JUDICIAL CODE OF CONDUCT, PERSONAL INJURY ACTIONS

ROY L. REARDON AND MARY ELIZABETH MCGARRY
SIMPSON THACHER & BARTLETT LLP

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The Court of Appeals had before it this spring four appeals from decisions of the State Commission on Judicial Conduct in which judges had been removed from office. Two of those appeals were decided on May 1, 2003 and are discussed below, *Matter of Mason* and *Matter of Fitzgerald.* Most significantly, in *Mason* the Court declared that it was "not bound by [a] . . . Federal District Court's decision," *Spargo v. New York State Comm'n on Jud. Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003) (Hurd, J.). *Spargo* had found unconstitutional certain sections of the N.Y. Code of Judicial Conduct that Justice Reynold N. Mason of Kings County Civil Court was removed from office for violating. Judge Hurd also enjoined the Commission from enforcing against anyone the rules he had held unconstitutional.

The other two cases, *Matter of Raab* and *Matter of Watson*, were argued before the Court of Appeals on May 7. Those cases are being closely watched because they raise the additional question of what restraints may be placed upon the speech of judicial candidates and judges consistent with the First Amendment, applying the U.S. Supreme Court's recent decision on the subject, *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002).

In a medical malpractice case, a unanimous Court answered a question that it left open in 1997, deciding that expert testimony is admissible to educate a jury in a *res ispa loquitor* action as to the likelihood that an occurrence would take place without negligence where a basis of common knowledge is lacking.

In a product liability case the Court addressed another matter that it had left "for another day" in an opinion five years ago (*Gebo v. Black Clawson Co.*) – the boundary of "casual manufacturer" status that places certain sales outside the reach of strict product liability claims. Finally, we briefly note the controversy over structured judgments and the legislation requiring them in certain circumstances, CPLR Article 50-A, again brought to the surface in *Desiderio v. Ochs.*

Federal Case Law Not Binding

The effect of a U.S. District Court ruling is perhaps the most significant issue raised by *In re Mason.*

Kings County Supreme Court Justice Reynold N. Mason was charged with misconduct by the Commission on Judicial Conduct ("Commission") for commingling funds in his attorney escrow account (including rent payments he received from an illegally sublet apartment), and paying personal expenses out of the account. After hearings, the Commission determined that removal from office was the appropriate sanction. Justice Mason sought review by the Court of Appeals.

Ian the interim, an action challenging various sections of the Code of Judicial Conduct was commenced in the Northern District of New York by, among others, Albany County Supreme Court Justice Thomas J. Spargo, another jurist charged by the Commission. The District Court held in *Spargo v. Comm'n*, that: it was not required to abstain from determining the constitutionality of rules promulgated under the New York Judiciary Law, that certain challenged provisions – including a prohibition from engaging in political activity – were void as prior restraint upon First Amendment rights, and that other rules were unconstitutionally vague. Plaintiffs obtained a permanent injunction barring the Commission from enforcing specified provisions of the Code.[i]

One question that occurs is whether the Commission's continued opposition to Mason's appeal from proceedings in which he was found to have violated two of the rules held unconstitutional by the District Court, including oral argument before the Court of Appeals, was consistent with the federal injunction issued last February.

In fact, on May 7, in yet another federal court proceeding, Columbia County Supreme Court Justice John G. Connor argued to Judge Hurd that a Commission proceeding against him was in violation of that Court's *Spargo* injunction, which the District Court had declined to stay. Judge Hurd rejected the argument in a May 9 order explaining that first, the Commission had charged Justice Connor with violating different Code provisions that those stricken in *Spargo*, and second, "[c]learly it [the Commission] may proceed when, as here, it brings specific misconduct charges relating to specific Code sections." In any event, on May 7th the Second Circuit granted a temporary stay of the *Spargo* injunction pending a May 20 argument on the Commission's motion for stay pending appeal.

Another question that occurs, which the Court of Appeals answered with a resounding "no" in its *per curium* opinion, was whether that Court was bound by the District Court's declaration certain Code provisions at issue in *Mason* were unconstitutional. Perhaps the federal ruling received short shrift by the Court because Judge Hurd's opinion had been harsh in its discussion of the Court of Appeals. The *Spargo* court's rationale for declining to abstain was that "plaintiffs do not have an adequate opportunity to have their constitutional claims determined" in state court, the Court of Appeals "never [having] undertaken a constitutional challenge to the Rules on review of a Commission determination."

In any event, Mason had not raised any constitutional challenge to any portion of the Code either before the Commission or in briefing to the Court of Appeals. The Court found that Mason unquestionably had commingled funds in an escrow account, an offense punishable by

disbarment. This conduct, and Mason's failure to cooperate with and lack of candor before the Commission, the Court concluded, made removal an appropriate remedy.

The Commission's removal remedy was also held appropriate in another case, *Matter of Fitzgerald.* Yonkers City Court Judge Edmund G. Fitzgerald had been disbarred while on the bench for having been derelict in his management of his attorney escrow account. Judge Fitzgerald had been charged with violating three sections of the Code, two of which had been held invalid in *Spargo.*

Expert Testimony in Res Ipsa Cases

The plaintiff in *State v. Lourdes Hospital* underwent successful abdominal surgery, but later sued the hospital, surgeon and anesthetist for an injury to her arm she allegedly sustained during the course of the surgery.

The issue in the case was what had caused plaintiff's injury. After discovery, the defendants moved for summary judgment on the basis that there was no direct evidence of negligence, a contention plaintiff conceded. Plaintiff invoked the doctrine of *res ipsa loquitor* to enable the jury to infer negligence, however, and submitted expert medical evidence that the injury would not have been sustained in the absence of negligence in dealing with her arm during the surgery.

The trial court denied defendants' motion, relying upon *Kambat v. St. Francis Hosp.*, 89 N.Y. 2d 489 (1997), the very case in which the Court of Appeals had concluded not to decide the issue of whether such expert evidence should be admissible. The Appellate Division, Third Department, reversed 3-2, setting up an appeal to the Court as of right. The Third Department held that an inference of negligence was not permitted because plaintiff's injury was not the sort from which the jury, drawing upon its common knowledge and experience, could conclude would not have occurred in the absence of negligence.

The Court reversed the Appellate Division and reinstated denial of summary judgment to defendants. In doing so, it reviewed the three elements a plaintiff must establish to invoke *res ipsa loquitor*: an event that ordinarily does not happen in the absence of negligence, causation within the exclusive control of the defendant, and no action or negligence by the plaintiff contributing to the occurrence.

Defendants argued that the first prong of the *res ipsa* test could not be met because plaintiff was relying upon expert evidence and the doctrine could only be invoked relying upon the "everyday experience" of the jury; in other words, if expert evidence was required, the test could not be met.

The Court in an opinion by Judge Carmen Beauchomp Ciparick disagreed, concluding that expert evidence could properly be used to "bridge the gap" between the jury's inability to conclude that the injury would not normally occur in the absence of negligence, using its own

experience and common knowledge, and the knowledge of doctors who had such ability based upon their experience.

The Court also cautioned that while in a proper case such expert evidence is permissible, a plaintiff must still prove the other prongs of the *res ipsa* test, and that while the doctrine permitted the jury to infer negligence, the inference could be rebutted by the proof offered by the defendant.

Casual Manufacturer

Is a custom fabricator regularly in the business of manufacturing and selling products a "casual manufacturer" and thus not subject to strict product liability claims because the fabricator does not regularly make the particular product that caused plaintiff's injury? No, answered the Court of Appeals in *Sprung v. MTR Ravensburg Inc.* The Court explained in an opinion by Chief Judge Judith S. Kaye that, "[s]o long as the product was built for market sale in the regular course of the manufacturer's business, as it was here, strict liability may apply."

The casual manufacturer doctrine arises out of the fact that the public policy reasons for imposing strict product liability do not apply in all situations. These policy reasons are that: due to the complexity of modern products and how they are made, the manufacturer is best able to determine if a product is suitable for its intended use; only the manufacturer has "the practical opportunity . . . [and] considerable incentive, to turn out . . . safe products;"[ii] one selling products in the ordinary course of its business assumes a special responsibility to the public; and the burden of injuries caused by a defective product are better placed upon the manufacturer and seller as a cost of business that may be insured.

These policy rationales apply to mass producers and sellers of a product. But because they do not apply to entities not in the business of selling products, the Court of Appeals has held, those entities may not be sued under strict liability.

The Court had most recently addressed casual manufacturers in *Gebo v. Black Clawson Co.*, 92 N.Y.2d 387 (1998). There the defendant, which was not ordinarily engaged in selling machinery, had modified an embossing machine for its own use and later sold the equipment. The Court held that such "occasional" or "casual" sales were not subject to strict liability claims.[iii]

In the case decided last month, plaintiff Sprung was injured when a retractable floor built into the wall of a pit in which he was working came loose from the wall and fell on him. Sprung sued VF Conner Inc., which had designed and manufactured the floor, and his employer, which had some involvement in the design of, installed and maintained the floor. Conner sought summary judgment on the grounds that the accident had been caused by the employer's conduct and, in any event, Conner was only a casual manufacturer because the product was the only retractable floor this custom metal fabricator had ever made.

The Court of Appeals found that the public policy reasons for imposing strict liability apply to custom fabricators who hold themselves out to the public as having expertise in their regular business of custom fabrication. If selling custom products is within a defendant's regular course of business, therefore, any product it builds for market sale can be the subject of a strict liability claim.

Structured Judgments

It would be inappropriate for this column to fail to acknowledge the three opinions of the Court in *Desiderio v. Ochs*, all in affirmance of the order of the Appellate Division, First Department. The Court of Appeals sustained the structured judgment ably crafted before Supreme Court Justice Alice Schlesinger in accordance with the literal dictates of CPLR Article 50-A, a statute aptly described as "every judge's nightmare." No more pointed cry by the Court to the Legislature for change can be recalled than that reflected in the Court's detailed opinion by Judge Carmen Beauchamp Ciparick and the concurring opinions of Judge Albert M. Rosenblatt and Judge Susan Phillips Read.

The structured judgment legislation, born out of well-intentioned "tort-reform," has drawn the scorn of bench and bar, as well as those who spearheaded the legislation to regulate and structure the payment of huge judgments. The affirmance of the result below represents a commendable exercise of judicial restraint by the Court to follow the dictates of a statute that turned a judgment of $50 million before structuring into a potential payout of $140 million. Clearly legislative change, which will be difficult to achieve, is needed.

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[i] Those provisions are Rules 100.1, 100.2(A), 100.5(A)(1)(c)-(g), and 100.5(A)(4)(a) of the Rules of the Chief Administrator of the Courts, N.Y. CRR, Title 22.

[ii] *Quoting Codling v. Paglia,* 32 N.Y.2d 330, 341 (1973).

[iii] However, under *Gebo,* even a casual manufacturer or seller may be held liable if it did not provide the buyer with adequate warning of "known defects . . . not obvious or readily discernible."