

# *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 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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## **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 resistance 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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## **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

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## **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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## **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