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

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DEFENDANTS' DISTINCT OBLIGATIONS UNDER ARTICLES 14, 14-A, AND 16 WHEN DEFENDING A PERSONAL INJURY ACTION

INADVERTENT WAIVERS RESULT WHEN ONE ARTICLE IS CONFUSED WITH ANOTHER

In *Jones v. Kalache,* .... Misc.3d ...., 915 N.Y.S.2d 479 (Sup.Ct., Westchester County, Jan. 20, 2011), a medical malpractice defendant pleaded an Article 16 defense when he meant to plead an Article 14-A defense. It resulted in the medical malpractice defendant's waiver of the right to have the jury consider plaintiff's own contributory fault, which might at least have abated the damages award. Defendant was held to forfeit that right because of his pleading neglect.

The *Jones* case is treated in Issue 230 of Siegel's Practice Review. The result in this common tort scenario suggests the value of a more general review of the three articles in juxtaposition, which we now undertake here in the Digest.

Article 14 of the CPLR is the article on contribution among tortfeasors. It codified in 1974 the celebrated Court of Appeals 1972 decision in *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, which overturned the common law rule that barred contribution among tortfeasors. That old rule enabled an injured person to pick from among the tortfeasors, singling out any one or any combination of them to pay all of plaintiff's (P's) damages, which let the unjoined ones off the hook entirely: the ones joined had no right to add them or otherwise proceed against them. *Dole* gave them that right, expanding contribution rights dramatically. (See Siegel, New York Practice 4th Ed. §§ 170 et seq.)

All of that happened during the reign of the old "contributory negligence" rule, which barred a plaintiff from any recovery at all if guilty of any contributory fault at all. That, too, was shortly to change, and that's where Article 14-A comes in. Distinct from Article 14 and its preoccupation with fault among tortfeasors, Article 14-A was enacted in 1975 – a year after the *Dole* codification of Article 14 – to substitute the rule known as "comparative negligence" under which a plaintiff guilty of contributory fault can still recover, but with his damages reduced by his own contributory share. (See id., § 168E.)

All that while, yet another old rule was holding sway: the common law rule of "joint and several" liability, under which each tortfeasor was responsible not only for the share of P's damages that he himself caused ("several" liability), but also for the shares attributable to the other culpable tortfeasors ("joint" liability); each tortfeasor was in effect a guarantor of all of P's damages. One paying more than his own share would of course have contribution rights against the others for their shares, but if any of these others proved insolvent, the loss was not the plaintiff's, but of the deep pocket from whom the plaintiff was able to collect everything.

In 1986, a little more than a decade after the 1974 and 1975 enactments of Article 14 and 14-A, the legislature decided that it was now time, if not to overturn it entirely, then in any event to modify the rule of joint liability. In that year, Article 16 was enacted, holding that any tortfeasor found responsible for 50% or less of the plaintiff's damages would be liable only for that, and no longer a guarantor of the shares of the others (i.e., no longer the bearer of the "joint" liability burden). Article 16 is a complicated article – much more so than the other two (see id., §§ 168A-168D) – but its mission, at least, is clearly distinguishable. (It applies, incidentally, only to P's non-economic damages, i.e., pain and suffering; for the economic damages – e.g., medical expenses and loss of earnings – joint liability is unchanged.)

Measuring the defendant's obligations under each of the three articles, we can start with Article 14-A, the least complicated. Under that article all the defendant wants to do is inject the plaintiff's own fault into the case so as possibly to mitigate damages. At the pleading stage all the defendant has to do is plead the plaintiff's contributory fault as a defense. CPLR 1412 says that briefly, and clearly.

The defendant may have greater chores under Articles 14 and 16, which require the defendant to consider whether to join others, not already parties, for purposes of seeking contribution from them (Article 14 business) or possibly just to reduce his own potential "joint" liability down to "several" only (Article 16 business). Under all three articles (Article 14-A now included) the defendant seeks to diminish his own exposure, but while Articles 14 and 16 require the defendant to consider this by turning to co-tortfeasors and impleading them if they're not already parties, Article 14-A contemplates no joinder problems for the defendant at all. Article 14-A is just a face-off between the defendant and the plaintiff in which the defendant seeks a reduction of damages based on the plaintiff's own comparative fault, and all the defendant has to do to assure that he has that chance is plead it as a defense.

That's what the defendant failed to do in *Jones*, and it cost him. He pleaded only Article 16, on liability among tortfeasors, instead of Article 14-A, on the plaintiff's contributory fault, and afterwards, when he asked the court to include a charge to the jury on the plaintiff's share of fault, the court refused it on the ground that the right was waived with the defendant's pleading omission. The defendant argued that the pleading of the Article 16 defense in effect covered the Article 14-A defense as well, but the argument was rejected and the charge refused.

Assuming that the injection of the plaintiff's fault would produce a significantly smaller verdict, the difference is what the defendant forfeited with the pleading omission.

If there was anything in other papers in the case, such as a bill of particulars, or otherwise injected into the case – such as at a conference or in discovery proceedings – in time to put the plaintiff on notice that he was charged with contributory conduct and to enable the plaintiff to prepare to meet the accusation, perhaps the court could deem the defect disregardable under CPLR 2001, but there's nothing like that in the opinion. It was apparently only in the "closing charge conference" that the point first came up, by then too late to remedy it.

The court also points to the role of CPLR 3018(b), the statute addressing affirmative defenses that the defendant has to plead. It lists some illustrative ones, and the Article 14-A defense is an explicit item on the list. Thus the defendant has it from two sides that contributory fault must be pleaded as a defense: CPLR 3018(b) and CPLR 1412.

As we noted in the SPR 230 treatment, tort lawyers in defense work, and notably those who defend tort actions only from time to time, should sit down with all three CPLR articles in front of them – 14, 14-A, and 16 – and see how they differ in their recitation of defendants' responsibilities. The review is not a task at all, and it can readily avoid the kind of substantive forfeiture the defendant sustained, almost casually, in the *Jones* case.

OTHER DECISIONS

INSURING ASBESTOS CLAIMS

Difference in "Aggregate" of Coverage as Used in Main Policy Versus Excess Policy Produces Dispute Resolved by Court in Favor of Insured Asbestos Maker

Union Carbide made asbestos and faced vast liability for the damages the asbestos caused. It sought as much insurance as it could get. This produced a basic policy of $5 million of coverage with one insurer, and excess coverage beyond that, in "layers", with other insurers. The dispute here concerned the fifth layer, covering losses exceeding $70 million and up to $100 million. Six insurers participated in that layer, meaning that each would pick up a 1/6th share of exposure in that range. They did this with a "subscription form policy" which "incorporated by reference" the terms of the basic policy, subject, however, to a distinct set of "declarations" that would apply to this policy only.

The declarations included a "Limit of Liability" of "$30,000,000. each occurrence and in the aggregate excess of $70,000,000. Umbrella Liability". The basic policy, however, which had a three-year duration, spoke of an "annual aggregate". This led to a dispute between the insured and two of the six fifth-tier insurers about their shares of the $30 million falling within the 70/100 range of their coverage. They said their "aggregate" exposure, each, was just $5 million; the insured claimed it was $15 million – $5 million for each of the three years of coverage. Whether such "annualization" was called for was the gist of the controversy. The Court of Appeals resolves it in the insured's favor.

Union Carbide Corp. v. Affiliated FM Ins. Co., ... N.Y.3d ...., ... N.Y.S.2d ...., 2011 WL 588470 (Feb. 22, 2011).

In an opinion by Judge Smith the Court says that the insurers' reading might be "plausible" in many contexts, but not in this one, involving an insured with "as large and complicated an insurance program" as this insured had to maintain. There were big differences between and among insurers, excess insurers, coverage, and coverage periods. Hence it is "implausible", holds the Court, to conclude that this insured

> would have bargained for policies that differed, as between primary and excess layers, in the time over which policy limits were spread.

Shortly into the opinion, we expected at least some reference to the rule of construction that ambiguities in insurance policies must be resolved in favor of the insured. The case is a maze seemingly tailor-made for that helpful old saw; it would have led to the same result but the Court seems to have made do without it.

There was another issue in the case concerning whether a two-month extension had been made in one of the insurer's policies. That insurer – Continental – wanted at one point "to withdraw entirely from insuring" Union Carbide's liabilities but was persuaded "to remain on the risk for two more months as an accommodation". Resolution of the effect of that extension could not be made on the record before the Court, so the issue was reserved for resolution by the trial court after remand.

MEDICAID BENEFITS

To Make Medicaid Pay More Than Statute-Set Minimums, "Exceptional Circumstances" Showing "Distress" Must Be Shown; Seeking Only to Revert to Former Standard of Living Doesn't Suffice

Medicaid benefits are available only to those whose means fall below a stated level, and when a qualified individual becomes institutionalized – as in this case in which the husband had to be placed in a nursing home – his income must be applied to the cost of the institutionalization. When he leaves behind a spouse, known as the "community" spouse, the law – not the spouse's former standard of living – sets the figure for the minimal needs of that spouse, and Medicaid kicks in only if the income available to that spouse falls short of that figure. To make Medicaid pay more than that, the New York statute (Social Services Law § 366-c[8][b]), implementing federal law, requires a showing of "exceptional circumstances which result in significant financial distress". Regulations define that to include such things as a noncovered medical expense, needed repairs to the "homestead", and sums needed to preserve an income-producing asset.

If a showing of that nature is made, income of the institutionalized spouse, to the extent available, may be invaded to apply to the community spouse, and Medicaid then steps in only if that, too, fails to meet the "exceptional" need.

What does not qualify as "exceptional" under the statute is a sum sought merely to restore the community spouse to her former standard of living. And finding that to be what the spouse was actually seeking in this Article 78 proceeding brought against the state Department of Health, the Court of Appeals upholds the department's refusal of the additional sums. *Balzarini v. Suffolk County Dep't of Social Services*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2011 WL 497925 (Feb. 15, 2011).

The department held that the costs cited by the applicant here are expenses that are deemed covered in the basic formula set by law for the support of the community spouse; it saw nothing in the evidence to suggest any of the "catastrophic" events that are needed to make Medicaid pay more. In an opinion by Judge Read, the Court of Appeals agrees with the agency.

The Court finds the proper description of these laws in its 1995 *Schachner* decision (Digest 427), which stated that the "narrow purpose" of the applicable formulae was "to protect the community spouse from financial disaster when the primary income-providing spouse [became] institutionalized". Inability to maintain to the full one's former standard of living does not qualify as a "disaster" under that standard, and all that was shown at the administrative hearing was that the wife "could not maintain her existing lifestyle if all of the husband's income was applied toward his medical care".

SCHOOL BUSSES

Public Bus Company That School District Contracts with for Bussing Students Doesn't Have Same Safety Obligations That Regular Yellow School Busses Have

The plaintiff 12-year-old, Derek, got off the public bus and then crossed right in front of it and was hit by an oncoming car going in the same direction as the bus. His father sued the bus company but the suit fails as the Court of Appeals holds that the company's obligation was merely to let the student off at a safe point. This the bus did; the Court holds that it had no further obligations beyond that. *Smith v. Sherwood*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2011 WL 497927 (Feb. 15, 2011).

In an opinion by Judge Graffeo, the Court contrasts this with the obligations that would have been imposed had the bus been a regular yellow school bus subject to the special provisions of the Vehicle and Traffic Law. One of the requirements is that the bus have – and use – flashing red lights that signal other drivers to stop until the lights go off and generally warn them that young persons may be involved and to be on the lookout for them. Public busses, such as those contracted with by the school district here, don't have that obligation. (Nor, apparently, the obligation of the driver of the regular yellow bus to guide the student in crossing and to keep the warning lights on until the guidance is concluded.)

Derek usually exited at a stop on the west side of the north/south street involved here, but for some unexplained reason the driver didn't stop there, but continued on his route into a parking lot for a turn-around (also part of the scheduled route) and then dropped Derek off on the east side of the street. The Court acknowledges that the reason for this posed

an issue of fact, but finds it unnecessary to resolve it because the bus driver carried out what the Court deems his sole obligation here: to let Derek exit "at a safe location" (whichever side of the street it might be on).

Should the school district have at least required a stipulation in the bus contract to require the driver, at a minimum, to signal to exiting students when it was safe to cross; or to supply some tag or other identification for students requiring that assistance? This is all new to us, but apparently no issues arose in the case about the obligations of the school district, which were presumably satisfied by its contracting with the public bus company just as it did.

WRONGFUL BIRTH

Because Government Programs May Not Cover All Expenses of Raising Disabled Child, Parents Have Claim Against Negligent Hospital for Expected Additional Costs

A "wrongful birth" claim is one by parents against physicians for failing to detect and report abnormal development in a fetus such as might have prompted them to terminate the pregnancy. When the child in that instance is born greatly disabled, with deformities that proper testing might have revealed as likely, the parents have a cause of action for the costs they are likely to sustain in caring for the child during minority.

In its brief memorandum opinion in 1987 in *Bani-Esraili v. Lerman*, 69 N.Y.2d 807, 513 N.Y.S.2d 382, addressing the compensation issue in a wrongful birth case, the Court of Appeals said that the parents

> may be compensated only in the amount that represents [the] ... legally cognizable injury, namely the increased financial obligation arising from the extraordinary medical treatment [to be] rendered the child during minority.

Suppose that the government supplies services for the child. Will that bar the claim against the negligent hospital? Not necessarily, the Court of Appeals now holds in *Foote v. Albany Medical Center Hospital*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2011 WL 497901 (Feb. 15, 2011), in which that additional element appears.

When the defendants in *Foote* moved for summary judgment, the plaintiffs submitted an affirmation by a physician who had prepared a "life care plan" detailing the care needed for the child. Acting as an expert on the plaintiffs' side, he referred to the government programs (as submitted by the defendants' experts) and concluded that they provided only a "minimum level of services" and that "optimal care"

> required more services than those provided by government programs and, as a result, plaintiffs had or would be forced to bear out-of-pocket expenses related to the child's special medical and educational needs.

That, holds the Court of Appeals in an opinion by Judge Ciparick, manifests a triable issue sufficient to bar the summary judgment that the supreme court had granted to the defendants. The appellate division reversed that and the Court of Appeals now affirms the reversal. The Court quotes from the appellate division opinion that

> [t]he existence of government programs ... will not, as a matter of law, eliminate plaintiffs' financial obligation for their son's extraordinary medical and educational expenses.

There were other issues in the case but the Court finds no need to address them here, leaving them for the supreme court to consider, if need be, on remand.

DISMISSAL FOR PLEADING FAILURES

Company Buying Valuable Painting Says It Was Defrauded Into Believing It Could Resell at Big Profit, But Fails to Plead Any Acceptable Theory of Recovery

If a plaintiff has a cause of action, the pleading rules are so generous that a court's discernment of any recognizable claim within the four corners of the complaint results in its sustaining, with the case preserved for trial. That's the liberal construction given CPLR 3013, the CPLR's main pleading statute. And even additional requirements imposed by special pleading statutes, like CPLR 3016(b), which on a fraud claim mandates the pleading of the "circumstances constituting the wrong ... in detail", have been liberally construed to preserve the claim if a court reviewing the pleading thinks it might possibly hold water. So held the Court in its 2008 *Pludeman* decision, reviewed recently in Digest 584.

With that liberal attitude setting the theme, a case that flunks all the tests and gets dismissed at the pleading stage must be especially remiss. *Mandarin Trading Ltd. v. Wildenstein*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2011 WL 445634 (Feb. 10, 2011), appears to be such a case. In an examination of all the bases on which the plaintiff sought recovery, the Court of Appeals, in a methodical review of each of them, finds the complaint defective – and defective enough to generate an outright dismissal without even a remand to give the plaintiff a second chance.

The transaction in *Mandarin* involved P's purchase of a Gauguin painting, apparently for $11.3 million, on the assumption – says plaintiff – that it was worth between $15 and $17 million. C, a middle man who first approached P, said he could arrange a resale at auction and recommended an expert, defendant (D), to appraise the painting. D presented his appraisal – that's where the $15 to $17 million assessment comes from – to one R. A major defect in the pleading is that R's connection with the case is completely unknown; "[n]either [R's] role in the transactions, nor his relationship to the parties is pleaded". And the appraisal letter itself is addressed "solely" to R and "neither indicates the purpose of the letter nor who requested the valuation of the painting". P got the letter, but "the complaint does not say from whom". Not a tight structure on which to found a claim for millions of dollars.

There were complications in how the transactions proceeded. The upshot, however, is that the auction was held, but failed to produce even the reserve price of $12 million that the auction set as a minimum, and the painting was not sold. On that basic fact pattern, with perhaps a few inconsequential embellishments, P went to court with this damages claim and a recitation of some four or five grounds for it.

In an opinion by Judge Jones, the Court addresses each of the grounds in turn and finds them all defectively pleaded.

A fraud claim was first. (It usually is in a parade like this.) It flunks the CPLR 3016(b) test for not having pled in detail "the circumstances constituting the wrong". A fraud complaint must set forth "all of the elements of fraud" and this one is found devoid of allegations to satisfy those elements.

Other claims are reviewed in turn, and also rejected. Negligent misrepresentation, for example, which requires demonstration of some kind of a "special or privity-like" relationship, such as found by the Court in its 1996 *Kimmell* case (Digest 447); such a relationship is not pleaded here. Breach of contract and unjust enrichment claims also fail.

The fact that the case results in a dismissal is a signal that the Court finds the pleading so essentially defective that it could not even earn P the right to amend to insert what's missing. The inference, when that happens, is that the Court thinks that the plaintiff has not merely failed to plead the facts, but that the needed facts just don't exist.

If the Court thought otherwise, it might at least have taken the path of allowing gaps in the pleading to be filled by an amendment or perhaps even a bill of particulars. That neither alternative step is taken in *Mandarin* buttresses the conclusion that the Court sees the plaintiff as having no remedy because it has not shown that it suffered any harm at the hands of any of the defendants sued.

In other words, dear plaintiff, the fault is not in our pleading of what we've got, but in what we've got.

ARBITRATOR'S POWERS

ARBITRATOR HELD TO EXCEED HIS POWERS BY SAYING HE HAS NO POWER TO CONSIDER ISSUE STATUTE SAYS MUST BE CONSIDERED

If a specific statute says you can, in other words, you have no power to say you can't.

In *Kowaleski v. New York State Dep't of Correctional Services*, 16 N.Y.3d 85, ... N.Y.S.2d .... (Dec. 21, 2010), a corrections officer (K) was given a notice calling for her termination for having made certain comments about fellow staff members and being "disrespectful and insubordinate" to her superior. She filed a grievance calling for arbitration, as required by a collective bargaining agreement (CBA), and in the arbitration

argued that all of this was based on and traceable back to her blowing the whistle on a fellow officer's misconduct several years earlier, i.e., the defense of retaliation.

Reading the CBA as limiting his authority merely to determine whether K was guilty of the charges and what an appropriate penalty would be, the arbitrator held that "he lacked authority to consider [K's] retaliation defense". He then made an award finding K guilty of the charge and the sustained charge a basis for her termination. K then brought this proceeding under CPLR 7511 to overturn the award.

After losing in the lower courts, K prevails in the Court of Appeals. The arbitrator was under a statutory obligation to consider the retaliation defense, the Court holds, and to consider it distinctly, by itself. This the arbitrator didn't do, finding himself, as noted, to be without that power, which flies directly in the face of the applicable statute, Civil Service Law § 75-b.

Subdivision 2(a) of § 75-b bars any disciplinary action against an employee for whistleblowing, and, more specifically still, subdivision 3(a) allows the employee to assert such action as a retaliation defense in the arbitration. It includes the instruction that

> [t]he merits of such defense shall be considered and determined as part of the arbitration award or hearing officer decision of the matter.

The arbitrator's failure to consider it is a violation of that law.

So be it, but what about the narrow grounds that CPLR 7511 offers for overturning an award? Mere errors of law don't suffice. Judicial rejection of the award must find some specific authority within CPLR 7511.

The Court finds that authority in CPLR 7511(b)(1)(iii): that the arbitrator "exceeded his power". When a statute includes a specific instruction, like that in Civil Service Law § 75-b, its ignoring is clearly an error of law, but, again, what about the general principle of arbitration that mere errors of law are not a basis for rejecting the award?

That restriction is by-passed, writes Judge Ciparick for the Court, when the arbitrator's holding is found to be "in excess of an explicit limitation on his power". The statute in this case said that the arbitrator had to consider the retaliation defense. Hence the arbitrator exceeded his power by holding that he could not.

This is a kind of paradox. Logically, an excess of power exists when the arbitrator goes too far. Here, however, the excess consists in his not going far enough.

The award is vacated and the case remanded for further proceedings. We'll affix the case to our growing collection of incongruities on the subject of arbitration, observed, most recently, in the lead note in Digest 611 last November.