WARREN COUNTY BAR ASSOCIATION, INC.

SPRING/SUMMER 2025 **TIPSTAFF** Volume VI Issue 2

IN THIS ISSUE

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Dear Colleagues,

Welcome to the Spring/Summer Edition of *Tipstaff*.

As our fiscal year comes to a close, the Association remains strong. There is much to be proud of and to look forward to.

This year the inaugural Cabin Fever event was held in January. A robust turnout of our members enjoyed an evening of pizza, beverages, s'mores, games, and "stories from the stage." This fun, informal gathering is sure to be repeated next year and in years to come.

The Foundation's March Mixer saw over 70 attendees, and $15,700 was raised, which will benefit local students from our community studying law and will support educational programs selected by the Foundation. Thanks to Dennis J. Tarantino, Esq., and his team: Brian C. Borie, Esq. Rose T. Place, Esq., Jill E. O'Sullivan, Esq., and Gregory J. Teresi, Esq.
Our Law Day ceremony was held at the Carriage House at the Fort William Henry. What a beautiful venue! Milly Koh received the Liberty Bell award. So worthy and well-deserved. What Milly Koh has overcome in her own life, and her accomplishments to improve the lives of others is truly remarkable. And it's obvious Milly has much more on her agenda. Many thanks to Committee Chair, Mathew T. Skinner and the entire Law Day Committee: Hon. Glen T. Bruening, Declan R. Chaskey, Esq., Alexandra D. Finocchio, Esq., Vanessa A. Hutton, Esq., Matthew J. McAuliffe, Esq., Steven G. Petramale, Esq., Alexandra C. Rozell, Esq., Jeffrey B. Shapiro, Esq., and Bethany C. Van Pelt, Esq. for all of the planning and preparation that went into making this event truly special.

Congratulations to the Greenwich High School Mock Trial Team - 2025 Regional Tournament winners. A huge thank you to Hon. Glen T. Bruening for once again chairing this committee and to all judges, attorneys, coaches, court personnel and everyone who volunteered their time throughout the tournament.

The annual dinner was held on May 15th at the incomparable Lake George Club. The dinner was well attended. Tributes to members who passed away this year were delivered. My heartfelt thanks and appreciation to James E. Cullum, Esq., for his words about Daniel J. Hogan., Esq. and Dennis J. Phillips, Esq., to Joshua D. Lindy, Esq., who spoke about Thomas A. Ulasewicz, Esq.; to James R. Burkett, Esq., for his remarks about Philip C. McIntire, Esq., and to Hon. Thomas E. Mercure, who spoke about Hon. G. Thomas Moynihan.

Thank you to all our officers and directors for your service throughout this year, especially Hon. Glen T. Bruening for his tireless efforts on budget issues and addressing our financial challenges. This year, the Board had to make some difficult decisions to address decreasing revenue, which included the closing of our office. But there is reason for optimism as early membership renewals are promising.

Welcome to new members Hon. Amy Quinn, Cheyenne L. Havens, Esq. and Steven G. Petramale, Esq. and Corissa Afsar-Keshmiri, Esq.

Thanks to all who contribute articles and case decisions to the *Tipstaff*. Keep those articles coming.

Best wishes to Hon. Nicole C. Fish, the new President of the Association. Nicole will be a spectacular President.

And, finally, an expression of gratitude and appreciation to our Executive Director, Kate Fowler.
I marvel at the enthusiasm, determination, dedication and energy Kate brings to our Association every day. Working with Kate has been and continues to be one of the great honors of my life.

Enjoy the summer. I hope you are able to take some time away from the office.
Looking forward to seeing you at the fall "Welcome Back Mixer."

Best,
Martin

CABIN FEVER
January 22, 2025

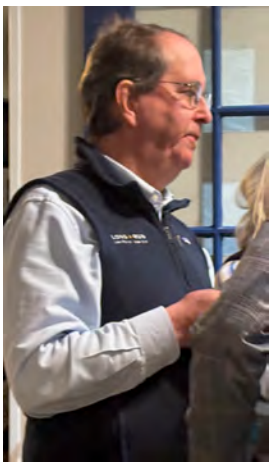
The Warren County Bar Association decided to do something different this year, and it was a big success! Anxious to shed the gloom of dark January days, we came together at *21 Ridge* to share pizza and beer, snacks and s'mores! Game tables were covered with games galore and silly prizes, but the best part of the night was our own version of "Stories from the Stage." Hosted by Hon. Eric Schwenker, attorneys and judges shared some of their funniest professional stories. We can't wait to do this again next year!











"STORIES FROM THE STAGE" ~ WCBA STYLE!

by James Cooper, Esq.

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

How to Bore Acquaintances and Annoy Judges

Latin mortuus est

My generation of law students at Albany Law School was cautioned not to use Latin in argument or briefing as it was out of fashion and considered a fatuous affectation. There were other reasons that can't be remembered, but I think among these was intuition that judges like to hear arguments in a format that they understand.

Regardless of the foregoing, Latin persists in practice and opinion as an economy of speech to express an idea. What follows is a list of Latin expressions in that class, and maybe just a few for fun that a lawyer should know:

res ipsa loquitur: --If this needs explaining, you forgot basic tort law, and your law school wants its diploma back.

post hoc ergo propter hoc: -- "Because it happened it must have been caused by what happened before." An antiphrasis, polemic expression to ridicule the flawed logic of an erroneous connection between effect and cause.

natura appetit perfectum; ita et lex:– Nature desires perfection, so does the law.

illegitimi non carborundum :-- pidgin Latin that translates, "Don't let the bastards get you down." forbidden to be used in decisions or opinions nor advisable in briefs as since the 1920s the word 'bastard' has been prohibited by the General Construction Law.

sic transit gloria mundi: --a general purpose expression that translates, " thus passes the fame of the world", useful if your spouse sees you in court and reviews your performance.

in medias res:-- into the heart of the matter, without preface; how your client was addressed by his wife when she smelled perfume on his clothing that wasn't hers.

mea culpa: --an exclamation heard on football fields when athletes slap their chests to indicate that they screwed up, as if their teammates are blind; translates, "my fault." Also sometimes useful as an expression of contrition after angering a Catholic judge.

ipso facto:-- The fact is obvious and conclusive, but a caution here to enunciate this precisely or risk offense.

ipse dixit:-- It is because he says it is; Dad's remembered diktat enabling new lawyers to understand judicial rulings.

cognoscenti:-- Italian derivation of Latin; A class of elite individuals with exquisite cultural insights among whom it is futile to aspire to be included; often seen expressing commentary on cable networks or The View.

quod est demonstrandum:-- "Thus it is demonstrated." (QED) A frequently used *bon mot,* fun, but not likely persuasive to opposing counsel or a court.

ignorantia legis neminem excusat:-- Ignorance of the law is no excuse.

ignoscitur ei qui sanguinium suum qualitur redemptium voluit:-- Self defense is a justification.

a fortiori: –a conclusion that necessarily follows proof of a fact.

lex loci:– The law of the location of the event governs.

mens rea:– The description of the defendant's plea that his state of mind was that he didn't mean to ...

nisi prius: – The trial court where you got hosed.

quantum meruit: – the theory of payment owed arising from your client's being too cheap to have you prepare a proper contract for his services.

nunc pro tunc:– A poor carpenter blames his tools, but a lawyer can ask a court for permission to insert something in the pleadings or out of sequence in a case that he failed to do because of his mistake.

in pari delicto:–equally at fault, often coupled with *in flagrante delicto*

profit a prendre: – a shared right in land with another in title to utilize his land and its crops; a useful response to a deputy called to answer a complaint that you were caught picking your neighbor's sweet corn at night, unless he is familiar with the Statute of Frauds.

quare clausum fregit: – the cause of action for trespass to steal sweet corn.

ultra vires: –actions taken beyond the scope of authority, e.g .the defense of a teenage rock star that he/she was under age when they signed an agent's commission agreement, or a lawyer who floats himself a loan from the escrow account.

sui generis: –an issue seemingly without precedent; a reason judges have clerks.

gratis: – a word that should never pass a lawyer's lips in fee discussions.

expressio unius est exclusio alteris: – an actually useful expression meaning that in interpretation of a statute the expression of one element excludes unexpressed alternative interpretations.

quo warranto:–"by what right"; An exclamation often heard in YouTube videos from male/female Karens refusing to comply with lawful police orders.

sub judice:– the explanation given to clients waiting for a judicial determination that the court's clerk is laboring through researching the law and can't decide it yet.

res gestae: –declarations and surrounding events as evidence in an incident, sometimes constituting an exception to the hearsay rule. See *in flagrante delicto* and chambermaid.

de minimis non curat lex: – The law does not concern itself with trifles.

A foolish consistency is the hobgoblin of little minds.– sorry, slipped in an Emerson quote; your only possible response to a precedent on all fours against you. Good luck with that.

cy-pres: – the clairvoyance that the law gifts to jurists to read the mind of a dead testator ghost whose lawyers didn't make clear alternative dispositions in a testamentary trust.

terminus and terminus ad quem:– a longed for point in time as in a CLE Trusts and Estates lecture, or when you've found the courthouse.

mandamus:– the remedy to compel a bureaucrat to fulfill a duty of his job.

ad terminum qui pretaerit:– Your rental term is expired, (so get the hell off my land).

coventio privatorum non potest publico juri derogare:– The agreement of private persons cannot derogate the law of public policy.

force majeure:– law French, a defense that superior or irresistible force was the reason one couldn't perform a contractual duty, like war, labor strike or the Adirondack Balloon Festival traffic.

impossibilium nulla obligato lex:–There is no obligation in law to do impossible things.

insanus est qui, abjecta ratione, omnia cum impetu et furore facit:– when reason is cast away and violence and rage is the response, one is insane, like the Greek expression, "Whom the gods would destroy, they first make mad."

judicia posteriora sunt in lege fortiora:– decisions closest in time to the present are deemed stronger in the law, so that reported appeal with your name on it as counsel will be diminished in importance as time passes. See *sic transit gloria mundi*

judici satis poenaest, quod deum habet ultorem:– It is punishment enough for a judge that he has God as his avenger; the utterance of a nisi prius judge to his reflection while shaving after he has been unanimously reversed on appeal.

Jim Cooper
October 2024

WCBF 2025 MARCH MIXER

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- Travis Brown, Esq.

From The Judge's Chambers

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

DECISION AND ORDER
Index No.: EF2021-69378
RJI No.: 56-1-2023-0453

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

JAMES STEGMAN and NANCY HOLZMAN,

Plaintiffs,

-against-

CITY OF GLENS FALLS, N.Y. and NIAGARA MOHAWK POWER CORP., Doing Business as NATIONAL GRID,

Defendants.

DECISION AND ORDER

Index No.: EF2021-69378
RJI No.: 56-1-2023-0453

APPEARANCES:

O'Connell & Aronowitz, P.C., Albany (*Stephen R. Coffey* and *Cristina D. Commisso* of counsel), for plaintiffs.

Barclay Damon LLP, Albany (*David M. Cost*, *Brienna L. Braman* and *Matthew J. Larkin* of counsel), for defendant Niagara Mohawk Power Corp., Doing Business as National Grid.

AUFFREDOU, J.

Motions (1) by plaintiffs for partial summary judgment on the issue of liability and (2) by defendant Niagara Mohawk Power Corp., Doing Business as National Grid (hereinafter NIMO or defendant) dismissing the complaint.

On August 9, 2020, plaintiff James Stegman was riding his bicycle on Maple Street in the City of Glens Falls, Warren County, New York.[1] As he progressed along Maple Street on an approach to Ridge Street, he traversed the top of an underground utility vault that is owned, was installed and is maintained by NIMO. The vault top is more or less at street level and is comprised of concrete slabs in which are set metal grates. The grates' purposes are to allow air flow around the components of NIMO's electrical distribution system that are housed in the

[1] This action was previously discontinued as against named defendant City of Glens Falls, N.Y. by stipulation. The stipulation did not effect an amendment of the case caption to remove said defendant therefrom.

vault, and to be lifted up so that NIMO's workers can gain access to the vault's interior. As Stegman rode over the vault, the front tire of his bicycle became lodged in a gap that lay between the outside edge of one side of one of the grates and the inside edge of the concrete housing in which the grate sets. The gap was approximately 1¼ inches wide and as many as 3 inches deep. The bicycle's involvement with the gap resulted in its sudden stop and injuries to Stegman when he was precipitated over the handlebars and onto the road surface. He now sues to recover for his injuries on a theory of premises liability. Defendant Nancy Holzman, Stegman's wife, sues on a derivative theory. The parties now move as aforesaid.

On a motion for summary judgment, the movant bears the initial burden to demonstrate entitlement to judgment as a matter of law (*see DiBartolomeo v St. Peter's Hosp. of City of Albany*, 73 AD3d 1326, 1326 [3d Dept 2010]). If this burden is met, the burden shifts to the opponent of the motion to demonstrate that a triable issue of fact exists (*see id.*). A property owner has a duty to remedy defective or dangerous conditions of which the owner has actual or constructive knowledge (*see Gami v Cornell Univ.*, 162 AD3d 1441, 1442 [3d Dept 2018], *lv denied* 32 NY3d 916 [2019]; *Zibro v Saratoga Natl. Golf Club, Inc.*, 55 AD3d 998, 999-1000 [3d Dept 2008]). "[T]rivial defects are not actionable" (*Gami*, 162 AD3d at 1442).

Turning first to NIMO's motion, it carried its initial burden to demonstrate entitlement to dismissal of the complaint by showing that the gap is not a defect or unreasonably dangerous condition (*see Gami*, 162 AD3d at 1442-1443; *Zibro*, 55 AD3d at 999-1000). The gap was a part of the vault's design, meant to allow the metal of the grate to expand and contract with changing weather and to enable workers to lift the grate up to access the interior of the vault. The photographs tendered to the court in connection with the parties' motions demonstrate that the gap was readily observable (*see Catman v Back Water Grille LLC*, 336 AD3d 996, 967-969 [3d

Dept 2024]; *Gami*, 162 AD3d at 1442-1443). The gap's presence on a portion of the roadway that is meant for vehicular traffic is not an inherently dangerous condition (*see* Vehicle and Traffic Law § 1234; *Gami*, 162 AD3d at 1442-1443). Plaintiffs' expert's opinions to the contrary are speculative, based upon inapplicable standards and insufficient to carry their responsive burden to identify an issue of fact that requires a trial (*Gami*, 162 AD3d at 1443; *Harris v Debbie's Creative Child Care, Inc.*, 87 AD3d 615, 616 [2d Dept 2011]; *Gonzalo v Joline Estates Homeowners Assn., Inc.*, 29 AD3d 631, 632 [2d Dept 2006]). Moreover, the gap was not less visible merely because Stegman was not looking at it as he proceeded over the vault. Alternatively, the court finds no question of fact that NIMO knew or should have known that the gap—which had existed since at least 2003 and perhaps as far back as 1964, and never before caused an injury of which anyone was aware—was dangerous.

For the foregoing reasons, the court also concludes that plaintiffs failed to carry their initial burden on their motion. Arguments not specifically addressed herein have been examined and found to be without merit. Accordingly, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment is denied; and it is further;

ORDERED that defendant's motion for summary judgment is granted, and the complaint and this action are dismissed; and it is further

ORDERED that the pretrial conference scheduled for Wednesday, December 14, 2024 at 10:00 a.m. via Microsoft Teams and the jury trial scheduled to commence at 9:30 a.m. on Monday, February 3, 2025 at the Warren County Courthouse are cancelled.

The within constitutes the decision and order of the court.

Signed this 2nd day of December 2024, at Lake George, New York.

ENTER:

HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

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

Papers Considered:
The affirmation of Stephen R. Coffey, Esq., dated May 23, 2024, with exhibits;
The affidavit of James Stegman, sworn to May 22, 2024, with exhibits;
The affidavit of Nancy Holzman, sworn to May 21, 2024, with exhibits;
The affidavit of Richard M. Balgowan, PE, PP, CPM, CPWM, PWLF, sworn to May 21, 2024, with exhibits;
Plaintiffs' memorandum of law, dated May 23, 2024;
The affirmation of David M. Cost, Esq., dated May 31, 2024, with exhibits;
Defendant's statement of material facts, dated May 31, 2024;
The affidavit of Ronald A. Bova, P.E., D.F.E., sworn to May 29, 2024, with exhibits;
Defendant's memorandum of law, dated May 31, 2024;
Defendant's memorandum of law, dated July 12, 2024;
The affirmation of David M. Cost, Esq., dated July 12, 2024;
The affidavit of Ronald A. Bova, P.E., D.F.E., sworn to July 2, 2024;
The affirmation of Stephen R. Coffey, Esq., dated July 12, 2024, with exhibit;
Plaintiffs' memorandum of law, dated July 12, 2024;
Plaintiffs' response to defendant's statement of material facts, dated July 12, 2024;
The affidavit of Richard M. Balgowan, PE, PP, CPM, CPWM, PWLF, sworn to July 12, 2024, with exhibits;
The affirmation of Stephen R. Coffey, Esq., dated July 31, 2024;
The affidavit of Richard M. Balgowan, PE, PP, CPM, CPWM, PWLF, sworn to July 31, 2024, with exhibits;
Plaintiffs' memorandum of law, dated July 31, 2024;
The affirmation of Brienna L. Braman, Esq., dated July 31, 2024;
The affidavit of Ronald A. Bova, P.E., D.F.E., sworn to July 30, 2024;
Defendant's memorandum of law, dated July 31, 2024; and
The transcript of oral argument held September 4, 2024.

Distribution:
Stephen R. Coffey, Esq.
Matthew J. Larkin, Esq.

Stegman and Holzman v City of Glens Falls et al.
Warren County
Index No. EF2021-69378

DECISION AND ORDER
Index No.: EF2019-07711
RJI No.: 17-1-2020-0066

STATE OF NEW YORK SUPREME COURT
COUNTY OF FULTON

RICK FRASIER and ELMVUE FARMS, LLC,

Plaintiffs,

-against-

NIAGARA MOHAWK POWER CORP., Doing Business as NATIONAL GRID,

Defendant.

DECISION AND ORDER

Index No.: EF2019-07711
RJI No.: 17-1-2020-0066

Appearances:

Harris Beach Murtha Cullina PLLC, Pittsford (*Dale A. Worrall* and *Kyle D. Gooch* of counsel), and *Bird, Stevens & Borgen, P.C.*, Rochester, Minnesota (*Jeremy R. Stevens*, *Grant M. Borgen* and *Danielle T. Bird*, admitted pro hac vice, of counsel), for plaintiffs.

Barclay Damon LLP, Albany (*William Foster* of counsel), and *Wheeler Trigg O'Donnell LLP*, Denver, Colorado (*Rick Nadolink*, *Ryan W. Cooke* and *Marisa O. Shearer*, admitted pro hac vice, of counsel), for defendant.

AUFFREDOU, J.

Motion by defendant for, among other things, referral of this action to the Public Service Commission of the State of New York (PSC) and a stay of the action pending the PSC's determination of the matters referred to it (NYSCEF Motion Seq. No. 12).

The factual landscape of this case is adequately set forth in this court's decision and order entered October 30, 2023. In brief, defendant is an electrical utility that services the Capitol District area of New York State. Plaintiffs, who operate a dairy and cattle farm in Johnstown, New York, claim that stray voltage emanating from defendant's distribution system is impacting their herd to their detriment. They seek monetary damages and, as relevant here, injunctive relief compelling defendant to "take all necessary steps to abate the stray voltage affecting" the farm. The matter is trial-ready but for the pendency of several motions in limine and the instant motion, the aforesaid part of which now comes before the court for decision.

Upon consideration of the affirmation of Ryan W. Cooke, Esq., dated September 4, 2024, with exhibits; defendant's corrected memorandum of law, dated October 18, 2024; the affirmation of Dale A. Worrall, Esq., dated October 4, 2024, with exhibits; plaintiffs' memorandum of law, dated October 4, 2024; the reply affirmation of Ryan W. Cooke, Esq., dated October 18, 2024; and defendant's reply memorandum of law, dated October 18, 2024, decision is hereby rendered as follows.

Defendant urges the application of the doctrine of primary jurisdiction, which "'applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body'" (*Albany-Binghamton Express v Borden, Inc.*, 192 AD2d 887, 888 [3d Dept 1993], quoting *Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 156 [1988]; *accord United States v Western Pac. R.R. Co.*, 352 US 59, 64 [1956]). Defendant asserts that plaintiffs' claim for injunctive relief—requiring defendant to modify its electrical distribution system to remediate the stray voltage, including by replacing its outdated and inadequate 2,400-volt electrical distribution system with a 14,400-volt system, ensuring a 90% relative balance between the three phases of the new 14,400-volt distribution system, and ensuring the same balance among the three phases of the existing 2,400-volt system pending its replacement—implicates the PSC's special competence and its overarching regulatory interests, and presents a "a need for the expertise and specialized knowledge of" the PSC (*Heller v Coca-Cola Co.*, 230 AD2d 768, 769 [2d Dept 1996], *appeal dismissed* 89 NY2d 856 [1996]). The court agrees.

The PSC “is expressly endowed with all powers necessary or proper to enable it to carry out the purpose of the Public Service Law” (*Consol. Edison Co. v Pub. Serv. Commn.*, 47 NY2d

94, 102 [1979], *revd on other grounds* 447 US 530 [1980]). It has been said that the PSC possesses the "very broadest of powers" in the regulation of public utilities, to the extent that it is the practical "alter ego of the legislature" (*Rochester Gas & Elec. Corp., v Pub. Serv. Commn.*, 135 AD2d 4, 7 [3d Dept 1987], *appeal dismissed* 72 NY2d 840 [1988]). It is specifically vested with general supervisory authority over electrical utilities, including the authority to investigate the adequacy, quality and safety of a utility's electrical service, and order improvements and remediation of its distribution systems (*see* Public Services Law § 66 [1], [2]; *see also* §§ 4, 65 [1], [14], [16]). It has promulgated regulations establishing procedures for the redress of utility customers' complaints and set forth comprehensive electric safety standards, including standards addressed specifically to stray voltage (*see* 16 NYCRR part 12; Order Adopting Electric Safety Standards, NY PSC Case No. 04-M-0159, Appx A [January 13, 2015]). The issues surrounding the allegations of stray voltage on plaintiffs' farm and what steps are appropriate to remediate any that may be present thus fall within the PSC's special competence, and it cannot be seriously disputed that the PSC's power and duty to supervise "the manufacture, conveying, transportation, sale [and] distribution of . . . electricity for light, heat or power[,] . . . electric plants[,] and . . . the persons or corporations owning, leasing or operating [them]" extends statewide, with a commensurate need to ensure the uniform application of the PSC's regulatory regime to all electric utilities servicing customers within the state (Public Service Law § 5 [b]; *see Romine v Laurito*, 186 AD3d 913, 915 [3d Dept 2020]; *Heller*, 230 AD2d at 769; *see also Szymanski v Thumb Elec. Coop.*, No. 319316, 2015 Mich App Lexis 579, at *4-7 [Ct of Apps of Mich, 1st Dist, March 19, 2015]).

In particular, the court is concerned that awarding the injunctive relief that plaintiffs seek could require defendant to implement changes to its distribution system that are inconsistent with

the PSC's statewide regulatory scheme. This concern highlights the acute need for the PSC's expertise in and specialized knowledge of the provision of electricity to electric utility customers, as to which the court perceives no ground for cavil. The factual issues presented in this case include whether stray voltage is present on the farm, whether any stray voltage on the farm is sourced in defendant's distribution system and due to the distribution system's being outdated or otherwise inadequate to prevent the stray voltage, what remedial measures are appropriate to abate any such issue, and whether such remediation is consistent with the PSC's statewide regulatory scheme and the standards applicable all other electrical utilities that operate thereunder. These are highly technical matters—many of which are sharply disputed by the parties' experts—that the court is poorly positioned to determine; whereas the PSC was created, empowered and staffed for the express purpose of governing electrical utility distribution, among other things (*see Romine*, 186 AD3d at 915; *Albany-Binghamton Express*, 192 Ad2d at 888; *Lamparter v Long Is. Light. Co.*, 90 AD2d 496, 496 [2d Dept 1982]; *Guglielmo v Long Is. Light. Co.*, 83 AD2d 481, 483-484, 488-489 [2d Dept 1981]).

Accordingly, the motion is granted to the extent stated herein, this matter is referred to the PSC and the action is stayed pending the PSC's determination of the issues presented to it, after which plaintiff may return to this court for redress of any of their claims that remain undetermined and legally viable after the PSC's determination (*see Guglielmo*, 83 AD2d at 488-489). Arguments not specifically addressed herein—including plaintiffs' arguments addressed to the timeliness of defendant's motion—have been examined and determined to be without merit.[1] Based upon the foregoing it is hereby

[1] The court does not agree that defendant's motion is one for summary judgment, a proposition upon which plaintiffs' timeliness argument depends, but rather one for a stay, upon which statute places no temporal limitation (*compare* CPLR 2201 *with* 3212 [a]). And while the court is sensitive to plaintiffs' concerns about defendant's bringing this motion only after the parties have brought the case to trial readiness over a period of over five years,

ORDERED that that branch of defendant's motion (NYSCEF Motion Seq. No. 12) that seeks a stay of the action and referral to the PSC is granted, the action is so referred and is stayed pending the PSC's determination of the questions presented to it or until further order of this court; and it is further

ORDERED that the PSC shall determine (1) whether defendant's electrical distribution system is producing harmful levels of stray voltage at plaintiffs' farm that require mitigation; (2) if so, how best to remediate or mitigate that condition; and (3) any other issue arising within or from this action that the PSC may determine to be within its purview upon presentation of such issue to the PSC by any party to this action; and it is further

ORDERED that the motions that remain pending herein—to wit, the remainder of NYSCEF Motion Seq. No. 12 (defendant's motion to strike plaintiffs' request for a jury trial), NYSCEF Motion Seq. No. 13 (plaintiffs' cross-motion to amend the complaint), NYSCEF Motion Seq. No. 14 (plaintiffs' omnibus motion in limine), NYSCEF Motion Seq. No. 15 (defendant's motion to preclude expert testimony), NYSCEF Motion Seq. No. 16 (defendant's motion to preclude expert testimony), NYSCEF Motion Seq. No. 17. (defendant's omnibus motion in limine), and NYSCEF Motion Seq. No. 18 (defendant's motion to deny plaintiffs' omnibus motion in limine)—are held in abeyance pending termination of the stay; and it is further

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defendant has explained the delay to a degree and, at bottom, the considerations that cause this court to refer the case to the PSC are no less compelling now than they might have been at an earlier stage in the action. In the court's view, the ends of substantive justice for the parties, on the one hand, and respect for and deference to the PSC's regulatory prerogative, on the other, require the PSC's participation in this dispute irrespective of the procedural posture of this litigation.

ORDERED that the pretrial conference scheduled for July 21, 2025 at 9:30 a.m. and the trial scheduled to commence on August 11, 2025 at 9:30 a.m. are cancelled pending termination of the stay, to be thereafter rescheduled if appropriate.

The within constitutes the decision and order of this court.

Signed this 31st day of January 2025, 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 NYSCEF system. Such uploading does not constitute service with notice of entry (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b [h] [2]).

Distribution (all via NYSCEF):
Kyle D. Gooch, Esq.
Dale A. Worrall, Esq.
Jeremy R. Stevens, Esq.
Grant M. Borgen, Esq.
Danielle T. Bird, Esq.
William Foster, Esq.
Rick Nadolink, Esq.
Ryan W. Cooke, Esq.
Marisa O. Shearer, Esq.

Frasier and Elmvue Farms, LLC v Niagara Mohawk Power Co.
Fulton County
EF2019-07711

DECISION AND ORDER
Index No. EF2022-70128
RJI No. 56-1-2022-0205

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WARREN

ELIZABETH WHITLOCK KADEL, MARGARET KADEL MCFADDEN, MARGARET KADEL ECK, ELIZABETH KADEL WALSH and WILLIAM GREER KADEL, JR.

Plaintiffs,

-against-

ALPINE MEADOWS, LLC and FARM CREDIT EAST, ACA,

Defendants.

DECISION AND ORDER

Index No. EF2022-70128
RJI No. 56-1-2022-0205

APPEARANCES:

Miller, Mannix, Schachner & Hafner, LLC, Round Lake (*Thomas W. Peterson* of counsel), for plaintiffs.

McPhillips, Fitzgerald & Cullum, LLP, Glens Falls (*Daniel J. Hogan* of counsel), for defendant Alpine Meadows, LLC.

Farer Law Firm, P.C., Albany (*Steven D. Farer* of counsel), for defendant Farm Credit East, ACA

AUFFREDOU, J.

Motion by defendant Alpine Meadows, LLC (hereinafter "Alpine") for summary judgment dismissing the second amended complaint, and cross-motion by plaintiffs for, among other things, summary judgment awarding them the relief sought in the second amended complaint.

Alpine owns an approximately 183.5-acre parcel of land that abuts both Friends Lake Road and the shore of Friends Lake, in the Town of Chester, Warren County (hereinafter "the Alpine parcel"). Plaintiffs own an approximately 0.28-acre lot that lies entirely within, and is landlocked by, the Alpine parcel (hereinafter "the Kadel parcel").[1] The Kadel parcel is accessed from Friends

[1] At the commencement of this litigation, plaintiffs Margaret Kadel Eck, Elizabeth Kadel Walsh and William Greer Kadel, Jr. held equitable interests in the Kadel parcel as distributees under the will of their late father, William Greer Kadel, Sr., but these no longer exist because his share of title thereto was vested solely in his wife, plaintiff Elizabeth Whitlock Kadel, through probate. Accordingly, the court's use of the term "plaintiffs" in the remainder of

Lake Road over a private road known as McPhillips Drive and McPhillips Lake Drive.[2] Plaintiffs' right to traverse McPhillips Drive and McPhillips Lake Drive for the purpose of ingress and egress to and from the Kadel parcel is not at issue.[3] McPhillips Lake Drive continues beyond the Kadel parcel and extends to the shore of Friends Lake, where one encounters a beach, dock and boathouse that are Alpine's property. Plaintiffs claim a prescriptive easement allowing them to traverse that portion of McPhillips Lake Drive that leads from the Kadel parcel to the lake and use the beach, dock and boathouse. They also claim to have acquired title to a small parcel of land—approximately 39 feet by 42 feet in size—that is situated along the roadway and the westernmost boundary of the Kadel parcel by adverse possession (hereinafter "the parking area").

The relevant history of these parcels dates back to 1926. At that time, the Alpine parcel was owned by a family known as McPhillips and the Kadel parcel had not yet been severed from McPhillips' acreage. In July of 1926, McPhillips conveyed title to the Kadel parcel to one Margaret Williams, who was plaintiffs' ancestor and predecessor in title, and apparently a relation to the McPhillips. Both the Alpine and Kadel parcels were conveyed successively over the years to descendants within each respective family or, in the case of McPhillips, to business entities created to hold the property, until the current state of ownership arose. Notable conveyances in these successions include a 2010 conveyance of the Kadel parcel from Frederick S. Kadel to his children, plaintiff Margaret Kadel McFadden and her brother, William G. Kadel, Sr., who is now deceased; and the conveyance of the Alpine parcel to Alpine in 2020.

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this writing shall refer only to Elizabeth Whitlock Kadel and Margaret Kadel McFadden, collectively, and each said plaintiff shall be hereinafter referred to individually by her surname.

[2] The dirt road is known as McPhillips Drive where it intersects Friends Lake Road then becomes McPhillips Lake Drive at some point along its course toward the Kadel parcel, which lies on McPhillips Lake Road.

[3] A letter from Alpine's counsel dated June 17, 2021 recognizes that plaintiffs "have an implied easement to access [their] property over the main dirt road as has been used previously for ingress and egress." Plaintiffs ask this court to "acknowledge" that they have an easement of ingress and egress to and from the Kadel parcel over McPhillips Drive and McPhillips Lake Drive. However, Alpine has ostensibly already done so and the court declines to offer a declaration in determination of rights that are not in controversy.

It appears undisputed that, from the time of severance of the Kadel parcel from the Alpine parcel, Margaret Williams, her guests and her successors in interest used the dirt road that is now known as McPhillips Lake Drive to access the lake, and used the beach, boathouse and dock that are situated on its shores. The dispute herein is rather whether such uses were permitted by McPhillips or hostile to their interests, so as to give rise to the prescriptive rights and title that plaintiffs now claim. The dispute arose shortly after Alpine took title to the Alpine parcel when its counsel sent the July 17, 2021 letter discussed in footnote 3, *supra*, in which he essentially reported the revocation of the license to use the road, beach, boathouse and dock that Alpine understood plaintiffs to have had from McPhillips. The revocation prompted plaintiffs to commence the within action, stating two causes of action to secure what they believe to be their ancient, vested rights to use those amenities, and settle their title to the parking area. Their complaint was twice amended, once to add the three plaintiffs who are no longer necessary parties, as noted in footnote 1, *supra*, and again to add Alpine's mortgagee, defendant Farm Credit East, ACA (hereinafter FCE), whose security interest is implicated by plaintiffs' claims. All defendants have joined issue. Discovery is complete and the parties move as aforesaid.[4]

Upon consideration of the affidavit of Daniel J. Hogan, Esq., sworn to October 30, 2023, with exhibits; the affidavit of Bernice McPhillips, sworn to October 6, 2023, with exhibits; the affidavit of Thomas F. McPhillips, sworn to June 27, 2022, with exhibits; the affidavit of Elizabeth Whitlock Kadel, sworn to December 18, 2024; the affidavit of Margaret Kadel McFadden, sworn to December 12, 2023, with exhibits; the affidavit and memorandum of law of Thomas W.

[4] Plaintiffs seek summary judgment against both Alpine and FCE. FCE has appeared in support of Alpine's motion and opposition to plaintiffs' cross-motion but has not moved on its own behalf. Rather, it asks the court to exercise its discretion to search the record and grant summary judgment dismissing the second amended complaint as to it, as a nonmoving party (*see* CPLR 3212 [b]; *see Digesare Mech., Inc. v U.W. Marx, Inc.*, 176 AD3d 1449, 1455 [3d Dept 2019]).

Peterson, Esq., sworn to December 22, 2023, with exhibits; the reply affidavit of Daniel J. Hogan, Esq., sworn to January 23, 2024, with exhibits; the affirmation of Steven D. Farer, Esq., dated January 25, 2024, with exhibits; and the reply affirmation of Thomas W. Peterson, Esq., dated January 30, 2024, decision is hereby rendered as follows.

"'To obtain summary judgment it is necessary that the movant establish his [or her] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his [or her] favor'" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], quoting *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979] [internal citation and quotation marks omitted]; *accord* CPLR 3212 [b]). Where such burden is met, summary judgment is appropriate unless the proof mustered before the court reveals a material question of fact requiring a trial (*see Stanhope v Burke*, 220 AD3d 1122, 1123 [3d Dept 2023]).

To establish their prescriptive claims, plaintiffs bear the burden to show by clear and convincing evidence that their use of the road, beach, boathouse and dock, or, in the case of the parking area, their occupation thereof, was hostile, open, notorious and continuous for the relevant statutory period (*see Millington v Kenny& Dittrich Amherst, LLC*, 124 AD3d 1108, 1109 [3d Dept 2015]; *Wechsler v People*, 13 AD3d 941, 944 [3d Dept 2004]). Where use or occupation is open, notorious and continuous for the requisite duration, "'hostility will generally be presumed'" (*Millington*, 124 AD3d at 1109, quoting *2 N. St. Corp. v Getty Saugerties Corp.*, 68 AD3d 1392, 1393 [3d Dept 2009] [brackets omitted], *lv denied* 14 NY3d 706 [2010]). "'However, permission can be inferred when the relationship between the parties is one of neighborly cooperation and accommodation, in which case no presumption of hostility will arise" (*Rosenzweig v Howlan*, 166 AD3d 1146, 1148 [3d Dept 2018], quoting *Schwengber v Hultenius*, 160 AD3d 1083, 1084 [3d Dept 2018 [internal quotation marks and citations omitted]). Moreover, "proof of permissive use

will negate the adverse or hostile element of the test" (*Beretz v Diehl*, 302 AD2d 808, 809-810 [3d Dept 2003]).

Alpine's proof that plaintiffs' and their predecessors' uses of the road, beach, dock, boathouse and parking area were permissive defeats plaintiffs' claims.[5] To begin, there is no competent proof of any element of the claims before approximately 1943. No one who has any personal knowledge of the openness, notoriety or continuity of the uses from 1926 to 1943 is alive today. And, though both plaintiffs have used the Kadel parcel for decades—McFadden was born into the Kadel family in 1941 and Kadel married into it in 1963—both admitted in deposition testimony that they have no relevant personal knowledge of any dealings that the Kadel family had with the McPhillips family (*see Wechsler*, 13 AD3d at 945). Rather, the person responsible for dealing with McPhillips was William G. Kadel, Sr. (hereinafter "Bill"). Neither plaintiff was privy to Bill's conversations and what they do know is known to them because Bill told it to them. The grounds for their belief that they own an easement and the parking area are that their family has always used them for as long as they remember. They have no direct knowledge of whether Bill's arrangements, or those made by other family members who preceded him as point person for dealing with McPhillips, involved obtaining permission from them, as the McPhillips family members who testified in deposition on Alpine's behalf claim. Bill died in 2018 and the documentary remnants of his understanding of the arrangement that his family had with McPhillips bespeak decidedly permissive uses.

[5] In summary judgment parlance, this proof carries Alpine's burden to establish its entitlement to judgment as a matter of law and plaintiffs have not carried their responsive burden to raise a question of fact as to hostility; or, conversely, to the extent that plaintiffs carry their initial burden to come forward with proof that would establish every element of their claims and entitle them to judgment, this proof satisfies Alpine's responsive burden. In either case, the court finds no triable question of fact that plaintiffs' uses were permissive.

Thus, even crediting McFadden's somewhat dubious claim that she can remember events that occurred over 80 years ago, when she was two years old, by which plaintiffs established open and continuous use from 1943, they cannot avail themselves of the presumption of hostility. There is ample and uncontroverted proof of neighborly accommodation between the Kadel and McPhillips families that renders the presumption unavailable (*see Millington*, 124 AD3d at 1110). Both plaintiffs used the phrase "civil and cordial" to describe their family's relationship with McPhillips, from which neighborly accommodation and permissive use may be inferred (*see Schwengber*, 160 AD3d at 1085).[6] Certain of Bill's letters to the McPhillips family also compel this conclusion. In a letter dated May 16, 1971, Bill referred to how much he valued the "long standing friendship among [the two] families." In connection with that statement, he refers to the "precarious" position his family would be in if McPhillips sold their land, betraying his understanding that a new owner could revoke the rights to which his family had become accustomed. In another letter dated July 31, 2005, Bill recounts aspects of this longstanding friendship, suggesting that his family's ownership of the Kadel parcel only arose in the first place out of Margaret Williams' friendship with McPhillips, indicating his understanding that his family's uses of McPhillips' property were always neighborly accommodations. "'[W]here permission can be implied from the beginning, no adverse use may arise until the owner of the servient tenement is made aware of the assertion of a hostile right'" (*Barra v Norfolk S. Ry. Co.*, 75 AD3d 821, 824 [3d Dept 2010], quoting *Susquehanna Realty Corp. v Barth*, 108 AD2d 909, 910 [2d Dept 1985]).

[6] The historic correspondence between Bill and members of the McPhillips family—replete, as it is, with reciprocal well-wishes for the other's family and pleasantries such as "[w]e look forward to seeing you this summer"—suggests that this description may be something of an understatement and tends to further prove the neighborly accommodation between them.

That awareness appears to have come with the commencement of this action. In that regard, it bears noting with respect to the road, beach, boathouse and dock that the Kadels' uses of these amenities was not exclusive but was always shared with McPhillips' other guests and invitees, who rented accommodations in the various lodging businesses that McPhillips operated on and around what is now the Alpine parcel and permitted their renters—some of whom were, from time to time, friends or family of the Kadels—to use the amenities to access and enjoy Friends Lake.[7] This proof of permissive use by others "'negate[s] the adverse or hostile element of the test and defeat[s] the creation of an easement by prescription'" (*Wechsler*, 13 AD3d at 944, quoting *Beretz*, 302 AD2d at 809-810; *see Susquehanna Realty Corp.*, 108 AD2d at 909).

The letters that present bases to infer permission from recognized neighborly accommodation also present direct evidence that the Kadels' uses of the road, beach, boathouse, dock and parking area were permissive, eliminating any question of fact in that regard.[8] The observation in Bill's May 16, 1971 letter that the Kadel family's position would become precarious if McPhillips sold their property is among such direct evidence. Put simply, if the Kadels owned an easement over the road and to use the beach, dock and boathouse, and owned the parking area in fee by adverse possession, the changing of hands of McPhillips' property—i.e., what is now the Alpine parcel—would not present a situation precarious to their continued enjoyment of those amenities. Put another way, the only reason that a sale could create a precarious situation for them is because a new owner could revoke their rights. In Bill's July 31, 2005 letter, he expressly recognizes that his family's use of the dock is by permission, in that he recounts that his father

[7] Alpine theorizes that this fact defeats the "notorious" element of the prescriptive test in that the Kadels' supposedly hostile uses could not be distinguished from the undisputedly permissive uses of others. This is an attractively sensical argument, but one for which the court could find no support in caselaw.

[8] Even if this court were to hold that the presumption of hostility arose upon plaintiffs' evidentiary showing of open, notorious, continuous uses, this proof would conclusively rebut that presumption.

sought and obtained permission to dock a boat there in 1957. Then, in the late 1960s, the McPhillips family began billing the Kadels for their uses of the dock, boathouse, beach and road. Alpine produced invoices to the Kadels specifically identifying that the fee was for "use" of the road and beach. The Kadels paid these fees each year for decades, never once asserting a prescriptive right in those amenities. Bill's comments in certain of his responsive letters that the payments were "voluntary" and for "maintenance" fall short of doing so and do not undermine Alpine's otherwise compelling showing that the Kadel's uses were always permissive.

The evidence before the court also contains letters from a member of the McPhillips family in which she refers specifically to the Kadels' rights to the beach, dock, boathouse and road as a license. In 2003, Bernice McPhillips, as managing member of one of the business entities that the McPhillips family created to hold their title, addressed the Kadels' "license" amidst her imposition of a series of rules for use of those amenities, that she would not have been in a position to impose if plaintiffs' rights could not be revoked. Bernice McPhillips again refers to plaintiffs' rights as a license in a 2015 letter in which she chastises them for overuse and misuse of the beach in a manner that exceeds the scope of the license that her family granted "every year to [Bill and his wife] for [the beach's] use by [them] and [their] children and grandchildren." Neither plaintiffs, Bill nor, so far as the evidence shows, any other member of the Kadel family, ever protested these characterizations. Nor did they commence suit at those times to enforce the rights that they now claim were vested in them decades ago.

Lastly, with respect to the parking area, there is evidence in the record demonstrating that Bill recognized McPhillips' superior rights to the property in that general area when he inadvertently felled trees that were on McPhillips' side of the his westerly boundary line and thereafter apologized, begged forgiveness, paid the stumpage value of the trees and asked to

purchase property that was also in the same general location of the parking area. In combination with the evidence of neighborly accommodation between the families and, indeed, independently thereof, this proof defeats plaintiffs' claim to have adversely possessed the parking area (*see Beretz*, 302 AD2d at 810).

Based upon the foregoing, the court finds it appropriate to dismiss the second amended complaint as against both Alpine and nonmoving party FCE. Arguments not specifically addressed have been examined and found to be without merit or academic in light of the holdings herein. Accordingly, it is hereby

ORDERED that plaintiffs' cross-motion is denied; and it is further

ORDERED that defendant Alpine Meadows, LLC's motion is granted, summary judgment dismissing the second amended complaint is awarded to the nonmovant defendant, Farm Credit East, ACA and the second amended complaint is dismissed as to both defendants.[9]

The within constitutes the decision and order of this court.

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

ENTER:

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

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

Distribution:
Thomas W. Peterson, Esq.
Steven D. Farer, Esq.
Substitute Counsel at McPhillips, Fitzgerald & Cullum, LLP[10]

[9] The action is not dismissed because Alpine's answer contains counterclaims that remain extant.
[10] The court has learned that Daniel J. Hogan, Esq. passed away approximately two weeks ago. His law firm continues to represent Alpine.

LAW DAY 2025

Hon. Martin D. Auffredou, President WCBA, welcomes the gathering.

Top Left: Matthew Skinner, Esq., Chair of WCBA Law Day, offers opening remarks. Top Right: Hon. Glen Bruening, Chair of the WCBA Mock Trial competition, welcomes members of the Greenwich High School team, regional winners of the 2025 competition.

Above Left: Members of the Greenwich High School Mock Trial team receive their award. Above Right: Kierstan DeCanio congratulates Milly Koh. Bottom Left: Elizabeth E. Little, Esq. presents the 2025 Liberty Bell Award to Milly Koh. Bottom Right: Milly's family and friends celebrate her award!

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

BIFURCATION AND TRIFURCATION

Hon. Mark C. Dillon *

Bifurcation occurs when a court directs that a full trial be divided into two parts, the first being that of liability and the second being that of damages. The relevant Uniform Rule in the supreme and county courts is Uniform Rule 202.42. It bears the caption of "bifurcated trials," and says in the first portion of the first sentence of the first subdivision that judges are "encouraged" to order them. "Encouraged" does not mean "must" or "shall." The encouragement to utilize bifurcation applies when "it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action" (Uniform Rule 202.42[a]). The First Department generally does not bifurcate trials. The other three departments within the state generally do bifurcate, consistent with the urging of Uniform Rule 202.42(a).

Bifurcation typically contemplates that liability will be tried first, for the obvious reason that if liability is negated, a damages trial, with all of its attendant time, trouble, and expense, will become altogether unnecessary. Additionally, even in the absence of a defense verdict at the liability trial, a verdict determining issues of liability among multiple parties might drive a settlement of the action, rendering the damages trial unnecessary.

At the jury *voir dire* where it is anticipated that the same jury will hear all parts of the case, counsel may ask questions about both liability and damages (Uniform Rule 202.42[c]). Uniform Rule 202.42(e) provides that if there is a verdict in favor of the plaintiff on liability or in favor of the defendant on a counterclaim, the damages trial "shall" be conducted immediately before the same judge and jury. But "shall" does not necessarily mean "shall," as the court retains the discretion under the Uniform Rule to find such procedures impractical, stating those reasons on the record.

Bifurcation is not mandatory but "may" be ordered in appropriate cases. Conversely, courts have authority to order a unified trial in a given case, which will typically occur where issues of liability and damages are so intertwined that they are inseparable (*Mujica v Nassau County Correctional Facility,* 231 A.D.3d 1046 [2d Dep't. 2024]; *Barron v Terry*, 268 A.D.2d 760 [3d Dep't. 2000]), such as in actions involving medical malpractice. But bifurcation may be inappropriate in certain general personal injury actions as well, such as under the circumstances which existed in *Castro v Malia Realty, LLC*, 177 A.D.3d 58 (2d Dep't. 2019) (opinion by Scheinkman, P.J.); *Carpenter v. County of Essex*, 67 A.D.3d 1106 (3d Dep't. 2009). *Castro* is a leading analytical opinion of then-Presiding Justice Scheinkman of the Second Department, which makes clear that the decision of whether to bifurcate is not guided by a hard-and-fast presumption but is left to the sound discretion of the trial courts on a case-by-case basis, and that bifurcation should not be used inflexibly.

The Court of Appeals held in *Rodriguez v City of New York*, 31 N.Y.3d 312 (2018) that a plaintiff may obtain summary judgment against a defendant on liability by proving the defendant negligent, without having to prove the absence of comparative negligence. Where summary judgment is granted, the issue of the plaintiff's comparative negligence is left for trial. When the plaintiff's comparative liability is left for trial, which is an offset to damages (CPLR 1411, 1412), then those post-motion cases do not need to be bifurcated. The plaintiff's comparative negligence may be folded into what would have been the pure damages trial. Bifurcated trials will continue to be seen as robustly as ever in parts of the state that utilize them, where summary judgment motions are not made by plaintiffs prior to trial or where, if made, are unsuccessful.

On very rare occasion, a reverse-bifurcation may make sense where damages should be tried ahead of liability, as illustrated in *Harari-Raful v. Trans World Airlines, Inc.*, 41 A.D.2d 753 (2d Dep't. 1973). *Harari-Raful* involved claims against the defendant airliner arising from an in-flight highjacking. International conventions limited recoveries at the time to $75,000 per passenger, absent the defendant's willful misconduct or negligence. The plaintiff sought damages on various causes of action that well exceeded $75,000. Relatedly, the plaintiffs sought discovery of the defendant's anti-highjacking program which the defendant opposed as containing highly-confidential information. The court directed a trial on damages to first determine whether an award would exceed $75,000. If not, the contested discovery as to the issue of willfulness and the anti-highjacking program would become immaterial to the action. If damages were to be found greater than $75,000, discovery was to proceed as originally contemplated by the trial court, followed by a trial on liability.

Trifurcation refers to a multi-defendant three-phased trial, addressing 1) whether there is any liability of the defendants at all, 2) the apportionment of the parties' respective liabilities if liability exists, and 3) the trial on damages. The CPLR and Uniform Rules make no explicit reference to trifurcation. CPLR 4011 and CPLR 603 implicitly grant courts the discretion to determine the sequence of trials, including the severance of claims or parties and the separation of issues. However, trifurcation is not an approach favored by the Court of Appeals, which once stated that "[i]t is preferable, and sometimes essential, that issues of liability be resolved at one stage of the trial" (*Greenberg v City of Yonkers*, 37 N.Y.2d 907, 909 [1975]).

The assessment of punitive damages is, in essence, a form of bifurcation or trifurcation. Where punitive damages are an issue at trial, the jury receives the usual instructions from the court about liability and, if tried separately, damages. The damages instructions merely elicit a verdict on whether punitive damages should be awarded, without asking the jury to set any particular amount. If the plaintiff prevails on liability and compensatory damages and the jury answers "yes" to punitive damages, a separate trial is then conducted as to the financial circumstances of the defendant which influences the amount of punitive damages, which may then be awarded to punish the defendant for reprehensible conduct (*Gomez v Cabatic*, 159 AD3d 62 [2d Dep't. 2018]; *Rupert v Sellers*, 48 AD2d 265 [4th Dep't. 1978]. *See also* 1 PJI 2:278 Comment, Caveat 3]). This protects the jury's separate compensatory award from being prejudicially influenced by evidence of the defendant's finances.

While bifurcation and trifurcation are terms with generic dictionary definitions, we in the legal profession understand them as matters of trial procedure.

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

2025 ANNUAL DINNER MEETING

IN MEMORIAM

James E. Cullum, Esq. shares thoughts about
Daniel J. Hogan, Esq. and Dennis J. Phillips, Esq.

James R. Burkett, Esq. shares thoughts about
Philip C. McIntire, Esq.

Joshua D. Lindy, Esq. shares thoughts about
Thomas A. Ulascewiz, Esq.

Hon. Thomas E. Mercure shares thoughts about
Hon. G. Thomas Moynihan.

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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Plaintiffs deprived of fair trial by Court's management of jury selection.

Mormile v. Marshall (Lynch, J., 12/19/24)

This rear-end auto accident claim went to trial on two issues: whether plaintiff sustained a "serious injury" (Insurance Law § 5102(d)), and if so, the amount of his damages. The jury returned a defense verdict, answering "No" to the first question – whether plaintiffs "established that the incident…was a substantial factor" in causing the injuries. Supreme Court (McBride, J., Madison Co.) entered judgement for the defendants but the Third Department reversed, finding plaintiffs had been deprived of a fair trial. Question one on the verdict sheet was improper as it related to probable cause and not "serious injury". Furthermore, the Appellate Division found the trial court failed to direct a specific method for jury selection (NYCRR 202.33) and failed to alternate the exercise of peremptory challenges to jurors between plaintiffs and defendants, an error that "compromised the fairness of the jury selection process".

No-fault coverage denied to claimant despite lack of WC insurance.

Quick v. State Farm Mutual Ins. Co. (Powers, J., 12/12/24)

Plaintiff was hurt while driving a tractor trailer his employer leased from a third party that was insured by State Farm. The employer failed to obtain workers' compensation (WC) coverage, so plaintiff sued the employer directly and settled the claim – after which he sought recovery of his basic economic loss with a no-fault benefits application to the defendant. Supreme Court (Graff, J., Ulster Co.) granted State Farm's motion for summary judgment, finding that the plaintiff was required to seek WC benefits from the Uninsured Employers' Fund prior to applying for no-fault benefits. Affirming, the Third Department noted that WC was the plaintiff's primary source for payment of his basic economic loss, and "only thereafter could he seek payment of no-fault benefits with his recovery" reduced by whatever benefits he received via WC.

Dental malpractice action dismissed as untimely.

Ferrara-Carpenter v. Ormsby (Reynolds Fitzgerald, J., 12/5/24)

Plaintiff treated with the defendant dentist for 3+ years, and more than 4 years later commenced this action claiming malpractice. Supreme Court (Aherne, J., Tompkins Co.) granted summary judgment to the defendant, finding the 2½-year statute of limitations was not tolled by "continuous treatment" and as such, the action was time-barred. The Third Department affirmed, agreeing that plaintiff's equitable estoppel argument also failed as there was insufficient evidence that the defendant concealed an act of dental malpractice and knowingly misrepresented the condition of the plaintiff's teeth.

Summary judgment affirmed for Defendant property owners.

Porter v. Stone (Lynch, J., 10/24/24)

Plaintiff, a medical professional arriving for an appointment at the defendant's home, broke his ankle when he slipped and fell on a painted walkway leading to the front door. In this action, plaintiff alleged defendant failed to properly maintain the walkway by utilizing a paint (lacking non-slip additives) that caused the surface to become slippery when wet. Supreme Court (Blaise, J., Cortland Co.) granted the homeowner's motion for summary judgment and the Third Department affirmed, citing again to the rule that "the mere fact that a floor or walkway becomes slippery when wet does not establish a dangerous condition".

DeMulder v. Hunter Mtn. Ski Bowl, Inc. (McShan, J., 12/5/24)

The assumption of risk doctrine often leads to dismissal of personal injury actions arising out of sporting/recreational activities – a fate suffered by this plaintiff, who was injured when he fell and struck a tree located off the edge of a trail at the defendant's ski resort. Supreme Court (Silverman, J., Greene Co.) granted summary judgment to the defendant and the Third Department affirmed, noting that plaintiff's deposition testimony (that he was a "strong, intermediate" skier and aware of the tree line and the danger it posed) contradicted his expert's opinion that the design and construction of the trail concealed the dangerous condition resulting from a lack of fencing at the accident location.

Premises liability claims.

Santiago v. National Grid (Fisher, J., 2/27/25)

During a project to install a new gas main, the defendant and its contractor had to dig a trench along the edge of a public road and the plaintiff's driveway, after

which the trench was backfilled with temporary asphalt. Plaintiff claimed he fell and was hurt when he lost his balance while trying to step over the trench. Defendants' motion for summary judgment, contending the defect was too trivial to be actionable and was otherwise an "open and obvious" hazard, was granted by Supreme Court (Powers, J., Schenectady Co.) but the Third Department reversed, noting that even small defects "can be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify" as hazardous.

Votra v. Village of Cambridge (Ceresia, J., 2/20/25)

New York law permits liability for a dangerous condition to be imposed on the owner of property that abuts public property if the landowner derives a special benefit from the property unrelated to public use. Here, the plaintiff claimed she was hurt in a fall when she caught her foot in a crevice in the sidewalk – part of which was sloped to form a driveway apron on the adjoining landowner's property. Supreme Court (Hogan, J., Washington Co.) granted summary judgment to all defendants but the plaintiff's complaint against the abutting property owner was reinstated on appeal. The Third Department cited to evidence that raised factual questions on the special benefit issue, including deposition testimony that the adjoining property owner arranged for the driveway to be cleared of snow and that the driveway was used regularly by the landowner's tenants.

Englander v. State of New York (Pritzker, J., 3/20/25)

Claimant, injured when his car crashed into a rock wall while navigating a "hairpin turn" on a state highway in Ulster County, claimed the road was not maintained in a reasonably safe condition – specifically, that his accident was caused by the lack of a guiderail and signs advising that the recommended speed on the turn was 5 mph. After trial, the Court of Claims (DeBow, J.) found in favor of the defendant and the Third Department affirmed. Claimant's evidence included an accident report summary that showed 45 accidents on the roadway over 16 years, but only 5 of the crashes involved vehicles that were travelling in the same direction as was the claimant, and the Appellate Division noted that while certain measures may have made the hairpin turn safer, "only reasonable care and foresight, not perfect safety, is required".

Hankey v. Ogdensburg City School District (Garry, J., 1/16/25)

Plaintiff, employed by a wholesale food distributor, was making a delivery of pies to the defendant school district's indoor sporting facility, in preparation for a Thanksgiving fundraiser. A school maintenance worker directed plaintiff to drop his delivery in a specified location some 10 feet away from the facility's hockey

rink, where a high school gym class was underway. About 5 minutes into his delivery, plaintiff was struck on the side of his head with a hockey puck (which had caromed in his direction after it was shot from the ice and struck a goalpost). Supreme Court (Farley, J., St. Lawrence Co.) denied the defendant's motion for summary judgment, premised on a primary assumption of risk defense. Affirming, the Third Department noted that the plaintiff was on site to work, was instructed exactly where to make the delivery, and "was therefore neither a spectator nor a bystander…within the meaning of the doctrine".

Plastic surgeon's alleged improper use of patient photos.

Perry v. Rockmore (Egan, J.P., 2/27/25)

The defendant plastic surgeon operated on the plaintiff, after which she learned that photographs depicting her face before and after the procedure had been posted on various commercial websites and social media platforms to promote the physician's work. Supreme Court (Ferreira, J., Albany Co.) granted partial summary judgment to the defendant, dismissing the plaintiff's claim for breach of fiduciary duty. The Third Department agreed that plaintiff's exclusive remedy for a privacy violation claim was by statute (Civil Rights Law §§ 50 and 51) because New York does not recognize a common law claim of privacy. But the Appellate Division reinstated the breach of fiduciary duty claim because the plaintiff's complaint revealed such claim arose out the doctor-patient relationship and not the alleged violation of privacy.

Service of late notice of claim (GML § 50-e) permitted.

Cook v. Maine-Endwell Central School District (Clark, J., 3/13/25)

A notice of claim against a municipal defendant must generally be served within 90 days after the claim arises (General Municipal Law § 50-e), but Supreme Court has discretion to consider an application for leave to file a late notice of claim if permission is sought before expiration of the statute of limitations. Here, the petitioner's child tragically took his own life hours after being disciplined at school with suspension and possible expulsion. One year and 89 days after the student's death (within the SOL applicable to a tort or wrongful death claim against a municipal corporation), petitioner filed an application to file a late notice of claim, which was granted by Supreme Court (Faughnan, J., Broome Co.). The Third Department affirmed, concluding that the school district had "actual knowledge of the essential facts constituting the claim soon after decedent's death", that the defendant failed to show it would be substantially prejudiced by permitting the claim to go forward, and that the claim as described was not patently meritless.

WARREN COUNTY BAR FOUNDATION ~ LEGAL SYMPOSIUM

On May 28th the Warren County Bar Foundation hosted the Legal Symposium for High School seniors in the newly renovated Warren County Supreme Court courtroom. The event was well attended with more than 150 seniors from Glens Falls, Queensbury, Lake George, Bolton, North Warren, Warrensburg and Saratoga Catholic enrolling.

Because 18-year-olds are considered adults in the eyes of the law, their relationship with the law changes. Local attorneys discussed several important topics with the students. Court of Claims Judge, the Honorable Kathleen B. Hogan, and District Attorney Jason Carusone, spoke with the students about the ramifications of having fake identification, texting while driving and picking up acquaintances in a vehicle. Public Defender Greg Canale and Attorney Rose Place discussed hosting a party, criminal sexual contact, rape, Title IX, and Family Court's role when a child is born and paternity isn't established. Attorney Mary Ellen Stockwell-Capasso spoke with the students about contract obligations while the students reviewed leases in small groups. In addition to the courtroom discussion, many of the students participated in a tour of the Warren County Jail and 911 dispatch center.

Denise Clark, a guidance counselor from Bolton Central School, stated that, "The Warren County Bar Foundation's Legal Symposium is a valuable field trip that we take our seniors on every year. Students watch real life scenarios and then learn the legal consequences for their actions." Glens Falls High School senior Brooke Eggleston stated, "the video scenarios that were presented before each discussion were very realistic and showed situations that would occur with teenagers. I appreciated the diverse panel of attorneys and found the symposium very informative, especially the section about leases."

Event organizer, Attorney Elizabeth Little, commented, "We're thrilled that our local school districts are willing to bring students to this important event. Although the event has been held for the last 20 years, post-Covid participation was challenging. As attorneys, we want to see students succeed as adults. We aim to give students some of the tools they need to avoid negative interactions with our legal system as they graduate from high school."

L: District Attorney Jason Carusone and the Honorable Kathleen B. Hogan discuss the automobile presumption with students

R: Cheyenne Havens, Esq., Honorable Kate Hogan, Rose Place, Esq., District Attorney Jason Carusone, Mary Ellen Stockwell-Capasso, Esq., Elizabeth Little, Esq., Ben Hogan, Esq.

Hon. Amy Quinn, New York State Court of Claims

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WARREN COUNTY BAR ASSOCIATION
ADVERTISING OPPORTUNITIES

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

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

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

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The Bulletin Board

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

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Deadline for submissions for next edition November 1, 2025