

**THE SARATOGA COUNTY
BAR ASSOCIATION**

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Saratoga County Bar Association

Law Notes

Serving the Interests of Justice

Tort & Civil Practice: Selected Cases from the Third Department

By Tim Higgins

**County clerk's date-stamp
not conclusive in filing
dispute**

**Resch v. Briggs (Kavanagh,
J., 5/8/08)**

Plaintiff was hurt in a car accident on April 18, 2003. His summons and complaint was stamped filed and received in the office of the Sullivan County Clerk on April 19, 2006. Defendant, naturally, moved to dismiss the claim as untimely, and plaintiff cross-moved for an order directing the County Clerk to acknowledge filing and receipt on or before April 18, 2003. What happened? Plaintiff's counsel mailed the summons and complaint via UPS express to the *Supreme Court Clerk's* office instead of the County Clerk's office. Testimony during a hearing on the motions revealed that the papers were received by the Supreme Court clerk on April 12th, and re-directed to the County Clerk no later than April 14th (although the "official" date-stamping didn't take place until April 19th). Supreme Court (LaBuda, J., Sullivan Co.) concluded the suit was commenced before the statute of limitations expired, and the Third Department affirmed, noting that while a date-stamp from a County Clerk does establish a presumption that filing occurred on that date,

"extraordinary circumstances may exist establishing that the actual filing" occurred on a date earlier than reflected on the stamp.

Dangerous tanning bed?

**Oliver v. Tanning Bed, Inc.
(Mercure, J.P., 4/11/08)**

Plaintiff claimed 18 minutes of tanning at defendant's salon caused her 2nd-degree burns over 65% of her body. The salon acknowledged that the bulbs it used for tanning were stronger than bulbs used elsewhere, but that customers were warned in advance of "the definite risk of serious sunburn". Supreme Court (Relihan, J., Broome Co.) denied defendant's motion for summary judgment and the Third Department affirmed, noting that defendant's proof did not include consent forms allegedly signed by plaintiff and concluding that it could not be said as a matter of law that the risk of sunburn posed by the stronger bulbs was so open and obvious that there was no duty to warn.

**"Continuous treatment"
doctrine (CPLR §214-a)**

**Boyle v. Fox (Peters, J.P.,
5/15/08)**

A medical malpractice action must be sued within 2½ years

of the negligent act/omission or last treatment "where there is continuous treatment for the same illness, injury or condition" giving rise to the negligence. Here the Third Department repeats the lesson that the continuous treatment doctrine cannot save an untimely case from dismissal by Supreme Court (Coccoma, J., Delaware Co.) when the visits to the doctor are merely part of the "general physician/patient relationship, routine examinations" or visits concerning medical matters not related to the alleged negligence. To invoke the doctrine, a plaintiff must show proof of treatment because "the continuing nature of a diagnosis is insufficient".

**Jury awards for pain and
suffering reduced**

**Nolan v. Union College
(Malone, J., 5/15/08)**

Plaintiff was hurt when she stepped into an uncovered manhole while walking across the defendant's campus (where she was a student). Defendant conceded liability and the case went to trial on causation and damages, the result of which was a \$15.8 million dollar verdict, consisting of \$7.8M for pain and suffering

Tort and Civil Practice Update, Continued from front page

(\$300,000 in the past) and future medical expenses of \$8M. Supreme Court (Lynch, J., Rensselaer Co.) cut the future pain and suffering award from \$7.5M to \$1.5M, and reduced the medical expenses recovery to \$3.36M. On appeal, the Third Department did not disturb the future medicals, but after the necessary “examination of comparable cases” ordered a new trial on future pain and suffering damages unless plaintiff agreed to a reduction from \$1.5M to \$450,000.

Kithcart v. Mason (Kane, J., 5/8/08)

In this auto accident case, the jury awarded the plaintiff \$60,000 for her past pain and suffering and \$400,000 for future pain and suffering. Supreme Court (Kavanagh, J., Ulster Co.) denied defendant’s motion to set aside the verdict pursuant to CPLR 4404(a). The Third Department determined that the award for future pain and suffering should be cut to \$300K, finding that amount “more in line with reasonable compensation” for a 63-year old plaintiff with a 20-year life expectancy who returned to work full-time within three days after the accident and given that testimony regarding her need for surgery or cortisone shots in the future was speculative.

Expert proof and the Frye hearing

Page v. Marusich (Malone, J., 5/8/08)

“A Frye hearing is appropriate to ascertain the reliability of novel scientific evidence” and Supreme Court (LeBous, J., Broome Co.) did not abuse its discretion in denying the plaintiff’s motions for such a hearing regarding the defendant’s planned expert testimony. So ruled the Third De-

partment in affirming the defense verdict below in this dental malpractice case. While the opinions rendered by the experts on each side differed significantly, there was no indication of disagreement “over a particular scientific methodology or technique in reaching the contradictory” opinions, and therefore a Frye hearing would not have been proper.

Suits versus school districts

Hilts v. Gloversville Board of Education (Malone, J., 4/24/08)

The plaintiff’s daughter, at the time a 10-year old in elementary school, slipped and fell on a playground. Her mother, who worked at the school, went to get her car to take the child to the emergency department and left the girl with the school nurse. When the mother arrived in her car, the nurse allegedly released the child and told her she could walk, after which the girl fell again and injured her right ankle. The Third Department affirmed Supreme Court’s (Sise, J., Fulton Co.) decision denying summary judgment, noting that even if the nurse did not owe a common-law duty to “hold up” the child, a person who voluntarily undertakes an act for which she has no legal obligation must thereafter act with reasonable care or be subject to liability for negligence.

Reid v. Schalmont School District (Cardona, P.J., 4/17/08)

Although a disagreement between expert witnesses is frequently enough to create a question of fact denying summary judgment, the general rule did not apply here when one of the expert affidavits lacked a factual or scientific basis for its

conclusions. Supreme Court (Catena, J., Schenectady Co.) granted summary judgment and the Third Department affirmed, dismissing the claims of the plaintiff who fell on an interior staircase after he delivered propane to the school’s outdoor tank. The plaintiff went into the school to have the delivery invoice signed, and asked for directions to a bathroom, which took him up and down a small set of wooden stairs, on which slipped and fell. Plaintiff’s expert claimed application of a finish to the steps made them “significantly more dangerous, especially when wet” but stopped short of claiming the finish was not properly applied or that it didn’t meet the relevant slip-resistant standard.

MacCormack v. Hudson City School District (Malone, J., 5/1/08)

The Third Department here reversed Supreme Court (Hummel, J., Columbia Co.) and dismissed the plaintiff’s case which arose out of a verbal altercation between two high school freshmen which culminated in one student striking the other in the face, causing the loss of two teeth. Schools are under a duty to supervise students but when injuries result from intentional acts of fellow students, the plaintiff must show the school had sufficient notice or knowledge that the dangerous conduct could reasonably have been anticipated and that negligent supervision was the proximate cause of the injuries. The punching student did have a disciplinary record but the Third Department found it insufficient to put the school district on notice of the situation that it characterized as “so sudden and spontaneous that no amount of supervision would have prevented it”.

3rd-party claim settled without worker’s comp carrier’s OK

Cosgrove v. County of Ulster (Peters, J.P., 5/22/08)

§29(5) of the Worker’s Compensation Law allows an injured employee to settle a third-party action arising out of the on-the-job injury so long as the worker’s comp insurer gives written consent prior to settlement. When such prior consent is not obtained, statute also allows for judicial approval of the settlement within three months after the case is settled. Here, Supreme Court (Ceresia, J., Ulster Co.) gave such approval some three years after the third-party action was resolved which prompted the carrier to appeal. But the Third Department affirmed, finding that the delay in plaintiff’s application for approval by the court was caused by the carrier’s own delay, that the delay did not prejudice the carrier and that the settlement (\$15,000) was reasonable given the viable defense to the third-party claim.

Leave to amend (CPLR §3025(b)) not always “freely given”

Pagan v. Quinn (Carpinello, J., 5/22/08)

Plaintiff commenced this medical malpractice action in June 2004, complaining that the defendant negligently removed a rod previously placed in his leg to stabilize a

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Availability is immediate, hours are flexible. Please reply to GrometLaw@aol.com or telephone 518-424-1779.

Tort and Civil Practice Update, Cont. from page 2

defendant served an amended answer to amplify a previously-plead affirmative defense, which prompted the plaintiff to serve an amended complaint that added new causes of action. Defendant rejected the amended complaint and plaintiff's motion to amend by leave of Supreme Court (Doyle, J., Albany Co.) was denied. While statute (CPLR §3025(b)) says such relief should be freely given, the Third Department agreed that it was not appropriate here, where plaintiff didn't supply a satisfactory explanation for delaying the motion to amend the complaint for two years after the case was started and two months before the scheduled filing of the note of issue.

Timothy Higgins, Esq.

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(518) 884-9466

e-mail: marybethhynes@yahoo.com

**General practice including appellate advocacy in both
Federal and State Courts**

Announcements . . .

Saratoga County District Attorney, James A. Murphy III, has announced the retirement of

William F. Reynolds, Esq.

from the Office of the District Attorney effective June 30, 2008.

There will be a retirement luncheon for Bill on September 12, 2008 at noon at The Factory in Ballston Spa. More details to follow.

Therefore, the new ADA coverage for the local courts which Bill covered from July 1 -December 31, 2008 will be as follows:

Village of Ballston Spa	Patrick J. Campion
Town of Milton (Calderon)	Lyn A. Murphy
(Thomas)	James R. Davis
Town of Saratoga	Robert J. Chauvin (July only)
	Jennifer Jensen (August through December)

Delain Law Office, PLLC

As the partnership between Nancy Baum Delain, Esq. and Glenn B. Liebert, Esq. is ending, Delain & Liebert, PLLC is now once again known as Delain Law Office, PLLC. The firm, owned and operated by Nancy Baum Delain, Esq., concentrates in business and intellectual property law, personal bankruptcy under Chapters 7 and 13, and IRS negotiations and tax abatement.

Mr. Liebert has left the firm and taken a position at the Warren County Public Defender's Office; we wish him all the best. Delain Law Office, PLLC has moved to 107 North College Street, Schenectady, NY 12305. Our telephone and fax numbers and internet contact information remain unchanged.

BAR ASSOCIATION GOLF OUTING

The annual **Saratoga County Bar Association Golf Outing** will be held at the Ballston Spa Country Club on Friday, July 11, 2008, with tee times starting at 1:00.

The format will be play your own ball, with prizes for low gross (first and second), low net (first and second), closest to the pin and longest drive. Wagers within and between foursomes are allowed, encouraged and common! The cost of \$40.00 covers green fee, cart and prizes. Lunch will be available at the Club's restaurant as well as food and libations following on a cash basis.

Reservations will be on a first come, first served basis. It is preferable to have foursomes sign up, but the Tournament Director will try to accommodate individuals. Call (884-4770) or e-mail (saracaty@govt.co.saratoga.ny.us) Mark Rider for reservations or information. The Country Club is located about a mile west of Ballston Spa on NYS Route 67, on the right.

Welcome New SCBA Members

Jesse George
Alexandra Maloney
Kevin Wheatley
Katherine Doyle
John Wright
Nancy Stroud

Jill Alicia Gruben, Esq. has opened

Gruben Law Firm, PLLC

The firm will be focusing on the practice areas of

- Labor and employment
- Wills, trusts and estates
- Estate litigation,
- Intellectual property,
- Business counseling
- Civil litigation

Ms. Gruben can be reached at
P.O. Box 2576, Malta, NY
12020,
518-791-2850 (p)
518-309-4132 (f)
jgruben@grublaw.com.

Change of Address

The Law Firm of *Poklemba & Hobbs, LLC* will be moving their Saratoga Office, effective July 1, 2008 to Visionary Park 2715 State Route 9, Suite 102 Malta, New York 12020

VOLUNTEERS NEEDED

The Legal Aid Society of Northeastern New York is hosting a Domestic Violence Clinic on **July 9th from 1-3pm** at the DVRC Offices located at 480 Broadway in Saratoga Springs.

Please contact Tiffany if you can volunteer some time.
(518) 689-6334