NEW YORK COURT OF APPEALS ROUNDUP:

COMPELLED PRODUCTION OF HIPPA-COMPLIANT AUTHORIZATIONS, ABSENCE OF TORT DUTY, AND DISORDERLY CONDUCT

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Governor Eliot Spitzer's renomination of Judge Carmen Beauchamp Ciparick to the Court of Appeals was confirmed by the Senate last week, as was widely expected. Judge Ciparick will serve through 2012, the year in which she will reach the mandatory retirement age of 70.

This month we discuss recent decisions of the Court in the areas of medical malpractice, negligence, and criminal law. In a closely watched group of cases, the Court held that a party may be compelled to provide adverse counsel with a HIPPA-compliant authorization permitting an ex parte interview of the party's treating physician, and set forth guidelines for conducting such interviews. In separate decisions, the Court found that a key element of liability in tort – duty – was missing, and therefore affirmed the dismissal of negligence claims in both cases. The Court also resolved a case that had attracted some humorous attention in the popular press, that of a prosecution for standing still on a New York City sidewalk.

Compelled HIPPA Authoritzations

In *Arons v. Jutkowitz*, the Court resolved an issue that had been hotly contested in medical malpractice actions. To the consternation of the plaintiffs' bar, the Court held (6-1) that a plaintiff may be compelled to provide an authorization that would permit (but not require) a treating physician to grant defense counsel an ex parte interview.

It is well-established that a party who puts his or her physical or mental condition in controversy thereby waives the physician-patient privilege as to treatment relevant to that condition. Article 31 of the CPLR and Section 202.17 of the Uniform Rules for New York State Trial Courts provide means of obtaining formal discovery of medical information, such as production of medical records, exchange of reports of a physical or mental examination, and depositions of treating physicians. In addition, it had become common practice for defense

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counsel in a medical malpractice action to try to obtain information by seeking to conduct an ex parte interview of the treating physician after a note of issue had been filed.

Enter HIPPA. Privacy Rules promulgated by the U.S. Department of Health and Human Services pursuant to the Health Insurance Portabilty and Accountability Act ("HIPPA") prohibited health care providers from disclosing an individual's health information unless mandated by the Privacy Rules or the individual had authorized the disclosure. After these Rules took effect, physicians would not agree to be interviewed absent the patient's consent in the form of a "HIPPA-compliant" authorization. Generally, the plaintiff would reject a demand to furnish an authorization, and defense counsel would then move to compel. The trial courts were divided over whether to grant such motions and whether to impose conditions on use of the authorizations.

In two of the cases decided together by the Court of Appeals, *Arons* and *Webb v. New York Methodist Hospital,* the plaintiffs were ordered to provide authorizations permitting their physicians to agree to ex parte interviews, and defense counsel was directed to furnish plaintiffs with any written statements or materials provided during the interviews, any audio or video recording of the physicians' oral statements, and any notes or memoranda of the interviews. These orders were reversed by the Appellate Division, Second Department, which held that the plaintiffs should not have been compelled to furnish authorizations. In a third case, *Kish v. Graham,* the Appellate Division, Fourth Department, also reversed a trial court order compelling authorizations. The Court of Appeals reversed in all three cases, held that plaintiffs should be compelled to provide HIPPA-complaint authorizations, and, in the cases of *Arons* and *Webb*, ruled that it was improper for the trial courts to direct defense counsel to turn over to plaintiffs material from any ex parte interviews.

Judge Susan Phillips Read's opinion for the majority began its analysis with two prior decisions of the Court, *Niesig v. Team I,* 76 N.Y.2d 363 (1990), which held that counsel may interview current employees of an adverse corporate party unless their acts or omissions in the matter are binding on the corporation or they are involved with implementing the advice of counsel, and *Siebert v. Intuit,* 8 N.Y.3d 506 (2007), which held that counsel may interview former employees of an adverse corporate party, even a senior executive who had been a participant in the events at issue and member of the corporation's litigation team, as long as measures were taken to steer clear of privileged information. These decisions had recognized the importance of "informal" discovery as a less expensive alternative to formal discovery, and the Court saw no reason why nonparty physicians should be treated any differently than the current or former employees in *Niesig* and *Siebert*.

The Court rejected the argument of plaintiffs and Judge Eugene F. Pigott, Jr.'s dissent that ex parte interviews of physicians are improper because they are not provided for in the discovery scheme set forth in the CPLR and Uniform Rules. Judge Read's opinion pointed out that there similarly are no provisions for interviews of an adverse corporate party's employees, and that attorneys have always sought to talk with nonparty potential witnesses. (Judge Pigott distinguished these other interviews of potential witnesses on the ground that they do not require court intervention, whereas post-HIPPA, treating physician interviews

involve a court compelling the plaintiff to furnish an authorization.)

In response to the argument that physician interviews carry a "danger of overreaching," the Court stated that it assumes attorneys will act ethically. Lest there be any doubt what the Court considers to be necessary disclosure, the opinion explained: "an attorney who approaches a nonparty treating physician (or other health care professional) must simply reveal the client's identity and interest, and make clear that any discussion with counsel is entirely voluntary and limited in scope to the particular medical condition at issue in the litigation." Of course, defense counsel will only be able to develop information through such informal means if the physician agrees to be interviewed ex parte, and many physicians may not want to submit to an interview for a variety of reasons, including the wishes of their patients. There may be ethical implications to counsel for a party attempting to persuade a non-party physician to decline an interview, either directly or through his or her client, however.

No Duty, No Tort

In fixing the point at which a duty toward another party attaches such that breach of that duty may lead to liability in tort, the Court must be guided by considerations such as "the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation." *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (2001). This principle has been evident in the Court of Appeals' tort decisions over the last several years, which have approved the expansion of liability only in rare circumstances. It was evident again in two decisions handed down in November.

In fact, the above language from *Hamilton* was quoted in Judge Theodore T. Jones' opinion in *Haymon v. Pettit.* The plaintiff's 14-year old son had been standing outside of a baseball park. He was injured when he ran into traffic while chasing a foul ball hit out of the park and was struck by a car driven by defendant Pettit, who had a .11% blood alcohol level at the time of the accident. Plaintiff sued Pettit and the operator of the park, the Auburn Community Non-Profit Baseball Association. The negligence claim against the Association was founded upon its promotional policy of offering free tickets to anyone outside of the park who retrieved foul balls and returned them to the ticket window. Plaintiff argued that this policy encouraged children to chase after foul balls, and that it was foreseeable they would chase balls into the street.

The Court stated that, even if the promotion did forseeably expose fans to the hazard of chasing foul balls into the street, tort liability cannot be based upon forseeability alone, but requires the existence of a duty. Normally the owner or occupier of land does not owe a duty to warn or protect others from a dangerous condition on adjacent land, unless it created or contributed to the condition. The Court reasoned that the dangers of crossing a street existed independent of the Association's promotion, and the Association could not control the street or the drivers who use it. In addition, to impose upon the operator of a baseball park a duty to warn or protect non-patrons from the acts of third parties would open up "limitless" possibilities for liability. The Court was unanimous in declining to impose a duty to warn or to

protect in these circumstances, and therefore affirmed the grant of summary judgment dismissing plaintiff's claims against the Association.

Motor Vehicle Inspections

In *Stiver v. Good & Fair Carting & Moving, Inc.*, the plaintiffs were injured when their car rear-ended another car that was stopped in the center lane of a highway. They sued the owner and driver of that car, and the inspection station that, two months prior to the accident, had conducted the annual New York State motor vehicle inspection of it, Good & Fair Carting. Here, too, the case against the defendant inspection station turned upon whether it owed a duty to plaintiffs.

Plaintiffs attempted to invoke two of the three exceptions to the rule that a contractual obligation does not give rise to tort liability in favor of a third party to the contract: (1) when the contracting party, in failing to exercise reasonable care, launches a force or instrument of harm; and (2) where the plaintiff detrimentally relies upon the contracting party's performance of its duties. (Plaintiffs had not preserved for appellate review any argument based upon the third exception, which applies when the contracting party has entirely displaced the other party's duty to maintain premises safely.) Judge Susan Phillips Read authored the opinion for the unanimous Court (Judge Eugene F. Pigott, Jr. taking no part), that found that neither of the asserted exceptions applied.

First, the Court stated, Good & Fair cannot be said to have "launched" an instrument of harm because its inspection neither created nor exacerbated a dangerous condition, but at most failed to detect one. Second, plaintiffs cannot be said to have detrimentally relied upon Good & Fair's inspection because they had no relationship with the other driver or his car, and many vehicles are found on New York roads that have not passed New York's annual inspection, for example cars registered in other states. Finally, as a matter of public policy, the Court was unwilling to impose liability on inspection stations for failure to detect safety-related problems because to do so would turn the stations into "insurers." It therefore held that the inspection station owed no duty to plaintiffs, and thus affirmed the entry of summary judgment dismissing the complaint against Good & Fair Carting.

Non-Moving Violation

"Those congregating on the street display 'atrociously bad manners' by 'discommod[ing] some other persons' but such conduct alone does not necessarily give rise to disorderly conduct." This summary of a nearly 80-year old precedent, *People v. Nixon*, 248 N.Y. 182, 185-88 (1928), cited in the Court's recent decision in *People v. Matthew Jones*, also sums up one of the holdings of *Jones.*

The principal issues in the case were whether the factual allegations in the accusatory instrument failed to establish a *prima facie* case of the violation to which the defendant had pleaded guilty, and, if so, whether the conviction should be vacated as a result.

The defendant and others had been standing on the sidewalk at 2:00 in the morning. While in most other places such activity (or lack thereof) at that time of night would not inconvenience many others, these individuals elected to stand still in Times Square, thereby causing numerous pedestrians to walk around their group. A police officer directed the defendant to move along, but he refused to do so. The officer then attempted to detain the defendant, and he attempted to run away. The defendant was charged with resisting arrest and disorderly conduct. The information charging these offenses essentially alleged no more than the above facts.

Defense counsel sought dismissal of the information on the basis that it was facially insufficient. When this motion was denied, the accused agreed to plead guilty to the disorderly conduct charge, and was sentenced to time served (a night in jail).

One question that comes to mind is how the defendant could have appealed his conviction after entering into a plea agreement. The answer is that the requirements for a facially sufficient information set forth in CPL 100.40(1), specifically that it contain non-hearsay allegations that, if true, would establish every element of the offense charged, are jurisdictional. Another question is why the requirements for an information are so strict. The Court, in an opinion by Judge Carmen Beauchamp Ciparick, explained that defendants charged by information do not have the same procedural safeguards as those charged by complaint; a felony complaint generally is followed by a grand jury proceeding and indictment, and a misdemeanor complaint must be followed by a deposition, but in the case of an information, the accused may be brought to trial for an offense based only on the charging instrument.

The defect in the information in *Jones* was that it did not allege all of the elements of a disorderly conduct violation pursuant to Penal Law 240.20(5). Those are that the defendant obstructed pedestrian or vehicular traffic "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . ." The information at issue had recited that the defendant had inconvenienced pedestrians, but "[s]omething more" is required, the Court unanimously held, "[o]therwise, any person who happens to stop on a sidewalk – whether to greet another, to seek directions or simply to regain one's bearings – would be subject to prosecution under this statute." In other words, in New York, disorderly conduct requires more than just "atrociously bad manners."