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NEW YORK COURT OF APPEALS ROUNDUP

Expert Analysis

Duty of Examining Physician, UCC Meets Bankruptcy Code, City Subpoenas

If a doctor performing an independent medical examination pursuant to CPLR 3121 inflicts injury in the process, may the injured person maintain an action for negligence? The answer is no, the injured person only has a cause of action for medical malpractice, the Court of Appeals ruled recently. We discuss that decision, as well as a decision involving the extent of an automobile seller's security interest in a vehicle when the owner files for bankruptcy, and a decision involving the New York City Department of Investigation's authority to investigate a person neither employed by nor doing work for the city for possible misconduct while appearing in a public forum.

Malpractice During IME

In *Bazakos v. Lewis*, the Court held (4-3) that the relationship between a doctor conducting an independent medical examination (IME) and the person being examined is a "limited physician-patient relationship" such that an action against the doctor for causing injury in the course of the examination must sound in malpractice, not negligence. It seems that the result came down to a matter of policy, specifically the policy behind the legislature's decision to shorten the statute of limitations for medical malpractice actions.

The plaintiff previously brought a personal injury action arising out of an automobile accident. Pursuant to CPLR 3121, he was required to submit to an IME. In the instant action, plaintiff alleged that the examining doctor injured him by taking the plaintiff's head in his hands and forcefully rotating it while simultaneously pulling it. He subsequently sued the doctor two years and eleven months after the examination—outside of the two-year, six-month limitations period for malpractice claims, but within the three-year limitations period for ordinary negligence.

The Supreme Court, Nassau County, granted the defendant's statute of limitation motion. The Appellate Division, Second Department, reversed (3-2).

By **Roy L. Reardon**

And **Mary Elizabeth McGarry**

The Court of Appeals, in an opinion by Judge Robert S. Smith, acknowledged that there was "some logic" to plaintiff's argument that, because the plaintiff was not the defendant's patient, the defendant was not providing him with medical care, and his relationship with the defendant in context of a mandatory litigation IME was essentially adversarial, the parties' relationship was not that of physician-patient. Nevertheless, the Court concluded, the defendant had been applying "specialized skills" in the course of performing "professional duties," and the examination therefore constituted "medical treatment by a licensed physician." This created a "limited physician-patient" relationship, thereby restricting to malpractice any claim that could be brought based upon the performance of the examination.

> In 'Bazakos v. Lewis,' the Court held that the relationship between a doctor conducting an IME and the person being examined is a 'limited physician-patient relationship.'

The majority observed that the purpose of CPLR 214-a, which created a statute of limitations for medical and dental malpractice that is six months shorter than that for negligence, was to address a crisis in the medical profession from insurers' threat to cease writing malpractice policies. The Court considered it unlikely that the legislature "found less reason to make insurance available to doctors performing IMEs than to those practicing medicine in more traditional contexts…."

Chief Judge Jonathan Lippman authored the dissent in which Judges Eugene F. Pigott Jr. and Theodore T. Jones joined. His opinion noted the adversarial nature of examinations conducted for litigation, characterizing the "independent" in IME as a euphemism. It also focused on the fact that conduct that would constitute malpractice in the context of ongoing medical treatment would not be malpractice in the context of an examination. The dissenters concluded that no physician-patient relationship arose in such circumstances, even on a limited basis. Rather, the scope of an examining doctor's duty is limited to the duty not to cause foreseeable harm—the standard for negligence, not malpractice.

Finally, the dissent found it implausible that the Legislature, in shortening the statute of limitations for medical malpractice claims against those who provide patient care, thought it necessary to shorten the limitations period to ensure that insurance coverage would be available to cover the provision of services other than medical treatment.

Purchase Money Obligation

An issue has been arising more frequently as a result of the confluence of three phenomena, and the U.S. Court of Appeals for the Second Circuit turned to the Court of Appeals for assistance in resolving it, pursuant to the certified question procedure.

First, longer-term car loans have resulted in more cars having "negative equity" at the time of trade-in, in other words having less value than the amount still outstanding on the loan. Second, in an effort to take advantage of the purchase money obligation provisions of the Uniform Commercial Code (UCC), §9-103[b][1], as well as the purchase money security interest (PMSI) provisions of the U.S. Bankruptcy Code applicable to automobiles, dealers are increasingly rolling the amount outstanding on a prior loan secured by the trade-in into the financing for the purchase of a new vehicle. And third, more people are filing for personal

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bankruptcy. This set of circumstances gave rise to the issue in *Matter of Peaslee* (*Reiber v. GMAC, LLC*).

Faith Ann Peaslee entered into a retail installment contract for the purchase of a new vehicle, and the $5,980 negative equity on the vehicle she traded in, along with other charges, was incorporated into the new vehicle financing for a total of $23,180. The security interest in the new vehicle was assigned to GMAC. Less than two years later, Ms. Peaslee filed for bankruptcy.

In her bankruptcy plan, Ms. Peaslee proposed keeping the vehicle and reducing GMAC's secured claim to an amount equal to the vehicle's resale value, $10,950. GMAC objected. It argued that the entire outstanding amount should be treated as a "purchase money security interest securing the debt... incurred within the 910-day[s] preceding the date of the...petition," under §1325(a) of the Bankruptcy Code. The trustee argued that GMAC's secured claim should be reduced as proposed by the debtor, with the $6,955 balance owed being treated as an unsecured claim.

The Bankruptcy Court agreed with the trustee. The District Court reversed, however, and the matter reached the Second Circuit. The Circuit Court determined that, because the Bankruptcy Code did not define "PMSI," the meaning of the term was governed by state law, specifically, whether the portion of a retail installment sale contract attributable to a negative equity roll-over constituted a "purchase money obligation" under the New York UCC. It certified this question to the Court of Appeals.

Section 9-103 of the UCC defines a purchase money obligation as one "incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral," but does not define either "price" or "value given." The Court of Appeals, in an opinion by Judge Eugene F. Pigott Jr., therefore turned to the Official Comments to that section. Comment 3 provides a long list of items that, along with "other similar obligations," may be included within "price" or "value given," indicating an intention that those terms should be construed broadly. In addition, allowing dealers to roll negative equity into financing for new purchases furthers "the policy of facilitating commercial transactions."

Judge Robert S. Smith authored a dissent in which Chief Judge Jonathan Lippman and Judge Carmen Beauchamp Ciparick joined. Judge Smith wrote that, while the majority's result may suit the purposes of the Bankruptcy Code, the Court did not have the power to interpret federal law in the context of answering a certified question and was confined to construing the UCC.

In the view of the dissent, the terms "price" and "value given" as used in §9-103 are ambiguous, even when interpreted with the aid of Comment 3, if those provisions are read in a vacuum. However, the dissent argued, the ambiguity disappears when the purpose of creating a security interest for purchase money obligations is considered. That purpose—to allow a party that lends money to finance the purchase of a good to obtain a lien on the good superior to any other lien, even a perfected lien in after-acquired property—is not served by granting a special priority to a lien from refinancing a trade-in.

DOI Subpoena

Parkhouse v. Stringer[1] was a rare case to reach the Court that pitted the need to protect citizens' freedom to speak out at public fora, with all of the implications of preserving First Amendment rights, against the investigative power and right of the New York City Department of Investigation (DOI) with respect to city affairs. The Court, while confirming its commitment to protect public speech against government intrusion, held that where sufficient facts are shown to justify the inquiry, as it held to be the case here, the city may inquire pursuant to its subpoena power. In doing so, the Court unanimously affirmed the order of the Appellate Division, First Department, in an opinion by Judge Robert S. Smith (Chief Judge Jonathan Lippman taking no part).

'Parkhouse v. Stringer' pitted the need to protect citizens' freedom to speak out at public fora, with all of the implications of preserving First Amendment rights, against the investigative power and right of the New York City Department of Investigation.

Virginia Parkhouse is a long-standing volunteer of Landmark West!, a nonprofit community group dedicated to preserving the architectural heritage of the Upper West Side.

On Oct. 17, 2006, the City Landmarks Preservation Commission (LPC) held a public hearing to determine whether landmark status should be given to the Dakota Stables and New York City Cab Company Stables, two historic sites on the west side of Manhattan.

At the hearing, Ms. Parkhouse appeared on behalf of Landmark West! and stated to the LPC that she was "volunteering today to read the statement of [Manhattan] Borough President Scott Stringer." What Ms. Parkhouse proceeded to read, however, was a version of an Aug. 14, 2006 letter from Mr. Stringer to the LPC, but with modifications made by Ms. Parkhouse in her handwriting. These modifications were not insignificant and were not identified to LPC as made by Ms. Parkhouse, and therefore left open the possibility that they were Mr. Stringer's changes.

Later, Mr. Stringer's counsel advised LPC that Ms. Parkhouse was not authorized to speak for the Borough President, nor was Landmark West!, and that neither had any affiliation with him. Mr. Stringer also expressed concern that someone may have falsely induced reliance by LPC based the attribution to him of statements he had not made or authorized someone to make on his behalf.

The LPC later filed a complaint with DOI, alleging Ms. Parkhouse had misrepresented Mr. Stringer's letter of Aug. 14. DOI opened an investigation, and when Ms. Parkhouse declined to be interviewed, it issued a subpoena for her testimony. Ms. Parkhouse moved to quash and DOI cross-moved to compel. Ms. Parkhouse lost in the motion court and in the Appellate Division, First Department. Her position was supported in both the Appellate Division and the Court of Appeals by the New York Civil Liberties Union as amicus.

In resolving the matter, the Court had no difficulty in summarily rejecting the argument by Ms. Parkhouse that she was immune from a DOI subpoena because she was not a city employee or doing business with the city. The broad power given DOI under the city charter, and the fact that Ms. Parkhouse clearly had information relevant to the subject matter of the investigation, made inquiry of her reasonable.

The Court's obvious anguish in sustaining the subpoena in this case would appear to arise from its concern that such a holding would have the effect in later cases of threatening freedom of speech protected by the First Amendment. We suggest, however, and without reaching any premature conclusion of impropriety, that there was more than a reasonable showing of justification here for the inquiry of Ms. Parkhouse. She did, in fact, alter Mr. Stringer's letter in a material way. She did not tell him or the LPC that she had done so. And what she told LPC appears to be a knowingly false statement. It would seem under these circumstances that plainly an explanation is in order. As the Court points out, she of course may seek to assert "any applicable privilege."

1. The petitioner in *Parkhouse v. Stringer* was represented by Whitney North Seymour, Jr., who is a retired partner of the authors' firm.