State of New York Court of Appeals

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To be argued Tuesday, November 12, 2013

No. 212 Auqui v Seven Thirty One Limited Partnership

Jose Verdugo was injured in December 2003, while working as a deliveryman for a restaurant, when a sheet of plywood fell from a building under construction at 731 Lexington Avenue in Manhattan and struck him on the head. He was granted Workers' Compensation benefits for treatment of his head, neck and back injuries, as well as post-traumatic stress disorder and depression. Verdugo and his wife brought this personal injury action against the building's owner, Seven Thirty One Limited Partnership; the construction manager, Bovis Lend Lease LMB, Inc.; and the concrete subcontractor, North Side Structures, Inc.

Two years after the accident, the restaurant's insurance carrier sought to discontinue Verdugo's Workers' Compensation benefits on the ground that he was no longer disabled. After a hearing, a Workers' Compensation Law Judge found that Verdugo suffered from "no further causally related disability since January 24, 2006" and terminated his benefits as of that date. On administrative appeal, the Workers' Compensation Board upheld the determination.

In 2009, Seven Thirty One and the other defendants in this case moved for an order precluding Verdugo from litigating the issue of his accident-related injuries beyond January 24, 2006, on the ground that the issue had already been decided in the Workers' Compensation proceeding. Supreme Court granted the defendants' motion to preclude, saying Verdugo "had a full and fair opportunity to address the issue of ongoing causally-related disability" and was collaterally estopped from relitigating it. Shortly thereafter, a different judge appointed Maria Auqui as guardian of Verdugo's property, and Verdugo moved to renew the preclusion motion on the ground the guardianship order raised a triable issue of fact regarding his ongoing disability. Supreme Court adhered to its prior decision.

The Appellate Division, First Department reversed in a 3-2 decision, saying, "The determination that workers' compensation coverage would terminate as of a certain date for plaintiff's injuries ... is not, nor could it be, a definitive determination as to whether plaintiff's documented and continuing injuries were proximately caused by defendants' actions. While factual issues necessarily decided in an administrative proceeding may have collateral estoppel effect, it is well settled that 'an administrative agency's final conclusion, characterized as an ultimate fact or mixed question of law and fact, is not entitled to preclusive effect'" because it "is imbued with policy considerations as well as the agency's expertise." The Appellate Division also concluded the 2009 guardianship order "raises an issue of fact as to the cause of plaintiff's ongoing disability sufficient to warrant denial of defendants' motion."

The dissenters took the position that plaintiff "should be precluded from relitigating the issue of continuing disability" since "the duration of [his] disability was an evidentiary determination fully and fairly litigated by him at the Workers' Compensation proceeding terminating his benefits." Additionally, "the uncontested appointment of a guardian for the plaintiff more than three years later does not raise a triable issue of fact as to when his work-related disability ended."

The Court of Appeals reversed in a 4-1 decision (20 NY3d 1035) in February 2013, granting the defense motion to preclude the plaintiffs from litigating Verdugo's accident-related disability beyond January 24, 2006. In June 2013, the Court granted reargument.

For appellants Seven Thirty One et al: Richard J. Montes, Woodbury (516) 487-5800
For respondents Auqui & Verdugo: Annette G. Hasapidis, South Salem (914) 533-3049

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To be argued Tuesday, November 12, 2013

No. 213 People v Anthony S. Pignataro

In November 2000, when Anthony Pignataro pled guilty in Erie County to first-degree attempted assault in satisfaction of attempted murder and assault charges, Supreme Court told him he would face a determinate sentence of between 5 and 15 years. The court did not inform him prior to his plea that he would also face a mandatory 5-year term of post-release supervision (PRS) after his release from prison, nor did it pronounce the term of PRS when it sentenced him to 15 years in prison in February 2001.

In 2005, the Court of Appeals ruled in People v Catu (4 NY3d 242) that mandatory PRS is a direct consequence of a conviction and that a court's failure to advise a defendant of a statutorily-required term of PRS prior to his guilty plea renders the plea involuntary. In 2008, the Court held in People v Sparber (10 NY3d 457) that only the sentencing judge may impose a term of PRS and that the "sole remedy" for a judge's failure to do so would be resentencing. The State Legislature responded by enacting Penal Law § 70.85, effective June 30, 2008, which provides that a trial court may, with consent of the district attorney, resentence a defendant to the original prison term "without any term of [PRS], which then shall be deemed a lawful sentence."

In May 2010, Pignataro was brought back to Supreme Court for resentencing pursuant to Penal Law § 70.85 on an application by prosecutors, who said they were consenting to a sentence without PRS that would give him the benefit of his original plea bargain. Pignataro moved to vacate his plea on the ground it was involuntary because he was not informed before he entered it that PRS would be mandatory. He also argued that section 70.85 violated due process because it denied him the right to withdraw his involuntary plea.

Supreme Court denied Pignataro's motion and resentenced him to 15 years in prison with no PRS. The Appellate Division, Fourth Department affirmed.

Pignataro argues Penal Law § 70.85 is unconstitutional because "neither the Legislature nor the Courts may compel a Defendant to accept a plea that was unconstitutionally obtained.... [T]he issue goes to the integrity of the plea itself, and not whether Mr. Pignataro received the benefit of [his] negotiated plea. Section 70.85 forces him to retroactively accept an unconstitutional plea." He says he should be given a new hearing and an opportunity to vacate his plea.

The prosecution and the State Attorney General, as intervenor, argue the statute is valid. The Attorney General says Pignataro was resentenced "to his originally promised 15-year term without PRS. As a result, PRS was never part of defendant's sentence, and the plea court's failure to mention PRS did not render defendant's plea involuntary. Alternatively, if defendant's guilty plea is deemed involuntary *ab initio* because PRS was mandated by statute but not mentioned at the plea proceeding, vacatur nonetheless is not required" because "the remedy afforded defendant under Penal Law § 70.85 -- specific performance of his plea agreement -- fully protected defendant's constitutional right to due process."

For appellant Pignataro: Charles J. Greenberg, Amherst (716) 695-9596
For respondent: Erie County Assistant District Attorney Michael J. Hillery (716) 858-2424
For intervenor Attorney General: Assistant Attorney General Jodi A. Danzig (212) 416-8820

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To be argued Tuesday, November 12, 2013

Nos. 214 to 223 Town of Oyster Bay v Lizza Industries, Inc. (and nine other actions)

These cases stem from major sewer construction projects undertaken by Nassau and Suffolk Counties beginning in the 1970s. Local municipalities were named as third-party beneficiaries in the counties' contracts for the sewer projects, which were completed between 1973 and 1987. In 2009, the Town of Oyster Bay and the Villages of Lindenhurst and Babylon brought these actions seeking damages for continuing public nuisance against five of the sewer contractors, alleging that faulty excavation and backfilling of the sewer lines caused the ground to settle, damaging roads, sidewalks, curbs and nearby water lines.

In separate proceedings, Supreme Court granted the defendant contractors' motions to dismiss the complaints as untimely, relying on the Appellate Division, Second Department's 2010 ruling in Town of Islip v H.T. Schneider Associates (73 AD3d 1029), a similar action arising from the counties' sewer projects. The Second Department, citing City School Dist. of City of Newburgh v Stubbins & Assoc. (85 NY2d 535), said in Town of Islip, "Since the alleged continuing nuisance 'has its genesis in the contractual relationship of the parties,' the cause of action sounding in continuing nuisance accrued when the construction work pursuant to the contract was substantially completed."

The Appellate Division, Second Department affirmed the dismissals of these ten actions, ruling they were time-barred whether they were governed by the three-year statute of limitations for injury to property or the six-year statute of limitations for breach of contract. In Village of Lindenhurst v J.D. Posillico, Inc. (Case No. 223), it said the Village's cause of action accrued "upon substantial completion of the work 'irrespective of when the damage was actually discovered.'" "'[N]o matter how a claim is characterized in the complaint -- negligence, malpractice, breach of contract -- an owner's claim arising out of defective construction accrues on the date of completion, since all liability has its genesis in the contractual relationship of the parties,'" it said, quoting Newburgh. "This rule applies to actions alleging breach of contract commenced by a third-party beneficiary to the contract...."

The municipalities argue the Newburgh accrual rule does not apply here because, unlike the school district in Newburgh, they were never meant to become owners of the sewer projects, they had no role in approving plans for the projects or the construction process, they had no control over the budget and change orders, and thus their relationship with the counties and contractors was not the "functional equivalent of privity." They say their status as third-party beneficiaries was intended only to require the counties' contractors "to repair damages to preexisting adjacent municipal property caused during the course of the sewer installation."

For appellants Oyster Bay et al: Michael F. Ingham, Farmingdale (516) 249-3450
For respondents Lizza Indus. & Hendrickson Bros.: John M. Denby, Smithtown (631) 724-8833
For respondent S. Zara and Sons: Robert J. Cosgrove, Manhattan (212) 267-1900
For respondent J.D. Posillico: Joseph P. Asselta, Mineola (516) 248-9880
For respondent Marvec Allstate: Jared T. Greisman, Manhattan (212) 487-9700

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To be argued Tuesday, November 12, 2013

No. 224 Doe v Guthrie Clinic, Ltd.

This federal case arose in July 2010, when John Doe (anonymous) went to Guthrie Clinic Steuben, a private medical facility in the City of Corning, for treatment of a sexually transmitted disease. While he was there, a nurse accessed his files and sent text messages to his girlfriend, who was the nurse's sister-in-law, disclosing the nature of his disease. The girlfriend forwarded the messages to Doe while he was still waiting for treatment at the clinic. Six days later, after Doe complained about the incident, the clinic fired the nurse and the president of Guthrie Clinic, Ltd., sent him a letter confirming that his confidential information had been disclosed and that disciplinary action had been taken. Doe brought this action in U.S. District Court for the Western District of New York against nine entities affiliated with the clinic in Corning, alleging breach of the fiduciary duty of confidentiality, among other claims.

U.S. District Court granted the defendants' motion to dismiss the suit, finding they could not be vicariously liable for the nurse's actions that were outside the scope of her duties. The court refused to follow the Appellate Division, Third Department's 3-2 decision in Doe v Community Health Plan-Kaiser Corp. (268 AD2d 183 [2000]), which said a corporation could be liable for an employee's disclosure about treatment the plaintiff received from a psychiatric social worker. The Appellate Division said, "To hold otherwise would render meaningless the imposition of such a duty [of confidentiality] on a medical corporation, since the wrongful disclosure of confidential information would never be within the scope of the employment of its employees."

On the appeal in this case, the U.S. Court of Appeals for the Second Circuit found that "existing state caselaw" regarding a medical corporation's liability for a breach of confidentiality by a non-physician employee "is extremely sparse." The Third Department's decision "remains the only relevant signpost on the question," it said, and it was hesitant "to rely on it exclusively" because direct corporate liability for the conduct of employees is generally limited to cases where the employees act within the scope of their employment. The court also said, "[A] number of New York state statutes govern the disclosure of personal health information, and how to regulate New York-based health care providers in this area is generally best left to the sound value judgments of New York's courts and legislature." The Second Circuit has asked this Court to resolve the issue in a certified question:

"Whether, under New York law, the common law right of action for breach of the fiduciary duty of confidentiality for the unauthorized disclosure of medical information may run directly against medical corporations, even when the employee responsible for the breach is not a physician and acts outside the scope of her employment?"

For appellant Doe: T. Andrew Brown, Rochester (585) 454-5050
For respondents Guthrie Clinic et al: Martha B. Stolley, Manhattan (212) 309-6000

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To be argued Tuesday, November 12, 2013

No. 225 People v Paul Cortez

Paul Cortez was charged with fatally stabbing his estranged girlfriend, Catherine Woods, in November 2005 at her apartment on East 86th Street in Manhattan, where Woods was living with another boyfriend. At Cortez's trial, Supreme Court allowed the prosecutor to introduce entries from Cortez's diaries, written between 1999 and 2002, in which he expressed his pain and anger toward two other ex-girlfriends, neither of whom he physically harmed, and toward women in general. He described one of the women as "poisonous" and "dangerous" and the other as a "sly whore," but said he was "unable to kill" and "unable to find retribution." The journals contained frequent references to knives, death, and cut throats. On the second day of trial, the court discussed with Cortez a potential conflict of interest on the part of one of his two defense attorneys, who was facing felony prosecution by the Manhattan District Attorney's Office for allegedly smuggling drugs to a different client in jail. Cortez waived any conflict. He was convicted of second-degree murder and sentenced to 25 years to life in prison.

The Appellate Division, First Department affirmed, finding the journal entries about prior girlfriends were not impermissible evidence of uncharged crimes or bad acts "because the entries only reflected hostile thoughts." It said Cortez's "hostility toward women, not limited to the victim, had a bearing on motive and was not unduly prejudicial (see People v Moore, 42 NY2d 421, 428 [1977])," and concluded that any error was harmless. A concurring justice expressed "concern" about the prosecutor's statements in summation "that these diary entries, of questionable relevance, demonstrated that defendant had become increasingly more 'hostile to women,' and that previous rejections had caused a 'murderous rage' to develop in defendant. I believe that these 'psychological opinions' went beyond fair comment on the evidence." Regarding the co-counsel's conflict of interest, the Appellate Division said, "After the court conducted a sufficient inquiry..., defendant made a valid waiver of the conflict" and, in any event, "there is no record evidence of prejudice."

Cortez argues the trial court committed reversible error "in admitting dated writings and drawings expressing defendant's violent thoughts and fantasies about unharmed ex-girlfriends -- without Molineux analysis, prejudice-probity balancing, limiting instruction or evidentiary foundation for the junk science propensity theory they launched." He says proof of prior bad thoughts should be subject to the same analysis as prior bad acts under People v Molineux (168 NY 264 [1901]). He also argues that his waiver of his co-counsel's conflict was invalid because the court conducted an inadequate inquiry, failing to explain the risks the conflict posed for him and giving him insufficient opportunity to consider and discuss those risks with unconflicted counsel. He urges the Court to provide clearer guidelines for conflict inquiries to ensure that "waivers are knowing and intelligent."

For appellant Cortez: Marc Fernich, Manhattan (212) 446-2346
For respondent: Manhattan Assistant District Attorney David M. Cohn (212) 335-9000

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To be argued Tuesday, November 12, 2013

No. 245 Matter of Holmes v Winter

James Holmes, who is charged with murdering 12 people and wounding many more in a shooting rampage at a movie theater in Aurora, Colorado, in July 2012, is seeking to compel New York-based reporter Jana Winter to appear in a Colorado court to identify her confidential sources for an article she wrote for FoxNews.com five days after the shootings. Citing two unnamed law enforcement officers, Winter reported that Holmes mailed a notebook "'full of details about how he was going to kill people' to a University of Colorado psychiatrist before the attack." Attorneys for Holmes sought sanctions in the District Court of Arapahoe County, asserting that the officers violated the court's pre-trial gag order by leaking the information. The court held a hearing at which 14 law enforcement officials testified they had some knowledge of the notebook's contents, but denied disclosing it to the media. Finding that Winter "has become a material and necessary witness in this case," the court issued to Holmes a certificate requiring Winter to testify in the Colorado proceeding pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.

Holmes then commenced this proceeding in Manhattan Supreme Court pursuant to CPL 640.10, the New York statute that codifies the Uniform Act, seeking a subpoena compelling Winter to testify in Colorado and to produce her notes on her confidential sources. The court granted the subpoena, rejecting Winter's claim that the information was privileged under New York's Shield Law, Civil Rights Law § 79-h(b). "[T]hose are all issues for the Colorado court," the justice said, concluding that Winter was a material and necessary witness and that her appearance in Colorado would not be an undue hardship.

The Appellate Division, First Department affirmed on a 3-2 vote, saying Holmes "demonstrated that [Winter's] testimony was 'material and necessary'..., and that she would not suffer undue hardship because [Holmes] would pay the costs of her travel and accommodations." It said Winter "is entitled to assert whatever privileges she deems appropriate before the Colorado District Court," but any assertion of Shield Law privilege is "irrelevant" to the New York proceeding "since admissibility and privilege remain within the purview of the demanding State rather than the sending State." It said the facts "do not establish with absolute certainty that the Colorado District Court will require the disclosure of confidential sources. As such, it calls into question whether this matter truly embodies a conflict between evidence privileged under New York law and evidence that is unprotected in the demanding State."

The dissenters said, "New York's public policy, as reflected in this state's Shield Law ..., is violated when a court of this state directs a reporter to appear in another state, where the purpose of requiring her appearance is to obtain from her the identity of her confidential sources, and where there is a substantial possibility that the demanding court will issue such a directive.... [T]he majority fails to acknowledge the near certainty that the Colorado court will reject [Winter's] privilege claim and compel her to provide the identities of her confidential sources, leaving her to face either a contempt order and incarceration, or the loss of her reputation as a journalist." They said Winter also established that she would suffer undue hardship that is "far more than three days of travel, a hotel stay, and missing work; it is nothing short of undermining her career, the very means of her livelihood."

For appellant Winter: Christopher T. Handman, Washington, D.C. (202) 637-5719
For respondent Holmes: Daniel N. Arshack, Manhattan (212) 582-6500