

**THE SARATOGA COUNTY
BAR ASSOCIATION**

P.O. Box 994
Saratoga Springs, New York 12866
(518) 587-5829
pclute@saratogacountybar.org
Patricia L. Clute, Executive
Coordinator
www.saratogacountybar.org

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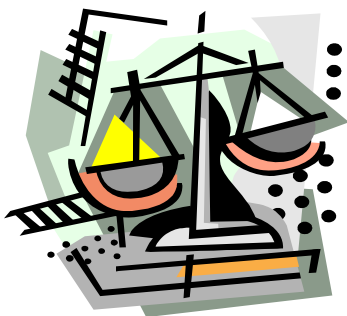


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Saratoga County Bar Association *Law Notes*

Serving the Interests of Justice

TORTS AND CIVIL PRACTICE UPDATE

By Timothy Higgins, Esq.

**Worker's Comp. Law §11
"grave injury"**

**Giblin v. Pine Ridge Log
Homes, Inc. (Mugglin, J.,
7/12/07)**

Plaintiff, working for a foundation subcontractor at a construction site, sustained an injury that culminated with surgical removal of his right eye. The defendant general contractor brought a third-party claim against the employer, who argued such suit was not proper unless the injury, loss of an eye, constituted a "grave injury" under Worker's Comp. Law §11. Supreme Court (Giardino, J., Schenectady Co.) declined to dismiss the third-party action, but the Third Department thought dif-

ferently concluding that the loss of a single eye does not meet the test of "permanent and severe facial disfigurement" as a matter of law. Apparently compelling was evidence which showed the plaintiff wore a prosthetic eye which he removed once a year for cleaning and 'before and after' photos of the plaintiff's facial appearance that demonstrated little difference. The Court specifically noted that "the list of grave injuries (in the statute) is exhaustive and is not to be extended absent legislative action".

**After-school program
"negligent supervision"
claim**

**Fulger v. Capital District
YMCA (Crew, III, J.P.,
7/12/07)**

The Third Department affirmed Supreme Court's (Nolan, J., Saratoga Co.) dismissal of the plaintiff's case alleging her infant son's broken leg resulted from defendant's negligent failure to supervise kids at an after-school program. The boy, 7 years old, sustained the fracture when he and three other children simultaneously dove to try to catch a football thrown to the group by a camp counselor. After noting that "there is nothing inherently unsafe in a game of catch", the Court affirmed the dis-

Continued on page 2

SEEKING SUBMISSIONS

Dear Bar Member:

On behalf of the SCBA Newsletter Committee, I would like to thank those of you who have donated your time and energy in providing submissions to *Law Notes*. We receive tremendously positive feedback from our members who have benefited from the information shared by fellow members of the SCBA.

Now with busy summer months having come and gone, I am sending out a "call for sub-

missions" once again. If you have an article, item of interest, not-for-profit spotlight, or announcement to share with the SCBA, please send your item for publication to: mcoreno@saratogalaw.com.

Once again, I wish to thank you all for your continued support.

Libby Coreno
Jones Ferradino
68 West Avenue
Saratoga Springs, New York
(518) 587-0080



TORTS AND CIVIL PRACTICE, continued from front page

missal and found that “no amount of supervision could have prevented the children’s spontaneous and uniform decision to dive for the loose ball.”

“Serious injury” dismissal Insurance Law §5102

Fisch v. Walters, et al. (Rose, J., 7/12/07)

Persistence paid off for the defendants whose motion for summary judgment was denied by Supreme Court (Hummel, J., Columbia Co.), and then denied a second time upon re-argument (the court initially neglected to consider the report of defendants’ examining neurologist). The Third Department reversed and ordered summary dismissal concluding that plaintiff failed to show the auto accident at issue resulted in a “serious injury” (as defined in Insurance Law §5102). Plaintiff’s proof highlighted the residual effects of a head injury but the Court found “limited evidentiary value” in the reports of the treating nurse practitioner and consulting neurologist which did not identify any diagnostic tests performed and failed to link their findings to anything beyond “subjective reports of headaches, dizziness, memory loss and mood swings” from the plaintiff and her parents.

Traverse hearing to resolve personal jurisdiction ques- tion

Dunn v. Pallett, et al. (Cardona, P. J., 7/19/07)

Many practitioners may be unfamiliar with a traverse hearing, the vehicle which gives the parties a chance to offer proof of whether personal jurisdiction over a defendant was properly obtained pursuant to CPLR Article 3.

Supreme Court (Teresi, J., Albany Co.) denied the plaintiff’s request for such a hearing and dismissed the action after defendants moved for summary judgment claiming a lack of personal jurisdiction. The Third Department reversed and said the hearing should take place to resolve the questions of fact presented by the contradictory affidavits offered by plaintiff’s process server and the woman he allegedly served with the summons and notice. (The process server identified the woman as the manager of the defendant business but the woman and the owner of the complex countered that she was an unpaid intern and not someone authorized to accept service of process on behalf of the defendant).

ATV vs. police vehicle; plain- tiff’s verdict affirmed

Beckwith v. State of New York (Kane, J., 7/26/07)

Claimant was 15-years old at the time of the accident and sustained injuries when the ATV he was riding left the highway, hit a drainage ditch and flipped over, ejecting him and his passenger. In the minutes preceding the accident, the ATV was being pursued by a New York State trooper, and properly so since the ATV was not registered or insured, the driver was unlicensed, and operation of the vehicles on state roads is against the law. At trial, claimant’s proof was that his ATV left the highway because it was bumped from behind by the patrol car. The State disputed the bumping theory and offered evidence that claimant, having ignored lights and siren and an order to pull over, veered off the highway and into the ditch as the patrol car pulled alongside or past the

ATV. The Court of Claims (Hard, J.) found for the claimant, attributing 90% liability to the defendant, and the Third Department affirmed repeating the well-known rule that it will give deference to findings by a trial court “which are based largely upon credibility determinations”.

Dog bite

Earl v. Piowaty (Mercure, J. P., 7/26/07)

Dog bite cases are common enough, but plaintiffs making such injury claims rarely move for summary judgment on liability. The plaintiff mother claimed her son was bitten by the dog when it suddenly jumped up and attacked him. Defendant didn’t deny the bite happened but said it occurred after the boy startled the sleeping dog by shouting directly in its face. On the motion, plaintiff argued she had established the defendant’s knowledge of the dog’s “vicious propensities” by offering the defendant’s own deposition testimony that her dog, one week earlier, had “nipped” at a neighbor who attempted to pet the dog. Supreme Court (Bradley, J., Ulster Co.) denied the motion and the Third Department affirmed, noting that “evidence of normal canine behavior is insufficient” and proof of “rambunctious behavior” meets plaintiff’s prima facie burden only when such rambunctiousness “is the very behavior that resulted in plaintiff’s injury”.

Timothy Higgins, Esq.
Power & Santola, LLP
39 North Pearl Street
Albany, New York 12207
(518) 465-5995
thiggins@powers-santola.com

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.

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David L. Ganje, Esq.
GANJE LAW OFFICE
Two Tower Place, Suite 4
Albany, New York 12203
(518) 437-9000
(518) 437-9115 fax
D.ganje@ganjelaw.com

WELCOME

DeGraff, Foy, Kunz & Devine, LLP is pleased to announce that **Kara J. Wojdyla** has become an associate with the firm. Ms. Wojdyla has joined Christine Carsky in the firm’s Saratoga Springs’ office at 47 West Harrison Street (Church Street), telephone 518-581-3200; telefax 518-581-9435. The firm has a long-standing tradition of depth and excellence as a full-service firm, and invites inquiries and referrals in all areas of practice.

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PRO BONO OPPORTUNITIES

By Kristie Cinelli, PAI Paralegal for LASNNY

It is hard to believe that we are three-quarters of the way through 2007. Track season is under way and before we know it, we will be starting the holiday season. 2007 has been an amazing year so far, and thanks to the SCBA members it has been a productive one as well.

The Legal Aid Society has been working on innovative ways to reach our clients. With the help of **Jim Doern**, we were able to provide advice to victims of domestic violence in a clinic setting regarding consumer issues. The event was a great success and we were able to reach eight clients in need of legal advice immediately. The impact was apparent by the clients' response to the format, as well, as their thankfulness for Jim's efforts.

Consumer issues seem to affect more clients every year. We hope that bankruptcy will never be our reality. Unfortunately, for many it is their only solution. Special thanks to **James Cox, David Devall, Jim Doern, Ronald Kim, Alan LeCours,**

Marty Pozefsky, Stephen Rodriguez and James Trainor for taking bankruptcies this year. It has been an uphill struggle to ensure that our clients are served in this area and I do not have the words to properly express my appreciation for their service - they are priceless. Consumer issues affect everyone socially and economically, whether directly or indirectly.

I would like to also recognize the continued efforts of **Vicki Bachmann and Bill Reynolds**. They have continued to volunteer their time and wisdom once a month to victims of domestic violence, by providing advice regarding an array of legal issues. November will be the one year anniversary for this clinic - thank you!!!

The clinics have been wonderful experiences, and of course, have led to more ideas that are brewing in the pot. I look forward to making these ideas a reality in the future. Please call me at 518-689-6322 or e-mail me at kcinelli@lasnny.org if you would like to like to volunteer.

SARATOGA COUNTY BAR ASSOCIATION

Calendar of Events

2007

September 19, 2007	Executive Board Meeting, 8:00 a.m. Third Floor, City Hall
September 27, 2007	Bar Dinner at The Factory 6:00 p.m. Cocktails, 7:00 p.m. Dinner
October 17, 2007	Executive Board Meeting, 8:00 a.m. Third Floor, City Hall
November 8, 2007	Bar Dinner at The Wishing Well 6:00 p.m. Cocktails, 7:00 p.m. Dinner
November 28, 2007	Executive Board Meeting, 8:00 a.m. Third Floor, City Hall
December 5, 2007	Holiday Gathering @ Longfellow's

WE'RE ON THE WEB
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