

TIPSTAFF

MAY - JUNE 2016 MAY 2016

THE PRESIDENT'S MESSAGE

By **KARLA W. BUETTNER**



When I was asked to prepare my first President's Message for this issue of the Tipstaff, I admit the idea was slightly daunting. After all, what could I possibly say that would be "Presidential"? In a time where the word "President" conjures up images of certain Republicans and Democrats and the media onslaught associated therewith, it was hard to sit down and figure out what to say. But as I contemplated the many meanings of "President," the same word kept resurfacing in my mind. Servant.

A President is a servant of the people he or she is elected to represent. That I can do. My parents taught me that the most important thing you can do for someone is to serve and help them. So that is what I intend on doing for the next year. As I stated in my remarks at the Annual Meeting, I am here for you. You are the membership. You are the "body" of this Association. We need to keep the "body" healthy, and to do so, we must listen to it. In the coming weeks you will receive a survey, asking you what the Bar Association means to you and what you expect the Bar Association to do for you. How can we keep you healthy? How can we serve you? What do you like best about the Association? What can be improved? I ask you to take five to ten minutes out of your extremely busy days to seriously respond to the survey. Without your input, we cannot improve the health of the Association and we cannot serve you. So as we move forward in this year, I am excited about the prospects of new and invigorating programs tailored for you, the members. I am both humbled and honored to act as your servant for the next year, and I look forward to working with all of you to make this Association one of which we are all proud.

WCBA Officers 2015 - 2016

Dennis J. O'Connor
President
doconnor@mfcflp.com
(518) 792-1174

Karla W. Buettner
President - Elect
kwb@bpsrfaw.com
(518) 792-2117

Maria G. Nowotny
Vice - President
marianowotny@albany.twcac.com
(518) 792-1880

Jeffrey D. Moyer
Secretary
jmoyer@meyerfuller.com
(518) 668-4653

Michael D. Dezik
Treasurer
mdozik@wplawny.com
(518) 409-8534

Maria G. Nowotny
Delegate to NY SBA House of
Delegates (518) 792-1880

Kristine K. Flower
Immediate Past President
kflower@cafrylawoffice.com
(518) 792-1582

2016-17 Officers appear on P. 10

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2016 WARREN COUNTY BAR ASSOCIATION ANNUAL MEETING

The 103rd Annual Meeting of the Warren County Bar Association was held on May 19, 2016. Continuing the tradition graciously facilitated by Dick Bartlett, the meeting was held at the Lake George Club. Not only the sun, but a rainbow, graced the skies over Lake George. Continuing another tradition, the incoming President of the New York State Bar Association, Claire P. Gutekunst, was the guest speaker. Claire spoke of the importance of the local bar associations and the beneficial synergies resulting from the State Bar and the local associations working together. Claire stated that in her presidency, she will continue and deepen the work initiated by former presidents. She also promised to initiate a few new projects of importance. Claire enthusiastically spoke of her local roots, visiting her father who still resides in Queensbury and considering the Warren Bar Association her "hometown" bar association.

Dennis J. O'Connor, completing his outstanding term as President, presided over the meeting recalling the accomplishments and memorable moments of the past year. The 2016-17 Association slate of officers presented by Kristine K. Flower was passed unanimously. The slate was composed of President* - Karla W. Buettner, President-Elect - Maria G. Nowotny, Vice President - Daniel J. Mannix, Secretary - Jeffrey D. Meyer, Treasurer - Michael D. Dezik, Delegate to the NYSBA House of Delegates - Eric Schwenker, Immediate Past President* - Dennis J. O'Connor, 2016 -18 Directors Marcy I. Flores, Joshua D. Lindy and Jessica H. Vinson and 2015-17 Directors* Jacquelyn P. White, Claudia K. Braymer and John D. Wright. (* denotes that election was not required for the respective position) In closing the meeting, Karla W. Buettner presented her outlook and plans for the coming year (please see President's Message appearing on page 1)

The Warren County Bar Foundation conducted its Annual Meeting as part of the program. Amy C. Bartlett presented The Conkling Center with a Foundation Merit Award to provide financing of a "round table" of legal topics relevant to the senior population of our area. Matthew Ludemann presented the annual report of the Foundation and the slate of officers for 2016-17 which included Directors, Jacqueline P. White, Paula Nadeau-Berube and Mary-Ellen Stockwell for the term of July 1, 2016 through June 30, 2019. Jill O'Sullivan will serve a one year term as Director through June 30, 2017.

We were pleased to host two Appellate judges, Hon. Eugene P. Devine and Hon. William E. McCarthy, who are pictured below with outgoing WCBA President Dennis J. O'Connor, incoming WCBA President Karla W. Buettner and incoming NYSBA President Claire P. Gutekunst.



LAW DAY 2016

The Warren County Bar Association celebrated Law Day with activities throughout the month of May. Courtney M. Haskins, as Chair of the Law Day Committee, with the strong support of committee members, Brian C. Borie, Timothy S. Shuler, Kathy Macura, Bruce O. Lipinski, Eileen M. Haynes, Katherine Chambers and Nathan Hall, planned the Law Day Breakfast, the Walk/Run and Lawyers in the Classroom.

The Breakfast was held on May 5, 2016. Dr. Kathleen T. Braico was honored with the Liberty Bell Award. Kevin Bruen, General Counsel and Deputy Commissioner, Department of Corrections and Community Supervision was the guest speaker. Josh Lindy presented the Mock Trial Competition award to the Lake George High School team, pictured below.



Morgan McDonald & Reigel Conway, both of Queensbury High School, were the winners of the essay contest. The morning's program concluded with a tribute in memory of J. Timothy Breen, Late Family Court Judge. Hon. Timothy Lawliss, Hon. Philip V. Cortese, Assemblyman Daniel G. Stec and Senator Elizabeth O'C Little offered meaningful words in Judge Breen's memory.

The annual Walk/Run commencing at Crandall Park was held this year for the fun and fitness of participants rather than being a timed run. Participants raised contributions which resulted in a significant contribution to the Open Door Soup Kitchen.

Lawyers in the Classroom drew a large number of member volunteers. The participating attorneys offered a presentation and led student discussion related to this year's theme, "Miranda: More Than Words," in 6th grade Social Study classes. Many thanks to Nathan Hall, Ted Wilson, Rob Smith, Asish Nelluvely, Elizabeth Little, Rose Landau, Brian Borie, Jason Carusone, Justin Grassi and Jennifer Jeram for dedicating the time and efforts to engage the students in this legal analysis.

2016 Real Life Legal Symposium

The Warren County Bar Foundation sponsored, as it has in the past, a Legal Symposium for area high school students. It was held on March 30, 2016 from 9:00 a.m. to 11: 15 a.m. at Hudson Falls Central High School.

Practical legal issues are discussed with the students. These are legal issues the students are likely to face soon as they graduate from high school. This year attorneys discussed topics relating family law, vehicle and traffic matters, college issues, real life Constitutional law, consumer topics and leases and contracts. As a result, the students can face situations in these areas with an appreciation of the issues likely to be encountered. The Symposium this year, as always, was enthusiastically received by the students.

Thirty-five to forty students from each of the following school districts attended: Argyle Central School, Fort Ann Central School, Fort Edward Central School, Granville Central School, Greenwich Central School, and Salem Central School. Approximately 100 students from Hudson Falls attended. In total, 315 students participated and were accompanied by faculty from the respective school districts.

The Foundation generously provided each of the school districts \$350.00 to cover transportation and related costs.

This year's Symposium was organized by Wilson Mathias, Cathi Radner, Jill E. O'Sullivan and Mary-Ellen Stockwell. The presenting attorneys were Joanna C. Davis, Benjamin Smith, Dustin J. Bruhns, Justin M. Grassi, John Wright, Michael Crow and Claudia Braymer. Hon. Eric C. Schwenker served as moderator posing extemporaneous questions based on real life scenarios.

JUDGE DAVID B. KROGMANN SELECTED TO RECEIVE 2016 HENRY CRANDALL AWARD

Judge David B. Krogmann, SCJ, retired, was selected to receive the prestigious Henry Crandall Award of Crandall Public Library. The award will be presented to Judge Krogmann at the Library's fall fundraiser, Seafarers' Soiree, on Friday, October 28 at The Queensbury Hotel.

The Library's press release highlights the significance of the award and Judge Krogmann's many qualifications in being selected as the recipient. The press release provides, in part:

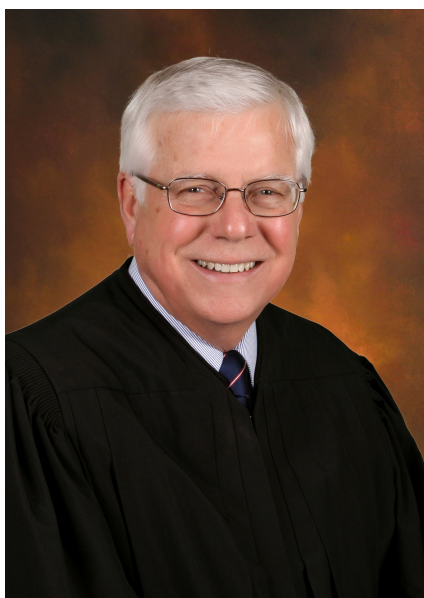
"The Henry Crandall Award recognizes individuals who have demonstrated the values and legacy of Library founder Henry Crandall (1821-1913), including generosity, perseverance, loyalty, compassion, civic pride, and philanthropy. Recipients have affected the improvement of the community and demonstrated commitment to Crandall Public Library. Manifesting these qualities and selected by the Board of Trustees for this year's award is now retired New York State Supreme Court Justice David B. Krogmann.

Judge Krogmann served as Trustee (1985-2003) and President (1987-2000) of the Crandall Public Library Board of Trustees at a pivotal period in the Library's history. Under Judge Krogmann's leadership, the Library became a special public library Improvement District (1992), ensuring a dependable funding base, and embarked on a renovation and expansion project (1997), eventually resulting in today's new and improved Crandall Public Library. 'Along with then-director Christine McDonald, Judge Krogmann played a momentous role in securing the Library's long-term sustainability and growth. We are the incredible community resource you see today thanks in large part to his dedication and passion,' stated Library Director Kathy Naftaly.

In addition to his contributions as a Library Trustee, Judge Krogmann has volunteered selflessly in many capacities, including on the boards of the Tri-County United Way, Chapman Historical Museum, Warren County Bar Association & Foundation, Lutheran Church of the Good Shepherd, Glens Falls Little League, and Adirondack Youth Hockey. He served publicly as 3rd Ward Councilman for the City of Glens Falls (1975-1981), Deputy Attorney for Warren County (1976-1978), and Glens Falls City Court Judge (1982-2003). A veteran

of the US Army, Krogmann received the Commendation Medal for Meritorious Service. His distinguished legal career concluded this past December, when he retired after 12 years as NYS Supreme Court Justice."

The Warren County Bar Association warmly congratulates Judge Krogmann on being selected for this distinguished honor.



Crandall Library may be contacted for further information on the presentation of the award.

MEMBER NOTES

FitzGerald Morris Baker Firth, P.C. is pleased to announce that Justin R. Markovits, Esq. has joined the law firm as an Associate Attorney in the Estates and Trusts practice group. He comes to the firm after working for KPMG and Ernst & Young in Silicon Valley, California.

Mr. Markovits received his J.D. from Boston College Law School in 2013, and went on to earn his LL.M (Master of Laws) in Taxation from University of Miami School of Law in 2014. He completed his undergraduate studies at Brown University, where he received a B.A. in Political Science.

LOCAL JUDICIARY OPINION NOTES

Current local opinions of interest to the bar have been curated by Judge Robert J. Muller, SCJ. Case names, cites and abstracts are presented below. The text of the Opinions can be found under the tab "Publications - Opinions - numbers 7-11 noted May-June 2016."

1. Motion In Limine to strike an affirmative defense concerning a rental agreement and a general release in a personal injury action involving an organized horseback riding event. The release was ruled invalid pursuant to GOL section 5-206 and not prohibiting defendants from introducing proof of either assumption of risk or contributory negligence.
Boland v. Rydin High Dude Ranch, Inc., Warren County, Index No. 58485, RJI No. 56-1-2013-014751 Misc. 3d 1208(A)
2. Questions of whether a roadway was ever a town road, and, if so, whether it has actually been abandoned. Summary judgment denied and trial is ordered on both issues. *Dashnaw and Dashnaw v. Town of Peru, et al.*, Clinton County, Index No. 2011-1163, RJI No. 09-1-2011-0416
3. A slip and fall case in which the questions presented included whether a maintenance contractor has contractually taken on the responsibility of property maintenance in such a comprehensive manner as to owe a duty of care to a non-contracting third party. Other issues addressed are indemnification claims and breach of a duty to procure insurance. *Cianciullo-Birch and Birch v. Champlain Centre North LLC*, Clinton County, Index No. 2012-1583, RJI No. 09-1-2013-0768, 50 Misc. 3d 1220(A)
4. Plaintiff's motion for summary judgment in lieu of complaint seeking to enforce an Indiana judgment. This court determined Indiana had jurisdiction to enter the judgment and granted the motion. *Precision Wall Systems, Inc. v. Arlington Equipment Corp.*, Warren County, Index No. 60716, RJI No. 56-1-2014-0591
5. Non-jury trial, affirmed by the Appellate Division, within which the Warren County trial court granted plaintiff's motion to conform the pleadings to the proof and rescinded the contract on the basis of mutual mistake. *Lakshmi Grocerty & Gas, Inc. v. GRJH, Inc.*, 2016 NY Slip Op 02891 [138 AD3d 1290], April 14, 2016 Appellate Division, Third Department

For text of the above opinions please visit www.warrencountybarassociation.org "Publications - Opinions numbers 7-11 noted May-June 2016."

* Submission of articles in areas of substantive law and otherwise law related are encouraged and welcomed! Please send your submissions to wcbn-ny@verizon.net. Thank you.

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

Tim Higgins, Esq.
Lemire, Johnson & Higgins, LLC
2534 Rt. 9
Malta, N.Y. 12020
(518) 899-5700
tjh@lemirejohnsonlaw.com



Summary judgment reversed in auto death case

Estate of McKenna v. Reale (Lynch, J., 3/31/16)

A car-bike accident in Columbia County claimed the life of plaintiff's decedent after the biker crossed the highway in front of defendant's automobile. Supreme Court (Zwack, J.) granted defendant's motion for summary judgment, in part based on a police report that concluded the "primary causative factor" of the collision was the decedent's failure to yield the right of way. Noting that in a wrongful death action, "admittedly slight and clearly circumstantial evidence" may be enough to raise a triable issue of fact, the Third Department reversed and reinstated the suit (except for the pain and suffering claim). Defendant's deposition testimony that he was uncertain whether he saw the bike moving from east to west across the road was enough for a jury to conclude that the driver "failed to see what there was to be seen through the proper use of his senses".

School liability suit dismissal is reversed

Lewis v. Board of Ed. Lansingburg CSD (Clark, J., 3/31/16)

The infant plaintiff (attending second grade), born with a disorder characterized by brittle bones that fracture easily, broke his leg in a fall after getting out of his wheelchair. In granting defendant's summary judgment motion, Supreme Court (Zwack, J.) declined to consider the testimony of the infant plaintiff because of his tender age (8 years old at his § 50-h hearing and almost 11 years old at deposition); the Court having raised the issue sua sponte. The Third Department found that determination erroneous, and in consideration of the merits of the claim reversed the order dismissing the case; noting that "plaintiff's testimony revealed that the version of events relied upon by defendants' experts was contested".

Reversal of jury's defense verdict

Johnstone v. First Class Mgmt. of New York, LLC (McCarthy, J., 4/7/16)

Plaintiff's premises liability claim against the owner of the rental property where he fell down the stairs and was injured was considered and rejected by a jury; after which

Supreme Court (Schick, J., Sullivan Co.) granted a motion to set aside the verdict (CPLR 4404(a)). In light of the “overwhelming” evidence at trial regarding defendant’s negligent maintenance of the stairway; including proof that a week before the accident the defendant was advised by a building inspector of loose steps and a railing that was only partly fastened, the Third Department affirmed the trial court’s post-verdict ruling because “no evidence was introduced that could fairly support a contrary conclusion”.

Reversal of summary judgment to property owner

Costello v. Pizzeria Uno of Albany, Inc. (Garry, J., 5/26/16)

Supreme Court (Breslin, J., Albany Co.) granted summary judgment to the defendant restaurant where plaintiff was hurt in a fall while being seated for lunch with two co-workers. The defendant did not produce an incident report or a witness who was present at the time of the fall, and on its motion for summary judgment relied on “low quality photographs” obtained by the plaintiff; rather than objective data or measurements or an evaluation of the floor surface (which plaintiff contended was unreasonably dangerous). Plaintiff’s co-workers testified that the floor was “uneven” and “looked buckled”; presenting factual questions about the existence of a defect and making the issue “not susceptible to determination as a matter of law”. The Third Department reversed and reinstated the case.

Bonus opinion: Court of Appeals splits on “storm in progress” defense

Sherman v. NYS Thruway Authority (5/5/16)

While a landowner owes a duty of care to keep his or her property in a reasonably safe condition, liability for negligence will not attach if a plaintiff is hurt “as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter”. Applying such “storm in progress” rule to this claim, the Court of Appeals, despite 3 dissenters, affirmed the Appellate Division ruling dismissing the claim. The claimant New York State Trooper, working out of the Newburgh barracks on property owned and maintained by the defendant Thruway Authority, was hurt after a slip-and-fall on a patch of ice. The fall happened at 8:15 a.m. while it was raining; some 90 minutes after conclusion of an “intermittent wintry mix” of snow, sleet and rain that started as an ice storm the night before. The Court of Appeals majority concluded that “the storm was still in progress” at the time of the injury and the defendant’s “duty to abate the icy condition had not yet arisen”. The dissenters felt summary dismissal was not proper; that the defendant failed to prove whether the storm had ended in Newburgh at the time of the fall and if so, whether it was too soon for the property owner to take protective measures; and further cautioned that the Court had never before “held that above-freezing rain alone constitutes a type of storm-in-progress that would relieve a property owner from taking any action” to make the property safe.

**WCBA OFFICERS
2016 -2017**

Karla W. Buettner
President
kwb@bpsrlaw.com; 518-792-2117

Maria G. Nowotny
President-Elect
marianowotny@albany.twc.com; 518-792-1880

Daniel J. Mannix
Vice President
dan@mullermannixlaw.com; 518-793-2535

Jeffrey D. Meyer
Secretary
jmeyer@meyerfuller.com; 518-668-4653

Michael D. Dezik
Treasurer
mdezik@wplawny.com; 518-409-8534

Eric C. Schwenker
Delegate to NYSSA House of
Delegates
eschwenker@mfcllp. com; 518-792-1174

Dennis J. O'Connor
Immediate Past President
doconnor@mfcllp.com; 518-792-1174