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# Saratoga County Bar Association *Law Notes*

*Serving the Interests of Justice*

## TORTS AND CIVIL PRACTICE UPDATE

By Timothy Higgins, Esq.

**Medical malpractice: limiting the scope of doctor's duty**

**Dombroski v. Samaritan Hospital (Spain, J., 11/21/07)**

Plaintiff went to the defendant hospital's emergency room for treatment of injuries sustained in a motorcycle accident. The attending doctors included an orthopedist and emergency medicine specialist. 11 months later plaintiff suffered a stroke and was diagnosed, for the first time, with diabetes and hypertension. In the lawsuit, he claimed the specialists negligently failed to diagnose the diabetes despite knowledge during the accident hospitalization that he had abnormally high levels of blood glucose (one of which was flagged on a lab report as a "panic

value"). Supreme Court (Teresi, J., Albany Co.) denied the doctors' motion for summary judgment but the Third Department reversed, agreeing with the defendants' argument that their duty to plaintiff was limited, respectively, to emergency and orthopedic care and did not extend to the claimed failure to diagnose diabetes.

**Jury award for defamation affirmed**

**Dobies v. Brefka (Carpinello, J., 11/8/07)**

A rarely-seen Supreme Court (Reilly, J., Schenectady Co.) jury verdict for the plaintiff in a defamation action resulted in an award for \$325,000, which included \$50K in counsel fees as special damages. Plaintiff convinced the jury that the de-

fendant (his former mother-in-law) harmed his emotional well-being and professional reputation by making an unfounded accusation that he had sexually abused his 3-year old daughter (defendant's granddaughter), the occurrence happening at the same time of a custody dispute between the plaintiff and defendant's daughter. The Third Department found the jury award of \$225,000 in compensatory damages was reasonable and fairly supported by the evidence, including proof that the "heinous allegations leveled against" the defendant resulted in him being permitted only supervised visitation with his children and forced him to resign from his job as a hos-

Continued on page 3

## Update from the Young Lawyers Committee From Karen D'Andrea and Kimberly Crocetta

***News and Events with the YLC:***

- January 2008 for Night Skiing at West Mountain which will be followed by an informal gathering at the lodge for food, drink and socializing and to massage our aching feet and warm up in front of the fire! Date to be decided. More infor-

mation to follow.

- YLC is seeking ideas for a volunteer/civic project in April 2008 please contact Karen D'Andrea (kesdandrea@aol.com) or Kimberly Crocetta at (kcrocetta@sktcclaw.com) with any suggestions.

- Reminder –BBQ and picnic in mid-June 2008, please contact Karen D'Andrea (kesdandrea@aol.com) or Kimberly Crocetta at (kcrocetta@sktcclaw.com) if you are interested in hosting this great event at your home.

## Faces in the Crowd



### Jonathan G. Schopf joins Pattison firm

(November 15, 2007 – Troy, NY) The law firm of Pattison, Sampson, Ginsberg & Griffin, PC, recently announced the hiring of Jonathan G. Schopf. Mr. Schopf's primary areas of practice include civil and criminal litigation and real estate law.

Mr. Schopf received a Bachelor of Arts Degree in Criminal Justice from Edinboro University of Pennsylvania in 2000. In 2004, Mr. Schopf received his Juris Doctor from Albany Law School at Union University. He is admitted to practice in New York State and in the United States District Court for the Northern District of New York. He is a member of the New York State Bar Association, the Capital District Trial Lawyers Association and the Albany & Saratoga County Bar Associations. Mr. Schopf's most recent published case, which involved various constitutional law issues, was City of Albany v. Trinity Church, 2006 NY Slip Op 52420(U).

"Jonathan is a wonderful addition to the firm," said Michael E. Ginsberg, Vice President of Pattison, Sampson, Ginsberg & Griffin, PC. "Jonathan has had a diverse background in various aspects of law. Jonathan will focus primarily in litigation, but will also practice in real estate, criminal and traffic matters."

Pattison, Sampson, Ginsberg & Griffin PC is one of Troy's most tenured and prestigious law practices dating back to the early 1800s. The firm's clients include major local universities and secondary educational institutes, Fortune 500 companies, banks, media outlets and not-for-profit organizations.

With a long-standing history of community service, Pattison, Sampson, Ginsberg & Griffin PC has been instrumental in shaping many of Rensselaer County's not-for-profit organizations. The firm's attorneys possess a broad range of experience and provide legal services in the areas of banking, education, labor and employment law, estate planning and probate, trusts, litigation, real estate, matrimonial and business law.



### Carin Cardinale joins Towne, Bartkowski & DeFio Kean

The law firm of Towne, Bartkowski & DeFio Kean, P.C., with offices in Albany, Saratoga and Schohaire counties, is pleased to announce the addition of Carin M. Cardinale as a staff attorney. Ms. Cardinale will work primarily out of the law firm's Saratoga Springs office, located at 491 Broadway. She will be concentrating her practice in matrimonial, litigation, equine and gaming and real estate.

### Arroyo Copland & Associates, PLLC., Expands Law Firm

ALBANY, NY - Arroyo Copland & Associates PLLC, an Albany-based law firm, has expanded its services from matrimonial and family law to include an appellate practice with the addition of Cynthia Feathers. Feathers, who joined the firm as Counsel, recently served as Pro Bono Affairs Director at the New York State Bar Association and handled the statewide "Access to Justice" initiatives for the State Bar.



Cynthia Feathers has 20 years of appellate experience and will handle civil and criminal appeals. She was a law clerk at the Appellate Division, Third Department and served as an attorney at the Attorney General's Appeals & Opinion Bureau in Albany, as well as the Center for Appellate Litigation in Manhattan. In addition, Feathers was a solo practitioner for five years in Saratoga Springs, handling a broad range of appeals. Feathers holds a J.D. from Boston College Law School and a B.S. in journalism from Northwestern University.

For additional information, contact Theresa Jones at 518-464-6000 or email [arroyocopland@nycap.rr.com](mailto:arroyocopland@nycap.rr.com).

## TORTS AND CIVIL PRACTICE, continued from front page

pital physician and relocate to another community.

### Not loving thy neighbor

#### Morrison v. Woolley (Mercure, J. P., 11/1/07)

Plaintiff was a home-builder locked in a dispute with the defendants over the quality of the work he performed. Defendants asked for repairs to be made and when plaintiff declined, they expressed their dissatisfaction by placing a sign on their property that read "MORRISON BUILT OUR HOUSE CONTACT US BEFORE HE BUILDS YOURS!". Lights were attached to the sign to make it visible at all times and the text was sometimes accompanied by "frowning 'smiley' faces". Plaintiff, at the time of the defendants' public protest, was trying to sell his house and claimed it became difficult because of the defendants' actions. Plaintiff brought suit for punitive damages and was granted an injunction by Supreme Court (Hall, J., Washington Co.) that directed that the sign be taken down during pendency of the litigation. The Third Department reversed and found it was error to grant the preliminary injunction because plaintiff failed to demonstrate a likelihood of success on the merits of his claims.

### Tragedy but no duty

#### Lodge-Stewart v. State of New York (Rose, J., 11/1/07)

Dismissal of the claimant's action (Collins, J., Court of Claims) was affirmed by the

Third Department because of the failure to meet the test of "the threshold issue in any negligence action": whether the defendant owes a legally recognized duty of the care to the plaintiff. Here, the claimant was the mother of a woman who was murdered by a parolee and who claimed the State of New York failed to adequately supervise the killer in accordance with its own policy and procedures on parole. In opposition to the defendant's motion for summary judgment, claimant failed to allege or show that the requirement to supervise the parolee created an enforceable duty to her daughter different from that owed to the public generally.

### Is your expert witness really an expert?

#### Pember v. Carlson (Lahtinen, J., 11/15/07)

Plaintiff's claim that he was hurt in an auto accident caused by defendant was rejected by a jury in Broome County. During trial, Supreme Court (Tait, J.) permitted defendant's engineering expert to testify over plaintiff's objections and also denied plaintiff's request to strike the expert's testimony as speculative and unreliable. The Third Department found no error in either ruling. The defense expert, despite never having an engineering license in New York, was nonetheless qualified in the field considering his education and 30 years experience as a civil engineering college professor. Furthermore, his opinions were not entirely speculative and could be supported by facts in the record.

### Motor vehicle and "serious injury" claims

#### St. Andrew v. O'Brien (Mugglin, J., 11/8/07)

The infant plaintiff (age 15) was struck by a car owned by the defendant and operated by her granddaughter (age 17). The driver was cited for violating the Vehicle & Traffic Law provision that restricted her driving privileges (she had a junior license) after 9:00 p.m. Supreme Court (Ceresia, J., Rensselaer Co.) denied the defendants' motion for summary judgment but did conclude that the V&T law violation did not constitute evidence of negligence. The Third Department affirmed, noting that the junior driver's statutory violation "relates solely to the authority to drive and does not create any standard of care which must be observed in the operation of a vehicle".

#### Frutchey v. Felicita (Crew, J., 11/21/07)

The infant plaintiff was a passenger in defendant Felicita's car, which went out of control during a snowstorm, crossed into the opposite lane, struck a second vehicle, and returned to its original lane of travel where it struck the vehicle of defendant DeLosa. That defendant (and his employer) moved for summary judgment on the contention that the defendant Felicita's conduct was the sole proximate cause of the crash. Supreme Court (Mulvey, J., Chemung Co.) denied the motion but the Third Department (with 2 dissenters) reversed. Con-

cluding that the defendant DeLosa was confronted with an emergency situation that he did not cause (the sudden appearance of the Felicita vehicle coming at him in the west-bound lane), the Court found the evidence sufficient to establish that he acted reasonably under the circumstances. The dissenting justices felt there were questions of fact whether DeLosa was driving too fast given the road conditions and following the car in front of his too closely and noted that the emergency doctrine does not operate to insulate defendants "from liability for prior tortious conduct".

#### Motrie v. Reid (Mugglin, J., 11/1/07)

#### Tubbs v. Pallone (Rose, J., 11/1/07)

In both cases, Supreme Court (Bradley, J., Ulster Co.; Mulvey, J., Chemung Co.) properly granted defendants' summary judgment when plaintiffs failed to make a prima facie showing of "serious injury" under Insurance Law §5102.

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submit an item of interest

## 10 Points to Revisit Before Year End

By Susan A. Fitzpatrick

The last page of the calendar has arrived. Many of our clients will be rushing around, (as will we) trying to tie up all loose ends and finishing, or at the very least beginning, all those good intentions we have put off all year long. One of the most popular questions of the December season is “What should I be doing?” or “What year end planning should I be doing?”. Discussed below are 10 (ten) year-end items that would be wise for you and your clients to visit before the year is over.

1. **Review your current will and trusts.** Serious thought and consideration is given with regard to whom to appoint as one’s executor and or trustee. However, the will made 10 years ago may not be as accurate now as it was when you signed it. Verify your executor and trustee designations to make sure they are still reflective of your wishes. If you have made specific bequests of personal property, now is the perfect time to review these bequests or to consider making additional or new bequests. Furthermore, if you have not reviewed these documents in several years, there may be different tax planning that is more appropriate to your changed situation.
2. **Annual Exclusions.** The first \$12,000 of a gift of a present interest to each donee is excluded in the amount of taxable gifts for IRS purposes. Each person can gift up to \$12,000 to another person annually without incurring any gift tax. There is an unlimited marital deduction between spouses. A husband and wife can jointly gift up to \$24,000 to a non-spouse individual, but each spouse must file their own individual Form 709 if the gift is \$24,001 or more. This is an extremely valuable tool, especially around the holiday time. Any gift above and beyond the \$12,000 (or \$24,00 if made jointly) is subject to gift tax, which is payable by the donor, that is, the person who gave the gift, not the person who received the gift. No gift tax return is required if you did not give more than \$12,000 to any one donee. In New York, we deviate from the federal Unified Credit amount, in that we cap our lifetime gift exclusion to \$1,000,000. The Federal limit is currently at \$2,000,000 through December 2008 and is slated to increase to \$3,500,000 in 2009.
3. **Overall review of financial accounts and title designations.** If a bank account or stock certificate is held in an individual name, at death, to transfer the bank account or stock certificate, one must go through the probate process. Although the probate process is not usually a complicated or lengthy process, it can be avoided with regard to a bank account or a stock certificate by changing the title of the account. An alternative to consider is changing the title of the account to include a “payable on death” (POD) designation to redirect an account, which will avoid having to resort to the probate process. By redesignating your account from “Susie Smith” to “Susie Smith Payable on Death to Bobby Jones”, upon the death of Susie Smith, the account will automatically transfer to Bobby Jones, with no further action necessary. This only permits the creator of the account to keep complete control over the account with no gift or joint ownership issues. The designated beneficiary can be changed and has no interest in the account until the creators death.
4. **Qualified Tuition Programs.** Qualified tuition programs under Internal Revenue Code (the “IRC”), Section 529 provide a mechanism for contributing significant dollar amounts to a College Savings Plan to encourage saving for the future higher education expenses of a designated beneficiary. The attractiveness of these plans are that the contribution payments are tax deductible on your New York State Tax Return (limited to \$5,000 individually and \$10,000 for jointly made gifts, annually). The withdrawals by a designated beneficiary are tax-free. This is an excellent way to grow a gift for educational purposes for the younger generation. The funds can be used to pay for tuition, fees, books, room & board and supplies at any eligible post-secondary school in the United States and abroad. More information with regard to these plans can be found at: [www.collegesavings.org](http://www.collegesavings.org). Contributions to Qualified Tuition Programs do not qualify for the education expense discussed below
5. **Review and update beneficiaries of your life insurance policies and retirement plan assets.** This is an excellent time to verify your beneficiary designations on insurance policies and retirement plans. Take into consideration any life changing events that have occurred, including, removing beneficiaries who are no longer with us, or who you no longer wish to benefit. In addition, do not forget to include any new additions, a new child, grandchild, or a

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## 10 Things to Do

(Con't from Page 4)

spouse, as the case may be. Make sure you take into consideration the rules and benefits of a stretch IRA.

6. **Tuition and Medical Gifts.** In line with the Annual Exclusion, a donor may make a gift toward the payment of tuition or medical expenses. The gift tax does not apply to an amount you paid on behalf of an individual to a person or institution that provided medical care for the individual. IRC Regulation 25.2503-6 provides examples of these exclusions. Medical care includes, but is not limited to expenses incurred for the diagnosis, cure, treatment or prevention of disease. (See IRC section 213(d) for the medical care requirement specifics.) The gift tax also does not apply to an amount you paid in 2007 on behalf of an individual to a qualifying educational organization as tuition for the education or training of the individual. The payment must be for tuition and must be made directly to the qualified educational organization. Payments made for books, supplies, room and board, or other expenses will not qualify for the exclusion. (See IRC 170 (b)(1)(A)(ii) for further regulations.)

7. **Charitable Giving.** This can be the season to give, and some even say it is better to give than to receive. You can make unlimited gifts to qualified charities and there will be no need to file a gift tax return. With some limitations, one can make limited distributions from their Individual Retirement Account, ("IRA"), up to \$100,000. A gift of appreciated securities is always welcome and will save the donor additional taxes.

8. **Review medical and miscellaneous itemized deductions.** Medical expenses and miscellaneous itemized deductions have "floors." For medical expenses, only those in excess of 7.5% of your adjusted gross income (AGI) count. Miscellaneous itemized expenses have to exceed 2% of your AGI to qualify. Your health insurance premiums count so long as you're not paying them out of a flexible spending account. If you're going to exceed the floor, accelerate your expenses. Prepay your dentist or your accountant. Make sure you mail your checks on or before Dec. 31. Alternatively, if you are not going to exceed your floors, defer the deductions to 2008. You may exceed your floors then.

9. **Pension or IRA contributions.** Discussed above are techniques to gift to another. As the year draws to a close, one should also consider a gift to oneself, namely a sound retirement fund, or at the very least, a meeting with a certified financial planner. If you're contributing to a retirement plan such as a 401(k) plan or a 403(b) plan, you can put in \$15,500 this year and the same amount in 2008. If you are 50 or older, you can put up another \$5,000 as a catch-up contribution.

10. **Plan ahead for 2008.** Organization is not necessarily any of our strong points. However, now that you are more familiar with available planning and savings options, consider the best way to implement these for 2008. Put a plan in to place for monthly contributions to a pension plan or a 529 plan. If your estate documents and advance directives are not in order, call your attorney today and make an appointment for January, instead of waiting until January to make the call.

By following some of the suggested end of year planning tips above, you can rest easy in the New Year knowing that your documents and assets are in order and that you have taken advantage of the available planning tools.



Susan A. Fitzpatrick is an associate with Burke & Casserly, P.C., an estate planning and financial planning firm in Albany.

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