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REPORTING IMPORTANT OPINIONS OF THE COURT OF APPEALS AND IN SPECIAL SITUATIONS OF OTHER COURTS

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RENEWING NEW YORK JUDGMENT TO SECURE NEW LIEN

RENEWAL SUIT, PERMISSIBLE DURING LAST YEAR OF 10-YEAR LIEN PERIOD, MUST BE BROUGHT EARLY ENOUGH WITHIN THAT YEAR SO THAT JUDGMENT CAN BE *RENDERED* WITHIN IT

If the renewal action is brought by the judgment creditor (JC) so late during the final year that there's insufficient time to assure that judgment can be entered on it within the year, a lien gap will open up and other creditors' liens may step in and take priority over JC's, which is what happened in *Gletzer v. Harris*, N.Y.3d, N.Y.S.2d, 2009 NY Slip Op 03763 (May 12, 2009). Some background:

A New York money judgment is good for 20 years under CPLR 211(b). But it's a lien on the real property of the judgment debtor (JD) for only 10 years under CPLR 5203(a). When the judgment is nearing the end of its first 10 years without having been satisfied, and the judgment creditor is soon to be without the lien value of the judgment, CPLR 5014(1) enables JC to sue on the old judgment and thereby acquire a new judgment with a fresh 10-year lien.

Before 1986, when JC, aware of the approaching end of the 10th year, would try to get the judgment renewed before the period expired so as to avoid a "lien gap" in which some other creditor might slip in, caselaw held that this was not permissible; that the creditor had to wait until the first 10 years had expired before bringing the renewal suit. See, e.g., *Brookhaven Memorial Hospital v. Hoppe*, 65 Misc.2d 1000, 319 N.Y.S.2d 564 (1971).

This of course created a problem for JC, which was recognized in a 1986 amendment that added what is presently the last paragraph of CPLR 5014 (and overruled cases like *Brookhaven*). The amendment allows the renewal suit to be brought during the last year of the initial 10-year lien period, enabling JC to get the lien renewed and extended before the first 10 years expire and thus to avoid a lien gap that could let another creditor's lien become senior. But to be sure of avoiding the gap, *Gletzer* warns that JC must bring the renewal suit early enough within the last year of the initial 10-year lien period so that the rendition of the judgment granting JC's application can also occur within the year.

In *Gletzer*, JC brought the renewal action on the last day of the 10-year lien period, assuring that its mere processing would virtually guarantee that it could not go to judgment until after the lien had expired, thus opening up a gap into which, in *Gletzer*, stepped two mortgagees of the property. They made their loans after the 10 years expired and before a renewal judgment could be rendered. In an opinion by Judge Ciparick, the Court of Appeals holds that these mortgagees prevail over JC because when they made their loans the public records indicated that JC's lien had expired. Had they made inquiry beyond those records, they might have learned of JC's pending renewal suit, but, says the Court, they had no obligation to make such an inquiry.

The original judgment was rendered with full New York jurisdiction, but JD afterwards moved to Missouri, creating an issue of whether JD was subject to New York jurisdiction in the renewal suit. The suit having been begun on the last day, a judgment in it would have run beyond the expiration of the 10-year lien period in any event, but with the jurisdictional issue factored in, it ran several years past it. When the renewal judgment was finally granted, the trial judge gave it nunc pro tunc effect back to the expiration of the original lien, thus purporting to close the gap and make JC the winner over the intervening mortgagees. The appellate division reversed that, and now the Court of Appeals affirms, agreeing that nunc pro tunc treatment was improper. The mortgagees win.

Citing its 1983 *Mansfield* decision (Digest 279) for further background on the application of the nunc pro tunc process, the Court notes additionally in *Gletzer* that the language of the CPLR 5014 amendment is in any event "prospective in tone ('shall take effect upon'), not retrospective", thus further rebutting the nunc pro tunc step.

It appeared in *Gletzer* that JD had ample real property, and apparently had had it for a while, so it isn't clear why JC did not take enforcement steps earlier, which could have made a renewal action altogether unnecessary. And as the Court points out in a footnote, even on the last day of the lien period there were other steps JC could have taken to extend the lien for the brief period of time enforcement would have required. See CPLR 5203(b) and 5235 and the Commentaries on them in McKinney's CPLR.

The Court recognizes in another footnote a jurisdictional issue lurking in the *Gletzer* background, but stresses that the issue was not before it. That's the question of whether it was necessary for JC to establish jurisdiction of JD in the renewal suit. Wouldn't the jurisdiction on which the original judgment was based have sufficed for a renewal judgment, too? That was an issue we stressed in our treatment of the appellate division decision in *Gletzer* (see Issue 196:1 in Siegel's Practice Review), posing the question whether a new action was needed at all for the renewal judgment.

The view is posited there that it should not have been; that renewal should have been available through the simple registration procedures of Article 54 of the CPLR, as elaborated in Commentary C5014:2 on McKinney's CPLR 5014. Article 54 gives the judgments of sister states a red carpet entry onto New York records with a simple

registration device. And Article 53 gives even a foreign country judgment facilitated access to New York dockets. (See SPR 132:3.) A duly rendered New York judgment seeking renewal should be entitled to no less.

These jurisdictional issues not having been preserved for appeal in *Gletzer*, they remain open for the Court's address in an appropriate future case – which would never come to be if judgment creditors kept closer track of enforcement possibilities.

OTHER DECISIONS

ANTI-SUICIDE PRESUMPTION

Presumption Is Only "Guide for Jury"; It Doesn't by Itself Compel Result

This case was the usual context for the appearance of this issue: an action by the beneficiary of a life insurance policy against the insurer, with the insurer wanting out under a suicide exception contained in the policy.

Here the trial judge sitting without a jury found that the decedent, S, did commit suicide and ruled for the insurer (D), dismissing the claim of S's widow (P). There was room in the record for that finding by the fact trier, but the appellate division then reversed and granted summary judgment for P by applying the anti-suicide presumption as if (when there's proof both ways) the presumption mandates a judgment as a matter of law against the party claiming suicide (D in this case).

That's wrong, holds the Court of Appeals in an opinion by Judge Smith. When the proof supports a fact finding either way, the matter must be left to the jury. The only role played by the presumption against suicide is as an element, albeit a potent one, in the judge's charge. Here there was no jury, and had the appellate division exercised its jurisdiction to review the facts here, and then overturned the trial judge and found for P as a matter of fact, its decision could have been upheld. But that's not what the appellate division did; it held for P by deeming itself bound to do so as a matter of law because of the presumption. Hence the Court of Appeals reverses and remands to the appellate division to conduct the factual review it did not conduct earlier. *Green v. William Penn Life Ins. Co.*, 12 N.Y.3d 342, N.Y.S.2d (May 5, 2009).

S had been unemployed for months when two empty bottles of "recently-prescribed pain medication" were found in S's nightstand drawer. S had had a medical the day before he died and his doctor said he had "suicidal thoughts". All these were pro-insurer factual allegations. But the doctor also quoted S as saying he was not suicidal, and family members described S as "upbeat" and "positive" shortly before his death, and those were factual allegations in favor of the beneficiary. This made the suicide question one of fact, holds the Court, just as the trial judge resolved it, in this instance in D's favor. Had the appellate division's reversal, in P's favor, been stated to be on the facts, the reversal of the trial court might have been upheld by the Court of Appeals, obviating a remand for further proceedings.

<u>ANTI-SUICIDE PRESUMPTION AGAIN</u>

Presumption Doesn't Apply to Coroner Investigating Cause of Death

Citing the above *Green* case, decided on the same day, the Court of Appeals says the presumption against suicide applies only in disputes over life insurance proceeds and that it has "never considered the presumption in any other context". Hence it holds that the presumption doesn't apply to a county medical examiner looking into the cause of a woman's death that might or might not have been suicide. In an opinion by Judge Read, the Court reverses an appellate division decision and upholds the examiner's decision of suicide. *Infante v. Dignan*, 12 N.Y.3d 336, N.Y.S.2d (May 5, 2009).

Underlying the issue in this case is what we might term a potential battle of presumptions: the presumption against suicide on the one hand and, on the other, the heavy presumption in favor of an administrative determination, which is governed by Article 78 of the CPLR. Under CPLR 7803, the administrative determination can be overturned only if found arbitrary and capricious, or an abuse of discretion, or lacking in substantial evidence – a pile of standards that in effect give the determination the force of a presumption of correctness.

Here the battle never comes off, however, because the presumption against suicide is held to have "no role to play" in the examiner's determination.

An overdose of Prozac was found in the decedent and the circumstances left room in the record for the examiner's finding of suicide. Had the anti-suicide presumption been applicable, the room would of course have been less and the case, brought by the decedent's father as administrator against the medical examiner's office to overturn the determination, would not have been disposed of as easily. But the presumption wasn't applicable and so, for this case, that was that.

If life insurance was indeed in the picture, an interesting question, not before the Court in *Infante*, is what would happen if the beneficiary of the policy now sued on it. Would the insurer be entitled to a collateral estoppel based on the examiner's finding of suicide? Or would the identity of issue test for the estoppel (see Siegel, New York Practice 4th Ed. § 462) step onto the scene and make an estoppel unavailable, requiring a de novo trial of the suicide issue and giving the beneficiary a fresh bite – if we may use a distasteful metaphor – of the suicide apple, with the anti-suicide presumption now on stage at last? And wouldn't the answer to that question be the same even if it was the father, the petitioner/loser in *Infante*, who was the beneficiary now suing on the policy? (See id., § 459.)

It would seem that the issue in the two scenarios, or in any event the elements relevant to its resolution, differ enough to run afoul of the identity of issue test and bar application of the estoppel doctrine.

PARENTAL RIGHTS

If Custodial Parent Has "Exclusive" Custody and Court Decree Is Silent on Educational Decisions for Child, Noncustodial Parent Can't Make Them

When W and H were divorced in 1996, family court gave W exclusive custody of the three children, including a legally blind son, who got special education services from New York City. Deeming these services inadequate, H sought a review by the education department. When that was denied on the ground that H lacked standing to make educational decisions for the child, H brought this federal action on the ground he was denied a right conferred by the federal Individuals with Disabilities Education Act. The federal court dismissed, also on the lack of standing ground. On appeal, the circuit found New York law, which governed the matter, unclear and asked the New York Court of Appeals to resolve it on a certified question.

As reset by the latter into terms it found more appropriate to answer, the question is whether the noncustodial parent retains decision-making authority on educational matters where

- (1) the custodial parent is granted exclusive custody of the child and
- (2) the divorce decree and custody order are silent as to the right to control such decisions.

The Court of Appeals answers the question No. *Fuentes v. Bd. of Educ. of City of New York*, 12 N.Y.3d 309, N.Y.S.2d (April 30, 2009).

In an opinion by Judge Jones, the Court adopts the position it now finds "well settled" in the appellate divisions: that unless the parties in an agreement express otherwise, or the court does in a decree or order, "the custodial parent has sole decision-making authority with respect to practically all aspects of the child's upbringing". Nothing in any of those sources expresses the contrary, and the Court rejects H's argument that a right of a noncustodial parent to participate in educational decisions should be implied.

The Court emphasizes "the importance of parties determining these issues at the time of separation or divorce".

The Court observes that "[g]enerally, there is nothing which prevents a noncustodial parent ... from requesting" data about the child's education, even saying that this should be "encouraged", but on the facts of a case like the present one, exclusive authority to "control" such decisions is with the custodial parent.

MUNICIPAL LIABILITY

Notice of Sidewalk Defect Sent to Wrong Department of Town Doesn't Satisfy Condition for Town Liability in Slip and Fall Case

And that is so, holds the majority in *Gorman v. Town of Huntington*, 12 N.Y.3d 275, N.Y.S.2d (April 7, 2009; 4-3 decision), even if the department that was notified is in fact the department that does the town's sidewalk repairs.

A municipality otherwise responsible for injuries caused by a defective sidewalk can, with a local law, make its liability contingent on its having been given written notice of

the defect. In a bylaw doing that, the town in this case required that the written notice be given to the town clerk or the town highway superintendent, paralleling the requirements of § 65-a(2) of the state's Town Law. But in this case notice had not been given to those officers, but rather to the town's engineering department. A majority of the Court of Appeals holds this inadequate, despite a showing that the engineering department was in fact the one that keeps the notice records for the town and actually goes out and fixes the sidewalk.

The defective sidewalk here was in front of a church whose pastor had notified the town's engineering department about the defect – in writing – four months before the plaintiff tripped and fell there. Her personal injury action is dismissed for want of proper notice. The majority, in an opinion by Judge Pigott, stresses that the notice requirement must be strictly construed and also rejects the plaintiff's argument that because it had long been the town's practice of letting the engineering department handle things in just this way, the town should be estopped from denying liability.

Three judges dissent, seeing at least potential merit in the estoppel argument, enough in any event to require a remand for a further development of the record. Judge Ciparick's dissenting opinion, concurred in by Chief Judge Lippman, sees "unresolved questions of fact as to the record-keeping practices" of the town. If further proceedings show that the town "purposefully altered" the record-keeping duties to shift them away from the clerk and superintendent and into the office of the engineer, an estoppel would be proper and the plaintiff's action could proceed.

In a separate dissent, Judge Smith says it's even possible that the engineering department "may be the only town office that has ever kept any record of ... sidewalk defects". If that's the case, he concludes, then the town would be "in violation of its obligations" and consequently subject to the estoppel the plaintiff sought.

The majority is adamant, however, about the strict construction rule, holding that "a written request to any municipal agent other than a statutory designee" will not satisfy the notice requirement.

TERMINATING SCHOOL ADMINISTRATOR

While School District Can Waive Its Statutory Right to Discharge Probationary Administrator, Intent to Waive Must Be Unambiguous and Wasn't in This Case

The applicable statute is § 3012(1)(b) of the Education Law. It says administrators shall be appointed for a three-year probationary period and "may be discontinued at any time" during that period. The question in *Consedine v. Portville Cent. School Dist.*, 12 N.Y.3d 286, N.Y.S.2d (April 7, 2009), is whether this right to terminate can be waived by the school district, with the result that the probationer is guaranteed a secure three-year term.

It can be waived, holds the Court in an opinion by Judge Jones, but on the facts of this case it wasn't. The Court thus upholds the elimination of this plaintiff's position – cited by the district as being for budgetary reasons – only six months into his three-year term.

(The parties had entered into an employment contract covering the period January 1, 2003 through December 31, 2005, at a stated annual salary.)

The Court relies principally on its 1976 decision in *Cohoes City School Dist. v. Cohoes Teachers Assn.*, 40 N.Y.2d 774, 390 N.Y.S.2d 53, which, although it involved collective bargaining, applied a statute containing what the Court finds to be "the very same operative language" that § 3012(1)(b) contains here in this tenure context. And while in neither this statute nor the one involved in *Cohoes* is there any "plain and clear restriction on a school district" that prevents it from agreeing to waive this statutory right of termination, the waiver must be express, and it wasn't in this case. Mere implication won't do, in other words, because where, as in the present case,

public policy concerns are implicated, a school district will not be deemed to have waived its statutory rights under the Education Law without an explicit agreement between the parties or compelling evidence that the school district made a conscious decision to do so.

The Court holds that the language in the present contract between the parties "is simply too equivocal" to establish a conscious waiver under the statute.

The case is especially hard news for the plaintiff, who apparently gave up a tenured teaching position at another school to take the administrative job (assistant principal) at this one.

NO-FAULT INCIDENTS

Attorneys' Fees That Insurer Must Pay Are Based Not on Each Bill Insured Submits, But on Total of Those Bills

Reversing the lower courts, the Court of Appeals accepts the insurance department's interpretation of one of the regulations it adopted establishing the attorney's fee that an insurer must pay when the claimant has to go to court or arbitration to collect. The regulation is 11 NYCRR 65-4.6, promulgated under authority given the department by § 5106(a) of the Insurance Law.

As is often the case, the plaintiffs here were medical providers to whom the injured insureds had assigned their claims against their no-fault insurer. The insurer here did not timely pay bills submitted by the insureds, leading to suit by the assignees. This invoked the provision requiring the insurer to pay the insureds' (in this case the assignees') attorneys' fees. The issue was whether the fees were to be based on each separate bill submitted for the insured, or on the total of that insured's bills. On the total, holds the Court in an opinion by Judge Pigott. *LMK Psychological Services, P.C. v. State Farm Mutual Automobile Ins. Co.*, 12 N.Y.3d 217, N.Y.S.2d (April 2, 2009).

Reviewing the responsibility for administering the no-fault provisions of the Insurance Law and the standards for judicial deference to the assigned agency's interpretation of its implementing regulations, the Court says that because the department's interpretation in this case

is neither irrational, unreasonable, nor counter to the clear wording of the statute, it is entitled to deference.

The trial court is directed on remittitur to recalculate the attorneys' fees accordingly.

An issue also arose about computing the 2% per month interest that § 5106(a) imposes on the insurer for unjustified rejection of a valid claim. The interest starts 30 days after the demand for payment is made, but a regulation tolls the interest period if the claimant doesn't bring an action or arbitration "within 30 days after the receipt of a denial of claim form".

Here the department's interpretation is that the running of interest is tolled if the claimant doesn't sue within 30 days after the insurer's denial even if the denial is itself late. That, too, is upheld by the Court, in furtherance of the statutory objective of having the claim processed fast:

Once a denial is issued, even if an untimely one, a claimant should still be encouraged to act to resolve the dispute quickly.

ANOTHER UNSUCCESSFUL LIBEL SUIT

N.Y. POST'S REWRITE OF L.A. TIMES ARTICLE, STATING MD WAS REVOKED WHILE TIMES SAID ONLY THAT REVOCATION WAS BEING CONSIDERED, IS STILL NOT ACTIONABLE

Maybe the Digest should have a separate department for unsuccessful libel suits against public figures. Establishing the actual malice or reckless disregard needed under the U.S. Supreme Court's *N.Y. Times v. Sullivan* case to cast liability on an alleged defamer is not entirely impossible when the plaintiff is a public figure, but it's close to it.

We reported a decision in last month's Digest, the *Shulman* case, in which the Court of Appeals set aside a \$100,000 punitive damages verdict that a school board member had won against a school superintendent who by lay standards bore him barrels of malice, but, held the Court, not of the kind that *Sullivan* requires. There the Court's exoneration of the defendant was based on the possibility – slim as it was – that the defendant believed the things he said about the plaintiff. The burden is on the plaintiff in these cases, and the plaintiff failed to exclude all possibility that the defendant might have believed what he said.

Now we have another case in which a libel claim against a public figure, in this case a physician (P), fails – this time at the summary judgment stage – because P failed to show proof from which a jury might find actual malice on the part of the defendant, the New York Post and its staff (collectively, D). D took an article from the wire service of the Los Angeles Times, which article said that the revocation of P's medical license was being considered based on drug overdosing, including the overdosing of a well known

rock star. The article was right but the Post published it under the inaccurate headline that D's license had already been "pulled" and included a paragraph stating that D's license had been "revoked". Still not actionable, holds *Kipper v. NYP Holdings Co.*, 12 N.Y.3d 348, N.Y.S.2d (April 30, 2009; 6-1 decision).

Reviewing the affidavits pro and con on the summary judgment motion in an opinion by Judge Ciparick, the Court acknowledges that D may have sought to enliven its article with a more exciting headline, and even with an inaccurate fact within the article, but it holds that under the circumstances of this case P still failed to show any possibility that this was done with "actual malice" directed at P, or, alternatively, "reckless disregard" of the truth or falsity of the statement. "Evidence of falsity does not equate with proof of actual malice", repeats the Court, citing – as it did last month in the *Shulman* case – its 1987 *Mahoney* decision (Digest 339).

D later published a "correction", moreover, the Court notes, and placed it at a point within the paper paralleling where the offending article had appeared.

The dissent, by Judge Pigott, sees at least enough here to send the case to a jury, and sees even in the "correction" an attempt by D to make it appear that the Times article was in error and that it was D that "ferreted out the truth" about the status of the license revocation proceeding.

The majority further rejects P's contention that D invented facts in order to "spice up" the article to increase circulation. The rewritten article, the Court explains, was "inconspicuously placed on page 24" of the paper, and even there was "dwarfed" by a big adjacent ad for home furnishings – hardly a situation that would motivate people to buy the paper.

Since *Sullivan* is addressed to libel suits by public figures, a court must in each case determine that the plaintiff is indeed a public figure. This plaintiff wasn't such merely because he was a physician: in a footnote the Court stresses "the extensive media coverage of his detoxification practice, his more than 100 television appearances as a medical expert, and his role as a doctor in several films".

As the *Shulman* decision advised, it's simply a matter of public figures growing a "thicker skin". (Integumentary, my dear Watson!)