

# State of New York Court of Appeals

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

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

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

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

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

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

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

For appellant Wegmans: Melissa A. Day, Amherst (716) 616-0111

For respondent Lazalee: Gregory R. Connors, Rochester (585) 262-2667

For respondent Workers’ Comp. Board: Assistant Solicitor General Sean P. Mix (518) 776-2010

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## No. 88 Matter of Wang v James

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

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

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

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

For appellant Wang: Andrew R. Borelli, Fayetteville (315) 637-3663

For respondent James: Assistant Solicitor General Kevin C. Hu (518) 776-2007

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

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

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

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

For appellants OCIDA et al: Paul J. Goldman, Albany (518) 431-0941

For respondents Bowers et al: Michael A. Fogel, Syracuse (315) 399-4343

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## No. 28 People v Thomas P. Perdue

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

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

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

For appellant Perdue: Carolyn Walther, Rochester (585) 753-3480

For respondent: Monroe County Asst. District Attorney Martin P. McCarthy, II (585) 753-4534