State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of January 2 - 3, 2013

State of New York Court of Appeals

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To be argued Wednesday, January 2, 2013

No. 1 United States Fidelity & Guaranty Company v American Re-Insurance Company

This dispute over reinsurance coverage stems from general liability policies that United States Fidelity & Guaranty Company and St. Paul Fire and Marine Insurance Company (collectively USF&G) issued to Western Asbestos Company, a distributor of asbestos products, from 1948 to 1959. Western Asbestos dissolved in 1967 and Western MacArthur Company (MacArthur) took over its business. When individuals began suing MacArthur for injuries caused by exposure to Western Asbestos products, USF&G refused to defend or indemnify MacArthur, and MacArthur sued the insurer in 1993. USF&G settled the suit in 2002 by agreeing to pay more than $975 million in satisfaction of all asbestos claims. The settlement required MacArthur to file for bankruptcy.

Beginning in 1945, USF&G had entered into a series of reinsurance treaties with American Re-Insurance Company (American Re) and the Excess Casualty Reinsurance Association (ECRA), a pool of four reinsurers. The treaties are excess-of-loss contracts that require the reinsurers to reimburse a portion of each covered loss above the amount of loss retained by USF&G. The treaty for 1956 to 1962, the focus of this case, required USF&G to retain the first $100,000 of covered loss. The retention amount increased to $500,000 and then to $1 million in later treaties. In 1981, the parties agreed to retroactively increase the retention amount to $3 million, but they now disagree about whether that amendment was meant to reach back to the 1956-62 treaty.

After settling with MacArthur, USF&G submitted reinsurance claims to American Re and ECRA that were based on the $100,000 retention amount in the 1956-62 treaty. USF&G also allocated all of the reinsurance claims to 1959, as it had allocated all of its losses on the asbestos claims to its 1959 policy with Western Asbestos. American Re and ECRA refused to pay the reinsurance claims, contending that, regardless of the terms of the settlement agreement, part of the settlement amount was payment for MacArthur's bad faith claims against USF&G for refusing to defend and indemnify it, which is not covered under the reinsurance treaty. They also argued the retention amount in the 1956-62 treaty had been increased to $3 million. This litigation ensued, and Supreme Court granted summary judgment for USF&G. The court subsequently entered a judgment against the reinsurers for $420,425,536.15.

The Appellate Division, First Department affirmed in a 4-1 decision, saying, "We find that the motion court correctly determined that the follow-the-fortunes doctrine required defendants to accept the reinsurance presentation made by USF&G herein. Accordingly, all of defendants' efforts to second guess USF&G's decisions concerning allocation of the loss ... are precluded from this court's review." If it were to reach the merits, it said, "MacArthur's prior bad faith claim has no bearing on the reinsurers' obligations because the settlement agreement that resolved the coverage action does not allocate any of the settlement funds to compensating MacArthur for USF&G's alleged bad faith." It also ruled the agreement to increase the retention amount to $3 million did not apply to the 1956-62 reinsurance treaty.

The dissenter argued, "The motion court erred when it concluded that defendants had not presented evidence to raise a triable issue of fact as to whether a portion of the settlement was attributable to ... MacArthur's bad faith claim against USF&G.... There is ample evidence, including the findings made by the bankruptcy court, and the record in the underlying coverage action brought by ... MacArthur against USF&G, to support defendants' position that part of the settlement represented bad faith damages."

For appellant American Re: Herbert M. Wachtell, Manhattan (212) 403-1000
For appellants ECRA et al: Kathleen M. Sullivan, Manhattan (212) 849-7000
For respondents USF&G et al: Mary Kay Vyskocil, Manhattan (212) 455-2000

State of New York Court of Appeals

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To be argued Wednesday, January 2, 2013

No. 2 Montas v JJC Construction Corporation

Jose Montas was injured in September 1999 when he slipped and fell while crossing Monroe Avenue, near East Tremont Avenue, in the Bronx. He said he stepped over a piece of wood and slipped on "sand and construction debris" while crossing the street with his cousin. The accident occurred about four feet from a concrete barrier and chain link fence that enclosed a City-owned work site, where JJC Construction Corp. was demolishing and rebuilding the Grand Concourse overpass and bridge over East Tremont. Montas brought this personal injury action against JJC and the City, testifying at trial that the sandy residue was generated by the cutting and removal of concrete for the roadway project. He did not preserve any of the residue, but identified the "greyish-white" substance in photographs of the accident scene. The president of JJC testified that a building about five to ten feet beyond where Montas fell was undergoing brick repointing at the time, that the light-colored residue identified by Montas was not the same as the yellow mason sand his company was using, and that the residue was old mortar chipped out during the re-pointing work by an unidentified contractor.

At the close of testimony, Supreme Court granted motions by the City and JJC to dismiss for failure to establish a prima facie case. It said the evidence presented by Montas "was much more suggestion than proof regarding the source of the sand.... [T]here is insufficient evidence of causation to put this dispute before a jury."

The Appellate Division, First Department affirmed in a 3-2 decision. It said the trial court "correctly determined that plaintiff's self-serving testimony that JJC's concrete-chopping activities were the source of the greyish-white sand in the street on which he slipped was too speculative to raise an issue of fact.... [T]he facts show that it is just as likely that the accident was caused by debris from the pointing project as by debris from the roadway project, and any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation...."

The dissenters argued that a jury "could rationally have found that the sandy debris upon which he claims to have slipped and fallen was generated by JJC's activities.... The jurors could reasonably have credited the testimony of plaintiff and his cousin, based on their direct observations, that JJC's concrete-cutting activities were the source of the sandy debris. The testimony of defendants' witnesses that a nearby brick-repointing project was the source of the sandy debris merely raised a credibility issue for the jurors, who were free to reject that testimony...."

For appellant Montas: Brian J. Isaac, Manhattan (212) 233-8100
For respondent JJC: Lauren J. Wachtler, Manhattan (212) 509-3900
For respondent City of New York: Assistant Corporation Counsel Omar Nasar (718) 590-3973

State of New York Court of Appeals

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To be argued Wednesday, January 2, 2013

No. 3 Matter of Ward v City of Long Beach

Brian Ward was a lieutenant in the City of Long Beach Fire Department in October 2003, when he allegedly injured his left knee while on duty in the firehouse. Based on the line-of-duty injury, the State Comptroller approved his application for disability retirement in November 2005. In May 2008, Ward applied to the City for supplemental disability pension benefits under General Municipal Law § 207-a(2), which would pay him the difference between his regular wages and the disability benefits paid by the state. The City Fire Commissioner denied his application in July 2008 without stating a reason. Ward appealed to the City Manager, who referred the matter to Corporation Counsel Corey E. Klein. Ward, saying his inquiries to the Corporation Counsel's office went unanswered, filed this article 78 proceeding in December 2008 to challenge the denial of his application.

The City moved to dismiss and submitted an affidavit from Edwin Eaton, the former City Manager, who said Ward's estranged wife, Beverly, came to his office in December 2007 and told Eaton and Klein that Ward was not injured at the firehouse, as he claimed, but was actually injured at his daughter's high school soccer game two days earlier and was tended by several bystanders. She said he made up the firehouse injury in order to receive enhanced benefits. Klein submitted an affidavit corroborating Eaton's account of the meeting with Beverly. Klein said he considered Beverly's statements, as well as the Comptroller's determination of disability and the underlying record, in denying Ward's appeal. He also considered his own observations of Ward playing in a beach volleyball league "every summer in recent memory." He said he informed Ward by letter that he denied his appeal "due to the causation and the permanence of your disability."

After denying the City's motion, Supreme Court granted Ward's petition and ordered the City to pay him supplemental disability pension benefits, ruling it had no rational basis to deny them. The court said, "The statements by Mrs. Ward were not made under oath.... She was not asked to submit an affidavit. There is no indication that any investigation was made by any City official to verify the contents of her statements, notwithstanding the fact that the knee injury took place in public, in the presence of a number of witnesses. There is no proof that any person in law enforcement took any action against petitioner based upon Mrs. Ward's statements." It said her statements were "wholly unverified" and were made when she was in the midst of divorce proceedings. It said Klein's observations of Ward playing volleyball were "made not by a medical professional but by a lay person, who is unable to relate what he saw to the petitioner's ability to function as a firefighter." The Appellate Division, Second Department, affirmed.

The City argues, "Beverly Ward's statements regarding the origin of her husband's injury provided a rational basis upon which to deny Brian Ward's application for benefits under General Municipal Law § 207-a(2), and, through its adoption of Brian Ward's story, the lower court erred by substituting its judgment for the City's." It says his application "was properly denied based on substantial evidence discovered by and through the City Corporation Counsel during an investigation."

For appellant Long Beach: Assistant Corporation Counsel Robert M. Agostisi (516) 431-1000
For respondent Ward: Louis D. Stober, Jr., Garden City (516) 742-6546

State of New York Court of Appeals

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To be argued Wednesday, January 2, 2013

No. 4 Matter of M.G.M. Insulation, Inc. v Gardner

The Bath Volunteer Fire Department (BVFD) is a not-for-profit fire corporation in the Village of Bath, Steuben County. It receives most of its operating revenue from a fire protection contract with the Village and, prior to 2007, it was based in a firehouse owned by the Village. In 2004, BVFD obtained a $2.5 million loan for construction of a new firehouse, which was to be repaid in annual installments of $158,658 over the next 30 years. The Village named itself the lead agency for the firehouse project under the State Environmental Quality Review Act (SEQRA), and it also agreed to increase its annual contract payments to BVFD by $150,000 to cover most of the loan cost. BVFD hired R-J Taylor General Contractors, Inc. for the firehouse project in 2006, without making provision for payment of prevailing wage rates in the area.

The State Department of Labor (DOL) determined that contractors for the firehouse project were required to pay prevailing wages under Labor Law § 220, which applies to public works contracts "to which the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law is a party." The statute provides that the "wages to be paid ... to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages." A DOL Hearing Officer upheld the determination, finding that BVFD and other volunteer fire corporations are the "functional equivalent" of municipal corporations and are therefore covered by the prevailing wage law. Colleen Gardner, who was then Commissioner of DOL, adopted the hearing officer's report. Taylor and its subcontractors (collectively Contractors) initiated this article 78 proceeding to annul the determination.

The Appellate Division, Third Department confirmed the determination, saying there was substantial evidence "under the particular facts of this case" to support DOL's conclusion "that BVFD -- despite its incorporation as a private entity -- essentially functioned as a Village department and, therefore, could be deemed a municipal corporation within the meaning of Labor Law § 220." It cited the general legal and financial control the Village exercised over BVFD and it said, "With respect to the project at issue, the record reveals that the Village, in addition to designating itself as lead agency for purposes of SEQRA review, initially was quite involved in discussions regarding the financing and development of the project...." It also held that construction of the firehouse qualified as a public work project.

The Contractors argue, "Prevailing wage requirements apply only to those entities specified in Labor Law § 220." They say, "[F]ire corporations are no more 'public' in purpose, no more regulated and no more reliant upon public financing than are charter schools, or many other not-for-profit corporations that provide a public service.... [S]ince these entities 'do not fall within any of the four categories to which the prevailing wage law applies,' they are not subject to its terms." They argue that 'substantial evidence' is not the test of whether the Commissioner exceeded her statutory enforcement authority by extending it to 'functional equivalents' of specified entities." They also say the firehouse is not a "public work" because it was built for the use of BVFD's members, not the general public.

For appellant Contractors: Anthony J. Adams, Jr., Rochester (585) 232-6900
For respondent Gardner: Assistant Solicitor General Zainab A. Chaudhry (518) 474-3429

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To be argued Wednesday, January 2, 2013

No. 5 People v Rafael L. Belliard

Rafael L. Belliard was arrested in Rochester in December 2006, after police found cocaine and a firearm in a hidden compartment of a car in which he was a passenger. He was indicted on charges of first and third-degree criminal possession of a controlled substance and second-degree criminal possession of a weapon. Belliard went to trial, but after Supreme Court ruled the prosecutor could cross-examine him about a prior drug conviction if he took the stand, he agreed to plead guilty to the entire indictment in exchange for a sentence of 12 years in prison.

At his plea proceeding in July 2007, Belliard admitted his constructive possession of the cocaine and the gun. The court did not inform him that, as a second felony drug offender, his new sentence must run consecutively to the undischarged portion of his sentence for a prior drug conviction pursuant to Penal Law § 70.25(2-a). He had been resentenced to a 5-year term of post release supervision (PRS) about six months before his arrest in this case. On appeal, he argued that his guilty plea was not knowing, voluntary and intelligent because Supreme Court failed to advise him that consecutive sentencing was mandatory under Penal Law § 70.25(2-a). The Appellate Division, Fourth Department summarily affirmed his conviction without opinion.

Belliard argues that mandatory consecutive sentencing under Penal Law § 70.25(2-a) is a "direct consequence of his guilty plea" and the trial court's failure to inform him of it violated his constitutional right to due process. He says, "While the 'possibility' of a consecutive state prison sentence may be deemed a 'collateral' consequence of a guilty plea, the absolute 'certainty' of such a sentence surely cannot. This mandatory penalty ... is a direct, adverse consequence to a second felony offender." He says, "This punishment is direct, immediate and completely automatic. The trial court has no discretion." He argues the court failed to provide him "with critical information that was necessary for him to make a voluntary and intelligent choice among alternative courses of action and for him to be fully aware of all direct consequences of his guilty plea."

The prosecution argues that the consecutive sentencing required by section 70.25(2-a) is not a direct consequence of Belliard's plea because it did not affect his sentence in this case. "The terms of defendant's 2007 sentence remained the same, i.e., defendant received the benefit of his bargain," it says. "The fact that defendant still had to face the consequences of his PRS violation cannot be used to invalidate the 2007 plea.... Such a result would be an unjust windfall to defendant Belliard who has been repeatedly unable to abide by the law." It argues that his "overall jail time might have been enlarged by consecutive sentences, but his 2007 sentence, standing alone, was left untouched. This is the hallmark of a collateral consequence, and the Second Circuit has rejected overall prison time as a demarcation for a direct consequence."

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

State of New York Court of Appeals

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To be argued Thursday, January 3, 2013

No. 6 Matter of New York State Office of Victim Services v Raucci

Steven C. Raucci, the former facilities director for the Schenectady City School District, is serving 23 years to life in prison following his 2010 conviction on 18 counts of first-degree arson, weapon possession and other crimes. He was found guilty of, among other things, planting bombs at the homes of coworkers and fellow union members whom he perceived as adversaries. During his incarceration, Raucci's pension checks from the New York State and Local Employees' Retirement System, about $5,800 per month, were delivered to his wife Shelley, who holds his power of attorney and was able to cash them. After two of Raucci's victims notified the State Office of Victim Services (OVS) of their intent to bring civil actions against him, OVS brought this proceeding on their behalf under the Son of Sam Law, Executive Law § 632-a, to freeze his assets.

OVS sought a preliminary injunction deeming Raucci to have directed the retirement system to send the pension checks to his inmate account and prohibiting disbursements, thus preserving the funds to satisfy any civil judgments awarded to his victims. The Rauccis argued the pension checks are exempt from seizure under the Son of Sam Law by Retirement and Social Security Law § 110, which protects the pensions of public employees from "execution, garnishment, attachment, or any other process whatsoever," and by CPLR 5205(c), which exempts defined benefit pension plans "from application to the satisfaction of a money judgment."

Supreme Court denied the motion for an injunction, finding it was precluded by "the clear language of Retirement and Social Security Law § 110." It said "the plain language of the statute ... protects [Raucci's] 'retirement allowance' from execution, garnishment, attachment, or any other process whatsoever." It did not decide the propriety of OVS's request for an order deeming Raucci to have directed that the checks be sent to his inmate account, but said it was "unprecedented."

The Appellate Division, Third Department reversed and granted the motion for a preliminary injunction, ruling the Son of Sam Law superceded the pension protections of section 110. While the Son of Sam Law originally allowed victims to recover only "profits from a crime," it said a 2001 amendment broadened it to allow recovery of "any profits from a crime or funds of a convicted person." The court said, "Although the Legislature expressly exempted certain categories of funds from the reach of the Son of Sam Law, it did not list pension proceeds as one of those categories, indicating that such funds were intended to be recoverable. Moreover, the older, more general provisions of Retirement and Social Security Law § 110 are subordinate to the more recent and specific dictates of the Son of Sam Law because 'a prior general statute yields to a later specific or special statute'...."

For appellants Steven and Shelley Raucci: Alan J. Pierce, Syracuse (315) 565-4500
For respondent OVS: Assistant Solicitor General Owen Demuth (518) 486-4087

State of New York Court of Appeals

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To be argued Thursday, January 3, 2013

No. 7 People v Carl Watson

Carl Watson was a part-time livery cab driver in Brooklyn in May 2007, when he shot and killed Livingston Powell, another livery driver with whom he had been feuding. He was charged with second-degree murder and weapon possession. Watson claimed self-defense, testifying that he panicked and fired when Powell walked toward his car in a threatening manner and reached for his waist, where he was known to carry a gun. The police found no gun on Powell. Prior to trial, Watson sought to subpoena the Brooklyn District Attorney's records of Powell's prior violent criminal conduct, including violent acts that were unknown to Watson at the time of the shooting, to support his claim that Powell was the initial aggressor.

Supreme Court ruled the evidence inadmissible based on longstanding New York case law. "It is clear that New York law does not authorize evidence of a homicide victim's prior violent acts to prove that the victim was the initial aggressor unless the defendant was aware of these acts. '[A] defendant claiming self-defense may not introduce evidence of the violent propensities of the alleged victim merely to show that the victim was the likely aggressor,['"] the court said, citing Matter of Robert S. (52 NY2d 1046) and People v Miller (39 NY2d 543). It also said the violent incidents cited by Watson "are largely remote in time, going back 20-30 years." The jury acquitted Watson of murder, but convicted him of first-degree manslaughter and second-degree criminal possession of a weapon. He was sentenced to consecutive terms of 10 years for manslaughter and 3½ years for weapon possession.

The Appellate Division, Second Department affirmed, saying, "The Supreme Court providently exercised its discretion in denying admission of evidence of the decedent's prior specific criminal acts of violence, because the defendant lacked the requisite knowledge of these criminal acts...."

Watson argues that "New York State should change its century-old law excluding evidence of a victim's violent character on the issue of who was the initial aggressor in a justification case in light of, inter alia, the overwhelming trend nationwide, the paramount purpose of evidentiary rules to promote accurate verdicts, and the defendant's fundamental right to present exculpatory evidence in his defense." He also argues the trial court denied him due process and a fair trial by refusing to admit evidence of Powell's decades-old shootout with police, which Powell had told him about, "to corroborate appellant's testimony that he reasonably believed he was in imminent danger."

For appellant Watson: A. Alexander Donn, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Camille O'Hara Gillespie (718) 250-2490

State of New York Court of Appeals

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To be argued Thursday, January 3, 2013

No. 8 Matter of Shenendehowa Central School District Board of Education v Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, Local 864

Cynthia DiDomenicantonio, a member of Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, Local 864 (CSEA), was employed as a bus driver by the Shenendehowa Central School District for nearly 10 years, until she failed a random drug and alcohol test in October 2009. She tested positive for marijuana and the School District discharged her. CSEA challenged her termination in arbitration, arguing the District violated the collective bargaining agreement (CBA), in which the District and CSEA "subscribe to the concept of progressive discipline, except for the most serious offenses." The CBA provides increasing steps for discipline beginning with written warnings, but it also states, "Suspension without pay or discharge may be invoked with less than two (2) written warnings where the employee's conduct creates a danger to the health, safety or welfare of staff, students and/or the general public.... A positive result in any required drug or alcohol test is considered such a danger." The provision permits suspension or discharge, but the District said it had adopted a zero tolerance policy for positive drug tests and DiDomenicantonio's discharge was mandatory.

The arbitrator found DiDomenicantonio tested positive for marijuana, but also found the District violated the CBA by refusing to exercise any discretion and treating her discharge as mandatory. He said the District, "after negotiating a Contract that provides for a range of discipline for a positive drug test, may not change or renounce that Agreement by unilaterally instituting an automatic discharge for positive drug tests." He ordered DiDomenicantonio reinstated without back pay.

Supreme Court vacated the award and confirmed the District's decision to terminate DiDomenicantonio. It said the District "was not compelled to terminate an employee who failed a drug test but it had the option to do so under [the CBA]. The arbitrator, by ruling to the contrary, 'in effect made a new contract for the parties' as opposed to interpreting it..., and thus clearly exceeded his power."

The Appellate Division, Third Department reversed in a 3-2 decision and confirmed the arbitration award, saying, "If [the District] intended to implement a zero tolerance policy, it could and should have negotiated with CSEA to include such mandatory language in the CBA. Not having done so, petitioner must abide by the language actually negotiated for and agreed upon with CSEA. As the arbitrator correctly stated, petitioner's '<u>unilaterally</u> established ... policy, no matter how consistently enforced by [petitioner,] is not consistent with the <u>mutually</u> negotiated [CBA].'" It said the remedy, which equated to a six-month suspension without pay, was rational.

The dissenters argued that the District had the contractual right to discharge DiDomenicantonio and it did not violate the CBA when it did so, since her failed drug test meant she "did not have a right to progressive discipline. Under the circumstances, why and how it settled on termination of respondent is totally irrelevant and involves collateral considerations that have nothing to do with its rights under the CBA." They said, "[W]hat the arbitrator chose to do here was not to answer the question posed by the parties for arbitration but, instead, to fashion a resolution of this dispute that he thought was palatable to all involved.... [I]n doing so, the arbitrator 'clearly exceed[ed] a specifically enumerated limitation on [his] power.'"

For appellant School District: Beth A. Bourassa, Albany (518) 487-7617
For respondents CSEA and DiDomenicantonio: Daren J. Rylewicz, Albany (518) 257-1443

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To be argued Thursday, January 3, 2013

No. 9 People v Robert B. Pealer

Robert Pealer was arrested for driving while intoxicated in October 2008 in the Village of Penn Yan, Yates County, while driving home from a bar. Police had received an anonymous tip that he was drunk. An officer followed his car for four minutes and, since Pearson committed no moving violations, finally stopped him for an equipment violation -- an "unauthorized sticker" on his rear window. He failed the field sobriety tests and was taken to the Sheriff's Department for a breathalyzer test, which indicated his blood alcohol content was .15 percent.

At his trial, County Court admitted into evidence breath test calibration and simulator solution certificates, prepared by the Division of Criminal Justice Services and the State Police, to verify the accuracy of the breathalyzer test. It admitted them under the business records exception to the hearsay rule, denying Pealer's objection that admitting the certificates without testimony by the persons who prepared them would violate his right to confront witnesses under the Sixth Amendment and Crawford v Washington (541 US 36). He was convicted of felony DWI, sentenced to 2⅓ to 7 years in prison, and fined $5,000.

The Appellate Division, Fourth Department affirmed, ruling the calibration certificates were not "testimonial" and, thus, not subject to the confrontation requirement. It said, "Here, the statements contained in the breath test documents are not accusatory in the sense that they do not establish an element of the crimes. Indeed, standing alone, the documents shed no light on defendant's guilt or innocence.... The only relevant fact established by the documents is that the breath test instrument was functioning properly. The functionality of the machine, however, neither directly establishes an element of the crimes charged nor inculpates any particular individual. Thus, the government employees who prepared the records were 'not defendant's "accuser[s]" in any but the most attenuated sense'...." It also held the initial stop of Pealer's vehicle was valid, regardless of whether it was pretextual.

Pealer argues the calibration certificates are testimonial in nature because they were prepared expressly for use in prosecuting accused drunk drivers. "While it is true that the calibration of breathalyzer machines is not geared towards a specific arrestee, the fact remains that the purpose of the testing is to guarantee the accuracy of the breathalyzer machines for use in litigation against [any] arrestee blowing into the machine.... Without confrontation, there is nothing to guarantee that law enforcement remains honest in actually conducting the required testing and not fabricating the records to assure more convictions." He says the certificates are not "neutral" business records because they were produced by law enforcement personnel for use in criminal prosecutions. Among other issues, he argues that allowing a stop based on the community college sticker in his rear window would give "the police license to conduct pretextual traffic stops based on little more than a 'whim, caprice or idle curiosity.'"

For appellant Pealer: John A. Cirando, Syracuse (315) 474-1285
For respondent: Yates County District Attorney Jason L. Cook (315) 536-5550

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To be argued Thursday, January 3, 2013

No. 10 Miglino v Bally Total Fitness of Greater New York, Inc.

In March 2007, Gregory Miglino, Sr. suffered cardiac arrest and collapsed on a racquetball court at a health club in Lake Grove, Suffolk County. The club's staff called 911 for an ambulance and asked anyone at the club with medical training to provide assistance. A personal trainer employed by the club, who was also trained in cardiopulmonary resuscitation and the use of an automated external defibrillator (AED), said the stricken man had his eyes open, normal color and a faint pulse. The trainer went to check on the status of the ambulance, and when he returned a doctor and medical student were tending to Miglino. The trainer said another employee had brought the club's AED to Miglino's side, but he did not use it. Miglino was unconscious when the ambulance arrived and the crew was unable to revive him.

Gregory Miglino, Jr., as executor of the decedent's estate, brought this negligence action against the owner of the club, Bally Total Fitness of Greater New York, Inc., claiming it was negligent in failing to use the AED. He argued that General Business Law § 627-a, which requires health clubs with more than 500 members to have an AED and an employee trained to use it, also imposes a duty on the clubs to use the device when necessary. Bally moved to dismiss the suit on the ground that it was immune under Public Health Law § 3000-a, known as the Good Samaritan statute, which provides that a person who voluntarily renders emergency treatment outside a medical facility may not be held liable for injury or death except in cases of gross negligence. Bally said it was also immune under General Business Law § 627-a, which includes a similar Good Samaritan provision. Supreme Court denied the motion.

The Appellate Division, Second Department affirmed, holding that General Business Law § 627-a imposes a duty on health clubs to use the AEDs it requires them to provide. The purpose of the statute "was to increase the number of lives that could be saved through the use of available AED devices at health club facilities," it said. Since the statute requires clubs "to provide an AED on the premises, as well as a person trained to use such device, it is anomalous to conclude that there is no duty to use the device should the need arise." It rejected Bally's Good Samaritan defense, saying, "While [section] 627-a does incorporate the provision of the Good Samaritan law requiring a showing of gross negligence when the statutorily required AED is used, where, as here, the cause of action is based on the failure to employ the device, as opposed to the manner in which it was employed, the gross negligence standard is not applicable."

Bally cites a First Department case, DiGiulio v Gran, Inc. (74 AD3d 450), which ruled that section 627-a does not implicitly require health clubs to use their AEDs. Bally argues that it satisfied the statute's requirements by having an AED and an employee trained to use it and that the Second Department "added words" to the statute "that conflict with those already present (volunteer/voluntarily) and which most certainly derogate the common law." It says, "The statute was not written to require AED use. It was written to require an AED and a person trained to use that device so that he or she would be encouraged to *volunteer* their assistance in an emergency." It also argues that it is immune from liability under the Good Samaritan statute and that Miglino "assumed the risk of cardiac arrest when he engaged in strenuous physical activity."

For appellant Bally: Brian P. Heermance, Manhattan (212) 825-1212
For respondent Miglino: John V. Decolator, Garden City (516) 578-8212