State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

November 14 thru November 16, 2023

State of New York
Court of Appeals

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To be argued Tuesday, November 14, 2023, in Buffalo

No. 87 Matter of Lazalee v Wegmans Food Markets, Inc.

Thomas Lazalee had worked as a truck driver for Wegmans Food Markets for 19 years when he developed a work-related injury – carpal tunnel syndrome – in his right hand and thumb that rendered him unable to work in August 2018. He had surgery to address the problem, Wegmans voluntarily paid him at the temporary total disability rate while he was unable to work, and he returned to work with his physician's approval in April 2019. Lazalee was diagnosed with the same injury to his left hand five months later and he had surgery to correct it in October 2019. His treating physician classified him as having a temporary total disability, and Wegmans again voluntarily paid him at the temporary total disability rate, until his physician cleared him to return to work in January 2020 without restrictions.

The Workers' Compensation Board awarded Lazalee payments for an established work related injury to his right hand, and he asked the Board to amend his claim to include the injury to his left hand. At a hearing in April 2020, Wegmans accepted the amendment to include the left hand in the established claim, but for the first time it asked to cross-examine Lazalee's physician about the degree of his disability, saying the physician "had claimant at total disability for three months" (from October 2019 to January 2020) "and then released him overnight at zero percent disability." A workers' compensation law judge (WCLJ) denied the cross-examination request, amended Lazalee's claim to include his left hand injuries, and awarded benefits. The Board affirmed the determination, finding Wegmans' request was untimely.

The Appellate Division, Third Department affirmed, rejecting Wegmans' argument that it was entitled to cross-examination under 12 NYCRR 300.10(c), which states, "When the employer ... desires to produce for cross-examination an attending physician whose report is on file, the referee shall grant an adjournment for such purpose." The court said Wegmans waived its right to cross-examine by not asserting it in a timely manner. "Following the October 2019 surgery, the employer accepted liability and voluntarily paid claimant for 11 weeks until [the physician] cleared him to return to work; at no point prior to the April 2020 hearing, three months after claimant's return to work, did the employer seek to suspend benefits, question his degree of disability or request further action.... We discern no basis, on these facts, to disturb the Board's finding that the request was untimely, waiving the right to cross-examination...."

Wegmans argues that its request was timely and it was entitled to cross-examine the physician "under the mandatory language of 12 NYCRR 300.10(c)" because it made the request at its first opportunity – at the first hearing held in the case – and before the WCLJ made any determination on the merits. "Wegmans had legitimate questions about whether Lazalee was disabled from *all work*, not just his work, which is the standard for being entitled to temporary total [disability] benefits...," it says, and asserts that the decisions of the Board and the Third Department would discourage employers from paying full disability benefits to their employees before a claim is adjudicated and benefits awarded.

For appellant Wegmans: Melissa A. Day, Amherst (716) 616-0111
For respondent Lazalee: Gregory R. Connors, Rochester (585) 262-2667
For respondent Workers' Comp. Board: Assistant Solicitor General Sean P. Mix (518) 776-2010

State of New York
Court of Appeals

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To be argued Tuesday, November 14, 2023, in Buffalo

No. 88 Matter of Wang v James

Dr. Jun Wang contends he is entitled to a defense and indemnification by New York State in a medical malpractice action stemming from pathology services he provided for an inmate at the state's Auburn Correctional Facility. An Auburn staff physician who was treating the inmate for a mass in his right armpit referred him to Dr. Robert Cotie, a surgeon at Cortland Regional Medical Center (CRMC), for evaluation. Dr. Cotie had a contract with the Department of Corrections and Community Supervision (DOCCS) to provide medical services to inmates. He recommended excision of the mass and a biopsy to rule out malignancy, a course of treatment that was approved by Auburn's Health Services Director. Dr. Cotie performed the surgery at CRMC in September 2012 and sent a sample of the mass to Dr. Wang, who had a contract with CRMC to provide in-house pathology services. Dr. Wang reported that the mass was not cancerous. The inmate was diagnosed with Hodgkin's lymphoma, a blood cancer, one year later and sued CRMC, Dr. Cotie and the Auburn Health Services Director for malpractice, alleging they had misinterpreted his biopsy. CRMC brought a third party action against Dr. Wang.

Dr. Wang sought a defense and indemnification from the state pursuant to Public Officers Law § 17, which requires the state to defend and indemnify state employees against civil claims arising from their performance of their official duties, and Correction Law § 24-a, which extends those protections to medical professionals who render care to inmates "while acting at the request of [DOCCS] or a facility of the department." The Attorney General's Office denied the request, saying he had no agreement with DOCCS to provide medical care and he had handled the inmate's biopsy under his private contract with CRMC. It later reaffirmed its denial, saying "Correction Law § 24-a requires some employment arrangement or other advance contractual or formal understanding between the provider and DOCCS." Dr. Wang then brought this suit against Attorney General Letitia James to compel the state to defend and indemnify him.

Supreme Court denied his petition and the Appellate Division, Fourth Department affirmed, saying the Attorney General's "determination that Correction Law § 24-a applies only where DOCCS has expressly requested the services of a particular health care provider 'is a reasonable one' that 'courts should not second-guess'.... Here, there is no evidence in the record supporting the conclusion that DOCCS ever expressly requested that petitioner perform pathology services on the biopsy sample.... Instead, petitioner's pathology services here were retained by CRMC, without any input from DOCCS."

Dr. Wang argues that he "is entitled to the protections of Correction Law § 24-a because DOCCS requested the surgical services of Dr. Cotie and approved Dr. Cotie's recommendation for a surgical biopsy, and pathology services are a required and integral part of a surgical biopsy. Accordingly, DOCCS requested professional medical services that necessarily included Dr. Wang's pathology review" and could not have been completed without it. He says "the meaning of the phrase 'at the request of' involves a matter of pure statutory interpretation and therefore, this Court should not give any deference to the State's determination."

For appellant Wang: Andrew R. Borelli, Fayetteville (315) 637-3663
For respondent James: Assistant Solicitor General Kevin C. Hu (518) 776-2007

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To be argued Tuesday, November 14, 2023, in Buffalo

No. 89 Matter of Bowers Development v Oneida County Industrial Development Agency

In 2017, the Mohawk Valley Hospital System (MVHS) received a $300 million grant from the state Department of Health to consolidate its medical services for Oneida, Herkimer and Madison Counties into a new healthcare campus in a blighted section of downtown Utica. The project includes construction of the Wynn Hospital and, on an adjacent parcel, a medical office building to be built and operated on a for-profit basis by Central Utica Building, LLC (CUB), a for-profit company formed by private physicians. MVHS owns three of the four parcels needed for the medical office building and related parking. The fourth parcel, about one acre in size, is owned by Rome Plumbing and Heating Co. Bowers Development has a contract to buy the parcel from Rome Plumbing and proposed to build its own medical office building on the site. In 2021, CUB applied for financial assistance from the Oneida County Industrial Development Agency (OCIDA) and asked the agency to acquire the disputed parcel by eminent domain for the CUB project. After a public hearing, OCIDA determined to condemn the parcel pursuant to General Municipal Law (GML) § 858(4), finding it would serve a public purpose, create jobs, and reduce burdens on public parking facilities. Bowers and Rome Plumbing commenced this proceeding to annul the determination.

The Appellate Division, Fourth Department annulled the condemnation decision in a 4-1 decision, saying "OCIDA lacked the requisite authority to acquire the subject property." An IDA's statutory purposes under GML § 858 are to promote and develop "commercial ... facilities," it said. "The purposes enumerated in the statute do not include projects related to hospital or healthcare-related facilities.... While OCIDA's determination and findings indicate that the subject property was to be acquired for use as a surface parking lot, the record establishes that ... the primary purpose of the acquisition was not a commercial purpose. Rather, the property was to be acquired because it was a necessary component of a larger hospital and healthcare facility project."

The dissenter said, "[T]he sole basis upon which the majority rests its decision to annul OCIDA's determination – and thereby intervenes into what is effectively the legislative process – is its conclusion ... that OCIDA's 'corporate purposes' do not include 'projects related to hospital or healthcare-related facilities.' It further concludes, in summary fashion and without any elaboration, that OCIDA's use of eminent domain here 'was not [for] a commercial purpose'.... Nowhere does the majority conclude that OCIDA's determination was irrational or that it lacked any foundation or basis.... Thus, by failing to address OCIDA's expressly stated basis for concluding that it had the statutory authority to exercise its eminent domain power – i.e., that it was done in furtherance of a commercial purpose – the majority has not only failed to afford OCIDA any deference with respect to its legislative determination..., it has entirely supplanted OCIDA by improperly making its own de novo determination of that question as a matter of law."

For appellants OCIDA et al: Paul J. Goldman, Albany (518) 431-0941
For respondents Bowers et al: Michael A. Fogel, Syracuse (315) 399-4343

State of New York
Court of Appeals

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To be argued Tuesday, November 14, 2023, in Buffalo

No. 28 People v Thomas P. Perdue

Christian Cirilla was shot in the leg as he argued with a woman in the front yard of her Rochester apartment building in 2017. Thomas Perdue was arrested and charged with the crime three weeks later. Only two eyewitnesses identified Perdue as the shooter at his trial five months later. One was Cirilla and the other was a woman who lived in an upstairs apartment of the same building who said she saw the shooting from her window. She called 911 to report the incident that night and said she could identify the shooter, but the police did not conduct an identification procedure – such as a lineup or photo array – with her before the trial. The prosecutor was unaware the witness would identify Perdue until she was on the witness stand, described the shooter, and said she would recognize him if she saw him again. Defense counsel objected and the court held a bench conference. Defense counsel argued that a first-time in-court identification would be unduly suggestive because Perdue would be the only person sitting with her at the defense table. The court, after hearing that no pretrial identification was made, said "that's not really good police work." But the court overruled the objection and allowed the witness to identify Perdue in front of the jury, saying, "She's subject to cross-examination." Perdue was convicted of second-degree assault, two counts of second-degree criminal possession of a weapon, and was sentenced to 12 years in prison.

The Appellate Division, Fourth Department affirmed, saying the unexpected first-time identification at trial did not violate Perdue's right to due process. "Where, as here, 'there has been no pretrial identification procedure [with respect to a witness] and the defendant is identified in court for the first time [by that witness], the defendant is not [thereby] deprived of a fair trial because [the defendant] is able to explore weaknesses and suggestiveness of the identification in front of the jury'" through cross-examination, it said.

Perdue argues that "in-court identifications where the defendant is seated next to counsel at defense table are tantamount to showups, are inherently suggestive and create a substantial likelihood that they are unreliable;" and that the "in-court identification made five months after the shooting" in this case "likely contributed to a mistaken identification which resulted in a wrongful conviction." He says other courts have used pretrial procedures, such as lineups, to test a witness's reliability "when the defense is notified that a witness will make a first-time in-court identification in order to protect the defendant's right to a fair trial, but because notice that the eyewitness would do so at Thomas Perdue's trial was not provided until she was already on the witness stand, her testimony as to identification should have been precluded."

For appellant Perdue: Carolyn Walther, Rochester (585) 753-3480
For respondent: Monroe County Asst. District Attorney Martin P. McCarthy, II (585) 753-4534

State of New York Court of Appeals

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To be argued Wednesday, November 15, 2023, in Buffalo

No. 90 Matter of Hoffmann v New York State Independent Redistricting Commission

The primary question in this appeal is whether the congressional district map drawn on order of this Court in Harkenrider v Hochul (38 NY3d 494 [2022]) is the final map that must be used until the next redistricting cycle begins after the 2030 federal census, or if it is an interim map for use only in the 2022 elections and the state's Independent Redistricting Commission (IRC) can be compelled to submit a second set of redistricting plans to the legislature for use in future congressional elections. The IRC, established by a State Constitutional amendment in 2014, has ten members equally divided between the major political parties. It deadlocked twice in 2022, first submitting two competing congressional maps to the Legislature, which rejected them, and then failing to submit a second redistricting plan as required by the Constitution. The Legislature then drew and adopted its own map, which was immediately challenged in Harkenrider. This Court ultimately declared the map void, finding that "the legislature and the IRC deviated from the constitutionally mandated [redistricting] procedure." It further ruled there was evidence to support the conclusion of the lower courts that the congressional map was an unconstitutional gerrymander. Concluding that "judicial oversight is required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election," this Court directed the trial court to adopt new district lines with the help of a neutral expert. The resulting map was used in last year's congressional elections.

In June 2022, Anthony Hoffmann and nine other registered voters commenced this proceeding for a writ of mandamus to compel the IRC to submit a second set of congressional redistricting plans to the legislature to be used for the rest of this decade. IRC Chair Ken Jenkins and two other commissioners answered in support of the petition to compel submission of a second map. The IRC remained divided, with Commissioner Ross Brady and four other members moving to dismiss the petition. The original Harkenrider petitioners intervened and moved to dismiss the suit and retain the 2022 map. Governor Kathy Hochul and Attorney General Letitia James filed an amicus brief in support of the petition for a new map.

Supreme Court dismissed the petition, saying it was timely, but "the requested relief to restrict the 2022 maps to the 2022 election violates the constitutional mandate [in article III, § 4(e)] that an approved map be in effect until" a new map is drawn after the next census.

The Appellate Division, Third Department reversed and granted the petition in a 3-2 decision, saying the IRC had a constitutional duty to submit a second map after its first map was rejected and Harkenrider did not remedy that failure. Compelling the IRC to submit a new map to the legislature "honors the constitutional enactments as the means of providing a robust, fair and equitable procedure for the determination of voting districts in New York...," it said. "[I]n granting this petition, we return the matter to its constitutional design."

The dissenters argued the petition was untimely and, in any event, "the Constitution requires that ... court-ordered maps remain in place until after the next census." They said there was no statement in Harkenrider that the court-drawn map was only for use in the 2022 election, and its "judicial remedy cured the IRC's failure to act by lawfully establishing a redistricting plan for the ordinary duration, leaving no uncured violation of law and thus foreclosing mandamus."

For intervenors-appellants Harkenrider et al: Misha Tseytlin, Manhattan (212) 704-6000
For appellants Brady et al: Timothy F. Hill, Sayville (631) 582-9422
For respondents Hoffmann et al: Aria C. Branch, Washington DC (202) 968-4490
For respondents Jenkins et al: Jessica Ring Amunson, Washington DC (202) 639-6000
For amici curiae Hochul et al: Assistant Solicitor General Andrea W. Trento (212) 416-8656

State of New York Court of Appeals

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To be argued Wednesday, November 15, 2023, in Buffalo

No. 91 Matter of Appellate Advocates v New York State Department of Corrections and Community Supervision

Appellate Advocates, a nonprofit public defender organization, submitted a Freedom of Information Law (FOIL) request to the Department of Corrections and Community Supervision (DOCCS) in March 2018 seeking “any and all records, documents, and files” related to training of its Board of Parole commissioners. Appellate Advocates said it was seeking insight into “the decision-making process and reviewability of [the Board’s] parole determinations.” DOCCS ultimately withheld 11 documents, asserting they were exempt from disclosure under the attorney-client privilege and the exemption for intra-agency materials.

Supreme Court, after reviewing the documents in camera, ruled all 11 were privileged because “the materials are clearly the unique product of an attorney’s professional skills and were confidentially disseminated to the Board of Parole Commissioners for the purpose of rendering legal advice.” It also held they were exempt as intra-agency materials because they “contain counsel’s recommendations and were disseminated confidentially in furtherance of the decision making process prior to final determinations.”

The Appellate Division, Third Department affirmed on a 3-2 vote, saying the documents were exempt from disclosure under the attorney-client privilege because they “were made ‘“for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship....”’” It said some documents “contain legal advice to the Board regarding the state of law and how the Board should conduct interviews in accord with such law;” some “provide counsel’s summary, view and impression of recent case law;” and others “discuss various legal standards and regulations” and were provided so the Board “could understand ... how it can comply with them.”

In a partial dissent, one justice said four of the documents were privileged, but the other seven “contain sections that are devoted solely to informing the Board of Parole of its duly codified statutory and regulatory duties in rendering parole determinations, without any fact-specific discussions or legal advice on how to apply the law to particular scenarios.... [T]he general legal principles outlined therein are not confidential.”

In a separate partial dissent, another justice said one of the 11 documents was improperly withheld because it contained no legal advice or exempt material. He said two other documents that provided “sample language” and “template paragraphs for denying release” should have been withheld under the intra-agency exemption rather than attorney-client privilege.

Appellate Advocates argues that the training documents are not protected by attorney-client privilege because they do not contain “legal advice on real-world factual scenarios” and, in any event, “the public policy exception to the attorney-client privilege mandates disclosure here.”

For appellant Appellate Advocates: Ron Lazebnik, Manhattan (212) 636-6934
For respondent DOCCS: Assistant Solicitor General Frank Brady (518) 776-2054

State of New York Court of Appeals

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To be argued Wednesday, November 15, 2023, in Buffalo

No. 92 People v Michael Bay
No. 93 People v Kevin Sullivan

The prosecutors in these unrelated cases filed a certificate of compliance with discovery obligations under Criminal Procedure Law (CPL) 245.50 and a statement of readiness for trial within the statutory time limit of the speedy trial statute, CPL 30.30. But in both cases they later found and disclosed to the defense additional discovery material, raising the question of whether this rendered the certificate of compliance invalid and statement of readiness illusory, thus risking dismissal of the charges on speedy trial grounds.

Michael Bay was arrested in the City of Cortland in April 2021 for a violation-level offense of harassment based on domestic violence against a family member with whom he lived. After the prosecutor filed a certificate of compliance and statement of readiness, defense counsel asked for a 911 tape and police arrest report, which the prosecutor said did not exist. More than a month later, the prosecutor gave the defense the police report and a domestic incident report. The defense moved to dismiss the case the next day, arguing the prosecution was not actually ready for trial within the 30-day speedy trial limit because its certificate of compliance was invalid. The prosecution turned over the 911 tape hours later. Cortland City Court denied the motion without a hearing, found Bay guilty of harassment, and sentenced him to time served.

Cortland County Court affirmed, saying "it is clear that the People were unaware of the three items of [late] discovery and when made aware of their existence, the items were obtained and disclosed to the defendant within less than one day.... The three items of discovery were not utilized by either the People or defendant" at trial, and the defense "failed to articulate any prejudice ... to the defendant as a result of receiving late discovery.... The record reflects diligence, good faith and actual readiness on the part of the People."

Kevin Sullivan was charged with driving while impaired by drugs and seventh-degree criminal possession of drugs after Amherst Town police found him unconscious in the driver's seat of a vehicle in July 2020. A drug recognition expert (DRE) evaluated Sullivan upon his arrest, but the police did not provide the DRE report to the prosecution before it filed its certificate of compliance and statement of readiness in October 2020. The prosecution repeatedly requested the DRE report from the police, by email and telephone, beginning in November 2020; finally obtained it in April 2021; and gave it to the defense in May 2021.

Amherst Town Court granted the defense motion to dismiss the case, finding the certificate of compliance was invalid. Because the "DRE is listed in the police report," the court said, "it was the duty of the district attorney's office when they got the discovery to make sure that the DRE was in there. I could understand if... the district attorney's office had no knowledge whatsoever that a DRE was even done.... But knowing that the DRE was done because it's listed in the police report, you have an obligation to turn that over before declaring ready" for trial.

Erie County Court reversed, finding the certificate was filed in good faith. "Although the People should have been aware that a DRE existed and had not been disclosed, this does nor take away from the People's exercise of due diligence in their attempts to obtain the report," it said. The court found no prejudice because "no hearings were held, no trial date was scheduled, and no motions were filed" before the DRE was disclosed. "The defense was not forced to engage in courtroom proceedings without reviewing this key piece of evidence, and thus, suffered no prejudice in the defense of the charges."

No. 92 – For appellant Bay: Kayla Hardesty, Cortland (607) 753-5046
For respondent: Cortland County District Attorney Patrick A. Perfetti (607) 753-5008
No. 93 – For appellant Sullivan: Shawn P. Hennessy, East Amherst (716) 430-5883
For respondent: Erie County Asst. District Attorney Michael J. Hillery (716) 858-7922

To be argued Thursday, November 16, 2023, in Buffalo

No. 8 Suzanne P. v Joint Board of Directors of Erie-Wyoming County Soil Conservation District

In June 2012, a 14-year-old boy was wading and swimming with friends in Buffalo Creek in the Town of West Seneca when he was washed over a low-head dam, held underwater by the strong current flowing over the dam, and drowned. The boy's mother, Suzanne P., brought this wrongful death action on behalf of her son's estate against the Joint Board of Directors of Erie-Wyoming County Soil Conservation District (Joint Board) alleging that it was the owner and operator of the dam and had been negligent. The estate also sued Erie County, the Town of West Seneca, and the separate Soil & Water Conservation Districts of Erie and Wyoming Counties (the Districts) on various grounds, including that they shared responsibility for the Joint Board's actions or they failed to warn of a dangerous condition at the dam. The low-head dam was designed and built in the 1950s by a federal agency now known as the Natural Resources Conservation Service (NRCS). The Joint Board, as sponsor of the project, has operated and maintained the dam under contracts and agreements with the NRCS, which the estate contends vested ownership of the dam in the Joint Board.

Supreme Court denied the Joint Board's motion for summary judgment dismissing the suit, saying there were issues of fact about whether the Board owned the dam, "especially in light of the operation and maintenance agreement" with the NRCS. The court dismissed all claims against the other defendants, finding that the Districts were "separate entities" from the Joint Board and were not responsible for the dam; that the County did not own the dam; and that the Town did not own or control the creek. The Appellate Division, Fourth Department affirmed.

After a bifurcated trial on the issue of the Joint Board's ownership of the dam, Supreme Court granted a directed verdict that the Joint Board was an owner of the dam. It said the operation and maintenance agreement between the Board and NRCS vests structures, including the dam, in the project sponsor. "The Sponsor is the Joint Board per the agreement.... This court believes that it's spelled out that the dam vests with the Sponsor, and the conditions to vest are still met to this day.... They may not know that they own it but it vests with them."

The Appellate Division, Fourth Department reversed and dismissed the suit, ruling the Joint Board did not own the dam. It said that "NRCS constructed the dams, which were permanently affixed to land underlying Buffalo Creek.... Thus..., the dams are structures that constitute fixtures annexed to the realty and are part thereof.... Inasmuch as the trial evidence also established the NRCS had no ownership interest in Buffalo Creek or the abutting land, no transfer of ownership of the subject dam by NRCS could have occurred under the terms of the agreement given that '"[a] grantor cannot convey what the grantor does not own"'...."

The estate argues that this Court should reinstate its claims against all of the defendants. Under the language of the contracts between the Joint Board and NRCS, it says ownership of the dam "automatically vested in the Joint Board" upon its completion, without regard to who owned the creek bed or abutting land and with no need for a transfer of ownership, making the Board responsible for posting signs warning about the dangers posed by the dam.

For appellant Suzanne P.: William A. Quinlan, Buffalo (716) 852-1000
For respondent Erie County: Jeremy C. Toth, Buffalo (716) 858-2204
For respondent West Seneca: Paul F. Hammond, Buffalo (716) 856-1344
For respondent Joint Board: Mark P. Della Posta, Buffalo (716) 856-1636
For respondent Erie Soil & Water: Justin L. Hendricks, Buffalo (716) 853-3801
For respondent Wyoming Soil & Water: Philip C. Barth III, Buffalo (716) 856-1300

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To be argued Thursday, November 16, 2023, in Buffalo

No. 94 Stoneham v Joseph Barsuk, Inc.

Mark Stoneham was injured in August 2018 while working on a heavy-duty trailer owned by David Barsuk at Barsuk's scrap yard in Batavia. Stoneham used a front-end loader to lift the trailer so he could replace a leaking air tank in its air brake system. While he was under the trailer completing the installation, the front-end loader rolled backward and dropped the trailer on top of him. Stoneham brought this action against Barsuk to recover damages for his injuries under Labor Law § 240(1), which requires owners and contractors to provide "proper protection" against elevation-related risks to workers engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Stoneham argued the statute applied because the trailer is a "structure" that he was "repairing."

Supreme Court dismissed the suit on summary judgment, ruling that Stoneham was not engaged in a protected activity within the meaning of the statute. "The plaintiff's work was limited to the replacement of a leaking air tank on the trailer's brake system," it said. "This kind of work is performed every day on trucks and trailers outside of a construction setting.... It ... is well settled that Labor Law § 240(1) does not apply to routine maintenance in a non-construction, non-renovation context."

The Appellate Division, Fourth Department affirmed in a 3-2 decision, saying that "individual statutory terms such as 'repairing' or 'structure' cannot be considered in isolation. Instead, any activity must be considered in light of the text of Labor Law § 240(1) as a whole and the statute's 'central concern[, which] is the dangers that beset workers in the construction industry'.... Here, plaintiff, a certified diesel technician, was injured while installing an air tank on a flatbed trailer on the premises of a recycling plant. Inasmuch as plaintiff was 'engaged in his "normal occupation" of repairing [vehicles]..., a task not part of any construction project or any renovation or alteration to the [recycling plant] itself,' he was not engaged in a protected activity within Labor Law § 240(1) at the time of the accident...."

The dissenters argued that the trailer qualified as a "structure." They said this Court's 1909 decision in <u>Caddy v Interborough R.T. Co.</u> (195 NY 415) "made clear that the meaning of the word 'structure,' as used in the Labor Law, is not limited to houses or buildings.... The Court stated, in pertinent part, that 'the word "structure" in its broadest sense includes any production or piece of work artificially built up or composed of parts joined together in some definite manner.'" They cited subsequent Fourth Department decisions that found a crane and a van were structures. "Here, the flatbed trailer upon which plaintiff was working also fits 'squarely within' the definition of a 'structure.'" They said there were triable issues of fact concerning "whether plaintiff was engaged in routine maintenance – which falls outside the protections of Labor Law § 240(1) – or a repair of the flatbed trailer, a protected activity."

For appellant Stoneham: John N. Lipsitz, Buffalo (716) 849-0701
For respondent Barsuk: James M. Specyal, Buffalo (716) 566-5400

State of New York Court of Appeals

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To be argued Thursday, November 16, 2023, in Buffalo

No. 95 People v Devon T. Butler

In March 2017, two undercover detectives investigating drug activity in Binghamton observed what they considered a suspicious interaction between Devon Butler and a man who briefly entered his car in a parking lot, touched hands with Butler, and quickly departed. The officers followed Butler out of the lot and eventually stopped him when he made several evasive maneuvers – a U-turn, speeding, and running a stop sign. At their request Butler got out of his car, leaving the door open. Detective Christopher Bracco brought his narcotics detection dog out of his vehicle and, as he walked him around Butler's car, the dog jumped into the driver's seat and "alerted" to the scent of drugs. Bracco then decided to "see if there's any odor" on Butler and allowed the dog to approach. The dog "put his nose in the groin/buttock region of [Butler], and then he sat," signaling drugs were present. Butler bolted, the officers gave chase and saw him reach down the back of his pants – as if to discard something – before they caught and arrested him. They found a package with 76 bags of heroin along the path of his flight. Butler admitted the drugs were his.

Broome County Court denied Butler's motion to suppress the drug evidence, finding the officers had "a founded suspicion that criminality was afoot, and lawfully permitted the K-9 search of the vehicle." It also found the K-9 search of Butler's person was legal because "there is not a reasonable expectation of privacy in the air surrounding a person.... It was therefore perfectly acceptable for [the dog] to approach defendant in an effort to 'sniff' the air surrounding defendant." Butler pled guilty to third-degree drug possession and evidence tampering and was sentenced to four years in prison.

The Appellate Division, Third Department affirmed on a 4-1 vote, with one justice concurring in result. The majority rejected County Court's analysis of the K-9 sniff of Butler's person, saying the "contact sniff ... intruded upon his personal privacy" under the state and federal constitutions, but it held for the first time that a reasonable suspicion standard should govern such a search and that the standard was satisfied. "A canine sniff is a minimal intrusion compared to a full-blown search of a person, intended only to detect the possession of narcotics...," it said. "Given the necessity for prompt action, it was not unreasonable for Bracco to allow the canine to approach defendant." The "contact was brief and the canine quickly alerted. In these circumstances, we conclude that the search was valid...."

The concurrence argued the majority, by adopting a constitutional standard and finding it was satisfied, two issues that County Court did not address, "exceeded its jurisdiction" under CPL 470.15(1), which limits review to issues "involving error or defect in the criminal court proceedings which may have adversely affected [the defendant]." However, she agreed with the majority that Butler "forfeited any expectation of privacy by abandoning the recovered heroin while being pursued," so suppression was properly denied.

The dissenter argued that "the more stringent probable cause standard should apply and..., because that standard was not met here, the canine sniff of defendant's person constituted an illegal search. The physical evidence obtained thereafter was tainted by the improper police conduct and should have been suppressed." He noted that "a canine sniff of an individual's groin area is not minimally intrusive."

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State of New York
Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at 518-455-7711 or gspencer@nycourts.gov.

To be argued Thursday, November 16, 2023, in Buffalo

No. 96 People v Joshua Messano

In August 2020, a detective patrolling in Syracuse saw a Mercedes move erratically through traffic and stop next to a Pontiac driven by Joshua Messano. The two drivers conversed through their windows and then pulled into the parking lot of a closed business. Messano walked over to the Mercedes and put his head in through the passenger window to speak with the driver. He stood back up, looked around and texted on his cell phone, then leaned back into the Mercedes to continue talking. The detective said this appeared, to him, to be a drug transaction, although he could not see a hand-to-hand exchange. A second Mercedes soon pulled into the lot and the detective recognized the driver as a man with prior arrests for drug possession. The detective called for back-up and several deputies responded. As one of them approached the Pontiac, Messano got out and walked toward him. The deputy frisked him for weapons, finding none, then ordered him to wait behind his car with a fellow officer. The deputy looked through the window of the Pontiac and saw a rolled-up dollar bill and white powder on the driver's seat. Messano was arrested and deputies searched his car, recovering a handgun.

Onondaga County Court denied Messano's motion to suppress the handgun, finding the pat frisk was permissible and the discovery of the white drug residue was lawful under the plain view doctrine. Messano pled guilty to second-degree weapon possession and was sentenced to five years in prison.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, rejecting Messano's claim that he was illegally detained when he was briefly held behind his car before the drug residue was discovered. It said, "[B]ased on the totality of the observations by the detective, which he communicated with the deputy..., the deputy had a reasonable suspicion that defendant was involved in a drug transaction." It also found that discovery of the drugs "was not the result of the allegedly illegal detention.... Even if the deputy had not detained defendant, he could have simply walked up to the vehicle, looked in the window, and observed the drugs in plain view on the driver's seat. Contrary to defendant's further contention, the deputy's observations of the rolled-up dollar bill and white powdery substance provided probable cause to arrest defendant for possession of drugs...."

The dissenters argued the frisk and detention of Messano was unjustified, saying the detective "admitted at the suppression hearing that he did not actually observe a hand-to-hand drug transaction" and the other circumstances were insignificant and not unusual. "Inasmuch as the actions observed by the law enforcement officers were 'at all times innocuous and readily susceptible of an innocent interpretation'..., the law enforcement officers lacked the requisite reasonable suspicion to detain defendant." They also argued the discovery of the drug residue was not attenuated from the improper detention, saying "there were no intervening circumstances. Instead, upon completing the pat frisk of defendant, the sheriff's deputy directed a fellow officer to detain defendant at the back of the vehicle, resulting in a continuation of the initial seizure that permitted the sheriff's deputy an unobstructed view of the driver's seat."

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