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RCBA NewsBrief

Volume 4

April 2010

COMMERCIAL LITIGATION ISSUES OF INTEREST

*Submitted by Paul Savad, Esq., Chair, Commercial and Corporate Law Committee;
Joseph Churgin, Esq., and Susan Cooper, Esq., of SAVAD CHURGIN, Attorneys at Law*

Your client owns a home built on a small hill. Until recently, your client's back yard abutted a vacant, heavily wooded lot. The new owner of the vacant lot recently changed the topography on his lot by leveling it out, removing trees and creating a steep slope from your client's property down to the newly excavated lot. When the town issued a violation, the owner of the vacant lot constructed a retaining wall to stabilize the slope. Nonetheless, the foundation of your client's home developed cracks. Your client sued the neighbor in strict liability for monetary damages for the wrongful removal of the natural lateral and subjacent support, evidenced by the cracks to the foundation of your client's home. Your expert's report supports the claim that the cracks were caused by the loss of the natural support of the soil. Will your motion for summary judgment based on strict liability be successful?

The answer is no.

In *Canarick v. Cicarelli*, 3/10/10 N.Y.L.J. 27 (col. 1) (Sup. Ct. Nassau Co.), the Canaricks sued their neighbors, the Cicarellis, along with several contractors and an architect, for damage to their property resulting from excavation on the Cicarellis' property. Both parties moved for summary judgment.

In 2005, the Cicarellis purchased a vacant wooded lot in Woodbury, New York, to build their home. The lot abuts the Canaricks' property and home, which sits on a hill above the Cicarellis' lot.

After obtaining a building permit from the Town of Oyster Bay, the Cicarellis' contractors removed trees and leveled out their lot, resulting in what the building inspector described as "a pretty vertical sheer cliff of soil" at the common boundary of the two properties. The Cicarellis constructed a retaining wall to stabilize the slope after the town issued a stop work order.

The Canaricks' complaint pled causes of action for strict liability, recklessness and negligence against the Cicarellis, the contractors and the architect, and sought monetary damages for the loss of lateral and subjacent support caused by the excavation.

Turning first to the claim for strict liability, the court noted that under the common law, "the owner of land is entitled to have it supported and protected in its natural condition (unimproved) by adjoining land, and that the adjoining owner may not remove earth to such an extent as to withdraw the natural support of the neighbor's soil." However, the court explained that this obligation is limited to the land only, and not to buildings erected on it, citing *Dorrity v. Rapp*, 72 N.Y. 307 (1878). Thus, a claim of strict liability for damage to the Canaricks' land might be supported by the common law, but any claim of damage to the Canaricks' home requires proof of recklessness or negligence.

Moreover, the court noted, there is a presumption that a building on the affected property increases the lateral pressure and contributes to any injury, citing *White v. Nassau Trust, Co.* 168 N.Y. 149 (1901). In the absence of any proof that the weight of Canaricks' home did not contribute to the loss of support, there could be no strict liability for damage to the land.

There was no evidence that the Cicarellis' construction was reckless or negligent. To the contrary, they properly built the retaining wall to stabilize the property in accordance with the town's requirements. Thus, any damage to the Canaricks' home was not due to any negligence or recklessness.

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HON. THOMAS E.
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We welcome your articles.

****All articles submitted will be reviewed by the Executive Committee for approval****

All of the Canaricks' claims were dismissed, including a claim of damage for removal of the trees that served as a buffer between the two properties. Since the bases of the trees were wholly located on the Cicarellis' property, they had the right to remove them.

The lesson?

Advise clients who are purchasing properties next to or near vacant lands that they could face future unanticipated adverse consequences from the development of such lands by changes in topography as well as zoning

Writing Tip of the Month

by Susan Cooper, Esq.

Stay above the fray.

Choose a readable typeface.

Your carefully crafted words can miss the mark, if you use a typeface that is difficult to read.

If you don't believe me, check out the 7th Circuit's rules with a detailed explanation of why the judges don't like the two typefaces commonly used by lawyers – Courier and Times New Roman (<http://www.ca7.uscourts.gov/Rules/type.pdf>).

Courier is a monospaced typeface developed for typewriters. Every letter is the same width, which makes it difficult to read. Times New Roman is proportionally spaced with letters of varying widths. It is easier to read, but it was developed to squeeze more letters into narrow newspaper columns, which is hard on the eyes in full-page writings, like legal briefs.

Check out books and magazines. Unless they are self-published, they are not printed in monotype, nor in Times New Roman.

What are the best ones to use in briefs? The 7th Circuit suggests any of the proportionally spaced serif types, noting that the Supreme Court and the Solicitor General use Century. Other readable types for briefs are New Baskerville, Calisto and Bookman Old Style.

Why do we care what the 7th Circuit in Illinois says? Because the judges know how they respond to the different typefaces, and we write for judges.

Susan Cooper, Esq., has provided legal research and writing services to the Rockland Bar for over 25 years. She can be reached at SusanCooperEsq@gmail.com.

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Each month the Employment Committee of the Rockland County Bar Association will endeavor to bring matters of interest to the general bar in an article in the newsletter. This month's article is written by:
Scott D. Frendel, Esq. of Braunfotel & Frendel, LLC

DISCRIMINATION IN THE WORKERS' COMPENSATION SETTING

Workers' Compensation Law §120 prohibits an employer from discharging an employee because such employee has claimed or is attempting to claim workers' compensation benefits. (See, *Matter of Lawrence v. Consolidated Edison Co.*, 240 A.D.2d 871 (3d Dep't 1977); *Matter of Buzea v. Alphonse Hotel Corp.*, 289 A.D.2d 749; *Matter of McBride v. Mutual Life Ins. Co. of N.Y.* 263 A.D. 2d 859). Section 20 of the Workers' Compensation Law provides:

It shall be unlawful for an employer or his or her duly authorized agent to discharge or in any other manner discriminate against an employee as to his or her employment because such employee has claimed or attempted to claim compensation from such employer, or because he or she has testified or is about to testify in a proceeding under this chapter and no other valid reason is shown to exist for such action by the employer.

An employee who claims that his employment was terminated in retaliation for claiming Workers' Compensation benefits bears the burden of demonstrating that the alleged discharge was in retaliation for filing a claim. (See, *Lawrik v. Superior Confections*, 300 A.D.2d 777 (3d Dep't 2002); *Donohue v. Scandinavian Airlines*, 134 A.D.2d 660 (3d Dep't 1987). Rather than creating a general cause of action the aggrieved party must pursue in civil court, such claims proceed within the administrative framework of the Workers' Compensation Board before an Administrative Law Judge. In fact, the Supreme Court lacks subject matter jurisdiction to hear such claims. (See, *McIntosh v. International Business Machines Corp.*, 112 A.D.2d 234, 491 N.Y.S.2d 449 (2d Dept. 1985). Any complaint alleging an unlawful discriminatory practice must be filed within two years of the commission of such practice.

As stated in *Matter of Lawrence v. Consolidated Edison Co.* (*supra*): "Courts have recognized that an employer seeking to dissuade its employee from pursuing a compensation claim rarely telegraphs its intent for all the world to see. Rather, as the employer has a vested interest in avoiding detection, it is expected that the employer will seek to accomplish its objective in a subtle fashion... thereby making it difficult for the employee to present direct evidence of retaliatory intent" (*Id.* at 873 [citations omitted]).

Nevertheless, the employee must demonstrate that the employer had retaliatory intent in discharging the employee. *Matter of Coscia v. Association for Advancement of Blind and Retarded*, 273 A.D.2d 719 (3d Dep't 2000). Additionally, the burden is on the employee to prove the existence of a causal nexus between the employee's activities in obtaining compensation and the employer's conduct against the employee. *Conklin v. City of Newburgh*, 205 A.D.2d 841 (3d Dep't 1984).

A violation of Section 120 cannot be found unless there is substantial evidence to support the claim. (See, *Axel v. Duffy-Mott CO.*, 62 A.D.2d 651, *rev'd on other grounds* 47 N.Y.2d 1 (1979)). As noted by the Appellate Division, "[d]iscrimination works both ways and, while discrimination against employees who file compensation claims should not be countenanced, the allegation of discrimination should not become a sword without just cause." *Brewster v. C.H. Liebfried Mfg.*, 65 A.D.2d 162 (3d Dep't 1978). With this being said, The Court of Appeals made it clear that that the Workers' Compensation law does not prohibit an employer from terminating an employee due to a work-related absence, so as long as the employer's personnel decisions regarding absences do not discriminate between work-related and unrelated absences. (See, *Duncan v. New York State Development Center*, 63 N.Y.2d 128 (1984)).

An employer found in violation of Section 120 is subject to monetary penalties assessed by the Board, in addition to liability for loss of wages and other benefits. The employer may further be directed to reinstate the employee, with the privileges the employee would have been entitled to but for the employer's retaliation. Any penalties paid for violation of Section 120 are payable directly by the employer, rather than the employer's insurance carrier. Agreements designed to indemnify an employer for compensatory awards and penalties associated with a claim under Section 120 are invalid. Since employers cannot be insured for claims under this provision, such claims are defended by attorneys retained directly by the employer who are familiar with all aspects of the Workers' Compensation Statute.

PERSONAL INJURY LITIGATION

On February 11, 2010 the Court of Appealsⁱ addressed the applicable special infancy toll in wrongful death actions. In a 4-3 opinion the Court held the toll is not applicable in personal injury claims.

The facts are poignant, but relatively straight forward. Infant Egypt Phillips was born in May 2001 and died on November 21, 2004. Abandoned by her biological father, she lived with her two sisters and the mother of the sisters. Prior to her death, medical treatment for physical injuries was rendered on two separate occasions at health care facilities. On each occasion suspected abuse was reported to various agencies in Greene County.

Convicted upon a plea of guilty with criminally negligent homicide was the mother. Convicted at trial with second-degree murder was the boyfriend of the mother.

As no relative qualified or sought to be administrator of the estate, an attorney was appointed administrator in October 2006. The administrator filed, and moved to file a late, notice of claimⁱⁱ for wrongful death and personal injury. Supreme Court granted the motion. As to the wrongful death cause of action, the notice of claim was filed within 90 days from the appointment of the administrator and within two years of the infant's death. As to the personal injury cause of action, the sole distributees were infants.ⁱⁱⁱ

The Appellate Division^{iv} found the wrongful death claim timely, but dismissed the personal injury claim. The tolling provision is personal to the decedent, not the distributees, therefore this claim was held to be untimely.^v

On appeal to the Court of Appeals, plaintiff argued that the toll applies where the sole distributee is an infant.^{vi} In *Hernandez* the Court of Appeals permitted the toll. In drawing a distinction between *Hernandez* and the case at bar, in an opinion authored by Justice Victoria Graffeo, the Court stated: [t]he distributee was the 'only person . . . whose interests are at stake in bringing this [wrongful death] action' (id.). In effect, we treated the distributee as the plaintiff under the tolling statute because, for all intents and purposes, the claim was his own." As contrasted from a personal injury claim that is designed to compensate the victim.

Writing for the dissent, Justice Carmen Beauchamp Ciparik would have extended the toll. Judge Ciparik disagreed that wrongful death and personal injury "are predicated on different theories" and "compensable by different measures of damages". The interest of the infant's distributees warrants a "tipping of the scales" in favor of the infant.^{vii}

The majority drew a distinction between the two causes of action viewing them as "materially separate and distinct" and "predicated on essentially different theories of loss which accrue to different parties". For the dissent, there was no distinction for the purpose of applying the infancy toll. Because the distributees, the infant's sisters, were unable to serve as personal representative of the estate due to their infancy.

The "practical consequences" of permitting the claim would be "minimal", because the beneficiaries on both claims are the same. It appears that the majority was concerned that permitting the claim would increase overall litigation. For the dissent, I submit, this was not a sound argument: "No purpose is thus served by denying this very narrow class of claimants – infants who are the sole distributees of a decedent – the benefits of these legislative determinations".

Was the majority correct in denying the cause of action or was the dissent correct in arguing that the law permits the toll? Was the concern that increased litigation would follow appropriate? You be the Judge.

Jeff Adams
jeff@jeffadamsesq.com

ⁱ *Heslin v. County of Greene, NY Slip Op 01010*

ⁱⁱ Condition precedent for a claim against a municipality

ⁱⁱⁱ CPLR 208, statutes may be extended for certain disabilities (infancy, incompetence, disability)

^{iv} 53 AD3d 996 [3d Dept 2008]

^v The notice of claim provision may be extended, but the statute of limitations cannot be extended

^{vi} *Hernandez v. New York Health & Hosps. Corp.*, 78 NY2d 687 [1991]

^{vii} In *Hernandez* we considered the difficult circumstance presented by the "confluence of the pertinent EPTL, SCPA and CPLR provisions" in a wrongful death case where the sole distributee of an estate was an infant (78 NY2d 693). We eschewed the "unnecessarily harsh result" reached by a "mechanical application of CPLR 208" and instead applied the infancy toll "until the earliest moment there is a personal representative or potential personal representative who can bring the action, whether by appointment of a guardian or majority of the distributee, whichever occurs first" (id.). We determined in *Hernandez* that what "ultimately" tipped the balance in favor of extending the CPLR 208 toll to permit the wrongful death claim to proceed was "the infancy of the sole distributee" (id. At 694). That same consideration should tip the scale here, where no person was entitled to commence the action other than the infant distributees until the appointment of (the) administrator.

EVENTS

LAW DAY 2010

FRIDAY, APRIL 30, 2010 @ 9:30 A.M.

JURY ASSEMBLY ROOM, ROCKLAND COUNTY COURTHOUSE

&

Criminal Law Committee Meeting:

5/11/10, 12:30 p.m. - 1:30 p.m. @ Rockland County Bar Association, 337 North Main Street, Ste 1, New City

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SITUATIONS AVAILABLE

Legal Secretary Local Firm seeking a full time experienced Legal Secretary specializing in Family and Matrimonial Law. Call Annette @ (845) 634-7007 or send resume to feinlawyer@msn.com

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SITUATIONS WANTED

Attorney Experienced Family Law Attorney, relocating from Maryland, licensed in NY and the UK, seeking entry level position in a small friendly law firm in Rockland. Call Leslie for resume (845) 634-2149 or 410-671-4212

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Internship Rutgers Law student with varied work experience including an internship with the Rockland District Attorney's Office is currently seeking summer internship with a Rockland County Law Firm. Call (845) 642-6814 or nhasting@pegasus.rutgers.edu

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CLE CALENDAR

Tuesday, April 27, 2010

CLE: Matrimonial Update

Time: 6:00 p.m.– 9:00 p.m. (Registration @ 5:30 p.m.)

Light Dinner

Level: Transitional/Non-Transitional

Cost: \$75.00 in advance; \$85 at the door; \$95 non-members
\$30 paralegals and students

Place: **Good Samaritan Hospital Auditorium, Suffern**

Credits: 3 (2.5 Professional Practice; .5 Ethics)

Credit is not given for partial attendance.

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INDIVIDUAL PART RULES

(Effective March 1, 2010)

I. COMMUNICATIONS WITH THE COURT

A. **Correspondences.** All correspondences to the Court and any Clerk shall be copied to all adversaries and must include the Index Number or Surrogates' File Number. Correspondences between attorneys and/or pro se litigants shall not be copied to the Court unless otherwise directed or where there is some specific judicial purpose to be served by transmitting copies to the Court. All correspondences and phone calls to the Clerk of the Court in a Supreme Court matter shall be addressed the Supreme Court Part Clerk and all correspondences and phone calls in a Surrogate's Court matter shall be addressed to the Chief Surrogate's Court Clerk.

B. **Faxes.** The fax number to be used for all Surrogates' matters is (845) 638-5632 and the fax number for all other matters (including Chambers) is (845) 638-5944. Neither Chambers nor the clerk will accept faxed copies of papers that must otherwise be filed in original form (such as objections, petitions, proofs of service, motions, opposition to motions, replies, proposed Orders, and documents to be "So Ordered"). All faxes must be faxed simultaneously to all other parties and the original document must be sent to the Court via regular mail. Counsel are not permitted, without prior approval, to send facsimile transmissions to Chambers that exceed five (5) pages in length.

C. **Ex Parte Communications.** Ex parte communications are prohibited except where an Order to Show Cause is submitted for signature, or, with the prior consent of all parties during settlement negotiations at the Courthouse.

D. **Court Papers.** All submissions bearing the caption of the matter must be signed by counsel [See *Rules of the Chief Administrator Section 130-1.1a*]. In any instance where a 'service list' is required on a legal document, the list must set forth not only the name, address and phone number of the submitting party or attorney but must also identify the party or person represented by that attorney and the person or party represented by the other persons named in that service list. All Surrogates' Court filings are to be made at the office of the Surrogate's Court clerk, and all Supreme Court filings are to be made at the Supreme Court Civil window.

II. COURT CONFERENCES AND CALENDAR CALLS

A. **General Rules.** Appearances at the calendar call are required by attorneys in all matters. All calendar calls are conducted before Judge Walsh in the Surrogates' Courtroom of the Rockland County Courthouse Monday through Friday, except Surrogate matters which shall be called on Tuesdays, at 9:30 a.m., unless otherwise directed. Settlement discussions may be conducted in Chambers. All counsel, and pro se litigants, must be fully familiar with the matter(s) on which they appear and must be authorized to enter into both substantive and procedural agreements on behalf of their clients.

B. **Preliminary Conferences.** Preliminary Conferences shall be scheduled and then conducted: (1) in civil matters after a Request For Judicial Intervention ("RJI") is filed in accordance with *Uniform Rule 202.12(a)*, or, (2) upon a specific directive by the Court, or, (3) once the Surrogate has obtained jurisdiction and objections to probate are filed. Preliminary Conferences will ordinarily result in an order addressing all aspects of anticipated pretrial discovery and scheduling a Compliance Conference or the dates by which a Note of Issue, Order Framing Issues or Statement of Issues is to be filed. Discovery may be expedited in third party actions, joint actions and consolidated actions to avoid undue delay.

C. **Compliance Conferences in Civil Matters.** The purpose of the Compliance Conference is for counsel, and pro se litigants, to report to the Court that pre-trial discovery has been completed, to enable the Court to direct a date on which a Note of Issue or Order Framing issues shall be filed, and to schedule dates for motions, a pre-trial conference, and trial. Parties are not permitted to file a Note of Issue in any action or proceeding unless permission to do so is granted by the Court at the Compliance Conference. Motions to strike Notes of Issue are discouraged as matters of outstanding discovery, if any, shall be raised, discussed and resolved at the Compliance Conference. The Court may issue a further discovery schedule at the Compliance Conference if circumstances or the interests of justice require. Any such additional discovery is likely to be based on an expedited schedule.

D. **Pre-trial Conferences.** The Court will conduct a Pre-trial Conference with all counsel and pro se litigants prior to the trial. Trial dates scheduled during a Pre-trial Conference should be viewed by parties and counsel as firm dates. Counsel attending Pre-trial Conferences shall be fully familiar with the facts and issues of the matter and shall be authorized to discuss and to enter into binding settlements, agreements and stipulations with respect to: (1) the factual, legal and evidentiary issues presented by the litigation, (2) settlement demands and offers, (3) unique or unusual issues likely to present themselves at trial, (4) witness scheduling, as well trial attorneys' vacation schedule, (5) likely duration of the trial and requests for adjournments of the trial date, and (6) applications for relief from part or all of the Trial Notebook requirements set forth in section VI(D)(A) hereof. The parties in any litigation, or in actions involving insurance carriers an authorized claims representative, must be available for the Pre-trial Conference either in person or by telephone for the purpose of direct contact with the attorneys engaged in settlement discussions. The Court will, on consent, conduct an additional Pre-trial Conference prior to the trial, but any such additional conference will not delay the trial as then scheduled. Settlement discussions will not delay the proceedings once the jury panel is seated for selection. Counsel shall notify all clients, witnesses and experts, in writing, of the trial date within three (3) business days of the pre-trial conference [See *Part VI(E)(b)* hereof].

E. **Non-Appearance at Scheduled Conferences.** The failure of any attorney or pro se litigant to appear for a scheduled conference may be treated as a default and may, when appropriate, result in the dismissal of a Complaint or Petition, the striking of an Answer or objections, or by other appropriate remedy authorized by *Uniform Rule 202.27*.

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F. **Substitution/withdrawal.** (i) In any matter in court all Substitutions of Counsel must be in writing, signed by the client, the incoming and the outgoing attorney, and, filed with the Court and served on all other parties in accordance with the CPLR before the outgoing attorney is relieved and discharged from the matter. (ii) In any matter in court where an attorney wants to be relieved and discharged, or, where a client wants to discharge an attorney, and where there is no incoming attorney, a motion for that relief must be made by Order to Show Cause on notice to the client and all other parties. In such event the moving attorney will remain the attorney of record until the court decides the motion and relieves and discharges the moving attorney.

III. DISCOVERY AND INSPECTION

A. **General Rules.** Every attorney shall exert a continuing effort to work co-operatively and courteously with all adverse attorneys towards the goal of completing all discovery expeditiously, efficiently and in the spirit of avoiding unnecessary motion practice and court intervention. Once a discovery schedule has been set by the court the dates and deadlines set forth therein shall be adhered to.

IV. MOTIONS AND ORDERS TO SHOW CAUSE

A. **Prerequisite.** Prior to the filing of any motion regarding discovery and disclosure the potential movant must notify the court in writing (one page maximum length), with a copy to all parties, setting forth the relief sought and the basis for the requested relief. The Court will then schedule a conference the purpose of which will be to hear and resolve the issues to be addressed in the motion without the necessity of a written application. Only where this conference does not resolve the dispute may the party seeking the relief proceed with the motion.

B. **General Rules.** All motions and oppositions to motions must be accompanied by a stamped, self-addressed envelope. The Court will entertain motions at 9:30 a.m. on any Friday, or in the case of a Surrogates' proceeding on any Tuesday, when the Court is in session. All Orders to Show Cause shall be submitted with original signatures affixed to the supporting affidavits and affirmations, shall include one proposed Order affixed to the supporting papers. The return date for an Order to Show Cause will be determined by the Court when the papers are submitted for consideration. There shall be no oral argument on any motion unless otherwise directed by the Court. The failure of a party to appear for oral argument when directed to will result in the waiver of that party's opportunity to offer oral argument in connection with the motion. All Orders to Show Cause shall include a provision that the method of service selected by the Court will be sufficient only if proof of such service is filed with the Court prior to the return date of the Order to Show Cause.

C. **Filing of Papers Applicable To All Motions.** The service list on all motions must include the identity of the party represented by each attorney identified in that service list. Motion papers must reflect the Index Number or Surrogates' File Number. The filing of a motion does not relieve any party from attending any previously scheduled conference or court appearance, regardless of the nature of the relief sought in the motion.

D. **Supporting Documents.** All documents required to decide the application must be included in the moving papers. It is not sufficient that those documents are on file with the Court Clerk. All motions to re-argue and renew shall include a copy of the prior decision and the entire prior motion, with its exhibits, if any.

E. **Reply Papers.** Reply papers shall not set forth new factual claims, legal arguments or requests for relief that were not within the scope of the papers that initiated the motion.

F. **Sur-Reply Papers.** Neither the *CPLR* nor the *SCPA* recognizes the existence of Sur-Reply papers, however denominated, and accordingly, the Court will not consider any post-Reply papers or materials absent a party receiving express permission from the Court in advance. Post-Reply materials received in violation of this rule will be returned, unread, to the Office of the Rockland County or Surrogate's Clerk for filing. Opposing counsel who receives a copy of post-Reply materials submitted in violation of this rule should not respond in kind.

G. **Summary Judgment.** Summary Judgment motions must be made no later than sixty (60) days from the date of the filing of the Note of Issue or Order Framing Issues.

V. DECISIONS AND ORDERS

In certain instances, the Court may render a Decision and issue an Order orally from the Bench. In such instances a transcript of the Decision and Order, the cost of which shall be born equally by the parties, shall be purchased by the plaintiff or petitioner and then served on all other parties and submitted to the court so the same can be executed by the Court and filed with the Office of the Rockland County Clerk or Surrogates' Clerk. Indigent parties may be excused from having to pay their share for the cost of the transcripts of such decisions and orders whereupon the other parties will pay their proportionate share of the total cost of the transcript.

VI. TRIALS AND HEARINGS

A. **Trial Dates.** Scheduled trial and hearing dates shall be adhered to except for the most extra-ordinary good cause shown and accordingly it is expected that clients, witnesses, experts and others will be timely advised of scheduled dates pursuant to Part II, Subdivision (D) hereof. The parties and their attorneys are encouraged to videotape the trial testimony of witnesses who are likely to be unavailable at trial in accordance with the applicable statutes and uniform rules, at the producing party's expense. All such videotaping should be conducted between the date of the Pre-trial Conference and the date of the trial. In scheduling and conducting trials, the Court shall endeavor to accommodate bona fide special preferences to the extent recognized by *CPLR Rule 3403* and *Uniform Rules 202.24* and *202.25*.

B. **Subpoenas.** When a Subpoena Duces Tecum is sought for a library, hospital or municipal corporation, or their departments and bureaus, the subpoena must be "So Ordered" on notice in accordance with *CPLR §2306* and *§2307*, and, the subpoena must be served on the intended recipient at least three days before the time fixed for the production of the documents, unless such notice is waived by the recipient of the subpoena or dispensed with by the Court. The Court's issuance of a "So Ordered" subpoena does not constitute a ruling as to the admissibility of the subpoenaed materials. All subpoena for materials protected by HIPAA shall refer to and annex a duly executed HIPAA compliant authorization.

C. **Interpreters.** In the event that any party or witness requires the services of a translator for foreign languages or services for the hearing impaired during a court appearance, conference, hearing or trial, the party shall notify, in writing, the Court, and the Clerk of the Court in which the matter is pending, of the need for same no later than three weeks prior to the court appearance, conference, hearing or trial.

D. **E.B.T. Transcripts.** Copies of E.B.T. transcripts that will be read or used for cross examination at trial shall be provided to the Court just before their use at trial.

Continued on Page 8.....

E. Pre-Trial Requirements

a. Trial Notebook

No later than five (5) business days prior to the scheduled trial date, counsel shall each provide to the other (one copy) and submit to the Court (two copies) a trial notebook which shall consist of:

- 1) Marked pleadings in accordance with *CPLR §4012*;
- 2) Statement of the relevant facts stating separately those that are not in dispute and those that are;
- 3) Pre-trial memorandum of law addressing any known or anticipated disputed legal issues that must be determined by the court;
- 4) A list of all potential witnesses for each party;
- 5) A list of all exhibits to be offered into evidence at trial by each party with a brief description of each exhibit...do **not** submit copies of the exhibits;
- 6) Preliminary requests to charge. The charges will be drawn from the Pattern Jury Instructions (PJI). If no deviation from the pattern charge is sought only the PJI numbers need be submitted. Where deviations or additions are requested, the full text of such requests must be submitted in writing together with any supporting authority.
- 7) In jury trials a proposed verdict sheet typed in final form for presentation to the jury. If agreement cannot be reached on a joint submission, then each side shall present a proposed verdict sheet, along with a written explanation as to why agreement on the verdict sheet was not reached.
- 8) All motions In Limine and or for Preclusion. Each shall set forth the factual basis and authority for the objected to exhibits or testimony. All opposition shall be filed no later than the first day of jury selection or openings in a non-jury trial.
- 9) The court may, in its discretion and for good cause shown, relieve counsel from all or part of the trial notebook requirements upon a showing that the issues to be tried are sufficiently narrow that the trial notebook is not necessary or that the interest of justice otherwise justifies such relief. Such requests will be entertained only at the pre-trial conference.

b. Witnesses. A witness not identified in the witness list provided to opposing counsel either in discovery or in the trial notebook, other than an impeachment or rebuttal witness, may not be permitted to testify unless an adequate explanation is provided for the failure to identify such witness prior to trial. Parties, witnesses and experts shall be advised of the scheduled dates in writing within three (3) business days of the day on which the trial dates are set [See *Part II (D)* hereof].

c. Exhibits. Any exhibit not identified in the exhibit list provided to opposing counsel, other than an exhibit offered for the purpose of impeachment or rebuttal, may not be admitted into evidence unless an adequate explanation is provided for the failure to identify such exhibit prior to trial. Exhibits marked into evidence at trial will not be returned until the final conclusion of the matter. Exhibits marked for identification will be retained by the offering attorney during trial, unless taken into evidence.

F. Identification of Trial Counsel. Whenever a matter is to be tried by an attorney other than the attorney of record, trial counsel shall be identified in a writing, filed with the Court on notice to all parties, no later than fifteen (15) days from the date for the pretrial conference [See *Uniform Rule 202.31*]. The court may waive this rule only in instances where the attorney of record is unexpectedly engaged in an unrelated trial and the late retention of trial counsel permits the trial before Judge Walsh to proceed without adjournment.

G. Pre-Voir Dire Conference. Immediately prior to jury selection the Court will conduct a conference [See *Uniform Rule 202.33 (b)*] in order to set time limits on jury selection, to hear and determine arguments concerning the number of peremptory challenges, to discuss trial stipulations, to hear and determine last minute arguments on motions In Limine, to discuss scheduling and to address any other appropriate trial related issues.

H. Jury Selection. Juries shall be selected by the parties outside the presence of the Court in accordance with “Whites Rules” found in *Appendix “E”* of the *Uniform Rules for the New York Trial Courts*. The Court may impose time limits for jury selection as authorized by *Uniform Rule 202.33 (d)*. Peremptory challenges will ordinarily be pooled between multiple plaintiffs on the one hand and between multiple defendants on the other, and generally, each side shall be entitled to three (3) peremptory challenges for regular jurors per panel and one (1) peremptory challenge for each alternate juror per panel. However, pursuant to *CPLR Section 4109*, the number of peremptory challenges may be adjusted by the Court in certain matters in the discretion of the Court and in the interest of justice. The jury selection process will not be delayed by settlement negotiations once the jury panel is seated.

I. Bifurcation. Trials of personal injury actions involving issues of both liability and damages shall be bifurcated in accordance with *Uniform Rule 202.42* and all subdivisions thereof. Trials on damages will commence immediately upon the completion of the trial on liability.

J. Non-jury Trials. Unless the Court directs otherwise, the parties may obtain and provide to the Court, at the party’s expense, at the conclusion of the trial, a copy of the trial transcript, and each party may submit a post-trial brief with respect to the issues raised at the trial, setting forth specific references to the relevant portions of the transcript and the documents in evidence and citing the applicable law. Along with the submission of the post-trial briefs, counsel may also present the Court with proposed findings of fact and proposed disposition.

VII. ADJOURNMENTS

All applications for adjournments of conferences, court appearances, hearings, trials and motions **shall** be made in writing actually received by the appropriate Clerk. No request for adjournment will be entertained unless the party seeking the adjournment has first attempted to obtain consent from all other parties. The application must be made immediately upon receipt of knowledge of the event or reason giving rise to the need for the adjournment. All requests shall state: good cause for the adjournment; whether the adverse party(ies) consent(s) to the adjournment; and may, at the option of the requesting party, suggest a date for the adjournment. The attorney receiving the adjournment **shall** immediately advise all other parties and pro-se litigants in writing of the adjourned date with a copy to the Court.

VIII. SETTLED AND DISCONTINUED CASES

Counsel shall immediately notify the Court in writing of a settled or discontinued matter. Following the initial notification counsel shall file a fully executed duplicate original Stipulation of Discontinuance or Settlement with the appropriate Court Clerk. Court appearances and jury proceedings scheduled prior to the settlement or discontinuance are not excused or delayed until the fully executed Stipulation is received by the Court.

Continued on Page 9.....

IX. MATRIMONIALS

A motion for a default Judgment of Divorce is required in all un-contested Matrimonial Actions unless the submitted papers include, among the other documents otherwise required by Statute or Rule: (i) an acknowledged affidavit from the defaulting party admitting service of the Summons & Complaint and consenting to all of the relief requested, or, (ii) an acknowledged Stipulation of Settlement executed by the defaulting party addressing all of the relief requested; and, (iii) a proposed Findings of Fact and Judgment.

X. ARTICLE 81 PROCEEDINGS

All Court Evaluator's reports shall be filed with the Court no later than noon of the day before the scheduled hearing date.

XI. RULES APPLICABLE ONLY TO SURROGATE'S COURT

1. Whenever a citation is served in an Accounting Proceeding a copy of the accounting shall be served on all parties, including waiving parties, with the Citation, and the Citation and affidavit of service shall recite that a copy of the accounting was served with the Citation.
2. If, in a probate proceeding, a beneficiary, attorney or draftsman has a fiduciary or confidential relationship with the testator/testatrix, an affidavit explaining the circumstances of the making the bequest and the drafting of the Will must be filed with the petition.
3. The clerk will not take a deposition or the testimony of any attesting witness in a probate proceeding unless the time to file objections limited in *SCPA 1410* has expired.

**So Ordered: /s/ Hon. Thomas E. Walsh, II, Surrogate/A.J.S.C.
March 1, 2010**

**PRESS RELEASE
JUSTICE BRANDEIS WESTCHESTER LAW SOCIETY**

presents

'Hitler's Courts: The Betrayal of the Rule of Law in Nazi Germany'

A 35 minute documentary film by Emmy Award-Nominated Filmmakers Joshua M. Greene and Shiva Kumar.

4:30 p.m. Monday, April 19, 2010

Rockland County Courthouse—Central Jury Room

Discussion to follow by Lawrence Raful,

Dean and Professor of Law, Touro Law School.

Light Fare will be served

ALL ARE WELCOME

"Hitler's Courts" features archival footage from the Nazi era, rarely seen photographs, and interviews with leading voices in international law, including Whitney R. Harris, a member of the prosecuting team in Nuremberg in 1947; retired Israeli Supreme Court Justice Gabriel Bach, former assistant prosecutor at the 1961 trial of Adolf Eichmann; Michael J. Bazyley, Professor of Law at Whittier Law School; and Raymond Brown, Professor of Law at Seton Hall Law School. These and other experts who appear in the film examine the perversion of law under Nazi rule and discuss how distinguished lawmakers were capable of complicity in the largest mass murder in history.

This screening will memorialize Holocaust Remembrance Day 2010 in Rockland County.

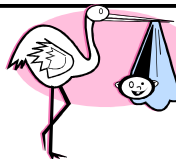
This film has been described as "a brilliant and chilling description of how law, judges and lawyers became the tools for repression and genocide in Nazi Germany. A powerful reminder, especially apt at this moment of American history, that the rule of law can be used to advance freedom or for the worst things that human beings can do." **Erwin Chemerinsky**, *Alston & Bird Professor of Law and Professor of Political Science, Duke Law School*

**GRIEVANCE
DISCIPLINARY LAW
(914) 682-0037**

**RICHARD E. GRAYSON
ATTORNEY AT LAW**

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THIRD FLOOR
WHITE PLAINS, NEW YORK 10601**

www.richardgraysonesq.com



**CONGRATULATIONS
CONGRATULATIONS**

**Kristie Jade
March 5, 2010**

Proud Parents

Yvonne Garbett (Harle)

&

Richard Harle

Big Brother & Sister

Thomas & Kaitlyn



.....

Name(s) _____ Updated E-mail _____

Credit is not given for partial attendance.

Make sure your blue evaluation forms are completed and turned in to CLE Coordinator to receive your certificate.

*If you pre-pay but are unable to attend the seminar you will be refunded the full amount only upon advance notice
(3:00 P.M. the day of the seminar) of your non attendance.*

MATRIMONIAL LAW UPDATE - APRIL 27, 2010 **6:00 p.m.— 9:00 p.m. \$ 75.00**

***Kosher Meals are dependant on the delivery service available from the caterer. All kosher meals must be ordered in advance and require an extra charge of \$10.00. Call the Association to place an order for a kosher meal. Please give us at least one weeks notice.*

****Hardship Policy****

**THE ROCKLAND COUNTY BAR ASSOCIATION WILL WAIVE THE CLE SEMINAR FEE FOR AN INDIVIDUAL WITH APPROPRIATE PROOF OF
HARDSHIP. PROOF MUST BE SUBMITTED ONE WEEK PRIOR TO SEMINAR. PLEASE CALL THE ASSOCIATION 845-634-2149 FOR MORE
INFORMATION**

SAVE THE DATE

CPLR UPDATE 2010

FRIDAY, MAY 7, 2010

1:00 P.M. - 4:00 P.M.

**GOOD SAMARITAN HOSPITAL AUDITORIUM
255 LAFAYETTE AVE, SUFFERN, NY**