70359

Papers Considered:

1. Affirmation of Peter J. Glennon, Esq., dated August 18, 2022, in support of plaintiffs' motion for preliminary injunction.

2. Affidavit of Anthony Massar, sworn to July 28, 2022.

3. Affidavit of Richard Cavalier, sworn to August 1, 2022.

4. Affidavit of Christopher Tague, sworn to August 2, 2022.

5. Plaintiffs' memorandum in support of motion for a preliminary injunction, dated August 28, 2022.

6. Affirmation of Daniel J. Martucci, Esq., dated August 26, 2022, with exhibits, in support of defendant Warren County Board of Elections cross motion to dismiss and in opposition to plaintiffs' order to show cause.

7. Defendant Warren County Board of Elections' memorandum of law in opposition to plaintiffs' order to show cause and in support of defendant's cross motion to dismiss the complaint, with exhibits, dated August 26, 2022.

8. Memorandum of law of Letitia James, Attorney General of the State of New York, in opposition to plaintiffs' motion for preliminary injunction and in support of the Attorney General's cross motion to dismiss the complaint, with exhibits, dated August 29, 2022.

9. Affirmation of Sarah L. Rosenbluth, Esq., dated August 29, 2022, with exhibits, in support of the Attorney General's motion to dismiss.

10. Affidavit of Robert G. Behnke, Esq., sworn to August 29, 2022, with exhibits, in opposition to plaintiffs' motion for a preliminary injunction.

11. Plaintiffs' reply in support of the motion for a preliminary injunction and response in opposition to defendant Warren County Board of Elections' motion to dismiss the complaint, dated September 1, 2022.

12. Plaintiffs' reply in support of the motion for a preliminary injunction and response in opposition to the Attorney General's motion to dismiss the compliant, dated September 2, 2022.

13. Affirmation of Daniel J. Martucci, Esq. in reply to plaintiffs' opposition and in further support of defendant Warren County Board of Elections' cross motion to dismiss the complaint, dated September 2, 2022.

14. Memorandum of law of defendant Warren County Board of Elections in reply to plaintiffs' opposition and in further support of the cross motion to dismiss the complaint, dated September 2, 2022.

15. Reply memorandum of law in further support of the Attorney General's cross motion to dismiss the complaint, dated September 2, 2022.

16. The affidavit of Thomas E. Connolly, sworn to September 2, 2022, in support of the Attorney General's motion to dismiss the complaint.

2022 WCBA MANNIX DINNER

This year's Mannix Dinner was even more memorable than usual. As always, it was a spectacular event at which several local judges, in the spirit of Pat and Jack Mannix, worked for 2 nights to prepare and then serve over 50 "seasoned" and new attorneys! And once again, Charlie Hoertkorn shared his time and talent to make the best Italian dinner ever! What made the evening even more memorable were 3 additional elements this year:

First, during dinner, nearly 20 young attorneys were asked to stand and introduce themselves and share an interesting fact about themselves. What a wonderful way to get to know these bright young stars!

Next, Elizabeth Little shared an audio clip of the late Fred Bascom (circa 1975). The clip was of Fred's humorous account of the time the White House Christmas tree was donated from Warren County, NY!

And finally, the evening ended with several guests sharing stories about attorneys we have lost recently, including John Carusone and Ron Newell. It was clear from the stories that, once a part of the WCBA, always a part of the WCBA. The memories of these fine colleagues are cherished and meant to be shared.

1

2022 Dessert Contest Winners:
Jason Carusone and Ann Vondrak!

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

REVISITING VENUE SELECTION

Hon. Mark C. Dillon *

There was an amendment to the venue-selection statute, CPLR 503(a), in 2017 (L.2017, ch. 366, sec. 1), which widened the venue selection options for plaintiffs. Previously, venue was to be placed in a county where any party resided at the time of an action's commencement, and if a party was a corporation, the county of its principal office (CPLR 503[c]). There are boutique exceptions to those general rules for the enforcement of contracts, municipal defendants, the location of real property for actions *in rem*, the location of contested personalty, and others (CPLR 501, 503[b], [d], [e], [f], 504, 506, 507, 508, Unconsol. Laws 7405).

The 2017 amendment to CPLR 503(a) expanded the venue choices to also include "the county in which a substantial part of the events or omissions giving rise to the claim occurred." The amendment primarily helps plaintiffs in choosing the most plaintiff-friendly venue possible. But the amendment has no real effect if the substantial events or omissions occur in a county where a party already resides.

Now that the amendment to CPLR 503(c) has been on the books for over five years, we can examine how the amendatory language has worked in practice. Does the statutory phrase "substantial part of the events or omissions" refer only to the situs of the liability, or potentially, to damages if elsewhere? If an injurious event occurs in one county but hospital and medical treatment is administered in another, may an action be commenced in the latter? If a defective product is manufactured in one county, sold in a second, and causes injury in a third, which county(ies) qualify for a "substantial part of the event"? In an earlier Practice Page, I predicted that the 2017 amendment allowed for ambiguities, and that the courts would be required to parse some of the new language's meaning.

One such case that helps parse the amended statute's meaning is *Harvard Steel Sales, LLC v Bain*, 188 AD3d 79 (4th Dep't. 2020). The plaintiff, of Cleveland, was in the business of selling galvanizing steel, and contracted for the galvanizing process to be performed by Galvstar, LLC, at a facility in Buffalo (Erie County). The defendant, Bain, was the principal of Galvstar and resided in New York County. The plaintiff's complaint sounded in fraud in the inducement, for Galvstar's alleged misrepresentation of its ability to galvanize steel meeting certain requirements. The defendant claimed the representations were made in Cleveland, while the defendant maintained in opposition that the parties' "meetings" were in Buffalo. Defendant Bain was the only named party with a residence in the state. The plaintiff commenced the action in Erie County and the defendant moved to change venue to New York County. The Appellate Division affirmed the change of venue to New York County, as the defendant's averments that specific representations were made in Cleveland were not necessarily contradicted by the

plaintiff's opposition that non-specific "meetings" were held in Buffalo, as to qualify as a substantial part of the events for CPLR 503(c) venue there. The lesson from the case is the value of specificity.

Another case worth noting is *Vereen v Flood*, 184 AD3d 758 (2nd Dep't. 2020). In *Vareen*, the plaintiff's decedent was admitted to a hospital for treatment in Orange County and then transferred to another hospital in Bronx County, where she died. The plaintiff's estate commenced an action against all of the medical providers in Bronx County, and certain Orange County defendants moved to change venue to Orange based on their residences. The plaintiff sought to retain venue in the Bronx based on that county being where a substantial part of the events or omissions occurred. The Appellate Division found insufficient evidence in the record for concluding where the substantial events or omissions occurred, and remitted the matter to the trial court for a framed-issue hearing on the issue. Again, the lesson of the case is the need for specificity in the papers.

The bottom line of these cases is that if a party is relying upon the "substantial events" prong of CPLR 503(c), the more evidentiary facts that can be presented on the issue by a party, the better it is for that party.

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* Mark C. Dillon is a Justice of 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

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

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Pre-existing injury sinks auto accident injury claimant.

Lemieux v. Horn (Egan, J.P., 10/13/22)

Few issues occupy more time in tort law motion practice than the "serious injury" standard in New York Insurance Law § 5102. This plaintiff's car was rear-ended by defendant's tractor trailer, and although plaintiff won summary judgment on liability, Supreme Court (Tait, J., Broome Co.) dismissed the complaint after concluding plaintiff had not sustained a serious injury. The Third Department (in a 3-2 split) affirmed, highlighting the plaintiff's medical history which included degenerative changes to the lumbar spine and medical treatment for lower back pain and radiculopathy. Even though plaintiff had back surgery less than a year after the accident, the Appellate Division felt the plaintiff's proof lacked objective medical evidence that distinguished the preexisting back condition from his post-accident complaints. The dissenters believed the defendants never met their initial burden of proof, and reminded the majority that "every first-year law student is aware of the eggshell plaintiff axiom", which permits a plaintiff to "recover to the extent that the accident aggravated his or her preexisting conditions".

Plaintiff's claim for punitive damages permitted.

Nazzarro, Jr. v. Salvatore (Aarons, J., 6/30/22)

Plaintiff alleged the defendant struck him with his pickup truck at a gas station – angry that plaintiff's friend's trailer was blocking the gas pump defendant wanted to use. Supreme Court (Mott, J., Ulster Co.) granted plaintiff's motion to amend his complaint to add a claim for punitive damages. Affirming, the Appellate Division noted the liberal amendment standard ("shall be freely given") in CPLR 3025(b), and concluded that although the defendant testified to a different version of events near the gas pump, the plaintiff was not required the prove the merits of the punitive damages claim at this stage of the litigation.

Jury must resolve disputed medical malpractice issues.

Fischella v. St. Luke's Cornwall Hospital (McShan, J., 4/28/22)

Plaintiff, incarcerated in state prison, had an episode of testicular pain, and after assessment in the prison infirmary and a telemedicine urology consult, was transported to the defendant's emergency room for treatment. In the ER, ultrasound confirmed torsion (an absence of blood supply to the testicle), followed by an urologist's examination and eventually surgical removal of the testicle. Supreme Court (Gilpatric, J., Ulster Co.) denied the defendant's motion for summary judgment, which was supported by an expert physician opinion that the emergency room doctor properly waited for the ultrasound result before requesting the urology assessment. Plaintiff's expert urologist defined testicular torsion as a "true surgical emergency" and opined that the ER doctor's decision to defer the urology consult until after the ultrasound was an unnecessary delay that decreased the plaintiff's chance of saving the testicle. Citing the disputed issues in the expert witness affidavits, the Third Department affirmed the trial court's denial of summary judgment.

Labor Law § 240(1).

Wood v. Baker Bros. Excavating (Colangelo, J., 5/5/22)

Plaintiff, a concrete laborer injured in a fall (approx. 3 feet) from a bridge footing, sought partial summary judgment on his Labor Law § 240(1) claim. Affirming Supreme Court's (Mott, J., Ulster Co.) denial of the motion, the Third Department agreed that the defendant general contractor raised several questions of fact, including whether the plaintiff failed to use safety equipment that was available to him (evidenced by day-of-accident job progress photos that showed portable scaffolding on the worksite).

DeGraff v. Colontonio (Clark, J., 2/17/22)

Defendant hired the plaintiff to build a one-story, single-family house and for the project rented for the plaintiff's use a lull – a 4-wheel, forklift-type machine equipped with a hydraulic arm used to lift and transport materials. Needing a work platform for himself and materials while wrapping the house in Tyvek (insulation), plaintiff stacked sheets of plywood on the lull fork. The platform gave way, causing the plaintiff to fall 12-16 feet to the ground, where he sustained injuries. A bifurcated jury trial on liability, during which Supreme Court (Schreibman, J.) denied plaintiff's motion for a directed verdict, resulted in a defense verdict, with the jury concluding the plaintiff was the sole proximate cause of his injuries. The Third Department, finding it "beyond dispute that the lull was not an adequate safety device" and that safety harnesses provided by

defendant were incompatible with the lull, reversed and ruled plaintiff was entitled to a directed verdict under Labor Law § 240(1).

Plaintiffs get second chances.

Bouchard v. State of New York (McShan, J., 6/30/22)

An injured claimant must show a municipal defendant owed a "special duty" if the allegedly negligent conduct arose out of a governmental (not proprietary) function. Concluding both questions in favor of the defendant, the Court of Claims (Milano, J.) dismissed this action, filed by a harness racing driver who was injured after being ejected from his sulky in a horse collision at the Saratoga track. The claimant alleged the NYS Gaming Commission created a dangerous condition in its pre-race inspections, which (if properly done) would have led to discovery of equipment defects and that a horse that fell during the race was "lame", and should have been scratched. Reversing and reinstating the claim, the Third Department found that the pre-race obligations of paddock judge and veterinarian were proprietary (unlike "more traditional governmental functions, such as police and fire protection") and therefore subject to an ordinary negligence standard (not requiring a showing of "special duty" to the claimant).

Bovee v. Posniewski Enterprises, Inc. (McShan, J., 6/2/22)

Supreme Court (Crowell, J., Saratoga Co.) granted summary judgment to the defendant owner of the property where plaintiff claimed he was hurt after tripping and falling in a parking lot. Plaintiff testified that his foot "hit something along the pavement and...stopped", causing him to fall to the ground. He did not immediately check the pavement to identify the cause of the fall but later (after being helped back to his car) noticed a crack in the pavement where the fall happened. Plaintiff identified the accident location in a deposition photograph, but was not sure which of the two visible pavement cracks caused him to fall. Reversing the trial court, the Third Department reinstated the plaintiff's action, finding that although some of the plaintiff's statements were inconsistent, he "was not required to state for certain which particular crack" led to the injury, and that a jury could rationally infer (without "mere speculation and surmise") that one of the two defects in the pavement caused his fall.

Hawver v. Steele (Reynolds Fitzgerald, J., 4/7/22)

Plaintiff, delivering sheetrock to a barn being renovated by the defendant property owners (wife and husband), was hurt when "big and heavy" barn doors fell on him. Supreme Court (Zwack, J., Columbia Co.) granted defendants' motion for summary judgment, finding (in part) that defendants were entitled to the homeowner liability exemption of Labor Law § 240(1). Reversing and

reinstating the complaint, the Third Department found the defendants failed to show the exemption applied (i.e., that the property was not being used solely for commercial purposes at the time of the accident). The defendant husband had testified that the barn was being renovated for use as a music studio for him and a photography workspace for his wife.

Constantine v. Lutz (Fisher, J., 4/28/22)

Plaintiffs, a mother and daughter, brought an action to invalidate a trust created by the daughter's grandfather; who died 7 months after executing a will in which he bequeathed $50,000 each to two grandchildren (the second of whom was also a plaintiff). The trust contained decedent's home and other assets, and after the testator's death, an estate proceeding reported assets of less than $37,000. The action to invalidate alleged undue influence by defendants (daughter of the decedent and defendant Lutz, who lived together) on the decedent in the creation of the trust. Supreme Court (Nolan, J., Saratoga Co.) granted the defendants' pre-answer motion to dismiss the action, but the Appellate Division – finding the grandchildren had the capacity to challenge the validity of the trust as "interested persons" (SCPA § 103), reversed and reinstated the plaintiffs' undue influence claim.

Claimant saved from lacking expert witness disclosure.

Freeman v. State of New York (Lynch, J., 6/2/22)

Claimant, incarcerated in state prison and working on a recycling crew, contended a lack of proper training and equipment led to his left foot injury, which was allegedly exacerbated by the failure to give him medication and proper medical care. The Court of Claims (Collins, J.) granted the defendant's motion to preclude trial testimony by the claimant's treating orthopedist because the witness was not identified in the claimant's CPLR § 3101(d)(1) expert witness disclosure. Claimant's counsel admitted to not being aware of the Third Department requirement to disclose *treating* doctors as expert witnesses, which the Appellate Division found to be a reasonable excuse. Finding "no basis to conclude that the noncompliance" was willful, the trial court's preclusion order was reversed.

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WARREN COUNTY BAR ASSOCIATION
ADVERTISING OPPORTUNITIES

This publication is the Warren County Bar Association (WCBA) online 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 approximately 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's 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 advertisers' information.

Prices for 2022-2023:
¼ page $150.00
½ page $250.00

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

If you are interested in advertising in the *TIPSTAFF*, please email Kate in the WCBA office at 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**

2022-2023 TIPSTAFF EDITORIAL STAFF
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