State of New York Court of Appeals

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WEEK OF OCTOBER 14 - 16, 2014

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 Tuesday, October 14, 2014

No. 180 Matter of Santiago-Monteverde
Santiago-Monteverde v Pereira

Mary Veronica Santiago-Monteverde is a tenant in a rent-stabilized apartment. After she filed a Chapter 7 bankruptcy petition, the Bankruptcy Trustee, John Pereira, informed her that he intended to accept her landlord's offer to buy her interest in the lease, prompting Santiago-Monteverde to amend her bankruptcy filing to list the value of her rent-stabilized lease as personal property exempt from the bankruptcy estate under Debtor & Creditor Law § 282 (2) (a) as a "local public assistance benefit." The Bankruptcy Court granted the Trustee's motion to strike the claimed exemption on the ground that the value of the lease did not qualify as a "local public assistance benefit." Santiago-Monteverde appealed to the District Court, which affirmed.

On appeal to the U.S. Court of Appeals for the Second Circuit, Santiago-Monteverde argued that the various protections provided to tenants by the rent stabilization program create a value in a rent-stabilized lease that is separate and distinct from the fair market value of the lease, and that this added value constitutes an exempt "local public assistance benefit" under Debtor & Creditor Law § 282 (2) (a). Recognizing that the argument raised an open question under New York law, the Second Circuit asked this Court to resolve the issue by certifying the following question: "Whether a debtor-tenant possesses a property interest in the protected value of her rent-stabilized lease that may be exempted from her bankruptcy estate pursuant to New York State Debtor and Creditor Law Section 282(2) as a 'local public assistance benefit'?"

For appellant Santiago-Monteverde: Ronald J. Mann, Manhattan (212) 854-1570
For respondent Pereira: J. David Dantzler, Jr., Manhattan (212) 704-6075
For amici curiae State and City of NY: Dep. Solicitor General Anisha Dasgupta (212) 416-8018

State of New York Court of Appeals

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To be argued Tuesday, October 14, 2014

No. 181 Matter of Kigin v New York State Workers' Compensation Board

In 1996, claimant Maureen Kigin injured her neck and back in a motor vehicle accident while performing a work-related task. She successfully established a workers' compensation claim for wage replacement benefits and ongoing medical treatment and, in 2006, the Workers' Compensation Board classified her as having a permanent partial disability. Liability for the claim was subsequently transferred to respondent Special Fund for Reopened Cases. To alleviate Kigin's chronic neck and back pain, her treating physician prescribed acupuncture treatment, which Kigin received in February and April 2010. Meanwhile, in 2007, the State Legislature amended section 13-a (5) of the Workers' Compensation Law to require "[t]he [B]oard ... [to] issue and maintain a list of pre-authorized procedures."

In 2010, the Board published proposed regulations, which incorporated guidelines for pre-authorized procedures recommended by a Governor's task force of medical professionals. After a comment period, the Board adopted those guidelines as the standard of care for the treatment of workplace injuries involving the back, neck, shoulder and knee, rendered on or after December 1, 2010. The guidelines were also incorporated by reference into formal regulations.

Included in the guidelines were a list of pre-authorized medical procedures, and limitations on the scope and duration of each procedure. With respect to acupunture, Kigin had already received the maximum number of treatments permitted by the guidelines without a variance. Her treating physician therefore submitted variance applications to the Special Fund seeking authorization for additional treatments. After an independent medical examination, the Special Fund denied the variance request. Upon review of the evidence, including additional depositions of plaintiff's treating physician and the physician who conducted the independent medical examination, a Workers' Compensation Law Judge denied the variance request. The Workers' Compensation Board affirmed.

The Appellate Division, Third Department, affirmed the Board's determination, saying "the Board acted within its legislatively conferred authority when it devised a list of preapproved medical care deemed in advance to be medically necessary for specified conditions, and did so in a manner consistent with Workers' Compensation Law § 13 (a) and the overall statutory scheme." Kigin contends that the Board "exceeded its statutory authority by promulgating [g]uidelines that ... 'pre-determine' medical necessity, resulting in the 'pre-denial' of medical care." According to Kigin, because the amendment to Workers' Compensation Law § 13-a (5) only directed the Board to pre-authorize certain treatment, "the [g]uidelines are contrary to the statute and amount to an improper administrative attempt to legislate through regulation." Kigin further contends that the guidelines "impermissibly shift the burden of proof established by the Legislature on the question of medical necessity from the employer or insurance carrier to the injured worker."

For appellant Kigin: Robert E. Grey, Farmingdale (516) 249-1342
For respondent Special Funds: Jill B. Singer, Albany (518) 438-3585
For respondent Workers' Comp. Board: Asst. Solicitor Gen. Paul Groenwegen (518) 474-6639

State of New York Court of Appeals

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To be argued Tuesday, October 14, 2014

No. 182 Borden v 400 E. 55th Street Associates, L.P.
No. 183 Gudz v Jemrock Realty Corp.
No. 184 Downing v First Lenox Terrace Associates

The common issue in these three cases is whether CPLR 901 (b), which in general prohibits class actions to recover statutory penalties, precludes class certification in these actions seeking recovery of alleged rent overcharges under the Rent Stabilization Law, where Rent Stabilization Law § 26-516 (a) mandates a penalty of treble damages for willful overcharge of rent, but the putative class representative has waived the right of the class to seek treble damages.

The plaintiffs in these cases are residential tenants in building owned by the defendants. The plaintiffs commenced these action on behalf of themselves and all other similarly situated tenants, alleging that the defendant building owners unlawfully deregulated the rent of certain units in the buildings while receiving tax benefits in the J-51 program pursuant to Rent Stabilization Law §§ 26-504.1 and 26-504.2 (a). The complaints in each action initially sought treble damages as a penalty pursuant to Rent Stabilization Law § 26-516 (a).

The plaintiffs in each of the cases subsequently waived any claim they might have to treble damages. In Borden and Gudz, the plaintiffs moved for class certification. Supreme Court, New York County, granted the motions and certified the classes in those cases, concluding that CPLR 901 (b)'s prohibition of the use of class actions to recover penalties was not implicated because of the plaintiffs' waivers, and any tenants who wished to pursue the treble damages penalty could opt out of the class and pursue an individual action. In Downing, the defendant moved to dismiss the complaint based on CPLR 901 (b), among other grounds. Supreme Court, New York County, granted the motion and dismissed the complaint.

In Borden and Gudz, the Appellate Division, First Department, affirmed the order granting class certification, and in Downing, the court reversed the dismissal of the complaint and remitted for further consideration of whether class certification was appropriate. The Appellate Division determined that the plaintiff's waiver of the treble damages penalty, and the remaining relief sought by the plaintiffs were compensatory, not punitive.

Defendant 400 East 55th Street Associates argues that Borden's attempt to waive the treble damages provision of the Rent Stabilization Law to evade application of CPLR 901 (b) is "void as against public policy and barred by" the Rent Stabilization Code § 2520.13. Defendant Jemrock Realty Co. contends that the Rent Stabilization Law and Code impose "mandatory" penalties that cannot be waived. Defendant First Lenox states that "interpreting CPLR 901 (b) to permit the waiver of a statutory penalty ... subverts the legislative intent Of CPLR 901(b), inviting class action abuse."

No. 182 For appellant 400 E. 55th St. Assocs.: Jeffrey Turkel, Manhattan (212) 867-6000
For respondent Borden: Christian Siebott, Manhattan (212) 779-1414
No. 183 For appellant Jemrock Realty Co.: Magda L. Cruz, Manhattan (212) 867-4466
For respondent Gudz: Christian Siebott, Manhattan (212) 779-1414
No. 184 For appellant First Lenox Terrace Assocs.: Todd E. Soloway, Manhattan (212) 421-4100
For respondent Downing: Matthew D. Brinckerhoff, Manhattan (212) 763-5000

State of New York Court of Appeals

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To be argued Wednesday, October 15, 2014

No. 189 People v Dwight D. DeLee

In 2009, an Onondaga County Grand Jury indicted defendant Dwight DeLee for murder in the second degree as a hate crime, murder in the second degree, and criminal possession of a weapon in the third degree. According to the People's witnesses a trial, DeLee approached and shot the victim -- an individual who identified as a transgendered woman -- with a rifle from close range.

At trial, County Court submitted several lesser included offenses to the jury, including manslaughter in the first degree as a hate crime and manslaughter in the second degrees as a hate crime as lesser included offenses of murder in the second degree as a hate crime, and manslaughter in the first and second degrees as lesser included offenses of murder in the second degree. The jury found defendant guilty of manslaughter in the first degree as a hate crime and criminal possession of a weapon in the third degree, but acquitted him of the remaining charges, including manslaughter in the first degree.

County Court denied DeLee's motion to set aside the verdict with respect to manslaughter in the first degree, which DeLee contended was inconsistent with the jury's not guilty verdict on the charge of manslaughter in the first degree. On DeLee's appeal, the Appellate Division, Fourth Department, modified the judgment of conviction by reversing the part convicting him of manslaughter in the first degree as a hate crime and dismissing count one of the indictment, and otherwise affirmed. The Appellate Division said that "all of the elements of manslaughter in the first degree are elements of manslaughter in the first degree as a hate crime," and determined that County Court "properly instructed the jury that the only difference between the two crimes in this case is that manslaughter in the first degree as a hate crime has an added element requiring the People to prove that defendant intentionally selected the victim due to his sexual orientation." The Appellate Division concluded that, "[b]y acquitting defendant of manslaughter in the first degree, the jury necessarily found that the People failed to prove beyond a reasonable doubt at least one element of manslaughter in the first degree."

The People ask the Court of Appeals to reinstate DeLee's conviction for manslaughter in the first degree as a hate crime, arguing that County Court instructed the jury to consider the hate-crime and non-hate crime manslaughter charges separately, and as a result the jury could have "reasonably concluded" that its finding of guilt as to the hate crime "negated a finding that it was a non-hate crime." The People contend that the jury's verdict, "when viewed in light of the trial court's instructions to the jury, was not repugnant to the jury's verdict of not guilty of manslaughter in the first degree as a non-hate crime."

For appellant: Onondaga County Chief Asst. District Attorney James P. Maxwell (315) 435-2470
For respondent DeLee: Philip Rothschild, Syracuse (315) 218-0179

State of New York Court of Appeals

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To be argued Wednesday, October 15, 2014

No. 185 Matter of New York City Asbestos Litigation
Andrucki v Aluminum Co. of America

After George Andrucki was diagnosed with malignant mesothelioma, he and his wife Mary filed a notice of claim against the Port Authority of New York and New Jersey on October 4, 2010, alleging that his disease was caused in part by his exposure to asbestos when he worked on the construction of the World Trade Center in 1971 and 1972. They commenced a personal injury action against the Port Authority and 16 other defendants and on November 12, 2010, they served the complaint on the Port Authority. Service of the complaint was premature under McKinney's Unconsolidated Laws of New York § 7107, which requires service of a notice of claim at least 60 days before suit is commenced against the Authority. George Andrucki died two weeks later. In January 2011, his wife filed a supplemental summons and amended complaint which added the Port Authority as a defendant and asserted a claim for wrongful death against all of the defendants, but she did not serve a second notice of claim on the Port Authority. The Port Authority moved to dismiss all claims against it, arguing that Mary Andrucki failed to obtain subject matter jurisdiction over it because she did not file a second notice of claim for wrongful death. The Port Authority did not appear at the trial, which proceeded while its motion was pending.

Supreme Court denied the motion to dismiss and held the Port Authority to be in default. "Determinative of this motion is that plaintiffs have complied with all of the requirements of [Uncons Laws] §§ 7107 and 7108. Indisputably, Mr. and Mrs. Andrucki served the Port Authority with a valid notice of claim on October 4, 2010. More than 60 days later..., plaintiffs herein explicitly added the Port Authority to this action via supplemental summons and amended complaint." It said Andrucki had "no obligation to file a new action against the Port Authority.... [Section] 7107 does not require it, nor would same promote the statute's purpose. Indeed, the legislature's intent to condition the waiver of sovereign immunity solely on compliance with specific temporal restrictions and the filing of a notice of claim is very clear." The court ultimately awarded Andrucki $2.5 million in damages.

The Appellate Division, First Department reversed and dismissed the complaint for lack of subject matter jurisdiction. It said, "The initial notice of claim specifically stated that it was for personal injury arising from the asbestos exposure and not for the decedent's death, which had yet to occur." Although New Jersey courts "have held 'substantial compliance' with the notice requirements to be sufficient for instituting an action against the Port Authority," and New York courts have held that under General Municipal Law § 50-e "notice of injury placed a municipality on notice of a plaintiff's subsequent death from that same injury," it said section 7107 "contains no substantial compliance provision" and must be strictly construed. "Under these circumstances, plaintiffs should have served on the Port Authority a new notice of claim concerning the wrongful death and survivorship actions."

For appellant Andrucki: Alani Golanski, Manhattan (212) 558-5500
For respondent Port Authority: Christian H. Gannon, Manhattan (212) 651-7500

State of New York Court of Appeals

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To be argued Wednesday, October 15, 2014

No. 186 Paterno v Laser Spine Institute

Frank Paterno, a Westchester County resident, is asking the Court to reinstate his medical malpractice action against the Laser Spine Institute (LSI), a surgical facility in Florida, and five Florida physicians who were involved in his treatment there in 2008. Paterno, who suffered from back pain, learned of LSI from an Internet ad it posted on America Online and he communicated with the facility through numerous telephone calls, emails and fax transmissions. LSI sent him insurance and registration forms, which he filled out and returned, and a letter with surgical recommendations. He sent his MRI films to the Florida facility, and an LSI physician contacted his own physician in New York by phone to discuss his proposed surgery. At LSI's request, Paterno had blood tests conducted by his New York physician and forwarded the results to LSI. He underwent two surgical procedures at LSI in June 2008. After his return, when he complained of constant pain, LSI physicians provided prescriptions for him to fill at New York pharmacies. In August 2008, LSI flew him back to Florida for "revision" surgery. He remained in pain and continued to communicate with LSI until December 2008. He later had surgery in New York to correct his condition, performed by physicians who were not affiliated with LSI.

LSI moved to dismiss Paterno's suit for lack of personal jurisdiction. He responded that he obtained long-arm jurisdiction over them pursuant to CPLR 302(a)(1), which provides that "a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent: 1. transacts any business within the state...." Even when not physically present, an entity transacts business in New York when it purposefully avails itself of the benefits and privileges of conducting business in the state. Supreme Court granted the motion to dismiss.

The Appellate Division, Second Department affirmed on a 3-2 vote, finding the "totality of the circumstances" did not provide a basis for imposing long-arm jurisdiction. "... LSI's email messages ... and telephone conversations with the plaintiff while he was in New York do not constitute 'business' activity and are not sufficiently 'purposeful' for jurisdictional purposes.... Although the case at bar involves a number of telephone calls and email messages..., it cannot be concluded that LSI 'projected [itself] ... into New York in such a manner [as to] purposefully avail [itself] of the benefits and protections of [New York] law [].... [T]he advent of the Internet does not alter the still-valid premise that the mere solicitation of business in this state does not amount to the transaction of business herein."

The dissenters said "the number, nature, and timing" of LSI's contacts with New York, including communicating with Paterno and his New York physicians, providing prescriptions, ordering blood work and MRIs, and using its website to solicit business, were sufficient to confer long-arm jurisdiction. The contacts "demonstrate the 'purposeful creation of a continuing relationship' with the plaintiff.... Particularly in light of evolving business practices resulting from technological advances, the manner in which businesses employing such technologies are increasingly reaching outside of their traditional jurisdictions to acquire new business, and the degree to which these changes have an impact upon consumers, there were sufficient minimum contacts present to warrant the exercise of jurisdiction pursuant to CPLR 302(a)(1)."

For appellant Paterno: Timothy G. Griffin, Bronxville (914) 771-5252
For respondents: Joshua R. Cohen, Manhattan (212) 742-8700

State of New York Court of Appeals

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To be argued Wednesday, October 15, 2014

No. 187 Nesmith v Allstate Insurance Company

In November 1991, Allstate Insurance Company issued a liability policy to Tony Wilson covering his apartment building in Rochester. The policy, with a limit of $500,000 per occurrence, was for one year and Wilson renewed it for two additional one-year periods. In 1993, two children of Felicia Young were exposed to lead paint while living in the building. The family moved out of the apartment and Wilson attempted to remediate the lead paint condition himself. In 1994, Jannie Nesmith and two children moved into the same apartment and were exposed to lead paint. Wilson was cited for health violations in December 1994, when lead hazards were found in some of the same locations as well as other areas of the apartment. Young and Nesmith brought separate personal injury actions against Wilson seeking damages for injuries the children sustained as a result of their exposure to lead. Wilson settled the Young lawsuit in 2005 for $350,000, which was paid by Allstate.

Allstate then took the position that its liability for all lead-related injuries in the apartment was limited to $500,000, leaving only $150,000 of coverage after the first settlement, because the lead exposure of both families was one occurrence under the terms of the policy. It relied on the policy's noncumulation clause, which states, "Regardless of the number of ... injured persons, claims, claimants or policies involved, our total liability under the Family Liability Protection coverage for damages resulting from one accidental loss will not exceed the limit [of $500,000]. All bodily injury ... resulting from one accidental loss or from continuous or repeated exposure to the same general conditions is considered the result of one accidental loss." Nesmith argued the full policy limit of $500,000 was available because the two families were unrelated and were injured during different policy periods and different tenancies, at different times, due to exposure to different lead hazards. Nesmith entered into a settlement in which she reserved her right to file this declaratory judgment action against Allstate for a determination of the amount of coverage available. She agreed to accept $150,000 if Allstate prevailed, and the insurer agreed to pay her $500,000 if the full policy limit was found to be available.

Supreme Court ruled in favor of Nesmith. "Plaintiff is correct in maintaining that there were two different families involved in the lawsuits..., that the lead paint condition responsible for lead poisoning in the [Young] matter had been remediated, that the chipping paint was in a different location in the Nesmith case, and that those children lived at [the apartment] during a different time frame.... Given the facts in this matter, the court cannot conclude that the infants in the two different cases were exposed to the same conditions that caused their injury."

The Appellate Division, Fourth Department reversed, saying the fact the plaintiffs were injured during different policy periods did not require Allstate to pay more than its single policy limit. It also ruled the Young and Nesmith claims stem from a single accidental loss. "[T]he evidence establishes that the lead paint that injured the second set of children is the same lead paint that was present in the apartment when the first set of children lived there.... Inasmuch as the claims arise from exposure to the same condition, and the claims are spatially identical and temporally close enough that there were no intervening changes in the injury-causing conditions, they must be viewed as a single occurrence within the meaning of the policy."

For appellant Nesmith: Mark G. Richter, Whitesboro (315) 736-6787
For respondent Allstate Insurance Co.: Barry I. Levy, Uniondale (516) 357-3000

State of New York Court of Appeals

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To be argued Wednesday, October 15, 2014

No. 188 Frezzell v City of New York

In 2006, plaintiff Kent Frezzell, an officer with the New York City Police Department, was involved in an automobile accident with another NYPD officer, Steve Tompos. Both officers were on-duty and driving separate marked police vehicles. Both officers responded to the radio call of a third officer who was on foot chasing a man with a gun. Frezzell turned onto a one-way street in the direction of traffic, while Tompos turned onto the same street against the legal flow of traffic. The two vehicles collided virtually head on.

Frezzell sued Tompos and the City of New York, alleging in a General Municipal Law § 205-e claim that the reckless acts of Tompos caused injuries to Frezzell. The defendants moved for summary judgment dismissing the section 205-e claim, arguing that that claim was subject to the recklessness standard of Vehicle and Traffic Law § 1104, and Tompos had not acted recklessly.

Supreme Court, New York County, granted the motion for summary judgment and dismissed the complaint, concluding that, "at best," Frezzel had "alleged mere negligence, which under the Vehicle and Traffic Law is not sufficient in this case." The Appellate Division, First Department, affirmed, stating that "defendants' proof established that ... Tompos ... did not act in 'reckless disregard for the safety of others' while operating his vehicle in the wrong direction on a one-way street."

Frezzell contends that "material questions of fact precluded the grant of summary judgment as a matter of law." According to Frezzell, questions of fact exist regarding whether Tompos disregarded traffic signals, proceeded despite impediments to his vision, or entered a police pursuit without authorization and without informing other officers of his presence. Frezzell argues that any one of these questions of fact "may jeopardize the privileged operation that Vehicle and Traffic Law § 1104 provides," and summary judgment was therefore inappropriate.

For appellant Frezzell: Jay L.T. Breakstone, Port Washington (516) 466-6500
For respondents NYC and Tompos: Asst. Corporation Counsel Victoria Scalzo (212) 356-0856

State of New York Court of Appeals

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To be argued Thursday, October 16, 2014

No. 190 Matter of Gorman v Rice

Catherine Gorman was charged with driving while intoxicated, unsafe lane change, and endangering the welfare of a child while driving home from a bridal shower in Nassau County in 2006. Her first trial ended in a mistrial at the request of defense counsel. During her retrial in District Court, after defense counsel said the judge had engaged in prejudicial conduct "verging on the point of a complaint being needed," the judge declared a mistrial and left the courtroom. On his return, the judge said, "Before we broke, I declared a mistrial. I reviewed the record, and it is clear that defense counsel said that my conduct verged on needing a complaint being filed. That being said, I am unable to preside over this trial. And I'm assuming, counsel, that you agree that I cannot -- I should not --- ... be able to preside over this trial." Defense counsel replied, "Yes sir." The judge said, "Then on consent, I'm going to declare a mistrial." Defense counsel said, "Judge, I'm not consenting to a mistrial.... Judge, I ... wasn't paying attention. No, I didn't mean to say that." After further discussion, the judge called a recess to permit defense counsel to consult with his client, saying, "If you and your client decide you want me to preside over this trial, then I'll reconsider it." When proceedings resumed, defense counsel said, "... regrettably we're going to go with the mistrial." The judge responded, "Very good. A mistrial is declared at the request of the defendant."

Before Gorman's third trial began, she petitioned for a writ of prohibition. She argued that she had not consented to the mistrial and, thus, further prosecution was barred by double jeopardy principles.

Supreme Court granted the petition and barred the retrial, finding Gorman "did not waive her right against double jeopardy by allegedly consenting to the mistrial for two reasons. First, there was no actual consent.... [T]he following quotations from defense counsel become most telling, 'Judge, I'm not consenting to a mistrial' and 'regrettably we're going to go with the mistrial'.... The defendant had serious concern, if not fear, about [her] ability to obtain a fair trial. In that context, acquiescence, not consent, was given by the defense.... Second, the consent to the court's declaration of a mistrial was meaningless because [Gorman's] consent was obtained after the court had already announced a mistrial.... [T]he bright-line rule is that the trial ends immediately upon a judge's declaration of a mistrial in open court and on the record.... The court has no power to continue the trial by withdrawing its declaration or asking for the defendant's consent after the declaration of a mistrial."

The Appellate Division, Second Department reversed. "The mere declaration of a mistrial does not terminate a criminal trial and thereby divest the trial court of the authority to rescind the declaration.... Accordingly, the Supreme Court erred in determining that the District Court did not retain the discretion to rescind its previous declaration of a mistrial prior to the discharge of the jury. Moreover, the District Court's initial declaration of a mistrial, made without [Gorman's] consent, was rescinded and, thereafter, a mistrial was declared upon [Gorman's] consent."

For appellant Gorman: Harry H. Kutner, Jr., Mineola (516) 741-1400
For respondent Rice: Nassau County Asst. District Attorney Barbara Kornblau (516) 571-3800

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To be argued Thursday, October 16, 2014

No. 191 Coleson v City of New York (*papers sealed*)

On June 25, 2004, Jandy Coleson was ambushed and stabbed by her husband, Samuel, when she went to pick up her seven-year-old son from his school in the Bronx. Two days earlier, she had called the police when he appeared at her apartment and threatened to kill her. He was arrested later that day. At the precinct, an officer told Coleson that her husband was "going to be in prison for a while" and that the police would give her "protection." Later that evening, an officer called from the precinct and told Coleson that her husband was "in front of the judge" and the court would "sentence him." Instead, he was released on his own recognizance the next day -- June 24, 2004 -- after his arraignment.

Jandy Coleson brought this personal injury action against New York City and its Police Department, contending that they breached a special duty by failing to provide promised police protection. Supreme Court granted the City's motion to dismiss the suit, finding Coleson "failed to establish the requirements for a special relationship."

The Appellate Division, First Department affirmed, based on Valdez v City of New York (18 NY3d 69 [2011]). The majority said, "The statements allegedly made by police officers and other employees of defendants -- that plaintiff's husband would spend time in jail, and that the police would provide 'protection' of an unspecified nature -- were too vague to constitute promises giving rise to a duty of care...."

Two justices concurred on constraint of Valdez, but wrote separately "to express concern at the current posture of the law regarding special duties of care by government entities." They said police made several "concrete statements" to Coleson -- that her husband would be in prison "for a while," that he was "in front of the judge" and would be sentenced -- that, prior to Valdez, "might well have been found to form a reasonable basis for plaintiff to believe that she would be safe from any further attack.... These alleged statements purported to inform plaintiff, apparently unequivocally, that her husband was in police custody and would remain there." The concurring justices expressed "fear that in the post-Valdez system, the police are now permitted to lull a domestic violence complainant into a false sense of security and then, when tragic results befall the complainant, disavow responsibility for having done so."

For appellant Coleson: Sang J. Sim, Bayside (718) 631-7300
For City: Assistant Corporation Counsel Susan Paulson (212) 356-0821

State of New York Court of Appeals

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To be argued Thursday, October 16, 2014

No. 192 Matter of Kilduff v Rochester City School District

This school disciplinary case hinges on the meaning of Education Law § 3020(1), which generally provides that tenured teachers are to be disciplined under the procedures specified in section 3020-a, which gives teachers a right to a hearing. An exception in section 3020(1) makes teachers subject to "alternate disciplinary procedures contained in a collective bargaining agreement ... that was effective on or before September [1, 1994] and has been unaltered by renegotiation." Where there are "alternative disciplinary procedures contained in a collective bargaining agreement ... that becomes effective on or after September [1, 1994]," section 3020(1) provides that teachers must be allowed to choose whether to proceed under section 3020-a or under the disciplinary procedures in the CBA.

Roseann Kilduff, a tenured social worker in the Rochester City School District, was informed by the District in September 2011 that she would be suspended for 30 days without pay for insubordination and other alleged misconduct. The District denied her request for a hearing under section 3020-a, saying that its CBA with the Rochester Teachers Association provides for such a hearing only when a teacher faces discharge and that all other cases are subject to the grievance and arbitration procedures in the CBA. After the District denied her grievance, Kilduff filed this article 78 proceeding to challenge her suspension, arguing the District violated section 3020(1) when it refused to afford her a hearing.

Supreme Court ruled in favor of the district, saying Kilduff was bound by the disciplinary provisions of the current CBA that took effect in July 2006 because they were the same as the disciplinary provisions of a CBA that took effect prior to September 1994. It found "no merit to [Kilduff's] assertion that the renegotiation of <u>any</u> terms" in a CBA renders inapplicable the exception in section 3020(1) that permits the discipline of a tenured teacher without a hearing. "Rather, the express terms of the statute require that the alternate disciplinary procedures and not just any term must have been altered by renegotiation...."

The Appellate Division, Fourth Department reversed and ordered the School District to reinstate Kilduff with back pay and benefits, finding it violated section 3020(1) when it suspended her without a hearing. It said the "plain language" of section 3020(1) "provides that a tenured teacher facing discipline, and whose terms and conditions of employment are covered by a [CBA] that became effective on or after September 1, 1994, is entitled to elect either the disciplinary procedures specified in [section] 3020-a or the alternative procedures contained in the CBA." Since the Rochester District's CBA took effect in July 2006, the court said Kilduff was entitled to her choice of disciplinary procedures and the District should have granted her request for a section 3020-a hearing.

For appellant School District et al: Cara M. Briggs, Rochester (585) 262-8412
For respondent Kilduff: Anthony J. Brock, Latham (518) 213-6000

State of New York Court of Appeals

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To be argued Thursday, October 16, 2014

No. 193 People v Howard Grubstein

In 2008, Howard Grubstein was charged with driving while intoxicated in the Town of Tuxedo, Orange County. At his arraignment in Town Court, he waived counsel and pled guilty to a misdemeanor count of driving while intoxicated. He did not appeal. In 2010, Grubstein was again arrested in Orange County for drunk driving. In light of his previous conviction, he was indicted on two class E felony counts of driving while intoxicated. He then moved in Tuxedo Town Court to withdraw his guilty plea to the 2008 DWI charge on the grounds that he did not have counsel when he entered the plea and that the court did not advise him that, should he re-offend, he could be charged with felony DWI as a result of the misdemeanor conviction.

Town Court treated Grubstein's motion as one to vacate the 2008 conviction under CPL 440.10 and, after reviewing the record, granted the motion. The prosecution appealed and filed an affidavit of errors, which said Town Court's decision failed to set forth required findings of fact and conclusions of law, among other things. Town Court filed a response to the affidavit of errors, saying that based on its review of the transcript of the 2008 plea proceeding, "it is evident that the Defendant was advised of his right to counsel by the Court. However, it is the Court's belief that the Defendant's waiver of counsel was not made knowingly or intelligently. The Defendant seemed to vacillate on his waiver of counsel and did not seem to understand the potential risks of appearing 'pro se.'"

Appellate Term, Ninth and Tenth Judicial Districts, reversed and reinstated the 2008 judgment of conviction. "We find that, to the extent that adequate facts appeared in the record to evaluate certain of defendant's claims regarding the sufficiency of the plea allocution, the only possible avenue of review was a direct appeal," it said, concluding that Grubstein's motion to vacate was precluded by CPL 440.10(2)(c).

While CPL 440.10(2)(c) precludes a post-judgment motion to vacate due to a defendant's "unjustifiable failure" to raise the issues on direct appeal, Grubstein argues the Town Court never advised him of his right to appeal and, thus, his failure to take a direct appeal is justified and CPL 440 relief is available. On the merits, he argues that his waiver of the right to counsel was invalid because Town Court failed to ensure that he understood the risks of proceeding without counsel, and so his motion to vacate the 2008 conviction was properly granted.

For appellant Grubstein: Richard L. Herzfeld, Manhattan (212) 818-9019
For respondent: Orange County Asst. District Attorney Elizabeth L. Schulz (845) 615-3640

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.

To be argued Thursday, October 16, 2014

No. 194 People v Derrick Hill

At Derrick Hill's trial for driving while intoxicated in 2010, his defense attorney asked the arresting officer a series of questions to elicit testimony that Hill had been polite and cooperative during his arrest and at the precinct -- that he took a breathalyzer test and physical sobriety tests at the officer's request, and that he responded that he understood when the officer read his Miranda rights and then signed the card. The prosecutor then sought to elicit testimony that Hill refused to answer any further questions from the officer. "Defense counsel in my view just opened the door on Miranda. His argument here is that defendant was cooperative, he just asked him if he would ask him any questions, asked him Miranda, was the defendant cooperative. In fact [] the defendant refused to answer questions...," the prosecutor said. "In this case he opened the door by even bringing up the Miranda card." The court permitted the officer to testify that Hill refused to answer any questions after the Miranda rights were read, and later instructed the jury, "Under the law, Mr. Hill is not required to answer any questions by the police. The jury is not permitted to draw a negative inference from the fact that Mr. Hill exercised that right." Hill was convicted of driving while intoxicated and driving while ability impaired.

The Appellate Division, First Department affirmed, rejecting Hill's claim that the admission of testimony that he refused to waive his Fifth Amendment rights deprived him of a fair trial. "The court properly exercised its discretion in determining that defendant's cross-examination opened the door ... to limited testimony that defendant declined to make a statement to the arresting officer," it said. "Defendant pursued a line of questioning that created misleading impressions about his post-arrest interactions with the police.... Furthermore, any potential prejudice was prevented by the court's thorough instruction, which defense counsel drafted, and which the jury is presumed to have followed...."

Hill argues, "Counsel did not open the door to evidence of pre-trial silence merely by asking a police witness whether appellant ... responded appropriately when read his Miranda rights, where counsel similarly asked whether appellant was cooperative when administered breathalyzer and coordination tests, and where there was nothing in counsel's questions that was misleading or for any other reason required the introduction of otherwise inadmissible evidence." He says such evidence has long been "presumptively inadmissible" under New York law.

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