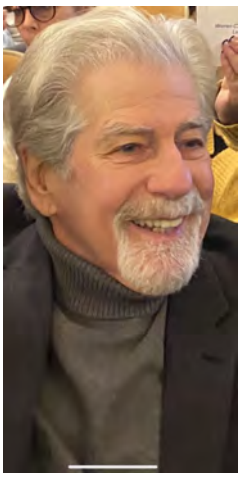
WARREN COUNTY BAR ASSOCIATION, INC.

TIPSTAFF

SPRING 2023 Volume IV Issue 2



IN THIS ISSUE

Dear Colleagues,

Spring has finally arrived in Warren County! And, as we celebrate the warmer temperatures, we look back with pride on all that we have accomplished since our last edition of *Tipstaff*!

We have hosted 2 informative and free CLEs this winter. In December, we shared a ZOOM CLE, entitled *Lunch with the Attorney General Grievance Committee*. Many thanks to the attorneys of the Third Department Judicial Grievance Committee, Monica A. Duffy, Michael G. Gaynor, Alison M. Coan, Lauren S. Cousineau, and Sarah A. Richards, who presented this important CLE. In March, Judge Robert A. Smith, James R. Burkett, Esq. and Deborah K. Ricci, Chief Clerk, provided a valuable TEAMS CLE entitled *The Nuts and Bolts of Surrogate's Court*. I am most thankful to Maria Nowotny for chairing this important committee and to Kate Fowler for all her contributions.

In December, we celebrated the holidays at the Glens Falls Country Club and then settled in for the long winter. February began a series of photo shoots for 90 of our attorneys. We now anxiously await the 2023 WCBA Composite Photo! And, of course, last month brought us the return of the March Mixer. After 3 long years, we were finally able to host it once again. 65 guests joined us at Park 26 and helped raise nearly $13,000. for scholarships and community grants. Many thanks to the committee: Brian C. Borie, Rose T. Place and Gregory J. Teresi for their hard work, to all the firms that donated so generously to the mixer, and, of course, to Kate Fowler, who keeps the Association on track!

Directors of the Association and the Foundation have been working hard, as well, to ensure that local students learn about important elements of the legal system. Throughout the winter, Judge Glen Bruening, with the help of several attorneys and judges, has, once again, coordinated the local Mock Trial competitions. This year's local winner is Greenwich High School. On April 22nd, the WCBA hosted the Regional Competition for the first time in 7 years at the Warren County Municipal Center.

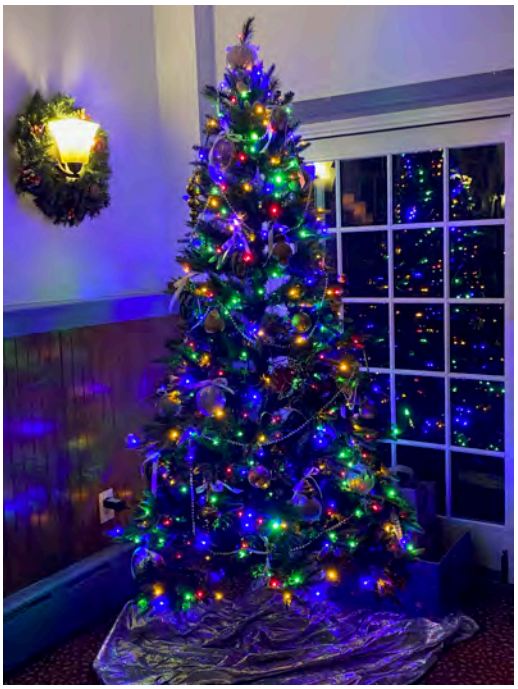
Directors of the Foundation, Elizabeth E. Little, Mary Ellen Stockwell-Capasso, Rose T. Place, Jill E. O'Sullivan, and Jacquelyn P. White have been preparing for an in-person Real Life Symposium for several area high schools. The Symposium, to be held in May, will present several scenarios depicting real life situations that students may encounter, and will feature Judge Kathleen B. Hogan, District Attorney, Jason Carusone, and Public Defender, Gregory V. Canale.

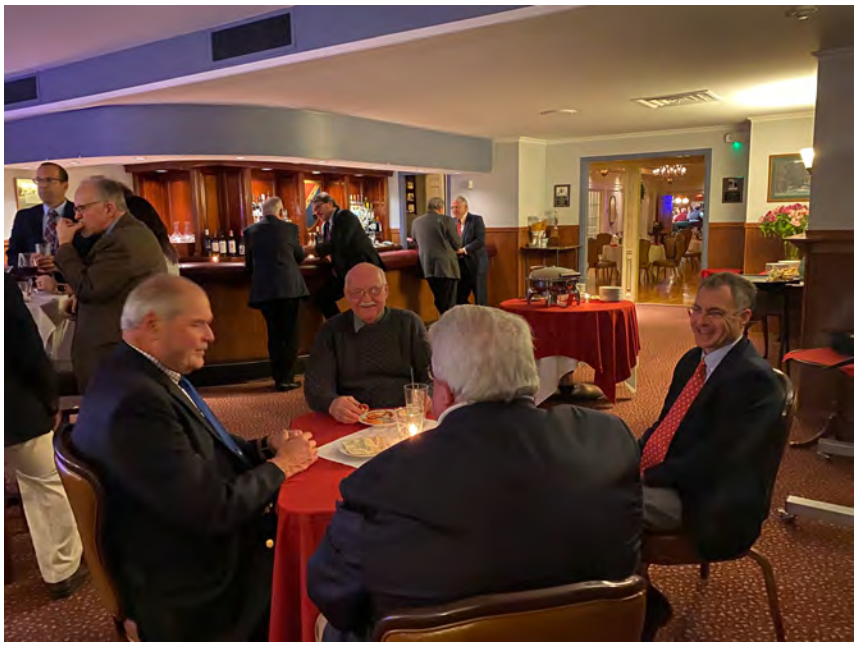
As the year winds down, we are looking forward to a great Law Day celebration at The Hyde on May 5th. We will honor this year's Liberty Bell Award recipient, Ruth E. Fish, FNP. We will wrap up the year at the Lake George Club on May 16th. We are honored this year to have Sherry Levin Wallach, Esq. NYSBA President, and Richard Lewis, Esq. NYSBA President-Elect joining us for the Annual Meeting.

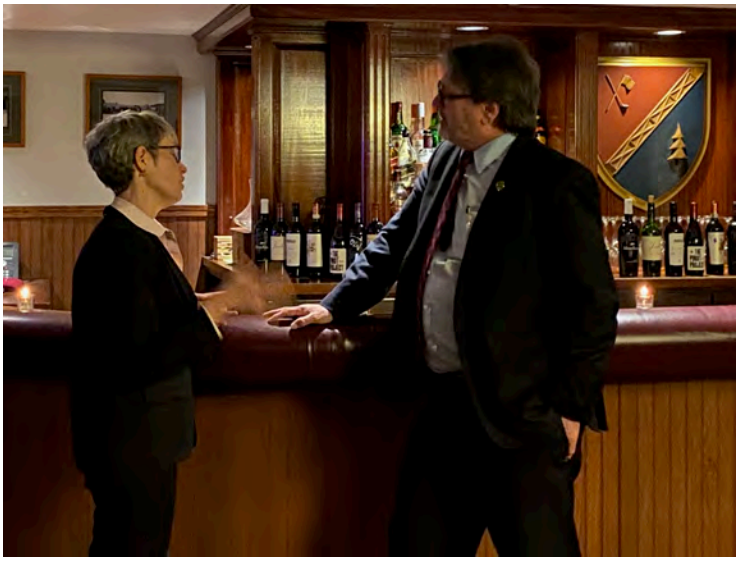
To top it all off, I am most pleased to share the fact that we now have the largest membership in recent years! We have 150 members and are so happy to have all of you as a part of this terrific group of colleagues.

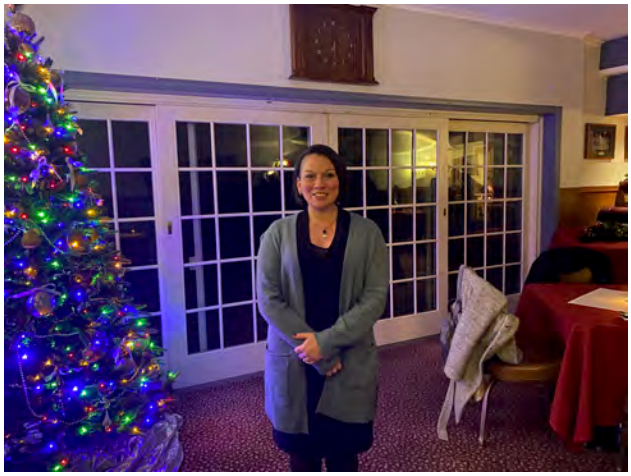
Best wishes,
Dennis

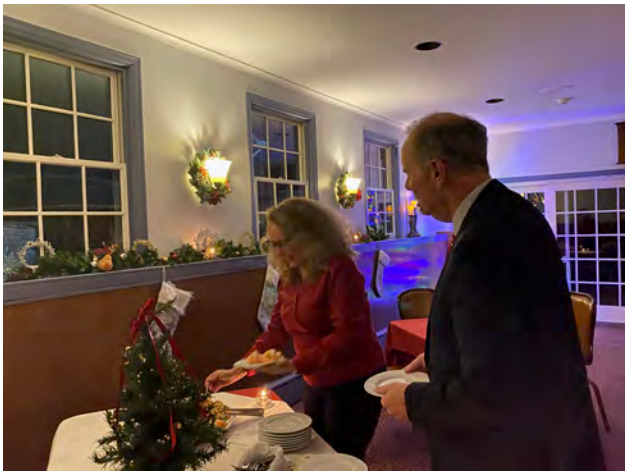
WCBA HOLIDAY PARTY
Glens Falls Country Club
December 1, 2023



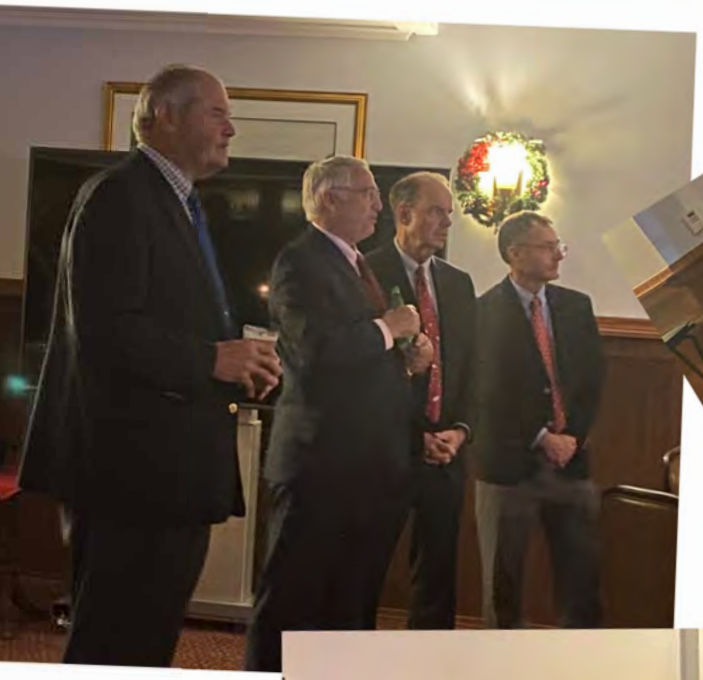


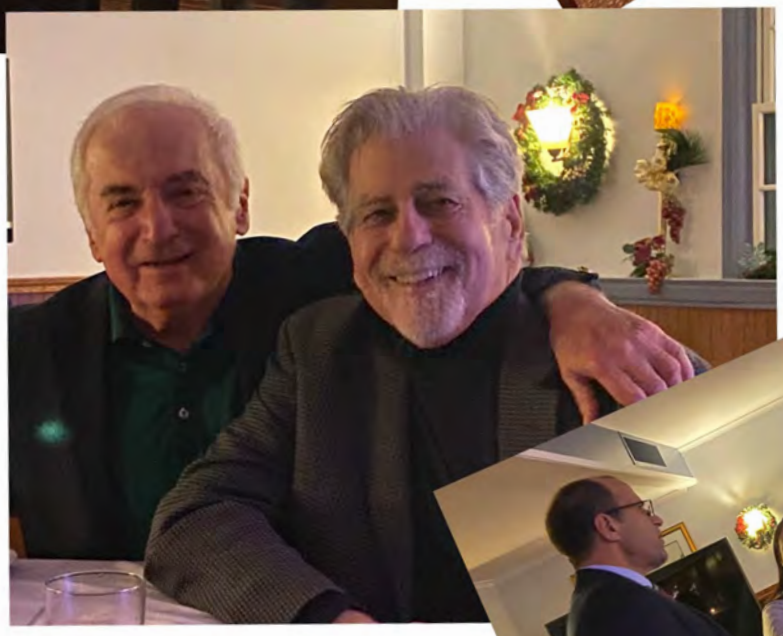


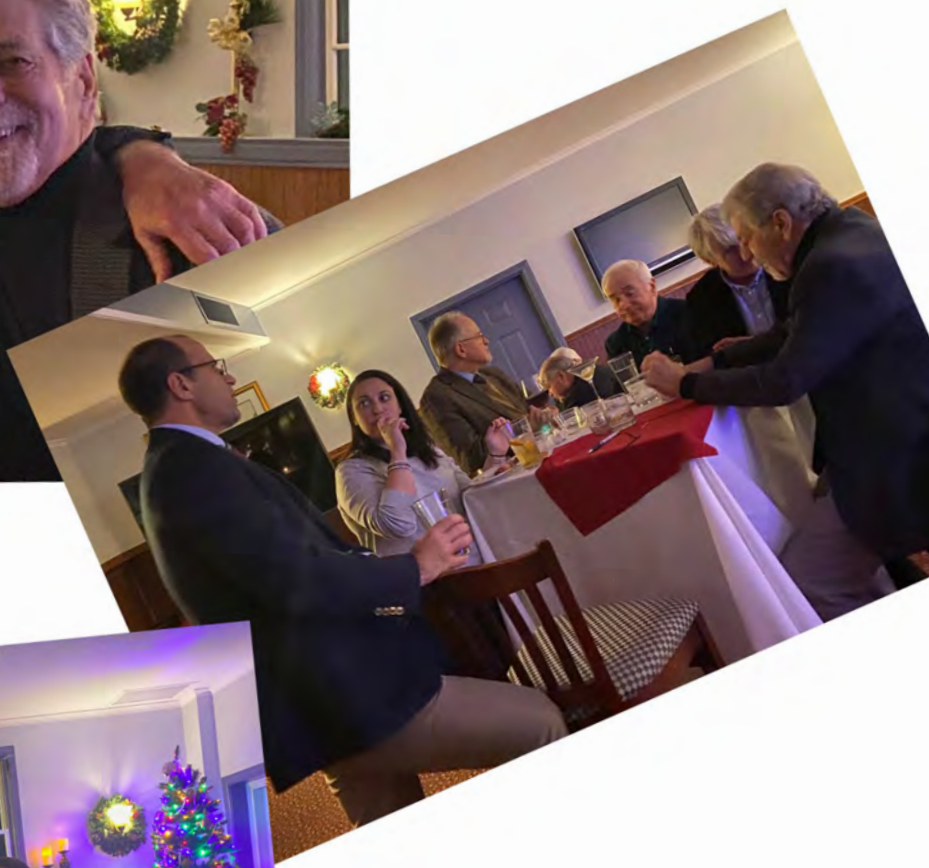


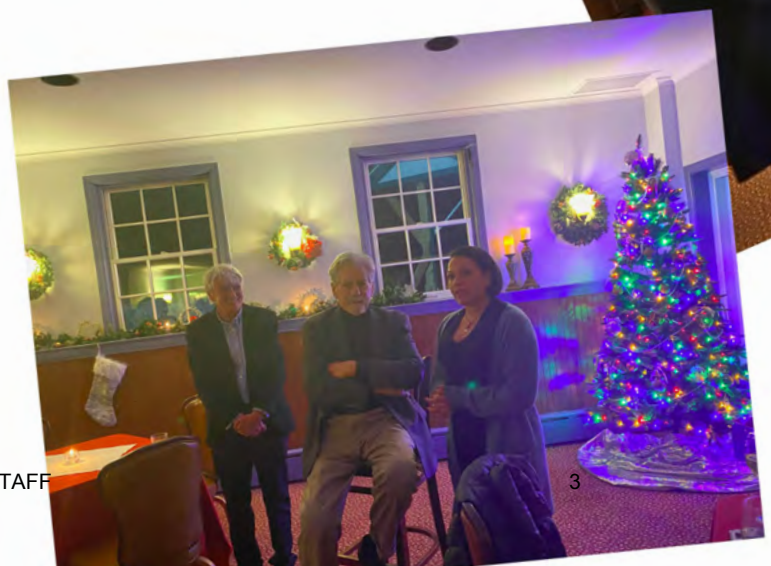


What a great evening to gather for Holiday Cheer and some enjoyable time with our colleagues. As always, the Glens Falls Country Club was the perfect setting for our festivities! Welcome to Nic Rangel, Esq. the new Executive Director of LASNNY!









by James Cooper, Esq.

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

MAGNA CARTA

Of the first seven French based Kings of England, King John, was the last, (1199-1216). All the chroniclers of his age characterized him as cruel, petty, small minded and paranoid. He lost almost all of his ancestors' Norman lands in France. A history of agreement to the French King, Philip Augustus', terms caused his nobles to use the sobriquet, "soft sword" to characterize him. John spent 2/3 of his reign living in France contesting the French Capetian dynasty trying and failing to hold the vast western half of what is modern France. When this was lost, English barons with lands remaining in France were forced to give them up or lose their English estates to the crown.[1] A sense of what we would call 'nationhood' began between them, arising from separation from the continent.

War is expensive. John taxed his subjects in every conceivable manner to prosecute it. He was an able administrator and deviously diplomatic. Creative taxation was the area of his malicious brilliance. John's unilateral taxation, cruelty, usurpations and failures in France were ultimately what caused his reign to be challenged.

Henry I, and John's father, Henry II, at their coronations had issued a charter of liberties, promising freedom for the church and to maintain peace in the land, so the first Plantagenet rulers established in a minor way subordination to the rule of law. King John's rule had many tyrannical characteristics provoking in the spring of 1215, demands by barons to reaffirm those charters which to him implied a duty to comply with ancient laws and traditions dating back to Saxon Kings. He asserted an infringement upon his divinely granted prerogatives. John's refusal prompted many powerful barons to repudiate their feudal vows of fealty to him. Active warfare began. Nobles came over to the rebels' side. They occupied London, John's capital city, and created in the process a stalemate that John was not then able to circumvent. The congress of Saxon Earls, Norman barons and high church officials at Runnymede was a conference with King John's representatives to finalize a negotiated peace. He resided in a castle nearby to evaluate proposals. For King John, *Magna Carta* was an expedient peace treaty, for the barons, a declaration of rights. The event in 1215 was arguably the beginning of England as a nation, blurring the previous cultural differences between the Normans and Anglo-Saxons.[2]

Magna Carta was unsigned by any party, but the King's seal was affixed. Scribes set about making at least thirteen sealed duplicate originals of which, four survive. It was in Latin, although there were later translations in Middle English, all of which antedate the invention of the printing press and so are in script on vellum. The original instrument is gone. The text was a narrative uninterrupted by paragraphs. In the sixteenth century one interpreter broke out paragraphs and numbered them which assumed a usefulness that has been commonly continued in versions to date.

The great charter had been negotiated by Stephen Langton, Archbishop of Canterbury, as go-between. He had been educated in Paris and was brilliant by the standards of his age, a scholar

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[1] Nobles of large landholdings

[2] England became Great Britain in 1707 when the Act of Union was ratified in the Scottish parliament making England and Scotland one nation

with liberal predispositions. Not surprisingly, the first references in *Magna Carta* limiting the King's prerogatives involved the Church. The document dealt in detail with many aspects of feudal obligations but also some day-to-day commercial and social issues. John had taxed the right to inherit baronial lands severely, by today's reckoning, in the high hundreds of thousands of dollars for large landholdings, (fees). To have court access for any legal redress an aggrieved noble had to pay to play. A noble widow had to pay a large tax for the right to remarry. John's approval of new husbands was required. He could compel remarriage to a noble of his choice. He imprisoned a noble's wife and son to starve them to death. There were numerous such oppressive outrages and taxes invented by King John that were redressed or limited by *Magna Carta*. A clause of huge significance to a later generation of Englishmen in America was that new taxes were not to be created until approved by a gathering of barons and the king, the first assertion that government should not impose taxes without agreement of the people's representatives. The name 'Parliament' became applied to such gatherings. Other restrictions on taxes, exactions, forfeitures and seizures enraged King John, famous for the reasonable face he put on for public appearances but not when his explosive anger was released in private. For his trouble, Stephen Langton was suspended by pope Innocent III because he did not act strongly enough to oppose the barons and to support John.

The original period of the charter's viable application was two months as John reneged on most implementations and sought and gained from Innocent III, a papal response nullifying its terms and excommunicating the barons as damned by God and his Apostles. John himself had been previously excommunicated for five years because he refused to accede to the Pope's choice for Archbishop of Canterbury and for his seizure of church estates. The pope had first tried arm twisting by issuing an interdict meaning that none of John's subjects could receive church sacraments which negated their heavenly aspirations. John was unaffected by the consequences to his people. To gain a diplomatic advantage, John negotiated reinstatement in good standing by ceding to the pope overlordship over England and Ireland, largely symbolic, but it turned out to be a strategic move as in doing so he became the pope's vassal and entitled to his protection. He declared his intention to lead a crusade to the Holy Land as a preemptive strategy to secure long term favor with the pope. He had no intention of crusading but tapped into Innocent's obsession to punish Islam. After Runnymede, John had credits to claim with the pope.

While negotiating *Magna Carta* terms to disgorge much of his confiscated wealth in lands and chattel seizures, the King prepared to overthrow the barons by stockpiling weapons and bringing in mercenaries from his remaining English fiefdoms on the continent. The barons, having as a condition of agreement to Magna Carta, re-sworn fealty and homage to the King, did not disarm and set about defending their southern base in London by occupying Rochester castle. John laid siege to the castle and using time tested medieval tactics captured it. Prior to a negotiated chivalrous surrender of the barons, captured knights were decapitated or mutilated. *Magna Carta* seemed dead and an affirmation of the maxim, "When you strike at a king, strike hard."

Northern barons and the Scottish King still had to be dealt with, so John with half of his army of mercenaries went north. He authorized them to despoil the lands and destroy castles and towns that were fiefdoms of the rebels. They laid waste by murder, rape, arson and pillage, so much so that surviving rebel nobles invited the French Prince Louis to invade England and become the King. John was running out of money to pay his mercenaries and to fight Louis' invasion when

in East Anglia, he fell ill and died of dysentery. A contemporary chronicler said of John, "England reeks with John's filthy deeds; the foulness of Hell is defiled by John."

King John's infant son became King Henry III. England was governed during his infancy by a regent and a council of barons. The regent was a universally respected Earl and knight, William Marshall. He was in his seventies and had served as soldier and counselor to Henry II and John. Innocent III had unexpectedly died, and there was a new pope who sent his legate to England. Marshall had the legate coronate Henry and declare that any noble who opposed Henry was excommunicated. That cut the legs out from under Louis who, after battle losses to Marshall, the English Navy and a sizable payment, was persuaded to abandon his invasion and occupation of London. Marshall caused *Magna Carta* to be revised omitting the right to rebel against the King and some other provocative clauses, and then to be reissued. For a century thereafter it became the legal touchstone in governance, reissued by several Kings.

The Wars of the Roses resulted in the Tudor dynasty. Henry VIII appointed himself head of the Church in England. His ministers had to finesse the opening clauses of *Magna Carta* that had protected the Church's freedom from the Crown. Those were ignored as *Magna Carta* lapsed into obscurity until the rise of the Stuarts and Charles I.

Charles I (1625-1649) revived royal prerogatives in effect under the earlier Plantagenet Kings and in his own way was as autocratic as King John had been, arbitrarily arresting his opponents. Parliament sought and found *Magna Carta* as precedent, largely through the arguments of the lawyer Sir Edward Coke, that as law of the land it supported their assertion of limits on the King's power. Coke said to Parliament that *Magna Carta* had earned its name, "not for the largeness, but for the weight." From that time *Magna Carta* took on an interpretation, more mystical than historically accurate. Charles I lost his head and England went through subsequent political convulsions, but the great charter had assumed hallowed status, a secular holy relic that prompted the enactment of the Petition of Right and the English Bill of Rights.

In America, the Declaration of Independence and the Bill of Rights contain paraphrases of clauses of *Magna Carta*. It is so revered that during World War II one of the original copies was stored safely in Fort Knox. The American Bar Association erected in the 1950s a monument to it at Runnymede. In 1297 Edward I reissued the amended *Magna Carta* formally incorporating it as an English statute. An original 1297 copy is stored in America's National Archives after private acquisition at auction for 21.3 million dollars. [3]

Clauses from *Magna Carta*, if not literally, certainly without ambiguity, were incorporated into the United Nations Universal Declaration of Human Rights.

Modern British Parliaments enacted statutes, (1863, 1970), to protect liberties and whittled away at *Magna Carta's* minutia as superfluous. The essential clauses associated with liberty are left as extant law in the British Roll of Statutes. These are the great charter's modern heritage cherished around the English speaking world and broadly claimed as human rights elsewhere. Here are some of the seeds that sprouted, flowered and refused to die:

¶39 No freeman shall be captured or imprisoned or disseised, (lands forfeited), or outlawed or exiled or in any way destroyed, nor will we (King speaking in third person) go against him or send against him, except by lawful judgment of his peers or by the law of the land. (due process)

[3] As with 1215 *Magna Carta* before, it was necessary to make copies for all county sheriffs.

¶40 To no one will we sell, to no one will we deny or delay, (speedy trial), right or justice.

¶12 No scutage (tax paid to buyout from feudal duty to furnish the King with a knight or armed soldiers) or other aid, (tax), is to be levied in our realm, except by the common counsel of our realm, (with exceptions for the ransom of a captive King or incident to the marriage of his first born male and female children)

¶14 And for us to have common counsel of the realm for the levying of aid [other than the three cases previously mentioned] or for the levying of scutage ...(Nobles and Clergy will be summoned). And when the summons has been made, the business shall proceed on the agreed day according to the counsel of those present even if not all of those summoned have come.

¶45 We will not appoint justices, constables, sheriffs or bailiffs other than those who know the laws of the realm and intend to keep it well.

¶15 In the future we will not grant to anyone that he may take an aid from his freemen, (except for ransom and costs incident to marriage of the first born) and for these there is to be only reasonable aid.

¶20 A free man may not be amerced (penalized) for a small offence, except according to the nature of the offence; and for a great offence he shall be amerced according to the magnitude of the offence***

¶28 No constable , or any of our bailiffs, shall take anyone's corn, (wheat) or any other chattels, unless he immediately pays for them in cash ***

¶38 No bailiff is in future to put anyone to law by his accusation alone, without trustworthy witnesses being brought forward.

¶60 All the previously mentioned customs and liberties which we have granted in our kingdom as far as we are concerned with regard to our own men, shall be observed by all men of our realm, both clergy and laity, a far as they are concerned with regard to their own men.

Next Law Day or even on the Fourth of July, stop to remember Madison and Jefferson, the other founding fathers and the influence the great charter had on their thinking. Remember those knights at Rochester castle who died horribly because they fought for the concept that royal rule had limits.

Jim Cooper
January 6, 2023

Magna Carta, the birth of liberty, (2015) Jones, Dan, Viking Press; The Historical Society of New York Courts; Kings and Queens of England (1978), Brownell, David and Knill,Henry, Bellerophon Books; Article: Magna Carta, the document that changed the course of history, (May-June 2022), Deanna O'Connor, Klinger Heritage Group, LLC; Wikipedia, King John I, Magna Carta, Wars of the Roses; YouTube-Documentary: King John Magna Carta, Treachery & Tyranny, The People Profiles

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

SUPREME COURT
STATE OF NEW YORK COUNTY OF WARREN

BOBBI JO FRYE,
Plaintiff,

--against –

EDWARD H. AKINS, and
BRUCE STEVENSON,
Individually and Doing
Business as WALT
STEVENSON EXCAVATION,
Defendants.

DECISION AND ORDER

Index No. EF2020-68403
RJI No. 56-1-2021-0077

APPEARANCES:

De Caro & Kaplen, LLP, New York City (*Michael V. Kaplen*, of counsel), for plaintiff.

Burke, Scolamiero & Hurd LLP, Albany, (*Steven V. DeBraccio*, of counsel), for defendants.

AUFFREDOU, J.

Motion by defendants for a protective order precluding plaintiff from having an observer present for her neuropsychological independent medical exam (IME) and obtaining the IME neuropsychologist's raw testing data in discovery.

The facts of this case are more fully set forth in this court's decision and order dated November 24, 2021. Such order granted plaintiff partial summary judgment on the issue of defendants' liability for injuries that she sustained when her vehicle was rear-ended by a dump truck that was owned by defendant Bruce Stevenson, individually and doing business as Walt Stevenson Excavation, and operated by defendant Edward H. Akins in the course and scope of his employment with Walt Stevenson Excavation. Plaintiff's injuries are alleged to include traumatic brain injuries, with the attendant loss of certain cognitive and occupational capabilities.

This motion comes before the court to resolve a discovery dispute that has arisen with respect to a neuropsychological IME of plaintiff. Plaintiff has agreed to undergo the IME but seeks to have an observer attend the IME with her. This observer, plaintiff's counsel attests, will be a licensed psychologist who specializes in neuropsychology and has no prior professional relationship with plaintiff, and will not interfere with the IME in any way. Plaintiff also seeks disclosure of all scoring protocols, test manuals, and raw data generated during the IME directly to her counsel, with said material to be kept confidential by counsel. Defendants, asserting that an observer would inappropriately skew the results of the IME, is unwilling to consent to the observer's attendance. Defendants also assert that they have no obligation to turn over the scoring protocols, test manuals, and raw data generated during the IME, but are nonetheless willing to disclose them to a neuropsychologist of plaintiff's choice, arguing that such disclosure must be adequate if there is no obligation to disclose the material at all in the first place. The parties being unable to bridge these gaps in their positions, defendants now move for the aforesaid protective order.

Upon consideration of the affirmation of Steven V. DeBraccio, Esq. dated July 20, 2022, with exhibits; the affidavit of Robert J. McCaffrey, Ph.D., sworn to July 19, 2022, with exhibits; the affirmation of Michael V. Kaplen, Esq. dated August 4, 2022, with exhibits; and the reply affirmation of Steven V. DeBraccio, Esq. dated August 11, 2022; oral argument having been held before the court on September 30, 2022; and the court having duly deliberated upon all the foregoing, decision is hereby rendered as follows.

In general, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). However, materials prepared by an expert "in anticipation of litigation or for trial" are exempt from disclosure, unless the party seeking

disclosure can demonstrate that it "is unable without undue hardship to obtain the substantial equivalent of the materials by other means" (CPLR 3101 [d] [2]). Moreover, this court is empowered to "deny[ ], limit[ ], condition[ ], or regulat[e]" the disclosure and use of otherwise discoverable material "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]). The court has "broad discretion in [its] supervision of expert disclosure" (*Rivera v Montefiore Med. Ctr.*, 28 NY3d 999, 1002 [2016]).

Turning first to the branch of the motion that seeks to preclude plaintiff's observer from attending the IME, plaintiff is entitled to have the observer present unless defendant makes a positive showing that the observer's presence would interfere with or otherwise impair the IME (*see Gonzalez v Red Hook Container Term., LLC*, 186 AD3d 1331, 1333 [2d Dept 2020]; *Markel v Pure Power Boot Camp*, 171 AD3d 28, 29 [1st Dept 2019]; F*lores v Vescera*, 105 AD3d 1340, 1340-1341 [4th Dept 2013]; *Lamendola v Slocum*, 148 AD2d 781, 781-782 [3d Dept 1989], *lv dismissed* 74 NY2d 714 [1989]; *see also Matter of Alexander L.*, 60 NY2d 329, 331, 336-337 [1983]). The court finds that defendant has not met this burden. The IME doctor's concerns regarding his ethical and contractual duties to keep testing methodologies and the proprietary information of test publishers in confidence are obviated by plaintiff's concession that the only observer in the room be a licensed psychologist with a specialization in neuropsychology and, it follows, the same professional obligations as the IME doctor.

Further, the court is not convinced that the observer's mere presence will impair the IME. The positions of plaintiff's expert—that the observer's presence would not affect the relationship between plaintiff and the IME doctor because injured plaintiffs already view such doctors as agents of their adversaries in litigation; that having someone there for support is likely to improve a

plaintiff's performance in testing; and the presence of the observer may help ensure that no deviations from testing protocols take place during the IME—are compelling. Similar positions were noted by the Appellate Division, First Department in their recognition of the "well established" right to have a "representative of [a plaintiff's] choice" attend an IME (*Markel*, 171 AD3d at 29-30). Accordingly, that branch of defendants' motion that is for a protective order precluding an observer from attending the IME is granted to the extent that plaintiff is precluded from having anyone other than a licensed psychologist of her choice attend the IME, said psychologist to specialize in neuropsychology and have no prior professional relationship with plaintiff; and said branch of the motion is otherwise denied.

A similar analysis applies to the issue of whether defendants would have to disclose all scoring protocols, test manuals, and raw data generated during the IME to plaintiff. Such materials are materials prepared for litigation and exempt from disclosure as such, unless the party seeking disclosure can show a substantial need for the material and that the party "is unable without undue hardship to obtain the substantial equivalent of the materials by other means" (CPLR 3101 [d] [2]; *see Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729, 732 [2d Dept 2011]; *Marazita v City of New York*, 62 Misc 3d 416, 420-421 [Sup Ct, Queens County 2018]). Assuming without deciding that the interest advanced by plaintiff—the need for meaningful cross-examination and to otherwise prepare to confront defendants' case—constitutes a substantial need, the need is satisfied by the court's permitting plaintiff's own expert to attend the IME, and defendants' offer to disclose the materials to a neuropsychologist of plaintiff's choice. The court infers in this offer the ability of such neuropsychologist to discuss and limitedly share the materials with plaintiff's counsel to the extent necessary to explain his or her expert opinion, as the offer would otherwise be a meaningless gesture. The court will not impute such cynicism to defendants or their counsel.

Rather, good faith is presumed, and the court thus finds that the disclosure offered by defendants is intended to be useful to plaintiff. Defendants' offer, so construed, adequately accommodates plaintiff's need to prepare a defense.

On the other hand, the court is convinced that preserving the confidentiality of the materials in some measure is required, and plaintiff concedes as much. Accordingly, the neuropsychologist to whom the materials is disclosed may show those portions of the materials to plaintiff's counsel as are necessary to explain his or her expert opinion but may not provide copies of the materials to counsel or anyone else without leave of court on notice to defendants; the neuropsychologist must keep the records in confidence and return them to the IME doctor at the conclusion of the litigation without retaining copies thereof.

Any arguments not specifically addressed herein have been examined and found to be without merit.

Based upon the foregoing, it is hereby

ORDERED that the motion for a protective order is granted to the extent that plaintiff is precluded from having anyone attend her IME other than a licensed psychologist of her choosing, who specializes in neuropsychology and has no prior professional relationship with her, said licensed psychologist being enjoined from interfering with the conduct of the IME in any way; and to the extent that disclosure of all scoring protocols, test manuals, and raw data generated during the IME is precluded other than to a neuropsychologist of plaintiff's choosing; and the motion is otherwise denied; and it is further

ORDERED that the neuropsychologist to whom the scoring protocols, test manuals, and raw data generated during the IME are disclosed shall keep such materials in confidence, may not provide copies of such materials to any person or entity without leave of this court on notice to

defendants, and must return said materials to the IME doctor at the conclusion of this litigation without retaining any copies thereof, but may discuss the materials with plaintiff's counsel and may show such portions of said materials or copies thereof to counsel as are necessary to explain the neuropsychologist's expert opinion during the pendency of this litigation; and it is further

ORDERED that any relief not specifically granted herein is denied.

The within constitutes the decision and order of this court.

Signed this 20th day of December 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:

Michael V. Kaplen, Esq.;
Steven V. DeBraccio, Esq.

Frye v Akins
Warren County
Index No. EF2020-68403

STATE OF NEW YORK SUPREME COURT
COUNTY OF WARREN

In the Matter of

GLENS FALLS POLICE BENEVOLENT ASSOCIATION, INC.,
Petitioner,

-against-

CITY OF GLENS FALLS,
Respondent.

DECISION, ORDER AND JUDGMENT

Index No.: EF2021-69754

APPEARANCES:

The Tuttle Law Firm, Clifton Park (*James B. Tuttle*, of counsel), for petitioner.

Ludemann & Associates, P.C., Glens Falls (*Nicole C. Fish*, of counsel), for respondent.

AUFFREDOU, J.

Petition pursuant to CPLR 7511 to vacate an arbitral award.

Petitioner is the duly recognized and exclusive bargaining representative for all police officers employed by respondent. Over the years, petitioner has negotiated a series of collective bargaining agreements (CBAs) that govern or governed the officers' terms and conditions of employment with respondent. The current agreement, at issue here, covered the period of January 1, 2020 through December 31, 2023. The immediately prior CBA covered the period of January 1, 2016 through December 31, 2019, and it appears undisputed that there was a CBA in place before that, which, as relevant here, covered a period of time encompassing the year 2014.

In 2014, respondent created the position of patrol lieutenant in its police department. Section 6.1.3 (b) of the current CBA recites that such officers are scheduled to work from 8:00 A.M. to 4:00 P.M., Monday through Friday. The CBA expressly permits respondent to alter this shift for purposes of responding to a police emergency but grants no other express, specific right

to respondent to deviate from the recited schedule. However, article 4 of the CBA ("Rights of the City") generally reserves to respondent,

> "[e]xcept as expressly limited by [other] provisions [of the CBA], all of the authority, rights and responsibilities possessed by [it] . . . , including, but not limited to the right to determine the . . . methods, means and number of personnel required for conduct of [its] programs [and] to administer the Civil Service system, including the . . . assignment . . . of employees."

In each year since the creation of the patrol lieutenant position except one year in which the position was vacant, respondent has temporarily altered, or "flexed," the patrol lieutenant's schedule, requiring him or her to work the midnight shift for a period of two-to-three weeks to cover as supervisor during the duty sergeant's absence for state-mandated training. A supervisor—meaning a sergeant, lieutenant, assistant chief or chief—must be working for all shifts.

In early 2021, Lieutenant Sean Lovelace was assigned to cover the duty sergeant's midnight shift from March 1, 2021 through March 21, 2021 while the sergeant attended mandatory state training. Petitioner unsuccessfully grieved this assignment on Lovelace's behalf to the chief of police, who denied the grievance based on the aforesaid flexing practice. The mayor thereafter affirmed the denial on the ground that filling in for the in-training duty sergeant by paying overtime to other sergeants, rather than flexing the patrol lieutenant, was cost prohibitive.

The parties ultimately proceeded to arbitration pursuant to article 13 of the CBA, at which respondent proffered uncontroverted proof of the past flexing practice. Petitioner asserted to the arbitrator that such was irrelevant, since the issue of a lieutenant's work schedule had been fully negotiated to fruition—as, it claimed, is evidenced by the recitation of the work schedules

in article 6 of the CBA—and, thus, Lovelace and petitioner were within their rights to revert to the CBA and enforce the plain terms of section 6.1.3 (b). Respondent, on the other hand, pointed to the absence of specific provision limiting its right to temporarily modify the work schedules set forth in article 6 of the CBA and cited to article 4, arguing that the broad reservation of rights quoted above included the right to flex the patrol lieutenant in order to properly conduct the operations of its police department during the duty sergeant's absence for state-mandated training. Respondent also adduced proof that the specific issue of flexing, as opposed to officers' ordinary schedules, had never been discussed during the negotiations of the current or prior CBAs and thus argued that contract reversion on such issue was unavailable.

The arbitrator held that contract reversion was unavailable to petitioner on the subject of its grievance because the flexing issue had not been negotiated to fruition. The arbitrator further found that a past practice of flexing had been established and had become a part of the CBA, and awarded denial of the grievance to respondent. In so doing, the arbitrator necessarily implicitly found that the relevant provisions of the CBA were ambiguous (*see Matter of Cazenovia Police Benevolent Assn. v Village of Cazenovia*, 53 PERB ¶ 4505 [2020] ["'where the language [of a CBA] is susceptible to more than one reasonable interpretation, extrinsic evidence, such as negotiation history and/or a past practice, is admissible to clarify the ambiguity,'" quoting *United Pub. Serv. Empl. Union v County of Columbia*, 41 PERB ¶ 3023 (2008)]).

Petitioner now seeks vacatur of the arbitrator's award on the ground that the arbitrator exceeded his power in making the award by rewriting the CBA (*see* CPLR 7511 [b] [1] [iii]). Upon the court's review of the verified petition and the exhibits attached thereto; petitioner's memorandum of law dated December 27, 2021; the verified answer; respondent's memorandum

of law and objection to the petitioner's memorandum of law dated January 30, 2022; petitioner's reply memorandum of law dated February 7, 2022; a letter from respondent's counsel in the nature of surreply, dated February 5, 2022; and a letter from petitioner's counsel in the nature of sur-surreply dated February 17, 2022; the court having heard oral argument on the petition; and the court having duly deliberated upon all the foregoing, decision is hereby rendered as follows.

"'[T]he role of the courts in addressing the disposition of disputes which have been submitted to binding arbitration pursuant to a collective bargaining agreement is limited'" (*Matter of Windsor Cent. Sch. Dist. V Windsor Teachers Assn.*, 306 AD2d 669, 670 [3d Dept 2003], *lv denied* 100 NY2d 510 [2003], quoting *Matter of New York State Nurses Assn. [Mount Sinai Hosp.]*, 275 AD2d 538, 540 [3d Dept 2000]). "A court cannot substitute its judgment for that of an arbitrator or conform the award to its sense of justice even where an arbitrator makes errors of law or fact" (*Windsor Cent. Sch. Dist.*, 306 AD2d at 670; *see Matter of Lentine v Fundaro*, 29 NY2d 382, 385-386 [1972] [arbitrators do justice; short of complete irrationality, may fit law to facts before them]). "An arbitrator's interpretation and application of the terms of a [CBA] is entitled to deference unless 'the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power'" (*Matter of New York State Dept. of Labor [Unemployment Ins. Appeal Bd.) v New York State Div. of Human Rights*, 71 AD3d 1234, 1236-1237 [3d Dept 2010], *lv denied* 15 NY3d 714 [2010], quoting *Matter of Henneberry v ING Capital Advisers, LLC*, 10 NY3d 278, 284 [2008] [internal quotation marks and citation omitted]; *see Matter of Dechamps v Sweet Home Cent. Sch. Dist.*, 158 AD2d 937, 937 [4th Dept 1990]).

Initially, neither article 13 of the CBA nor the parties' referral of this matter to the New

York State Public Employment Relations Board presents a specific limitation on the arbitrator's power to decide the relevant question presented to him—whether respondent violated the CBA when it flexed Lovelace's work schedule in March 2021. Moreover, to the extent that petitioner argues that the arbitrator's award violates public policy, the court perceives no basis for finding that the law prohibits the particular matter that the arbitrator decided in an absolute sense or that the award violates any well-defined constitutional, statutory or common law of this state, and petitioner advances no specific argument to the contrary (*see Matter of Jandrew v County of Cortland*, 84 AD3d 1616, 1618-1619 [3d Dept 2011]).

Turning to the crux of this dispute, the court does not find that the arbitrator acted irrationally in making the award. Section 6.1.3 (b) of the CBA may be rationally viewed as ambiguous as to respondent's right to flex a patrol lieutenant in light of article 4 thereof. There is no specific limitation on respondent's power to adjust officers' work schedules for short periods of time to satisfy the responsibilities of its police department, and the broad language of article 4 of the CBA may rationally be read to reserve that power to respondent. It follows that the arbitrator's resort to respondent's extrinsic evidence of past practice to interpret the meaning of the CBAs provisions with respect to flexing was appropriate. The uncontroverted evidence that a patrol lieutenant has been flexed to accommodate a duty sergeant's state-mandated training in each year in which the position of patrol lieutenant existed (except for the one year in which such position was unfilled) provides a rational basis for the arbitrator to find that the CBA affords respondent a right to flex such officer's schedule for such purpose—the arbitrator did not improperly rewrite the CBA (*see Jandrew*, 84 AD3d at 1620-1621; *Windsor*, 306 AD2d at 670; *New York State Thruway Auth. v Local 72, N.Y. State Thruway Empls.*, 115 AD2d 43, 47 [3d

Dept 1986]; *Matter of Manhattan & Bronx Surface Tr. Operating Auth. v Transport Workers Union*, 84 AD2d 749, 750-751 [2d Dept 1981]).[1] Finally, given the uncontroverted evidence that flexing has never been the subject of negotiation between the parties, the arbitrator rationally found that the flexing issue had not been specifically negotiated to fruition and rejected petitioner's contract reversion claim (*see Matter of Watertown Professional Firefighters Assn., Local 191, IAFF-NYSFFA v City of Watertown*, 47 PERB ¶ 3015 [2014]).

Arguments not specifically addressed herein are rejected or rendered academic in light of the foregoing.

Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that the petition is denied, the arbitral award is confirmed, and this proceeding is dismissed.

The within constitutes the decision, order and judgment of this court.

Signed this 22nd day of August 2022, at Lake George, New York.

ENTER:

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

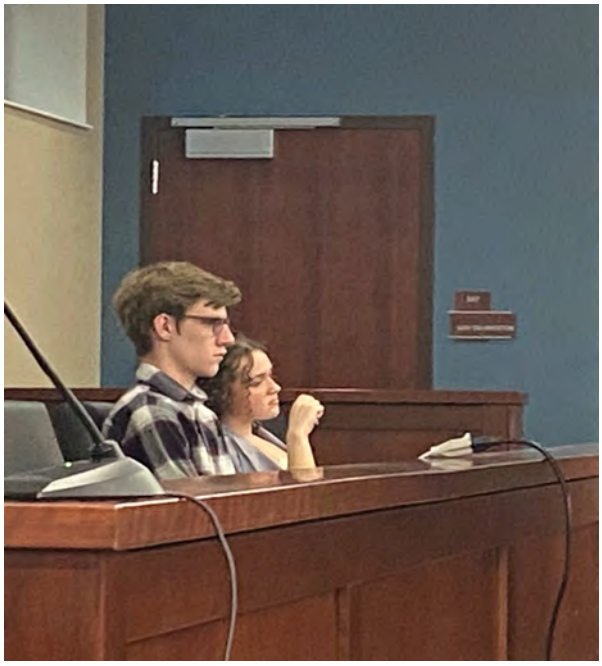
The court is uploading the decision and order to the New York State Courts Electronic Filing System (NYSCEF). Such uploading does not constitute service with notice of entry (*see* 22 NYCRR 202.5-b [h] [2].)

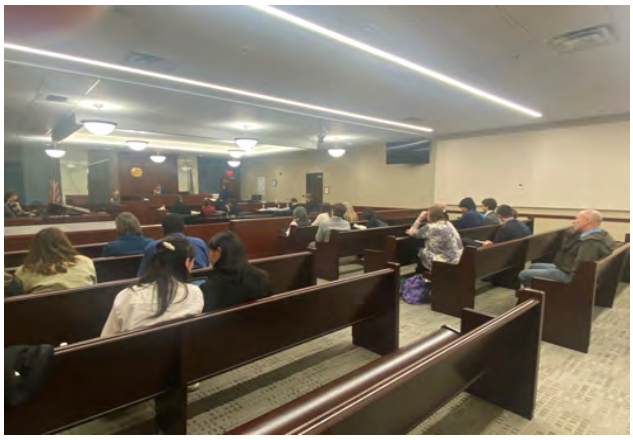
Distribution:

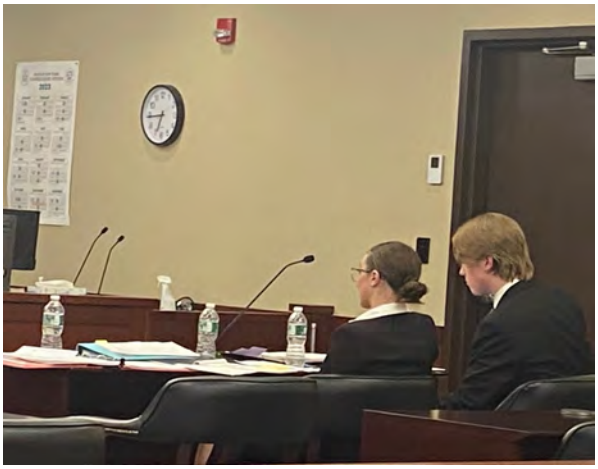
James B. Tuttle, Esq.
Nicole C. Fish, Esq.

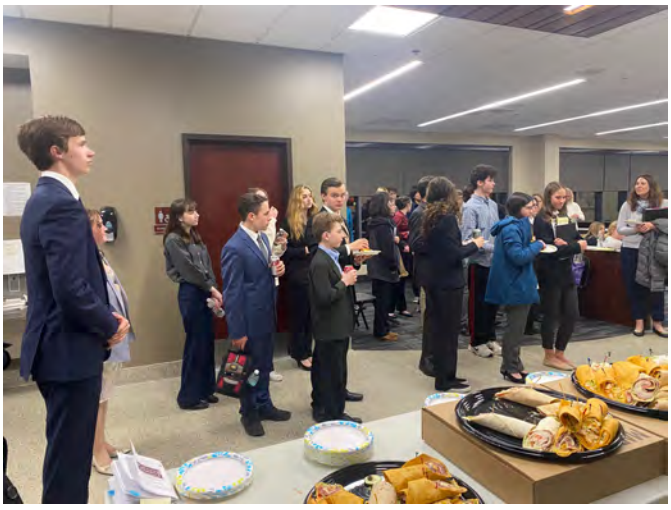
[1] The record reflects that a patrol lieutenant has not been flexed for any other purpose.

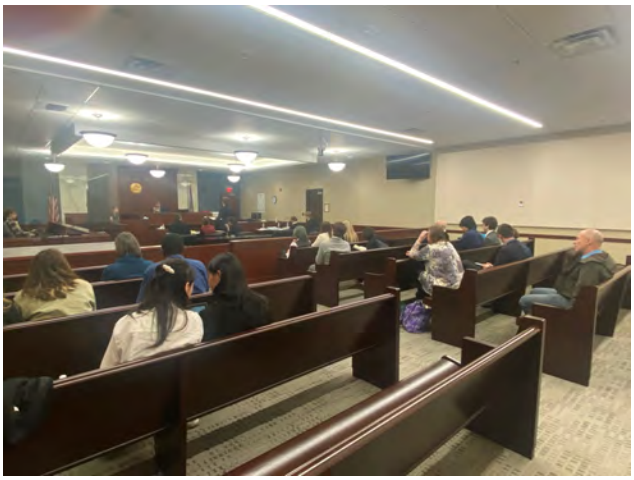
AN EVENING AT THIS YEAR'S MOCK TRIAL COMPETITION

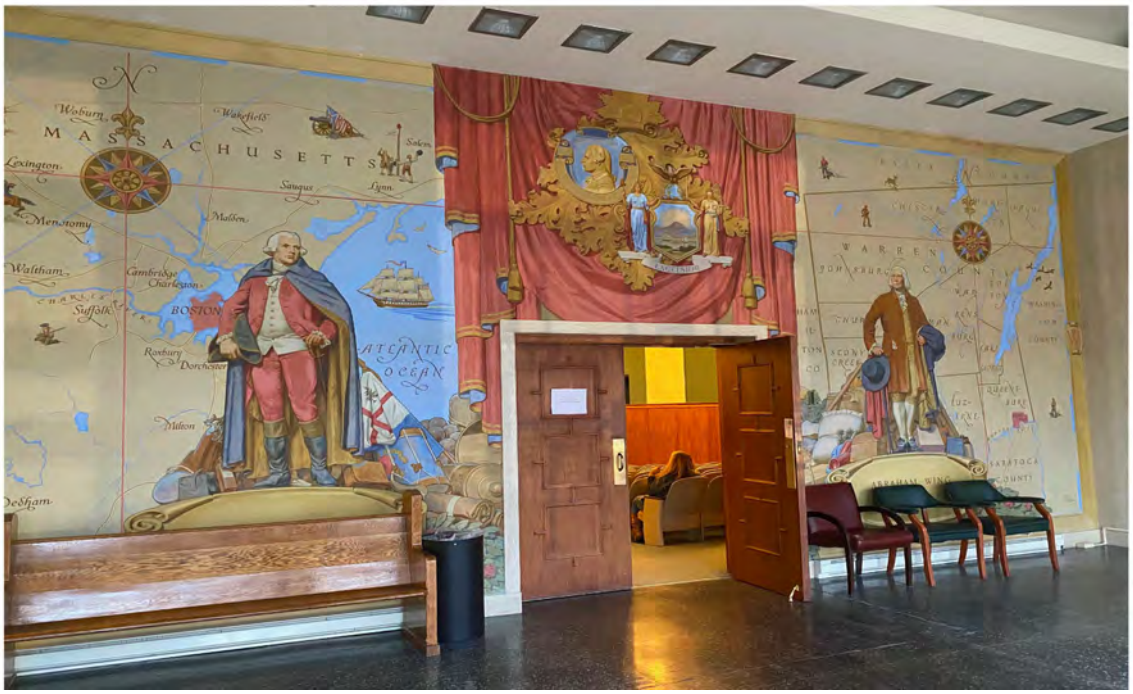








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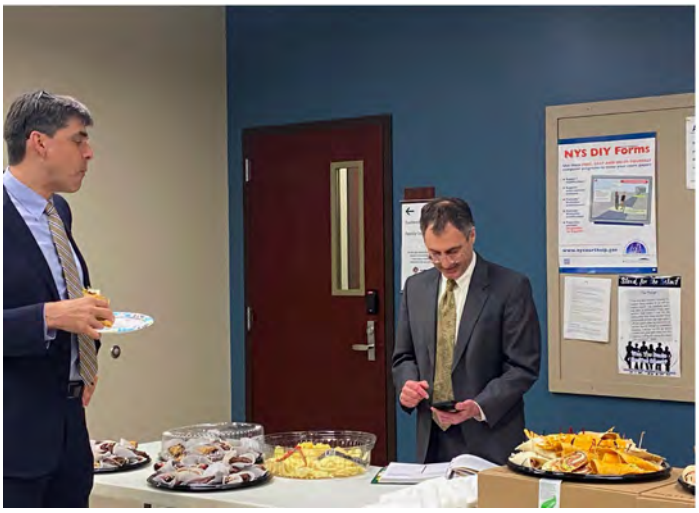
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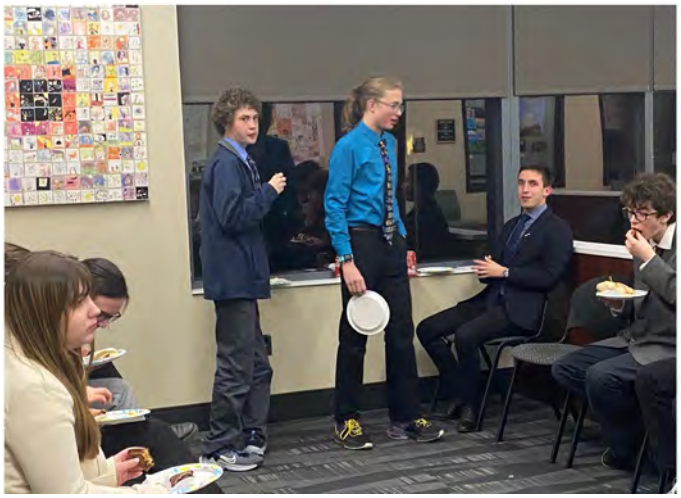

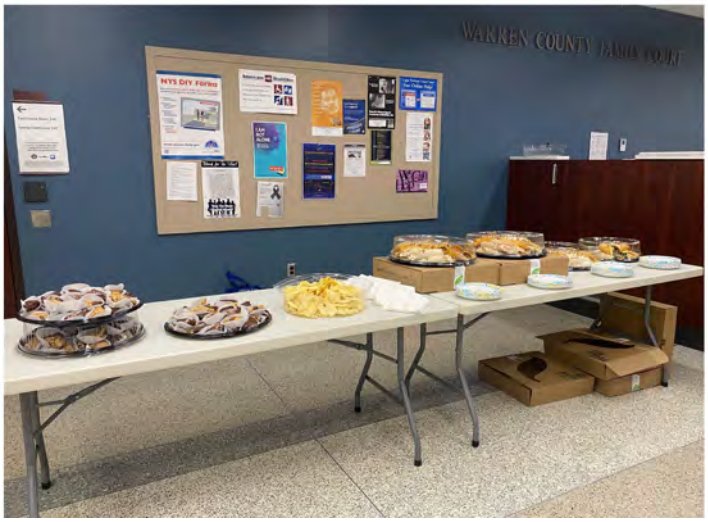
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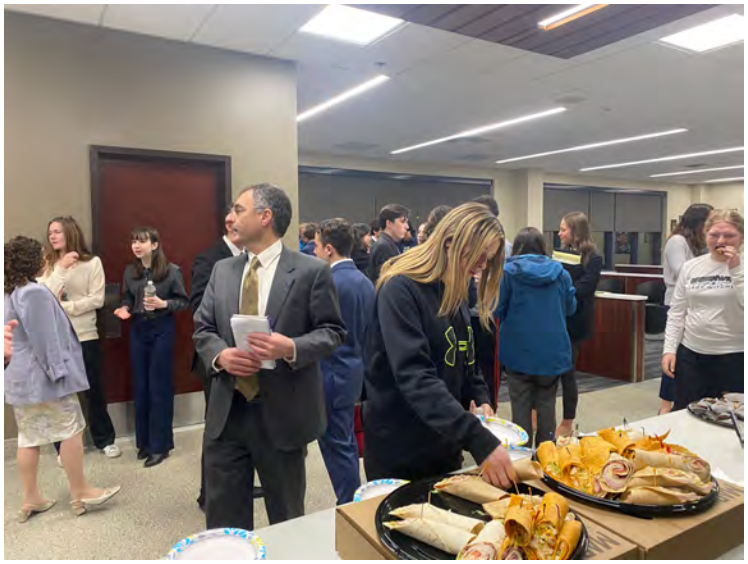

STATE OF NEW YORK SUPREME COURT
COUNTY OF WARREN

RICHIE FOSTER LEVINE,
Plaintiff,

-against-

LAKE GEORGE STEAMBOAT COMPANY, INC.,
Defendant.

DECISION AND ORDER

Index No.: 2021-69590
RJI No.: 56-1-2022-0111

APPEARANCES:

Richie Foster Levine, Hoosick Falls, plaintiff pro se.

H. Wayne Judge, Glens Falls, for defendant.

AUFFREDOU, J.

Motion by plaintiff for summary judgment on the causes of action in the complaint, and cross motion by defendant for summary judgment dismissing the complaint and attorney's fees.

Plaintiff is an individual who applied online for employment with defendant, the operator of a boardwalk restaurant and steamboat with restaurant services on Lake George, in Warren County, New York. He commenced suit by the filing of a verified complaint on or about October 28, 2021, alleging four causes of action for employment discrimination under Executive Law § 296 (15) and (16), and Correction Law §§ 752 and 753. Plaintiff's allegations center on two questions on defendant's employment application—"Have you ever been convicted of a criminal offense? (Do not include parking tickets)" and "If 'YES', please explain." Plaintiff noted four prior convictions in response to the questions—a 1997 conviction for misapplication of property that was sealed under CPL 160.50; a 1998 conviction for issuing a bad check, which was not yet sealed when plaintiff submitted the application but upon which plaintiff had been issued a certificate of relief from

disabilities;[1] a 2004 conviction for falsifying business records, second degree, upon which plaintiff had been issued a certificate of relief from disabilities; and a 2004 conviction of attempted disseminating indecent material to a minor that was neither sealed nor subject to a certificate of relief from disabilities (*see* Correction Law § 701; Penal Law §§ 110.00, 135.00, 175.05, 190.05, 235.22). Defendant claims that it never received plaintiff's employment application. It did not respond to it and plaintiff was not hired.

Plaintiff claims that the employment application questions required him to disclose his 1997 and 1998 convictions, even though they were vacated, the criminal actions that gave rise to them terminated in his favor and the records of these arrests and prosecutions sealed under CPL 160.50. From there, he argues that the questions are unlawfully discriminatory under Executive Law § 296 (16), give rise to an inference of discrimination under Executive Law § 296 (15), constitute adverse action against him and indicate that defendant did not apply the factors or exceptions set forth in Correction Law §§ 752 and 753. He now moves for summary judgment on his claims, asserting that the contents of the questions are not in dispute and their discriminatory character is evident. Defendant cross-moves for summary judgment on its affirmative defenses to the complaint, which include a claim that the complaint fails to state a cause of action, and for attorney's fees on the ground that the action is frivolous.

Upon consideration of the affidavit of Richie Foster Levine, sworn to March 29, 2022, with exhibits; an unsworn statement from Richie Foster Levine, dated March 28, 2022, that is styled an "affirmation," by which plaintiff provides copies of the complaint and answer herein;[2] plaintiff's

[1] Plaintiff submitted his application on June 12, 2021. His 1998 conviction was not dismissed and sealed under CPL 160.50 until August 4, 2021.

[2] Plaintiff is apparently a paralegal but there is no evidence, and plaintiff does not expressly claim, that he is authorized to give a sworn statement by affirmation instead of affidavit (*see* CPLR 2106 [a]). There being no

memorandum of law in support of motion for summary judgment, dated March 28, 2022; the affirmation of H. Wayne Judge, Esq. in support of attorney's fees, dated April 29, 2022; the affirmation of H. Wayne Judge, Esq. in opposition to plaintiff's motion for summary judgment and in support of defendant's cross motion for summary judgment, dated April 2022, with exhibit; the affidavit of Luther Dow, sworn to April 27, 2022; the affidavit of Kim Chapman, sworn to January 27, 2022; the affidavit of William Wilson, sworn to April 19, 2022; the affidavit of Hall Neimer, sworn to April 27, 2022; the affidavit of Tammi L. Blake, sworn to April 27, 2022, with exhibit; the unsworn "affirmation" of Richie Foster Levine in opposition to defendant's motion in support of attorney's fees, dated May 6, 2022;[3] and the unsworn "affirmation" of Richie Foster Levine in reply to defendant's affirmation for plaintiff's motion for summary judgment and in opposition to defendant's cross motion for summary judgment, dated May 6, 2022, with exhibits;[4] and the court having duly deliberated upon the foregoing, decision is hereby rendered as follows.

All of plaintiff's claims depend upon a finding that the employment application questions at issue are facially discriminatory and, therefore, also give rise to an inference that defendant took unlawfully discriminatory adverse action upon plaintiff's application for employment. There can be no dispute as to the contents of the application questions and, since their meaning is readily discernable from their plain language and the governing law, summary disposition of the claims in the complaint is appropriate (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Van Alstine v Padula*, 228 AD2d 909, 910 [3d Dept 1996], *lv dismissed* 89 NY2d 858 [1996]; *see also*

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apparent dispute that the copies of the complaint and answer that are annexed to the purported affirmation are accurate, and the provision of such pleadings being the only matter addressed in the purported affirmation, the court will overlook this defect and consider the pleadings provided in connection with both the motion and cross-motion (*see* CPLR 2001; *see also* CPLR 3212 [b]; *Deridder v Omni Electro-Motive Co.*, 195 AD3d 1102, 1103 [3d Dept 2021]).

[3] *See* footnote 2, *supra*.

American Pharm. Servs. Inc. v Wing, 259 AD2d 923, 924 [3d Dept 1999] [employing "common sense construction" of response to question on Medicaid provider application], *lv denied* 94 NY2d 751 [1999]).

Executive Law § 296 (16) declares it an unlawful discriminatory practice to ask a job applicant about or take adverse action upon, among other things, "any arrest or criminal accusation . . . which was followed by a termination of that criminal action . . . in favor of" the applicant. The employment application questions, by their terms, ask only whether an applicant has a past criminal conviction and, if so, for details about such. Nothing in the questions' text justifies a finding that they required disclosure of convictions that have been sealed pursuant to CPL 160.50, as plaintiff asserts. This finding is supported, if not compelled, by the law that is applicable to this issue, of which this court has good reason to believe plaintiff is aware. In particular, CPL 160.60 declares that, "[u]pon the termination of a criminal action . . . in favor of" an accused, which are the grounds upon which plaintiff's 1997 conviction and, later, his 1998 conviction were sealed, the entire "arrest and prosecution shall be deemed a nullity and the [accused] shall be restored, in contemplation of law, to the status he [or she] occupied before the arrest and prosecution." Notably, CPL 160.60 does not speak in terms of "conviction," likely because the termination of a criminal action in favor of an accused does not result in a conviction, except in discrete circumstances related to marihuana reform that are not applicable here (*see* CPL 160.50 [3]).[5] CPL 160.60 goes on to relieve persons in whose favor criminal actions have terminated of any onus to disclose information related to the "arrest and

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[4] *See* footnote 2, *supra*.

[5] Indeed, the history of plaintiff's 1997 and 1998 criminal actions is instructive. To be sure, he was initially convicted of crimes related to those arrests. However, those convictions were later vacated under CPL 440.10, upon which the convictions ceased to exist, the actions were restored to their pre-judgment status, and the charges thereafter dismissed, after which it could not be said that plaintiff had any criminal conviction related to his 1997 or 1998 arrests (see CPL 440.10 [4]-[9]).

prosecution." Executive Law § 296 (16) does the same, again speaking in terms of "arrest or criminal accusation" in cases that concluded by "termination of [the] criminal action . . . in favor of" an accused. In view of the foregoing, the court declines to read the simple, unambiguous and, in the court's reckoning, standard questions on defendant's employment application as seeking information that they do not seek by their plain terms.[6] Plaintiff therefore fails to carry his initial burden on his summary judgment motion on the first cause of action—his Executive Law § 296 (16) claim—to the extent that it alleges that defendant's including the subject questions on its employment application constituted an unlawful discriminatory practice.

Plaintiff's Executive Law § 296 (16) claim is twofold, however, in that he also alleges that defendant took action that was adverse to him on the basis of the 1997 and 1998 arrests and prosecutions. As noted in footnote 1, *supra*, plaintiff had a conviction for issuing a bad check that was not vacated and sealed until after he applied for work with defendant. As such, the court reads plaintiff's Executive Law § 296 (16) adverse action claim in the first cause of action as pertaining only to the 1997 arrest and prosecution, and his Executive Law § 295 (15) denial of employment claim—his second cause of action—as pertaining to the 1998 conviction that was in place when he applied for work and the 2004 convictions which remain in place (*compare* Executive Law § 296 [15] *with* [16]; *see Perez v New York State Human Rights Appeal Bd.*, 71 AD2d 150, 152-153 [3d Dept 1979, Herlihy, J., concurring], *lv denied* 49 NY2d 702 [1980]; *People v Doe*, 52 Misc 2d 656, 656-657 [Nassau Dist Ct 1967]).

Executive Law § 296 (15) declares it an unlawful discriminatory practice to deny a person

[6] Plaintiff's reliance on *Holihan v Limandri* (2013 NY Slip Op 31413 [U] [Sup Ct, NY County 2013]) for the proposition that the application questions must be found to be unlawfully discriminatory because they are not accompanied by a notice that an applicant need not disclose any material that was sealed by law is misplaced. That decision does not stand for that proposition. To the extent that it does, it is from a court of coordinate jurisdiction

employment by reason of a prior criminal conviction if the denial is in violation of Correction Law article 23-A. In turn, Correction Law § 752—the subject of plaintiff's third cause of action—proscribes such conduct unless the prior conviction has a direct relationship to the employment sought or granting employment would endanger a specific person or the general public. Correction Law § 753—the subject of plaintiff's fourth and final cause of action—sets forth eight factors to be considered when an employer makes a determination under Correction Law § 752 and states that a certificate of relief from disabilities "creates a presumption of rehabilitation" in regard to the crime to which it pertains.

Insofar as "liability under [Executive Law §] 296 (15) arises only upon a violation of [Correction Law] article 23-A," plaintiff's third and fourth causes of action should be dismissed as duplicative of his second cause of action and subsumed therein, and the court shall consider plaintiff's arguments in support of his third and fourth causes of action in connection with his second cause of action (*Griffin v Sirva, Inc.*, 29 NY3d 174, 182 [2017]; *see* Executive Law § 296 [15]). To establish his claim of unlawful discrimination, plaintiff was required to show that he was a member of a protected class—here, a person with one or more prior convictions covered under Executive Law § 296 (15) or a person in whose favor a criminal action was terminated covered under Executive Law § 296 (16)—he was qualified for the position(s) sought, he was not hired and the failure to hire was under circumstances from which an inference of discrimination may be drawn (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]; *Godbolt v Verizon N.Y. Inc.*, 2013 NY Slip Op 30100 [U], *5-6 [Sup Ct, NY County 2013], *affd* 115 AD3d 493 [1st Dept 2014], *lv denied* 24 NY3d 901 [2014]).

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and this court declines to follow it.

Plaintiff asserts that defendant unlawfully discriminated against him by failing to consider the factors in Correction Law § 753; refusing to hire him because of his sealed conviction; and/or refusing to hire him because of one or more of his three convictions, to which, he avers, neither exception set forth in Correction Law § 752 applies. However, he fails to allege that any refusal to hire him was under circumstances that would give rise to an inference of discrimination. Certainly, the mere fact that he was not hired, without more, cannot give rise to such inference. Plaintiff points primarily to the application questions as evidence that defendant's hiring practices were discriminatory, but that argument fails upon the court's analysis of the questions' character, above. Defendant's supposedly having removed the questions about which plaintiff complains from its employment application form is not an admission that the questions were discriminatory, as plaintiff contends. Nor does the court find that defendant's failure to respond to plaintiff's request under Correction Law § 754 for "a written statement setting forth the reasons for [the] denial" of employment evinces that it unlawfully discriminated against plaintiff in hiring. Plaintiff did not submit that request to defendant until February 7, 2022, several months after commencing this action and well after defendant explained in its written, verified answer that it did not hire him because it never received his application. Plaintiff therefore fails to carry his initial burden to establish entitlement to summary judgment on the balance of his complaint and his motion should be denied.

Turning to the cross-motion, defendant carried its initial burden by establishing that it never received plaintiff's application and could not, therefore, have refused him employment for unlawfully discriminatory reasons. It has provided five affidavits to that effect from its personnel, and other evidence intended to demonstrate that plaintiff never actually submitted an application. In opposition, plaintiff points once again to the text of the application questions, defendant's

modification of the employment application and defendant's failure to provide him a Correction Law § 754 statement. As noted, these circumstances do not give rise to an inference of unlawful discrimination, and thus do not create a question of fact as to the propriety of defendant's reasons for not hiring plaintiff (*see Eastern Greyhoud Lines Div. of Greyhound Lines, Inc. v New York State Div. of Human Rights*, 27 NY2d 279, 283 [1970] [must show "employment decision was in fact actuated by discrimination"]). In the absence of such circumstances, plaintiff's assertions that defendant failed to consider the factors in Correction Law § 752 or refused him employment because of the sealed conviction that he gratuitously reported and/or the prior convictions that he was bound to report are conjecture.[7] As such, the cross motion should be granted to the extent that it seeks dismissal of the complaint.

Finally, the court finds that plaintiff's claims, though tenuous, are not frivolous within the meaning of Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (a) and defendant's cross motion is, accordingly, denied to the extent that it seeks an award of attorney's fees (*see He v Realty USA*, 131 AD3d 1336, 1340 [3d Dept 2014], *lv dismissed and denied* 25 NY3d 1018 [2015]).

Arguments not specifically addressed herein have been examined and found to be without merit or rendered academic by the holding herein. Based upon the foregoing, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendant's cross motion is granted to the extent indicated herein and otherwise denied; and it is further

[7] Though not central to this decision, it seems to the court that plaintiff's felony conviction for attempted disseminating indecent material to minors might properly trigger either of the exceptions set out in Correction Law § 752 (1) and (2). Notably, this conviction is not subject to a certificate of relief from disabilities and plaintiff does not appear to complain about unlawful employment discrimination on the basis of this conviction.

ORDERED that the complaint and this action are dismissed.

The within constitutes the decision and order of this court.

Signed this 13th day of September 2022, at Lake George, New York.

ENTER:

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

The court is filing the original decision in the Warren County Clerk's Office. The court is also providing both counsel with a copy of the decision and order; such delivery does not constitute service with notice of entry.

Distribution:

Richie Foster Levine,
H. Wayne Judge, Esq.

Levine v Lake George Steamboat Co. Inc.
Warren County
Index No. 2021-69590

STATE OF NEW YORK SUPREME COURT
COUNTY OF WARREN

VILONA T. MASTBETH,
Plaintiff,

-against-

DERRICK E. SHIEL, as Executor of the Estate of RICHARD E. SHIEL,
Defendant.

DECISION, ORDER AND JUDGMENT

Index No.: 2006-48121
RJI No.: 56-1-2006-0346

APPEARANCES:

Harp Law Office, Clifton Park (*Kimberly A. Harp*, of counsel), for plaintiff.

Stafford, Carr & McNally, P.C., Lake George (*Nathan Hall*, of counsel), for defendant.

AUFFREDOU, J.

The parties to this litigation own neighboring, but not adjacent, properties on Thomas Mountain in the Town of Lake Luzerne, Warren County, New York, both of which are accessed by and along a private roadway known as Griffin Road. It branches in a generally northerly direction off a public highway called Old Stage Road and runs in a generally north-south direction to and from the parties' properties, among others. Neither party's property has frontage on a public street.

Defendant Derrick E. Shiel, as executor of the estate of Richard Shiel (hereinafter "defendant") is the owner of a certain piece of real property located at 254 Griffin Road (hereinafter, "the Shiel parcel"). Richard Shiel (hereinafter "Shiel") purchased the Shiel parcel from G. Judson Kilmer (hereinafter "Kilmer") on October 2, 1998. Kilmer, now deceased, owned the property from January 18, 1991 to October 2, 1998. He took title from George D. McGowan, who owned the property from January 4, 1984 to January 18, 1991.

Plaintiff Vilona T. Mastbeth (hereinafter "plaintiff") is the owner of two contiguous parcels lying somewhat to the south of the Shiel parcel on Griffin Road (hereinafter, collectively, "the Mastbeth parcels"), which she purchased with her husband, Joseph Mastbeth.[1] The southernmost Mastbeth parcel (hereinafter "the lower Mastbeth parcel") was the first that plaintiff acquired, having taken title on August 11, 1989. She later unified title to the Mastbeth parcels by the purchase of the northernmost Mastbeth parcel (hereinafter "the upper Mastbeth parcel") on June 10, 1991. Plaintiff's use of these lands and a cabin situated on the upper Mastbeth parcel is largely seasonal.

Griffin Road, as it proceeds from Old Stage Road, runs along the boundaries of certain properties that lay to the south of the Mastbeth parcels, proceeds along the easterly boundary of the lower Mastbeth parcel, then through the southeasterly corner of the upper Mastbeth parcel and beyond, through certain other parcels and, ultimately, as relevant here, to the Shiel parcel, allowing access to the Shiel parcel and the others that lay between it and the Mastbeth parcels. An easement agreement executed in December 1986 by the then-owners of the lower Mastbeth parcel and the parcels to its south over which Griffin Road proceeds granted each other rights of ingress and egress on Griffin Road over their respective lands, which rights were appurtenant to and ran with title to each affected parcel. Shiel's predecessor in title was not a party to this agreement and his parcel was neither benefited nor burdened by it.

Nonetheless, Shiel used Griffin Road for ingress and egress to the Shiel parcel from the time he took title to, as relevant here, May 2004, when the events at issue here occurred. In May 2004, the plaintiff and her son, Cory Mastbeth, attempted to access their property for the first time since the preceding winter, but were unable to due to the condition of Griffin Road. Beginning at the southerly

[1] Joseph Mastbeth passed away prior to the events that gave rise to this litigation, leaving plaintiff as the sole surviving tenant by the entireties of the Mastbeth parcels.

border of the lower Mastbeth parcel and extending up through the upper Mastbeth parcel—a distance of approximately 1500 feet—Griffin Road was dug up and impassable. Ditches were dug on either side of the road, dirt and large rocks were piled in the middle, and many trees were down on both sides.

Plaintiff commenced this action in 2006 against Shiel and several other owners of parcels to the north of the Mastbeth parcels. Through various pretrial proceedings, the action was discontinued or dismissed against all other defendants but Shiel.[2] Plaintiff's third amended complaint asserts four causes of action against Shiel, alleging trespass upon Griffin Road, injury to Griffin Road, trespass upon the Mastbeth parcels and injury to the Mastbeth parcels. Shiel's answer to the third amended complaint asserted three counterclaims, alleging a public easement by use over Griffin Road, that he possessed a private easement over Griffin Road by prescription, and that he sustained damages as a result of plaintiff's interference with his use of the roadway.

Trial of the action commenced on February 4, 2019 and was continued intermittently over approximately the next year, on February 5, 2019, February 6, 2019, January 8, 2020 and March 2, 2020. During the earlier part of trial, certain statements that Shiel allegedly made to plaintiff and her son were admitted as party statements on the presumption that Shiel would later have the opportunity to testify and rebut or otherwise respond to such evidence. However, Shiel passed away during the course of trial. The executor of his estate was substituted as defendant herein, and Shiel's prior deposition testimony was admitted into evidence on stipulation.

[2] The court's record does not reveal how former defendant Harold Hisnay (hereinafter Hisnay) was released from the action. No order or stipulation appears in the court's file on this now-16-year-old case, in which the action was dismissed or discontinued against Hisnay. However, counsel to plaintiff has advised the court by phone and email that she and her client have long understood that Hisnay is no longer a party to the action. As such, the court will treat these advisements as a statement of discontinuance of the action as against Hisnay. Alternatively, they are acknowledgements that plaintiff's claims against Hisnay have been abandoned. In any case, to the extent necessary,

During the continuation of trial after the substitution, counsel for defendant argued that the evidence of Sheil's statements should be stricken from the record under the Dead Man's Statute (*see* CPLR 4519). The court reserved on that decision and the parties submitted posttrial affirmations on the issue. The court also reserved decision on, among other things, plaintiff's objections to defendant's final witness, Roger Saheim (hereinafter "Saheim"), the owner of an excavation and property management company, and the admission of defendant's exhibits JJ and KK—estimates for road repair, one of which was from Saheim—on the ground that the estimates and defendant's intent to call Saheim to the stand were belatedly disclosed. Plaintiff also objected to defendant's exhibits JJ and KK on foundation and hearsay grounds. The court reserved on that objection as well.

At the close of proof, defendant withdrew the counterclaim for a public easement by use but moved posttrial to amend the answer to the third amended complaint to assert a counterclaim sounding in laches. That motion is fully submitted. The parties have each furnished the court with proposed findings of fact and conclusions of law. The court now makes the following findings of fact and conclusion of law; and decision upon the action, of the posttrial issues and of the issues upon which the court reserved at trial is hereby rendered.

Turning first to defendant's counterclaim for a prescriptive easement over Griffin Road, such an easement "is established where a party demonstrates, 'by clear and convincing evidence, that the use of the servient property was open, notorious, continuous, hostile and under a claim of right for the requisite 10-year period'" (*Burpoe v McCormick*, 190 AD3d 1070, 1070 [3d Dept 2021], quoting *Allen v Mastrianni*, 2 AD3d 1023, 1024 [3d Dept 2003]). The court specifically credits the testimony of George D. McGowan (hereinafter "McGowan"), predecessor in title to Shiel and former head of

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the court will order the complaint dismissed as against Hisnay in this decision, order and judgment.

the Warren County Soil and Water Conservation District, because his testimony flowed logically and cogently, was impaired by no ostensible bias and was meaningfully corroborated by the testimony of other witnesses. McGowan testified that Griffin Road ran all the way up to the Shiel parcel when he purchased it, and that he used the roadway openly, continuously and without permission from plaintiff, her husband or her predecessors in title for the entire period of his ownership, a term of six years, including trucking logging equipment along the road and performing occasional road maintenance on it. He further stated that Griffin Road was approximately 20 feet wide before May 2004, the road was the only means of accessing the upper parcels, and the numerous owners of the northern parcels used the road to access their land.

McGowan also testified to his long-time friendship with Kilmer, his successor in title and Shiel's immediate predecessor in title. McGowan stated that Kilmer accessed the property via Griffin Road, and that McGowan continued to use Griffin Road to access the property occasionally as Kilmer's guest after selling to him, in order to hunt it. McGowan testified that Kilmer logged the property quickly after the sale. Although plaintiff proved that Kilmer eventually asked her permission to travel Griffin Road to lumber the property in 1996, Kilmer had already owned the Shiel parcel and used Griffin Road to access it in a usual and customary manner for five years by the time such permission was granted. Tacked to McGowan's use, the prescriptive period for an easement of ingress and egress over Griffin Road had already run before Shiel took title. Accordingly, the court finds that defendant has substantiated his counterclaim for an easement by prescription over Griffin Road.

That said, and while there was some evidence submitted at trial to show that plaintiff or her agents interfered with Shiel's use of the roadway, the court heard no evidence to establish that any

damages were suffered thereby or, at least, evidence from which any damages could be valued on other than a speculative basis (*see Wfe Ventures v Gbd Like Placid*, 197 AD3d 824, 834 [3d Dept 2021]). As such, the counterclaim for damages for interference with the right of way must fail. Finally, defendant's motion to amend the answer to include a counterclaim for laches is rendered academic by the foregoing and is denied for that reason.

Turning, then, to plaintiff's causes of action for trespass and injury to Griffin Road and the Mastbeth parcels, the court credits plaintiff's evidence and testimony regarding the condition of the road as she and her son discovered it in May 2004. Plaintiff's photographic evidence depicts the roadway in the condition aforesaid, which even defendant's expert described as impassible. The court also credits the testimony that the road was widened and that portions of the Mastbeth parcels that were not historically within the bounds of the easement were damaged thereby.

The court notes that its finding that Shiel had a right of way over Griffin Road does not preclude a finding that he trespassed upon Griffin Road. Assuming, without deciding, that Shiel's prescriptive rights included some reasonable right to maintain the road, placing Griffin Road in the condition in which it was found in May 2004, which prevented plaintiff from accessing her property for approximately six months, far exceeded any right to maintenance that Shiel had (*see Bloomingdales, Inc. v New York City Tr. Auth.*, 52 AD35 120, 124 [1st Dept 2008], *affd* 13 NY3d 61 [2009]; *Bogan v Town of Mt. Pleasant*, 278 AD2d 264, 264 [2d Dept 2000], *lv dismissed* 97 NY2d 638 [2001]). This observation, however, merely brings the central issue on the trespass and injury causes of action into focus—that is, whether Shiel is the person who dug up Griffin Road in or around May 2004.

The issue of Shiel's identity as the person who dug up the roadway was a matter of

significant contest at trial and is the issue to which the parties' posttrial submission regarding the Dead Man's Statute pertain. On review of all the proof that was duly admitted at trial on this issue, the court finds that plaintiff adequately proved, directly and circumstantially, Shiel's identity as the person who dug up Griffin Road, and does so without resort to the statements that defendant alleges are precluded by the Dead Man's Statute, which are essentially Shiel's admissions to plaintiff and her son that he dug up the road. A ruling on the parties' Dead Man's Statute arguments being unnecessary to the court's disposition of the issue of Shiel's identity, the court finds the question academic and renders no opinion on it.

Plaintiff admitted several photographs of a man on one excavation machine or another, ostensibly performing work on the relevant portion of Griffin Road. Although these photographs were not admitted for the purpose of proving that the man on the machines was Shiel, Cory Mastbeth was able to identify the machines as belonging to Shiel and testified credibly to his basis of knowledge regarding same. The court further credits Cory Mastbeth's testimony that Shiel's backhoe was on plaintiff's property in the area of the dug-up roadway in May 2004. In particular, the court credits his ability to discern a backhoe belonging to Shiel's brother, who owns a parcel to the south of the Mastbeth parcels, from Shiel's backhoe by noting (1) that the backhoes have different style buckets on the ends of their arms, and (2) the presence of the brother's backhoe on the brother's property at that same time. Finally, the court credits Cory Mastbeth's testimony regarding the last of the photographs that were admitted, which the court, after hearing the parties' arguments about same, admitted for the purpose of proving Shiel's identity as the person on the machine depicted therein. The court notes a motive for Shiel to have placed Griffin Road in the condition in which it was found in May 2004 that is evident from the proof—a need to improve access to his home on his parcel. The

court considers this motive alongside Shiel's somewhat unique opportunity to dig up Griffin Road—his ownership of machines that are used for excavation, and the fact that he lived at his parcel year-round; that is, at times when plaintiff and her family were not present to witness his activities on the Mastbeth parcels. Upon all the foregoing proof, the court finds that, in or around May 2004, Shiel used the machines that he owned to attempt maintenance on Griffin Road for the purpose stated, causing the damage to the road and the Mastbeth parcels of which plaintiff complains.

Accordingly, the court must now turn to an assessment of what damages, if any, are due to plaintiff. Preliminarily, the court overrules plaintiff's objection to the admission of the testimony of Roger Saheim and defendant's exhibits JJ and KK on the ground of belated disclosure (*see Chase v OHM, LLC*, 75 AD3d 1031, 1034 [3d Dept 2010]; *Alber v State of New York*, 252 AD2d 856, 857 [3d Dept 1998]). Defendant's need to fill evidentiary gaps left by Shiel's midtrial death was an adequate explanation upon which to find that the belated disclosure of the exhibits was not willful. The record discloses that the exhibits were disclosed weeks before they were proffered at trial, and their disclosure signaled the likelihood that defendant would call one or more experts to the stand to authenticate or explain the estimates. Saheim was not called to the stand until two months after defendant's exhibits JJ and KK were first proffered during defendant's testimony. Any surprise or prejudice to plaintiff was minimal. She had an adequate opportunity to confront Saheim and, notably, declined an opportunity to recall one or more of her expert witnesses to rebut his testimony or the contents of the estimates.

Defendant's exhibit KK must nonetheless be ruled inadmissible as hearsay and plaintiff's objection to that exhibit on that ground is sustained. Plaintiff's objection to defendant's exhibit JJ on authentication and hearsay grounds, upon which the court reserved during defendant's testimony,

were obviated by Saheim's testimony. That objection is overruled and defendant's exhibit JJ is received for consideration by the court.

Plaintiff seeks damages adequate to compensate her for Shiel's trespasses to and interference with Griffin Road and the portions of the Mastbeth parcels that are not within the easement but were impacted by Shiel's road maintenance efforts. She has, however, proffered no evidence that would permit the court to declare such damages in other than speculative terms (*see Wfe Ventures*, 197 AD3d at 834). Similarly, plaintiff offered nothing at trial that would allow the court to value the loss of her use of the Mastbeth parcels and the cabin that she maintains on them (*see id.*). As such, the causes of action seeking damages on these grounds must fail.

Plaintiff's claim for stumpage damages under RPAPL 861, which arises from Shiel's trespass to her property and injury to trees thereon is similarly inadequately proven. That is, while the trial proof makes clear that a number of small trees were knocked down in the course of Shiel's road maintenance efforts, plaintiff offers only speculation as to how many were so damaged. Plaintiff presented no testimony from a forester or similar expert who might offer a scientific opinion about the number of trees that would be found in the damaged area, and Cory Mastbeth's testimony that approximately 300 trees were downed is insufficiently definite proof upon which to base an award of damages (*cf. St. George's Operating & Improvement Co., Inc. v Wilson*, 81 AD3d 632, 632 [2d Dept 2011]).[3] Cory Mastbeth did not testify that he counted the trees; rather he essentially guessed at the number of trees that he saw downed. His testimony is also unclear as to whether his estimate included trees that were downed on the easterly side of Griffin Road across from the lower Mastbeth parcel, which property does not belong to plaintiff. Finally, upon review of plaintiff's photographic

[3] Plaintiff's exhibit 44 (Stumpage Price Report for Winter 2012) is general information provided by the New York State Department of Environmental Conservation and substantiates neither the number, density or species of the

evidence, the court finds that it does not support Cory Mastbeth's estimate that 300 trees were destroyed.

The court now turns to plaintiff's claim for damages for Shiel's injury to Griffin Road and the Mastbeth parcels, to return these areas to the condition in which they existed before Sheil's road maintenance efforts. It is clear from the proof that the roadway is no longer in the condition in which it was found in May 2004—it is more or less passable by all accounts. The parties' evidence and testimony, however, present divergent positions on whether it is the same or worse than it was before Shiel's intervention. For the reasons that follow, however, the court needs not resolve this dispute.

The parties offered three cost estimates for the work necessary to return the road to the condition in which it existed before Shiel dug it up—one from plaintiff and two from defendant. Only one of defendant's estimates was received in evidence, defendant's exhibit KK having been ruled inadmissible above. The estimate from plaintiff's expert, Harold Way (hereinafter "Way") (plaintiff's exhibit 76) lists a total job cost of $79,550. However, plaintiff's proof established that Way's estimate was to place the 1500 feet of Griffin Road that runs along and through the Mastbeth parcels in the same condition as the portion of that road that runs from Old Stage Road to the southerly border of the lower Mastbeth parcel. Sometime in 2002, Shiel's brother, Robert Shiel, who owns a parcel immediately south of the Mastbeth parcels, undertook to repair and improve Griffin Road from Old Stage Road to the southerly border of the Mastbeth parcels, widening it and improving passage over that portion of the roadway. All the proof before the court demonstrates that, running north from the southerly border of the lower Mastbeth parcel, Griffin Road was never in as good a condition as Robert Shiel had placed it to the south thereof. It was neither as wide nor as well

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trees that were removed herein.

graded or drained. As such, the court accepts defendant's argument that the Way estimate is an improper measure of damages for the work required to return Griffin Road to the condition in which it existed before Shiel's road maintenance, as such would result in a windfall to plaintiff, compensating her for the loss of road conditions that did not exist when Shiel damaged Griffin Way.

Saheim's testimony established that his estimate (defendant's exhibit JJ) suffers the same impairment. In addition, Saheim testified that the estimate was for work to be done at cost. Thus, this estimate also cannot be said to be the correct measure of damages to compensate plaintiff for the damage done to Griffin Road, since it is ostensibly less than the market value for the work. As such, the court is left with no valid proof upon which to base an award of damages (*see Kelly v Bensen*, 151 AD3d 1312, 1314-1315 [3d Dept 2017]). It was plaintiff's burden to establish damages on this cause of action. She failed to do so, the deficiency in her proof was not cured by defendant's proof, and the court is thus constrained to find that this claim must also fail.[4]

Turning to plaintiff's claim for damages to compensate her for the destruction of the portions of the Mastbeth parcels that lay outside Griffin Road and were damaged by Shiel's road maintenance, Way's estimate included work that he deemed necessary to restore those areas of the Mastbeth parcels to the condition in which they were before Shiel's road maintenance, but the estimate is not itemized, and Way did not testify about the cost of each item of work listed on the estimate. As such, it is impossible for this court to determine the amount of damages appropriate to compensate plaintiff on this claim, on other than a speculative basis (*see Wfe Ventures*, 197 AD3d at 834). As such her claim for damages for Shiel's damaging the Mastbeth parcels must fail.

[4] The court notes that this result is reached somewhat serendipitously for defendant, since there is no indication that defendant's exhibit KK suffers from the same impairments as the Way and Saheim estimates. Thus, had plaintiff not objected to it, it may have furnished both defendant's tacit admission that Griffin Road was in need of repair in order to return it to its pre-May 2004 condition, and a reliable measure of damages to be awarded to her.

The parties remaining arguments, including any objections or arguments upon which the court reserved during trial that have not been specifically discussed herein, have been examined and found to be without merit or academic in light of the foregoing.

Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that the third amended complaint is dismissed as against defendant Harold Hisnay, to the extent that it has not already been dismissed against him, for the reasons stated herein; and it is further

ORDERED AND ADJUDGED that plaintiff's claims are unsubstantiated and judgment is awarded to defendant dismissing the third amended complaint; and it is further

ORDERED AND ADJUDGED that defendant's counterclaim for a prescriptive easement over Griffin Road is substantiated; Griffin Road is declared to be 20 feet in width, 10 feet of its width lying to either side of the center line of the roadway; and judgment enjoining plaintiff from interfering with defendant's use of Griffin Road for ingress and egress to his property is awarded to defendant; and it is further

ORDERED AND ADJUDGED that defendant's remaining counterclaims are unsubstantiated and judgment dismissing such counterclaims is awarded to plaintiff.

The within constitutes the decision, order and judgment of this court.

Signed this ___ day of August 2022, at Lake George, New York.

ENTER:

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

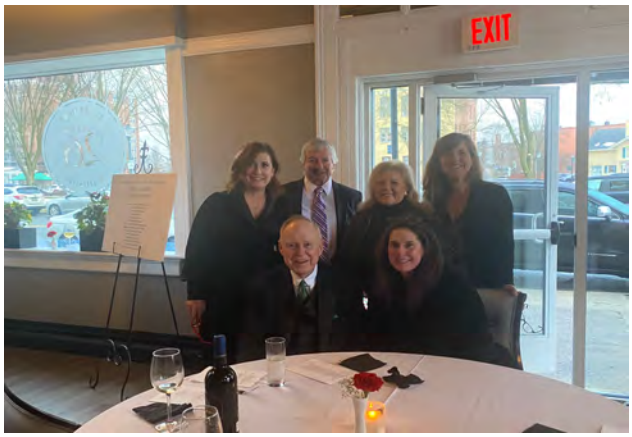
The court is filing the original decision in the Warren County Clerk's Office. The court is also providing both counsel with a copy of the decision and order; such delivery does not constitute service with notice of entry.

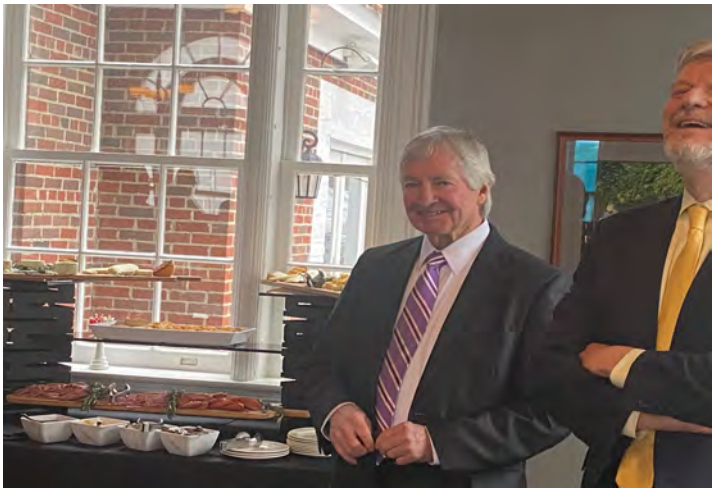
Distribution:

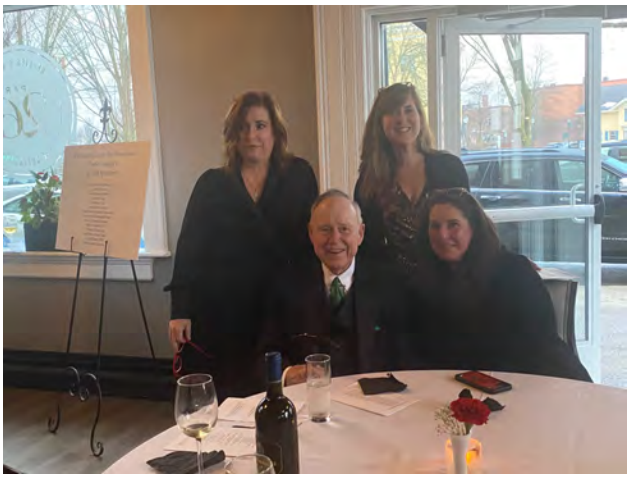
Kimberly A. Harp, Esq.
Nathan Hall, Esq.

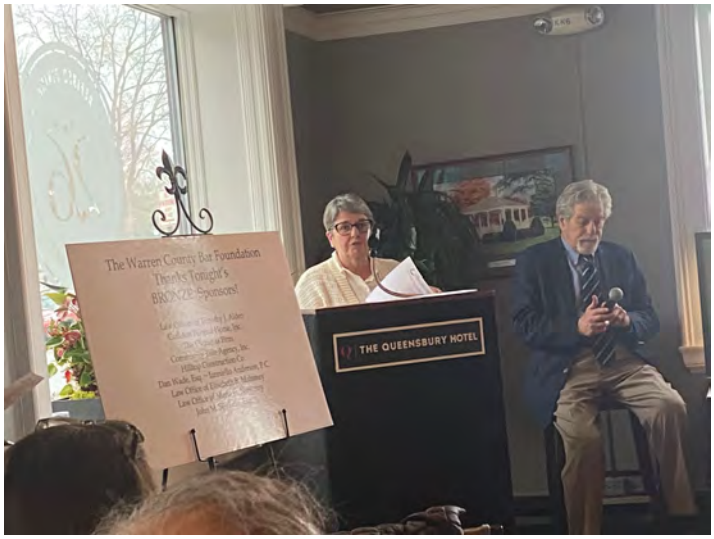
Mastbeth v Shiel
Warren County
Index No. 2006-48121

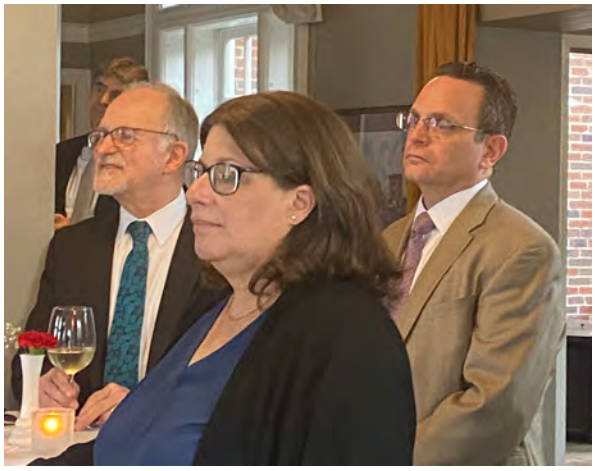
2023 MARCH MIXER
MARCH 23, 2023
PARK 26 ~ QUEENSBURY HOTEL

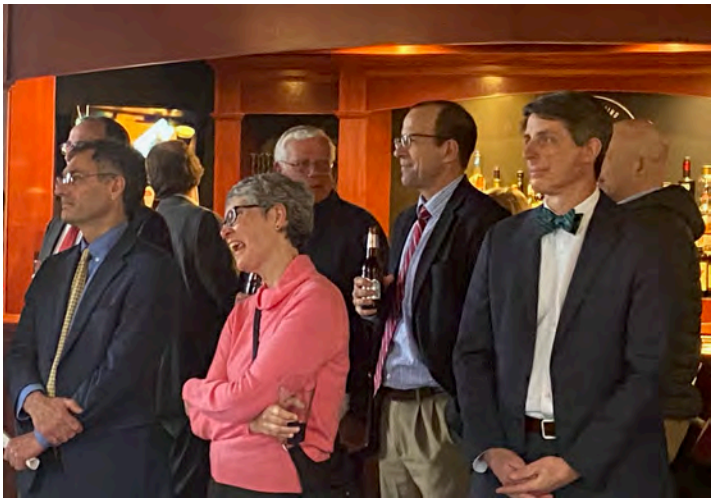




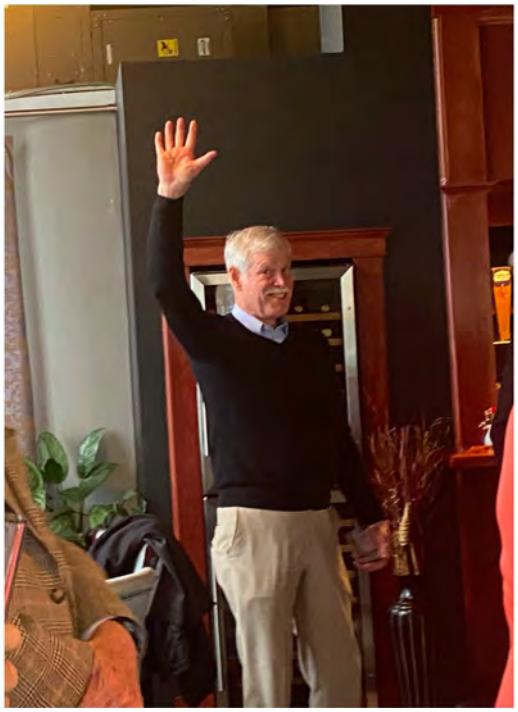


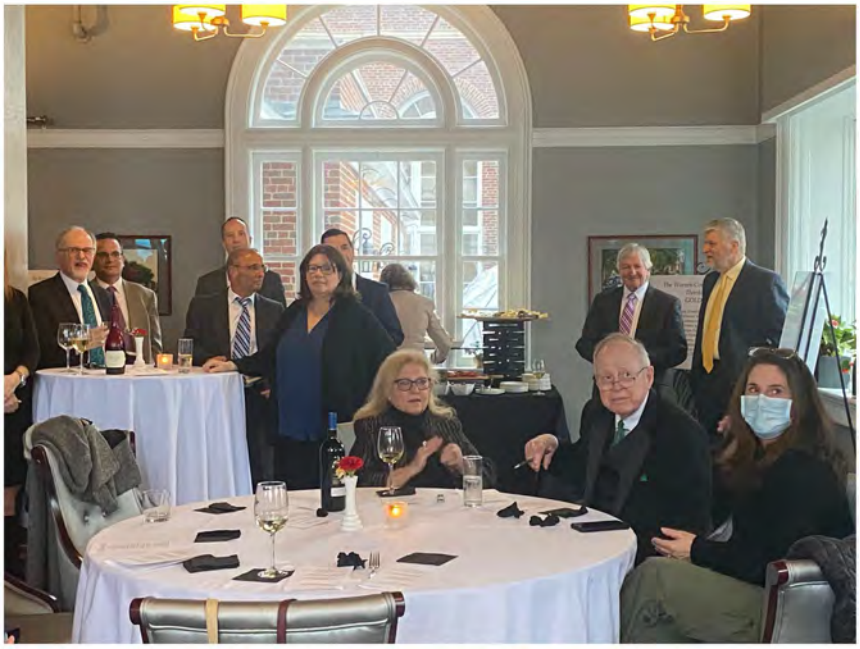


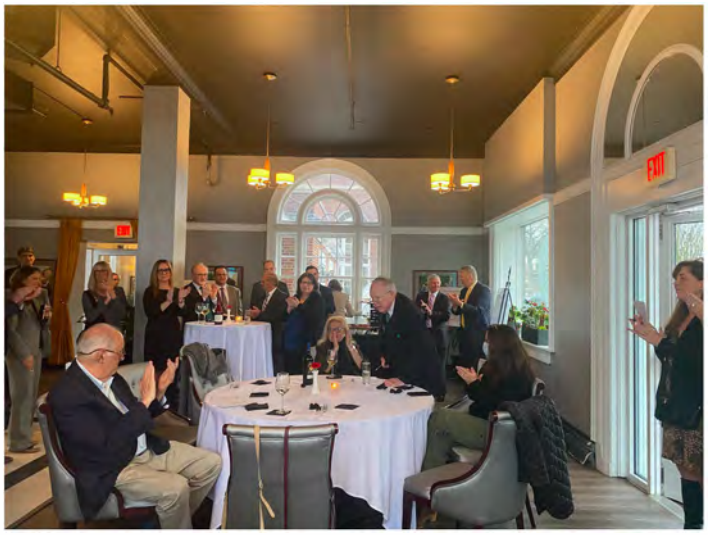




What a wonderful way to celebrate Thomas J. McDonough and all retired WCBA attorneys as we raised over $13,000. for Scholarships and Community Merit Grants!



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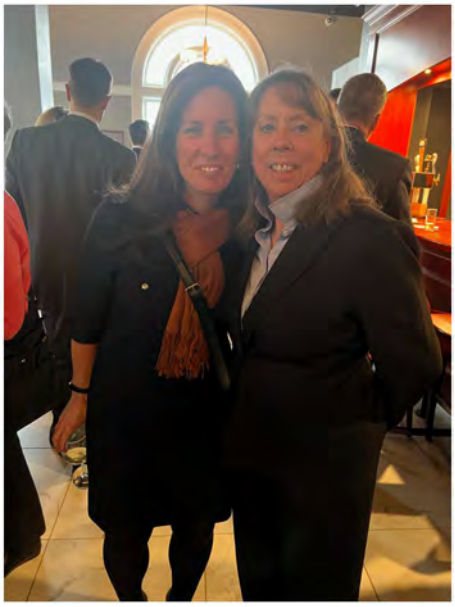

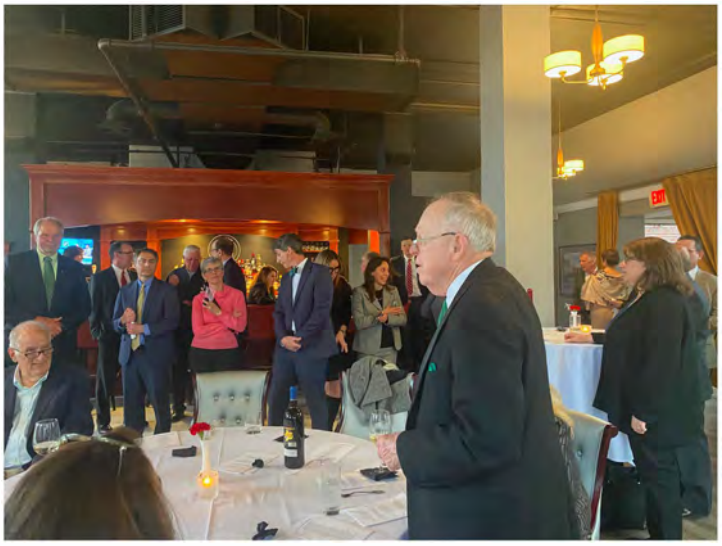
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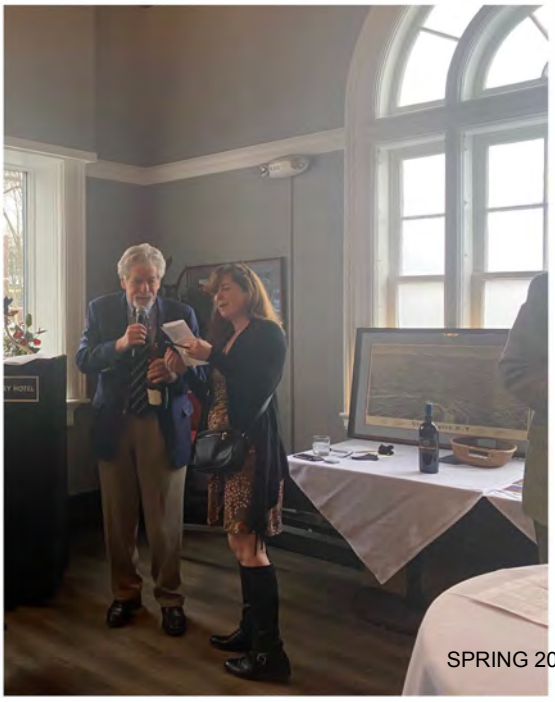

The Practice Page

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

DISCONTINUANCES OF LITIGATION

Hon. Mark C. Dillon*

The discontinuance of litigation is like a see-saw. The earlier it is sought in a litigation, the easier it is for the plaintiff to obtain. The later it is sought, the more is required. The discontinuance statute is CPLR 3217 and should be thought of as consisting of three stages.

Stage One. If the defendant has not yet served a responsive pleading, or if none is required, the plaintiff may discontinue an action by mere unilateral notice (CPLR 3217[a][1]; *Bayview Loan Servicing, LLC v Windsor*, 172 AD3d 799, 801). At that earliest stage of litigation, a discontinuance is easy as the adversary party and the court have not yet invested time, effort, or expense on the case.

Stage Two. This stage involves the time between the responsive pleading at the front end and the submission to the case to a judge or jury for fact finding at the back end. Discontinuances between that expanse of time may be accomplished one of two ways. The first is by written stipulation signed by counsel for all of the parties, so long as no party is an infant, incompetent, or conservatee, and no non-party has an interest in the litigation (CPLR 3217[a][2]; *HSBC Bank USA., National Association v Rini*, 202 AD3d 945, 947). Alternatively, a discontinuance may be granted without a stipulation by court order, upon a notice motion, upon conditions the court deems proper (CPLR 3217[b]; *Tucker v Tucker*, 55 NY2d 378, 383-84).

Stage Three. Once an action proceeds to the submission of the trial evidence to a judge or jury for deliberative fact-finding, an action may only be discontinued if there is a stipulation by all parties *and* a court order per3mitting it (CPLR 3217[b]; *e.g. Madison Acquisition Group, LLC v 7614 Fourth Real Estate Dev., LLC*, 134 AD3d 683, 685). After all, by that time, the parties and the court have invested in a trial, subject merely to a verdict by the trier of fact, which should render tactical discontinuances more difficult to obtain. As a practical matter, any party's refusal to stipulate to a discontinuance operates as a veto on the issue, as the court cannot exercise its discretion to order a discontinuance without the unanimous stipulation of the parties (*Emigrant Bank v Solimano*, 209 AD3d 143 [decided Sept. 28, 2002]).

What if an action is referred by the court to a referee to hear and report, as permitted by CPLR 4311 and 4320? Does the deliberative process that would require both a fully-executed stipulation and a court order trigger upon the conclusion of the referee trial, or the issuance of the referee's report, or the filing of a motion to the Supreme Court to confirm the report, or the return date of the motion to confirm? The answer to this question of first impression was provided very recently by the Second Department in *Emigrant Bank v Solimano, supra*. In *Solimano*, the court noted that the referee's report and recommendations are not conclusive as they are subject to the review of the Supreme Court. The motion to confirm solicits the parties' due process rights to be heard, similar to closing arguments at a trial. The point in time most akin to the commencement of the post-evidentiary deliberative process is

the return date of a party's motion to confirm, reject, or modify the report, when the Supreme Court possesses all of the papers needed to render an informed and conclusive determination of the matter.

Contrastingly, as noted in *Solimano*, if a matter is referred to a referee to hear and "determine" as authorized by CPLR 4301, the point at which the plaintiff must have a unanimous stipulation of the parties *and* a court order for a discontinuance is the conclusion of the evidentiary portion of the trial and the closing arguments of all counsel, when the final deliberative phase of the action commences. After all, a referee determining the matter "shall have all the powers of a [trial] court" in determining issues (other than the very limited exception of holding a party in contempt).

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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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Emergency doctrine not proper in snow/ice car crash action.

Williams v. Ithaca Dispatch, Inc. (Ceresia, J., 12/22/22)

A defendant seeking summary judgment based upon the "emergency doctrine" must show, as a matter of law, (s)he was confronted with an emergency not of his/her own making and that their reaction to the emergency was reasonable under the circumstances. In this 3-car, chain-reaction auto accident, the moving defendants (vehicles 2 and 3) claimed a sudden snowfall and icy road conditions were the "emergency", and were granted summary judgment by Supreme Court (C.P. Baker, J, Chemung Co.). Plaintiff was a passenger in vehicle 2 (a taxicab), the driver of which testified he was confronted with a "wall of snow" but also agreed that the conditions were not consistent with a "whiteout". The Third Department reversed, citing to "clear issues of fact" relating to weather, road conditions, vehicle speeds and the actions of the drivers trying to avoid the collisions. The moving defendants also argued that plaintiff didn't sustain a "serious injury" as required by Insurance Law § 5102(d) but Supreme Court never reached that issue – instead, addressing it in what the Appellate Division said only "amounted to an academic exercise".

Labor Law § 240(1).

Morin v. Heritage Builders Group, LLC (Pritzker, J., 12/1/22)

Plaintiff was a sheetrock taper who fell while working on a construction site owned by defendant, and contended the scaffolding he used while working on a cathedral ceiling was inadequate because he needed to place a plank (from which he fell) from the scaffold to a windowsill so he could run one piece of tape across the entire room. Supreme Court (Freestone, J., Saratoga Co.) denied summary judgment motions by all parties on the Labor Law § 240(1) cause of action, and the Third Department affirmed. Defendants' expert opinions, including one from a safety professional with drywall construction experience who claimed the scaffolding alone could have been used "without any detriment

to the quality of the work being performed", rebutted the plaintiff's prima facie showing that the statute was violated and proximately caused his injuries.

Whiting v. Nau (Clark, J., 12/8/22)

Defendants owned and lived on property that included a home and 2-story barn, the latter of which was being renovated by plaintiff's employer when (without a proper ladder available) plaintiff fell from an elevated walk board erected to allow him to reach a ceiling above a stairwell. Opposing plaintiff's motion for partial summary judgment under Labor Law § 240(1), defendants sought the statutory exemption afforded to owners of 1-2 family homes who contract for but don't direct or control the work. Supreme Court (McBride, J., Tompkins Co.) denied both summary judgment motions, which was affirmed by the Third Department. Although social media posts by one of the defendants indicated the remodeled barn would be used to provide rentals through Airbnb (a commercial use disfavoring the homeowner's exemption), there was conflicting evidence showing the completed renovations would produce two apartments, one of which to be used as the defendants' residence.

Premises liability.

Barna v. Belmont Management Co., Inc. (Ceresia, J., 12/1/22)

Plaintiff's decedent broke both of her arms in a fall down a darkened stairwell (during a power outage) in the defendants' senior apartment complex. Defendants, relying on the absence of a common law duty to provide lighting during a power outage, moved for summary judgment, which was denied by Supreme Court (Crowell, J., Saratoga Co.). Affirming, the Third Department concluded defendants *assumed* a duty of reasonable care when they installed battery-powered auxiliary lights (for power outage events) in the stairwell, along with battery-operated touch lights designed to work if the outage lasted longer than 90 minutes.

Homeowner's insurer must defend in school injury action.

Vermont Mutual Ins. Group v. LePore (Aarons, J., 12/8/22)

Plaintiff filed this declaratory judgment action claiming it had no duty to defend or indemnify the defendant LePore, who allegedly injured the defendant Cole (a school district employee) when Cole tried to break up a fight between LePore and another student. Plaintiff disclaimed coverage under LePore's homeowner's insurance policy – contending the fight was not an "occurrence" as defined by the policy and that defendant's "intentional" conduct was excluded from coverage. Affirming Supreme Court's (Powers, J., Schenectady Co.) denial of

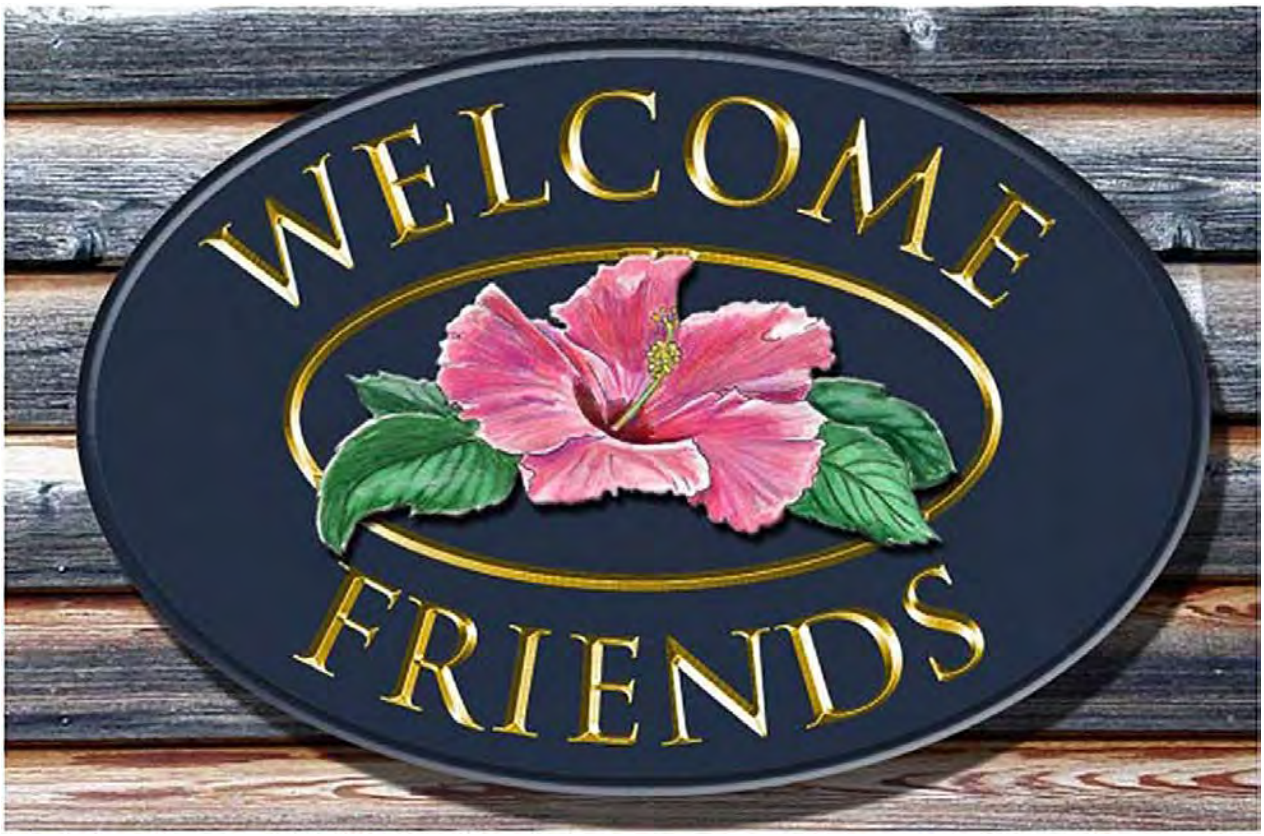
plaintiff's summary judgment motion, the Third Department noted that an insured "may be indemnified for an intentional act that causes an unintended injury", and that the insurer failed to "meet its heavy burden of showing that the allegations in the personal injury action fell wholly within the policy exclusion".

BONUS: Court of Appeals on the "special duty" doctrine.

Maldovan v. County of Erie (Troutman, J., 11/22/22)

Howell v. City of New York (11/22/22)

To win a negligence claim against a municipal defendant acting in a governmental capacity, a plaintiff must prove the existence of a "special duty", which can arise in three situations, one of which is where the defendant voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally. It is a high bar for plaintiffs to reach, and in the above cases the Court of Appeals (despite dissents) found a failure to establish the four, well-settled elements of proof: an assumption of an affirmative duty to act on behalf of the injured party; knowledge that inaction could lead to harm; direct contact between the municipality's agents and the injured party; and justifiable reliance by the plaintiff. Acknowledging that "immense harm under heartbreaking circumstances" are not unusual in special duty cases, the majority (see *Maldovan*) reiterated that the rationale for the rule is that exposing such defendants to tort liability "may render them less, not more, effective in protecting their citizens".



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WARREN COUNTY BAR ASSOCIATION
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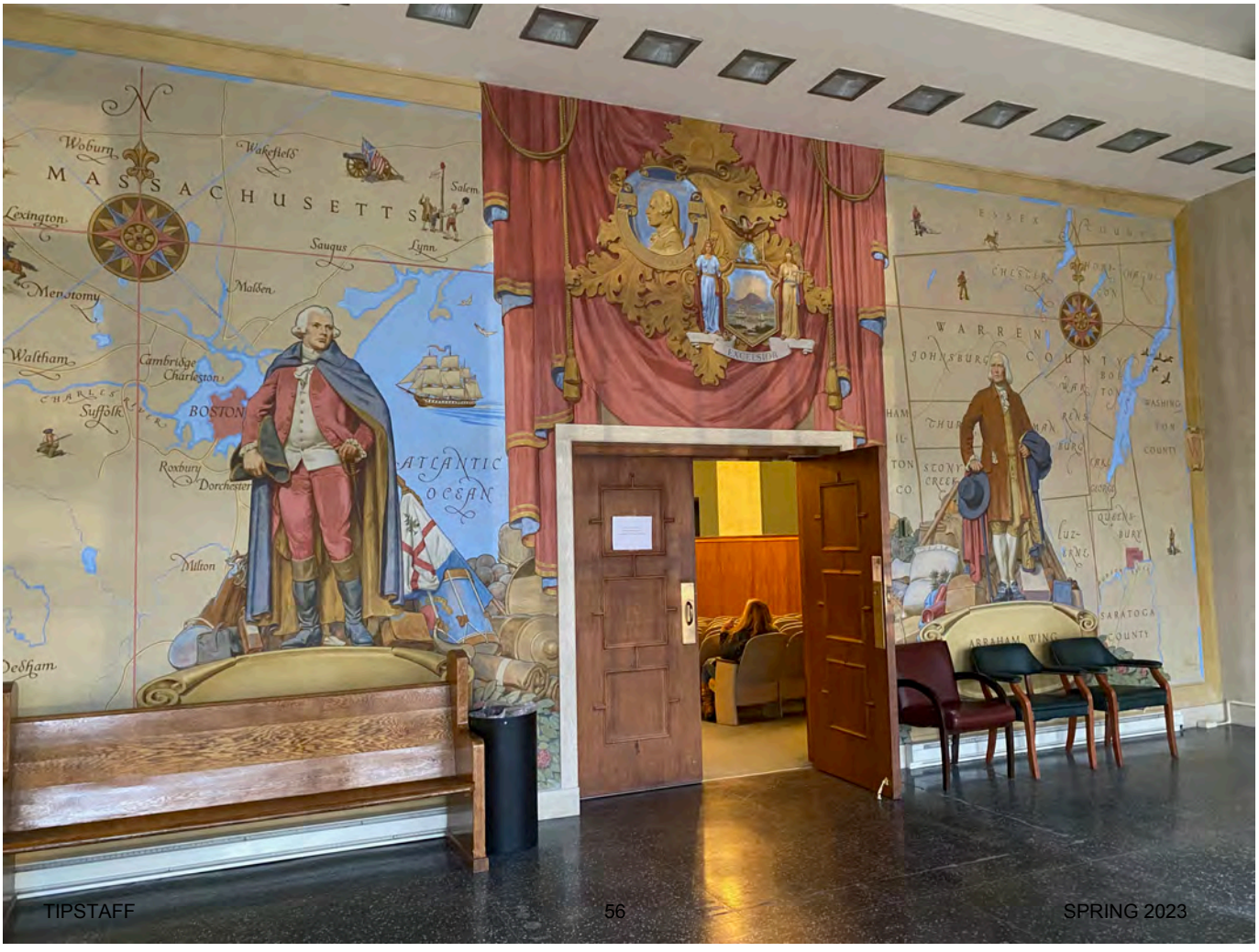

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***TIPSTAFF* is a publication of the Warren County Bar Association, Inc. We encourage you to submit articles of interest, classified ads, and announcements to Kate via email at: admin@wcbany.com**

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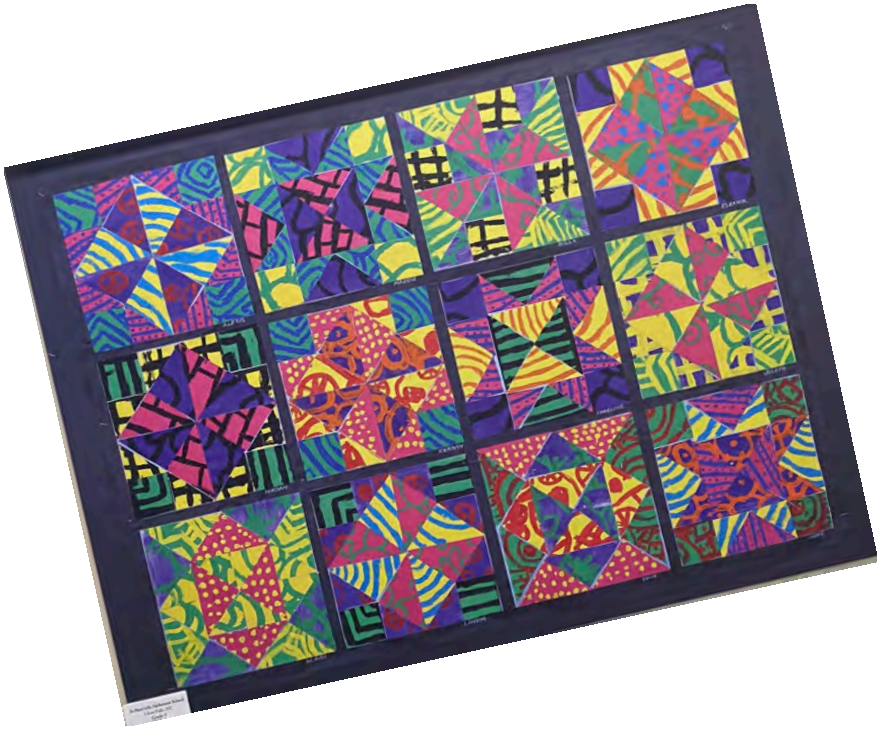

Art Work: Paper Pinwheel Quilt made by St. Mary's-St. Alphonsus students in Mrs. Peggy Clohessy's Grade 3 Art Class. On display in the Warren County Municipal Center's Family Court.