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Saratoga County Bar Association Law Notes

Serving the Interests of Justice

TORTS AND CIVIL PRACTICE UPDATE

By Timothy Higgins, Esq.

Plaintiff's damages award sliced in half

Beadleston v. American Tissue Corp. (Rose, J. 6/21/07)

The Supreme Court (Krogmann, J., Washington Co.) jury that heard plaintiff's negligence case awarded him damages of \$1.1M, after concluding the defendant was 75% at fault. The Third Department did not disturb the negligence findings but swung a mighty axe at the damages verdict, directing a new trial on several of the findings unless plaintiff stipulated to a reduced award of approximately \$525,000. Among other things, the Court found there was no basis for *any* award of future lost wages (for

which the jury had given \$320K), that \$600K for 30 years of future pain and suffering was too much, and (finally, good news for the plaintiff) that the jury's failure to award money for past pain and suffering was unreasonable (setting \$75K as appropriate based on the evidence).

Plaintiffs get their day in court: Surviving the motion for summary judgment

Raney v. Seldon Stokoe & Sons, Inc. (Peters, J. 7/5/07)

Defendant is a family farm corporation that regularly sells hay to the third-party defendant (Eastern) which employed plaintiff's decedent. Arthur Raney died after being

struck by a 900-pound bale of hay that had fallen from a stack of bales piled on top of a box trailer. The procedure for loading the hay was devised by Eastern, but carried out by Eastern and the defendant farm which operated a payloader during the process. The defendant farm argued on a summary judgment motion that it did not owe plaintiff a duty of care. Supreme Court (Krogmann, J., Washington Co.) disagreed and also denied plaintiff's motion (CPLR 3025(b)) to amend the complaint to allege "concerted action" liability by defendant and third-party defendant. The Third Department

Continued on page 2

LAWYER REFERRAL PLAN

Dear Bar Member:

The Saratoga County Bar Association has approved the adoption of a Lawyer Referral Plan. In brief, the Plan has a yearly fee to join, and allows you to select a limited number of practice categories to be listed under. Referrals will be made on a rotating basis from each category.

Patty Clute is the administrator of the Plan. She will be mailing you an application form and other materials in the near future. If you have any questions, E-mail Bob Doran at bob.doran@tglawyers.com or phone him at 464-6770.

Thank you.



TORTS AND CIVIL PRACTICE, continued from front page

agreed that summary judgment was not appropriate but permitted plaintiff to amend the complaint, finding there was sufficient merit to the claim and given that defendants did not claim prejudice or surprise.

Ballan v. Arena Management Group, LLC (Cardona, P. J. 6/14/07)

Supreme Court (Nolan, J., Saratoga Co.) denied the defendant's summary judgment motion premised on the argument that plaintiff assumed the risk of falling and breaking her arm while ice skating. The Third Department affirmed, noting that while an ice skater *does* assume the risk of accidentally colliding with other skaters, the risk assumed does not extend to injuries arising out of the allegedly reckless or intentional conduct of other skaters. Among other things, plaintiff claimed that defendant had no staff supervising any of the skaters, which included a group of young boys who were "ramming into each other and throwing themselves on the ice", one of whom caused the plaintiff's fall.

Seybolt v. Wheeler (Mercure, J. 7/5/07)

The 12-year old infant plaintiff was knocked down and bitten by defendants' dog, sustaining injuries to the right side of his face and eye. The defendant landlords of the property were granted summary judgment by Supreme Court (Nolan, J., Saratoga County) but the same relief was denied as to the defendant dog owners. The Third Department found plaintiff did sufficiently raise a question of fact whether defendants knew or should have known of the dog's vicious

propensities, such evidence including an affidavit from the dog's veterinarian and the vet's treatment records (two years prior to the attack) which indicated the dog was "aggressive" and that it "Tried to bite – owner to muzzle!".

Keep your CPLR close by (procedural matters)

DeLuke v. Albany Rest. Supply and Palma Lumber Co. (Lahtinen, J. 7/5/07)

Plaintiff alleged he slipped and fell on snow/ice and hurt his back. After issue was joined, the defendant Palma moved for summary judgment. Plaintiff did not submit opposition papers and Supreme Court (Teresi, J., Albany Co.) granted the motion. Because the summary judgment motion was not opposed, the basis for dismissal was plaintiff's default and plaintiff was not yet aggrieved. As such, plaintiff's trip up to the Appellate Division was premature because plaintiff's "sole remedy was to make a motion to vacate the order in Supreme Court" and if that fails, the order denying such motion can then be considered by the Third Department.

Coty v. County of Clinton (Cardona, P. J. 7/5/07)

Plaintiff filed his Note of Issue and 125 days later the defendant moved for summary judgment. Counsel for the parties had stipulated to the late filing (acknowledging the 120 day deadline established by CPLR 3212(a)) but Supreme Court (Dawson, J., Clinton Co.) dismissed the motion sua sponte as untimely. The Third Department affirmed, noting that leave of court and good cause for the delay is required by statute if

the motion is made after the 120th day. Perhaps more important is the decision's reference to a pair of Court of Appeals opinions from 2004, in which that Court "clearly indicated" the 120 day deadline was a strict requirement that parties must take seriously.

Hansen v. Gehl Company (Mercure, J.P. 6/14/07)

Plaintiff placed venue in Rensselaer County, his place of residence, when he filed suit. But at deposition, plaintiff explained that while the farm he owns does include property in Rensselaer County, the house in which he lives (on the farm property) is actually located in Washington County. Defendant's motion for a change of venue as of right failed to comply with the procedure set forth in CPLR 511, and was denied by Supreme Court (Ceresia, J.). Seeking reversal on appeal, defendants argued they should have been exempted from statutory compliance due to plaintiff's "willful omissions and misleading statements" but the Third Department found no error by the trial court.

Slip and fall cases

Bray v. McGillicuddy's Tap House (Peters, J.P. 6/21/07)

During his non-jury trial, plaintiff testified that he tripped on a raised portion of a rug in the entranceway of defendant's bar, causing him to fall forward and strike his face on the iron armrest of a vestibule bench. The defendant's bartender confirmed that the rug would bunch up and that two bar employees would regularly inspect the rug on high-traffic evenings, although

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Torts and Civil Practice, *continued from page 2*

the night of the plaintiff's fall (a Wednesday) was not a busy night and he, the bartender, was the person responsible for keeping an eye on the subject rug that night. Supreme Court (Kavanagh, J., Ulster Co.) found that the rise in the rug existed before plaintiff fell, and that it constituted a recurrent dangerous condition of which defendant was aware, a finding that led to an award of damages. Deferring to credibility determinations made by the trial court in hearing the testimony of plaintiff, his friend (who did not witness the fall but saw the aftermath) and the bartender, the Third Department affirmed, finding ample support for the conclusion "that defendant should have, but failed to, correct the condition in the exercise of reasonable care".

Gerfin v. North Colonie Central School Dist. (Spain, J. 6/21/07 [501927])

Supreme Court (Teresi, J., Albany Co.) denied summary judgment to the defendant sued by the father of a 6th grader who fell in a school hallway

and broke his ankle. The boy had been outside at recess playing in the snow and was walking down the hall toward a gymnasium pushing a metal cart containing sports equipment. Plaintiff argued the fall was caused by a pool of water that formed when snow on children's boots --left outside of classrooms that lined the hall-- melted and collected in the center of the hall. That evidence was enough for the Third Department to agree there was a question of fact as to whether the school district created the allegedly dangerous condition.

White v. State of New York (Mugglin, J. 6/21/07 [501687])

Claimant (injured in a Clinton County prison while working as a paralegal) proved the State was 100% at fault for her fall, but the Court of Claims (Collins, J.) found no causal connection between the fall and her knee injuries. The Third Department affirmed, describing claimant's testimony as "vague and contradictory", and criticizing her medical proof on causation because it was based only on the claimant's subjective complaints as opposed to objective findings in her medical records.



Hon. Stephen Ferradino and Stephanie Ferradino, Esq.

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Sept. 14

Topic: Challenges in Trying a High Profile Case in the Media

Time: 3:00 - 5:00 p.m.

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Price: \$60

Topic: If You Thought the IRS Was Bad, Wait Until You Get a Call From These Guys! (COPS)

Time: 5:00 - 6:00 p.m.

Credit: 1 Hour of Ethics & Professionalism
Price: \$60

Sept. 15 Judges Round Table Discussion: Update and Comparisons on the Hottest Topics.

Hon. Richard T. Aulisi, Supreme Court Justice, 4th Judicial District

Hon. Erin M. Peradotto, Supreme Court Justice, Appellate Division, 4th Dept.

Hon. Bernard J. Malone, Jr., Supreme Court Justice, Appellate Division, 1st Dept.

Time: 9:00 a.m. - 11:00 a.m.

Credit: 2 Hours of Law Practice Management
Price: \$85

Topic: Real Estate Update

Speaker: Robert J. Sneeringer, Sneeringer, Monahan, Provost, Redgrave Title Agency, Inc.

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Credit: 1 Hour of Professional Practice
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Hon. Harry W. Seibert, Leah Everhart, Esq., Hon Stephen Ferradino, and Karen D'Andrea, Esq.

CRIMINAL LAW UPDATE

By Michael P. McDermott, Esq.

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“Gimme three steps, gimme three steps mister, gimme three steps toward the door”¹

Defendant carjacker was apprehended after crashing his stolen vehicle. Hurt in the crash, he was taken by the police to a hospital where he was handcuffed to the bed. When the police began to loosen his handcuffs in response to his complaints of pain, the defendant broke away and ran down the hospital corridor. He was caught inside the hospital, just a few feet from the exit door.

Convicted of grand larceny and escape, the defendant contended in the Court of Appeals that his conviction should be reduced to attempted escape because he didn't make it outside the door.²

The Court held the “crossing-the threshold” rule applies only to an escape from a detention facility.³ Here, the People needed only to prove that the defendant “escaped from custody.”⁴ The Court was quick to point out that simply freeing himself of the handcuffs was not enough to constitute the crime of escape. However, once the defendant was out of police control and they had to give chase, the crime was complete.

More on Excited Utterances

In the three years since the Supreme Court decided *Crawford v. Washington*⁵, the Court of Appeals has addressed the Confrontation Clause on no less than six occasions.⁶ In the latest de-

cision, *People v. Nieves-Andino*⁷, the Court split 4 to 3 over the admissibility of a shooting victim's identification of his assailant to a police officer.

In *Nieves-Andino*, the victim was shot multiple times by a rival drug-dealer in front of a witness. The witness called 911 and the police arrived at the scene within two minutes. The victim was conscious and provided the police with the name and address of his attacker. Sometime later, the victim died of his injuries.⁸ At trial, the police officer was allowed to recount his conversation with the victim to the jury. The defendant was convicted of second-degree murder. The Appellate Division affirmed.

Crawford prohibits the introduction of the “testimonial statements” of a witness who does not testify at trial. Last year in *Bradley*⁹, the Court of Appeals held that when the primary purpose of police interrogation was to deal with an emergency, the statements offered were not “testimonial” and therefore not subject to *Crawford*. Here, the majority found that the purpose of the police questioning was to find out the nature of the attack in order to “resolve the present emergency”.

Three judges on the court disagreed with this analysis, but concurred in result because they found the error to be harmless in light of the eye witness testimony at trial that identified the defendant as the assailant. In the view of the concurring judges, there was no “emergency” in this case because the assailant had fled. Rather, the purpose of the police questioning was to establish past events that would be relevant to a future prosecution

and were therefore testimonial” and barred under *Crawford*.

Prosecution Delay Results in Dismissal

A four month delay in providing the court with Grand Jury minutes resulted in the dismissal of a vehicular manslaughter indictment.¹⁰ In rejecting the People's argument that the period during which the defendant's omnibus motion was pending should be excluded from speedy trial calculations, the court held that the court's inability to determine the threshold motion to dismiss (because the People failed to produce the minutes) created a direct impediment to the commencement of trial and therefore the People were not “presently ready for trial”. The entire time period that the minutes were in the People's possession, but not delivered to the court, was chargeable to the People as post-readiness delay.

Constitutional Error in Juror Substitution without Written Consent

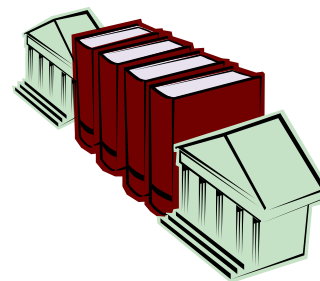
A little more than an hour into deliberations, a juror became ill. With the defendant present, in open court and on the record, defense counsel consented to the substitution of an alternate juror (who had been sequestered) for the ill juror. Sound okay? No good says the Third Department.¹¹ CPL 270.35 (1) requires a writing signed by the defendant in open court to make a substitution once delibera-

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CRIMINAL LAW UPDATE, continued from page 3

tions have begun. Failure to strictly comply with this requirement infringes upon the defendant's constitutional right to trial by 12 jurors, creating a situation where more than 12 jurors "have expressed their views about the evidence and the defendant's guilt or innocence."¹² Given the constitutional implications, the requirement of a writing cannot be deemed a technicality.

DWI History Lesson

For those of you interested in brushing up on your legislative history, the Court of Appeals recently chronicled the past 97 years of attempts to eradicate drunken driving in New York. The occasion was *People v. Litto*,¹³ a case that asked whether driving under the influence of "Dust-Off" constituted intoxication. "Dust-Off" is an aerosol product commonly used to clean off computer equipment. When inhaled (or "huffed"), it produces a "high". The 19 year-old defendant "huffed" while driving 50 mph down a four lane highway. About 45 seconds

later, the defendant's car veered into oncoming traffic and crashed into another vehicle. One person was killed and five others were seriously injured.

A predicate to charging the defendant with vehicular manslaughter was the charge of DWI. But did defendant's "high" constitute intoxication under the statute? The motion court, Appellate Division and Court of Appeals all answered that question in the negative. The charge in question was VTL 1192(3), the so-called common-law DWI. The defendant could not be charged with VTL 1193(4), driving while impaired by drugs, because the aerosol "huffed" was not a "drug" as defined in the Public Health Law.

The law does not define (and apparently has never defined) the term "intoxication"; hence the foray into almost a century of legislative history. The end result? Intoxication refers to "a disordered state of mind caused by alcohol, not drugs".¹⁴ In so holding, the court recognized that gaps may exist in the law requiring even more legislative consideration.¹⁵

Footnotes

1. Gimme Three Steps by Lynyrd Skynyrd © 1973
2. *People v. Antwine*, 2007 NY Slip Op 05585, decided June 28, 2007.
3. Penal Law 205.10(1)
4. Penal Law 205.10(2)
5. 541 US 36 (2004)
6. *People v. Reynoso*, 2 NY3d 820 (2004); *People v. Hardy*, 4 NY3d 192 (2005); *People v. Douglas*, 4 NY3d 777 (2005); *People v. Goldstein*, 6 NY3d 119 (2005), cert. denied, 126 US 2293 (2006); *People v. Pacer*, 6 NY3d 504 (2006) and *People v. Bradley*, 8 NY3d 124 (2006)
7. 2007 NY Slip Op 05584, decided June 28, 2007
8. The decision does not discuss when the victim died in relation to when he spoke to the police. Presumably, a considerable period of time passed because the exchange is never characterized as a "dying declaration."
9. 8 NY3d 124
10. *People v. Johnson*, 2007 NY Slip Op (3rd Dept.), decided July 19, 2007

11. *People v. Garbutt*, 2007 NY Slip Op 05972 (3rd Dept.), decided July 12, 2007
12. *Id.* (quoting *People v. Ortiz*, 92 NY2d 955 at 957 (1998)).
13. 2007 NY Slip Op 05582, decided June 27, 2007
14. *Supra* at p.1.
15. In 2006 the legislature added subdivision 4-a to prohibit driving while using a combination of "drugs or of alcohol and any drug or drugs." This law was not in effect at the time of this incident and the court did not pass on whether the term "any drug" would encompass the aerosol used by this defendant.

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