

**THE SARATOGA COUNTY
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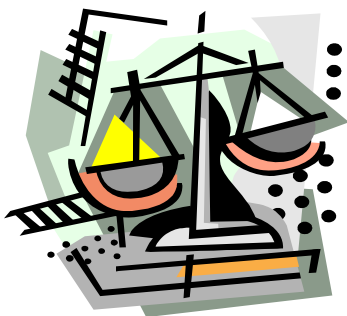


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Inside this issue:

- Matrimonial Law Update** 2
By Michael P. Friedman, Esq.
- Announcements** 4



Saratoga County Bar Association *Law Notes*

Serving the Interests of Justice

TORTS AND CIVIL PRACTICE UPDATE

By Timothy Higgins, Esq.

Post-9/11 “terrorist” rant is slander per se

Yamine v. DeVita

Plaintiffs were naturalized US citizens of Lebanese descent who owned and operated a restaurant in the defendant Village of Owego. In April 2002, on the heels of the September 11th terror attacks on the World Trade Center and other sites, plaintiffs learned that the village chief of police, while in uniform, was making public assertions that plaintiffs “were terrorists, drug dealers and gun runners associated with Osama Bin Laden”.

Through their own attorney, plaintiffs made an effort to discourage such comments.

When that attempt failed, plaintiffs served a Notice of Claim on the Village, but even that did not stem the slander by the police chief. The defamation action went to trial, with the jury returning a verdict to plaintiffs for \$200,000 each in compensatory damages. Supreme Court (Tait, J., Tioga Co.) denied defendant’s motion to set aside the verdict and the Third Department affirmed, finding the police chief’s comments rose to the level of slander per se, and in such a case damages (found not to be excessive) need not be alleged or proven.

Plaintiff’s \$1.2M verdict reversed and new trial ordered

Imbierowicz v. A.O. Fox Memorial Hospital

Trial of a medical malpractice/wrongful death case in Supreme Court (Spargo, J., Albany Co.) ended with a verdict for plaintiff against four defendants, and a damage award that included over \$1M for past and future pecuniary losses. The Third Department found error in the jury charge regarding plaintiff’s burden of proof in a death case (“Noseworthy charge”) and that the opinion of plaintiff’s economic loss expert was speculative

ADOPT A SOLDIER

Colleen Whalen, Esq.

Dear Bar Member:

I am associated with the “Adopt a Soldier” organization which is located in Gansevoort. This group sends care packages to our soldiers overseas and to those who have returned injured. The organization also helps military families who have sons, daughters, husbands and wives overseas. It has almost 500 soldiers who receive the packages.

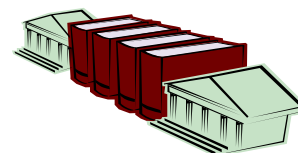
Adopt a Soldier is a completely volunteer organization and it conducts fundraisers to purchase things and pay for the necessary postage.

Please contact me if you are interested in adopting a soldier this holiday season. I am happy to pick up any donation or arrange a time to drop things off at my office.

In addition, the Adopt a Soldier organization wants to become a 501 (c) corporation.

Please let me know if you are interested in assisting the organization and willing to donate your time.

Thank you so much,
Colleen Whalen



Matrimonial Law Update

By Michael P. Friedman, Esq. and republished with the permission of the Albany County Bar Association

"A girl can wait for the right man to come along but in the meantime that still doesn't mean she can't have a wonderful time with all the wrong ones." **Cher**

"You can find women who have never had an affair, but it is hard to find a woman who has had just one." **François, Duc De La Rochefoucauld** (1613-1680)

"I married beneath me. All women do." **Roseanne Barr** (1952-)

As expected for this time of year, the Third Department issues precious few decisions. Formal arguments ended June 6 and did not begin again until September 4, so it will take a few weeks for the machinery to start churning out those gems we love to read. In the meantime, they tackle such burning issues as the thickness of the new runway at the Chemung County Airport¹ or the appropriate fine for some MTA director getting a free \$150 ticket to a Transit Museum gala². In the latter case, it took over four months for the decision, a millennium in Third Department time, and there was one dissent. So, what are we to do in the meantime? Gossip, of course.

Do you know what a matrimonial lawyer's dream is? A wealthy client married to a crazy person. That is a trough for extended legal wallowing, as you usually have good results, a happy client and it takes oodles of time to get there. And we all know time is the only commodity we can utilize to generate money. If you don't believe me, take a gander at Disciplinary Rule 2-106 and 22 NYCRR 1400. I have followed with interest the fortunes of Peter Tauck who is nearing 90 days of hearings in the longest divorce trial in Connecticut history and certainly the most expensive. After all, he is (a) wealthy and (b) married to a crazy person. In this nine year marriage, the mom disappeared with the kids and somewhere along the way may have signed herself into drug rehab. In a tasteless bit of over the top lawyering, one of his attorneys told the press that Ms. Tauck was a "markedly disturbed woman with para-

noid features and poor temper control." Not to be outdone, Ms. Tauck falsely accused her husband of sexually molesting the children and cocaine and sexual addictions. All of this aside, I am mostly fascinated by the legal fees generated by this mess. Ms. Tauck hired New York lawyer Judd Burstein³ at \$850 an hour, who was promptly banned from representing her in Connecticut. No matter, Mr. Burstein is a "consultant" and she is seeking to have her hubby pay his fees and her other counsel, currently due about \$2.5 million. As for Mr. Tauck, he has paid \$70,000 just to house and feed his lawyers during the trial. A helluva guy. He has paid \$7 million in legal and expert fees thus far, and the law guardian Gaetano Ferro, God bless him, has pocketed \$1.3 million and no one is challenging his fees. It's a great world, isn't it? So what did Ms. Tauck get for her \$2.5+ millions? She is currently in alcohol rehab in California and she will get only supervised visits after she completes her inpatient program. Hell, I could have gotten her that for \$1 million. Oh well.

Speaking of money, remember Attorney at Law Debra Opri? She sued David Hasselhoff for \$289,000 claiming her retainer with his wife allowed her only to collect from him. Her case was tossed by the trial judge so she'll have to be content with suing Larry Birkhart for some \$600,000 in fees. As for the former Mrs. Halsselhof, she was sued the next day by another matrimonial lawyer for about \$40,000. I guess without the Third Department to guide us, there's a whole lotta suing going on.

Let me ask you something. How would you like to be awarded over a quarter million dollars in legal fees to be paid by a husband in a divorce case only to have the Appellate Division yank it away from you? Not a good day. That's exactly what happened in Warner v. Houghton⁴ where the trial judge stuck it to the husband and the Appellate Division First Department unstuck it. For example, the wife was awarded a lump sum of \$188,000 for "lost opportunity earnings"

since she relocated with her husband to Singapore. There is no such concept in the Equitable Distribution Law and the Court of Appeals supposedly settled that issue in 1985,⁵ so that award was eliminated. In addition the trial court's decision to award half the appreciation in the defendant's separate property home was remanded for a determination of any increase due to the wife's efforts versus market forces. As for the legal fees, the quarter million buckaroos were supposedly based on the husband's misconduct in discovery and failing to appear. The entire fee award was reversed and the issue remanded to determine only those fees related to the defendant's noncompliance with court orders or failing to appear at court. Strangely the First Department felt she could well afford to pay the \$250,000 on her \$160,000 yearly income and \$220,000 in savings. I'd like to see who pays their bills. At least she won't have to pay for housing and feeding her lawyers.

Finally this bit of sad news. Kevin Federline is broke. His income barely pays the bills, so his divorce lawyer is seeking to have poor Britney pay \$50,000 in legal fees from her \$737,000 monthly income. I'd say he has a shot, unless he lives in the First Department, which of course he doesn't. Is it any wonder that the divorce rate in Great Britain has hit a 30 year low? Who can afford these things?

Riposare in pace, Luciano et Leona.

1. Fahs Roylston paving Company v. County of Chemung, __A.d.3d__ (Third Dept., September 6, 2007)

2. \$2,000 in case you care, Matter of Rubinfeld v. NYS Ethics Commission, __A.D.3d__ (Third Dept., September 6, 2007)

3. One of Donald Trumps' lawyers in his matter with Ivana, Trump v. Trump, 179 A.D.2d 201 (2nd Dept., 1992)

4. __A.D.__ (First Dept., August 30, 2007)

5. Capiello v. Capiello, 66 NY2d 107 (1985).

TORTS AND CIVIL PRACTICE, continued from front page

and lacked a proper foundation. As such, a new trial must be held on both liability and damages.

Toxic torts: plaintiff's proof sufficient

Jackson v. Nutmeg Technologies, Inc.

Plaintiffs are among those New York State Department of Tax and Finance employees who have filed "sick building" occupational exposure lawsuits arising out of their work in Building 8 in Albany's Harriman office campus. Defendant, which supplied the state with a corrosion-prevention chemical used in the heating and cooling system, moved to preclude plaintiff's expert witness from testifying and sought summary judgment. Supreme Court (Teresi, J., Albany Co.) denied both motions and the Third Department affirmed. The Court rejected the defendants' claim that a Frye hearing was required on plaintiffs' expert proof because the proffered opinions did not constitute a "novel methodology" for demonstrating a causal connection between a chemical compound and plaintiffs' symptoms/disease.

Late Notice of Claim should not have been allowed

Heffelfinger v. Albany International Airport

Plaintiff drove a shuttle bus for the airport's management contractor and during the course of his work fell on airport property and injured his knee. The fall occurred in October 2004. He had knee surgery in March 2005. In November 2005 plaintiff applied for, and received, permission from Supreme Court (Doyle, J., Albany Co.) to file a late notice of claim (pursuant to

General Municipal Law § 50-e (5)). Defendant contended this was an unwise exercise of Supreme Court's discretionary powers, and the Third Department agreed. Found lacking was any evidence that the defendant timely obtained "actual knowledge of the essential facts of petitioner's claim of negligence" such as the exact location of the fall and the contention that poor lighting was one of the contributing causes. Furthermore, the claimant's excuse for late filing, that he did not know the extent of his injuries, was described as "unpersuasive" in light of his acknowledgment that he knew in January 2005 he was going to need knee surgery.

Motor vehicle cases

Baker v. Thorpe

The Third Department affirmed Supreme Court's (Krogmann, J., Washington Co.) dismissal of the plaintiff's lawsuit which arose out of a rear-end collision auto accident. Plaintiff's proof didn't reach the "serious injury" threshold in any of the three categories alleged. Although carpal tunnel syndrome can form the basis for a "significant limitation" claim, this plaintiff's problems ended when he had surgery for the condition.

Hart v. State of New York

Claimant's personal injury lawsuit alleged a failure to identify and timely address an icy road surface in a rock cut area on the Taconic State Parkway. The Court of Claims (Sise, J.) found for the State after a trial limited to liability proof, and the Third Department affirmed. Defen-

dant's highway maintenance supervisor witnessed the accident and acknowledged at deposition that road temperatures in rock cut areas were 1-2 degrees lower than pavement in other areas of the highway and therefore may get icy sooner than other sections of the road. However, this knowledge did not constitute constructive notice of this particular icy condition, and road inspection records for that spot showed no problems 1-to-3 hours before claimant's accident.

Holbrook v. Pruiksma

The jury found defendant was negligent and the sole proximate cause of the auto accident but that plaintiff did not sustain a "serious injury" (Insurance Law § 5102 (d)). The Third Department affirmed the verdict and found that Supreme Court (Doyle, J., Greene Co.) did not abuse its discretion in denying plaintiff's request for a missing witness charge regarding a physician who conducted a physical examination of the plaintiff 2 ½ weeks before trial but never produced a written or oral report. Defense counsel proved that no report was ever received from the doctor, and the Court concluded that "given the undeniable weakness of plaintiff's case" any error in failing to give the charge was harmless and did not deprive plaintiff of a fair trial.

McCulley v. Sandwick

Plaintiff claimed at trial that the defendant's car, southbound like hers, broadsided her vehicle when she attempted to make a left turn. Defendant's version of the

accident contradicted the plaintiff's, and a responding police officer testified that plaintiff, at the scene of the crash, reported she mistakenly turned right and then while in the intersection attempted a corrective move. The jury found defendant was negligent but not a proximate cause of the accident, and Supreme Court (Teresi, J., Albany Co.) denied plaintiff's motion to set aside the verdict. The Third Department affirmed but with two dissenters, who thought that based on the conflicting proof at trial, the jury finding that defendant was negligent required it to then apportion liability accordingly.

Horan v. Brown

At the time of the motor vehicle accident, plaintiff Horan was a passenger and was holding her five-week old son. Defendants counterclaimed against her seeking apportionment of liability because of her failure to put the child in a car seat. Supreme Court (McCarthy, J., Albany Co.) dismissed the counterclaim for failure to state a cause of action, and the Third Department affirmed. A passenger has no independent legal duty to insure the safety of a fellow passenger and any alleged breach of the parent-child relationship would constitute negligent parental supervision for which there is no liability within a third-party's claim for contribution.

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Young Lawyers Committee

**Fall General Membership
Social**

When: Tuesday, October 9, 2007

6:00 pm – 8:00 pm

Where: Mouzon House Restaurant

1 York Street, Downtown Saratoga Springs

(518) 226-0014

Cost: \$15.00 per person

Come and mingle with your fellow members at the beautifully restored Mouzon House. There will be gourmet hors d'ourves and cash a bar.

PLEASE MAKE YOUR RESERVATIONS by Thursday, October 4 by calling the Saratoga County Bar Association at 587-5829 or by e-mail at pclute@saratogacountybar.org

ANNOUNCEMENT

Center for Excellence in Aging Services is hosting

Step Up, Speak Out & Stop Financial Elder Abuse Conference

on

Tuesday, October 23rd, 2007 at the Albany Marriott.

There is no fee to attend this all day conference but seating is limited so please RSVP as soon as possible.

Contact: Lauren Velazquez

Project Coordinator

Financial Literacy Initiative Center for Excellence in Aging Services

School of Social Welfare

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Albany County Bar Association's
Young Lawyers Committee
Proudly Presents

The Young Lawyers Cocktail Party
For the Bench & Bar

At
74 State Street
on
October 11, 2007
at 5:30 p. m.

Come join us for a networking reception & meet some distinguished
members of the Bench and Bar!!

Young Lawyers: \$20
(Admitted 10 years or less or 37 years old or younger)
All Others: \$25
Law Students and Paralegals: \$10

I (We) will attend the Young Lawyers Cocktail Party on October 11, 2007.

My check for \$ _____ is included.

Name: _____

Address: _____

Phone: _____ E-mail: _____

**Make your check payable to: Albany County Bar Association
and Remit to: The Stedman House, 1 Lodge Street, 2nd Floor,
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For additional information, please contact 445-7691