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CPLR 214(6): First Department Rejects Extension of Discovery Rule to Attorney Malpractice

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opments in New York Practice section in the October *Survey* of this volume; a sequel appeared in the last *Survey*.

Other cases of special significance include *Caton v. Caton*, where the court held that the failure to publish a summons within twenty days after the granting of the order of publication is a jurisdictional defect; *Kenford Co. v. County of Erie*, wherein the Fourth Department allowed disclosure against a nonparty witness where it would aid preparation for trial; *Zellman v. Metropolitan Transportation Authority*, which holds that the names of eyewitnesses, even if obtained by investigation, are discoverable if they are material and necessary; *Rubino v. G. D. Searle & Co.*, wherein the court allowed the videotaping of a pretrial examination; and *Phillips v. Joseph Kantor & Co.*, in which the Court of Appeals allowed consideration of evidence excludable under the dead man's statute to defeat a motion for summary judgment.

Additionally, under article 31, the trend toward allowing discovery and inspection of the defendant's automobile liability insurance policy is considered. Under article 11, the Court of Appeals' answer to the question as to whether the state or local government is responsible for indigents' publication costs in matrimonial actions is presented.

The *Survey* sets forth in each installment those cases which are deemed to make the most significant contribution to New York's procedural law. Due to space limitations, many other less important, but, nevertheless, significant cases cannot be included. While few cases are exhaustively discussed, it is hoped that the *Survey* accomplishes its basic purpose, viz., to key the practitioner to significant developments in the procedural law of New York.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 214(6): First Department rejects extension of discovery rule to attorney malpractice.

Generally, the three-year statute of limitations prescribed by CPLR 214(6) for malpractice actions begins to run at the time of injury.[1] Two exceptions to this rule have been created. *Borgia v. City of New York*[2] established the "continuous treatment" doctrine, whereby the accrual of a malpractice cause of action is delayed until the services of the physician for the same or related injuries terminate. *Flanagan v. Mount*

[1] Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *cert. denied*, 374 U.S. 808 (1963); Conklin v. Draper, 229 App. Div. 227, 241 N.Y.S. 529 (1st Dep't), *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1930).

[2] 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962); *accord*, O'Laughlin v. Salamanca Hosp. Dist. Authority, 36 App. Div. 2d 51, 319 N.Y.S.2d 128 (4th Dep't 1971).

Eden General Hospital[3] established a discovery rule for medical malpractice cases where a foreign object is left in the patient's body; accrual of the cause of action is postponed until the plaintiff could reasonably have discovered the injury.[4] In *Siegel v. Kranis*,[5] the Appellate Division, Second Department, applied the "continuous treatment" doctrine to attorney malpractice.

In *Gilbert Properties, Inc. v. Millstein*,[6] the Appellate Division, First Department, rejected an extension of the discovery rule to attorney malpractice. The plaintiff had lost a cause of action because its attorney, having failed to search the title record, did not proceed against the true owner of the building that had collapsed and damaged its property in 1963. The plaintiff replaced the attorney in 1966; the error was discovered upon the 1969 reversal of a judgment in its favor. After the plaintiff brought a malpractice action against the attorney in 1970, the appellate division ultimately sustained the defense of the statute of limitations, holding that the cause of action had accrued when the attorney sued the wrong parties.

" '[T]he statutory period of limitations begins to run,' " the court stated, " 'from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury.' "[7] It further reasoned that to extend the foreign object exception to attorney malpractice would be too radical a departure from the traditional view for an intermediate appellate court to formulate,[8] adding

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3 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 508 (1971).

4 The *Flanagan* discovery rule, initially limited to foreign object malpractice cases, was extended to a malpractice action for the breaking of a prosthetic device placed in the plaintiff's hip four years earlier. Murphy v. St. Charles Hosp., 35 App. Div. 2d 64, 312 N.Y.S.2d 978 (2d Dep't 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 507 (1971). More recently, the discovery rule was applied to an injury caused to the plaintiff's pancreas during an operation for the removal of his spleen and discovered four years later. Dobbins v. Clifford, 39 App. Div. 2d 1, 330 N.Y.S.2d 743 (4th Dep't 1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 153 (1972).

5 29 App. Div. 2d 477, 288 N.Y.S.2d 831 (2d Dep't 1968). *See* Marine Midland Trust Co. v. Penberthy, De Iorio & Rayhill, 60 Misc. 2d 11, 301 N.Y.S.2d 221 (Sup. Ct. Oneida County 1969).

6 40 App. Div. 2d 100, 338 N.Y.S.2d 370 (1st Dep't 1972).

7 *Id.* at 105, 338 N.Y.S.2d at 374-75, *quoting* Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 300, 200 N.E. 824, 827 (1936). The dissent, however, relied on Siegel v. Kranis, 29 App. Div. 2d 477, 288 N.Y.S.2d 831 (2d Dep't 1968), *discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 306 (1968), arguing that the plaintiff's malpractice cause of action did not accrue until its attorney's error resulted in an unfavorable judgment against it. 40 App. Div. 2d at 106, 338 N.Y.S.2d at 376.

8 40 App. Div. 2d at 104, 338 N.Y.S.2d at 373, *citing* Schiffman v. Hospital for Joint Diseases, 36 App. Div. 2d 31, 33, 319 N.Y.S.2d 674, 676-77 (2d Dep't 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 147, 151 (1971) (misdiagnosis of ailment not equated with foreign object malpractice).

that even if the exception applied, the alleged error in this case was readily discoverable by the plaintiff or its new attorneys.[9]

Although a discovery rule for attorney malpractice would apparently not have aided the plaintiff in *Gilbert*, it would promote fairness in cases where there has been substantial delay before an attorney's malpractice could reasonably have been discovered.[10]

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 316(c): Failure to publish summons within twenty-day statutory period deemed a jurisdictional defect.

The CPLR, consistent with its policy of liberal construction,[11] permits the court to correct a mistake or irregularity at any stage of an action provided that there is no substantial prejudice to the rights of opposing parties.[12] Although courts have differentiated curable irregularities from incurable jurisdictional defects, no general standard has emerged from this classification.[13]

In *Caton v. Caton*,[14] the Supreme Court, Monroe County, addressed itself to the irregularity-jurisdictional defect dichotomy as it applied to service by publication of a summons in a divorce action. Therein, the first publication was not made within twenty days after the granting of the order of publication as required by CPLR 316(c).[15] In holding the defect to be jurisdictional and dismissing the complaint, the court distinguished mere irregularities in service by publication[16] from jurisdictional defects in the manner or time of publication.[17]

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9 40 App. Div. 2d at 104-05, 338 N.Y.S.2d at 373-74.

10 There is something profoundly distressing in the notion that a cause of action may become time-barred even before the plaintiff knew or could, as a reasonable man, have known about its existence. There may even be a due process question. 7B MCKINNEY'S CPLR 214, commentary at 437 (1972). *Cf.* Wilson v. Econom, 56 Misc. 2d 272, 288 N.Y.S.2d 381 (Sup. Ct. N.Y. County 1968). *But see* Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 218-19, 188 N.E.2d 142, 145, 237 N.Y.S.2d 714, 719, *cert. denied*, 374 U.S. 808 (1963).

11 CPLR 104.

12 CPLR 2001.

13 Valz v. Sheepshead Bay Bungalow Corp., 249 N.Y. 122, 134, 163 N.E. 124, 128, *cert. denied*, 278 U.S. 647 (1928).

14 72 Misc. 2d 544, 339 N.Y.S.2d 92 (Sup. Ct. Monroe County 1972).

15 Service was made by publication, but the first publication was three days late.

16 Lambert v. Lambert, 270 N.Y. 422, 1 N.E.2d 833 (1936) (failure to timely file the order of publication is curable by a *nunc pro tunc* order); Winter v. Winter, 256 N.Y. 113, 175 N.E. 533 (1931) (failure to file proof of service before judgment is an irregularity); Valz v. Sheepshead Bay Bungalow Corp., 249 N.Y. 122, 163 N.E. 124, *cert. denied*, 278 U.S. 647 (1928) (publication of summons in a newspaper different from the one named in the order of publication may be cured by amendment of order *nunc pro tunc*); Mishkind-Feinberg Realty Co. v. Sidorsky, 189 N.Y. 402, 82 N.E. 448 (1907).

17 72 Misc. 2d at 545, 339 N.Y.S.2d at 94, *citing* Doheny v. Worden, 75 App. Div. 47,