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THE SARATOGA COUNTY BAR ASSOCIATION

SERVING THE INTEREST OF JUSTICE

LAW NOTES

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Inside this issue:

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TORTS AND CIVIL PRACTICE

SELECTED CASES FROM THE APPELLATE DIVISION, 3RD DEPARTMENT

TIM HIGGINS, ESQ. | LEMIRE & HIGGINS, LLC

PTSD AS "SERIOUS INJURY" CAN BE DIAGNOSED BY NON-DOCTOR.
Vergine v. Phillips (Lynch, J., 12/20/18)

Post-traumatic stress disorder ("PTSD") can constitute a "serious injury" as a plaintiff in a motor vehicle accident suit from show (Insurance Law § 5102(d)) to survive a motion for summary judgment. Supreme Court (Buchanan, J., Schenectady Co.) dismissed this plaintiff's PTSD claim because the diagnosis came not from a physician but from plaintiff's therapist, a licensed clinical social worker ("LCSW"). Addressing what it described as a "novel threshold question", the Third Department reversed the lower court, concluding that given the LCSW's scope of practice under the Education Law and the experience required for licensing purposes, such a therapist "is competent to render an opinion as to whether a person has PTSD" under the "serious injury" analysis.

PREMISES LIABILITY
PLANTIFF'S VERDICT BASED ON CIRCUMSTANTIAL EVIDENCE AFFIRMED.
Tyrell v. Pollak (Clark, J., 7/12/18)

Plaintiff's decedent sustained multiple injuries, including a fractured skull and bleeding on the brain, in what appeared to be a fall down an outside staircase at a residence owned by the defendant. The fall was unwitnessed and the victim's injuries and eventual death prevented him from testifying at deposition or trial, after which the jury rendered a verdict for the plaintiff which survived defendant's motion to set aside (Tomlinson, J., Sup. Ct., Fulton Co.). Affirming the verdict, the Third Department found the plaintiff's case, relying on "entirely…circumstantial evidence", was nonetheless sufficient and did not require the jury to speculate. Plaintiff's trial evidence included photos of the staircase "in a general state of disrepair" and poorly lit, made worse by tree overgrowth that caused a nearby street light to illuminate only the bottom few steps.

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TORTS AND CIVIL PRACTICE

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SUMMARY JUDGMENT REVERSALS.

Facteau v. Mediquest Corp. (Rumsey, J., 6/21/18)

Plaintiff tripped and fell in the women's locker room at the defendant's wellness center, claiming she caught her sneaker on the edge of a floor mat that was negligently installed and not properly secured. Defendant successfully moved for summary judgment (Powers, J., Sup. Ct., Clinton Co.) upon proof that the mats were inspected daily for safety concerns and the absence of prior complaints or falls by other customers. The Third Department reversed and reinstated the plaintiff's complaint, finding her proof in opposition to the motion raised a question of fact about whether the defendant created a dangerous condition. In addition to an expert (architect) affidavit, plaintiff offered her own testimony that the two large, square mats in the shower area were never connected and often overlapped, to the point where she had rearranged the mats several times herself to eliminate the risk of tripping.

Ellis v. Lansingburgh Cent. School Dist. (Pritzker, J., 7/5/18)

Supreme Court (Zwack, J., Rensselaer Co.), after searching the record following denial of the defendant's motion for summary judgment, granted such partial relief to the plaintiff; who claimed she slipped and fell on an unpaved grass path that led from a parking lot to one of the defendant's elementary schools. Plaintiff, who fractured her leg in the fall, chose not to use a paved walkway along the side of the school building; walking instead on the grass which had been cleared of snow after a storm the day before the fall. Based on evidence that the school district created the path on which plaintiff fell, the Third Department found denial of the defendant's motion was proper, as "the only valid inference is that it was foreseeable that people would use the path once it had been cleared". But it also concluded plaintiff should not have been granted a judgment on liability as the proof showed a triable question of fact whether the path constituted a dangerous condition.

DUTY OWED BY OWNER OF LAND ADJACENT TO HIGHWAY.

Giannelis v. Borgwarner Morse Tec Inc. (Pritzker, J., 12/13/18)

Under New York law, an owner of land abutting a public sidewalk generally does not owe a duty of care to the public to keep the property in a safe condition solely by reason of being an abutter. But there are exceptions to that rule, two of which came into play in this action by the wife of a bicyclist struck and killed by a car. The operator of the car had just finished her work shift at the defendant Borgwarner's plant; the collision occurring as the driver left the plant's south exit and merged into a public road. Supreme Court (Faughnan, J., Tompkins Co.) denied the defendant's motion for summary judgment and the Third Department affirmed. Evidence in the record, including a showing that the public road had been altered for the exclusive benefit of Borgwarner and the company's placement of a yield sign where the plant property abutted the highway, raised questions of fact about whether the "special use" and "creation of a dangerous condition" exceptions should apply.

DECEDENT'S MEDICATION LIST NOT SHIELDED FROM DISCLOSURE.

Wrubleski v. Mary Imogene Bassett Hosp. (Egan, Jr., J., 7/12/18)

Plaintiff's wife was injured in a fall while running at a health club, after which she retained a lawyer who instructed her to write a summary of the events and resulting medical treatment. Sadly, she died suddenly a month later from a pulmonary embolism, and her husband filed the above medical malpractice action. During discovery, plaintiff claimed the attorney-client privilege (CPLR 4503 (a)(1)) shielded the decedent's writings from disclosure, which brought on the defendant's motion to compel production of the notes. Supreme Court (Tait, J., Otsego Co.), after in camera review of the requested documents, ordered disclosure of the decedent's "medication log", which was relevant on the issue of whether she followed instructions to take aspirin as directed by her medical providers. Affirming, the Third Department agreed that the medication log was not protected by the attorney-client privilege, as such communications "must be primarily or predominantly of a legal character" to be shielded from disclosure.

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TORTS AND CIVIL PRACTICE

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NEW TRIAL FOR PLAINTIFFS AFTER EXPERT WITNESS PROBLEMS.

Normandin v. Bell (Aarons, J., 6/7/18)

Plaintiffs' (medical malpractice) expert witness was delayed (by weather concerns) coming to court for trial testimony, and upon arrival did not have his original case file with him (contrary to the court's standing order). The expert was allowed to testify (over defendant's objection) without possession of the original file but with the expectation that it would arrive in court in time for cross-examination. It did not, and the expert did not come to court the next morning, after which Supreme Court (Crowell, J., Saratoga Co.) granted the defendant's (renewed) motion to strike the expert's testimony and denied plaintiffs' motion for a continuance. After plaintiffs rested, defendant's motion for a directed verdict (premised on the failure to prove a prima facie case due to the absence of expert testimony) was granted. Reversing, the Third Department remitted the case for a new trial, concluding that the trial court abused its discretion in denying the plaintiffs' application for a continuance, finding no evidence that "the failure of the plaintiffs' expert to appear and complete his testimony…stemmed from a lack of due diligence by plaintiffs".

COURT OF APPEALS: A STAIRWAY CAN BE A SIDEWALK.

Hinton v. Village of Pulaski (2/21/19)

The defendant's Village Code required written notice of a sidewalk defect as a precondition of imposing liability on the Village. Plaintiff's fall and injury happened not on a sidewalk; but on a stairway connecting a public road to a municipal parking lot. Despite two dissenters, the Court of Appeals (which had previously ruled that a stairway "functionally fulfills the same purpose that a standard sidewalk would serve") found the lower courts had properly dismissed the plaintiff's cause of action for failing to plead or prove compliance with the written notice provision.

IS TITLE INSURANCE A FOUR-LETTER WORD?

DAN WADE, ESQ. OF IANNIELLO ANDERSON, P.C.

We're all familiar with auto insurance, health insurance and homeowner's insurance, but what do you know about title insurance? Do you know if you're covered?

Owning a home is likely the biggest investment you're ever going to make. And like most homeowners, the "American Dream" comes with a mortgage attached. It's safe to bet that as the mountainous stacks of papers were being shuffled around during your real estate closing, you may not even remember that you purchased title insurance for the lender. Lenders require this to protect their security. It's important to note that the title insurance you purchased for the lender, sometimes called a loan policy or mortgage policy, only covers losses incurred by the lender. It does not cover you. At the closing table, you would also have been offered an owner's title policy. As a practice, I prefer to discuss any expenses like this with my clients prior to closing day. The decision of whether or not to purchase the owner's title policy could have ramifications for you down the road should you decide to sell someday. So, what does an owner's policy of title insurance cover and why is it important?

An owner's policy of title insurance will cover any loss you might suffer as a result of the condition of title to the property you own being something other than what was insured. The owner's policy covers you up to the dollar amount you paid for the property. Some of standard covered title risks include: public record or clerical errors not previously discovered, forgery or lack of capacity or legal authority of a party somewhere in the history of the ownership of the property, unsettled mortgages or other liens of record not previously disclosed, lack of a right of access, recorded easements not previously disclosed, and deed not being joined/executed by all necessary parties, to name a few.

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IS TITLE INSURANCE A FOUR-LETTER WORD?

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So, having something "pop up" 5, 10, 15 years from now when you try to sell your home could cause a devastating delay to your deal and cost you thousands of dollars in fees trying to correct an issue if you didn't have an owner's policy. With an owner's policy, you would have the ability to make a claim and put the title insurance company and their attorneys to work correcting the issue. In some instances, the title insurance company insuring the buyers of your property may be able to seek indemnity from your title insurance company allowing the deal to proceed on schedule while they work behind the scenes to correct any title defects, saving you both time and money.

The good news is that in New York State an owner's policy premium is a one-time fee, unlike auto, health, or homeowner's insurance. You pay it once and you're done. In addition, title insurance premiums are strictly governed by the New York State Department of Finance, so you'll pay the same premium rate no matter which title insurance agent you purchase your policy from. No shopping around needed. The best part is that your owner's policy will cover you for as long as you own the insured property.

I recommend to all of my clients that they purchase title insurance. As a one-time fee that provides peace of mind for as long as you own the property, it's a worthy investment. And yes, title insurance is a four-letter word. But that four-letter word is "gold" because it's worth its weight should you someday need it.

THE ELECTRIC CITY COURT

MICHAEL P. FRIEDMAN, ESQ.

"There are two kinds of statistics, the kind you look up and the kind you make up." Rex Stout

"Schenectady City Court is very busy with annual filings in excess of 18,000, in a jurisdiction with a population of 65,000, which is why we maintain that the City of Schenectady needs to provide us with a suitable court facility as they are mandated to do." Lucian Chalfen, Public Information Director, New York State Unified Court System

Provide you? Really? Lucian Chalfen can be excused for a slip or two because he has been in the job of Public Information Director for only a year and a half. He was pressed into service abruptly when his predecessor David Bookstaver was the subject of a New York Post story that he had shown up at work only about two to four days a week and hadn't worked Fridays for three years. In a conversation with another person that Mr. Bookstaver inadvertently sent to a Post reporter via "butt dialing," Mr. Bookstaver said that the story was true, that he barely shows up for work and he'll "suffer through an embarrassing story and then go get my [expletive deleted] pension and retire." After all, what would one expect for $166,000 per year? Exit Mr. Bookstaver, enter Mr. Chalfen.

Being the voice of the New York Court System is not always easy. You must announce every year that the court system's annual report is available together with its impressive statistics of the annual decline in filings broken down by court, county and city. So, it was somewhat surprising to learn that Schenectady's Mayor Gary McCarthy had received some resistance from the Unified Court System when he suggested the city could survive with three City Court Judges and that there was no need to create another courtroom. Councilman Vince Riggi claimed that "our courts are jam-packed right now." So, why does the court system care, or was it related to their request for an extra $44+ million this year on top of their per capita nation leading $2.3+ billion budget? In any event, Mr. Chalfen weighed into the local fray as above. After all, the new courtroom will cost about $3 million, not chump change to a city of 65,000.

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THE ELECTRIC CITY COURT

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A little history is in order. Mr. Chalfen is correct that Schenectady has a population of about 65,000. However, in 1970 the city had a tad shy of 78,000 citizens and just one city court judge for that year and a whole slew of years thereafter. A fourth judge was added by the Legislature in 2015. The rate of pay for a Schenectady City Court Judge was $175,000 plus benefits in 2017, but they each earned over $184,000. Why? Because Lucian Chalfen's boss, Chief Administrative Judge Lawrence Marks, decided they were not so busy handling those jam-packed courts so in their spare time they could do work as "Acting County Court" judges.

Which brings us back to the Unified Court System's statistics. Much as it might help to further the Unified Court System narrative, there were not 18,000 annual filings in Schenectady City Court in 2018. There were 16,022, a miscalculation of nearly 20% (19.89% to be exact). In 2017 there were only twenty City Court criminal trials that went to verdict. There haven't been over 18,000 filings in Schenectady since 2016 and 2018 represents a decline of 24% over 2010 when there were 2 or maybe 3 City Court judges. In 2010, the rate of pay of a Schenectady City Court Judge was $108,800 so they have had a 69% increase in seven years. Nice.

By now we should all be used to the court system stretching the statistics. For years they falsely claimed they needed more money in the budget because of 4 million filings per year even though that number ended in 2012. But Schenectady? The Unified Court System's interest and false narrative hits a little too close to what used to be home. Besides, these courts aren't being provided for the benefit of the Unified Court System, they exist for Schenectadians.

Michael Friedman practiced law for over 30 years. Mr. Friedman is the author of numerous articles on matrimonial practice including The Case for Parental Access Guidelines in New York and the Case for Joint Custody in New York for the New York State Bar Association's Family Law Review, Pensions and Retirement Plans: Valuation Strategies for the New York Domestic Relations Reporter and a monthly matrimonial article for the Albany County Bar Association.

ENERGY ATTORNEY STEVEN WILSON JOINS YOUNG/SOMMER LLC

Young/Sommer LLC announced today that attorney Steven D. Wilson has joined the firm as Of Counsel, effective immediately. Wilson, primarily working with clients in the Energy regulation field, brings over 20 years of legal experience representing private developers, municipal electric utilities, regulated utilities and owners of renewable, fossil-fuel and nuclear generators before various federal and state agencies.

In his new role, Wilson will provide counsel to clients about energy projects before federal and state agencies, including obtaining approvals under Article 10, for the transfer of regulated assets, financing approvals, major and minor rate cases, hydroelectric licensing, and general representation of clients' interests in administrative proceedings.

In addition to providing counsel on retail markets, Wilson will provide advice and representation to clients related to New York's wholesale markets administered by the New York Independent System Operator.

Wilson earned his J.D. degree at Albany Law School Union University. He holds a B.A degree in economics from the State University of New York at Albany.

Young/Sommer LLC is a full service New York State law firm concentrating in Environmental, Municipal, Land Use, Energy, Wind and Hydro Development, Commercial Litigation, Brownfield Redevelopment and Superfund, Education, Labor and Family law. With offices in Albany, the Young/Sommer legal team provides legal services throughout New York State. Additional information on Young/Sommer LLC can be found at www.youngsommer.com.

E. STEWART JONES HACKER MURPHY LLP ANNOUNCES THE OPENING OF FOURTH OFFICE LOCATION

E. Stewart Jones Hacker Murphy LLP is proud to announce the opening of fourth office location:
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We look forward to providing the same exceptional service to our clients at yet another location – please visit us there!

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LEMERY GREISLER LLC WELCOMES NEW ATTORNEY

Lemery Greisler LLC, a leading Capital Region business law firm, has announced the addition of Shalini Natesan as an associate attorney.

Ms. Natesan concentrates her practice in commercial loan finance transactions, corporate transactions, and estate planning and administration. Prior to joining Lemery Greisler LLC, Ms. Natesan spent eight years as a Tax Attorney at Ernst & Young, LLP in Boston, specializing in tax issues as they relate to cross border investments, mergers and acquisitions, and corporate restructurings. After relocating her practice to Albany, she gained additional experience in matrimonial and family law matters and general civil litigation.

A native of Toronto Canada, Ms. Natesan obtained her Bachelor of Commerce from McMaster University in 2003 and then obtained her law degree from Albany Law School in 2006. She is admitted to practice law in both Massachusetts and New York.

Lemery Greisler LLC is a business law firm with offices in Saratoga Springs and Albany. The firm is dedicated to providing insightful and experienced legal advice to help businesses succeed in the market place. For more information on Lemery Greisler, please call 518.581.8800 or visit www.lemerygreisler.com.

BOND, SCHOENECK & KING PLLC SEEKING LABOR AND EMPLOYMENT ASSOCIATE

Bond, Schoeneck & King PLLC is currently seeking an associate for our Labor and Employment practice in our Albany, NY office. Candidates must be motivated, hard-working, have outstanding academic credentials, excellent communication skills, and at least four years' experience in labor and employment law, or in another area of law with a strong interest in labor and employment law. We are an EEO Employer. Please send a letter of application, resume and law school transcript to hrbsk@bsk.com.

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PROTECTING FARMS FOR THE FUTURE: THE LAW AND PRACTICE OF AGRICULTURAL CONSERVATION EASEMENTS

Date & Location
Date: 4/11/2019
Time: 1:00 PM to 6:30 PM
Location: Cornell Cooperative Extension - Ulster County
232 Plaza Road (Kingston Plaza)
Kingston, New York 12401

CLE Credits*: 3.0 hours, Professional Practice
Cost: $100 for attorneys, $25 for non-attorneys
Agricultural conservation easements help keep family farms viable by preserving working farms, making farmland more affordable, and facilitating the transfer of real estate assets to future generations. For many farmers and farmland owners, the conservation easement has proven to be a critical tool in estate and retirement planning, as well as a core part of their business strategy.

In the near future, over a million acres of farmland in New York State will be transferred and most of it will be at risk of conversion to non-agricultural use. With less than 5% of New York's farmland permanently protected, this wave of land conveyance has the potential to undo the incredible progress that the state's rural communities have made in strengthening the agricultural economy. To preserve the state's unique agricultural heritage, farmers must engage in thoughtful land planning with professionals who understand how to balance preservation with growth, for today and tomorrow.

Join us to learn about agricultural conservation easements at an in-depth and comprehensive Continuing Legal Education (CLE) program* led by experts in the field, including attorneys, appraisers, and financiers. A complete schedule is below. An hour-long networking session will immediately follow the workshop sessions and panel, at which time complementary light fare and local beverages will be served. Guests are welcome to bring their own lunches to the early sessions.

All are welcome, including attorneys, farmers, retirement planners, and others.

Please register by March 26. Registration is required and space is limited.

Questions can be sent to dsugar_tmp@pace.edu.

This program is sponsored by American Farmland Trust and the Pace-NRDC Food Law Initiative. In addition, this program is supported by Farmland for a New Generation New York, in partnership with American Farmland Trust and the Department of Agriculture and Markets with funding from the State of New York.

*Application for New York accreditation of this program is currently pending.

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