

INSIDE THIS ISSUE:

PRESIDENTS
MESSAGE 1

TORTS & CIVIL
PRACTICE 2-3

STATE OF NY
SUPREME
COURT
CHAMBERS 4

CHARLES
EVANS HUGHES
AWARD 5

MANNIX
DINNER 6

FARM S
UCCESSION
WORKSHOP 7

JOB LISTINGS 8

WARREN COUNTY BAR
ASSOCIATION, INC.
16 Maple Street Suite 3
Glens Falls, NY 12801

Telephone (518)
792-9239

wcba-ny@verizon.net
ESTABLISHED 1913

Michele Battle
Executive Director

TIPSTAFF



Photograph by Carl Heilman II

PRESIDENTS MESSAGE **Karla W. Buettner, Esq.**

Without a doubt, fall is my favorite season. Not just because of the crisp mornings, sunny afternoons, and beautiful colors. Not even just because of the cozy sweaters, fleeces and blankets that I sit in and under to watch my daughter's soccer games. Who doesn't remember going back to school with brand new folders, notebooks that haven't been doodled on, and freshly sharpened pencils, and feeling that sense of anticipation that "this is the year!" I don't care how old you are. There is something about the fall that brings renewal and optimism about the potential of a new season.

I hold this same optimism and excitement about the Bar Association this fall. Over the summer we have been working hard on breathing new life into the Association. Due to the immense computer and marketing knowledge and talent of our Executive Director, Michele Battle, the Bar Association now has a vital social media presence on Facebook, Twitter and Instagram. Michele regularly updates those accounts as well as our website. In addition, we are moving further into the electronic age by having e-vites and on-line registrations for our events.



Our President-Elect, Maria Nowotny, has a year chock full of interesting, entertaining and educational events planned for the membership, from the annual Pat Mannix Dinner to two CLE programs.

I would like to personally thank all those involved in our two successful membership programs. On September 15, 2016, we were treated to an interesting presentation by Hon. Martin D. Auffredou and Court Attorney Michael O'Dell regarding the Best Practices in Court, followed by a delicious lunch on the deck at the Dockside. On October 15, 2016, we were thrilled to honor Judge Thomas E. Mercure with the Charles Evans Hughes Award. Over 90 guests attended the event, including numerous distinguished members of the judiciary and a partner from Charles Evans Hughes' law firm, Hughes Hubbard & Reed LLP.. Please enjoy the photos and article inside on this wonderful evening.

As the daylight grows shorter and the weather a little more brisk, as we all become expert political analysts around November 8th, and as our country elects a new President, I hope we all remember the reasons we became attorneys, the reasons we continue to practice, and enjoy not only the practice of law but the comradery that we enjoy as members of the Bar.

Torts and Civil Practice: Selected Cases from the Appellate Division, 3rd Department, By Timothy J. Higgins is a partner at Lemire, Johnson & Higgins, LLC

New trial ordered after erroneous jury charge

Vallone v. Saratoga Hospital (Garry, J., 7/14/16)

Plaintiff sought treatment in the defendant hospital's emergency room for recurrent seizures, one of which (while in the ER) caused him to be burned when he spilled a cup of hot coffee that had been brought to him by his father. Discharged the next day, plaintiff followed up with a plastic surgeon who recommended referral to a burn center where plaintiff was treated, including skin-grafting surgery. At trial of plaintiff's negligence and medical malpractice action, the jury found the hospital's treatment of the burns was substandard, but also determined the plaintiff was comparatively negligent in causing the coffee spill. Placing 90% of the fault on plaintiff, the jury awarded \$25,000 for past pain and suffering and no award for future damages. Supreme Court (Crowell, J., Saratoga Co.) denied plaintiff's motion to set aside the verdict which the Appellate Division reversed with an order for a new trial on damages, concluding that the comparative negligence instruction (plaintiff having coffee in the ER) was erroneous "when a plaintiff's alleged negligence preceded the alleged medical malpractice and is not otherwise alleged to have contributed to the harm resulting from the malpractice".

Discovery dispute over slip-and-fall video

Atiles v. Golub Corp. (McCarthy, J., 7/28/16)

Plaintiff fell in one of the defendant's stores. In discovery, her counsel sought video surveillance of the location of the fall; in response to which defendant produced footage covering the period of 24 hours before the fall through eight (8) minutes after the fall. Plaintiff's motion to compel discovery of video covering two (2) hours post-fall was denied by Supreme Court (Ferreira, J., Albany Co.), and the Third Department affirmed. The post-fall video that was disclosed showed two store employees "stooped down and proceeded to wipe the floor in the area of the accident", after which the area was opened to customer traffic. Plaintiffs' request for an adverse inference jury charge was properly denied because of the failure to show defendant "intentionally or willfully destroyed the video under obligation to preserve it".

Threshold for punitive damages

George v. Albert (Devine, J., 7/21/16)

Plaintiff brought this negligence and intentional tort action for, among other things, punitive damages, after a gas station confrontation with defendant, an off-duty New York State trooper. Plaintiff's car had passed another vehicle (driven by defendant's girlfriend) on a highway exit ramp, and defendant told the girlfriend to follow plaintiff's vehicle because he believed plaintiff was driving recklessly and posed a risk to others. An ensuing argument and scuffle ended with the plaintiff pinned to the ground, and after the arrival of police, handcuffed and in a patrol car. Defendant's motion to dismiss the punitive damages claim, which requires proof of conduct reflecting "a high degree of moral culpability", was denied by Supreme Court (McGrath, J., Rensselaer Co.). Affirming, the Third Department noted that defendant acknowledged he wrongly told cops that the altercation began when plaintiff attacked him; and that a jury could find such "aggressive and dishonest behavior" a sufficient basis on which to award punitive damages.

State had sufficient notice of nature of claim

Davila v. State of New York (Garry, J., 6/16/16)

Claimant's decedent resided in a group home operated by the Office of Mental Retardation and Developmental Disabilities ("OMRDD"); and died from severe, fire-related injuries. The Court of Claims (Fitzpatrick, J.) granted claimant's summary judgment motion on liability, in part supported by OMRDD's own investigation of the 2009 incident (in which four residents died) which detailed a failure to follow an established fire drill protocol. Defendant unsuccessfully cross-moved to dismiss the claim for non-compliance with Court of Claims Act § 11-(b); which requires information "sufficiently specific to enable a defendant to reasonably infer the basis for its alleged liability". Finding the claim here met that standard, the Appellate Division affirmed, noting that when an agency of the state has performed its own internal investigation of an incident "it cannot be readily found that a lack of specificity has interfered with the defendant's ability to investigate a claim".

Torts and Civil Practice: Selected Cases from the Appellate Division, 3rd Department, By Timothy J. Higgins is a partner at Lemire, Johnson & Higgins, LLC

GML § 50-e not applicable to contract claim

Strauss v. City of Glens Falls (Lynch, J., 6/16/16)

Plaintiff brought a small claims action against the defendant in Glens Falls City Court after the parties were unable to resolve a property damage dispute arising out of an easement plaintiff gave the city for a sewer project. City Court dismissed the claim for non-compliance with the “notice of claim” requirements of General Municipal Law § 50-e, and Warren County Court (Hall Jr., J.) affirmed. Reinstating the claim, the Third Department noted that the GML’s notice provision (and a similar requirement in the “Glens Falls City Charter”) applies only to tort actions and not claims like this one sounding in breach of contract.

School liability suit dismissed in full

Elbadwi v. Saugerties Cent. School Dist. (Egan, J., 7/7/16)

The infant plaintiff, 10 years old and attending the defendant’s elementary school, broke her arm in a fall after jumping onto a school playground slide. Prior to the December incident, the plaintiff’s class gathered for recess and, according to the defendant’s lunch monitor, students “were expressly instructed to remain on the blacktop area adjacent” to the playground; which had a rubberized surface and was icy with snow accumulated on the playground equipment. Within a minute after venturing outside, the infant was hurt when she jumped onto the slide while trying to avoid a collision with another student. Supreme Court (Fisher, J., Ulster Co.) dismissed plaintiff’s negligent supervision claim but denied summary dismissal of a premises liability cause of action. The Third Department modified and dismissed the case in full, finding the accident was caused by the infant’s “inattentiveness” and near collision with a classmate, in response to which the plaintiff elected to jump onto the slide, from which she fell.

Bonus opinions: Court of Appeals

Mazella v. Beals (6/30/16)

Plaintiff’s husband died by suicide, and for the preceding 10 years had been taking anti-depressant medications that the defendant doctor prescribed; but without examining his patient or seeing him in an office visit. At trial of plaintiff’s medical malpractice case, the defendant admitted he deviated from accepted medical practice but contended his negligence was not the proximate cause of the patient’s suicide. A jury found defendant solely liable and awarded plaintiff \$1.4M in damages. After the Appellate Division affirmed, the Court of Appeals reversed and ordered a new trial; finding the trial court erroneously admitted evidence concerning the defendant’s negligent treatment of 12 other patients. Prior to trial, the defendant’s motion in limine to preclude use of the evidence; a consent agreement between the doctor and the New York Office of Professional Medical Conduct (“OPMC”); was denied, leading to its use during plaintiff’s questioning of the doctor. Given the defendant’s concession that he deviated from accepted standards of medical care, the Court of Appeals ruled the OPMC consent order was “nothing more than evidence of unrelated bad acts, the type of propensity evidence that lacks probative value concerning any material factual issue”, and a potential inducement to the jury to improperly decide the case based on evidence of the defendant’s character.

Matter of NYC Asbestos Litigation (6/28/16)

Revisiting product liability law within the well-litigated link between asbestos-exposure and mesothelioma, the Court of Appeals holds that the manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which “is necessary to enable the manufacturer’s product to function as intended”. In these consolidated cases, the asbestos exposures occurred on a Navy ship and a General Motors plant. In short, the defendants argued that they had no control over the design, manufacture or sale of the third-party product that attached to their own product and as such, had no duty to warn of related dangers. Adopting the new rule, which it describes as “no radical innovation”, the Court notes that there is a relationship of sorts between the defendant and the maker of the third-party product; in that the defendant’s product “naturally opens up a profitable market for that essential component, thereby encouraging the other company to make that related product and place it in the stream of commerce”.

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

Sofield v. Village of Saranac Lake, et al

This is a blasting case involving claims for property damage, nuisance, and emotional distress but also involves the CPLR 3126 sanctions for destruction of evidence. Summary judgment motions resulted in dismissal of the emotional distress and private nuisance causes of action but also awarded summary judgment on liability against the blasting company.

Miller v. Saha 50 Misc.3d 1218(A)

The court opined in this medical malpractice action whether a properly noticed deposition upon oral questions of Dr. Saha may be reconvened as a video deposition where the parties agreed to a continuation after hours of questioning. During the hiatus, the questioning party served notice to schedule and the cover letter reiterated same was to be a videotaped deposition. When Saha finally appeared at the deposition there was an objection to proceeding by video. The video deposition did not proceed and Saha moved for a protective order, while the cross-motion sought to compel the process, and an application for costs. Proponent claimed Saha was difficult to understand, but deposition transcripts did not reflect same. The court noted the unilateral conversion of an already-commenced oral deposition into a video deposition, while not prohibited by any rule, was, without reasons more compelling than given here, unnecessary. Thus, a protective order was granted Saha, yet, the court stated that a simultaneous audio recording would be allowed. Also, while the cross-motion to compel the video deposition was denied, the application for costs incurred attendant to the aborted proceeding was granted.

Anderson v. EP Glens Falls et al 50 Misc.3d 1220(A)

The Court granted a defense motion for summary judgment involving a slip and fall that occurred at approximately 7:00 P.M. on March 1, 2011 in a parking lot owned by defendant The Pines at Glens Falls Center for Nursing and Rehabilitation (hereinafter The Pines), located at 170 Warren Street in the City of Glens Falls, Warren County. Plaintiff Debbie M. Anderson was an employee of The Pines and defendant Jim Girard Landscape Maintenance Corporation (hereinafter Girard) is the movant. The causes of action relating to Girard concern allegations of negligence and warranty. Interesting, to me, discussion of the duties of care.

Prutzman v. Albany Med et al 51 Misc.3d 1216(A)

This was a motion in limine in a medical malpractice action for an order pursuant to CPLR § 3101(d)(1)(I) precluding the plaintiff from offering any testimony of her hospitalist expert at the trial of this action unless the plaintiff serves a further expert response to the moving defendants' demand including the names of the undergraduate, medical, and post graduate medical school from which the expert graduated; also where the expert attended and completed internships, residencies and, or, fellowship programs; and the hospitals at which the expert has worked or been affiliated. The Court found that commercial internet service providers emerged in the very late 1980s and by the mid 1990s their traffic went from a trickle to a tsunami, pushing at its crest wide-ranging and easily accessible research tools in all of the disciplines—not envisioned three decades ago—including the fee-based service “Board Certified Docs” which the plaintiff sufficiently demonstrates would easily come close to, if not precisely landing upon, their expert's identity. No further disclosure was required.

CHARLES EVANS HUGHES AWARD PRESENTATION

The Warren County Bar Association, Inc. (WCBA) was pleased to bestow its highest honor, The Charles Evans Hughes Award, upon the eminently accomplished attorney and jurist, Honorable Thomas E. Mercure, on October 15, 2016. The award ceremony held at the Hyde, fittingly, followed the day of activities celebrating the life and achievements of Charles Evan Hughes.

The Charles Evans Hughes Award recognizes a current or former member of the Warren County Bar Association who has developed an exemplary legal reputation which extends beyond Warren County and adjoining counties; has a distinguished record of accomplishment in various aspects of the practice of law; and has an exemplary reputation for contributions in the non-legal community. The distinction is so great and the standards so high, the WCBA has only recognized two others with the award - Honorable Richard J. Bartlett in 2002 and Lawrence E. Corbett, Jr., Esq. in 2004.

Honorable Thomas E. Mercure is a most fitting recipient. He served as Justice of the Appellate Division, Third Department from January 1, 1988 through May, 2013 making him the longest serving Justice in the Court's 120 history. His tenure included serving as Acting Presiding Justice in 2011 and 2012 and as Administrative Judge of the Third Judicial District for the year preceding his retirement. He was nominated three times to New York State's highest court, the Court of Appeals, and temporarily sat on the highest court in 1994 and 2011. As Appellate Division Justice, he heard more than 20,000 cases and wrote in excess of 3,000 opinions. Among the parallels noted between Charles Evans Hughes and Judge Mercure, the most often cited was Judge Mercure's work ethic. Upon retiring from the Appellate Division, Judge Mercure did not retire from the law. He practices "of counsel" with Carter Conboy law firm today.

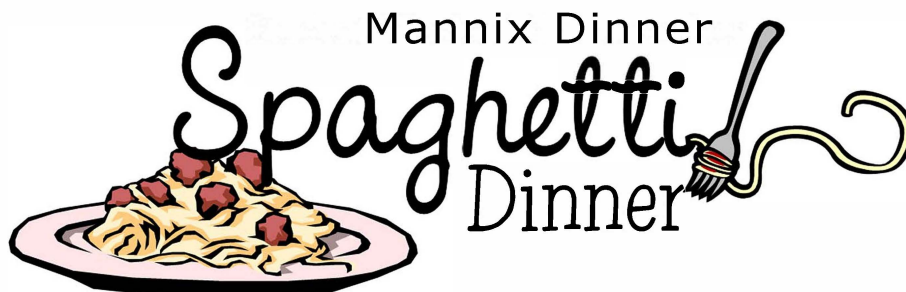


Additional legal distinctions and contributions of Judge Mercure include being the youngest elected county court (Washington County) judge in the state, and previously serving as Washington County District Attorney. He also was a member of the Pattern Jury Instructions Committee, the State Ethic Commission of the Unified Court System, the Advisory Committee for Judicial Ethics and the New York State-Federal Judicial Council. He is a member of the New York State Bar Association, the Washington County Bar Association, as well as, the Warren County Bar Association. Civic contributions include being a long-time member of the Fort Edward Lions Club, a member of the Board of Directors of Warren-Washington Council on Alcoholism, and a Little League baseball coach.

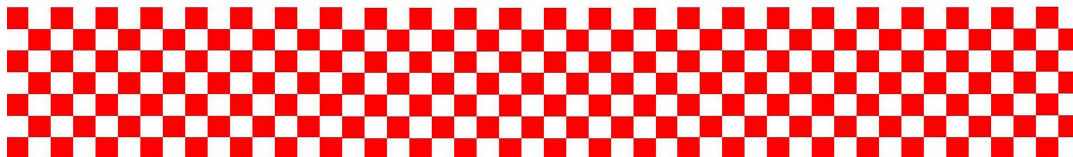
The distinguished roster of speakers included Honorable David B. Krogmann, James B. Kobak, Jr., Esq., of Hughes Hubbard & Reed LLP, the law firm founded by Charles Evans Hughes, Michael J. Catalfimo, Esq., of Carter Conboy, and Warren County District Attorney Kathleen B. Hogan, Esq. Lawrence E. Corbett, Esq. and Amy C. Bartlett, Esq., in recognition of her father, Honorable Richard J. Bartlett, assisted WCBA President Karla W. Buettner, Esq. in presenting the award.



JOIN US FOR THE MANNIX DINNER NOVEMBER 16th!
COOKED AND SERVED WITH A SMILE BY JUDGES



Thursday, November 17th, Messiah Parish House, 296 Glen Street. At 5:30 p.m.



Pat Mannix and **Jack Mannix** were Warren County Bar Association members who encouraged camaraderie and collegiality among the members, both young and old. Pat Mannix regularly hosted spaghetti dinners at his home and Jack Mannix left a bequest to the Warren County Bar Foundation to fund programs that continued to promote these traditions. It is in their spirit that the WCBF and WCBA are proud to invite you to their annual Mannix Dinner. Please join us on Thursday, **November 16th**, for a casual evening where we will share stories, history and traditions about the law and past members of the WCBA.

We encourage all "seasoned" attorneys to attend!

Menu will include:

Spaghetti
 Chicken Parmesan
 Tossed Salad
 Villa's Bread
 Dessert
 Beer, Wine, Coffee and Sodas

Come join us for an evening of great home cooking, stories and conversation!

Where: Church of the Messiah Parish

House 296 Glen Street, Glens Falls

When: Thursday, November 16th

Time: 5:30 p.m.

Price: \$15.00 per person

(Attorneys admitted to practice 10 years or less and their significant others are FREE!)

All WCBA members and their significant others are encouraged to attend.

*In the spirit of **Pat and Jack Mannix**, to encourage attendance and to defray the cost to all who attend, the dinner expenses have been underwritten by the Warren County Bar Foundation, Fees paid by seasoned attorneys benefit the WCBA.*

<https://mannixdinner2016.eventbrite.com>

Are you a farmer who is ready for retirement?
Not sure how to transition the operation to the next generation?

• • • • •

Join a panel of experts for a

Farm Succession Workshop

Participants will learn about farm business transfer, debt and mortgages, conservation easements, health insurance needs, Medicaid, long-term care and more.

Our expert panelists are Attorney Tara Anne Pleat, Attorney John H. Lavelle, and Bill Martin, Farm Credit East



Workshop is scheduled for:

Wednesday, November 9, 4:00-6:00pm

Location :

Saratoga National Golf Club
Howard Room (2nd Floor)
458 Union Avenue,
Saratoga Springs, NY 12866

*Light refreshments will be available

***Please R.S.V.P by email, call or visiting**
www.saratogaplan.org/events

**Provide: Names of guest, address, phone,
email**



Preserving Land and Nature

For Questions on this
workshop contact us at
(518) 587-5554
Info@saratogaplan.org



This farmland conservation educational workshop is partially supported by the Hudson Valley Farmlink Network, which is coordinated by the American Farmland Trust and has received primary funding from the Doris Duke Charitable Foundation.

JOB POSTINGS

Associate Attorney General Practice

Bartlett Pontiff Stewart & Rhodes is seeking an associate for general practice. Contact Mal O'Hara at mbo@bpsrlaw.com

SENIOR ATTORNEY

APPELLATE DIVISION, 3RD DEPARTMENT

ATTORNEY GRIEVANCE COMMITTEE

- ALBANY, NY This position will be assigned to the Appellate Division, Third Judicial Department's Attorney Grievance Committee, which investigates complaints of professional misconduct filed against attorneys. Senior Attorneys, under the supervision of the Chief Attorney, will be

expected to investigate, prepare and present cases before the Committee and at disciplinary hearings before referees, represent the

Committee in attorney disciplinary proceedings before the Court and perform other assigned duties. Senior Attorneys should have

exceptional analytical, writing and oral skills. Trial and/or administrative hearing experience is strongly preferred. A valid New York

State driver's license and automobile are required.

APPLICANTS ARE ENCOURAGED TO COMPLETE THE EEO DATA COLLECTION FORM.

General Practice Associate

We are a growing, Albany based, New York State certified Women-owned Business Enterprise ("WBE") law firm seeking a General Practice Associate with 2-4 years of experience to join our Firm's Albany office. Contact Amanda Landi at amanda.landi@townelaw.com.

Litigation Associate

We are a growing, Albany based, New York State certified Women-owned Business Enterprise ("WBE") law firm seeking a General Practice Associate with 2-4 years of experience to join our Firm's Albany office. Contact Amanda Landi at amanda.landi@townelaw.com.

Warren County Public Defender's Office has an opening for an attorney

Please contact Public Defender Marcy Flores with a resume and a writing sample at:

floresm@warrencountyny.gov
or at Warren County Public Defender's Office, 1340 State Route 9, Lake George, NY 12845. (518)761-6207.

Legal Secretary

Seeking a full time legal secretary for a busy Glens Falls office. Concentration in family law and matrimonials with some other general civil litigation. Duties will include typing, document assembly, client interaction, scheduling and calendar management and other general office tasks. Experience with dictation, Microsoft Word and Outlook and Amicus are necessary. Salary based on experience with a 401(k) plan, vacation, sick and personal time and medical benefits all offered.

Please email: Jeffrey McMorris
jem@stancliftlaw.com

WARREN COUNTY BAR ASSOCIATION

OFFICERS: 2016 - 2017

KARLA W. BUETTNER
President

MARIA G. NOWOTNY
President-Elect

DANIEL J. MANNIX Vice
President

JEFFREY R. MEYER
Secretary

MICHAEL D. DEZIK
Treasurer

ERIC C. SCHWENKER
Delegate to the New York State House of Delegates

DENNIS J. O'CONNOR
Imm. Past President

DIRECTORS:

MARCY I. FLORES
JOSHUA D. LINDY
JESSICA H. VINSON
JACQUELYN P. WHITE
CLAUDIA K. BRAYMER
JOHN D. WRIGHT