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.

JANUARY 6, 7 and 9, 2014 CALENDAR

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Monday, January 6, 2014

No. 1 New York Hospital Medical Center of Queens v Microtech Contracting Corp.

New York Hospital Medical Center of Queens contracted with Microtech Contracting Corp. in March 2008 to demolish certain structures in the basement of the Hospital in Flushing. Microtech hired two undocumented aliens, brothers Gerardo and Luis Lema, to perform the work. The Lemas were injured during their first day on the job when a chimney fell on them, and Microtech provided compensation for their injuries pursuant to the Workers' Compensation Law. When the Lemas filed a personal injury suit against the Hospital, citing Labor Law violations, the Hospital brought this action for contribution and indemnification against Microtech.

Microtech moved to dismiss the complaint on the ground that the Hospital's claims for contribution and indemnification were barred by Workers' Compensation Law § 11, which generally prohibits third-party claims against employers for common law indemnification for workplace injuries. The Hospital argued that Microtech violated the federal Immigration Reform and Control Act of 1986 (IRCA) by failing to verify the immigration status of the Lemas and, therefore, was not entitled to the protection of the Workers' Compensation Law.

Supreme Court granted Microtech's motion dismiss, finding that the exceptions to Workers' Compensation Law § 11 do not include an employer's alleged hiring of undocumented aliens and, thus, the Hospital's claim for indemnification from Microtech was barred by the statute. The Appellate Division, Second Department affirmed, holding that "the IRCA does not preempt the applicable provisions of the Workers' Compensation Law and that the violations of the IRCA alleged here do not abrogate the protections provided to the defendant by Workers' Compensation Law § 11 from third-party claims for contribution and indemnification." It said the Hospital's complaint "fails to allege a legally cognizable exception to" section 11.

The Hospital argues that, because Microtech violated the IRCA by hiring the Lemas without verifying their immigration status, "the employment contracts between Microtech and the Lemas were illegal contracts that are unenforceable in New York courts. Thus, Microtech may not defend this case on the ground that the Lemas were its employees and therefore the action is barred by section 11...." It says, "Requiring employers to pay contribution and indemnification in these circumstances will provide employers with an incentive *not* to hire persons not authorized to work in the United States."

For appellant Hospital: Timothy J. O'Shaughnessy, Woodbury (516) 487-5800
For respondent Microtech: Dennis M. Wade, Manhattan (212) 267-1900

State of New York Court of Appeals

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To be argued Monday, January 6, 2014

No. 2 Executive Plaza, LLC v Peerless Insurance Company

This federal case hinges on the interplay between two provisions in a $1 million fire insurance policy issued by Peerless Insurance Company to cover a two-story office building in Island Park owned by Executive Plaza, LLC. One provision required Executive, when seeking payment for replacement costs, to repair or replace its damaged property before bringing suit on the policy and to complete the replacement work "as soon as reasonably possible." The other provision required Executive to bring any lawsuit against Peerless within two years after the damage occurred. The question is, what happens when it is not reasonably possible to replace a damaged property within two years?

Executive's building was destroyed by fire on February 23, 2007, and within days Executive hired an architect and a construction company to replace it. However, zoning laws had changed since the office building was erected and Executive was required to obtain a variance and other approvals from local authorities. It filed its application in June 2007, but did not receive its final building permit until November 2008, 17 months later. By October 2010, Executive had substantially completed its new building.

In February 2009, less than two years after the fire, Executive sued Peerless to recover its replacement costs up to the $242,000 remaining under the policy limit (Peerless had earlier paid it $758,000 to cover the actual cash value of the damaged property). U.S. District Court for the Eastern District of New York dismissed the suit as premature because the new construction was not complete. In October 2010 -- after completing the new construction, but more than two years after the fire -- Executive sent a demand letter for $242,000 to Peerless and, when the insurer rejected it, brought this action to recover its replacement costs. The district court dismissed the second action as time-barred. Executive appealed.

The U.S. Court of Appeals for the Second Circuit is asking the New York Court of Appeals in a certified question to determine whether, under the terms of the insurance policy, Executive would be "covered for replacement costs if the insured property cannot reasonably be replaced within two years," or whether the two-year limitations clause is enforceable regardless of whether the work could reasonably be completed within that time.

For appellant Executive Plaza: David Jaroslawicz, Manhattan (212) 227-2780
For respondent Peerless: John N. Love, Boston, MA (617) 267-2300

State of New York Court of Appeals

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To be argued Monday, January 6, 2014

No. 3 People v Lance J. Reed

Shawn Thomas, a drug dealer, was shot to death on the afternoon of April 7, 2007, on Pennsylvania Avenue in Rochester. After a year-long investigation, Lance Reed was charged as an accomplice with robbery and felony murder, based on allegations that $40,000 was taken from Thomas after he was killed.

Several eyewitnesses heard the gunshots and saw a Lincoln Town Car drive away with the shooter. One of them identified Reed as the driver, and said the shooter bent over the victim immediately after the shooting and then got in the car. Police discovered the vehicle the next day near the home of Reed's sister and in it they found a plastic Tops supermarket bag that was closed at the top with two knots and ripped open at the bottom. Thomas's girlfriend testified that shortly before the murder, she had counted out $40,000 for him to use to buy drugs, bound the bills with colored rubber bands, and placed them in a Tops grocery bag, which she tied closed with two knots. She identified the bag that police recovered from the Lincoln as the one that held the cash. Reed was convicted of second-degree felony murder and two counts of first-degree robbery and was sentenced to 15 years in prison.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, rejecting Reed's claim that there was insufficient evidence that anything was stolen from Thomas. "It has long been the law in New York that evidence establishing that a defendant possessed a wrapper or container that had held property before it was stolen is sufficient to support a conviction for stealing that property...," the majority said. "Consequently, '[t]his evidence, although circumstantial, was nevertheless more than sufficient to lead a reasonable person to conclude that defendant' or one of his accomplices stole the cash from the victim."

The dissenters said the plastic grocery bag "is a common item" that could not be conclusively identified as the bag that held the cash. "[N]one of the seven eyewitnesses to the shooting -- many of whom also saw the assailant's departure from the area of the shooting -- saw the taking of property from the victim," they said. "Moreover, none of those witnesses saw anyone walk from the vicinity of the victim's body carrying anything other than a gun." They argued there was insufficient evidence to support the robbery convictions or the felony murder conviction that was premised on the robbery.

For appellant Reed: Svetlana K. Ivy, Rochester (585) 753-4947
For respondent: Monroe County Asst. District Attorney Nicole M. Fantigrossi (585) 753-4618

State of New York Court of Appeals

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To be argued Monday, January 6, 2014

No. 4 People v David W. Schreier *(papers sealed)*

On the morning of December 24, 2008, David Schreier stood outside of his neighbor's apartment in the Town of Gates and videotaped her through a window in her front door as she stood naked in her bathroom at the top of a stairway. The woman spotted the camera after several minutes, closed the bathroom door and called the police, who followed footprints in the snow to Schreier's apartment next door.

Schreier was charged with unlawful surveillance in the second degree (Penal Law § 250.45[1]), which applies when, "For his or her own ... amusement, entertainment, or profit, or for the purpose of degrading or abusing a person, [a defendant] intentionally uses or installs ... an imagining device to surreptitiously view, broadcast or record a person dressing or undressing or the sexual or other intimate parts of such person at a place and time when such person has a reasonable expectation of privacy, without such person's knowledge or consent." After a bench trial in Monroe County Court, he was convicted of the charge and sentenced to five years probation.

The Appellate Division, Fourth Department affirmed, rejecting Schreier's claim there was insufficient evidence that he acted "surreptitiously," that the complainant had "a reasonable expectation of privacy," and that he made the recording for his own amusement. "With respect to the surreptitious nature of the recording, we note that defendant videotaped the victim in the early morning hours, around dawn, obscured himself and his compact camera from the victim's view and, when confronted by the police, initially denied that a recording existed," the court said. Regarding the complainant's reasonable expectation of privacy, it said she "was recorded at 7:30 a.m. in the second-floor bathroom of her home as she was preparing for work. Her location was largely obscured from outside view, except from a particular vantage point through a certain window that could be obtained only by a person of above-average height, standing immediately outside her door."

Schreier argues he did not act "surreptitiously" because he did not use a telephoto lens or hidden camera, but instead stood at the complainant's front door with nothing to conceal him "from full public view while the recording was being made.... From its inception, this law was meant to prohibit recordings made from **non**-public clandestine places, hidden from the entire public, not just secreted from the complainant." He argues the complainant had no reasonable expectation of privacy at the time because she "could be -- and was -- seen from a public place while standing nude in her bathroom. Absent any effort on her part to shield herself from public view -- as by covering the window in her front door, or closing her bathroom door -- the complainant cannot as a matter of law be said to have possessed an expectation of privacy under the statute." He also contends the prosecution failed to prove his criminal intent.

For appellant Schreier: Timothy P. Murphy, Buffalo (716) 849-1333 ext. 323
For respondent: Monroe County Asst. District Attorney Nicole M. Fantigrossi (585) 753-4618

State of New York Court of Appeals

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To be argued Monday, January 6, 2014

No. 5 People v Alias Stone *(papers sealed)*

Alias Stone was charged with two counts of second-degree burglary for allegedly entering non-public areas of a midtown Manhattan hotel in January and March 2008 and, during the first incident, stealing an employee's cell phone. He had assigned counsel for his trial, but during jury selection insisted he be allowed to represent himself, a request the court reluctantly granted. Stone completed jury selection, gave a brief opening statement in which he did not outline a defense, and began cross examining the first prosecution witness, a hotel employee, in such a manner that he appeared to concede he had been in the employee's office, which was the basis for the burglary charges. He then told the judge he was "very nervous" and the court granted his request to reinstate his assigned counsel. Stone was disruptive throughout his trial and expressed delusions that his attorney, the prosecutor and the court were conspiring against him. After he was convicted of both burglary counts, but before he was sentenced, Stone was diagnosed with paranoid schizophrenia and hospitalized. When he was finally found competent to proceed, after being medicated, he was sentenced to seven years in prison.

On appeal, Stone argued the trial court erred in allowing him to represent himself without first determining whether he was competent to do so. He cited the U.S. Supreme Court's ruling in Indiana v Edwards (554 US 164 [2008]), which held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial ... but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."

The Appellate Division, First Department affirmed, saying Edwards "was expressly limited to circumstances in which a court *denies* a trial-competent defendant's application to proceed pro se on the ground that mental illness nevertheless renders the defendant incapable of self-representation. We need not determine whether there are circumstances in which a court is *required* to insist upon representation by counsel for such a defendant because the record here does not reflect that defendant suffered from such a mental incapacity at the time of trial." Stone's pro se performance "did not suggest such an incapacity," it said. "Defendant's opening statement, though brief, was cogent and appropriate. While his cross-examination of the People's main witness may have been less than artful, there is no basis for attributing this to mental illness, as opposed to the lack of skill demonstrated by many pro se defendants."

Stone argues that, given his behavior, the trial court erred in failing to inquire into his competence to stand trial and the higher level of competence required to represent himself. "The kind of competence required to stand trial with the assistance of counsel is substantively different from the kind of competence required to conduct one's own defense without the assistance of counsel.... [T]he latter requires competence sufficient to perform the many onerous tasks associated with the presentation of a defense, among them, 'making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury,'" he says, citing Edwards (554 US at 176).

For appellant Stone: Leah Friedman, Manhattan (212) 474-1598
For respondent: Manhattan Assistant District Attorney Sheila O'Shea (212) 335-9000

State of New York Court of Appeals

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To be argued Tuesday, January 7, 2014

No. 6 K2 Investment Group, LLC v American Guarantee & Liability Insurance Co.

K2 Investment Group and ATAS Management Group made loans totaling nearly $3 million to Goldan, LLC, a real estate company owned by New York attorney Jeffrey Daniels and a partner. When Goldan failed to repay the loans and declared bankruptcy in 2009, K2 and ATAS sued Goldan and its owners. Their claims against Daniels included legal malpractice, based on allegations that he agreed to represent them in the transactions and that he failed to record mortgages to secure the loans and failed to obtain title insurance. Among other claims, they also alleged that he breached his personal guarantees of the loans.

American Guarantee & Liability Insurance Company, Daniels' malpractice insurer, disclaimed coverage based on policy provisions stating that it would not cover "any Claim based upon or arising out of, in whole or in part: ... D. the Insured's capacity or status as ... an officer, director, partner ... or employee of a business enterprise" (the Insured's Status Exclusion), or "E. the alleged acts or omissions by any Insured ... for any business enterprise, whether for profit or not-for profit, in which any Insured has a Controlling Interest" (the Business Enterprise Exclusion). When Daniels forwarded a settlement offer of $450,000, American Guarantee again disclaimed coverage. Daniels failed to appear in the malpractice action and the court entered a default judgment awarding $2,404,378 to K2 and $688,716 to ATAS. The court also, upon the plaintiffs' application, discontinued their personal guarantee claims. Daniels then assigned all of his claims against American Guarantee, including claims of bad faith, to K2 and ATAS.

K2 and ATAS brought this action, as assignees of Daniels' rights under the malpractice policy, to recover the amount of the default judgment and to recover for American Guarantee's alleged bad faith refusal to defend or indemnify Daniels.

Supreme Court granted summary judgment to the plaintiffs on their cause of action to enforce the default judgment, but dismissed their claims of bad faith. The Appellate Division, First Department affirmed in a 3-2 decision, saying the policy exclusions "are patently inapplicable" to the legal malpractice claim. The dissenters argued there were issues of fact as to whether the exclusions applied.

The Court of Appeals affirmed, on a different ground, on June 11, 2013. It held that American Guarantee, by breaching its duty to defend Daniels, lost its right to rely on the policy exclusions in litigation over its obligation to indemnify. On September 3, 2013, the Court granted American Guarantee's motion for reargument.

For appellant-respondent American Guarantee: Robert J. Kelly, Manhattan (212) 483-0105
For respondents-appellants K2 and ATAS: Michael A. Haskel, Mineola (516) 294-0250

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To be argued Tuesday, January 7, 2014

No. 7 People v Mikal Smith

Mikal Smith and his brother, posing as police officers with badges around their necks, stopped Hector Diaz in the stairwell of his Manhattan apartment building in December 2007, instructed him to place his hands on the wall and went through his pockets, taking out his wallet and keys and then returning them. The brothers said Diaz was not who they were looking for and told him he was free to go. Diaz discovered $200 was missing from his wallet, although $60 had been left in it. He called the police, who arrived as the brothers were walking away from the building. Malik Smith appeared to discard something during the chase and, after he was arrested, the officers backtracked and found two imitation gold shields on lanyards, a loaded revolver, and a starter's pistol beneath a parked van. After a jury trial, Smith was convicted of second-degree robbery and several lesser charges and was sentenced to nine years in prison.

On appeal, Smith argued there was insufficient evidence to satisfy the definition of robbery in Penal Law § 160.00, which states that a person commits robbery when "he uses or threatens the immediate use of physical force upon another person for the purpose of ... overcoming resistence to the taking" or "compelling the owner ... to deliver up the property."

The Appellate Division, First Department affirmed the robbery conviction, saying Smith and his accomplice "impersonated police officers in order to effect physical control over the victim. They compelled him to submit to a patdown, and in the process they took property from his person. This satisfied the force element of second-degree robbery.... The theft was not merely a larceny by trick, because the removal of property was accomplished not only by impersonating police officers, but also by physically restraining the victim during the patdown."

Smith argues the evidence might support a conviction of larceny by trick or scheme to defraud, but not robbery, because there was no proof he used force or the threat of force to take money from Diaz. He says that "there was barely any touching of Diaz and not the hint of force used. Diaz, himself, made clear that there was no display of a weapon, no pushing, shoving, cursing, or even physical contact other than Appellant removing some of Diaz' property and returning it except for $200. The entire incident took less than one minute and involved the most minimal of intrusion. Any fear instilled was not fear of physical violence, but rather the anxiety occasioned by the possibility of being arrested and all the anxiety that flows therefrom."

For appellant Smith: Leonard J. Levenson, Manhattan (212) 732-0522
For respondent: Manhattan Assistant District Attorney Caitlin J. Halligan (212) 335-9000

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To be argued Tuesday, January 7, 2014

No. 8 Biotronik A.G. v Conor Medsystems Ireland, Ltd.

In May 2004, Biotronik A.G. and Conor Medsystems Ireland, Ltd., which manufactured coronary stents under the trade name CoStar, entered into an agreement that made Biotronik the exclusive distributor of CoStar stents in Europe and other foreign regions. The distribution agreement was to expire at the end of 2007, but provided for a potential one-year extension. The price Biotronik was required to pay Conor for the stents was based on a percentage of the average resale price that Biotronik charged for the stents. The agreement, governed by New York law, contains a clause limiting liability for breach of contract, which states, "Neither party is liable to the other for any indirect, special, consequential, incidental or punitive damages with respect to any claim arising out of the agreement (including without limitation its performance or breach of this agreement) for any reason." Johnson & Johnson purchased Conor in February 2007. Conor informed Biotronik in May 2007 that it was ceasing its manufacture of CoStar stents and recalling the product from the market. Biotronik then brought this breach of contract action against Conor, seeking damages for lost profits.

Supreme Court dismissed the suit, ruling that the lost profits sought by Biotronik were consequential damages, rather than general damages, and thus barred by the distribution agreement. The court said, "The fact that Conor would receive a fixed percentage of Biotronik's sales does not change the fact that Biotronik is claiming damages in the form of lost profits on collateral business arrangements, and that these are consequential damages the parties expressly agreed would not have to be paid in the event of a breach."

The Appellate Division, First Department affirmed, holding that Biotronik's claim for lost profits is barred by the agreement's exclusion of consequential damages. "Contrary to plaintiff's contention that its lost profits constitute general damages falling outside that limitation," it said, "a plaintiff suing to recover profits that it would have made by reselling the defendant's goods to third parties ... is seeking consequential damages...." The court said lost profits "only constitute general damages where the nonbreaching party seeks to recover money owed directly by the breaching party under the parties' contract...."

Biotronik argues that its "resale of CoStar stents for profit was the very purpose of the Agreement. Biotronik's loss of these profits was not only probable -- it was inevitable -- once Conor stopped supplying CoStar. These lost profits are thus general damages flowing directly from Conor's breach, not some 'consequential' side effect that would be barred by the Agreement."

For appellant Biotronik: Ronald S. Rauchberg, Manhattan (212) 969-3000
For respondent Conor: Harold P. Weinberger, Manhattan (212) 715-9100

State of New York Court of Appeals

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To be argued Tuesday, January 7, 2014

No. 9 Matter of Baldwin Union Free School District v County of Nassau (and two other matters)

Towns and other municipal entities are responsible for real property tax assessments in most areas of the state, and state law requires the localities to pay their proportionate share of refunds resulting from errors in those assessments. When the Nassau County Charter was enacted in 1936, it gave the County the authority to conduct all property tax assessments within the County, but the general state law that makes towns and local districts responsible for tax refunds was left in place. In 1948, at Nassau County's request, the State Legislature amended the County's Charter and Administrative Code to make Nassau County liable for all property tax refunds arising from assessment errors, since it is the assessing unit. The amendments are known as the "County Guaranty." In 2010, the Nassau County Legislature adopted Local Law No. 18 to supercede and repeal the County Guaranty. Under the new law, the County remained the assessing authority, but the towns, cities, school districts, and special districts that received property tax revenue were made liable for their proportionate share of refunds awarded in tax certiorari proceedings.

Of these three cases challenging the validity of Local Law No. 18, one was filed by the Baldwin Union Free School District and 40 other school districts in the County; another was commenced by taxpayers Barbara Hafner and Linda Wiener; and the third was brought by the Town of North Hempstead and 19 of its special districts. The plaintiffs sought a declaration that the new law violates the New York Constitution and the Municipal Home Rule Law.

Supreme Court awarded summary judgment to the County and declared that Local Law No. 18 is valid, ruling that the statute is consistent with state law and the County acted within its authority. "In short, both state statute and Local Law [No. 18] now require the County to charge back the amount of refunds attributable to the town, special district or school district...," the court said. "Nassau County has the authority to amend its County Charter by making changes in the Administrative Code with respect to local matters that do not conflict with state statutes."

The Appellate Division, Second Department reversed and declared the local law violates the State Constitution and Municipal Home Rule Law, saying, "[I]t is indisputable that Local Law No. 18 ... is inconsistent with the state law that enacted the County Guaranty. Moreover, Local Law No. 18 is in conflict with Municipal Home Rule Law § 34(3)(a), a general law that provides that ... a county charter or charter law shall not supercede 'any general or special law enacted by the legislature [w]hich relates to the imposition, judicial review or distribution of the proceeds of taxes or benefit assessments'...."

For appellant Nassau County: Ronald J. Rosenberg, Garden City (516) 747-7400
For respondent school plaintiffs: David N. Yaffe, Melville (631) 694-2400
For respondents Hafner & Wiener: Catherine V. Battle, Manhattan (212) 533-6300
For respondent town plaintiffs: Maureen T. Liccione, Garden City (516) 393-8295

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To be argued Tuesday, January 7, 2014

No. 10 People v Paul Thompson *(papers sealed)*

Paul Thompson was shot and wounded by a rival drug dealer, Rasheem Williams, in a dispute over territory in the Stapleton area of Staten Island in July 2003. Williams was himself shot to death in the same neighborhood in October 2003. Several witnesses said a man in a hoodie came up behind Williams and shot him twice in the head. Police stopped Thompson a short distance away and discovered the murder weapon, a silencer, and a hoodie discarded in a nearby backyard. A fingerless glove and other evidence seized from Thompson during a search after his arrest was suppressed on the ground that police lacked probable cause for the arrest. A grand jury declined to indict Thompson. The case was presented to a second grand jury after a new eyewitness came forward and identified Thompson as the shooter, and he was indicted on murder and weapon charges. His first trial ended with a hung jury.

At his second trial, Thompson's attorney said during summation that investigators had tested the silencer and did not find Thompson's DNA on it. He argued the silencer "was in the shooter's hands. The shooter touched the silencer at some point.... [H]ands have skin cells." The prosecutor objected and moved to reopen her case to present evidence of the suppressed fingerless glove, arguing the defense had opened the door. Supreme Court granted the request and the prosecutor recalled a detective, who testified that he found a fingerless glove in Thompson's pocket when he frisked him. Thompson was convicted of second-degree murder and two counts of weapon possession and was sentenced to 25 years to life in prison.

The Appellate Division, Second Department affirmed, ruling that Thompson was not prejudiced by the trial court's decision to allow the prosecutor to reopen her case to admit the previously suppressed glove into evidence. "Defense counsel's comments during summation opened the door to the admission of the evidence...," the court said. "Following the admission of the glove, the defendant was given an opportunity to deliver supplemental summations. Under the circumstances, the trial court's ruling permitting the People to reopen their case was not an improvident exercise of discretion...."

Thompson argues his attorney's "perfectly fair summation" did not open the door to admission of the glove and the trial court "improperly altered the prescribed order of trial and denied defendant due process and an effective suppression remedy." He says, "Counsel's argument was not misleading since, even if appellant were the shooter, the suppressed glove would not have blocked DNA deposits ... from his uncovered fingers" or from his other, ungloved hand. "Thus, counsel's summation created no false impression to correct. Furthermore, by dramatically halting the summation to allow the People to reopen their case to present the glove, the court prejudicially magnified its apparent value." He also argues, among other things, that the prosecutor impaired the integrity of the second grand jury by dissuading it from calling an eyewitness who had exculpatory information, and that he was denied his right to a public trial when the court excluded his friend and business partner from the courtroom.

For appellant Thompson: Warren S. Landau, Manhattan (212) 693-0085
For respondent: Staten Island Assistant District Attorney Anne Grady (718) 876-6300

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To be argued Thursday, January 9, 2014 (10 a.m. session)

No. 11 Voss v The Netherlands Insurance Company

Deborah Voss, owner of several businesses in the Syracuse area, purchased a commercial building to house them in the Village of Liverpool in 2006. She obtained insurance coverage for the building through CH Insurance Brokerage Services Co., Inc., which procured a $75,000 business interruption policy from Peerless Insurance Company to cover lost business income caused by damage to the property. She later said in a deposition that CH Insurance considered the types of businesses she owned, their sales figures and the size of the building to determine the appropriate amount of coverage and, when she questioned the sufficiency of the $75,000 business interruption policy, the brokerage assured her the amount was adequate and said it would review the coverage annually as her businesses grew.

The roof of the building breached in March 2007, causing significant water damage, and after a contractor made repairs, the roof partially collapsed in April 2007, causing more water damage. Voss later testified that Peerless paid $3,197 for business interruption after the first incident and $30,000 after the second. Later in April 2007, Voss agreed on CH Insurance's recommendation to reduce her business interruption coverage to $30,000. The building suffered another partial roof collapse in February 2008, and Voss testified that she received no payment on her business interruption claim.

Voss and her companies brought this action for negligence and breach of contract against CH Insurance, among others, alleging the broker improperly advised them that $75,000 in business interruption coverage would be adequate. They claimed their losses exceeded $2 million. Supreme Court granted the broker's motion for summary judgment dismissing the suit.

The Appellate Division, Fourth Department affirmed on a 3-1 vote. It said CH Insurance failed to establish that no special relationship existed between it and the plaintiffs, finding evidence that Voss relied on the broker's "expertise and assurance regarding the appropriate level of insurance." However, it ruled the suit was properly dismissed because the plaintiffs were "charged with conclusive presumptive knowledge of the terms and limits" of the policy. It also found that, even if CH Insurance negligently failed to obtain sufficient coverage, its negligence was not a proximate cause of the plaintiffs' damages in view of Voss's testimony that her businesses would have remained operational if the $75,000 policy limit had been paid in a timely manner for each of the first two incidents.

The dissenter argued that, if Voss relied on CH Insurance's expertise and experience, "it is no answer for the broker to argue, as an insurer might, that the insured has an obligation to read the policy." He said that, if the plaintiffs could demonstrate that they had a special relationship with CH Insurance and that the broker was negligent, the disparity between the $75,000 policy and the plaintiffs' claimed loss of $449,724 in the April 2007 roof collapse "would provide the necessary proximate cause for an award of damages" for that incident.

For appellants Voss et al: Dirk J. Oudemool, Syracuse (315) 474-7447
For respondent CH Insurance: Thomas M. Witz, Albany (518) 449-8893

State of New York Court of Appeals

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To be argued Thursday, January 9, 2014 (10 a.m. session)

No. 12 People v Victor Gonzalez

Victor Gonzalez was arrested for the murder of his boss, Wilfredo Lebron, at Gonzalez's apartment in the Hunts Point area of the Bronx in May 2006. He struck Lebron several times in the head with a hammer, then dismembered the body and scattered it in garbage bags over a four-block area around his home. He admitted killing Lebron in a written statement to police and a videotaped statement to a prosecutor, saying Lebron was drunk and repeatedly assaulted him. He said Lebron had abused him physically and mentally for weeks and had threatened to kill him, claiming that he acted in self defense and also that he "lost my mind" during the struggle.

Gonzalez initially filed a CPL 250.10 notice of intent to present psychiatric evidence in support of a defense of extreme emotional disturbance (EED) and he submitted to a mental examination by a prosecution psychologist, but he withdrew the notice before trial. After the prosecution presented its evidence, including the videotaped confession in which Gonzalez made numerous statements to the effect that he had lost his mind, the defense rested without calling witnesses or cross-examining any prosecution witnesses about his mental state. Based entirely on the prosecution's evidence, Gonzalez asked the trial court to instruct the jury on the EED defense. The court agreed, but also found that his request for the charge was the equivalent of a "notice of intent to proffer psychiatric evidence" under CPL 250.10, which would permit the prosecution to reopen its case and present evidence of his statements to its psychologist in rebuttal. Gonzalez then withdrew his request for an EED charge. He was convicted of second-degree murder and sentenced to 25 years to life.

The Appellate Division, First Department affirmed, saying, "When defendant requested the EED charge based on his statements to the police, defendant 'offered' that evidence 'in connection with' the EED defense, notwithstanding the fact that defendant did not present a case.... To allow defendant to recharacterize his statements [in the videotaped confession] as evidence of EED, yet not permit the People the opportunity to present evidence in rebuttal, would be manifestly unfair, effectively allowing the defense to 'sandbag' the prosecution, and defeat the very purpose of the statute." Since the prosecution's psychiatric evidence "was obtained, with defendant's consent, when defendant gave notice of his intention to present an EED defense," it said, Gonzalez "necessarily waived any Fifth Amendment rights regarding that evidence, to the extent it would be offered in relation to the EED defense."

Gonzalez argues, "Neither the plain language of CPL 250.10, its legislative history, nor the case law ... entitles the People to reopen their case and rebut their own evidence" based solely on a request for an EED charge. "It governs, and is exclusively triggered by, psychiatric evidence 'offered ... by the defendant,'" and he says he offered no such evidence on direct or cross-examination. He also contends that he never waived his Fifth Amendment privilege and that, by "effectively conditioning the EED charge on the admission into evidence of Appellant's statements to the People's psychiatrist, the trial court impermissibly forced Appellant to choose between a warranted jury charge and not having his statements used against him, violating his Fifth Amendment right."

For appellant Gonzalez: Mathew S. Miller, Manhattan (212) 450-4531
For respondent Bronx District Attorney: Peter D. Coddington(718) 838-7090

State of New York Court of Appeals

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To be argued Thursday, January 9, 2014 (10 a.m. session)

No. 30 Morris v Pavarini Construction

Glenford Morris, a carpenter, was injured during the construction of a building at Seventh Avenue and 34th Street in Manhattan in June 2002, when the back wall of a metal form that other workers were building as a mold for a concrete wall fell and crushed his hand.

Morris brought this personal injury action against the construction manager, Pavarini Construction, and the owner, Vornado Realty Trust. Among other things, he alleged that they violated Labor Law § 241(6), which imposes a nondelegable duty upon building owners and contractors to "provide reasonable and adequate protection and safety to construction workers" and to comply with safety rules and regulations promulgated by the Department of Labor. He predicated his claim on an alleged violation of 12 NYCRR 23-2.2(a), a safety regulation governing concrete work, which provides, "Forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape."

The Appellate Division, First Department dismissed the claim, ruling the regulation did not apply because the form was still under construction when the accident occurred. The Court of Appeals reversed and remitted the matter (9 NY3d 47), saying "a more complete record is necessary, both as to the nature of the object that caused the injury and the opinions of those expert in the construction of concrete walls as to whether the words of the regulation can sensibly be applied to anything but completed forms."

Supreme Court dismissed Morris's claim after a hearing on remittal, concluding that the safety regulation applies only to completed forms and that the back wall of a form, by itself, does not constitute a "form" within the meaning of 12 NYCRR 23-2.2(a). The court said, "Is a quarter panel a car? A fender? A hood? All of them put together is a car but not before."

The Appellate Division reversed on a 4-1 vote and granted summary judgment to Morris, finding the regulation applies to the assembly of forms. "The operative language of § 23-2.2(a) is that forms shall be 'braced or tied ... so as to maintain [their] position and shape,'" it said. "The erection of the back form wall is essentially the first step in this process. It defies common sense to think that the form could be structurally safe and maintain its final position and shape, if the back wall that anchors the structure is prone to falling over and collapsing because there is no requirement that it 'be properly braced'.... Moreover, it defies logic to limit the Code's directive where the danger posed to workers from these forms is so great, given that they are often hoisted to upright positions without adequate safety bracing and may remain standing for days prior to completion."

The dissenter argued that the regulation applies only to completed forms and concrete pours. "That the focus of [12 NYCRR 23-2.2(a)] is the structural integrity of the form during the placement of concrete is evident from its language, particularly the provision that the position and shape of the form be maintained by ensuring that it is 'braced or tied together.' While a requirement to brace a form could be extended to include the support of the single vertical wall panel that fell and injured plaintiff, the alternative to utilize ties to accomplish the same purpose can only be applied to a pair of such panels."

For appellants Pavarini and Vornado: Daniel Zemann, Jr., Manhattan (212) 972-1000
For respondent Morris: Cheryl Eisberg Moin, Manhattan (212) 668-6000

State of New York Court of Appeals

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To be argued Thursday, January 9, 2014 (10 a.m. session)

No. 29 People v Luis Guaman

Luis Guaman was arrested in a midtown Manhattan subway station in April 2009 after a police officer saw him approach a male passenger from behind and rub his "groin area" against the complainant's buttocks. Guaman was charged by Criminal Court information with forcible touching (Penal Law § 130.52), a Class A misdemeanor, and two lesser charges. The statute states, "A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person; or for the purpose of gratifying the actor's sexual desire. For the purposes of this section, forcible touching includes squeezing, grabbing or pinching." Guaman pled guilty to forcible touching in satisfaction of all charges and was sentenced to a conditional discharge and three days of community service.

On appeal, he argued the accusatory instrument was facially insufficient and jurisdictionally defective because it failed to allege that the touching was "forcible."

The Appellate Term, First Department affirmed the conviction, saying, "The information -- comprising the misdemeanor complaint and the victim's supporting deposition -- alleged that at a specified time and inside a designated subway station defendant rubbed his 'groin area' and exposed penis against the victim's buttocks without the victim's consent. These factual allegations, 'given a fair and not overly restrictive or technical reading' ..., are sufficient for pleading purposes to establish reasonable cause to believe and a prima facie case that defendant committed the crime of forcible touching...."

Guaman argues the Appellate Term's "interpretation of the forcible touching statute implicitly reads the word 'forcibly' out of the statutory text." "The meaning of the words "forcible touching ... must be determined in accordance with the company they keep, the three specific examples" of "squeezing, grabbing or pinching," he says. "[I]n common parlance the act of 'squeezing, grabbing or pinching' is likely to entail the infliction of pain or at least non-trivial physical discomfort.... Obviously, the mere act of 'rubbing' does not without more entail either such compression, pain or physical discomfort. Surely no one would think that a mother who rubbed or patted her child's head had 'forcibly' touched her child's head."

For appellant Guaman: James M. McGuire, Manhattan (212) 698-3658
For respondent: Manhattan Assistant District Attorney Yuval Simchi-Levi (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, January 9, 2014 (10 a.m. session)

No. 15 Fabrizi v 1095 Avenue of the Americas, LLC

Richard Fabrizi, an electrician, was injured in March 2008 while renovating commercial space in a Manhattan building. He had been directed to reposition a "pool box," a component of a conduit system for telecommunications wires, and he had disconnected the box from the conduit pipes above and below it. This left the section of conduit above him, a steel pipe four inches in diameter and eight to ten feet long, secured only by a compression coupling to the next section of conduit at the ceiling. Fabrizi said he had asked for set screw couplings, which he considered more secure, but he was not provided with any. As he knelt beneath the suspended conduit to drill a hole through the floor, the pipe fell and crushed his thumb. He brought this personal injury action, including a Labor Law § 240(1) claim, against the building's owner, 1095 Avenue of the Americas, LLC; the general contractor, J.T. Magen Construction Company; and the tenant of the renovated space, Dechert LLP.

Supreme Court denied motions by 1095 and Megan for summary judgment dismissing the section 240(1) claim and granted Fabrizi's motion for summary judgment on liability. "[L]iability under this section is not limited to cases in which the falling object was in the process of being hoisted or secured. The question is instead whether the conduit 'required securing' while plaintiff was drilling a hole in the floor beneath it...," the court said. Liberally construing the statute to accomplish the purpose of protecting workers from gravity-related dangers, the answer is yes. No safety device was placed and operated to guard plaintiff from the unchecked speedy descent of the conduit pipe."

The Appellate Division, First Department modified to deny Fabrizi's motion and otherwise affirmed on a 4-1 vote, holding that the facts of the case are within the scope of Labor Law § 240(1). The majority said Fabrizi's "testimony is that when directed to move the pool box, he requested a set screw coupling to secure the pipe to prevent the pipe from falling during the disassembly, and that the failure of defendants to provide this device was a proximate cause of his accident.... [W]e find an issue of fact as to whether defendants failed to provide a protective device...." It said "falling object" liability under the statute is not limited to cases where the object fell while being hoisted or secured.

The dissenter said, "To permit this action to go forward would require a departure from the well settled rule that the protection of Labor Law § 240(1) is unavailable where no breach of the statutory duty to provide a worker with a protective device of the kind listed in the statute has been demonstrated.... [T]he coupling is not a statutory safety device. Rather, it is a component part of an already built conduit system, whose purpose is to connect two sections of conduit pipes in alignment...." He also said Fabrizi's injuries "were the direct consequence of his action in disengaging and removing the devices that secured the conduit pipe in place" before he began to drill.

For appellants 1095, Magen and Dechert: Daniel Zemann, Jr., Manhattan (212) 972-1000
For respondent Fabrizi: Brian J. Isaac, Manhattan (212) 233-8100