

**THE SARATOGA COUNTY
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Saratoga County Bar Association *Law Notes*

Serving the Interests of Justice

Estate Planning Law Firm Expands



Bonnie McGuire Jones and **Edward V. Wilcenski** welcome **TARA ANNE PLEAT** as a partner and announce the expansion of their law firm to Jones Wilcenski & Pleat PLLC.

Tara Anne Pleat has spent 10 years working in the field of Trust, Estate and Tax Planning & Administration and currently focuses her practice on planning for residents of New York

and Florida, as well as for closely held business owners. For the past four years Tara has also been active in the firm's extensive Special Needs Estate Planning practice that is headed by Attorney Ed Wilcenski.

Attorney Pleat currently serves on the boards of the Estate Planning Council of Eastern New York and of the Children's Museum at Saratoga. She is a graduate of the Leadership Saratoga program sponsored by the Saratoga County Chamber of Commerce.

With the expansion, the 14 person, Jones Wilcenski & Pleat law firm is in a stronger position to offer its legal ser-

vices to clients in all stages of life, including the active business owner, the retiree, the octogenarians, and

INDIVIDUALS WITH SPECIAL NEEDS AND THEIR FAMILIES.

The attorneys of Jones Wilcenski & Pleat PLLC serve families in Saratoga County, the Capital Region and the Hudson River Valley, **AND THE FIRM HAS BEEN "AV"** rated by Martindale-Hubbell, the highest rating for expertise and ethics given by the independent rating service of the legal profession.

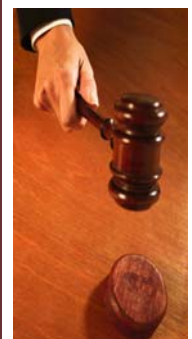
New Firm of *Peterson & Thomas, P.C.*

Thomas W. Peterson and Alison C. Thomas are pleased to announce the formation of Peterson & Thomas, P.C.

Both Mr. Peterson and Ms. Thomas were formerly partners in the firm of Brown, Peterson, Craig & Thomas.

The firm is a general practice law firm which concentrates in Estates, Litigation (State and Federal), Real Estate and Municipal Law, and can be reached at:

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TORTS AND CIVIL PRACTICE: Selected Cases from the Appellate Division, 3rd Department By: Timothy Higgins, Esq.

Slip and fall

Avina v. Verburg (Mercure, J.P., 1/31/08)

The Third Department affirmed Supreme Court's (McDonough, J., Albany Co.) summary judgment dismissal of the plaintiff's case. The fall happened on a concrete sidewalk located between exterior stairs and the entrance to defendants' residence, as the plaintiff was in the process of delivering a 12-pound fruit basket. Plaintiff alleged and hoped to rely upon a building code violation, but the Courts found that the lack of a handrail on the stairs was not a proximate cause of the fall, that the fall occurred on the defendants' walkway and not the stairs, and that freezing rain falling at the time of the accident created the icy condition that led to the slip and fall.

Davis v. Sabella (Kavanagh, J., 2/21/08)

Plaintiff alleged her injuries resulted from a fall on a staircase at defendant's restaurant, but the case was dismissed by Supreme Court (Dawson, J., Clinton Co.) as untimely. Plaintiff admitted that her suit was filed three years and two days after she fell, but claimed the defendant should be estopped from asserting a statute of limitations defense because she relied on an inaccurate "date of accident" in a letter to her lawyer from the defendant's insurance carrier. The Third Department affirmed Supreme Court's decision, finding the plaintiff failed to show affirmative wrongdoing by the defendant that "deliberately induced" the fatal delay in filing suit.

Mosquera v. Orin (Mercure, J.P., 2/21/08)

This plaintiff slipped and fell while on a walkway leading into the defendant's house which she had been hired to clean. Although there was a snowstorm in progress at the time of the fall, plaintiff attributed her fall to a patch of ice that formed before the storm began. Supreme Court (Pulver, J., Greene Co.) granted defendant's motion for summary judgment and the Third Department affirmed, concluding that defendant offered undisputed proof that a storm was happening at the time of the fall and that plaintiff's theory of the accident was both speculative and not supported by her evidence.

Labor Law §§ 200, 240, 241(6)

Norman v. McGuire (Rose, J., 2/21/08)

A claim for damages alleging violation of Labor Law §200 requires proof that a defendant contractor exercised some supervisory control over the performance of the work. This proof was lacking in the plaintiff's case, which was dismissed by Supreme Court (Mulvey, J., Tompkins Co.) and affirmed by the Third Department. Plaintiff worked for a prime contractor on the construction project but evidence that his supervisor had "conversations about safety" with an employee of the defendant contractor did not constitute proof that the defendant had the authority to control the work that resulted in the injury.

Weinberg v. Alpine Improvements (Spain, J., 2/21/08)

Plaintiff was part of a work crew doing a night time renovation of a supermarket that was open for business during the day. He was hurt in a fall from a stepladder that he believed happened when he slipped due to a greasy substance on his work boots. The Third Department affirmed Supreme Court's (Kramer, J., Schenectady Co.) dismissal of the plaintiff's claims under Sections 240 and 241(6), but reinstated the claim (against one defendant) premised on a failure to comply with the common-law negligence standard codified in §200. Plaintiff acknowledged that the ladder did not fall, was adequate for the job and was properly placed, causing the demise of his §240 cause of action. The §241(6) claim did not survive because the plaintiff's supporting Rule 23 provisions were either non-specific or not applicable to the facts of the case. The §200 claim of the plaintiff against the property owner survived due to that defendant's failure to show, as a matter of law, that it did not create the alleged dangerous condition and did not have actual or constructive notice that it existed prior to the injury.

Medical malpractice dismissal

Cellupica v. Bruce (Kavanagh, J., 2/28/08)

Plaintiffs' medical malpractice claims alleged negligent

performance of a surgery and substandard follow-up care during office visits, the last of which was some five months after the operation. The lawsuit was filed three days before the three-year anniversary of the surgery, and defendants moved for summary judgment contending expiration of the 2½-year statute of limitations. Supreme Court (Kramer, J., Schenectady Co.) permitted the plaintiffs to amend their complaint to allege fraudulent concealment of medical malpractice and thereafter denied the motion for summary judgment. The Third Department reversed and dismissed the complaint as untimely, further noting the lack of any "clear and convincing evidence" from the plaintiffs that late filing of the complaint resulted from fraud, deception or

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submit an item of interest



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Going Away? Leave a Note.

By JulieAnn Calareso, Esq.

As a parent of two young children, I take every opportunity I can to sneak away for a little while – a couple of hours to the movies, an evening at a restaurant that doesn't offer crayons and a tablecloth to color on, and yes, even occasionally, a trip that puts me far enough away from my kids that they could finish an entire episode of Blues Clues before I made it back to them. While my cell phone is always on, the babysitter has been fully briefed on everything down to the most minute detail, and the fridge is plastered with charts and emergency information, I always leave something else – a note authorizing someone else to make health care decisions on my children's behalf in the event I am unable to.

This parental designation is something I remember my own parents doing when I was a child – a note that I brought to my friends' parents at sleepovers, or the note that my grandparents pocketed anytime my siblings and I were left loose on them. After becoming a parent myself, I adopted that practice, and now encourage all parents to know about and use this important provision of the law when they leave children with others.

A parental designation has its legal basis in the General Obligations Law of New York State. It is an informal way to give authority to another person to make decisions on a minor child's behalf in the absence of a parent or legal guardian. The parent is designating someone else to be "a person in parental relation" to that minor child, and such designation may be presented to any school, health plan, or health care provider.

The requirements for such parental designation are: (1.) it

must be in writing; (2.) it must include the name of the parent; (3.) it must include the name of the child; (4.) it must include the name of the designee (the person whom the parent is naming to have this authority); (5.) it must have the parent's signature; and (6.) it must be dated. It may also state a period of time during which the designation is valid, provided that it does not exceed thirty (30) days. If a parent wishes to make a parental designation that exceeds thirty (30) days, there are other requirements that must be met. These requirements are a bit more stringent, including the requirement that the document be notarized. In such a case, if the requirements are met, then the designation may remain in effect for up to six (6) months.

A parental designation remains in effect until the thirty (30) day or six (6) month period expires (as applicable), or until it is revoked. It is possible to state in the designation itself a date on which the power will be revoked. This may be practical if a parent knows the precise timing of a trip or event. However, caution may dictate building in a small cushion in case circumstances and travel prevent the parent and child from reuniting as scheduled. If the parent who signed the designation passes away, the parental designation is revoked.

If the parent wishes, the designation may contain authorization or prohibition against certain treatments or activities. It is important to remember that any decision of a designee can be superseded by the parent.



JulieAnn Calareso, Esq., a full-time working mother of two young children, is an attorney with the law firm of Burke & Casserly, P.C., in Albany, New York 518-452-1961 (www.burkecasserly.com), who focuses her practice in Estate Planning and Elder Law.

Revocation of the designation occurs upon the expiration of the time period, upon the designee receiving written or oral notice of revocation, or upon the parent executing a new parental designation. It is also possible for a parent to revoke a parental designation by notifying the school, health plan or health care provider to whom the parental designation was presented.

The effect of the designation is that the designee then has the authority to make decisions and give consent for medical, dental, health and hospital services, including immunizations. It does not impose upon the designee a duty of support. It does not result in a change of residence for the child, as the child will continue to be deemed to be a resident of the permanent address of his or her parent and will therefore remain in his or her original school district. Someone who relies upon the direction of a designee and who has, in good faith, acted on that representation, shall not be found negligent for any action or omission if acting in good faith and at the direction of the designee.

Absent such parental designation, a health care provider is entitled to provide emergency services to a child if, in

Criminal Law: Decisions of Interest

By: George P. Conway, Esq.

People v. Lewis [2008 NY Slip Op 100200]

The Appellate Division Third Department announced that it will no longer follow the line of cases holding that a defendant's challenge to the validity of a waiver of appeal is unpreserved for appellate review if the defense did not move to withdraw the plea or vacate the judgment of conviction.

People v. Williams [2008 NY Slip Op 100317]

In a unanimous decision, the Appellate Division Third Department affirmed an order of the Supreme Court denying a defendant's motion for resentencing pursuant to the Drug Law Reform Act of 2005 on the ground that the defendant had been found to have committed numerous serious disciplinary infractions while incarcerated. In so doing, the Court chose to follow the First Department's holding in People v. Paniagua (45 Ad3d at 107-108) and declined to follow the Second Department's holding in People v. Sanders (936 AD3d 944 [2007]).

People v. Stevens [2008 NY Slip Op 01319]

In a unanimous decision, the Appellate Division Second Department affirmed an order of the County Court designating the defendant a level three sex offender having found no merit in the defendant's argument that the assessment of points against him based upon the victim's physical helplessness constituted improper "double counting" because he was also assessed points based upon the victim's age.

People v. Dathan [2008 NY Slip Op 01369]

In a unanimous decision, the Appellate Division Second Department affirmed a Supreme Court decision denying a defendant's motion for resentencing under the Drug Law Reform Act on the ground that at the time of the motion the defendant was less than three years away from being eligible for release on parole. [See also: People v. Dela Torre 2008 NY Slip Op 01160]

People v. Sumpter [2008 NY Slip Op 01376]

In a unanimous decision, the Appellate Division Second Department reversed the County Court's decision denying the defendant's motion to suppress lineup identification testimony and ordered a new trial on the ground that defendant's right to counsel was violated because the police held the lineup without first notifying defense counsel and affording her a reasonable opportunity to participate.

People v. Haggerty [2008 NY Slip Op 01166]

In a unanimous decision, the Appellate Division Second Department affirmed a denial of a motion for a mistrial based on admission of a surveillance video that was slightly different from the version given to the defense prior to trial on the ground the defendant failed to show he was prejudiced by the delay in the production of the correct video.

People v. Tabor [2008 NY Slip Op 195] [KA 06-02794]

In a unanimous decision, the Appellate Division Second Department reversed a second degree assault conviction and

granted a new trial holding that the County Court erred in summarily denying the defendant's request to proceed pro se. The Appellate Court found the request to proceed was: unequivocal and timely asserted; knowing and intelligent; and defendant had not engaged in conduct which would prevent the fair and orderly exposition of the issues.

People v. Revette [2008 NY Slip Op 100901]

In a unanimous decision, the Appellate Division Third Department reversed an arson conviction and dismissed the indictment with leave to the People to represent on the grounds that one of the grand jurors was the wife of one of the sheriffs who investigated the alleged crime and testified before the grand jury. In rendering its decision, the Appellate Court relied heavily on the fact that the grand juror –despite having been asked– did not give an unequivocal statement of an ability to remain impartial. The court also relied on the fact that the significance of her vote could not be determined since the actual number of grand jurors voting to indict was not recorded.

People v. Haddock, Jr.

[2008 NY Slip Op 100699] In a unanimous decision, the Appellate Division Third Department reversed a verdict convicting the defendant of two counts of failure to register under the Sex Offender Registration Act. The Appellate Court ruled that the County Court erred in refusing the defendant's request

that the jury charge include an instruction that the People needed to prove that he knowingly failed to comply with the SORA's registration requirement. The Appellate Court did so even though the statute itself–Correction Law §168-t–does not expressly designate a mental state.

News Release

Attorney Thomas A.

Ulasewicz announced that the law firm of Ulasewicz, Melewski & Greenwood, LLP has undergone restructuring and is now known as The Ulasewicz Law Firm, LLP. The firm's principal offices will remain located at 112 Spring Street, Saratoga Springs with its satellite office at 2453 Main Street, Lake Placid. Attorneys Patricia M. Ulasewicz and Bernard C. Melewski will continue to work principally out of the firm's Saratoga Springs Office.

The firm provides a general practice of law with special emphasis on environmental and land use matters, energy law, administrative law, real property law including Offering Plans and Homeowners Associations, municipal law, business/corporate law, Trusts & Estates, Will drafting, Elder Law and Government Relations.

"We are also very pleased to announce that our firm has established a formal affiliation with the law firm of Fitzgerald, Morris, Baker, Firth, P.C. out of Glens Falls," said Ulasewicz. "The Fitzgerald firm will provide us with legal assistance in various areas of the law and expand on what already formidable group of attorneys experienced in all fields of litigation, appellate work, mediation and arbitration," Ulasewicz added. "It is a very exciting time for our small group of hard-working people at the Ulasewicz Law Firm."

New website will be:
www.ulf-law.com

YLC: First Annual Ski Night

From Kimberly A. Crocetta, Esq.

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*Past President of the Bar

On Monday February 25, 2008, a group of energetic members of the bar met at West Mountain for a ski event sponsored by the Young Lawyer's Committee.

The night was perfectly clear and approximately fifteen eager skiers could not have asked for a better evening for a session of night skiing at the mountain. Karen D'Andrea and her husband, Faust, attended along with Kim Crocetta, Matt Coseo and others. The group met after skiing to remark about the good weather and to take a rest for the remainder of the evening; some of the group included: Murielle Redmond, Bill Reynolds, Marne Onderdonk, Kyle Kordich, Leah Everhart and Kara Wojdyla.

The next Young Lawyer's event will be participating in a volunteer project in April, more details to follow. For more information contact: co-chairs, *Karen D'Andrea* kesdandrea@aol.com or *Kim Crocetta* at kcrocetta@sktclaw.com



Ethics Update & Multi-Jurisdictional Practice and Watertown Admissions Ceremony

Friday, March 28, 2008, 10:00 am

You are cordially invited to attend a complimentary 1.5-hour CLE program sponsored by the Northern District of New York Federal Court Bar Association, to be followed by an admissions ceremony and luncheon with members of the Federal Judiciary.

Presenter: Professor Steven Wechsler, Syracuse University College of Law

Where/When: Friday, March 28, 2008 @ Black River Club, Watertown, N.Y.

10:00 a.m. - 11:30 a.m.	CLE Program (no fee)
11:30 a.m. - 12:00 p.m.	Admission Ceremony
12:00 p.m.	Luncheon with Judiciary (no fee)

CLE Registration, lunch reservations and transportation from Syracuse to Watertown by Caz Limo (space limited) may be arranged by March 21, 2008 by e-mail to Donald Oliver, NDNY-FCBA President, at LMFielding@bklawyers.com. Please include your name, firm name, address and phone number. The NDNY-FCBA would like to recognize attendees who served in the military. If you served in the military, please include the branch and years of service.

*Co-sponsored by Hancock & Estabrook, LLP, CLE certified provider (credit available to all admitted attorneys).

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TORTS AND CIVIL PRACTICE, continued from page 2

misrepresentation by the defendant.

“Serious injury” verdict for plaintiff

Talcott v. Zurenda (Cardona, P.J., 2/28/08)

Liability was conceded in this motor vehicle action, and after a non-jury trial, Supreme

Court (Relihan, J., Broome Co.) found for the plaintiff, concluding that he sustained a “serious injury” under Insurance Law §5102(d) in the 90/180 days category. The Third Department affirmed, finding sufficient “objective medical evidence of an injury or impairment of a nonpermanent nature which would have caused the

alleged limitations on plaintiff’s daily activities” and that such activities were curtailed “to a great extent rather than some slight curtailment”.

Leave a Note, continued from page 3

the physician’s judgment, an emergency exists and the child is in immediate need of medical attention and an attempt to secure consent would result in the delay of treatment which would increase the risk to the child’s life or health. It may only take a few moments to do, but giving a parental designa-

tion to any person who will be caring for your children for any extended period of time when you are not immediately available may enable your child to have important health care decisions made on his or her behalf in a time of crisis. Take the extra two minutes as you write the

notes on the fridge and leave all your contact numbers to leave a parental designation. You’ll enjoy your time away more knowing that you did.

Welcome New SCBA Members

Valerie Vanderwal

Benjamin M. Mastaitis

James DiPasquale



Announcements . . .

THOMAS E. KELLY and PATRICIA LEONARD are pleased to announce the formation and opening of the firm of KELLY & LEONARD, LLP.

Mr. Kelly and Ms. Leonard are former Bronx County Assistant District Attorneys. Mr. Kelly was a partner and Ms. Leonard was of counsel at the firm of Horigan, Lombardo and Kelly, PC.

The firm will specialize in the areas of personal injury, criminal defense and residential real estate.

The firm can be reached at:

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ELDER Network NY

Working to create an “aging prepared community”, the Center for Excellence in Aging Services at the University of Albany in cooperation with area agencies on aging has created www.ElderNetworkNY.org. The web tool is part of an initiative to expand the availability of information and assistance in the Capital Region. The site is designed to offer “choices in services for senior adults and persons with disabilities in Albany, Rensselaer, Saratoga and Schenectady Counties” by providing an online resource library, a searchable database of local programs, a calendar of community events and an open forum. It allows users to educate themselves about issues that are important to them and facilitates their connection to assistance when they need it.

ElderNetworkNY.org is approaching the second anniversary of its launch and is proud to be hosting over 10,000 user

“sessions” each month. Bar Association members may find the SERVICES search capability particularly useful to identify community supports by topic or location. Area human service providers have been enlisted to help keep information timely and accurate. While staffing does not allow listings of individual professionals at this time, the site uses referral tools to help users connect with attorneys, doctors and others.

ElderNetworkNY.org welcomes your suggestions for LEARN ABOUT resources on the array of legal issues of interest to our users.

If your office would like more information or a demonstration of ElderNetworkNY.org, contact Pat Maxon at (518) 591-8704.