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, May 28, 2013

No. 122 Barenboim v Starbucks Corporation
Winans v Starbucks Corporation

In these federal cases, two groups of Starbucks employees brought putative class actions against the company contending that its tip distribution policy violates New York Labor Law § 196-d, which states, "No employer or his agent ... shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee.... Nothing in this subdivision shall be construed as affecting the ... sharing of tips by a waiter with a busboy or similar employee." The term "agent" is defined as a "supervisor," but the Labor Law does not define "supervisor." The State Department of Labor, in its Hospitality Industry Wage Order (12 NYCRR Part 146), interprets the statute as permitting food service workers to share in tips if they "perform, or assist in performing, personal service to patrons at a level that is a principal and regular part of their duties and is not merely occasional or incidental."

The Starbucks policy requires that customers' tips be pooled and then distributed among baristas and shift supervisors, and it prohibits store managers and assistant store managers from receiving any share of the tip pool. In Barenboim, baristas argue shift supervisors are "agents" under section 196-d and Starbucks violates the statute by distributing a portion of the tips to them. Shift supervisors, like baristas, are paid hourly and are primarily responsible for serving customers, but they also assign baristas to their work stations, administer break periods, and perform other limited supervisory duties. In Winans, assistant store managers argue they are not "agents" and are eligible to receive tips under section 196-d and, therefore, Starbucks violates the statute by denying them a share of tips that their own customer service helps to generate. Assistant managers are generally full-time, salaried employees who serve customers and who have more extensive managerial duties than shift supervisors.

U.S. District Court granted summary judgment to Starbucks in both cases. The court ruled in Barenboim that shift supervisors are not agents of Starbucks because their limited supervisory duties "do not carry the broad managerial authority or power to control employees that courts have held to be sufficient to render an employee an 'employer or [employer's] agent' within the meaning of Section 196-d." In Winans, it found there were unresolved issues of fact regarding whether assistant store managers are agents of Starbucks, but it ruled the tip distribution policy is legal because the statute, while precluding employers and their agents from retaining tips, does not compel employers to include any specific eligible employees in a tip pool.

The U.S. Court of Appeals for the Second Circuit has asked this Court to resolve the key issues by answering a pair of certified questions: "1. What factors determine whether an employee is an 'agent' of his employer [under section 196-d] and, thus, ineligible to receive distributions from an employer-mandated tip pool?" and "2. Does New York Labor Law permit an employer to exclude an otherwise eligible tip-earning employee under § 196-d from receiving distributions" from such a tip pool? Regarding the first question, it also asks whether "the degree of supervisory or managerial authority exercised by an employee" is relevant and whether the Labor Department's Wage Order is "a reasonable interpretation of the statute that should govern disposition of these cases?"

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For appellants Winans et al: Adam T. Klein, Manhattan (212) 245-1000
For amicus curiae Labor Dept.: Steven C. Wu, Manhattan (212) 416-6312
For respondent Starbucks: Rex Heinke, Los Angeles, CA (310) 229-1000

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To be argued Tuesday, May 28, 2013

No. 128 Kowalski v St. Francis Hospital and Health Centers

In December 2006, a highly intoxicated Kevin Kowalski arrived at the emergency room of St. Francis Hospital and Health Centers in Poughkeepsie at about 11:20 am, seeking admission to a detoxification program. He had a bruised face, broken nose, and a blood alcohol content (BAC) of .369. Dr. Chandra Chintapalli examined him and arranged for a detox facility to accept him. About four hours later, Kowalski removed his IV line and informed hospital staff that he wanted to leave. A nurse told him to wait for the friend who brought him to the hospital to return. Kowalski left the hospital at 3:45 pm, unaccompanied and without being discharged. At about 5:30 pm, he was struck by a car as he attempted to cross Route 9 in Poughkeepsie. After the accident, which left him quadriplegic, his BAC was .350.

Kowalski filed this medical malpractice action against the hospital, Dr. Chintapalli and the doctor's employer, Emergency Physician Services of New York (EPSNY), alleging they were negligent in not detaining him at the hospital and not providing more intensive supervision. The defendants moved for summary judgment and submitted affidavits from medical experts, who said Kowalski could not have been involuntarily detained because he was not suicidal and did not pose an imminent threat to others. In opposition, Kowalski submitted expert affidavits saying the defendants were obligated to provide more intensive supervision for a patient in his impaired condition and should have searched for him or called the police when he left the hospital.

Supreme Court denied the defense motions, saying the opinions of the defendants' experts were "contradicted by the plaintiff's medical expert[s], leaving a conflict of medical opinion that should be resolved by a finder of fact."

The Appellate Division, Second Department reversed and granted the defendants' summary judgment motions to dismiss, saying, "A person who is brought voluntarily to a medical facility for treatment of alcoholism cannot be involuntarily confined solely for that treatment (see Mental Hygiene Law § 22.09[d] ...)." It said the defendants established "that they lacked authority to confine the plaintiff upon his departure from St. Francis, where he voluntarily sought treatment. In opposition, the plaintiff failed to raise a triable issue of fact."

Kowalski argues the defendants had a common law duty "to protect and safeguard the intoxicated Appellant, once he was a patient in their care. They could not discharge this duty simply by looking the other way and leaving him all alone, when he wandered on foot out of the ER, into a position of much greater peril." He says, "The Appellate Division erred in deciding this case as a matter of law, rather than allowing a jury to consider the reasonableness of the medical defendants' acts and omissions."

For appellant Kowalski: Susan E. Galvão, White Plains (914) 949-2700
For respondent St. Francis Hospital: Robert R. Haskins, Poughkeepsie (845) 471-4455
For respondent EPSNY: Timothy S. Brennan, Albany (518) 640-6900
For respondent Chintapalli: Robert A. Spolzino, Manhattan (212) 490-3000

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To be argued Tuesday, May 28, 2013

No. 124 People v Isidoro Marra *(papers sealed)*

Isidoro Marra was charged with raping a woman who was passed out on a couch at Villa Isidoro, a restaurant and inn he owned in Richfield Springs, in September 2009. The complainant and her boyfriend had drinks at the bar with Marra and, after she spilled some wine on herself, the complainant went to another room to lie down and fell asleep. As she slept, her boyfriend went home with her car. She testified that when she woke up, Marra was on top of her having intercourse and she pushed him off. Herkimer County Court allowed the prosecutor to introduce several photographs taken at the hospital after the incident showing bruises and red marks on the complainant's face, back, arms and legs, although there was no allegation that Marra used force nor was any evidence offered concerning the cause of the bruises. A prosecution DNA expert testified that testing of a vaginal swab "excluded" Marra as a contributor. During summation, the prosecutor told the jury that the absence of Marra's DNA from the vaginal swab could be explained if he had worn a condom, although there was no evidence he wore a condom. Marra was convicted of first-degree rape under Penal Law § 130.35(2) (having intercourse with a person "incapable of consent by reason of being physically helpless") and was sentenced to 18 years in prison.

The Appellate Division, Fourth Department reduced the sentence to 10 years and otherwise affirmed the judgment although, in weighing the evidence, it said "a different verdict would not have been unreasonable." Ruling the photographs were relevant and properly admitted, it said, "The nurse who took the photographs testified that some of the bruises and red marks depicted looked 'fresh' while other injuries looked 'older.' The photographs of the 'fresh' injuries were relevant to the issue of physical helplessness under the People's theory that, by undressing the victim and having sexual intercourse with her while she was sleeping, defendant caused bruising and red marks to the victim's body that would not normally result from consensual intercourse." Any error in admitting photos of older bruises was harmless, it said, because the injuries "were relatively minor in nature and thus not inflammatory" and "the jury was well aware of the fact that the 'older' bruises may have existed prior to the rape." The court rejected Marra's claim that his attorney rendered ineffective assistance by failing to object to the prosecutor's remarks about possible condom use and by undermining a witness who gave testimony favorable to the defense.

Marra argues the trial court erred in admitting "inflammatory photographs showing injuries to a rape victim that were never alleged to have been inflicted by the defendant, that were irrelevant to the charge of rape of a helpless victim and the most inflammatory of which were inflicted before the incident.... While the photographs were not gruesome, they painted a picture of a man who took advantage of a helpless woman by using physical force, which was not the charge defendant faced." He says their admission was not harmless in "this factually close case," which "was based almost exclusively on the credibility of the victim, whose behavior immediately after the incident was inconsistent with her later claim of rape." He argues his counsel was ineffective in, among other things, failing to object to the prosecutor's unfounded suggestion of condom use. "There is no strategic reason to allow the People to create new evidence to explain away what the Appellate Division found disturbing -- the lack of DNA proof of penetration in a rape case."

For appellant Marra: Salvatore D. Ferlazzo, Albany (518) 462-0300
For respondent: Herkimer County Asst. District Attorney Jeffrey S. Carpenter (315) 867-1155

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To be argued Tuesday, May 28, 2013

No. 125 People v Lester Q. Jones

Lester Jones was accused of beating and robbing a woman after following her into the elevator of her Manhattan apartment building in May 2006. The police sergeant who arrested him about two weeks later acted on a report from a witness who did not see the robbery itself, but saw Jones enter the building and then flee at about the time of the incident. After taking Jones to the 28th Precinct, the sergeant contacted the lead detective on the case and learned the detective had obtained detailed descriptions of the robber from the victim and an eyewitness, who knew Jones by the nickname "Iz," and a police photo of the suspect, who used the same nickname. The descriptions and photo matched Jones. After eight more hours in custody, Jones was placed in a lineup and the victim identified him. Jones moved to suppress the lineup identification, arguing the police lacked probable cause to arrest him. Supreme Court denied the motion without a hearing. Jones was convicted of first-degree burglary and second-degree robbery and was sentenced to 20 years to life in prison.

On appeal, the Appellate Division, First Department remitted the matter to Supreme Court for a Dunaway hearing on Jones' motion to suppress the lineup. The lower court found the initial arrest was illegal because the sergeant did not have probable cause to believe Jones committed the robbery. The court denied the motion, however, finding that the lead detective had sufficient evidence and when the sergeant called him, the sergeant was "led immediately to information which provided the requisite probable cause that allowed the defendant to be held for the line-up conducted several hours later. The telephone call between the sergeant and the detective was the 'intervening event' that attenuated the arrest from the corporeal identification of the defendant as the perpetrator of the robbery."

The Appellate Division affirmed, saying, "The hearing court correctly found that although the police initially lacked probable cause to arrest defendant, the lineup identification by the victim was based on intervening probable cause and was sufficiently attenuated from the illegal arrest...." It said, "Under the circumstances, the communication between the detective and the sergeant constituted a direction to arrest defendant. Accordingly, under the fellow officer rule, the sergeant now had probable cause for defendant's continued detention...."

Jones argues the evidence at the hearing "established that a lineup identification of Mr. Jones -- the principal evidence at Mr. Jones's trial -- was the direct product of a flagrantly unconstitutional and pretextual arrest for doing nothing more than standing on a public sidewalk at two o'clock in the morning.... [T]he Appellate Division's conclusion that the lineup was sufficiently attenuated from the illegal arrest was wrong as a matter of law and lacks factual support in the record of the Dunaway hearing. Where the police held Mr. Jones on a bogus charge in order to investigate a more serious crime, suppression of the fruits of the arrest is necessary to deter similar constitutional violations in the future." Among other issues, he argues the trial court improperly admitted evidence of threats made to a witness by third parties.

For appellant Jones: Matthew L. Mazur, Manhattan (212) 698-3500
For respondent: Manhattan Assistant District Attorney Grace Vee (212) 335-9000

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To be argued Tuesday, May 28, 2013

No. 126 James v Wormuth

Marguerite James brought this medical malpractice action against Dr. David Wormuth and his medical group for damages allegedly arising from a lung biopsy he performed at Crouse Hospital in Syracuse in October 2004. The procedure involved inserting a thin guide wire through the chest wall to mark the area of the lung that was to be biopsied. The four-centimeter strand of wire became dislodged and Dr. Wormuth was unable to locate it. He stopped searching after 20 minutes and decided to leave the wire in James' chest, explaining that he believed it would be riskier to extend the time she was under general anesthesia and make a larger incision to find and remove the wire. James subsequently complained of pain caused by the wire and Dr. Wormuth performed another operation to remove it two months later.

At trial, James did not present expert testimony to support her claim that Dr. Wormuth negligently failed to remove the wire and instead relied on the doctrine of res ipsa loquitur (the thing speaks for itself), which would permit a jury to infer negligence when a foreign body is unintentionally left in a patient. Supreme Court granted a defense motion for a directed verdict dismissing the complaint, ruling the doctrine did not apply: "It is undisputed that the wire was left in plaintiff's body intentionally. There has been no proof and plaintiff does not contend that the wire was negligently or improperly inserted into plaintiff's body or that any negligence on the part of Dr. Wormuth caused the wire to dislodge." Regarding the decision to leave the wire in place, it said expert testimony was necessary to establish the standard of care and how it was breached.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, saying, "Although plaintiff is correct that '[r]es ipsa loquitur is applicable where ... a foreign body is unintentionally left in a patient following an operative procedure'..., plaintiff neither established at trial nor argued in opposition to defendants' motion that the wire fragment was unintentionally left inside her thorax. To the contrary, she elicited testimony from the defendant that he purposely left the wire inside plaintiff because he determined, in the exercise of his medical judgment, that there was a lower risk of harm to plaintiff by taking that course of action than by making a larger incision to remove the wire."

The dissenters argued that res ipsa loquitur applies here: "[W]e respectfully disagree with the majority that the failure to remove the subject part of the wire was solely purposeful. The record establishes that the loss of that part of the wire was unintentional and, in our view, the fact that defendant realized the foreign body at issue had been lost before closing the incision does not change the fact that plaintiff presented evidence that the operation had the unplanned and inadvertent result of leaving an implement inside plaintiff's body. Even though a medical decision was made to abandon the lost implement and close the incision before it was recovered, the loss of that foreign body at the surgical site speaks for itself and satisfies the element of res ipsa loquitur at issue in this appeal...."

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For respondents Wormuth et al: Mark L. Dunn, DeWitt (315) 449-2616

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To be argued Tuesday, May 28, 2013

No. 63 People by Cuomo &c. v Greenberg

In 2005, the New York Attorney General filed this civil enforcement action against two former executives of American International Group (AIG), former Chairman and Chief Executive Officer Maurice R. Greenberg and former Chief Financial Officer Howard I. Smith, alleging they violated the Martin Act and Executive Law § 63(12) by conducting two fraudulent reinsurance transactions five years earlier in order to conceal from investors the declining financial condition of AIG, which was then the largest insurance company in the world. The Attorney General alleged that a sham transaction with General Reinsurance Corporation (GenRe) was designed to conceal a decline in AIG's loss reserves, which had become a concern to investors, and a transaction with CAPCO Reinsurance Company, Ltd., an offshore company controlled by AIG, was designed to mischaracterize underwriting losses as capital losses. After Greenberg and Smith left the company in 2005, AIG publically acknowledged improprieties in both transactions and restated its financial statements for 2000 through 2004. In this action, the Attorney General sought money damages on behalf of AIG shareholders and injunctive relief.

Supreme Court denied the defendants' motion for summary judgment dismissing the suit. The Appellate Division, First Department affirmed in a 4-1 decision in May 2012, holding that the Martin Act and Executive Law claims for damages on behalf of private investors are not preempted by federal securities laws, that the Attorney General has standing to pursue those claims, and that there are triable issues of fact as to whether the defendants knew of or participated in the fraudulent aspects of the GenRe and CAPCO schemes.

In the wake of the settlement of a parallel federal securities class action brought by AIG shareholders, approved by U.S. District Court for the Southern District of New York in April 2013, the Attorney General's Office withdrew the claims for damages. However, it said the federal settlement "has no effect on the Attorney General's claims for equitable relief, which we intend to pursue vigorously." The office said it will "continue to seek, among other remedies, several forms of injunctive relief, including but not limited to a ban on participation in the securities industry and a ban on serving as an officer or director of a public company."

Attorneys for Greenberg and Smith replied that any injunctive relief would be moot and that the Attorney General "long ago abandoned any pursuit of equitable relief." They said the Attorney General "repeatedly represented to the courts below and to the federal court that this action was brought *to recover damages on behalf of AIG shareholders worldwide*.... As a matter of law and fact, this case is not an action for injunctive or other equitable relief."

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For respondent State: Solicitor General Barbara D. Underwood (212) 416-8808