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

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EVEN IF RECORD SUFFICES FOR APPELLATE REVIEW, EX-PARTE ORDER, INCLUDING COURT'S SUA SPONTE ORDER, IS NOT "ON NOTICE" AND CAN'T BE APPEALED OF RIGHT; WHAT REMEDY FOR APPELLANT?

Most of us have witnessed conduct in a courtroom or chambers that does not appear in the record. Sometimes the conduct rises to such a level that it does get into the record, as when an opposing lawyer, raising an objection, recites for the record the other side's offensive comportment.

It wasn't the opposing side that objected to a lawyer's conduct in a recent case, but the court itself, the judge reciting the offensive acts, imposing sua sponte a hefty monetary sanction, and producing some fascinating issues of appealability in *Sholes v. Meagher,* .... N.Y.2d ...., ... N.Y.S.2d .... (per curiam; June 10, 2003).

The main question, although by no means the only one, was whether a sua sponte order is appealable of right. The Court's answer is that it is not, resulting in an affirmance of an appellate division order dismissing the appeal.

The sanctioned person in this case was the defendant's lawyer. She was required to pay the other side's costs and attorneys' fees of more than $13,000 for misconduct during the trial. According to the trial court's decision, reported in the N.Y. Law Journal of Aug. 6, 2001, p.30, col.6 (Sup.Ct., Suffolk County; Catterson, J.), the lawyer, in a consistent pattern of conduct, greeted every court ruling, especially those at side bar, with

> frank lookings of disbelief, sneering, shaking [her] head, and various expressions designed to indicate ... [her] displeasure ....

She did this incessantly, the trial court said, despite regular warnings and regular apologies in response. Having frequently admonished that her continuing conduct could result in a mistrial, the court reviewed the sanctions rule and the Second Department rules about courtroom decorum, considered all of her statements in defense, and noted the insincerity of her apologies. Each admonition was followed by the same conduct for which she had issued the apology, and sometimes only just issued it. The trial court at last rejected her final apology, declared a mistrial, and made an order imposing on her and her firm the expense of it.

She took an appeal from the order, purporting to appeal as a matter of right on the authority of CPLR 5701(a)(2). That provision, however, allows an appeal of right only from an order made by motion "upon notice". While the sua sponte order may qualify as a motion made by the court, the Court of Appeals decides in *Sholes* that it should not be treated as a motion made "upon notice" and hence may not be appealed under CPLR 5701(a)(2).

The purpose of requiring that notice of motion be given before an order is appealed is to assure that all sides will be heard on the matter. This in turn assures that a record will be made, adequate for appellate review. As the Court of Appeals describes it, what occurred here is that the trial court

> announced it was declaring a mistrial and scheduled submissions, requiring the attorney to submit an affidavit on why she should not be censured for her conduct, and her opponent to submit an affidavit detailing his costs and expenditures at trial.

The imposition of those requirements, argued the would-be appellant, was the practical equivalent of a notice of motion procedure and should have been sustained as such. The Court of Appeals rejects the argument, concerned that it would lead to case-by-case arguments about whether proceedings taken in a given situation really afforded the opportunity to be heard offered by a formal notice of motion:

> While the procedure in this particular case [said the Court] may well have produced a record sufficient for appellate review, there is no guarantee that the same would be true in the next case. Moreover, the amount of notice will vary from case to case, and its sufficiency may often be open to debate.

The Court thus opts for the "certainty" that a regular notice of motion would offer under paragraph (2) of CPLR 5701(a), while reminding the would-be appellant that there is a well-known alternative procedure she could have used all the while to secure an appeal as of right. It comes from paragraph 3 of the same statute, addressed to an order resulting from an ex-parte motion.

Paragraph 3 provides that the party aggrieved by the ex- parte order may move, on notice, to vacate or modify it. Whatever order the court makes on that motion qualifies as an order resulting from a motion made on notice, making it appealable of right like an order governed by paragraph 2. (See Siegel, New York Practice 3d Ed.
§ 526.)

Note, however, that it is only the order on the vacatur motion that is freshly appealable; the original order does not itself become appealable anew — i.e., the 30-day period for appealing it, previously expired, is not revived — merely because a motion to vacate it is made afterwards. That's of no consequence in the ex-parte order situation, however, because no appeal lies from an ex-parte order at all.

It is of great consequence when the original order was made on notice, however. There, the aggrieved person should be sure that it's the order on the vacatur motion that is now being appealed, not the original order, whose appeal time has gone. See on this matter *Steinhardt Group, Inc. v. Citicorp,* 303 A.D.2d 326, 757 N.Y.S.2d 537 (1st Dep't, March 27, 2003).

In the ex-parte situation, an appeal from the order on the vacatur motion, whether the motion is granted or denied, will usually bring up for review all of the matters addressed in the earlier ex-parte order, so that the unavailability of a fresh appeal from the latter will not matter. Cautious lawyers will often specify both orders in the notice of appeal, which is harmless enough as long as the appealable order is one of the two. The appeal from the other (the original order) is likely to be dismissed, but, again, no matter, because the other (the order on the vacatur motion) is appealable and should bring up the same issues.

One often sees that kind of disposition at the outset of appellate opinions. The appeal from one of several orders is dismissed, making it look for a moment as if all is lost, only to the see the court, in its next breath, sustain the appeal from the other order and proceed to review everything through it.

Again the caution in this maze: if the original order was itself appealable, as where it was made on notice, letting the time to appeal it lapse will not enable a later motion to vacate to offer in essence a new 30-day period for appealing the original order, at least not when there's nothing new that's arisen and all the vacatur motion seeks to do is raise the same issues disposed of in the earlier, unappealed, order.

When the earlier motion was on notice, in other words, the motion to vacate is not a vehicle for merely repeating the same issues, as it is when the earlier motion was ex-parte or sua sponte.

To be superimposed on all this, of course, is that as long as no appeal was taken from the original order, it might still be reviewed later, as part of an appeal from a final judgment. See CPLR 5501(a)(1). That course needs a showing that the original order "necessarily affects" the final judgment, however, i.e., a showing that if the order had gone the other way, it would have produced a different judgment.

The gist of the *Sholes* decision is that it puts the imprimatur of the Court of Appeals on the proposition that the ex-parte order from which no appeal of right lies includes an order entered by a court sua sponte.

Since a motion to vacate is the path to an appeal of right when an ex-parte order is the root of the grievance, the question naturally arises whether it is still open to the aggrieved person to make that motion now, almost two years after the offending order was made. The Court notes the point but expresses "no view as to whether a motion to vacate is still available".

Is it? An engrossing question. Some motions affecting prior orders are restricted in point of time by the period in which the earlier order could have been appealed. A motion to reargue has been the quintessential example of that. If the time to appeal the order has expired, then so has the time to move to reargue it. Is an order to vacate also in that category?

The vacatur of judgments has a governing statute, CPLR 5015(a), with time constraints either explicit or case-created. (See Siegel, New York Practice 3d Ed. §§ 426-429.) The roughly equivalent statute for orders is CPLR 2221, which governs motions affecting prior orders, including motions to reargue, renew, modify, etc. A motion to vacate is also listed, but while a specific time limit is imposed on the motion to reargue — see CPLR 2221(d)(3) — none is imposed on the motion to vacate.

There being no stated statutory time limit, should one be imposed by caselaw? If so, what should it be?

With a motion to renew, which differs from a motion to reargue in that it is based on new proof not submitted earlier, a time limit is subsumed in the requirement of CPLR 2221(e)(3) that the applicant excuse its failure to include the proof during round one. That would seem to offer no parallel here, with the motion to vacate, unless the offender has something new to show to excuse the earlier misconduct.

The more accurate parallel is not the motion to renew but the motion to reargue, which now has its own time limit, set forth in the recently amended CPLR 2221. Before that the time to appeal an order made on reargument was assimilated to the time in which to appeal the order. As long as the appeal time was open, so

was the time in which to move to reargue. (See on this point the lead note in Issue 86 of Siegel's Practice Review.)

That attractive analogy is lost when the order at issue is not appealable, which is of course the very problem of the sanctions order made in *Sholes*. With no explicit time limit, and none logically derivable from caselaw, it would not be unreasonable to conclude that there is no time limit on a motion to vacate a sua sponte order made by a judge in a case still alive and pending, i.e., a case still sub judice, as we assume *Sholes* is.

If appellate review of the order can't be generated during the action, either because (1) the order is not appealable as of right or (2) because it is held too late to move on notice to vacate the order, then would the order be reviewable as part of an appeal from a final judgment later rendered in the action? See and analyze the several paragraphs of CPLR 5501(a).

These iffy questions reduce the *Sholes* decision to a single lesson. If the order is made sua sponte, and aggrievement is great enough to support an appeal, make a motion to vacate, make it on notice, make it fast, and if the motion is denied, appeal it promptly.

Something we haven't yet mentioned is that an order not appealable of right under subdivision (a) of CPLR 5701 may be appealed by permission under subdivision (c). The aggrieved lawyer in this case did not seek such permission, apparently relying all the way on the assumption that the order was appealable of right. In the course of reviewing a record on an appeal improperly taken of right, the appellate division will sometimes grant permission to appeal sua sponte and just keep the appeal where it is. The court did that in *Ploski v. Riverwood Owners Corp.,* 255 A.D.2d 24, 688 N.Y.S.2d 627 (2d Dep't 1999), for example. "[I]n view of the important issue involved", said the court, "we treat the notice of appeal ... as an application to appeal and grant leave".

The appellate division did not do that in *Sholes*.

The dismissal of the appeal in *Sholes* avoided the difficult and as yet unanswered question of what happens — even when an appeal is properly set up — if the other party doesn't oppose the appeal? Who will there be to defend the court's action before the appellate court? That was a key but sidestepped issue in *Honeycrest Holdings, Ltd. v. Integrated Brands, Inc.,* 283 A.D.2d 398, 723 N.Y.S.2d 892 (2d Dep't 2001), discussed in Issues 99:2 and 109:3 of Siegel's Practice Review. The matter is on the agenda of the Advisory Committee on Civil Practice, where it remains unresolved.

COURT OF APPEALS DECISIONS

TENANTS IN COMMON

Where Tenants in Common Agree to Divided Possession and Control, Negligent Injury to Visitor in One's Part Does Not Result in Liability to the Other

In an age of cooperatives, condominiums, time-sharing and other new-fangled forms of property uses, it's not often that we meet something as venerable as a simple tenancy in common. Some of us will therefore appreciate the trip back offered by *Butler v. Rafferty*, 100 N.Y.2d 265, ... N.Y.S.2d .... (June 10, 2003).

It was not just a tenancy in common here, but a tenancy in common between the Rafferty children, Brian and Maureen. The very music of the names would take us back to The Sidewalks of New York, but for the wretched fact that the house was in an upstate suburb, hardly a place for nostalgia.

Anyway, they owned the house in common, which would ordinarily mean that each had use of the whole premises and, concomitantly, responsibility for all of it. But these siblings made an agreement to divide the residence, with each having exclusive use of a part and neither having use or control over the other. They adhered to this agreement and respected each other's rights. In fact, the only door leading from one's part of the house to the other's was blocked by a refrigerator, probably a Frigidaire.

Anyway, Maureen's husband built a bunk bed on her side of the house, in the room of her son. Her son's name was Patrick. Now Patrick invited some teenage friends over, and one of them was Kate. There were probably some John McCormack records at the Victrola near the Morris chair (the one with the off-white antimacassars on the armrests.)

Anyway, the bunk bed apparently had inadequate railings, and while these young friends were watching a movie, Kate, on the top bunk, tried to pass a tray of cookies to a friend on the lower bunk. Here the fun stops and the lawsuit starts. She fell and was injured, allegedly because of the absent railings.

The only question was whether Brian could be liable for any of the negligence in the building or maintenance of the bunk. He could not, holds the Court of Appeals in an opinion by Judge Rosenblatt. The liabilities emanating from a tenancy in common can be modified by the kind of agreement the siblings made, and the modification made here, with each sibling having exclusive control of his or her share, segregated the two and their liabilities.

The question is whether the defendant "exercised possession and control" over the subject segment of the premises, explains the Court, and the record clearly establishes that this defendant did not. And it makes no difference that the defendant maintained an insurance policy that covered the whole structure. That alone does not establish possession or control.

MD'S LIABILITY TO THIRD PERSONS

When P Accompanies F, a Friend, to See MD About a Problem Diagnosed as Meningitis, MD's Failure to Advise P to Seek Treatment, Too, Is Not Actionable

In its 1997 *Tenuto* decision (Digest 457), the Court of Appeals held that a physician who gave oral polio vaccine to an infant without warning the immediate family of a risk to themselves in their contacts with the infant faced liability to one of the parents who contracted polio as a consequence. A key factor in the extension of malpractice exposure in *Tenuto* was that it was the doctor's vaccination of the infant that created the risk to the parents. When that factor was not present in a later case — *Cohen* (Digest 486, in 2000) — a wife's attempt to draw support from *Tenuto* for her claim against a urological surgeon failed: the surgeon in that case had operated on her husband to increase his sperm count but the operation failed and they had to turn to the in vitro method.

The factor is also absent in *McNulty v. City of New York,* 100 N.Y.2d 227, 762 N.Y.S.2d 12 (May 13, 2003). Here, too, the risk was not of the physician's creation, so here, too, the third-person's claim is barred. In an opinion by Judge Smith, the Court declines to extend a physician's liability to a third person when it was not the physician's treatment that caused the patient's malady.

P and F were friends and both were nurses. When F contracted what turned out to be infectious meningitis, F's boyfriend called P. P came over and helped arrange for F's transfer to a hospital, and spent some time at F's bedside. F's physician, MD, advised the family and P of F's condition, but he is alleged to have merely "shrugged his head" when asked by P whether P needed treatment, too, because of her contact with F. The same question was put by P to two other MDs, at a facility to which F was transferred. The question was alleged to have drawn the same negative response, but P was in fact ultimately diagnosed with the same type of meningitis and suffered serious hearing loss as a result.

All the MDs deny these facts. Assuming their truth, however, and observing that "ideally" the doctors should have advised P of the need for treatment, the Court holds that none owed a duty of care to P and that tort liability therefore could not attach. The Court decides to draw the line at *Tenuto*, restricting the physician's liability to third persons to the case in which it was the physician's treatment that created the exposure to the third persons and the third persons are also shown to have "a special relationship with either the physician or the patient".

The possibility that P might have had a claim against the doctors under statutes that imposed a duty to warn and which might have been found to support a private right of action for a violation was not before the Court, the claim that presented it having been dismissed below and no appeal having been taken from it.

Chief Judge Kaye concurs on the ground that sustaining a cause of action in a case like this would require

> enlargement of the doctors' ambit of duty, to patients' friends, acquaintances and unknown other potential plaintiffs, a step I am unwilling to take based on the case before us.

Perhaps in a given situation the question-and-answer intercourse between third person and MD might be intensive enough to create a physician-patient relationship, with or without compensation contemplated, but that was not the situation in *McNulty*.

RESIDENTIAL COOPERATIVES

"Business Judgment Rule" Is Applied to Uphold Co-Op Board's Decision to Oust Objectionable Member

In its 1990 *Levandusky* decision (Digest 365), the Court of Appeals rejected a "reasonableness" test to review decisions of a residential cooperative corporation in a dispute with a tenant/shareholder over building policy. It adopted instead the "business judgment rule", like that applied to decisions of corporate directors that are challenged in the commercial sphere. In *Levandusky*, the rule was applied to uphold a board's stop-work order against a co-op member making an unauthorized modification in his apartment. The order was found a reasonable exercise of "business judgment" and the courts were therefore directed to defer to it.

The rule is now applied to support a board's decision to oust a member altogether and force the sale of his unit on the basis of the member's "objectionable" conduct. *40 West 67th Street v. Pullman,* 100 N.Y.2d 147, 760 N.Y.S.2d 745 (May 13, 2003).

There were 38 units. The defendant had one. After the co-op punctiliously followed the procedural requirements of the co-op agreement, conducting a hearing at which 75% of the members were present but which the duly notified defendant chose not to attend, a unanimous vote was made to seek the defendant's eviction on a myriad of grounds: unsupportable complaints against and even physical altercations with neighbors; a stream of "vituperative" and apparently groundless letters of complaint to the board; defamatory flyers sent to fellow residents; dishonest representations about what prior occupants of his apartment said about neighbors; and even an accusation of "close intimate

personal relations" between the woman upstairs and the wife of the board's president.

The board's decision would have been governed simply and exclusively by the business judgment rule but for the fact that this was an eviction. As such, it also fell under the terms of Real Property Actions and Proceedings Law § 711(1), a statute that applies to landlord-tenant relationships and requires "competent evidence" of the tenant's misconduct. While that implies that a court alone must make the judgment, the Court of Appeals, in an opinion by Judge Rosenblatt, is

> satisfied that the relationships among shareholders in cooperatives are sufficiently distinct from traditional landlord-tenant relationships that the statute's "competent evidence" standard is satisfied by the application of the business judgment rule.

The Court enumerates three matters that should be checked out before deference is made under the rule, and finds all three fulfilled here. The board (1) acted within its authority as conferred by the co-op agreement; (2) the step it took advanced the legitimate purpose of the board, which included encouraging reasonable cooperation among the cooperators; and (3) there was no evidence at all that the board acted in bad faith.

OWNER'S PARKING LOT LIABILITY

Showing That Owner Had Notice of Dangerous Condition on Its Parking Lot Is Required for Liability

The issue of notice was even part of the Pattern Jury Instruction applicable in this kind of case, which involved an injury sustained by a plaintiff on the defendant's parking lot. The Court of Appeals holds that it was error for the trial court to strike that aspect of the charge, which would have focused jury attention on just what kind of notice the defendant had of the dangerous condition. The improperly charged jury having held the owner in, the Court reverses and orders a new trial. *Peralta v. Henriquez,* 100 N.Y.2d 139, 760 N.Y.S.2d 741 (May 13, 2003).

The distinctions relied on by the lower courts in holding notice an unnecessary element of the plaintiff's proof, such as whether the lot was intended for public or private use, have been abandoned, observes the Court. In an opinion by Judge Wesley citing the Court's 1976 decision in *Basso v. Miller,* 40 N.Y.2d 233, 386 N.Y.S.2d 564, the Court explains that the landowner's responsibility must be assessed "in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk". Notice to the owner is a key element in the application of those factors, and it was error for the lower courts to have held otherwise.

The injury here was to a woman visiting the apartment of a friend in one of two adjacent buildings owned by the defendant. They were serviced by a parking lot,

also owned by the defendant. The lot had no demarcated spaces, so users could park in different ways. While scurrying from her car to get out of the rain and into the house, the plaintiff was struck in the eye by a bent antenna on one of the parked vehicles. She argued that a lack of adequate illumination made the owner of the lot liable for her injury as a matter of law.

Not as a matter of law, the Court answers. It points out that there was apparently some illumination, from a light on the back of a delicatessen that was also part of one of the buildings. Whether it was adequate, and whether the defendant was on notice of its adequacy amid the other circumstances, had to be left to a properly charged jury. The charge in this case was improper for having eliminated the notice issue.

TERM LIMITS DOCTRINE

While Municipal Board Can't Bind Future Boards on Governmental Matters, It Can on Mere "Proprietary" Ones, and Here Does with a Contract on Golf Club Management

"The term limits rule prohibits one municipal body from contractually binding its successors in areas relating to governance unless specifically authorized by statute", recites the Court of Appeals in *Karedes v. Colella,* 100 N.Y.2d 45, 760 N.Y.S.2d 84 (May 8, 2003). But the doctrine doesn't apply when the municipality is exercising a mere "proprietary" function, like running a business traditionally left to private enterprise. Hence in each case in which an issue of municipal obligation arises and in which there's no statute in point, whether a contract made by the governing board of a municipality for a specific term can be undone by a later board boils down to the nature of the function the municipality was carrying out when it made the contract.

Here the contract was made by a village that had bought a golf club. Not one of those iron or wooden sticks with which (hopefully) to strike a hard little white ball, but the whole shebang: premises, course, greens, facilities, pro shop, restaurant, profanity syllabus, etc. And it operated the club for profit, including the retention of a manager for a specified term.

Alas, the profit did not continue. For various reasons the operation began to lose money. Losing money generates controversy, and here it also generated election defeats for some of the members of the board who had voted the contract term for the manager. Could a new board, driven by a driven mayor, get out of the contract? It could not, rules the Court of Appeals in an opinion by Judge Graffeo. This was clearly the exercise of a proprietary function, not a governmental one, and the term limits doctrine did not apply.

The idea that golf is not a sovereign undertaking will come as a surprise to many. It differs little from a public school classroom in English, after all, often generating inventive combinations of the language's basic vocabulary.

FIREFIGHTERS' CLAIMS

Differentiating "Indirect" from "Proximate" Cause, Court Says Showing of Either Will Suffice to Give Firefighter Claim Against Property Owner for Violation of Fire Regulation

As the Court of Appeals noted in its 1995 *Zanghi* decision (Digest 427), § 205-a of the General Municipal Law creates a cause of action for firefighters against those in control of a building when there has been a failure to comply with a specific safety enactment, as long as it is shown that there is a link between the violation and the injury. In its recent decision in *Giuffrida v. Citibank Corp.,* 100 N.Y.2d 72, 760 N.Y.S.2d 397 (May 8, 2003), the Court takes a broad view of what a "link" is and substantially — if not, indeed, dramatically — smoothes the path of injured firefighters to recovery against code violators.

In an opinion by Judge Rosenblatt that reviews the history of § 205-a, the Court notes the gradual legislative steps taken away from the common law rule. The common law rule barred a firefighter's negligence claim for injuries suffered in the line of duty, primarily on assumption of risk grounds. In the *Zanghi* case itself, for example, the Court held that if the performance of duty merely increases the risk of injury, firefighters — and, under analogous statutes, police officers as well — have no common law claim of negligence.

But *Zanghi* also noted the exception made when a code violation is found to be a link in the chain of causation. *Giuffrida* now stretches that link across a broad terrain.

The firefighter in *Giuffrida* was injured by smoke inhalation when he had to remove his air hose because he'd run out of oxygen while fighting a blaze in a doughnut shop. To the lower courts, the removal of the hose was the cause of his injuries, and they granted summary judgment for the defendant property owner. The plaintiff had offered evidence that the defendant failed to properly maintain a fire suppression system over the deep fat fryer area, as required by law, and that the defendant had been cited at least twice for such violations. While that may well have been the cause of the fire, to the lower courts it was not the proximate cause of the injuries.

It didn't have to be the "proximate" case, rules the Court of Appeals; it need only have been an "indirect" cause.

"Proximate" cause means "direct" cause, the Court stresses, and § 205-a also applies in terms to "indirect" as well as "direct" causes. If a jury were to credit the plaintiff's proof submitted in opposition to the summary judgment motion in this

case, “indirect” cause for the plaintiff’s injury can be attributed to the fire violation. Summary judgment could therefore not be granted.

According to the defendant, this would mean that every code violation that produces a fire will produce as well a tort claim by a firefighter injured while fighting it. “This overstates the case”, responds the Court of Appeals. Future cases will doubtless have to clarify whether it does or not.

The defendant’s final point about the firefighter’s being contributorily at fault is the only easy one the Court had to dispose of in *Giuffrida*. “[C]omparative fault principles cannot be applied in defense of a GML § 205-a action”, notes the Court, citing its 1995 *Mullen* decision (Digest 431) on § 205-a as wholly dispositive of that issue.