State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of January 2 thru January 4, 2018

State of New York Court of Appeals

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To be argued Tuesday, January 2, 2018

No. 1 Forman v Henkin

Kelly Forman brought this lawsuit against Mark Henkin to recover for injuries she allegedly suffered when she fell from one of his horses while riding in South Haven State Park on Long Island in June 2011. She said the leather strap attaching a stirrup to the saddle broke, causing her to fall; and she alleged that Henkin was negligent in failing to properly equip the horse for riding and failing to maintain the saddle and tack. Among other injuries, she claimed that she suffered traumatic brain damage that caused cognitive deficits, memory loss, inability to concentrate, difficulty in communicating, and social isolation. Forman said she had been an active Facebook user prior to the accident, posting photographs and messages, but she deactivated her Facebook account about a year after her fall. In discovery, Henkin moved for an order compelling Forman to give him unrestricted access to her Facebook account, arguing the records were necessary to evaluate her alleged injuries and her credibility.

Supreme Court granted the motion, in part, and directed Forman to produce some records from the non-public portion of her Facebook account, including all photographs of herself that she privately posted after the accident, except those involving nudity or romantic encounters, and also the timing and length, but not the content, of her private Facebook messages.

The Appellate Division, First Department modified in a 3-2 decision and vacated those portions of the order requiring Forman to disclose any information about her private Facebook messages or any photographs that she did not intend to use at trial. Henkin's "speculation that the requested information might be relevant to rebut plaintiff's claims of injury or disability is not a proper basis for requiring access to plaintiff's Facebook account...," it said. "The discovery standard we have applied in the social media context is the same as in all other situations -- a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims.... This threshold factual predicate ... stands as a check against parties conducting 'fishing expeditions' based on mere speculation...."

The dissenters argued the Appellate Division has placed an unnecessarily high burden on litigants seeking disclosure of social media records, saying, "The case law that has emerged in this state in the last few years ... holds that a defendant will be permitted to seek discovery of the nonpublic information a plaintiff posted on social media, if, and only if, the defendant can first unearth some item from the plaintiff's publicly available social media postings that tends to conflict with or contradict the plaintiff's claims." They said the "material and necessary" standard in the discovery statute, CPLR 3101(a), "only requires a reasoned basis for asserting that the requested category of items 'bear[s] on the controversy'..., or a showing that it is likely to produce relevant evidence.... There is no reason why the traditional discovery process cannot be used equally well where a defendant wants disclosure of information in digital form and under the plaintiff's control, posted on a social networking site."

For appellant Henkin: Michael A. Bono, Manhattan (212) 267-1900
For respondent Forman: Kenneth J. Gorman, Manhattan (212) 267-0033

State of New York Court of Appeals

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To be argued Tuesday, January 2, 2018

No. 2 Matter of Kelly v DiNapoli
No. 3 Matter of Sica v DiNapoli

The petitioners applied for accidental disability retirement (ADR) under Retirement and Social Security Law § 363, which provides enhanced pension benefits for police officers and firefighters who are "physically or mentally incapacitated for performance of duty as the natural and proximate result of an accident" while on duty. The Office of State Comptroller denied both applications on the ground that their injuries were not the result of an "accident" within the meaning of the statute.

Orangetown Police Officer James J. Kelly injured his neck and shoulder in October 2012, as he worked to rescue a family trapped in its collapsing home during Hurricane Sandy. A falling tree had partially destroyed the house, two walls and half of the roof had fallen in, one resident was dead, and downed trees and power lines were delaying the arrival of trained rescue crews. Kelly was hurt as he threw debris off the injured residents and deflected a falling rafter.

The Appellate Division, Third Department confirmed the denial of ADR benefits on a 3-2 vote, saying "the threat that compelled [Kelly's] response as a police officer and first responder -- the dangerous condition in the home -- was the same threat that ultimately caused [his] injuries. Given this substantial evidence that petitioner's injury resulted from foreseeable risks inherent to being a police officer whose duty it was to assist injured persons, we will not disturb [the] determination...." The dissenters said Kelly was not trained for such rescue work and the risks were not foreseeable. "[T]he circumstances of petitioner's injury were of an extraordinary, urgent, and wholly unanticipated nature, and the resulting risks to him were beyond the scope of his anticipated duties, even given the potentially dangerous nature of his work as a police officer.... He was providing urgent emergency services in the midst of a Hurricane."

Yonkers Firefighter Pat Sica was exposed to carbon monoxide and cyanogen chloride, colorless and odorless gases, when he responded to a medical emergency at a supermarket in September 2001. He performed cardiopulmonary resuscitation for about 30 minutes on a store employee who collapsed and stopped breathing in a walk-in freezer, then assisted another worker who had fallen unconscious outside the freezer. As a result of his exposure to the toxic gases, Sica developed dilated cardiomyopathy, which impairs heart function.

The Appellate Division, Third Department annulled the denial of ADR benefits on a 3-2 vote, finding the incident was an accident. While the court had previously held that "exposure to toxic fumes while fighting fires is an inherent risk of a firefighter's regular duties," it said Sica "was not responding to a fire that presented the inherent and foreseeable risk of inhaling toxic gases.... The record evidence further reflects that petitioner was neither aware that the air within the supermarket contained toxic chemical gases..., nor did he have any information that could reasonably have led him to anticipate, expect or foresee the precise hazard when responding to the medical emergency...." The dissenters said Sica "was injured by the same dangerous condition that gave rise to the need for his emergency medical assistance, exposure to chemical gases. Moreover, petitioner was on notice that his duties included exposing himself to such dangerous conditions by his job description, his training and his actual professional experiences. Given this record evidence, a reasonable mind could conclude that petitioner suffered injuries that were the result of the risks inherent in his regular professional duties as a firefighter and emergency medical assistance provider explicitly tasked with risking chemical exposure and specifically trained for that risk...."

For appellant Kelly: Joseph M. Dougherty, Albany (518) 436-0751
For respondent Sica: Donald P. Henry, Manhattan (914) 946-7403
For appellant/respondent DiNapoli: Assistant Solicitor General William E. Storrs (518) 776-2037

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To be argued Tuesday, January 2, 2018

No. 4 People v Jude Francis *(papers sealed)*

Jude Francis was found guilty of raping and robbing a woman at gunpoint in Brooklyn in April 2003, when he was 19 years old. Near the end of his 13-year prison term, the Board of Examiners of Sex Offenders reviewed his risk of reoffending under the Sex Offender Registration Act (SORA), Correction Law article 6-C. Among other factors, the Board assessed Francis 25 points based on his prior criminal history, which consisted solely of his adjudication as a youthful offender in 2001, when he was 17 years old, after he pled guilty to third-degree possession of stolen property and received a conditional discharge. The Board's guidelines provide that prior juvenile delinquency and youthful offender adjudications are part of a sex offender's criminal history, but courts have held that juvenile delinquency adjudications may not be considered in determining an offender's risk of reoffense. Francis' total score of 115 points made him a presumptive level three (high risk) offender. Without the 25 points assessed for his youthful offender adjudication, he would have been a level two (moderate risk) offender.

At his SORA hearing in Supreme Court, Francis argued that he should not have been assessed points for his youthful offender adjudication, which is not a criminal conviction under the Criminal Procedure Law. CPL 720.35(1) provides that a "youthful offender adjudication is not a judgment of conviction for a crime or any other offense," and the statute requires that the records be sealed. He also argued that, like juvenile delinquency, youthful offender adjudications should not be considered in SORA proceedings The court found all of the risk factor points were properly assessed and designated Francis a level three sexually violent offender.

The Appellate Division, Second Department affirmed in a 3-1 decision. It said juvenile delinquency cases are civil proceedings in Family Court involving "individuals who are too young to be held criminally responsible for their conduct," while "youthful offender adjudications can only follow a criminal conviction" and, under CPL 720.35(2), sealed youthful offender records may be disclosed "if there is specific statutory or judicial authorization to do so." It found that authorization in CPL 720.35(2), which makes youthful offender records available to the Department of Corrections and Community Supervision (DOCCS), and in Correction Law §§ 168-1 and 168-n(3), which requires that Board members be employees of DOCCS, makes them responsible for assessing the future threat posed by sex offenders, and requires a SORA court to review "any materials submitted" by the Board. It said these provisions "provide the requisite statutory authorization to permit both the Board and courts to consider sealed youthful offender adjudications in conformity with CPL 720.35(2)."

The dissenter argued the youthful offender statutes were meant to allow "an individual to avoid the stigma and practical consequences that accompany a criminal conviction" resulting from impulsive and immature behavior, and "the Board exceeded its authority in adopting guidelines which include youthful offender adjudications" in the assessment of an offender's risk level. "There is no indication that the legislature intended to specifically authorize the Board to utilize youthful offender adjudications in determining a sex offender's criminal history when it amended Correction Law § 168-1(1) in 2011," amendments that were "simply intended to effectuate the merger of the Department of Correctional Services and the Division of Parole into DOCCS." She said, "[T]he majority's decision has the effect of treating the defendant's youthful offender adjudication as if it were a criminal conviction, contrary to the laudable purpose of the youthful offender statutes."

For appellant Francis: Jenin Younes, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Anthea H. Bruffee (718) 250-2475

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To be argued Wednesday, January 3, 2018 (arguments begin at 10 am)

No. 5 Matter of Aponte v Olatoye

After his mother was diagnosed with advanced dementia in 2009 and her doctors said it was unsafe for her to live alone, Jonas Aponte moved into her apartment at the New York City Housing Authority's Sedgwick Houses in the Bronx to care for her. In August 2010, NYCHA denied a permanent permission request to add Aponte as an occupant of his mother's one-bedroom apartment on the ground that it would "create overcrowding conditions." The case manager noted that "tenant is applying to have son live with her as her health is failing and she cannot live alone." In January 2011, the mother submitted an affidavit of income which listed Aponte as an occupant. The housing manager crossed out his name because he was not an authorized resident. In February 2011, NYCHA denied a second permanent permission request to add Aponte to the household, allegedly because the manager believed Aponte had signed the form for his mother. After his mother died in July 2012, NYCHA denied Aponte's request to lease her apartment as a remaining family member and, after a hearing, denied his grievance. Supreme Court upheld NYCHA's determination.

The Appellate Division, First Department reversed on a 3-2 vote and annulled NYCHA's denial of succession rights to Aponte, ruling it was arbitrary and capricious. "NYCHA never considered evidence of petitioner's mother's disability in denying the applications" to add Aponte to the lease, it said. "The ground proffered for the denial, i.e., that adding petitioner to the household would result in overcrowding, creates an unacceptable Catch-22 -- a request to add an additional family member will almost always result in overcrowding [if] NYCHA fails simultaneously to consider transferring the applicant to a larger apartment." Rejecting NYCHA's claim that it could, and effectively did, meet its duty to the mother by granting Aponte temporary residency, without succession rights, the court said, "We can never know what would have constituted a reasonable accommodation of [his] mother's disability under the circumstances. Neither petitioner nor his mother was afforded a meaningful opportunity to demonstrate what would constitute a reasonable accommodation.... NYCHA's determination cannot be deemed rational in light of the absence of a proper inquiry and an opportunity to be heard on the issue...."

The dissenters said, "NYCHA's denial of petitioner's grievance has a rational basis" because "he was not an authorized occupant of the apartment for a one-year period before his mother's death.... [T]he fact that NYCHA properly denied multiple applications to add petitioner to the lease does not make its determination denying petitioner's grievance arbitrary and capricious. Petitioner's mother was repeatedly made aware that she could not add petitioner to her household because it would create overcrowding. She was also given the opportunity to request a reasonable accommodation for her disability but she opted not to do so. Thus, NYCHA cannot be faulted for failing to consider transferring [her] to a larger apartment.... [W]e can state that, had she requested it, [her] disability could have been reasonably accommodated by granting petitioner temporary residency, and further that her disability was accommodated de facto by NYCHA knowingly permitting petitioner to remain in the apartment."

For appellants NYCHA and Olatoye: Jane E. Lippman, Manhattan (212) 776-5259
For respondent Aponte: Leah Goodridge, Manhattan (212) 417-3700

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To be argued Wednesday, January 3, 2018 (arguments begin at 10 am)

No. 6 People v Casimiro Reyes

Casimiro Reyes was a member of a Latin Kings gang in Brooklyn in 2010, when its leaders announced plans to firebomb the apartment of a fellow gang member who was trying to leave the Latin Kings and had assaulted another member of the gang. Reyes attended at least two meetings, along with as many as two dozen other gang members, where leaders discussed plans to break the windows of the apartment and throw Molotov cocktails inside. On the night of the arson attack, Reyes was arrested at a nearby subway station for unrelated misdemeanors -- turnstile jumping and possession of a boxcutter. He told law enforcement authorities in written and videotaped statements that he joined in the attack and threw one of the firebombs himself, but investigators determined that he could not have been present because he was already in police custody when the arson occurred.

Reyes was charged with second-degree conspiracy under Penal Law § 105.15, which states that a person is guilty of the crime "when, with intent that conduct constituting a class A felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct." Convicted at trial, he was sentenced to 6 to 18 years for conspiracy and concurrent one-year terms on the misdemeanor counts.

The Appellate Division, Second Department reversed the conspiracy conviction and vacated the sentence, finding there was legally insufficient evidence to establish the agreement element. "Although the People's evidence showed, inter alia, that the defendant was present at gang meetings where the plan to commit the arson was discussed and that he knew the details of that plan, the evidence was legally insufficient to prove that the defendant entered into a conspiratorial agreement," it said.

The prosecution argues there was legally sufficient evidence to prove Reyes' guilt of second-degree conspiracy. "[T]he evidence established that defendant was party to an agreement with other gang members that certain gang members would commit an arson at the home of the family of [the disaffected member], and the evidence also established that defendant had the intent that the arson be committed."

For appellant: Brooklyn Assistant District Attorney Thomas M. Ross (718) 250-2534
For respondent Reyes: Allen Fallek, Manhattan (212) 577-3566

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To be argued Wednesday, January 3, 2018 (arguments begin at 10 am)

No. 7 Lohnas v Luzi

Darlene Lohnas was treated by Dr. Frank Luzi Jr., of Northtowns Orthopedics, P.C., in Erie County, for osteoarthritis of her left shoulder beginning in December 1998. Dr. Luzi performed partial joint replacement surgery on the shoulder in January 1999, and he saw her for a series of post-surgery visits ending in January 2000. Lohnas returned to see him in August 2001, complaining of lost motion and increased pain in her left shoulder. Dr. Luzi performed surgery to repair her rotator cuff in January 2002, and saw her for a series of port-operative visits ending in April 2002. Lohnas returned for a check-up in September 2003, reporting that she hurt her left shoulder when she was pushed against a wall. Dr. Luzi diagnosed her as having a strain and contusion of the shoulder, recommended exercises and anti-inflammatory medication, and noted that he would see her "on an as needed basis." Lohnas did not see Dr. Luzi again until April 2006, when she complained of continuing pain and lost motion in her shoulder. He told her he was no longer performing shoulder surgeries, and she began seeing a different surgeon for treatment of her shoulder in July 2006.

Lohnas brought this malpractice action against Dr. Luzi and Northtowns on September 30, 2008, alleging that he negligently performed the surgeries in 1999 and 2002. The defendants moved to dismiss as time-barred all claims based on treatment rendered prior to March 30, 2006 under CPLR 214-a, which states that a medical malpractice action "must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same ... condition which gave rise to the" claim. Supreme Court denied the motion, finding Lohnas raised triable issues of fact about whether the limitations period was tolled under the doctrines of continuous treatment and equitable estoppel.

The Appellate Division, Fourth Department dismissed her equitable estoppel claim, but in a 4-1 ruling found there were issues of fact regarding the continuous treatment doctrine. Although Lohnas left the 2003 visit without a future appointment and there was "a gap in treatment that exceeds the 2½-year period of limitations" before she next saw Dr. Luzi in 2006, the court said, "The determination whether continuous treatment exists 'must focus on the patient'.... Based on plaintiff's version of the facts, there is support in the record for a finding that plaintiff 'intended uninterrupted reliance' upon defendant's observation, directions, concern, and responsibility for overseeing her progress. Notably, during approximately seven years of treatment with defendant, plaintiff underwent two surgeries, saw no other physician regarding her shoulder, and returned to him for ... a potential third surgery" in 2006. While Lohnas "certainly admitted to being discouraged with defendant" after the 2003 visit, "we cannot conclude that such discouragement renders the continuous treatment doctrine inapplicable as a matter of law."

The dissenter argued that, "because the parties only contemplated treatment after September 5, 2003 on an 'as needed basis,' the continuous treatment doctrine does not apply.... Moreover, inasmuch as plaintiff admitted that the more than 2½-year gap in treatment was because she was discouraged with defendant and she did not expect any actual treatment if she returned, it cannot be said that there existed the 'trust and confidence' that ordinarily marks the physician-patient relationship.... Here, plaintiff's testimony ... established that for over 2½ years she neither believed nor expected that defendant was making, or would make, any continuing efforts to treat her shoulder problems. In my view, under these circumstances, the policy reasons underlying the continuous treatment doctrine are simply not implicated."

For appellants Luzi and Northtowns: Tamsin J. Hager, Buffalo (716) 849-6500
For respondent Lohnas: Brian P. Fitzgerald, Buffalo (716) 852-2000

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To be argued Thursday, January 4, 2018 (arguments begin at noon)

No. 8 Dormitory Authority of the State of New York v Samson Construction Co.

In 2001, New York City entered into an agreement with the Dormitory Authority of the State of New York (DASNY) to manage and finance the design and construction of a $240 million, 15-story forensic laboratory for the Office of the Chief Medical Examiner on the Bellevue Hospital Campus in Manhattan. DASNY contracted with Perkins Eastman Architects, P.C. to design the project and with Samson Construction Co. to conduct excavation and foundation work. From 2002 to 2004, pile driving and other foundation work at the site caused an adjacent Bellevue building to settle; damaged nearby streets, water mains and sewer lines; and delayed the project by more than 18 months. DASNY and the City brought this breach of contract and negligence action against Perkins, among others, seeking $37 million in damages.

Supreme Court granted Perkins' summary judgment motion to dismiss the claims by the City, which was not a party to the architectural services contract, because the contract did not expressly provide that the City was a third-party beneficiary of the contract. However, the court denied Perkins' motion to dismiss DASNY's negligence claim as duplicative of its breach of contract claim. It said architects and other professionals "may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties."

The Appellate Division, First Department modified by reinstating the City's breach of contract claim, saying the City had raised an issue of fact as to whether it was an intended third-party beneficiary of the contract. It said, "The contract expressly states that a city agency will operate the DNA laboratory, and the City retained control over various aspects of the project, including participation in and approval of the design of the building, the budget for the project, the selection of contractors, including Perkins, and the construction of the building." It agreed with the lower court that DASNY can proceed with its negligence claim, saying "there is a factual question whether Perkins assumed an independent legal duty as an architect to perform its work in a manner consistent with the generally accepted standard of professional care in its industry.... There are issues of fact whether the project was so affected with the public interest that Perkins's failure to comply with the relevant professional standards could result in catastrophic consequences...."

In a partial dissent, one justice said the negligence claim should be dismissed as duplicative "because plaintiffs are 'essentially seeking enforcement of the bargain'.... DASNY's allegations of a mere breach of duty of care do not transform its breach of contract claim into a tort claim.... [N]o 'catastrophic' harm is or could be alleged in this case. The settling of the building took place gradually over a couple of years and never posed a serious threat to the public's safety. Nor were emergency safety measures or repairs required."

For appellant Perkins Eastman Architects: Mark C. Zauderer, Manhattan (212) 412-9500
For respondents City and DASNY: Asst. Corporation Counsel Kathy Chang Park (212) 356-0855

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To be argued Thursday, January 4, 2018 (arguments begin at noon)

No. 9 People v Douglas McCain
No. 10 People v Albert Edward

In separate cases, these defendants pled guilty to criminal possession of a weapon in the fourth degree, under Penal Law § 265.01(2), after they were found to be carrying knives. The arresting officers reported in the misdemeanor complaints that the defendants said they had the knives for "protection." The statute requires proof that a defendant possessed a weapon "with intent to use the same unlawfully against another." The defendants argue that their statements of intent to use the weapons legally, for self-defense, do not support the statutory element of unlawful intent, rendering the complaints jurisdictionally defective.

Douglas McCain was arrested in Queens in March 2013, when a police officer saw a "razor knife" clipped to the outside of his pants pocket. He told the officer, "It's for my protection. At least I'm not carrying a gun." After his plea, he was sentenced to time served.

The Appellate Term for the 2nd, 11th and 13th Judicial Districts affirmed based, in part, on Penal Law § 265.15(4), which provides that possession of an instrument "designed, made or adapted for use primarily as a weapon, is presumptive evidence of intent to use the same unlawfully against another." The court said, "Furthermore, defendant's admission that he intended to use the knife as a weapon by itself supports the charge" and his "untested claim that his anticipated use would be justified does not render the accusatory instrument defective, since the issue of whether he had intended to use the knife solely in self-defense is a trial issue...."

Albert Edward was arrested for trespassing in the lobby of a Manhattan public housing project in July 2012. When the officer searched him and found a box cutter, Edward said, "I use it on the train for protection." He was charged with three trespassing counts, but pled guilty only to the weapon charge and was sentenced to 10 days in jail.

The Appellate Term, First Department affirmed, saying Edward's "own statement that he carried the box cutter 'for protection,' 'effectively manifested that he himself considered it a weapon of significance to the police and not an innocent utilitarian utensil'...." The presumption of unlawful intent in Penal Law § 265.15(4) could apply to the facts alleged, it said, and his "untested claim that he would not use the box cutter unless absolutely necessary to lawfully defend himself does not render the weapon possession charge defective. While justification may excuse the unlawful use of a weapon, it does not excuse the unlawful possession of it...."

The defendants argue that their knives "did not qualify as a 'dangerous knife' or any other 'dangerous instrument' governed by the presumption of unlawful intent" in Penal Law § 265.15(4); and the facts alleged, including their statements that they carried the knives for protection, "did not establish that [they] intended to use [them] unlawfully against another person." They say the statements were the only evidence of their intent, and it was evidence of lawful intent. Noting that Penal Law § 265.01(2) applies to some items "that are not per se weapons," Edward says, "It is critical that the facts alleged in the accusatory instrument establish the element of unlawful intent, as the possessor's criminal intent is what converts an object of ordinary use into a dangerous weapon."

No. 9 For appellant McCain: Amy Donner, Manhattan (212) 577-3487
For respondent: Queens Asst. District Attorney Kayonia L. Whetstone (718) 286-7038
No. 10 For appellant Edward: Whitney Robinson, Manhattan (212) 5767-7989
For respondent: Manhattan Assistant District Attorney Sheryl Feldman (212) 335-9000