State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of February 12 - 14, 2013

State of New York Court of Appeals

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To be argued Tuesday, February 12, 2013

No. 43 White v Farrell

In June 2005, Paula White and her late husband, Leonard, signed a contract to buy a house in Skaneateles from Dennis and Nancy Farrell for $1,725,000. The Whites made a deposit of $25,000. One condition of the sale was that the Farrells install a drainage system prior to closing, which was scheduled for July 10, 2005. Three days before the closing, the Whites informed the Farrells that they were terminating the contract because "[t]he drainage situation may never be rectified." The Farrells ultimately sold their property to a different buyer in March 2007 for $1,376,550.

The Whites brought this action against the Farrells to recover their $25,000 deposit, and the Farrells counterclaimed for breach of contract. The Farrells sought actual damages of $348,450, the difference between the stated price in their contract with the Whites and the price they finally received in the March 2007 sale, and consequential damages of $217,636.88 to cover their mortgage payments, property taxes and other carrying costs for the property.

Supreme Court granted the Farrells' motion for summary judgment, ruling the Whites had breached the sales contract and the Farrells were entitled to retain the $25,000 deposit, but the court determined the Farrells had suffered no actual damages. It adopted the standard from Webster v Di Trapano (114 AD2d 698 [3d Dept]), which said "the proper measure of damages is the difference between the contract price and the market value of the property at the time of the breach." Based on deposition testimony of the Farrells' realtor that the fair market value of the property in 2005 was $1,725,000, the court found no actual damages were attributable to the breach "because the contract price and the value of the property at the time of the breach was the same." It also rejected the Farrells' claim for consequential damages. The Appellate Division, Fourth Department affirmed without opinion.

The Farrells argue that they suffered actual damages and are entitled to recover, contending that the lower courts applied an improper standard. "A subsequent arms-length sale is the best manner to determine the damages in a residential breach of contract action and only if there is no subsequent sale should opinion evidence of the fair market value at the time of the breach be utilized." They also argue that they are entitled to consequential damages.

For appellant Farrells: John A. Cirando, Syracuse (315) 474-1285
For respondent White: W. Bradley Hunt, Syracuse (315) 474-7571

State of New York Court of Appeals

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To be argued Tuesday, February 12, 2013

No. 44 People v Stephen DeProspero

During a large-scale investigation of Internet file sharing of child pornography, the State Police found evidence that Stephen DeProspero repeatedly downloaded suspected child pornography in February and March 2009. On May 4, 2009, police obtained a warrant to search his home in the city of Rome and to seize his computers and related equipment. When the warrant was executed the next day, a "limited preview" of his computer found a single image of a young girl having sexual contact with a man. The State Police Crime Laboratory did not conduct any further forensic examination of the seized equipment at that time. DeProspero accepted a plea offer in September 2009, pleading guilty to possessing a sexual performance by a child. On November 2, 2009, he was sentenced to six months in jail and ten years of probation.

After the sentencing, defense counsel requested the return of the seized property, including two digital cameras. The prosecutor told the State Police to examine the equipment before releasing it to ensure that it contained no contraband. In January 2010, a forensic analyst found hundreds of pornographic images and videos of children on the computer and recovered from a digital camera a deleted video clip of a disabled boy, a resident of the group home where DeProspero worked, having sexual contact with him. Indicted on new charges, DeProspero moved to suppress the evidence on the ground that the police lacked authority under the original warrant to search his computer and cameras once the 2009 prosecution had ended. He argued they were required to obtain a new search warrant. After County Court denied his motion, he pled guilty to predatory sexual assault against a child and was sentenced to 18 years in prison.

The Appellate Division, Fourth Department affirmed, rejecting his claim that the authority to search his property expired at the conclusion of the 2009 prosecution. Neither the warrant nor the Fourth Amendment set a specific time limit for examination of a seized computer, and the delay in this case was reasonable, it said. "[T]he police had an obligation to search defendant's property for contraband before returning it to him" because returning child pornography "would constitute a crime." Ruling the police did not need a new warrant for the 2010 search, it said, "Once defendant's property had been lawfully seized pursuant to the May 2009 warrant, he lacked a legitimate expectation of privacy in that property, notwithstanding the passage of time."

DeProspero argues the examination of his digital camera in 2010 was a warrantless search requiring suppression. He cites DeBellis v Property Clerk (79 NY2d 49), which held that once criminal proceedings have terminated, "the government's presumptive right to detain the property no longer exists" and "due process requires that the property be returned upon demand unless the government can establish a new basis for its detention." At that point, he says, his "expectation of privacy in his property was fully restored" and any further intrusion by the state "is unreasonable unless supported by probable cause and a warrant." To avoid returning contraband, he says police could get a court order authorizing a search or simply "wipe the hard drive clean."

For defendant DeProspero: Frank Policelli, Utica (315) 793-0020
For respondent: Oneida County District Attorney Scott D. McNamara (315) 798-5766

State of New York Court of Appeals

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To be argued Tuesday, February 12, 2013

No. 45 People v Kirk Hanley *(papers sealed)*

Kirk Hanley was a 21-year-old City College student in April 2008, when he told a friend that he had been thinking about shooting other students at the school with a replica Remington 1858 black powder revolver and then killing himself. The friend persuaded him to go with her to the financial aid office, left him in the waiting room and alerted an employee, who called campus security and the police. When officers arrived, Hanley grabbed a 19-year-old female student, pointed his gun at her head and threatened to shoot her if anyone moved. He also shouted at the officers to kill him. After a short time, he released the student and pointed the gun at his own head. The officers eventually convinced him to put down the gun and arrested him.

Without waiving his right to appeal, Hanley pled guilty to the entire indictment: second-degree kidnapping, second-degree criminal possession of a weapon (two counts), and first-degree reckless endangerment. He was sentenced to 14 years for kidnapping and concurrent terms of 7 years for weapon possession and 1 year for endangerment. On appeal, he argued the kidnapping charge must be dismissed under the merger doctrine because the same conduct, holding another person at gunpoint, was the basis for his kidnapping and reckless endangerment convictions.

The Appellate Division, First Department affirmed. "By pleading guilty, defendant forfeited appellate review of his argument that his kidnapping conviction merged into his conviction for reckless endangerment...," the court said. "Moreover, since there was no trial, the record is inadequate to review defendant's claim."

Hanley argues he did not forfeit his merger claim because the claim is not inconsistent with his plea. "By pleading guilty, [he] admitted facts sufficient to establish the elements of both kidnapping and reckless endangerment. He did not concede the validity of the prosecution's theory that he could be convicted of both kidnapping and reckless endangerment based upon the very same acts...," he says. "Because kidnapping merger is not about factual sufficiency, but about whether the kidnapping conviction should be precluded under circumstances with a great potential for overcharging, the claim is not forfeited by a guilty plea."

For appellant Hanley: Matthew L. Mazur, Manhattan (212) 698-3500
For respondent: Manhattan Assistant District Attorney Gina Mignola (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, February 13, 2013

No. 46 People v Anthony Griffin

In February 2006, Anthony Griffin was arraigned on robbery charges based on holdups at two Starbucks coffee shops in Manhattan in September 2005. The case was repeatedly delayed over the next five months due to the assignment of a new prosecutor, unavailability of police witnesses or the prosecutor, and other things. On July 10, 2006, with the case on for hearing and trial, the prosecutor sought an adjournment to July 25 because two police witnesses were unavailable. Griffin's counsel from the Legal Aid Society then informed Supreme Court that he was leaving Legal Aid and sought more time for his replacement to prepare. The court refused the request and directed that a new defender be assigned by the following day so the case could proceed on July 25. A Legal Aid supervisor told the court that it could not be ready for trial by that date and, if the court thought Legal Aid should be relieved, it should do so. The court said, "Legal Aid is relieved. That is also your request." The supervisor responded, ""[W]hat I asked you to do is if you were going to force us to be ready for trial on July 25th, that what you should do is relieve us because we're not going to be ready." The court adjourned the case to July 12 for assignment of 18-B counsel. Griffin was not consulted throughout the exchange. The case was transferred to another judge in October 2006, when Griffin pled guilty to first-degree robbery and attempted robbery in return for a sentence of 20 years to life.

The Appellate Division, First Department reversed the conviction in a 3-2 decision, saying "the court's discharge of defendant's counsel without consulting defendant was an abuse of discretion and interfered with defendant's right to counsel.... The court's improvident exercise of discretion reflected a difference in treatment of the Legal Aid Society as compared to the People." The issue was not waived by Griffin's guilty plea, the majority said. "In any event..., the court did not include defendant in the discussion to assign new counsel. Therefore, it cannot be said that defendant knowingly and voluntarily waived the issue. Nor do we find that counsel's plea in desperation, that Legal Aid be relieved if an adjournment was not granted, is dispositive of the issue.... Inasmuch as it could not be ready in two weeks in a complex case involving a life sentence, the Legal Aid supervisor had no choice but to ask to be relieved when the court denied his request for a reasonable adjournment, which effectively resulted in removal."

The dissenters said, "[T]he record clearly reflects that the court did not improperly remove Legal Aid from the case or otherwise interfere with the attorney-client relationship.... It directed Legal Aid to assign another of its staff attorneys to be ready for trial within two weeks.... Legal Aid demurred and asked to be relieved. This request was granted and new counsel was assigned. As a result, there was no removal and clearly no violation of the attorney-client relationship." They said, "The majority's criticism of the court for not consulting with the defendant about relieving Legal Aid and appointing 18-B counsel is unfounded. It was Legal Aid who presented the court with the conundrum that it should be relieved if it was not granted more than a two-week adjournment."

For appellant: Manhattan Assistant District Attorney Sheila O'Shea (212) 335-9000
For respondent Griffin: Harold V. Ferguson, Jr., Manhattan (212) 577-3548

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To be argued Wednesday, February 13, 2013

No. 47 People v Keith A. Adams

Keith Adams was arrested by Rochester police in September 2009 for sending three vulgar and highly offensive text messages to a Rochester City Court judge, who had recently ended a brief intimate relationship with him. The complainant-judge saved the messages and Adams acknowledged that he sent them to her. The other Rochester City Court judges recused themselves and a visiting judge from Wayne County was assigned to preside over the case. The acting City Court judge granted the request of the Monroe County Public Defender to be relieved as Adams' counsel and assigned a Wayne County attorney to represent him.

Adams moved for disqualification of the Monroe County District Attorney's Office due to a conflict of interest, based on actual prejudice and an appearance of impropriety, and for appointment of a special prosecutor. Prosecutors from the office regularly appear before the complainant-judge in City Court criminal cases and therefore "feel constrained in how they handle this matter," Adams said, alleging that the district attorney deferred to the wishes of the complainant in refusing to offer a plea. Monroe County Court denied the motion without a hearing, saying "the only actual prejudice noted is whether or not he gets a certain plea bargain and the law is clear that there's no entitlement to a plea bargain." The court also found the case "isn't being treated any differently from other cases." After a jury trial in City Court, Adams was found guilty of second-degree aggravated harassment. He was sentenced to time served, a one-year conditional discharge with an order of protection, and had to pay a $200 surcharge.

On appeal, the conviction was affirmed by a different County Court judge. "Courts, as a general rule, should remove a public prosecutor only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or substantial risk of abuse," the court said, citing Schumer v Holtzman (60 NY2d 46). "Simply stated, the Defendant had no actual proof of unfair treatment," it said. "Further, Defendant fails to show actual prejudice occurred for the purposes of this appeal. While there is an indication by trial counsel that he would like a plea offer to a violation, there is nothing in the record that Defendant actually would have taken such a plea."

Adams argues, "As a matter of law, the complainant's status as an active judge, presiding over criminal cases in the same county where her criminal complaint was filed, created a *per se* conflict of interest" for the district attorney.... [A] person accused of committing a crime has a right to be prosecuted by an impartial advocate for the People..., someone unhampered by any conflict of interest, real or apparent." He claims he suffered actual prejudice when the district attorney, "based upon the wishes of the complainant," refused to offer a plea to a reduced charge. Conceding that he was not entitled to a plea, he says his "specific argument was that the Monroe County District Attorney should not have been the decision-maker." Adams also argues he was entitled to a hearing on his claim of actual prejudice.

For appellant Adams: David R. Juergens, Rochester (585) 753-4093
For respondent: Monroe County Assistant District Attorney Leslie E. Swift (585) 753-4564

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To be argued Wednesday, February 13, 2013

No. 48 Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO
No. 49 Matter of City of Oswego v Oswego City Firefighters Association, Local 2707

These cases arose after the State Legislature enacted article 22 of the Retirement and Social Security Law in December 2009, establishing a new Tier V for the Police and Firemen's Retirement System (PFRS) and requiring employees who join the PFRS on or after January 10, 2010 to contribute three percent of their wages to the retirement fund. Section 8 of the statute provides an exception to the contribution requirement for new employees who join "a special retirement plan ... pursuant to a collectively negotiated agreement with any state or local government employer, where such agreement is in effect on the effective date of this act and so long as such agreement remains in effect thereafter." Section 1206 states, "In the event of any conflict between the provisions of this article and any other provision of law, this article shall govern."

The cities of Yonkers and Oswego had a preexisting collective bargaining agreements (CBA) with their firefighters' unions that gave employees the option to enroll in PFRS or in a "384-d" retirement plan, and both Cities agreed to pay the employees' retirement contributions. Yonkers' contract with Yonkers Fire Fighters, Local 628, expired on June 30, 2009, and Oswego's contract with Oswego City Firefighters Association, Local 2707, expired on December 31, 2009. Both CBAs were being renegotiated when article 22 took effect. When the Cities began requiring new firefighters to make retirement contributions under article 22, asserting the section 8 exception did not apply because the CBAs were no longer "in effect," the Unions sought arbitration.

In No. 48, the Appellate Division, Second Department granted Yonkers' petition to permanently stay arbitration. "Contrary to the contention of the Union, the CBA, which terminated by its own terms in June 2009, was no longer 'in effect' at the time of the effective date of article 22..., which was January 10, 2010; therefore, the exception set forth in section 8 of that article is inapplicable...," it said. "Under these circumstances, the subject arbitration is barred by statute (see Civil Service Law § 201[4]; Retirement and Social Services Law § 470)."

In No. 49, an arbitrator ruled Oswego must continue making retirement contributions for firefighters enrolled in the 384-d plan, as provided in the CBA. The Appellate Division, Fourth Department affirmed the award, saying the expired CBA was still in effect and the section 8 exception applied. Under the Triborough doctrine, "as embodied in Civil Service Law § 209-a(1)(e), it is an improper practice ... for a public employer 'to refuse to continue all the terms of an expired agreement until a new agreement is negotiated'...," it said. "Because a new agreement between the City and the Union had not yet been negotiated at the time the subject firefighters joined the PFRS, all of the terms of the expired agreement were still in effect."

(No. 48) For appellant Yonkers Union: Richard S. Corenthal, Manhattan (212) 239-4999
For respondent Yonkers: Terence M. O'Neil, Garden City (516) 267-6300
(No. 49) For appellant Oswego: Earl T. Redding, Albany (518) 464-1300
For respondent Oswego Union: Mimi C. Satter, Syracuse (315) 471-0405

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To be argued Wednesday, February 13, 2013

No. 50 Orsi v Haralabatos

Four-year-old Keith Orsi suffered a displaced fracture of his left elbow when he fell from a trampoline in March 2004. He was taken to Stony Brook University Hospital, where his primary physician was Dr. Susan Haralabatos of Stony Brook Orthopaedic Associates (SBOA). Dr. Haralabatos performed surgery, fixing the fracture in position with two sterile wires that protruded through the boy's skin. Keith was given antibiotics before and after surgery and was released the next day. When he developed a sore throat and fever, he was readmitted to the hospital on March 20. Dr. Haralabatos concluded he had a superficial infection where the wires protruded. Keith was treated with antibiotics and released after two days. At a follow-up visit on March 25, Dr. Haralabatos found no sign of infection. She removed the cast and wires on April 15 and observed pus at the site of the wires, but concluded it was due to irritation rather than infection. On April 19, Dr. Haralabatos noted irritation at the site and prescribed an antibiotic. Keith's parents missed follow-up appointments on April 22, April 29, and May 3. On May 4, Dr. Haralabatos noted pain and swelling at the boy's elbow, and tests determined that he had developed chronic osteomyelitis, a bacterial bone infection, causing permanent skeletal damage.

Keith Orsi and his parents filed this medical malpractice action against Dr. Haralabatos and SBOA, among others. Dr. Haralabatos and SBOA moved for summary judgment dismissing the complaint, submitting affirmations from two medical experts who opined that the doctor acted within the accepted standard of medical care. The plaintiffs opposed the motion and submitted the affirmation of an expert who opined that Dr. Haralabatos departed from the relevant standard of care on the April 15 visit by failing to take a culture of the pus at the puncture site, take Keith's temperature, treat the infected puncture, and prescribe prophylactic antibiotics; and on the April 19 visit by failing to order blood testing and X-rays. The defendants argued that the three "missed visits" from April 22 to May 3 "deprived the defendants of the opportunity to evaluate [Keith] at that critical time and makes it impossible to determine when precisely ... the osteomyelitis began or became apparent."

Supreme Court denied the motion to dismiss, saying the plaintiffs "raised triable issues of fact by submitting an affirmation by their expert as to specific allegations of deviations from the standard of care." On appeal, the defendants reiterated their argument that the parents' failure to bring Keith to the three "missed visits" prevented Dr. Haralabatos from monitoring his condition and constituted a superceding intervening act that caused his injuries.

The Appellate Division, Second Department reversed and dismissed the suit, saying the defendants' expert affirmations established that they "did not depart from good and accepted standards of medical practice, and that, in any event, any alleged departures did not proximately cause [Keith's] injury." While the plaintiffs raised triable issues regarding the defendants' compliance with medical standards, "they failed to raise a triable issue of fact as to whether the alleged departures proximately caused" their son's injury.

The plaintiffs argue they raised triable issues regarding the defendants' departures from the standard of care during the April 15 and 19 visits and, because the three missed appointments came after those departures caused Keith's injuries, any negligence on the parents' part could not be a superceding intervening cause.

For appellant Orsi: Joseph P. Awad, Garden City (516) 832-7777
For respondents Haralabatos and SBOA: Eric M. Kraus, Manhattan (212) 759-4888

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To be argued Thursday, February 14, 2013

No. 51 Oakes v Patel

Lisa Oakes brought this medical malpractice action, on behalf of herself and her husband Daniel, seeking damages for the failure of health care providers at Buffalo's Millard Fillmore Suburban Hospital to diagnose and treat Daniel's cerebral aneurysm in 1998. He suffered a massive stroke two and a half weeks after he began treatment. After trial in 2008, the jury found Dr. Rajnikant Patel, Dr. Satish Mongia, and hospital owner Kaleida Health were negligent and Kaleida was vicariously liable for the negligence of Dent Neurologic Institute. The jury awarded more than $5.1 million in damages, including $2 million for pain and suffering, $1.8 million for future custodial care, and $210,000 for loss of consortium.

Supreme Court granted plaintiffs' motion to set aside the verdict on damages unless defendants stipulated to increase the awards to $10 million for pain and suffering, $3.9 million for future custodial care, and $3.5 million for loss of consortium. The defendants rejected the proposed additur. The court also denied Kaleida's motion to amend its answer to raise affirmative defenses based on proofs of claim the plaintiffs filed in 2003 in a liquidation proceeding against Kaleida's insurer, PHICO Insurance Company, which included a release of claims against any PHICO insured. After a retrial on damages in 2009, the jury awarded $9.6 million for pain and suffering, $4.72 million for future custodial care, and $2.4 million for loss of consortium, bringing the total verdict to $17.8 million.

The Appellate Division, Fourth Department affirmed on a split vote, ruling the defendants failed to preserve their challenge to the amount of the trial court's proposed additur to damages at the first trial. The majority said that, "because defendants did not challenge the court's additur before, during or after the second trial, and did not raise that issue on appeal, no such issue is properly before us.... We cannot conclude that, by challenging the court's order setting aside the first verdict in part, defendants thereby implicitly challenged the amount of the court's additur." It found the damages award at the second trial was not excessive. Regarding the releases the plaintiffs filed in the PHICO liquidation, they were to become "null and void" if "coverage is avoided by the Liquidator," the court said. "Because Kaleida's liability for the negligence of Dent is included in the claims specified to PHICO and because PHICO's liquidators avoided, or announced that they would avoid, coverage of that portion of the claim, plaintiffs' releases were rendered null and void."

One dissenter argued the majority erred in upholding the damages awarded at the second trial without first reviewing the defendants' claim that the trial court's proposed additur at the first trial was excessive. She said the defendants preserved the issue when they opposed the plaintiffs' motion to set aside the first damages award by contending it did not deviate from what would be reasonable, a contention that "necessarily encompasses the argument that an additur in <u>any</u> amount would be inappropriate," and by rejecting the additur. She also argued that the additur was excessive and the defendants "should be afforded the opportunity to stipulate to a proper additur in the context of this appeal." The other dissenter argued the second damages award was excessive.

For appellant Patel: Ann M. Campbell, Buffalo (716) 849-6500
For appellant Kaleida: Amy Archer Flaherty, Buffalo (716) 856-5500
For appellant Mongia: Gregory T. Miller, Buffalo (716) 852-0400
For respondent Oakes: Ronald J. Wright, Buffalo (716) 852-1234

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To be argued Thursday, February 14, 2013

No. 52 People v Randolfo Diaz *(papers sealed)*
No. 53 People v Bill Williams *(papers sealed)*

The common issue in these appeals, in which the defendants were charged with sexually abusing children, is whether prosecutors may present expert testimony about the typical behavior of child abusers. In both cases, prosecutors called psychologists to testify about child sex abuse syndrome to explain delayed disclosure and piecemeal disclosure of abuse by victims, but the experts also described the "grooming" of victims -- the means abusers commonly use to obtain access to a child, establish trust, gradually escalate sexual activity, and maintain secrecy.

Randalfo Diaz was accused of abusing a girl in Brooklyn in 2006 and 2007, beginning when she was eight years old. A jury found him guilty of course of sexual conduct against a child in the second degree and child endangerment. He was sentenced to five years in prison.

The Appellate Division, Second Department reversed and ordered a new trial, saying the trial court erred in allowing expert testimony "describing how a sex offender typically operates to win over the trust of a child victim, a description closely paralleling the complainant's account of the defendant's behavior.... While expert testimony may be admitted 'to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand' ..., it is inadmissible 'when introduced merely to prove that a sexual assault took place ... or bolster a witness' credibility.'" It said the trial court also improperly precluded testimony of a former boyfriend of the complainant's mother, who claimed the girl falsely accused him of abusing her when she was five.

The prosecution argues the expert testimony was necessary "to explain to jurors why a child victim of sexual abuse may comply with the abuser's sexual demands even in the absence of any threats or use of force by the abuser and why the child may delay in reporting the abuse."

Bill Williams was accused of abusing two 12-year-old girls in Brooklyn in 2006 and 2007. He was convicted at a bench trial of first-degree rape, criminal sex act and other charges, and was sentenced to 66 years to life in prison.

The Appellate Division, Second Department reduced his sentence to 46 years to life, but affirmed his convictions on the most serious charges. "While the hypothetical situation described by the prosecutor during the direct examination of the expert bore some similarities to the facts of this case," it said, "the expert did not offer an opinion with respect to the credibility of the complainants, and expressly disavowed any intention of rendering an opinion as to whether the complainants were victims of sexual abuse...."

Williams argues that "expert testimony about the typical conduct of abusers is highly prejudicial, since it invites the jurors to find a defendant guilty by simply comparing the defendant's alleged conduct with that of a typical pedophile and deciding he fits that profile." He says the expert "improperly provided his 'professional opinion' that detail after detail of the complainants' allegations were 'consistent with' child sex abuse syndrome."

(No. 52) For appellant: Brooklyn Assistant District Attorney Ruth E. Ross (718) 250-2529
For respondent Diaz: Anna Pervukhin, Manhattan (212) 693-0085
(No. 53) For appellant Williams: Kendra L. Hutchinson, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Ruth E. Ross (718) 250-2529

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To be argued Thursday, February 14, 2013

No. 54 Matter of Duarte v City of New York *(papers sealed)*

In September 2010, Arisleida Duarte was indicted in the Bronx on charges including attempted murder and assault, and was held at the Rose M. Singer Center (RMSC) on Rikers Island pending trial. Duarte was pregnant at the time of her arrest and she applied for admission to the RMSC's Nursery Program, which provides housing and other services to permit incarcerated mothers to live with their newborn children up to one year of age. A deputy warden notified her that her "application has been rejected based on the following: VIOLENT CRIMINAL RECORD (Attempted Murder)" and "Extensive Infraction History." The warden of RMSC denied Duarte's appeal "in accordance with the Nursery Program Procedures."

Duarte brought this article 78 proceeding against the City to challenge the determination, arguing it did not comply with Correction Law § 611(2). The statute states, in part, "A child may remain in the correctional institution with its mother for such period as seems desirable for the welfare of such child, but not after it is one year of age.... The officer in charge of such institution may cause a child cared for therein with its mother to be removed from the institution at any time before the child is one year of age." The warden said in an affidavit that Duarte had already served a sentence for gang assault and was convicted of three infractions during that incarceration, including graffiti and assaulting an inmate. She said Duarte's pending charges and criminal history "show that she poses a threat to the safety and security of her unborn child as well as to the other mothers and their babies in the Nursery Program."

Duarte gave birth to a son on April 18, 2011. Two days later, Supreme Court granted her petition and ordered the City to admit her to the Nursery Program, saying, "The sole criterion set forth in [section 611(2)] for the return of a newborn to its inmate mother ... and its remaining in the care of its mother in prison is the welfare of the child.... The only basis for denial of an inmate's request to care for her child in prison ... is a finding by the chief medical officer of the correctional institution that the mother is physically unfit to care for her child." RMSC authorities made no assessment of whether Duarte "was unfit to care for the child or whether placement of her newborn into her care at the Nursery would be detrimental to the welfare of the child," the court said, noting that her application was supported by medical officials at RMSC.

The Appellate Division, Second Department affirmed, ruling the denial of Duarte's application was arbitrary and capricious. "[U]nder the statute, the relevant consideration in determining whether the child may remain with the mother is the welfare of the child," it said, but the RMSC "failed to make any assessment of whether the subject child's welfare would best be served by remaining with his mother."

The City argues, "Under the plain language of the statute..., 'the best interest of the child' is not the exclusive or over-riding consideration" in deciding whether to grant admission to the Nursery Program, and a facility "may consider its institutional needs, including the safety of the other mothers and infants in the program." Section 611(2) "specifically provides the warden with the authority to remove the child from the facility at any time without reference to the 'welfare of the child,'" it says, and it would be "incongruous" to grant the warden such authority to remove a child, "but not authority to deny an initial application for a child to be admitted to the Nursery Program."

For appellant City: Assistant Corporation Counsel Fay Ng (212) 788-1034
For respondent Duarte: Valentina M. Morales, Manhattan (212) 696-8843

State of New York Court of Appeals

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To be argued Thursday, February 14, 2013

No. 55 M&T Real Estate Trust v Doyle

M&T Real Estate Trust brought this action under article 13 of the Real Property Actions and Proceedings Law (RPAPL) to foreclose on commercial mortgages executed by James J. Doyle II and secured by Jim Doyle Ford, his former automobile dealership in the Town of Tonawanda, Erie County. M&T was the successful bidder when the property was sold at public auction in September 2009. M&T's counsel sent the referee who conducted the sale a proposed deed in May 2010, asking him to sign and return it. The referee executed the deed and mailed it back, but before it arrived M&T's counsel telephoned to inform the referee that his client would not accept the deed because another party was negotiating to purchase the foreclosure bid. When the deed arrived, M&T's counsel mailed it back to the referee with a letter reiterating that his client would not accept the deed at that time.

In late July 2010, M&T's counsel told the referee that M&T was willing to accept the deed. When the referee sent the original deed with the May 2010 date, M&T's counsel asked him to "re-execute" the deed so it would be "dated concurrently with its delivery." The referee re-executed the deed, dated August 9, 2010, and delivered it to M&T's counsel, who accepted and retained it. On September 3, 2010, M&T moved to confirm the referee's report and for a deficiency judgment against Doyle and Doyle Ford. Doyle opposed the motion for a deficiency judgment on the ground it was untimely under RPAPL § 1371(2), which provides that such a motion must be made "within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser."

Erie County Court granted M&T's motion, saying, "M&T's motion for a deficiency judgment ... was timely made under RPAPL § 1371, having been brought within ninety (90) days of the consummation of the sale of the Premises by the Referee pursuant to the Referee's Deed dated August 9, 2010...." It subsequently awarded M&T a deficiency judgment of $426,657.11.

The Appellate Division, Fourth Department reversed, ruling M&T's motion for a deficiency judgment was untimely because "the foreclosure sale was consummated and the 90-day period commenced in May 2010 upon the delivery of the Referee's [original] deed." The court said, "'When the Referee[] signed the deed[] presented by [plaintiff's] counsel, [he was] left with no title to convey to any other party,' and thus the sale was consummated upon the delivery of that deed in May 2010, notwithstanding the refusal of plaintiff's counsel to accept and retain physical possession of the deed at that time," quoting Lennar Northeast Partners Ltd. Partnership v Gifaldi (258 AD2d 240).

M&T argues, "Under long-established principles of New York property law, the term 'delivery' requires both delivery and acceptance of the deed," citing Ten Eyck v Whitbeck (156 NY 341 [1898]). "Simply put, a conveyance of real property in New York is not accomplished unilaterally," citing Brackett v Barney (28 NY 333 [1863]). "Accordingly, delivery of a deed must include an acceptance of the deed by the intended grantee in order for the delivery to be complete and the transfer of real property to be consummated."

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