State of New York Court of Appeals

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To be argued Wednesday, March 20, 2013

No. 70 Verizon New England, Inc. v Transcom Enhanced Services, Inc.

Verizon New England, Inc. obtained a $57,716,714 federal court judgment against Global NAPs, Inc. (GNAPS) in January 2009. On March 30, 2009, Verizon sought to enforce its judgment by serving a restraining notice and information subpoena on Transcom Enhanced Services, Inc. and other customers and business partners of GNAPS. The restraining notice directed Transcom not to sell, assign, transfer or interfere with "any property in your possession" in which GNAPS had an interest. In response to the subpoena, Transcom eventually disclosed that it had an agreement to buy telecommunications services from GNAPS since 2003. The agreement, as orally modified, required Transcom to pay GNAPS in advance on a weekly basis, but did not require it to continue using GNAPS' services.

When Transcom continued to make its weekly payments of $61,500 to GNAPS, Verizon brought this turnover proceeding in March 2010 to seize from Transcom the $2.4 million it had paid to GNAPS since receiving the restraining notice and to hold Transcom in contempt. After a hearing, Supreme Court denied the turnover, dismissed Verizon's petition and vacated all restraints, holding that prepayment for services yet to be rendered is not a form of property or debt that would be subject to a restraining notice.

The Appellate Division, First Department affirmed in a 3-2 decision, finding that Transcom "owed no debt, but rather held a credit balance with GNAPS" as a result of its weekly prepayments. The court said, "[W]e must conclude that GNAPS does not have any rights under the modified agreement: there is simply no obligation for Transcom to purchase services from GNAPS. Thus, GNAPS has no right to payment that it could assign or that could be attached by its judgment creditors." Verizon argued Transcom could have stopped payment on the first check it sent GNAPS after receiving the restraining notice, but the court said that "almost certainly would result in GNAPS declining to provide the weekly service for which the check had been sent.... The net result is that Verizon might gain $61,500 ... in partial satisfaction of a $57 million judgment; but it would have caused a loss to, and disrupted the business of, an innocent bystander garnishee."

The dissenters said, "Transcom should not be allowed to ignore the restraining notice when it had every reason to predict that it would continue to do business with [GNAPS]. Transcom and [GNAPS] had a highly regular and predictable business relationship which was all but certain to, and in fact did, continue to generate revenues after Transcom received Verizon's restraining notice." Therefore, they argued, GNAPS "had a 'future interest' in payments from Transcom that constituted property pursuant to the plain language of CPLR 5201(b), and which was subject to restraint." While Transcom might have lost GNAPS as a business partner if it redirected its weekly payments to Verizon, "so too might a valued employee stop working for an employer forced to garnish his or her wages.... These are simply accepted risks of the collection system," they said, arguing that the majority's "narrow view of what constitutes property" provides "a virtual road map for frustrating the efforts of judgment creditors."

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To be argued Wednesday, March 20, 2013

No. 71 Matter of Dashawn W.

New York City's Administration for Children's Services (ACS) brought these Family Court Act article 10 proceedings against Antoine N. and his wife in February 2007, charging them with abuse and neglect of four children living with them in Manhattan. One petition alleged Antoine inflicted "severe abuse" on the youngest child, five-month-old Jayquan N., who had been admitted to Bellevue Hospital three days earlier with a freshly broken collarbone. Hospital personnel also discovered Jayquan had previously suffered four fractured ribs on his left side, which had partially healed. He and the other children, ranging from two to five years old, were removed from the home and placed in custody of ACS.

Family Court entered findings of ordinary abuse and neglect of all four children by Antoine, but it dismissed the allegation of "severe abuse" which, under the definition in Social Services Law § 384-b(8)(a)(i), occurs when a child suffers "serious" injury "as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life." The court found Jayquan suffered "protracted, painful, horrible injuries," but said that in view of People v Suarez (6 NY3d 202), it could not determine whether a parent acted with depraved indifference without an eyewitness to describe how the injuries were inflicted.

The Appellate Division, First Department reversed, saying Suarez did not preclude a finding of depraved indifference in this case because "Social Services Law § 384-b(8)(a) encompasses conduct which is either intentional or reckless, unlike Penal Law §§ 125.25 (1) and (2), which, pursuant to Suarez, are almost always mutually exclusive. In any event, Suarez recognized that in cases involving abused children, conduct evincing depraved indifference to human life may be present in a one-on-one situation." It found clear and convincing evidence of severe abuse by Antoine, but remanded the case for Family Court to determine, as required by Social Services Law § 384-b(8)(a)(iv), whether ACS made diligent efforts to strengthen the parental relationship or whether such efforts should be excused.

On remand, Family Court ruled that "the statutory efforts to strengthen the parental relationship should be and are hereby excused as they would be detrimental to the best interests of the child(ren)." Taking notice of a 1994 determination that Antoine had abused another son, four-month-old Antoine Jr., who suffered a fractured skull, wrist, and four fractured ribs, the court said, "The prognosis for change in the [father's] indifferent behavior is poor...." The Appellate Division affirmed.

Antoine argues the severe abuse finding should be vacated because there was insufficient evidence that he acted with depraved indifference to Jayquan's life, saying, "Other than his position as father and an adult in the home in charge of the children, there is no evidence linking Antoine N. with Jayquan's injuries." He also argues that a finding of severe abuse requires a determination that ACS made diligent efforts to reunite his family or that it was excused, but "there was no evidence of diligent efforts [and] no evidence that ACS had moved to be excused or could have moved to be excused pursuant to the statutes at the time of trial."

For appellant Antoine N.: Elisa Barnes, Manhattan (212) 693-2330
For respondent ACS: Assistant Corporation Counsel Deborah A. Brenner (212) 788-1039
Attorney for the children: Claire V. Merkine, Manhattan (212) 577-3505

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To be argued Wednesday, March 20, 2013

No. 72 Matter of Granger v Misercola *(papers sealed)*

Petitioner Granger, who is serving an eight-year sentence for felony drug possession, commenced this Family Court Act article 6 proceeding in May 2011 seeking visitation at the prison with his son, who was born in September 2008. Granger and the boy's mother, respondent Misercola, never married and were separated before the boy was born, but Misercola obtained an order of filiation and support against Granger and he acknowledged paternity. Granger was arrested and jailed on the drug charges in 2009, but said he had already established a relationship with his son. At a hearing in November 2011, he testified that he was present at the boy's birth, visited him about a dozen times during the six or seven months before his incarceration, and thereafter sought to maintain a relationship with him by telephone and by sending letters, cards and gifts. He said his mother and sisters were willing to drive the child to the prison for visits. Misercola opposed visitation, saying she thought the child, then three, was too young for the long drive and she feared that visiting a prison might have negative effects on his development. She said Granger had little contact with his son before he was jailed, and she objected to Granger's family transporting the boy because they were strangers to him.

Family Court granted the petition and ordered visitation at the prison once every other month, after an initial six-month period of more limited visits to familiarize the child with Granger's mother and sisters. "The concerns raised by [Misercola] are certainly valid, but ... the law in New York presumes visitation with a non-custodial parent to be in the child's best interest and the fact that such parent is incarcerated is not an automatic reason for blocking visitation," it said. "Losing contact for such a long period is felt to be detrimental to an established relationship." The court said Granger "demonstrated that he was involved in a meaningful way in the child's life prior to his incarceration and seeks to maintain a relationship with him" and his son "is of sufficient age to make the trip and benefit from the visitation with his father."

The Appellate Division, Fourth Department affirmed, citing the presumption in favor of visitation and saying "the fact that a parent is incarcerated will not, by itself render visitation inappropriate." It concluded "there is a sound and substantial basis in the record to support" the visitation order, saying "the father made, and continues to make, efforts to establish a relationship with the child, and it cannot be said that he is 'a stranger to the child.'" It rejected Misercola's argument that it should consider Granger's recent transfer to a more distant prison, saying any change in circumstance should be raised in a modification petition.

Misercola, supported by the attorney for the child, argues the lower courts applied an improper standard: "Rather than first considering what was in [the child's] best interests and then balancing that against the concerns of the parties, both lower courts applied a presumption in favor of visitation and imposed a burden on [her] to rebut that presumption." She also argues the record "lacks a sound and substantial basis to support the Family Court's determination" and that the Appellate Division "erred in failing to consider the impact of [Granger's] change in location on the child's best interests."

For appellant Misercola: Mary P. Davison, Canandaigua (585) 905-0164
Attorney for the child: Melissa L. Koffs, Chaumont (315) 681-8468
For respondent Granger: Charles J. Greenberg, Amherst (716) 695-9596

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To be argued Wednesday, March 20, 2013

No. 73 Matter of Sagal-Cotler v Board of Education of the City School District of the City of New York
No. 74 Matter of Thomas v New York City Department of Education

The common question here is whether the petitioners, paraprofessionals employed by the New York City Department of Education (DOE), are entitled to legal representation and indemnification by the City in civil suits brought by students alleging the petitioners struck them for misbehavior at school.

Deborah Sagal-Cotler was escorting a class of special needs students to the cafeteria of a Brooklyn school in December 2008, when one of the students began singing and ignored three requests to come along with her. She later admitted, "I lost it and I slapped his face." She was suspended without pay for ten days and reassigned. A complaint was filed against Josephine Thomas in May 2009, when a kindergartner at a Bronx school reported she hit him on the head with the back of her hand when he "was doing the wrong thing" during math instruction. Thomas denied the charge, but DOE found the charge was substantiated by another witness. The finding was placed in her personnel file and she was reassigned. Both students sued.

The City Law Department denied the petitioners' requests for defense and indemnification based on General Municipal Law § 50-k, which requires the City to provide legal defense to an employee for conduct "while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency...." Education Law § 2560(1) requires defense and indemnification of DOE employees "subject to the conditions, procedures and limitations" of section 50-k, and DOE rules forbid striking students. The petitioners filed these article 78 proceedings to challenge the denials under Education Law § 3028, which requires school districts to defend employees against suits "arising out of disciplinary action taken against any pupil ... while in the discharge of his duties within the scope of his employment."

In Sagal-Cotler, Supreme Court found the statutes were in conflict and Education Law § 3028, which specifically addresses "disciplinary action in an education context," should apply. It ruled Sagal-Cotler was acting in the scope of her employment and was entitled to defense and indemnification. In Thomas, Supreme Court found the statutes "can be harmonized" and section 2506, which "specifically applies to New York City schools," should control. Since "corporal punishment by a school employee violates specific regulations," the court said, the City had a rational basis to deny her a defense.

The Appellate Division, First Department, in separate decisions issued by the same panel, ruled in favor of DOE on a 3-2 vote. Finding the statutes "do not conflict and should be read together," the majority ruled section 2560(1) applies to DOE employees and they are not entitled to a defense if they were in violation of DOE rules or regulations, which prohibit corporal punishment. The dissenters argued the statutes' "plain language renders them irreconcilable" and section 3028 is controlling, as the more specific one, because "it applies only to claims arising from disciplinary action taken against students." They said the claims against both petitioners arose from the discharge of their duties.

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For respondent DOE: Assistant Corporation Counsel Paul T. Rephen (212) 788-1200

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To be argued Wednesday, March 20, 2013

No. 75 People v Jacob Milton

Jacob Milton was arrested in October 2007 and charged in two felony complaints with numerous crimes, including first-degree grand larceny and scheme to defraud. One complaint alleged that he obtained Social Security numbers and other personal identifying information from mortgage applicants through his work for the Griffin Mortgage Company in Jackson Heights and then used that information to obtain fraudulent mortgages totaling more than $1 million in their names. The other complaint charged that he used the information to open credit card accounts in the names of other mortgage applicants. Each of the felony complaints named four individuals as victims. Milton entered into a cooperation agreement, waived indictment, and pled guilty to first-degree grand larceny under a superior court information (SCI) that named two financial institutions "and others" as the victims. He was sentenced to two to six years in prison.

The Appellate Division, Second Department reversed, vacated the guilty plea, dismissed the SCI, and remitted the matter for further proceedings on the felony complaint. The court said the first-degree grand larceny count in the SCI "was not an 'offense for which the defendant [had been] held for action of a grand jury' (CPL 195.20), in that it was not an offense charged in the felony complaint or a lesser-included offense of an offense charged in the felony complaint.... The designation of the alleged victims in the [SCI] differed from those named in the felony complaint.... Thus, the [SCI] to which the defendant pleaded guilty did not 'include at least one offense that was contained in the felony complaint' ... and, consequently, the [SCI] was jurisdictionally defective...."

The prosecution argues the SCI was valid because the charges in it "were previously charged in a specific felony complaint referenced in the SCI, with limited permissible factual variations. Indeed, the only differences between the SCI charges and the felony complaint were that the SCI narrowed the time frame for the offenses and, as to one count involving a complex mortgage fraud, substituted, at the request of the defendant, the names of the banks involved as complainants rather than individuals. Because the factual differences were minor, because the SCI could unquestionably have been amended immediately upon filing to reflect these same changes, and because no prejudice accrued to the defense, the differences between the SCI and the felony complaint did not change the nature of the charge previously alleged so as to render the SCI jurisdictionally defective."

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