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

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WORKERS' COMPENSATION COMPLICATIONS

COMP CARRIER PAYING DISABLED CLAIMANT MUST ALSO PAY SHARE OF LITIGATION COSTS WHEN CLAIMANT SUCCESSFULLY SUES THIRD PARTY, BUT FIGURING THAT SHARE MUST AWAIT EACH FUTURE PAYMENT

And of course the payment of that share to the claimant must await the computation. This means that this part of attorneys' fees and litigation costs – all of which the claimant must in effect pay up front – will not be reimbursed to the claimant except in spurts later on.

When the third-party suit succeeds, the comp carrier, which has been paying out to the injured claimant all this while, has a lien on the third-party recovery. Recognizing that the lien will reimburse the carrier for what it has paid, the statute requires the carrier to pay its share of the litigation expenses and fees that produced the third-party recovery.

Two prior cases in the Court of Appeals address similar situations involving workers' compensation carriers. One is the 2007 *Burns* decision (Digest 574), the other the 1983 *Kelly* decision (Digest 288). Both are relied on by the Court in its recent decision in *Bissell v. Town of Amherst*, 18 N.Y.3d 697, ... N.Y.S.2d .... (March 27, 2012), and both might therefore be profitably reread for background.

The specific issue in *Bissell* concerned a comp award made to a claimant who was rendered a paraplegic in a work-related accident. An award was made to him providing for regular payments of compensation to be made over his lifetime.

As against the employer, workers' compensation is of course the exclusive remedy, but the claimant may still bring an ordinary tort suit against a nonparty who contributed to the injury. This the claimant did, and recovered a judgment that included a substantial sum for "future medical expenses" that came to about $4,260,000 after reduction to present value.

The claimant wanted this sum included in the figure on which the carrier's fair share of litigation expenses is computed, and wanted to receive payment for the entirety of that share now.

He can't have it now because it's too speculative, holds the Court of Appeals in an opinion by Judge Pigott. The carrier will instead be required to pay the ascribable share of litigation expenses only as each payment for medical expenses is actually incurred by the claimant in the future.

As the *Burns* case phrased it, estimating each potential future medical expense in advance depends too much on surmise. But how to estimate it, then? That, quotes the Court from the *Burns* decision, must be left to the trial court, which,

> in the exercise of its discretion, can fashion a means of apportioning litigation costs as they accrue and monitoring (e.g., by court order or stipulation of the parties) how the carrier's payments to the claimant are made. Thereby, the court can ensure that the payment of attorney's fees by the carrier is based on an actual, non speculative benefit.

Acknowledging that an assessment for future medical expenses is made by the jury and included in the recovery in the third-party action, the Court here in *Bissell* sees

> a distinction between a non speculative future medical expenses award made by a jury and the *benefit* that the carrier receives under the Workers' Compensation Law as a by-product of that award.

In the third-party action, the Court points out, "the injured employee will have only one opportunity to obtain a recovery for future medical expenses", while in the comp context "it is possible to wait and see what happens".

As an aside, we might take workers' comp out of the picture altogether and substitute another common scenario that doesn't involve it – a personal injury not occurring on the job – but which poses analogous mathematical complications. We refer here, of course, to the dark realm of Articles 50-A and 50-B of the Civil Practice Law and Rules, which mandate that the payment of certain money judgments in tort actions be spread out over the future. As noted in the Gleason Commentaries on those articles in McKinney's, they're addressed to "perceived inequities" in the way the common law computed into a present lump sum the amounts awarded for anticipated future expenses and for suffering experienced by the victim or the victim's dependents in a personal injury or wrongful death case. "The common law system gave the jury a difficult mathematical problem", the Commentaries explain, "the calculation of the sum, which if paid today, would supply funds to fairly compensate for future losses".

We might also note that while many lawyers deem those articles outright atrocities, others regularly immersed in the realm – and of course the economists to which they go begging for help – see them more as a shrine before which they and their dependents periodically worship. (The Commentaries suggest, in fact, that the articles would be more appropriately dubbed "The Non-Uniform, New York Economists' Full Employment Acts".)

The judges who deal with the articles from time to time have not frequently been seen among the worshipers.

OTHER DECISIONS

DECEPTIVE BUSINESS PRACTICES

E, Lessee of Equipment and Financial Services from Lessor R, Fails to Sustain Claim After Dispute Over Lease's Renewal Steps, Because E Could Show No Damage

The lease was for a two-year period and called for automatic renewal for like two-year periods unless either party gave at least 60 days written notice of termination to the other. It recited the monetary consequences of a failure to follow the prescribed termination steps.

Lessee E, the party seeking to terminate, did not give lessor R adequate termination notice, and that would presumably have triggered some of the recited consequences, but E contended that all fault in that regard lay here with R for failing to satisfy the requirements of §§ 5-901 and 5-903 of the General Obligations Law. Those statutes require R, between 15 and 30 days prior to the time the lease calls for renewal, to call E's attention to the renewal option and its time demands.

R did not give that notice, and even indicated that it was never its practice to, but the bottom line here – in *Ovitz v. Bloomberg L.P.*, 18 N.Y.3d 753, ... N.Y.S.2d .... (March 27, 2012; 6-1 decision) – is that no harm at all came to E because R waived whatever penalties it had been claiming. Hence E had no justiciable claim to make and its suit fails. In an opinion by Judge Jones affirming the appellate division, the Court grants R's motion to dismiss E's complaint in its entirety under CPLR 3211(a)(7) (failure to state a cause of action).

Judge Pigott, the dissenting judge, points to the fact that part of the relief sought by E's complaint was a declaratory judgment, the nature of which, he argues, sets up a context for sustaining E's action at this early stage and leaving resolution of the issues for further proceedings.

The dissent also takes issue with the appellate division's finding that the cited statutes give "no private right of action for the violation", but the majority does not resolve that issue. It assumes "without deciding" that the statutes do confer such a private right of action but says E's claim was nevertheless "rightly dismissed because he has not suffered any harm as a result of [R's] alleged practices". He did not pay any termination fees, and did not pay for any services he didn't receive.

E had sought to make this a major case on R's renewal practices: he brought the action in class form, but it never got to the stage of class certification.

LIABILITY FOR BANK BURGLARY

Security Company Gets Off Hook for Burglary at Bank Because Its Contract Required Bank to Secure Insurance for Losses

Two different security companies contracted with the Abacus bank to supply it with security services (intruder detectors, alarm systems, etc.). The bank was afterwards broken into by talented burglars who, on a weekend, got into the bank's back entrance and with acetylene torches broke into the concrete and metal walls of a vault. Within the vault they then got into a safe that contained the bank's "overnight" cash of some $600,000, and property of about $927,000 from some safe deposit boxes.

The allegations say the companies' equipment was not functioning properly for some time and that they knew of this but failed to correct or even warn about the problem. The suit is by the bank against the companies to recover its losses.

One of the companies, Diebold, earns a complete dismissal of the action because its contract had a "Property Insurance and Waiver of Subrogation" clause that required Abacus to "look solely to its insurer" for such losses. The bank's contract with the other company, however, ADT, had "no similar waiver-of-subrogation clause". It provided instead only "that insurance, if any, covering personal injury and property loss or damage" was the bank's responsibility to obtain.

Therein lies a distinction with a big difference, holds the Court of Appeals in *Abacus Federal Savings Bank v. ADT Security Services, Inc.*, 18 N.Y.3d 675, 944 N.Y.S.2d 443 (March 22, 2012). It dismisses all the claims against Diebold, but not as against ADT. ADT's contract with the bank "does not contain a similar waiver-of-subrogation clause that would act as a total defense", says the Court in an opinion by Judge Ciparick.

The Court says that as a "general rule", parties may enter into contracts that absolve them from liability for their own negligence, but not when the charge is one of gross negligence; there New York's "public policy" will not allow contractual insulation. It cites for this proposition its 1992 *Sommer* decision (Digest 389).

The Court then finds that gross negligence can be spelled out against both defendants from the allegations of the complaint, so the key question is the effect of their contracts' stipulations about the securing of insurance.

It has a decisive effect in the *Diebold* case, holds the Court, but not in *ADT*. Quoting from its 1979 opinion in *Board of Educ. v. Valden Associates, Inc.*, 46 N.Y.2d 653, 416 N.Y.S.2d 202, the Court explains that

> [a] distinction must be drawn between contractual provisions which seek to exempt a party from liability ... and contractual provisions ... which in effect simply require one of the parties to the contract to provide insurance for all of the parties.

The Diebold contract falls under the latter, the Court finds, but the ADT contract does not because it "did not require Abacus to obtain insurance to cover losses stemming from ADT's gross negligence"; the question of whether to obtain insurance in the *ADT* case was just a "discretionary" matter, the Court finds.

Since the burglary took place on a weekend when the bank was closed and bank personnel absent, the Court's observation that "[t]he police were not notified during the course of the burglary" might suggest that the burglars were expected to give the notice. An eccentric idea, of course, but perhaps less so in the case of a bank that calls itself Abacus. (Perhaps a generous reader can send it some new software.)

FREEDOM OF INFORMATION LAW

Exemption from FOIL Disclosure for Inter-Agency Materials Applies to State and Municipal, But Not Federal, Agencies; Hence Records Exchanged by State DEC with Federal EPA Are Not Exempt

The records concerned PCBs in the Hudson River and the joint endeavor of the U.S. Environmental Protection Agency (EPA) and the N.Y. Department of Environmental Conservation (DEC) to undertake a dredging project to clean them out.

The town of Waterford gets its water from the Hudson and sought to secure from the DEC its records on the project, but the DEC withheld some of the records that had been exchanged between it and the EPA. The DEC relied on Public Officers Law § 87(2)(g), which exempts certain "inter-agency" materials.

The Court of Appeals turns to § 86(3) of the law for the definition of "agency", finding it pointedly applicable to state and municipal agencies and hence pointedly inapplicable to federal ones. While the common definition of "agency" might include the federal ones, that's irrelevant when a statutory definition preempts, as it does here. In an opinion by Chief Judge Lippman, the Court therefore concludes that

> [s]ince the EPA is not an 'agency' for purposes of [the] FOIL, the inter- agency exemption does not apply to materials exchanged between these entities.

Any change in that regard must be sought from the legislature, the Court declares. *Waterford v. New York State Department of Environmental Conservation*, 18 N.Y.3d 652, 944 N.Y.S.2d 429 (March 22, 2012).

Section 87(2)(g) refers to "intra-" as well as "inter-" agency materials, which enabled the Court to cite its 1985 *Xerox* decision (Digest 310), involving the "intra-", in response to another of the DEC's arguments here in *Waterford*, an "inter-" case. In *Xerox*, the Court considered materials prepared by consultants and held that even reports done by outside consultants may be exempt from disclosure under the statute as “intra-agency materials”.

The DEC was seeking to have the Court treat the EPA as just the equivalent of an outside consultant in the *Xerox* sense, and thus to secure the same exempt status for the traded reports here in *Waterford*. The Court rejects the analogy. The EPA here was the lead agency on the dredging project; it “was not retained by the DEC and does not function as its employee or agent”.

It’s the deliberative process that this category of exemption aims to protect and, as *Xerox* recited, it would make “little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants”.

CIVIL SERVICE DISCIPLINE

When Hearing Officer’s Recommendation to Terminate School Official Is Reviewed by Board of Education, Board Members Who Testified at Hearing Must Disqualify Themselves

The hearing in this case involved misconduct and incompetence charges against the petitioner, the business manager of a school district. Two of the persons testifying against him at the hearing were members of the Board of Education.

The hearing officer found against the petitioner and recommended his discharge under the applicable disciplinary statute, § 75 of the Civil Service Law. When the determination then came before the board for review, both of the testifying members participated and voted to uphold the dismissal.

Holding that the two testifiers should have been disqualified, the Court of Appeals upholds the appellate division’s annulment of the determination and the remand it made for a new review by the board, with the testifiers excluded. *Baker v. Poughkeepsie City School District*, 18 N.Y.3d 714, ... N.Y.S.2d .... (March 22, 2012; 4-3 decision).

The tainted board members here were the president of the board, to whom the petitioner spoke in violation of instructions from his supervisor, and a board member who had discovered an error by the petitioner in calculating the school budget.

Although involvement in the disciplinary process doesn’t require recusal automatically, says the Court in an opinion by Judge Jones, recusal is indicated in this case because the two members had become “personally involved”. Their participating in the review would therefore be untenable because it would require them to assess their own credibility as witnesses. If their votes were needed to effectuate a decision (the so-called rule of necessity), the conclusion might be otherwise, but here that’s irrelevant because, the Court finds, “neither of their votes were needed to take disciplinary action”.

The three-judge dissent, written by Judge Pigott after reviewing the "substance" of the two board members' testimony at the underlying hearing, finds that no issue of credibility existed in this case such as to rouse the stated apprehensions of the majority, because the petitioner did not dispute any of the facts as to which the two testified. As to the member who had called attention to the error in the school budget, for example, the point about its containing error was undisputed.

The dissent also points out that at the stage of this review by the Court of Appeals, the case had already gone back to the board and the board had voted again, the same way, but this time without the participation of the two challenged members. The result is that the only consequence of the Court's present decision, stresses the dissent, is that the petitioner will recover back pay, but that alone "has consequences that extend beyond this case". It means that there is

> nothing to prevent industrious attorneys for employer and employee alike from subpoenaing pertinent members of the governing boards to proffer testimony on matters tangential to the issues,

thereby enabling them to disqualify members whom they expect to vote against them.

PRIMA FACIE TORT

Wife's Family, Sued by Adulterous Teacher for Trying to Get Him Fired by School Authorities, Can't Plead Privilege

The statements made by the defendants were apparently true – or are assumed to be on this motion to dismiss, in any event. They alleged that the plaintiff took up with a colleague and that the defendants, his wife's father and brother, wrote to the school and made a concerted effort to get him fired. Stressing that that was their motive, a majority of the Court of Appeals holds that this takes their conduct out from under the shield of absolute privilege otherwise offered by *New York Times v. Sullivan* and like cases.

Citing its 1958 decision in *Brandt v. Winchell*, 3 N.Y.2d 628, 170 N.Y.S.2d 828, the majority says that a "balancing test" must be applied between the interests of the parties and the interests of the public,

> for claims alleging that a lawful act (the making of a complaint) became unlawful as a result of [the defendants'] ... malicious motives.

Applying such a test here in an opinion by Judge Graffeo, the Court holds that a prima facie case is made out against these defendants. It sustains the complaint. *Posner v. Lewis*, 18 N.Y.3d 566, 942 N.Y.S.2d 447 (Feb. 21, 2012).

In a concurring opinion by Judge Smith, three judges disagree about the use of a "balancing test". They also vote to sustain the claim, but only because they do not see the subject of these communications as involving public matters of the kind that the U.S.

Supreme Court has sought to insulate from suit. They say that in the sense used in the relevant caselaw,

> [t]he subject of the communications at issue here – principally, plaintiff's adulterous affair with a fellow teacher – was not a matter of 'public concern'.

The communication in *Brandt*, for example, says the concurrence, involved a topic discussed in "nationally circulated printed publications and in nationally broadcast radio programs", and it is "unacceptable" to extend it to offenses "as minor as adultery (a class B misdemeanor that is never prosecuted)". The concurrence continues that

> [t]he *Brandt* privilege should be held to protect, at most, communications about matters of public concern or about significant criminal activity.

In adopting the "balancing test", the majority sees a "critical distinction" between the present case and *Brandt*. Again accepting the complaint's allegations at this pretrial stage, the Court says the defendants here "did more than instigate an inquiry or investigation". Stressing the family elements, the Court sees in the complaint allegations that the defendants attempted to coerce the plaintiff

> into relinquishing his parental rights by offering him money and threatening to reveal certain information to school authorities to ensure that he was denied tenure ... [and when he refused] the defendants made good on the threat.

The majority's conclusion is that the complaint here doesn't merely allege "malicious motive", but in essence a "blackmail scheme" – conduct altogether beyond anything prior caselaw would support as privileged.

HOW MUCH NOTICE REQUIRED IN TAX FORECLOSURES?

PROPERTY OWNERS, NOTIFIED OF FORECLOSURE FOR NONPAYMENT OF REAL PROPERTY TAX, ARE NOT CONSTITUTIONALLY ENTITLED TO NOTICE OF SUBSEQUENT PROCEEDINGS BEYOND THAT

In a dispute all too typical of what can happen when a property owner fails to pay real estate taxes and a dispute results about whether the owner has been given adequate notice of the resultant tax foreclosure proceedings, the owners lose out to the county but generate some strong lessons for property owners in all cases in the future. The owners lose the property here when the Court holds the county's notice procedures adequate and when – between the lines – the owners are themselves found at fault for sitting on their rights too long (in this case for several years starting in 2004). *Orange County Commissioner of Finance v. Helseth*, 18 N.Y.3d 634, 942 N.Y.S.2d 442 (Feb. 21, 2012).

Apparently because of a change of address – from the still-owned property foreclosed on to a new address at a different site – the owners didn't get notice of the tax foreclosure. It is conceded, however, that the various steps of attempted notice given by the county satisfied constitutional requirements. These included publishing the notice in five newspapers three times over a two-month period, posting the notice in "conspicuous" places at the county finance office, county clerk's office, and county courthouse, and mailing the notice to the owners by regular and certified mail to the old address the county still had of record. That mail was returned "unclaimed".

In an opinion by Judge Jones, the Court of Appeals finds those methods adequate to satisfy due process, despite the owners' claim of lack of actual notice. It reverses the lower courts, which had faulted the county for not making a more individual inquiry about the location of the owners. The Court of Appeals does not deem such an additional inquiry mandated by due process.

The owners did say they took steps to correct the address on county records, and still didn't get subsequent notices at that address. (County records continued to indicate the old address.) That conflict is addressed no further by the Court of Appeals in *Helseth*, which is what leads us to assume that the Court frowns on inaction by owners who, knowing that periodic tax payments are called for, take too little initiative to see they're paid.

That seems to us the best lesson of the case. We may conclude from it that it's incumbent on the owners to inquire about their tax obligations in these circumstances, and not the obligation of the county to give any more notice of foreclosure than it did.

An interesting further element in the case is that a local law conferred on the owners an additional "release" option, providing that its enforcement official

> may, prior to the public auction [the foreclosure's culmination], permit the previous owner of record to purchase ... [the property] through a release of the County's interest ....

The owners claimed they didn't get notice of that, either, but the Court holds that no constitutional guarantee applies to such a step; that "constitutional due process only required notice of the pending foreclosure action and not for each successive stage of the proceedings". Its position is that "all that was constitutionally mandated of the County was the provision of reasonable notice of the governmental taking ... the foreclosure action".

The Court finds in point the Second Circuit's 1988 decision in *Weigner v. City of New York*, 852 F.2d 646, which held that as long as the initial notice of the foreclosure action was given, the municipality, in that case the city,

> was not required to send additional notices as each step in the foreclosure proceeding was completed or when each of the available remedies was about to lapse.

Here in *Helseth* the Court also sees the local law supplying the release option as merely a “courtesy extended to the previous landowner ... [which] should not be equated with the establishment or guarantee of a property right”.