

**THE SARATOGA COUNTY  
BAR ASSOCIATION**

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- **James S. Cox, Vice President**
- **John M. Hogan, Treasurer**
- **Marne L. Onderdonk, Secretary**
- **William F. Reynolds,  
Immediate Past President**

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# Saratoga County Bar Association *Law Notes*

*Serving the Interests of Justice*

## **Karl J. Sleight is the new SCBA President**



Outgoing President, William F. Reynolds welcomes new SCBA President, Karl J. Sleight

### **Incoming Officers**

On June 13, 2007, the new Saratoga County Bar Association welcomed its 2007-2008 officers. Karl J. Sleight of the law firm of Harris Beach in Albany was installed as President for the upcoming year. Local attorneys James S. Cox, John M. Hogan, III, and Marne Onderdonk were installed as Vice-President, Treasurer and Secretary, respectively. Outgoing SCBA President, Wil-

liam F. Reynolds welcomed his successor and was then honored by the SCBA for his tremendous year of service as President.

### **Honoring Ifigenia T. Brown**

The organization and its members also honored Ifigenia T. Brown as a legal pioneer for female attorneys for her role as the first female president of the Saratoga County Bar Association. First admitted to practice in 1956, "Ify" was a distinguished graduate of Syra-

cuse Law School where she was just one of two female graduates in her class. Mrs. Brown was also a founding member of the Ballston Spa law firm of Brown & Brown in 1958, now known as Brown, Peterson, Craig & Thomas, where she still serves as Of Counsel.

Since 1997, Mrs. Brown has served as the appointed Chairwoman of the State Board of Real Property Services for New York.

## Torts and Civil Practice: Selected Cases from the Appellate Division, 3rd Department By Timothy J. Higgins, Esq.

### Slip and Fall cases (proof of subsequent accidents admissible; slippery condition caused by “disgorging”?)

#### Petrilli v. Federated Dept. Stores (Spain, J. 5/24/07)

Plaintiff claimed his multiple injuries were caused when he slipped and fell on clean, dry tile flooring in the entrance of the defendant’s department store. Before trial, Supreme Court (Lebous, J., Broome Co.) denied defendant’s motion in limine to preclude plaintiff from introducing evidence of *subsequent* accidents at the same location. The jury found for the plaintiff and awarded damages totaling \$761,000. While evidence of later accidents are usually not admissible to prove defendant’s negligence, the Third Department found no error in permitting plaintiff to introduce evidence of nine other persons who fell in the same location under the same circumstances (three of the nine individuals testified at trial). Plaintiff premised his claim on the allegation that the tiles used were inherently slippery and therefore should not have been used at a store entrance. In such a case, evidence of the subsequent accidents “is admissible and of probative value on the issue of whether a dangerous condition existed” but is not relevant to the issue of whether defendant had notice of the allegedly dangerous condition (and such limiting instruction was given to the jury).

#### Perry v. Wine & Roses, Inc. (Lahtinen, J. 5/17/07)

Plaintiff suffered an ankle fracture in a fall within the bathroom of the nightclub operated by the defendant, and claimed the slip and fall was caused by vomit on the floor. The jury concluded the bathroom floor was not reasonably safe at the time but that defendant was not negligent. Plaintiff moved to set aside the verdict as against the weight of the evidence but Supreme Court (Kavanagh, J., Ulster Co.) denied the motion. No doubt choosing its words carefully, the Third Department noted there was a factual dispute about whether the defendant had either actual or constructive notice and therefore the jury could have concluded that “the disgorging...could have occurred shortly before the accident”.

### Close but no cigar (3-2 decisions; plaintiffs sent packing)

#### Berg v. Albany Ladder (Lahtinen, J. 5/17/07 [501054])

Plaintiff was hurt during the course of unloading steel trusses from a flatbed truck at a construction site. His claims, which naturally included alleged violations of Labor Law §§ 240(1) and 241(6), were dismissed by Supreme Court (Catena, J., Schenectady Co.). The Third Department agreed (barely; with 2 dissenters), finding that the accident was not caused by the lack of a required safety device (§240) but instead by the improper movement of the trusses by a forklift. Plaintiff’s claim under §241(6) claim did not survive because the provision of the Industrial Code on which plaintiff premised the claim, 23-9.2(b)(1) (power-operated equipment), recited a general, not specific, safety standard.

#### Miller v. Consolidated Rail Corp., (Carpinello, J. 6/7/07 )

Plaintiff was employed as a car hauler in the Selkirk yard of the defendant railroad, CSX Transportation, where he would load automobiles onto trucks and drive them to car dealerships. A dispatcher for his company advised him the auto yard was dark due to a power outage, and that he should be careful while working. Plaintiff allegedly tripped on the ramp of one of his company’s trucks and was injured in the resulting fall. He sued CSX and Conrail on theories including inadequate lighting, failure to have a back-up lighting system and failure to warn of a dangerous condition. Supreme Court (Teresi, J., Albany Co.) denied defendants’ motion for summary judgment, but a majority (3-2) of the Third Department panel saw it differently and dismissed the complaint, finding CSX kept the auto yard in a reasonably safe condition and owed no additional duty to provide emergency lighting. Important to the majority was that a power outage in the auto yard was a rare occurrence, that CSX immediately took steps to remedy the problem, and that plaintiff’s employer (not CSX) made the decision to have plaintiff work in the darkened yard.

### Damage awards reviewed

#### Hensley v. Lawrence (Crew, J.P. 5/31/07 [500416])

A jury in Saratoga County awarded plaintiff (13 years old at the time of injury) \$2 million and \$1 million for past and future pain and suffering for the injuries she sustained when her rowing shell was struck by a boat owned by the Sheriff’s Department. Plaintiff’s injuries included a pelvic fracture which resulted in a piece of bone left protruding into her pelvis. At trial, there was conflicting medical testimony about the effects of the bony spike, including whether it would make child-bearing and vaginal delivery difficult. Supreme Court (Williams, J.) denied defendants’ motion to set aside the verdict. The Third Department noted “a paucity of case law” on comparable verdicts, but found two cases instructive and used them to find the \$3M verdict excessive and a material deviation from what would be considered reasonable. Plaintiff was given the choice of going back to trial on damages or stipulating to a reduced pain and suffering award of \$1,250,000 (\$1M for past). Judge Cardona dissented on the issue of future pain and suffering, finding the jury’s \$1M award over 10 years to be reasonable.

#### Robinson v. CSX Transportation (Kane, J. 5/31/07 [501015])

Plaintiff was a railroad conductor on a two-person crew transporting two engines and 90 cars carrying automobiles from Buffalo to

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## Torts and Civil Practice Continued from page 2

Albany. The auto cars were side-tracked at a stop in Wayne County, after which plaintiff was supposed to take the engines to a rail yard in Syracuse. A radio-controlled device that monitors air pressure in the brake system and applies the emergency brakes when needed malfunctioned during the end of the side-tracking stage, resulting in the plaintiff being injured. A FELA claim ensued, and after trial the jury awarded plaintiff damages of \$4.7 million. Supreme Court (Doyle, J., Albany Co.) denied defendant's motion to set aside the verdict, and the Third Department affirmed. Without reference to injuries or damages, the Court reviewed plaintiff's proof at trial, finding it satisfied the liberal negligence standard established under FELA, in which the test "is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury".

### Insurance Law § 5102(d): "serious injury"

#### Ames v. Paquin (Lahtinen, J. 5/31/07 [500802])

Plaintiff lost control of his car in a snowstorm and slid down an embankment. While later seated in a police car awaiting arrival of a tow truck, a tractor trailer struck the police cruiser, sending it and the plaintiff down the embankment yet again. Plaintiff's bill of particulars alleged he met the "serious injury" threshold in at least 3 of the categories therein, including the failure to perform his usual and customary activities for at least 90 out of the first 180 days after the accident. Defendants' motion for summary judgment was granted by Supreme Court (Tait, J., Tioga Co.) but reversed on appeal. The Third Department found defendants' proof on the motion never shifted the burden to plaintiff on the 90/180 day category because the defense medical affidavit reflected a physical examination of plaintiff done more than 28 months post-crash and the physician did not address plaintiff's limitations during the first 180 days.

### Court of Claims Act § 11: jurisdiction requires filing AND service of claim

#### Tooks v. State of New York (Mugglin, J. 5/24/07 [501572])

The Court of Claims (Sise, P.J.) granted the defendant's motion for summary judgment based on lack of subject matter jurisdiction because claimant had failed to serve the State within two years of the date of accrual of the cause of action (death claim pursuant to Court of Claims Act § 10(2)). Claimant was the mother of a prison inmate fatally stabbed by two inmates on June 18, 2000. Her Claim was filed with the clerk's office on June 3, 2002, but service of the Claim was not completed until June 21, 2002. Despite the fact that the clerk's office acknowledged filing of the claim by letter dated June 18, 2002 (2 years from the date of death), claimant did not comply with the filing and service requirements of Act § 11(a)(1) and the harsh result of dismissal was affirmed by the Third Department which noted the "failure to comply with *either* the filing or service provisions of the Court of Claims Act results in a lack of subject matter jurisdiction requiring dismissal of the claim" (emphasis added).

## BEWARE !!!

By Stacy Gorman, Esq  
Assistant Public Defender, Saratoga County

I am writing to inform you of an on-line scam that is occurring in this area, which is affecting unsuspecting, innocent people. The scam involves the use of fraudulent money orders which are sent to innocent people to cash at a bank. These money orders have the name of a legitimate bank or lender on them and appear to be real.

A person is informed that he has just won a lottery and that he is to receive a large sum of money. The individual is told that the origin of the lottery is either out of state or out of the country. The unsuspecting winner is then told that in order to receive his lottery winnings, he must pay a tax on

the winnings. The lottery tells the winner that a money order will be mailed to his residence and that the winner is to cash the money order and send the money back to the lottery for payment of the tax. The lottery representative tells the winner that once the tax payment is received, his total winnings will be dispersed.

For example, the winner is told he has won \$200,000.00 and that the taxes owed on the winnings is \$4,000.00. The winner is sent by overnight mail a money order for \$4,000.00. The winner cashes the money order and sends back the \$4,000.00 expecting to receive \$196,000.00.

No harm no foul right? Wrong! By the time the winner realizes that his lottery winnings are not coming, he is contacted by the bank or the authorities and is in-

formed that the money order he previously cashed is fraudulent. Some bank tellers are now recognizing at the time the money order is presented that it is fraudulent. The authorities are still contacted and the person presenting the money order has some explaining to do.

As a result of this scam, innocent people could face criminal charges ranging from possession of a forged instrument to grand larceny. In one particular case in Warren County, the defendant presenting the money order, who was unable to cash the money order due to the bank identifying the money order as being fraudulent, was charged with a felony.

## NOT-FOR-PROFIT SPOTLIGHT

### The Cohen Family Educational Trust

On Monday, September 10, 2007, a benefit golf tournament will be held for the family of **Kerriann Coleman-Cohen** at **Fairways of Half-moon** in Mechanicville, NY.

Kerriann died of cancer last November at the age of 35, leaving behind her loving husband, Mark, of ten years and their three young children. Kerriann fought courageously for her life so as not to leave her 2 year-old son, William, her 6 year-old daughter, Keira, and her 8 year-old son, Daniel, without their mom. A non-smoker, Kerriann lost her life to a very aggressive form of lung cancer just five months after being diagnosed. Always

a courageous fighter, she defeated breast cancer just four years earlier. During this last battle, Kerriann sought out and was treated by specialists at Memorial-Sloan Kettering Hospital, the Dana Farber Institute in Boston and the M.D. Anderson Cancer Center at the University of Texas. She underwent several uncompromising chemotherapy regimens and daily radiation, and she endured much suffering. Kerriann persisted in her battle despite overwhelming odds and with constant discouraging reports from doctors. Her greatest source of strength came from her desire to remain with her family for as long as possible. Her only wish

was to raise her adored children into adulthood in the natural order that most mothers are fortunate to experience. This cancer knew no compassion and deprived her of that opportunity. An unfathomable void remains for her loving family to bear. Kerriann was raised in New City, NY and attended preparatory and secondary schools there. She graduated from Siena College in 1992 and obtained her Juris Doctorate from Albany Law School of Union University in 1995. Kerriann firmly established roots in this community following her Siena days through many personal,

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**If you would like to highlight a local not-for-profit or charity with which you are affiliated, please let a member of the SCBA Editorial Staff know. Please provide a one-page article on the not-for-profit or charity to be published in the newsletter.**

### Family Treatment Court Part III in Alternatives to Incarceration By Paul W. Martineau, Jr., Esq.

The root cause of many neglect proceedings (FCA, Article 10) in the Family Court is substance abuse, either drugs or alcohol. The Saratoga County Family Treatment Court (FTC) was founded in 2003 to combat this problem.

Substance abuse by a parent can be devastating to the children in a family, especially if it is necessary to place the children outside of the family unit as a result of such neglect or abuse. In order to shorten the length of out of home placement and to reunite the children with a sober and functional parent, this Court was established. In order to accomplish this task, the FTC provides parents with various programs which provide treatment, parenting skills, ongoing support services and judicial

monitoring.

This program is voluntary. In order to participate, one must make an admission to the petition before the Court. At that time, the Court will enter a dispositional order in which the party becomes a participant in the FTC. Upon entry, the participants receive weekly judicial monitoring of their progress in all phases of their participation, which includes weekly drug and alcohol testing. The program is nominally a twelve month program with three phases leading to graduation. Upon graduation, the judicial monitoring ceases, although services and support may still be provided.

This program is founded upon some basic guidelines:

1. **Accountability:** It is imperative that the participants

appear as scheduled before the Court. Their attendance at all meetings scheduled through their treatment provider is a must. It is axiomatic that this regular attendance is a critical component to their successful completion of the program.

2. **Honesty:** The Court and the treatment team expect nothing less than a participant being forthright in all dealings with them. The team and Court may understand a stumble during the program and will assist that person to get back on track. The Court and the team will not accept a person trying to deceive them in an attempt to avoid possible sanctions. Such dishonesty is a statement that one has yet to accept their own.

3. **Desire to be a sober functioning parent:** This

attribute is fundamental to success in the program. It is a demonstration that one truly desires to make a life change and succeed in being a role model for one's children. The FTC team can assist, but it is each individual's motivation that is critical to their success.

While not all participants are successful, this program offers them a better chance for success through structure, services and a support network provided by the Court, the team, DSS and service providers. For those who are successful, their suspended judgment and admission is dismissed. The future offers a chance at having a successful parent/child relationship. For those who are unsuccessful in the program, they continue under the terms of their original dispositional order entered at the time of their admission.

## Cohen Family Trust Continued from page 4

professional and civic activities. She was an accomplished and well-respected attorney who had been an associate with the Albany law firm of O'Connor, O'Connor, Bresee and First, P.C. at the time of her death. She was a communicant of St. Pius X Church in Loudonville where her children attend school.

She was very active in the lives of her children and would rarely be seen without at least one of them in tow. She was liked and adored by many who respected her unique gifts as mother, wife, daughter, sister and friend. She had a special talent for making others feel happy.

You are invited to join Kerriann's family and friends to celebrate her life on Mon-

day, September 10, 2007 at the golf outing. Your participation will help support an educational trust fund established for her children.

The outing will include several raffles and prizes. If you would like to donate a gift for the raffle, please contact one of the committee members listed below.

We are also seeking tee and flag sponsors to underwrite the cost of the event. If you are interested in being a sponsor, please contact a committee member or simply fill out one of the Sponsorship Forms at the end of this edition of *Law Notes*.

If you would like to contribute directly to the trust fund, checks should be made payable to the *Cohen Family Educa-*

*tional Trust*. All proceeds will go directly toward making a difference in the children's future. Thank you in advance for your support.

With warm regards,

*Andy Cohen (857-6110) and Jim Davis (858-3132) and The Friends of the Kerriann Coleman-Cohen Memorial Golf Tournament.*



## YOUNG LAWYERS COMMITTEE

**Second Annual YLC BBQ: A Big Success**

**June 21, 2007**



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\*please contact the editorial staff to submit an item of interest for publication.

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### Welcome New SCBA Members

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Joseph Dowling  
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The 2007-2008 SCBA Officers are sworn in by Hon. Stephen Ferradino, JSC. From left to right: James Cox, Vice-President; Marne Onderdonk, Secretary; John (Jake) Hogan, III, Treasurer; and Karl Sleight, President.

**Farewell Message from William F. Reynolds, Esq.  
2006-2007 SCBA President**

Dear Members,

June 2007

Everyone told me there would be such a sense of relief when my term as President ended, and throughout the year I was continually comforted at Bar dinners by colleagues empathizing with me over the burden of office. But I have to tell you, it was a great experience and one I am thankful for. My thankfulness relates mostly to the strong spirit of cooperation, sharing of vision and willingness to take responsibility for a task that I discovered among our members. I can't remember a time when anyone said "no", and I certainly asked enough times. This spirit is proof and a testimony to the strength of our Association, and all of us can take both pride and comfort in knowing that the Saratoga County Bar has a solid foundation on which to build its future.

It is a temptation to name the names of those who did so much for me and for the Bar this past year, but the odds are that a name would be missed, and I would regret that very much. Rather, I take special note of the Young Lawyers' Committee, the Mock Trial Committee, the Law Day Committee, all those who worked on implementing the Lawyers' Assistance Plan, the dedicated few who put together the Lawyer Referral Plan, and of course, our members whose vision and creativity produced this new Law Notes. Did I miss anything here? If so, I ask forgiveness. Making this list reminds me of the task I had not to miss any of the judges at Bar dinner welcomes, and it seems I always missed someone.

So in closing and farewell, thanks for the opportunity and for the memories.

Bill Reynolds

**CORPORATE SPONSOR AGREEMENT**

***Kerriann Cohen Memorial Golf Outing***

**FAIRWAYS OF HALFMOON GOLF COURSE, HALFMOON, NY**

**Monday September 10, 2007**

Company or Organization Name:

Address:

State, Zip Code

Phone Number:

I hereby agree to pay \$ 250.00 for a sponsorship of a laminated sign of approximately 18: x 24". This sign will be placed on either a Tee Box or a Green.

Below please PRINT or type clearly the information that you would like to appear as your advertisement.

Please make your \$ 250.00 donation payable to the **Cohen Family Educational Fund** and mail to by **2007**.

On behalf of the *Kerriann Cohen Memorial Golf Outing Committee* we thank you for your support.

Sponsor Signature: \_\_\_\_\_

Date: \_\_\_\_\_

**SPONSOR AGREEMENT**

***Kerriann Cohen Memorial Golf Outing***

**FAIRWAYS OF HALFMOON GOLF COURSE, HALFMOON, NY**

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State, Zip Code

Phone Number:

I hereby agree to pay \$ 250.00 for a sponsorship of a laminated sign of approximately 18: x 24". This sign will be placed on either a Tee Box or a Green.

Below please PRINT or type clearly the information that you would like to appear as your advertisement.

Please make your \$ 100.00 donation payable to the **Cohen Family Educational Fund** and mail to by **2007**.

On behalf of the *Kerriann Cohen Memorial Golf Outing Committee* we thank you for your support.

Sponsor Signature: \_\_\_\_\_

Date: \_\_\_\_\_