WARREN COUNTY BAR ASSOCIATION, INC.

# TIPSTAFF

Winter/Spring 2021 Volume II Issue 2

## IN THIS ISSUE



Dear Sisters and Brothers of the Bar:

It is my pleasure to welcome you to the 2021 Winter/Spring edition of the *Tipstaff*. It is my hope that you and your families continue to be safe and healthy in these unusual times and that we all have access to a vaccine soon. As we continue to practice predominantly remotely, it is as important as ever to continue our membership contact and to not lose touch with our colleagues and friends. I must expressly thank our Executive Director, Kate Fowler, in continuing this contact for us, whether through her work with the *Tipstaff* or in her *Weekly Digests*, her efforts to keep us in touch and up to date are extremely appreciated.

Over the winter of 2020-2021, the Bar Association has remained active and relevant in this pandemic environment. In December, 2020, we held a donation "drive-thru" where our members donated funds to the Open Door Mission and gloves, hats and clothing to Warren County Head Start. As a result of these efforts, we delivered boxes of hats and gloves to Head Start and over $3,000 to the Open Door! Both organizations appreciated the donations, especially since we still held a fundraiser for their entities even though we could not meet in-person.

In January, 2021, the Bar Association hosted a CLE entitled "Operations and Procedures At Warren County Courthouse In The Time of COVID-19," which included presentations by Hon. Robert J. Muller, Hon. Martin D. Auffredou, Hon. Paulette M. Kershko, Principal Law Clerk Jennifer Purcell Jeram, Principal Law Clerk Jillian O'Sullivan, Commissioner of Jurors Wanda Smith, and Supreme Court Clerk April Schmick. We had 40 members participate in the CLE and genuinely thank the Judges and Court Staff for presenting to us.

During this time, we have re-focused efforts on increasing our memberships. We currently have 152 members of the Bar Association, which is one of our highest membership rates. We have also continued with the committee to prepare the Warren County Legal History for the Historical Society of New York Courts. A committee of local judiciary, bar members and historical experts have frequently met and are assembling this history. The committee seeks to have the Warren County Legal History published by June, 2021.

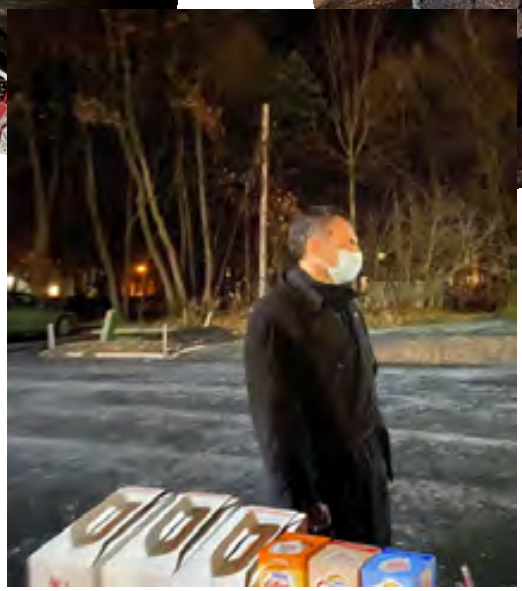
While the way we do things may have changed, we have already had a productive year and are continuing our preparations for more CLEs, meetings, and Law Day celebrations in the coming months. Until then, please enjoy the rest of the Winter/Spring edition as there are interesting and informative articles that are of importance to all of us. Until I "see" you again, stay safe and stay healthy.

Sincerely,

Jessica Hugabone Vinson

# WCBA 2020 GATHER & GIVE

**When it became clear that, due to COVID-19 restrictions, our usual holiday party would not be possible this year, the WCBA Board of Directors sought ways to gather safely and to give to those most in need in our community. The answer was a cold but lovely event we called *Gather & Give*. Not only did we share delicious coffee, cocoa and homemade cookies, we collected lots of hats, mittens and scarves for the children of Warren County Head Start and over $3,000.00 in cash for The Open Door Mission. It was a great way to celebrate friendship and holiday joy, while we shared our blessings with others!**

**WCBA members safely gather in the Bartlett, Pontiff, Stewart & Rhodes' parking lot on a very cold December night.**

**(Above) Karen Judd delivers a boxful of hats and mittens to Shari Marci, Executive Director of Warren County Head Start. (Right) Jessica Vinson and Kate Fowler deliver a donation check to Kim Cook, Executive Director of the Open Door Mission.**

# Witch Doctors and Psychologists

James Cooper, Esq.

George Washington's values were shaped by his study as a youth of Lucius Annaeus Seneca's work, *Morals*. Monstrous villains are deemed worthy of study. Biography of great men and women as well as evil men and women seems to be of enduring interest because, like witch doctors and psychologists, we try to understand what makes people tick. We strive to know what causes people to excel or be grotesquely different. Is it nature or nurture? The answer is, 'yes'.

Our region produced the most nationally respected judge, who never served on the United States Supreme Court, Learned Hand. His grandfather, Augustus Hand, a lawyer from Elizabethtown who developed a statewide practice from there, told his sons, "The highest post a man can hold in the United States is that of a distinguished member of the bar." Each became an attorney. Learned Hand's father, Samuel Hand, established a practice in Albany as the most eminent lawyer arguing in the Court of Appeals, as in the 1860s, most prominent law firms were in New York City, but their practice was to refer Court of Appeals cases to Albany's appellate specialists rather than to travel and argue themselves. With his father, two uncles and a biblical patriarch of a grandfather as lawyers, Learned Hand had a huge family tradition to live up to and a bizarre name to live down.

His maternal family perpetuated a custom of giving children family surnames, thus, Hand got two in 1872: Billings Learned Hand. The stiff, Puritan, class conscious Hands and Learned himself, never considered "Bill", as a casual name, so he was saddled with what to do with Billings and in his youth went by 'B. Learned Hand', as he felt that Billings would appear to be an affectation. One can imagine what his classmates did with his name. He was socially awkward and did not fit in with children at Albany Academy. He did not like team sports. He was a loner and spent his childhood's happiest hours in his room studying and enjoying his stamp collection. This was due in large part to a hovering mother and a distant father, whose relationship with Learned was not close nor personal.

Hand brooded in correspondence in later life that his father suffered from a "melancholic disposition." Although accomplished in legal circles, it can be argued that Hand's father was overawed by the accomplishments of Augustus Hand, who had been elected to congress, served on the Court of Appeals and in New York's legislature. Samuel shared little with his son. His private life involved amassing an impressive library collection and spending his time at home alone there reading.

He had been instructed by Augustus that excellence in the law involved unrelenting focus, education, hard work and avoiding distractions like unrelated hobbies.

Samuel, like Augustus, was a Jacksonian Democrat, opposed to a large national government. He was a social reform Democrat. He was appointed to the Court of Appeals, but later was vetoed for election by Tammany Hall Democrats. President Cleveland had indicated that he was on his list to be appointed to the Supreme Court, but he contracted cancer and died when Learned was 14. Thereafter, his wife inculcated Learned with exaggerated praise for his father as a model of excellence, an intellectual giant. A marble statue makes a cold parent. To live up to the legacy passed down by his father, grandfather and uncles became Hand's heavy burden.

A child's nature can't be wholly suppressed, so when Learned vacationed with his family at E-town, he and his cousin would climb nearby mountains and ridges, lie on their bellies on rocky summits and view Lake Champlain imagining Roger's Rangers or General Burgoyne's fleet sailing toward Ticonderoga. He loved rambles through freshly fallen snow there.

He graduated second in his class from Albany Academy and was accepted at Harvard. There, his family's prestige in Albany came up against an impenetrable caste system that left him outside of the clubs of highest status. He began to form friendships only as an upperclassman, some with faculty, like George Santayana. He became intellectually challenged by studying economics and philosophy and felt drawn to philosophy as a career until disclosure to a department advisor resulted in an indifferent response that demoralized him and steered him into Harvard's law school as the path of least resistance. He was surprised to enthusiastically flourish in the study of law. Harvard was in the second decade of instruction by caselaw study to develop analytical thinking, as opposed to lecturing principles of law. He was refreshed by the intellectual challenge and for the first time in his life formed deep friendships with classmates, some for his lifetime. He graduated summa cum laude, and although a cousin had signed on with a New York City law firm, Hand's intimidation by New York City and relationship with his mother caused him to return to the Albany family home. In later life he would characterize Albany as, "...a hick town up the river", notwithstanding it being his nurturing hometown.

He was a failure as a practicing attorney, lacking basic street smarts. He worked for influential firms in Albany but was relegated to doing state filings of papers for other lawyers, filing collection documents, and writing appellate briefs for other lawyers. He was referred a child support paternity case by a Massachusetts attorney. He was buffaloed by his opposing counsel, disregarded by the judge. He sent the woman he represented fifty dollars of his own money out of guilt. This and the failure to bill for ministerial work doing filings caused his mentors to be frustrated with him and calls into question what he learned at Harvard's economics classes.

He became counsel for good government organizations and wrote reports exonerating a police officer accused of misconduct in a labor dispute and was praised for an analysis of the state's psychiatric asylum. He diverged from the family tradition as conservative, isolationist Democrats and supported Theodore Roosevelt, switching his registration to Republican.

Albany for him was an intellectually barren void that he tried to fill by teaching at Albany Law School and by regularly joining an informal group of lawyers in New York for topical debates. He temporized for years whether to move there but was unable to make the commitment because of his sense of duty to his mother and personality characteristics described by his biographer as,"insecurity, anxiety, self doubt, introspection, lack of confidence, and low self esteem."

Hand married a Bryn Mawr graduate, Frances Fincke, who had the opposite characteristics in abundance. They moved to New York, where Hand continued to fumble as a practicing attorney in two small Wall Street firms, so he sought out like minded attorneys and satisfied his 'hobby' of social reform by promoting good government groups and progressive causes. This circle of friends with common interests widened to include the city's most powerful and influential Republican lawyers.

Hand's reputation grew from his intellectual contributions such as authoring articles in the nationally read Harvard Law Review. There he criticized the U.S. Supreme Court's decision in Lochner v. New York, 198 U.S. 45, (1905) that began a thirty year reign of judicial nullification of progressive legislation under the theory of due process violation of 'freedom to contract.' Lochner involved the state regulating the total hours a baker could be forced to work.

> "For the state to intervene to make more just and equal the relative strategic advantage of the two parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is as proper a legislative function as that it should neutralize the relative advantages arising from fraudulent cunning or from superior force."

Hand surrendered to the reality that he would never be a successful practicing attorney and pursued a federal judgeship in 1907, five years after moving to New York. The powerful friends he had attracted in his tangential work for good government organizations and political reform coalitions were accidentally the political base he needed to gain the appointment to become a federal judge of the Southern District of New York. He was appointed by President Taft in 1909. Although there was competition for the appointment, the reality of being a judge then involved dreary facilities, no clerk support, low salary and begging Washington for supplies, even typewriter ribbon. He floundered as a trial judge for two months and taxed his intelligence to get up to speed in areas of federal law, such as bankruptcy and admiralty, with which he had no previous experience. Eventually,

his powerful intellect overcame his inexperience. He was a quick study as a judge and rapidly began to complain that his major frustration was the disingenuous tactics of counsel to promote their clients' interests, rather than to accede to the obvious resolution of issues, obvious to him anyway.

The balance of his life's work is too massive to be cataloged here. His onetime law clerk and biographer wrote a tome to cover it. He wrote over four thousand opinions in a career over fifty years that saw him elevated to the Second Circuit Court of Appeals where he became Chief Judge. Although a fair reading of his major opinions reveals that he was a philosophical liberal, where the circumstances justified it, his decisions were conservative. He consistently opposed courts becoming the ultimate legislative branch and deferred most times to legislative prerogatives. He wrote opinions reversed early in his time but later adopted as law by the Supreme Court. His opinion reversed the conviction of a dangerous Soviet spy by suppressing an illegal search resulting in public outrage. His court upheld a conviction of another Communist party member for urging the violent overthrow of the government which he held was prohibited speech under the statute and not protected by Article 1. The offender was imprisoned and later murdered there, beaten to death with a chunk of brick in a sock. Hand agonized about that. His Second Circuit court became the most respected appellate court in America under his stewardship.

The precision of his opinions and the humanity of his analysis of the right course of action to render justice were the marvel and pride of legal scholars of his time. He would have been appointed to the United States Supreme Court but for circumstances certainly known only to President Franklin Roosevelt. Speculation is that when an opening arose there were already two New Yorkers serving on the Court. Justice Douglas later indicated that he thought that the repeated urging of Felix Frankfurter supporting his appointment annoyed and irritated Roosevelt. The ostensible reason was that when a later opening came up, Hand was deemed too old, although he outlived the appointee.

There is the possibility that Hand's deciding some New Deal cases against Roosevelt led to revenge. He vehemently opposed the scheme to pack the Supreme Court. Hand wanted an appointment and revealed some uncharacteristic bitterness to the subsequent appointments of Hugo Black, William Douglas and Frank Murphy referring to them as "Hillbilly Hugo, Good Old Bill, and Jesus, lover of my soul." He opposed the Nuremberg War Crime trials as vengeance and not justice as they omitted Allied war crimes. On his death at age 89 he was universally acknowledged as the greatest jurist of his era and was in retrospect, perhaps the greatest judge of the twentieth century. He was buried in the Albany Rural Cemetery.

Hand made contributions off the bench, somehow finding time to be a founding member of the American Law Institute and on its board and in attendance at meetings from 1923 to 1961, (the year of his death), actively involved in its

publication of Restatements of the Law of ... He was, with other intellectuals of his time involved in the creation of The New Republic magazine in 1914. He wrote articles for it but eventually deemed it improper for a judge to opine there on matters of contemporary controversy.

What made Hand great? He got a great set of genes. There were the family imperatives, but his academic successes were his own. His wife and her father and all his relatives pushed him to press on as a lawyer, but his decision to try to become a judge opposed them. He was handicapped by his personality, but strove on courageously. He had empathy for the underdog and outsider, but in some instances seemed an aloof snob with elitist compassion. He supported the application of a Jewish friend to become a member of Albany's Fort Orange Club where his friends there of that social class routinely black-balled Jews. He was deeply interested in politics but felt that judges should not aspire to political office. He hated McCarthyism and Richard Nixon but voted for the reelection of Eisenhower as the McCarthy antidote. He struggled as an attorney, but if an attorney annoyed him in oral argument he was known to rotate his chair and turn his back. He became an agnostic but was inclined to invoke the deity in public speeches and find structure for his sense of justice in his Calvinist upbringing. He was a political moderate and became the model of an unbiased jurist, able to approach issues with an absolutely open mind. He was a profoundly complex man, so he leaves unanswerable the question, 'What made him tick or made him so special?'

Here are excerpts from some of his writings and speeches:

United States v. Kennerley 209 Fed 119 (S.D.N.Y 1913) (obscenity)

"It seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library, in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature".

His sarcasm could be vicious:

"This is the most miserable of cases, but we must dispose of it as though it had been presented by actual lawyers".

He addressed a massive naturalization crowd in Central Park:

"What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near to two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest".

In the climate of McCarthyism:

"My friends will you not agree that any society which begins to be doubtful of itself; in which one man looks at another and says: "He may be a traitor," in which that spirit has disappeared which says: "I will not accept that, I will not believe that- I will demand proof. I will not say of my brother that he may be a traitor," but I will say, "Produce what you have. I will judge it fairly and if he is, he shall pay the penalties; but I will not take it on rumor. I will not take it on hearsay. I will remember that what has brought us up from savagery is a loyalty to truth, and truth cannot emerge unless it is subjected to the utmost scrutiny"–will you not agree that a society which has lost sight of that, cannot survive?"

Jim Cooper

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This article is almost entirely paraphrased from the biography by Gerald Gunther, LEARNED HAND the Man and the Judge, Alfred A. Knopf, Inc., publishers, 1994, 677 pages of text and photographs, 104 pages of footnotes. Many characterizations are my own and should not be ascribed to Gunther.

# STATE OF NEW YORK SUPREME COURT CHAMBERS
# ROBERT J. MULLER, JUSTICE OF THE SUPREME COURT



2021 WL 687244
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
This opinion is uncorrected and will not be published in the printed Official Reports.
Supreme Court, New York, Warren County.

Angela Vernum, as Executrix of the Estate of Clay A. Beaudet, Plaintiff,
v.
Sharon Freyer, Defendant.

EF2020-68128
|
Decided on February 11, 2021

**Attorneys and Law Firms**

Stafford, Carr & McNally, P.C., Lake George (Nathan Hall and Bruce Carr of counsel), for plaintiff.

Cabaniss Casey LLP, Albany (David Cabaniss of counsel), for defendant.

**Opinion**

Robert J. Muller, J.

**1 Defendant is a licensed attorney in New York who focuses her practice primarily on real estate transactions. In May 2017 she was retained by plaintiff, as executrix of the estate of Clay A. Beaudet (hereinafter Clay), to represent her in the sale of two parcels of land located at 9 Rhode Island Avenue and 0 Rhode Island Avenue in the Town of Queensbury, Warren County. 9 Rhode Island Avenue is .14 acres in size and improved by a single-family dwelling. 0 Rhode Island Avenue — which is located immediately adjacent to 9 Rhode Island Avenue — is .21 acres in size and unimproved. At the time of this initial retainer, plaintiff had contracted to sell both parcels of land to DKC Holdings, Inc. (hereinafter DKC). These contracts were subsequently cancelled, however, when certain title issues were discovered and DKC was unwilling to await their resolution.

Specifically, defendant discovered that Clay never held title to 0 Rhode Island Avenue. Both 9 Rhode Island Avenue and 0 Rhode Island Avenue were previously owned by Dorothy Skellie (hereinafter Dorothy) and her husband, Ernest Skellie (hereinafter Ernest), as tenants by the entirety. Ernest died in 1998, leaving his interest in the property to Dorothy, who then married Clay. In 2006, Dorothy executed a warranty deed conveying 9 Rhode Island Avenue from herself to herself and Clay as tenants by the entirety. She did not, however, convey title to 0 Rhode Island Avenue, which she continued to own individually until dying intestate in 2013. Upon her death, Clay acquired an ownership interest in 0 Rhode Island Avenue as Dorothy's surviving spouse. Defendant advised that an investigation was necessary, however, to determine whether Dorothy had other heirs who might also have an interest in the property.



**For Full Decision Click Here**

# STATE OF NEW YORK SUPREME COURT CHAMBERS
# MARTIN D. AUFFREDOU, JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

LISA BUGLIONE,

Plaintiff,

-against-

BRUCE D. HARPER, DEBRA R. HAUPT and NBT BANK, N.A.,

Defendants.

**DECISION AND ORDER**

Index No. EF2019-67322
RJI No. 56-1-2019-0465

**Appearances:**

*Meyer, Fuller & Stockwell, PLLC*, Lake George (*Jeffrey R. Meyer* of counsel), for plaintiff.

*Miller, Mannix, Schachner & Hafner, LLC*, Glens Falls (*Brian Reichenbach* of counsel), for Bruce D. Harper and Debra R. Haupt, defendants.

**AUFFREDOU, J.**

Plaintiff is the owner of a parcel of real property, known as 43 Morgan Court, in the Town of Lake George, Warren County ("plaintiff's parcel" or "plaintiff's property"), which she acquired by deed dated July 31, 2015. Defendants Bruce D. Harper and Debra R. Haupt ("defendants") are the owners of a parcel of real property known as 37 Morgan Court, in the Town of Lake George, Warren County ("defendants' parcel"), which is located adjacent to plaintiff's parcel.

Prior to plaintiff's purchase of her parcel, defendants and plaintiff's predecessors in title, Joseph and Valerie Dellaporta ("plaintiff's predecessors in title") learned that a small portion of an asphalt driveway leading to plaintiff's garage, and an area adjacent thereto, are located on defendants' parcel. Plaintiff claims that when she purchased plaintiff's parcel, the sellers represented to her that the property included the asphalt driveway and the area adjacent thereto, extending to and including an earthen embankment and the adjoining area, which is covered in



For Full Decision Click Here

STATE OF NEW YORK
SUPREME COURT COUNTY OF FULTON

SALVATORE MANNINO,

Plaintiff,

-against-

ANNA RANDAZZO MANNINO,

Defendant.

**DECISION AND ORDER**

Index No. 2020-08653
RJI No. 17-1-2020-0343

**APPEARANCES:**

*Law Offices of Ronald R. Schur, Jr.*, Mayfield, for plaintiff.

*Wood Seward & McGuire, LLP*, Gloversville (*Benjamin C. McGuire* of counsel), for defendant.

**AUFFREDOU, J.**

Plaintiff commenced this action by the filing of a summons and verified complaint on October 30, 2020. Plaintiff asserts causes of action for constructive trust and unjust enrichment. Defendant moves for an order dismissing the complaint, pursuant to CPLR 3211 [a] [5] and [7], contending that plaintiff's causes of action must be dismissed on the grounds of statute of frauds and failure to state a cause of action. Plaintiff opposes.

In deciding the motion, the Court has reviewed and considered the following: the affidavit of Anna Randazzo Mannino, sworn to December 7, 2020, with exhibits, in support of the motion; and the affidavit of Salvatore Mannino, sworn to January 11, 2021, and the affirmation of Ronald R. Schur, Jr., Esq., dated January 11, 2021, in opposition to the motion.

Plaintiff is the son of defendant and her late husband. According to defendant, in 1988, defendant and her late husband purchased real property located at 44 North Main Street in

STATE OF NEW YORK
SUPREME COURT COUNTY OF WASHINGTON

ELIZABETH DUNN,

Plaintiff,

-against-

LAURA SIEME GIORDANO AND THE COUNTY OF WASHINGTON,

Defendants.

**DECISION AND ORDER**

Index No. EC2020-31815
RJI No. 57-1-2020-0263

**Appearances:**

*Herzog Law Firm P.C.*, Albany (*Daniel J. Persing* of counsel), for plaintiff.

*FitzGerald Morris Baker Firth P.C.*, Glens Falls (*John D. Aspland, Jr.* of counsel), for The County of Washington, defendant.

**AUFFREDOU, J.**

Plaintiff claims to have sustained personal injuries on April 20, 2019, when she was attacked by a dog owned by defendant Laura Sieme Giordano while in Lake Lauderdale Park ("the park") in the Town of Jackson, County of Washington. Plaintiff alleges, *inter alia*, that defendant The County of Washington ("defendant" or "the County") was negligent in: failing to conspicuously post the rules and regulations of the park; failing to post signs warning owners to have their dogs on a leash; failing to enforce the rules and regulations of the park; and failing to provide law enforcement or other enforcement to oversee the park.

The County moves to dismiss plaintiff's complaint, pursuant to CPLR 3211 [a] [1], on the ground of a defense based upon documentary evidence and pursuant to CPLR 3211 [a] [7], on the ground that the complaint fails to state a cause of action.

# STATE OF NEW YORK SUPREME COURT CHAMBERS
# MARTIN D. AUFFREDOU, JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK
SUPREME COURT COUNTY OF WASHINGTON

RICHARD E. BURCH,

Plaintiff,

-against-

LAWRENCE (LARRY) BURCH
HEIDE BURCH
DEE BURCH,

Defendants.

**DECISION AND ORDER**

Index No. 2019-31134
RJI No. 57-1-2020-0334

**Appearances:**

*Richard E. Burch*, plaintiff pro se.

*John R. Winn*, Granville, for Heide Burch, defendant.

*McMahon & Coseo, P.C.*, Saratoga Springs (*John L. McMahon* of counsel), for Dee Burch, defendant.

**AUFFREDOU, J.**

Plaintiff commenced this action to recover the balance allegedly due to him for burying, or covering with dirt, a number of animal carcasses on the Potter farm in Hartford, New York. In his amended complaint, plaintiff alleges, among other things, that his brother, defendant Lawrence (Larry) Burch ("Larry Burch"), and his nieces (Larry's daughters), defendants Heide Burch and Dee Burch, operate a livestock removal business known as Larry Burch Services. Plaintiff claims that defendants Heide Burch and Dee Burch hold title to equipment necessary for the operation of the business and provide vehicles or equipment to be used to continue day to day operations of the business, as well as insurance that benefits the business. Plaintiff alleges that in May, 2019, Larry Burch hired plaintiff, with his bulldozer, at a rate of $125 per hour, to bury livestock which plaintiff

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

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## Discovery of expert witnesses' financial records permitted.

**Loiselle v. Progressive Casualty Ins. Co. (Garry, P.I., 11/5/20)**

Plaintiff, hurt in a car accident caused by an uninsured driver, made a demand for payment under his SUM coverage with Progressive. When the claim was denied, he sued the insurer for breach of contract, and later served a subpoena duces tecum (seeking Form-1099 income records) on the vendor who hired two expert witness physicians to examine plaintiff (IMEs) for Progressive. Supreme Court (Ferreira, J., Schoharie Co.) granted defendant's motion for a protective order and quashed the subpoena. Noting a split among the Appellate Divisions whether such non-party records were discoverable, the Third Department - considering an issue of first impression - reversed the lower court, agreeing with plaintiff that the 1099 forms showing the amount of compensation received by the doctors from Progressive "may reveal a financial incentive that the physicians have in testifying", which is relevant on the issue of possible bias or interest on the part of the doctors.

## Inadequate expert witness disclosures sinks plaintiffs' claims.

**Garrison v. Dick's Sporting Goods, Inc. (Devine, l., 10/22/20)**

Alleging they were injured while shooting a defectively designed crossbow purchased from the defendant sporting goods store, plaintiffs commenced an action for negligence and products liability. In violation of the Third Judicial District's§ 3101(d)(1) rule, plaintiffs did not serve a product liability expert witness disclosure prior to or at the time of filing the Note of Issue. Supreme Court (Cahill, J., Ulster Co.) granted defendant's motion to dismiss the product liability claims, and after granting plaintiffs more time to respond; later issued a second order that also dismissed the negligence cause of action. Affirming dismissal of the products liability claim, the Third Department ruled plaintiffs failed to show "unusual or unanticipated circumstances and substantial prejudice" warranting late disclosure under the Third District rule but did reinstate the negligence cause of action; noting that Dick's may have created a

duty of care when one of its employees allegedly tried to repair the crossbow and gave it back to plaintiffs.

**Young v. Sethi (Garry, P.J., 11/5/20)**

Plaintiff sued her surgeons after a spinal fusion operation, alleging that during the procedure they repositioned her pelvis - impacting a pre-existing (genetic) physical anomaly, causing her new injuries and debilitating pain. Following discovery, Supreme Court (Tait, J., Broome Co.) granted defendants' motion for summary judgment; despite testimony from the plaintiff and her sister that the defendant neurosurgeon told them that he had de-rotated her pelvis (conduct to which the plaintiff insisted she did not consent). Affirming dismissal of the action, the Third Department found the plaintiff's expert witness - a chiropractor who contended such a spinal manipulation under general anesthesia is a chiropractic, not surgical, procedure - was not qualified to render an expert medical opinion on "the standards of care applicable to interbody fusion surgery". The Appellate Division also ruled the plaintiff's claim that the defendants intentionally repositioned her pelvis, as a separate and unauthorized procedure during the course of the spinal surgery, was untimely; as it was governed by the 1-year statute of limitations for battery (CPLR § 215(3)).

**Summary judgment dismissal for property owner reversed.**

**Desroches v. Heritage Builders Group, LLC (Lynch, J., 10/22/20)**

Plaintiff and two friends - after consuming alcoholic beverages - took a walk (after midnight) in the Timber Creek subdivision and entered a house that was under construction. Failing to observe an 8-10 foot opening in the floor that was located 10-15 feet from the front door, plaintiff fell through the hole into an unfinished basement, sustaining head injuries that required hospitalization. Defendants, the property owner/developer and general contractor, won summary judgment (Nolan, J., Saratoga Co.), with Supreme Court concluding that the plaintiff's entry into the property while intoxicated "was not reasonably foreseeable as a matter of law". The Third Department reversed and reinstated the plaintiff's complaint, finding several questions of triable fact (including whether there was a 'no trespassing' sign on the property) and rejecting defendants' contention that plaintiff's intoxication was a superseding cause of the incident.

**Errors in jury charge nets Plaintiffs new trial.**

**Michalko v. Deluccia (Reynolds Fitzgerald, J., 10/22/20)**

Plaintiff, after two heart attacks and cardiac stenting procedures, took medications to reduce the likelihood of blood clots. Prior to, and after, an elective colonoscopy, the medication regimen was stopped, per the direction of the attending cardiologist and gastroenterologist. Five days after the colonoscopy, plaintiff had another heart attack - and later sued his physicians, claiming they negligently failed to consult with each other and negligently directed the patient to stop the medication therapy. Supreme Court (Baker, J., Chemung Co.) denied plaintiff's motion to set aside the jury's defense verdict but the Third Department reversed and ordered a new trial - finding that the trial court's jury instructions were flawed. The habit evidence charge (PJI 1:71) was improper because there was no "evidentiary gap" that required filling with an inference; and the medical judgment charge (PJI 2:150) should not have been given because there was no evidence that the physicians chose between two or more medically acceptable alternatives.

**Jury's verdict of no "serious injury" affirmed.**

**Warner v. Kain {Pritzker, J., 9/24/20)**

Defendant admitted liability in this auto accident injury action, and after trial Supreme Court (Richards, J., St. Lawrence Co.) denied plaintiff's motion to set aside the jury's verdict and finding that plaintiff did not sustain a "serious injury", as required under Insurance Law§ 5102(d). Plaintiff relied primarily on the expert testimony of an orthopedic surgeon who performed an independent medical exam (IME) and testified that Warner "sustained a bilateral fracture" in his lumbar vertebrae; although the witness did not use the word *fracture* in his IME report and several diagnostic reports received in evidence specifically noted there was no fracture. Affirming the trial court, the Third Department noted that the jury was "not required to accept an expert's opinion as long as its decision not to do so is supported by some other evidence or cross-examination of the expert".

**COURT OF APPEALS: "vicious propensities" rule does not shelter veterinary clinic.**

**Hewitt v. Palmer Veterinary Clinic, P.C. {Stein, J., 10/2/20)**

Under New York law, an owner of a dog may be liable for injuries caused by the animal only when the owner knew or should have known of the dog's vicious propensities. In reversing an order of summary judgment to the defendant here - where the plaintiff claimed she was injured by a dog that had been returned to the clinic's waiting room after a medical procedure to remove a broken toenail - the Court of Appeals found the vicious propensities rule does not extend to veterinary clinics; given that clinics have "specialized knowledge" in the

treatment of animals who are ill, injured or distressed, which makes the clinics "uniquely well-equipped to anticipate and guard against the risk of aggressive animal behavior".

## THE PRACTICE PAGE

# AFFIDAVITS VERSUS AFFIRMATIONS

**Hon. Mark C. Dillon ***

There are circumstances in New York Practice when affidavits *must* be used, and others when affirmations *may* be used instead. The improper use of an affirmation can be fatal to an application or its defense. An affidavit signed by a fact witness should state facts, not legal arguments. Affirmations may properly be filed under penalties of perjury by attorneys to recount a case's procedural history and provide pleadings and other exhibits. Uniform Rule 202.8 instructs that legal arguments should not be included in affidavits but in a separate legal brief, though in practice, our state courts routinely accept legal argument contained within attorney affirmations.

Affirmations are more convenient to prepare than affidavits, if for no other reason than that a notary public or other acknowledging officer need not be enlisted to confirm the identity of the affirmant, administer an oath, and oversee the document's execution. When an attorney is also a party, the attorney should utilize the affidavit format to support or oppose factual matters (CPLR 2106[a]; *Nazario v Ciafone*, 65 AD3d 1240, 1241), notwithstanding that person's status as an officer of the court. If an attorney serves process under CPLR 308 or other statute, or serves litigation paperwork in the normal course, the attorney is best advised to execute an affidavit of service, rather than an affirmation, as such conduct casts the attorney in the role of a fact witness to the task undertaken.

CPLR 2106[a] provides that affirmations may be used by non-party physicians, osteopaths, and dentists authorized to practice in the state. The provision caters to the convenience and time pressures of medical and dental professionals. By extension, persons authorized in those fields wholly outside of New York may not properly submit information by affirmation (*Kelly v Fenton*, 116 AD3d 923, 924). The language of CPLR 2106 does not extend to chiropractors (*Casas v Montero*, 48 AD3d 728, 729), engineers (*Woodard v City of New York*, 262 AD2d 405), architects (*Laventure v McKay*, 266 AD2d 516, 517), or other non-designated experts and professionals. If an affirmation is improperly used instead of an affidavit, the defect is waived unless the adversary party objects to it (*Sam v Town of Rotterdam*, 248 AD2d 850, 851), though an objection may be cured by an oath taken by a notary public before the return date of the application (*Brightly v Liu*, 77 AD3d 874, 875).

Occasionally, a witness may have a sincere religious objection to swearing an oath to the Almighty. Any person who, for religious reasons, wishes to use an affirmation as an alternative to a sworn statement may do so. However, to be effective, such an affirmation must still be taken before a notary public or other authorized official (CPLR 2309[a]; *Slavenburg Corp. v Opus Apparel, Inc*., 53 NY2d 799, 801). This procedure is different than that used for

physicians, osteopaths, and dentists as those professionals are within the expressed scope of CPLR 2106, whereas persons with religious reservations are not.

Affidavits and affirmations are to be executed "in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs" (CPLR 2309[b]). For this reason, the documents invoke the language of an oath. Affirmations are to be executed to reflect that their content is "affirmed...to be true under the penalties of perjury" (CPLR 2106[a]). A mistake in the form of a submission, or in the right to submit it, will not necessarily be lethal provided it is caught in time, and courts are lenient in allowing the correction of mistakes under the grace provisions of CPLR 2001 (*e.g. Gallucio v Grossman*, 161 AD3d 1049, 1053). However, attorneys should not rely on the discretionary forgiveness of such defects because, absent the favorable exercise of that discretion, a non-compliant affirmation is rendered incompetent as proof of the facts asserted within it (*Law Offices of Neal D. Frishberg v Toman*, 105 AD3d 712, 713).

None of this is rocket science, which is all the more reason that documents should be submitted to courts in their proper forms.

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* Mark C. Dillon is a Justice of the Appellate Division, 2nd Dept., an Adjunct Professor of New York Practice at Fordham Law School, and a contributing author of the CPLR Practice Commentaries in McKinneys.

# In Memoriam

## Ronald "Ron" Lewis Newell*
## (April 19, 1943-January 15, 2021)

Ronald "Ron" Newell was born in Glens Falls, to Mable and George Newell, the youngest of three children,
He passed away unexpectedly at home in January, with his wife, Martie, by his side. Ron grew up on Elm Street and graduated from Glens Falls High School in 1961. After graduating, Ron attended SUNY Oneonta. He married Martie and attended the University of Tennessee, where he obtained his law degree.

Ron began his legal career at the late John Hall's Legal Practice in Warrensburg in 1969. Later he opened his own practice in Glens Falls and was eventually asked to be City Attorney for Glens Falls by Mayor Frank O'Keefe, a position he held until his death.

Ron enjoyed travel, relaxing at the family cabin on Lake George, and any time spent with his grandchildren,

Ron also purchased and renovated the McEchron House on Ridge street, restoring the historical landmark to be used as a popular restaurant, Morgan & Co.

Ron was known for his love of family, his quick wit, his connection to the community and his loyalty to others. He is survived by Martie, his wife of 53 years, brother Eli "Bud" Newell, his children: Benjamin, Christopher, Rebecca, and Seth, along with their spouses and 5 grandchildren.

If desired, memorial contributions can be made to the Chapman Museum in Glens Falls.

* All information taken from the Post Star.


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