

## THE SARATOGA COUNTY BAR ASSOCIATION

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### SAVE THE DATE

### SCBA HOLIDAY PARTY!

Thursday, December 20th

Longfellow's Restaurant  
Courtyard

# Saratoga County Bar Association Law Notes

*Serving the Interests of Justice*

## TORTS AND CIVIL PRACTICE UPDATE

By Timothy Higgins, Esq.

### Medical malpractice

#### Aulita v. Chang (Carpinello, J., 10/25/07)

Plaintiff filed suit in 2005, alleging medical negligence related to surgery in 2001 and the failure to diagnose kidney cancer in 1999. Defendants moved for summary judgment claiming the statute of limitations had expired, but Supreme Court (Teresi, J., Albany County) found the claims were timely based on the "continuous treatment" doctrine. The Third Department agreed with regard to the acts arising out of the 2001 surgery based on evidence that plaintiff never intended to abandon treatment with the defendants and that the physicians considered themselves to be actively involved in the patient's care. But claims related to the al-

leged failure to diagnose in 1999 were dismissed as time-barred because no follow-up appointments were contemplated by either plaintiff or defendants, and a 2001 visit to assess the cancerous kidney "could only be considered a 'resumption' of treatment as opposed to a continuation of his prior care."

#### Juric v. Bergstraesser (Mercure, J., 10/25/07)

The setting for this case was the emergency department at Benedictine Hospital but the plaintiff claimed not that he was victimized by medical negligence, but that his privacy rights were violated. Plaintiff, who came to the ER with chest pain, contended he told the doctor treating him that he did not want to be admitted to the hospital under the

orders of his former family physician who, by coincidence, was on call that night at the hospital. The family physician was apparently informed of the patient's condition and allowed to review the ER chart, causing the doctor to tell the patient's wife that she and her daughter might be in danger. Plaintiff claimed this was a violation of his common law right to privacy and that disclosure of this information harmed him emotionally and caused adverse consequences in matrimonial litigation. Supreme Court (Bradley, J., Ulster County) granted defendants' summary judgment upon the finding that New York does not recognize a common law right of privacy. The Third Department agreed as to the

## LAW DAY COMMITTEE MEMBERS NEEDED

*Steve Dorsey*, the Chair of the Law Day Committee, is looking for members interested in serving on this year's Committee. Committee members will assist in planning the Law Day Luncheon at the Canfield Casino on **Wednesday, April 30, 2008**. Luncheon planning duties will include selecting a guest speaker, choosing a caterer and luncheon menu, plan-

ning the program, recommending a recipient of the Liberty Bell Award to the SCBA Executive Committee, and recognizing the winner of the SCBA's 2008 Mock Trial competition and all other participating teams.

Other duties will include planning and doing appropriate community service activi-

ties for Law Week.

Bar members interested in serving on or returning to the Committee are asked to please contact Steve at 884-4770, or by email at sarcaty2@govt.co.saratoga.ny.us. The first Committee meeting will be held in early December on a date to be determined.

## ADVANCED DIRECTIVES

By Susan A. Fitzpatrick, Esq. of Burke & Casserly, P.C.

The Health Care Proxy, Living Will and Do Not Resuscitate Order are often referred to as Advance Directives. An Advance Directive provides instructions to your agent and physician as to what treatment and care you wish to have when you are unable to make your own medical decisions (for example, if you are in a coma). Advance Directives tell your physician that you do or do not want certain kinds of treatment. However, they can also say that you want a certain treatment no matter how ill you are.

### Health Care Proxy

A Health Care Proxy allows you to appoint an agent to make health care decisions on your behalf when you are unable to make the decision for yourself. New York Pub. Health Law Article 29-C provides the guidelines for the form Health Care Proxy.

Your agent stands in your shoes and can make almost any treatment decision that you can make. When an agent is making your health care decisions, the decisions must be in accordance with your religious and moral beliefs. If your wishes are not familiar to your Agent, then your health care treatment is based upon your best interests at that time. It is important to discuss your health care desires with your agent.

The law only provides for one agent. You are able to, and it is good planning to also nominate an alternate/successor agent. This person would act only if the first agent was unable, unwilling or ceased to act on your behalf.

You can provide guidance to your Agent of your wishes and your instructions in an accompanying Living Will (discussed further below). However, your Agent cannot make a decision regarding artificial hydration or artificial nutrition without evidence of your wishes. Your Health Care Proxy can provide a specific statement as to what your wishes are in these areas. Additionally, you should state that you have discussed your wishes regarding artificial nutrition and hydration with your agent, and that your agent knows your wishes.

To properly execute a health care proxy you need to be at least 18 years of age and competent. The form requires two (2) witnesses, eighteen (18) years of age or older. Your witnesses should not be your Agent or any named alternate agent. The form does not need to be notarized nor does it need to be prepared by or executed in the presence of an attorney.

Unless otherwise provided, a Health Care Proxy does not expire. The proxy can be revoked through verbal or written notice to the Agent, execution of a later Proxy, or by any other act evidencing intent to revoke the proxy. Each state must honor a validly executed proxy from another state, even if it is a different format.

A health care provider or employee thereof shall not be subjected to criminal or civil liability, or be deemed to have engaged in unprofessional conduct, for honoring a health care decision made by an agent in good faith. An agent is also granted statutory immunity from criminal or civil liability for making a health care decision in good faith.

The New York State Department of Health's website provides a sample form Health Care Proxy, available online at [www.health.stat.ny.us/professionals/patients/health\\_care\\_proxy/intro.htm](http://www.health.stat.ny.us/professionals/patients/health_care_proxy/intro.htm)

### Organ and Tissue Donation

There is a critical need for organ and tissue donors. In the United States, over 100,000 people (adults and children) are waiting for an organ transplant. More than 8,000 people in New York are waiting for an organ donation. These 8,000 people do not include thousands who are waiting for tissue donations.

Organs that can be donated include the kidney, liver, heart, lung, pancreas and intestines. Tissue donations include heart valves, bones, corneas and tendons. You can indicate your intentions regarding organ and tissue donation by:

- Signing the back of your drivers license;

- Registering online at <http://www.health.state.ny.us/nysdoh/donor/>; or
- Stating your organ and tissue donation wishes in your Health Care Proxy.

If you are unable to indicate your donation wishes, the law provides that the following persons (in the order of priority) can consent to the donation of your organs or tissues: your spouse, your adult child, either parent, your adult sibling, or a court appointed guardian appointed prior to death.

### Living Will

A Living Will expresses what your medical treatment instructions are in certain situations. The person nominated as your agent under your Health Care Proxy will carry out your instructions provided in your Living Will. While a Living Will is provided for by law in many other states, New York does not have a law providing for a Living Will. However, New York courts do consider and honor your instructions in the Living Will as proof of what your medical treatment or care wishes are. A Living Will can be offered as clear and convincing evidence of a patient's wishes, thereby avoiding a judicial proceeding to determine the appropriateness in following such wishes.

Attention should be paid to the medical treatments that you do or do not want in a particular situation. Listed below are examples of treatments that you may or may not want to have administered.

Artificial Respiration  
Electric Shock Therapy  
Artificial Nutrition  
Antibiotics  
Artificial Hydration  
Surgical Procedures  
Cardiopulmonary Resuscitation  
Dialysis  
Antipsychotic Medications  
Transplantation  
Blood Transfusions  
Abortions/Sterilization

A Living Will should be executed in the same manner as a Health Care Proxy.

Continued on page 4

## TORTS AND CIVIL PRACTICE, continued from front page

defendant hospital but reinstated the plaintiff's claim against the physician because the complaint could be liberally construed to allege a breach of the "implied covenant of trust and confidence that is inherent in the patient-physician relationship."

### **Goodspeed v. Adirondack Medical Center (Cardona, P. J., 8/9/07)**

Plaintiff made two trips in three days to the defendant hospital's emergency department with complaints of pain and swelling in his right testicle. The symptoms did not resolve and upon a third ER visit one week after the first evaluation, he was diagnosed with testicular torsion and required surgery. Defendants moved for summary judgment but were denied by Supreme Court (Dawson, J., Essex Co.). The defendant hospital appealed contending plaintiff's proof on the motions below focused only on the conduct of the defendant urologist and did not allege or address the hospital's claimed vicarious liability. The Third Department, however, found it did not need to consider such arguments as they were not raised by hospital's counsel during motion practice and therefore were not preserved for review on appeal.

### **Sinkholes and potholes**

### **Ribaud v. Delaney Construction Corp. (Peters, J., 10/18/07)**

The defendant contractor was hired by the Town of Queensbury for a sewer renovation project along Route 9. During the course of the work, a sinkhole developed along the curb on the north side of the highway. A project superintendent noticed the hole, arranged for it

to be filled with a flowable fill product that took about two hours to cure and harden and placed an additional warning sign, barrels and cones to divert traffic from the area. Plaintiff, riding his bike, managed to avoid the barrels and cones and rode into the wet flowable fill, resulting in injuries which resulted in his negligence suit. Supreme Court (Krogmann, J., Warren Co.) denied defendant's motion for summary judgment finding a triable issue of fact as to whether the warning signs and barriers were sufficient. The Third Department reversed and dismissed the plaintiff's case, finding his proof on the motion (an attorney's affirmation only) inadequate to overcome the defendant's prima facie showing of entitlement to judgment as a matter of law.

### **Moons v. Wade Lupe Construction Co., Inc. (Cardona, P.J., 8/2/07)**

Plaintiff was a UPS driver who injured her ankle when she stepped into a pothole that she contended was on property the defendant owned or was responsible to maintain in a safe condition. Supreme Court (Hoye, J., Schenectady Co.) reserved decision twice on defendant's motions for a directed verdict; one after the close of plaintiff's proof and again before the case went to the jury. The Third Department found that the directed verdict should have been granted. The evidence at trial showed the pothole was actually located partially in the roadway and partially in the right-of-way maintained by the Town of Colonie. In such a case, an abutting land owner (such as the defendant) is not under a duty to keep the prop-

erty safe unless it created the hazard, or it was required by statute or ordinance to maintain the site, or the property was designed or changed in a way that gave the adjoining landowner some "unique benefit unrelated to the public use."

### **"Serious injury" motion practice**

### **Woods v. Johnson (Mugglin, J., 10/25/07)**

The Third Department affirmed Supreme Court's (Work, J., Ulster Co.) decision that the determination of whether plaintiff sustained a "serious injury" (Insurance Law § 5102(d)) should be left to a jury. 16 months after the rear-end accident (which Supreme Court found was caused solely by defendant's negligence) plaintiff had surgery to repair a fracture in her cervical spine. However, there existed a dispute among doctors whether the fracture was caused by the trauma of the accident or degenerative changes in the plaintiff's spine unrelated to the auto crash. Perhaps most interesting was that a difference of opinion on causation existed between the two orthopedists, partners no less, who operated on the plaintiff's spine.

### **Felton v. Kelly (Cardona, P. J., 10/25/07)**

Plaintiff's case survived defendant's motion for summary judgment in Supreme Court (Kavanagh, J., Ulster Co.) contending an insufficient showing of "serious injury". The Third Department agreed but only to the extent that the "90/180 days" category should be considered at the time of trial. Claims un-

der "permanent consequential limitation" and "significant limitation of use" should have been dismissed in light of the plaintiff's failure to offer sufficient evidence of a probative value. For example, plaintiff's neurologist affirmed the plaintiff's cervical spine movement was "limited" but there was neither a qualitative nor quantitative assessment of the limitation that would support a conclusion that it was either permanent or significant.

### **Cameron v. Engelhart (Mugglin, J., 10/18/07)**

The accident sounded dramatic (defendant's car crashed through the front window of a Blockbuster store and pinned the plaintiff between two counters) but the evidence of plaintiff's injury was hardly as compelling. The Third Department found Supreme Court (Dawson, J., Clinton Co.) should have granted defendant summary judgment given the absence of proof of a "serious injury" related to the incident. Among other things, neither of two physician affidavits included any indication of when the plaintiff was last examined, or what diagnostic tests were done to compare plaintiff's condition to "normal function". Furthermore, the bulk of plaintiff's medical proof related to examinations and findings several years after the happening of the accident, further straining the already thin causal connection.

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## ADVANCED DIRECTIVES , con't

By Susan A. Fitzpatrick, Esq. of Burke & Casserly, P.C.

### Do Not Resuscitate Order

A DNR Order, (Do Not Resuscitate Order) contains very specific instructions regarding the non-administration of CPR (Cardiopulmonary Resuscitation) in the event you suffer a cardiac or respiratory arrest (your heart stops beating or you stop breathing). If your heart stops beating or you stop breathing, CPR will not be performed in an effort to restart your heart or lungs.

The law is structured to provide CPR in the absence of a DNR Order. In New York, every patient admitted to a medical facility is presumed to have consented to having CPR administered upon them. If a patient does not wish to have CPR, that patient must have consented to having his/her doctor issue a DNR in order to avoid having CPR performed. A DNR Order can be conditioned on the happening of certain medical conditions.

There are two types of DNR Orders: (i) a Hospital DNR Order, which only provides for the withholding of CPR while you are in the hospital, and (ii) a Non-Hospital DNR Order, which pro-

vides for the withholding of CPR everywhere else.

To enter into a DNR, you must be at least eighteen (18) years of age and competent. You can consent to a DNR in writing or verbally. Your written consent should be signed in the presence of at least two (2) witnesses each being at least eighteen (18) years old, and both shall also sign the consent. You may verbally consent to a DNR, as long as there are two (2) witnesses present, (also 18 or older), with one of the witnesses being a physician affiliated with the hospital in which you are being treated. A parent can consent to a DNR for their minor child. Your Health Care Agent, appointed Guardian, spouse, adult child, parent, sibling, or close friend can also request a DNR Order if you lack capacity to do so for yourself. If the attending physician determines that you, as the patient would suffer from an immediate and severe injury from a discussion about CPR, he/she can also consent to a DNR Order on your behalf.

### Final Notes

Care and attention should be taken when drafting these documents. Each document should be consistent with the terms reflected in all the documents. Multiple copies of these documents should be provided to a client. The client should be advised to discuss medical treatment directions and wishes with his/her family and loved ones. A client should provide copies of the Advanced Directives to physicians, agents and alternate agents. Finally, a client's Advanced Directive should be reviewed every few years to ensure that the directions they contain accurately reflect the client's wishes and circumstances.

- Susan A. Fitzpatrick, Esq. is an Associate with Burke & Casserly, P.C., located at 255 Washington Avenue Extension, Albany, New York 12205. You may contact Ms. Fitzpatrick at (518) 452-1961 or [sfitzpatrick@burkecasserly.com](mailto:sfitzpatrick@burkecasserly.com)



## Adirondack Women's Bar Association

November 29, 2007



# Racing the Night Away

Please join us...

**AWBA invites you and your friends and family to this general membership event for an enjoyable evening of dinner and harness track racing at the Racino's Fortune's Buffet.**

When: November 29, 2007, 6:00 p.m.

Where: Saratoga Gaming and Raceway

Price: \$25.00 for members and their significant others.

\$30.00 for nonmembers and their significant others.

For directions, please call 581-5790.

Please reserve your place by November 12, 2007 by making payment to:

Leah Everhart, Esq.

Miller, Mannix, Schachner & Hafner, LLC

451 Glen Street

P.O. Box 765

Glens Falls, NY 12801

(518) 793-6611



**Please bring a new unwrapped toy for AWBA's November and December Toys for Tots drive.**





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\*please contact the editorial staff  
 submit an item of interest



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**ANNOUNCEMENTS**

**JONES FERRADINO**

*Welcomes Newest Associate*



Cindy Lunsford, Esq., has joined Jones Ferradino, Attorneys at Law, as an associate. After earning her *juris doctor* from the University of Cincinnati, Ms. Lunsford began her legal career as judicial law clerk to Hon. David. B. Krogmann of the Fourth Judicial District, and then joined the Glens Falls firm of Bartlett, Pontiff, Stewart & Rhodes. At Jones Ferradino, Ms. Lunsford's areas of practice include real estate, zoning and planning, trusts and estates, as well as criminal matters.

Ms. Lunsford was born and raised in Louisville, Kentucky and now makes her home in Ballston Spa with husband, Ken.

**VOLUNTEER ATTORNEYS NEEDED!**

**The Legal Aid Society and The Domestic Violence and Rape Crisis Services of Saratoga County**

will be co-sponsoring an "Ask-A-Lawyer" clinic on the  
 2nd Wednesday of each month

It will be held at the Domestic Violence and Rape  
 Crisis Services of Saratoga's office located at  
 480 Broadway - LL20,  
 Collamer Builder - Lower Level  
 Saratoga Springs

The purpose of the clinic will be to offer legal advice to persons faced  
 with domestic violence.

An attorney will answer questions in the areas of  
 matrimonial law, family law, consumer and housing issues. In order to  
 facilitate this request, we need attorneys to volunteer their time at this  
 clinic. It will be for only two (2) hours, from 1:00 p.m. until 3:00 p.m.  
 Of course, you will be provided with CLE credit for your time.

**ADVANCED CHILD SUPPORT ISSUES**

Friday, December 7, 2007  
 Seminar 8:30-12:40  
 Glen Sanders Mansion, Scotia New York

**CRIMINAL LAW FALL CLE**

**DWI: WHAT YOU NEED TO KNOW**

Friday, December 7, 2007  
 Seminar 12:40-5:00  
 Glen Sanders Mansion, Scotia New York

\* Contact Schenectady County Bar Association for details (518) 393-4115

**PLEASE TAKE NOTICE** that after October 30, 2007, compliance with new DRL §177, regarding Health insurance, is a prerequisite for a divorce

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**ATTORNEY**

Mid-size law firm with offices in Albany and Poughkeepsie seeks attorney with top academic credentials and 2-3 years experience with health care law and/or corporate/transactional work. Top salary and outstanding paid benefit package for the right candidate. Please forward resume and law school transcript to the attention of Mary E. Lawson, Iseman, Cunningham, Riester & Hyde, LLP, 9 Thurlow Terrace, Albany, NY 12203. (Website: www.icrh.com)

**HARRIS BEACH LAUNCHES DIVERSITY SCHOLARSHIP PROGRAM**

The law firm of Harris Beach pllc has launched a diversity scholarship program in keeping with its diversity initiatives. The annual scholarship will take effect in the 2008-2009 school year and provide second-year law school students \$7,500 toward the cost of tuition. Scholarship recipients will also be offered an opportunity to participate in the Harris Beach law student summer program and be considered for an offer of employment upon graduation. Scholarship candidates and recipients must be members of groups traditionally underrepresented in large law firms and must express a desire to work, live and practice law in New York state.

"Our scholarship program is an extension of our dedication to enhancing a diverse culture at Harris Beach," said William M. Flynn, managing partner of the Harris Beach Albany office. "It is designed to recognize the scholastic achievements of students who represent groups that have traditionally been underrepresented in the legal community and promote employment opportunities for them in New York state where we have offices."

"A vibrant and growing law firm must be reflective of the communities which it serves," said James A. Spitz, Jr., Harris Beach CEO. "It is our goal that those students who receive scholarships to further their legal education ultimately return and contribute their professional skills for the benefit of our communities. I am proud that we as a firm have incorporated diversity as a key component of our firm culture."

Founded in 1856, Harris Beach is one of the country's *Top 250* law firms as ranked by the *National Law Journal* and has offices throughout New York state in Albany, Buffalo, Geneseo, Ithaca, New York City, Niagara Falls, Rochester, Syracuse, and Yonkers, as well as Newark, New Jersey. Amongst large upstate New York law firms, Harris Beach has proportionally more associates representing diversity and was one of the first such firms to elect an African-American as an equity partner. Harris Beach has been noted for having a higher proportion of equity women members than the national average based on a 2006 report issued by the National Association of Women Lawyers. The firm is also above the national average for the number of female associates, as a percentage of total associates. Unlike a traditional law firm practice, Harris Beach attorneys with less than full-time schedules can remain on the partnership track and be elected to partnership.

Harris Beach attorneys have leadership roles in the Women's Bar Association of the State of New York; National Federation for Just Communities of Western New York; Rochester Black Bar Association; South Asian Bar Association of New York; Puerto Rican Bar Association; and the National Bar Association. Harris Beach is also an active member of the Workforce Diversity Network, the Upstate New York Regional Minority Purchasing Council, Inc., and the Monroe County Bar Association's Minority Clerkship Program. Additionally, the firm recently launched the Harris Beach Diversity Compliance Team to help organizations and Minority and Women-Owned Business Enterprises work together to maintain compliance with state procurement regulations related to diversity.

The firm's approximately 200 lawyers throughout New York state provide a full range of services for its clients, which include *Fortune 500* corporations, privately-held companies, emerging technology businesses, financial institutions, health care providers, educational institutions, not-for-profit organizations and foundations, state and local governments and authorities, and individuals

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