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

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VIOLATING CONDITIONAL ORDERS

DISREGARD OF CONDITIONAL PRECLUSION ORDER AFTER IGNORING MANY DISCLOSURE DEMANDS BRINGS REVERSAL AND DISMISSAL IN *GIBBS* CASE AND ANOTHER STERN WARNING FROM COURT OF APPEALS

In its 2008 *Wilson* decision (Digest 585), the Court of Appeals warned of the severe consequences of ignoring a disclosure order and then ignoring the conditions that in essence excused the disclosure failure and gave the plaintiff a second chance. That's a frequent scenario in personal injury cases and it happened again in the more recent *Gibbs v. St. Barnabas Hospital*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2010 NY Slip Op 09198 (Dec. 16, 2010; 4-3 decision).

Gibbs is a classic example of the genre. It became a celebrity over the past year or so when the bar first found out that the case was on its way to the Court of Appeals. It was expected to address just what consequence attends the violation of the condition in a conditional order, a matter of interest to all litigation lawyers.

The situation is that an order, after recognizing and reciting excessive dilatory conduct on plaintiff's part in resisting bill of particulars and/or discovery demands, has been issued by the court dismissing the case or precluding plaintiff from putting in proof of it (in essence the same thing) "unless" – here's the conditional part – the plaintiff furnish the required bill or make the required discovery within a stated time.

What the bar contemplated was a Court of Appeals statement of whether the passing of the stated time, without compliance, results in dismissal (or absolute preclusion – again, the same thing), or still leaves some way out for the plaintiff.

The Court's position is that the plaintiff's conduct is a default, mandating that the plaintiff who wants to get out from under must now submit the famous twin showings

always needed to overcome a default: a reasonable excuse for the default and an affidavit showing that the plaintiff's case has merit. The *Gibbs* plaintiff, in default on bill of particulars and discovery requirements for more than a year before finally being tendered the benefaction of a merely conditional preclusion order, then violated the condition and offered neither an excuse nor a merits showing. The result: summary judgment dismissing the action.

The majority opinion in what is once again a closely divided court is written by Judge Graffeo. The three-judge dissent is by Judge Ciparick, protesting that only wilfulness on plaintiff's part can justify such a dismissal and pointing out that at no point did either of the lower courts state that plaintiff's defaults were wilful. The majority's position, an important point to note for the future, is in essence that continued disregard of proper demands without even the effort of seeking extensions of time from the opposing party and without offering the court any excuse for the delay or any showing of the case's merits, amounts to wilfulness in this context and justifies the ultimate penalty of dismissal. Perhaps what the conduct should be called, if the words don't explode when put together, is "constructive wilfulness".

The Court also stresses that this was a medical malpractice action, which means that the proof of merits on an application to excuse the default must include the affidavit of a medical expert.

Gibbs now joins an exclusive coterie of Court of Appeals cases that stand together to condemn dilatory conduct in litigation.

A charter member of this growing society is the Court's 1999 *Kihl* decision (Digest 480), also addressing disclosure defaults (as does the 2008 *Wilson* decision cited at the outset of this note). Another member is the *Brill* case of 2004 (Digest 534), applying a strict standard to the CPLR 3212(a) time limit for making a motion for summary judgment. Then *Brill* was followed in short order by the 2005 *Slate* case (Digest 544), adopting the same attitude about delays in summons service. There may be other cases that have some claim to membership in this austere organization, but now, with *Gibbs*, we have a decision whose credentials for membership are impeccable, making for at least a quintet of similarly indignant Court of Appeals decisions and making their collective warning to the bar louder than ever.

The appellate division in *Gibbs*, in preserving the action, did impose a money sanction, but it was only $500. The inadequacy of this sum as a supposed deterrent led the Court to an almost sarcastic reference to inflation in a footnote referring to a decision in a similar situation in 1984 in which the trial court, in forgiving a default, exacted a payment of $415 from the plaintiff. (On at least one chart we found, inflation would have more than doubled that by 2009, the time of *Gibbs*.)

The Court includes in its opinion the following statement of how all sides, including the courts, are adversely affected by what it deems this culture of ignored deadlines:

> [I]t places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic non-compliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well.

The Court concludes this with a simple quotation from the *Kihl* decision: "a litigant cannot ignore court orders with impunity". The dismissal in *Gibbs* should bring the point home.

OTHER DECISIONS

"*INSURABLE INTEREST*"

Person Obtaining Insurance on Own Life Can Assign It to Another Having No Insurable Interest, Even Though Latter Could Not Directly Obtain Such Insurance

Obtaining it directly has generally been condemned by the law as amounting to a wager on how long the insured will live, and a violation of New York public policy. But two subparagraphs, (1) and (2) of Insurance Law § 3205(b), pose a dilemma for the courts on this subject.

The second involves one person directly buying insurance on the life of another; for that the statute requires that the one buying the insurance have an "insurable interest" in the insured's life – based on love or something else that gives the buyer a reason to want the insured to live.

The first provision, however, in which the insured takes out insurance on his own life, allows the insured to make an immediate assignment of it to anyone at all, including one with no insurable interest.

This is a peculiar pairing. The would-be wagerer is out if it tries to insure the subject person directly, but in – and with the prospect of a handsome recovery – if it can get the insured to buy the policy himself and then assign it. The peculiarity, and the history of the statute and its several parties, produces a divided panel in *Kramer v. Phoenix Life Ins. Co.*, 15 N.Y.3d 539, ... N.Y.S.2d .... (Nov. 17, 2010; 5-2 decision).

Kramer took the policies out himself. Big ones, totaling some $56 million dollars. That, mainly in 2005. Many complicating facts, to be sure, but two as uncomplicated as can be. The first is that Kramer died in 2008. The second is that all the participants then went to war to see who was entitled to what from the insurance policies.

Kramer's widow, with her own claim, brought an action in federal district court against sundry claimants, disclaimants, assignees, family, etc. The district court was at sea. It

rendered an interlocutory decision but then, with the special certification procedure of 28 U.S.C. § 1292(b), got the Second Circuit to review it, in essence squeezing the case through this tiny opening in the rule of finality that federal law insists on for appeals. This was the first "certification". The Second Circuit, equally at sea, made the second one: a certification to the New York Court of Appeals of the question of the interpretation of Insurance Law § 3205(b).

The circuit asked whether the statute bars an insured from securing insurance on his own life and then "immediately transferring the policy to a person without an insurable interest". Citing subparagraph (1) § 3205(b) in an opinion by Judge Ciparick, the New York Court of Appeals reviews the history of the statute and answers the question no: the statute does not bar it, the assignment is valid, and the assignees' claims are in essence sustained.

We may infer that investors in this transaction – in essence bettors – were part of its inception, but the particulars are not furnished in the majority or dissenting opinions; the reader is instead left to the federal district court's opinion for details. Both opinions in the New York Court of Appeals concentrate on the law, and reach different conclusions.

The majority sees the language of subparagraph (1) as clear and dispositive and concludes that as long as the insured takes the initial policy out himself, he can immediately assign it to anyone at all without regard to insurable interest. Indeed, it would seem in this case that the investors have the antithesis of an insurable interest: no reason to wish the insured long life and every reason to hope he dies soon. But that's the statute, holds the Court.

The dissent, by Judge Smith, is too uncomfortable with that result to buy on to it. More candid in describing what is transpiring in a situation like this, the dissent protests that

> [e]ven if we ignore the possibility that the owner of the policy will be tempted to murder the insured, this kind of 'insurance' has nothing to be said for it. It exists only to enable a bettor with superior knowledge of the insured's health to pick an insurance company's pocket.

Continuing a bit deeper into the morbidity that hovers over this scene, the dissent guesses that the buyers of the policy in this case – the assignees –

> thought, probably with good reason, that they knew something about [the insured's] health that the insurance companies did not know.

To the dissent, this was nothing but a wager, and despite the technical language of subparagraph (1), the dissent sees in the statute's background and history "no reason to believe the Legislature ever intended to abolish the anti-wagering rule" that existed at common law.

The majority says that if the common law had such a rule, it is in any event overruled by the statute.

We have an image of a coterie of vultures in a tree outside the insured's bedroom – all of them smiling, no mean feat when you have a beak.

NOTICE TO GET NEW LAWYER

Failure to Give Plaintiff 30-Day Notice after His Lawyer's Suspension from Practice Spares Plaintiff a Dismissal

The 30-day notice is a requirement of CPLR 321(c). It operates when a party's lawyer is incapacitated or suspended from practice during an action. It provides that as of that moment nothing may be done adverse to that party until he is notified to appoint another attorney and given 30 days in which to do so. No such notice was given the plaintiff in this case, *Moray v. Koven & Krause*, 15 N.Y.3d 384, ... N.Y.S.2d .... (Oct. 26, 2010). Hence a dismissal visited on him by the lower courts is reversed by the Court of Appeals and the case remanded for further proceedings.

The case was for legal malpractice against D law firm for alleged malpractice in a prior action regarding a real estate purchase. That action was dismissed for failure to prosecute under CPLR 3216, generating the present malpractice action, of course with new counsel. New counsel turned out to be only temporary counsel, however, because he had been suspended from practice in the midst of his attempt to commence this new malpractice action.

Plaintiff started the new action by filing a summons and notice under CPLR 305(b). (We have often condemned that as a poor even if permissible choice, advising that summons and complaint is the better pairing in almost all cases. See Siegel, New York Practice 4th Ed. § 60.)

When CPLR 305(b) is used for filing, the service comes later after a demand by D under CPLR 3012(b). Here P's lawyer's suspension occurred between the filing and the service, generating diverse steps by P's original lawyer and then by a supposed-to-be replacement lawyer. And during this period of continued obfuscation the trial court dismissed the action and this was affirmed by the appellate division. Obviously upset with what it felt to be the plaintiff's victimization, the Court of Appeals granted leave to appeal and cancelled all of the anti-plaintiff proceedings for the simple failure of defendant or anyone else to give P the CPLR 321(c) 30-day notice to get another lawyer.

In an opinion by Judge Read, the Court stresses that the 30-day stay engendered by CPLR 321(c) is an automatic one, and that nowhere during the trial-level proceedings was CPLR 321(c) even mentioned. The appellate division held that this amounted to a waiver by the plaintiff and that the CPLR 321(c) issue could therefore not be raised for the first time on appeal. The Court agrees that it doesn't usually resolve cases on a ground not raised in the trial court, but it finds the present context "unusual" and hence makes an exception of it:

> We are dealing with a statute intended to protect litigants faced with the unexpected loss of legal representation. And there is no indication in this record that plaintiff sought to raise CPLR 321(c) only after having conducted his lawsuit pro se for some period of time after his attorney became disabled.

It's not unlawful to use CPLR 305(b) to commence an action with a summons not accompanied by a regular complaint; it's just a bad idea. We mention the point only in passing. And if there's a basis for the underlying claim of malpractice based on the dismissal of plaintiff's earlier action for non-prosecution under CPLR 3216, then it's also notable in passing that plaintiff has had more than his share of bad luck with the lawyers he relied on.

Often when one sees a case with disputed points about CPLR 305(b), or CPLR 321(c), or CPLR 3012(b), or CPLR 3216, a charge of malpractice, if not already part of the case, is not too far off.

NOTICE TO REDEEM

Statute Calling for Notice to Be Served on "Legal Representative" Does Not Mean Mere "Attorney" for Interested Party, But One Itself Having "Party" Status

An executor or administrator of a decedent's estate is what is ordinarily meant by the term "legal representative" in a statute, and that's what it's held to mean in a Nassau County provision involving the right to redeem a piece of real estate that's in foreclosure, in this case foreclosure of a tax lien.

The provision involved, from the county's code, says that the holder of the tax lien – here apparently an assignee of the county – must give notice of the right to redeem the property before an action to foreclose the lien may be brought, and it lists those to whom the notice must be given. The controversy in this case, *Kese Industries v. Roslyn Torah Foundation*, 15 N.Y.3d 485, ... N.Y.S.2d .... (Nov. 17, 2010), concerns one of the listed servees.

The list is in Nassau County Administrative Code § 5-51.0(a). It includes occupants, owners, trustees, mortgagees, judgment creditors, etc., and also "the heirs, legal representatives and assigns" of any of them. The holder of the tax lien in *Kese* had apparently bought it from the county for about $68,000. In its action to foreclose the lien, it did give the required notice-to-redeem to all on the list, including the plaintiff in the present action (which seeks to cancel the foreclosure), but not the plaintiff's attorney. No one (including the plaintiff Kese) having come forward to redeem the property, the county issued a tax deed to X, who then sold the property to Y for some $444,000. Seeking to take advantage of the failure to serve Kese's attorney – and, we suspect, with a covetous eye on the difference between $68,000 and $444,000 – Kese brought the present action to declare the tax deed void and, in a series of counts, to do everything else needed to let it lay hands on the property by belatedly redeeming it from under the tax lien.

No go, holds the Court of Appeals in an opinion by Chief Judge Lippman. The "legal representative" on the list here is meant to include a person who is itself a party, not a mere attorney for a party. The Court points out that when a term is ambiguous, help in resolving its meaning can come from comparing it with words nearby. Here the phrase "legal representatives" shares context with occupants, owners, trustees, mortgagees, and creditors, among others, each of which it considers a party in interest. This shows that the "legal representatives" meant are such as executors or administrators, who are themselves "parties" with direct interests, and not mere agents of parties, as attorneys are.

The Court finds this to be the construction reached in virtually every other state and in the federal courts – all sources, in fact, except one appellate division case in the Second Department – *Hua Nan Commercial Bank v. Albicocco*, 270 A.D.2d 265, 704 N.Y.S.2d 605 (2000). Calling the holding in the *Hua* case a "flawed construction", the Court of Appeals overrules it.

Hence the notice sent out by the foreclosing plaintiff is deemed good, and the effort to redeem by the plaintiff in the present action is deemed too late. Reversing the appellate division (which had followed its own prior *Hua* case), the Court of Appeals returns the case for further proceedings.

WHO IS AN EMPLOYEE?

Incidental Control Over "Result" Doesn't Turn Independent Contractor into Employee; Control Over "Means" Is the Test

The issue was whether the alleged "employer" had to pay for unemployment insurance for the individual involved. It did if he was an "employee", but not if he was an independent contractor. The administrative law judge and the commissioner of labor deemed him an employee, and the appellate division upheld that as supported by substantial evidence. Reversing, the Court of Appeals holds that the record did not furnish such support. It cancels the assessment. *Empire State Towing and Recovery Ass'n v. Commissioner of Labor*, 15 N.Y.3d 433, ... N.Y.S.2d .... (Oct. 26, 2010).

Empire is an association of tow truck operators which retained O'Connell, a lawyer with an Albany office, "for legal and lobbying services". He maintained a database for the association and did various mailings for it, among other things, but he did these things out of his own office and did not work exclusively for the association. The Court of Appeals finds that what he did was achieve "results" the association wanted, but "means", not "results", is the test, and the Court finds that the means in this case were controlled by O'Connell.

The labor department pointed to the fact that while O'Connell could sign checks, he had to get the association treasurer to co-sign for anything over $500. That was a mere incident, in the Court's eyes. So was the requirement that O'Connell submit "periodic reports and attend meetings", conditions just as readily exacted of independent contractors.

Writing the opinion, Judge Jones stresses that the test is based on "overall control", and that there was no substantial evidence in the record to support a finding that such control was exercised over O'Connell. Hence he was not an employee, and the association did not have to pay for unemployment insurance for him.

The test used is especially apt, says the Court, when the work involved is, as it is here, the work of a professional who also has to be sensitive to "ethical responsibilities".

"LATENT EFFECTS OF EXPOSURE"

Injury Occurring Mere Hours After "Exposure" Can Nevertheless Be Deemed "Latent", Giving Plaintiff Statute of Limitations Extension for Delayed Discovery of Cause

That's the answer the Court of Appeals sends back to the Second Circuit after answering three certified questions on the subject, all concerned with CPLR 214-c, and most particularly its subdivision 4.

CPLR 214-c was enacted in 1986. It overruled a long line of cases that began with the Court of Appeals *Schmidt* case half a century earlier. *Schmidt* held in 1936 that when exposure to a substance causes an injury, the statute of limitations on the claim runs from the time of exposure – the time when the culprit substance enters the body – and never mind that the plaintiff doesn't become aware of any resultant injury until it manifests itself years later. This kind of case became known as the "latent exposure" case.

It took 50 years, but in 1986 the legislature at last overruled *Schmidt* and its progeny with the adoption of CPLR 214-c.

Subdivision 2 of CPLR 214-c starts the three-year statute in latent exposure cases from the time the plaintiff discovers or with reasonable diligence should have discovered the injury – meaning the symptoms that the exposure produces. (We did a lead note on the subject in Digest 321.)

Another part of the statute, subdivision 4, addresses the situation in which the plaintiff discovers the injury but doesn't then realize what the cause of it is, discovering the cause only later. It gives the plaintiff one year from the discovery of the cause in which to sue, with the proviso that the discovery of the cause occur no later than five years after the discovery of the injury.

Subdivision 4 is the prime subject of the certified questions in *Giordano v. Market America, Inc.*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2010 Slip Op 08382 (Nov. 18, 2010; 4-3 decision). Subdivision 2 explicitly refers to an injury caused by the "latent" effect of exposure; subdivision 4 doesn't use the word, but the Court in *Giordano* holds that that's nevertheless what the subdivision applies to – a substance that implants injury immediately but doesn't produce effects until later. It's all of a piece with the overall

purpose of CPLR 214-c. That's the Court's holding in response to the Circuit's first question.

The second and harder question concerns the discovery-of-cause aspect of subdivision 4. It asks whether an injury that occurs within hours of exposure can be considered "latent" and thus afford the plaintiff the advantage of the extended time that subdivision 4 allows for discovery of the cause.

In *Giordano* the plaintiff suffered strokes in 1999, caused, plaintiff contends, by a drug called ephedra that plaintiff had been taking for two years. Designed among other things to regulate weight, it can result in temporary constriction of some blood vessels for a short period after ingestion.

Plaintiff claims not to have suspected ephedra of causing the strokes until 2003 when he read news reports of a baseball player whose stroke might have been caused by ephedra. This was some four years after plaintiff's strokes, putting plaintiff in need of the discovery-of-cause time extension of CPLR 214-c(4) in order to support an action.

In an opinion by Judge Smith, the majority holds that plaintiff may have the extension. The Court acknowledges that while the discovery-of-injury/discovery-of-cause link was planned only for injuries whose discovery is long delayed, it believes that if legislative attention were called to the present situation, in which the injury is discovered in relatively short order and only discovery of the cause is long delayed, it would have included it in the CPLR 214-c benefits.

That's the main issue on which the dissent, written by Judge Read, disagrees. The statute's history, it says,

> evidences only a desire to enact a time-of-discovery rule for plaintiffs afflicted with latent diseases, such as workers exposed to asbestos or the adult daughters of mothers who ingested DES during pregnancy, not a free-floating intention to alter the accrual rule in every case where a disease's etiology is difficult to divine.

The third question put by the Circuit deals with the proof required of plaintiff to show that the causal connection to the injury could not be discovered in time for suit without the "cause" extension the statute offers. Is it plaintiff's own knowledge of the causation that counts here, or that of the "technical, scientific or medical" community of the expert group involved? The latter, holds the Court.

What the plaintiff was trying to do here in *Giordano* was also what was tried in the Court's 1997 *Wetherill* decision (Digest 448): have the Court hold that plaintiff need only show that he himself was unaware of the cause, i.e., use the subjective standard of his own actual knowledge. But that would make every case contingent, held *Wetherill*, "on such fortuitous circumstances as the medical sophistication of the individual plaintiff and the diagnostic acuity of his or her chosen physician". Hence the Court held, and now

holds again, that the awareness that counts is that of the scientific community itself, not the plaintiff's own.

The case goes back to the federal court for resolution, with its questions answered.