State of New York Court of Appeals

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MARCH 24 - 27, 2014 CALENDAR

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Monday, March 24, 2014

No. 73 Matter of Allen B. v Sproat *(papers sealed)*
No. 74 Matter of Robert T. v Sproat *(papers sealed)*

The issue in these cases, brought by insanity acquittees released from secure confinement, is whether Supreme Court may, under Criminal Procedure Law § 330.20, authorize their temporary confinement for psychiatric examination if they violate the conditions of their release.

Robert T. was charged with second-degree manslaughter in Ulster County in 1995, after he drove into oncoming traffic in an apparent suicide attempt and collided with a vehicle, killing its driver. Allen B. was charged with arson and reckless endangerment in Delaware County in 1993 for setting fire to a building after he got into a dispute with one of its occupants. Both men were found not responsible by reason of mental disease or defect and were placed in custody of the State Office of Mental Health (OMH) pursuant to CPL 330.20, based on findings that each suffered from a dangerous mental disorder. Robert was released from confinement in 2002 and Allen in 2005, each subject to an order of conditions.

In 2010, when OMH moved to extend the orders of conditions, Supreme Court granted its request to include a provision that, "should the [petitioner] fail to comply with any of the above conditions and refuse to appear for or comply with a psychiatric examination, the Commissioner [of OMH] shall apply to the court for a Temporary Confinement Order for the purpose of conducting an effective psychiatric examination in a secure facility." Robert and Allen filed these article 78 proceedings at the Appellate Division, seeking writs of prohibition to bar enforcement of the temporary confinement provision.

The Appellate Division, Second Department granted their petitions in a pair of 3-1 decisions, saying the provision "is not authorized by CPL 330.20 and improperly establishes an ex parte enforcement procedure" in violation of due process. "[I]f an individual violates an order of conditions and has a history of dangerous mental disorder, it is clear that the proper procedure is an application for recommitment" under CPL 330.20(14), in which "the subject of the application is entitled to notice and an opportunity to be heard.... The disputed provision in this case did not provide for notice and an opportunity to be heard, thus depriving the petitioner of statutorily prescribed due process protections." It said, "The Supreme Court does not have authority to issue a 'Temporary Confinement Order' without notice until there is an application for recommitment -- temporary or otherwise -- on notice, in its current form."

The dissenter said, "There is nothing in the express language of CPL 330.20 that prohibits or limits the court's authority to entertain an application for a temporary confinement order such as the one at bar." Citing CPL 330.20(1)(o) and (12), he said "the Legislature saw fit to draft the statute in very broad terms so as to allow a court to properly devise 'reasonably necessary or appropriate' conditions.... The temporary confinement order ... constitutes an alternative means, separate from and short of a full recommitment order application process," to monitor and avert "an insanity acquittee's potential degeneration" into a dangerous mental state. Regarding due process, he said the provision "is not a self-executing order" and requires the court to grant or deny OMH's application.

For appellants OMH et al: Assistant Solicitor General Andrew W. Amend (212) 416-8022
For respondents Allen B. and Robert T.: Lisa Volpe, Mineola (516) 746-4373

State of New York Court of Appeals

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To be argued Monday, March 24, 2014

No. 66 Matter of Board of Managers of French Oaks Condominium v Town of Amherst

The Board of Managers of the French Oaks Condominium brought this tax certiorari proceeding against the Town of Amherst in 2010 to challenge the Town's $5,176,000 assessment on its 39 condominium units. At trial, the Town moved to dismiss the petition on the ground the report of the Condominium's expert appraiser was so flawed that it failed to show by substantial evidence that the complex was overvalued. The referee denied the motion, saying, "Petitioner's appraisal contained many reasonably comparable rental properties, and the conclusions of value by the appraiser ... were for the most part sufficiently supported by 'facts, figures and calculations,' as required by 22 NYCRR 202.59(g)(2)." Rejecting the Town appraiser's capitalization rate, which was based on nationwide data, and applying the capitalization rate calculated by the Condominium's expert, which was based on actual sales of apartment complexes in local suburban areas, the referee determined the value of the French Oaks complex was $4,353,030. Supreme Court adopted the referee's decision.

The Appellate Division, Fourth Department affirmed in a 3-2 decision. The comparable properties used by the Condominium's appraiser were older than French Oaks and he did not describe their interiors, it said, but he "provided the year in which many of the comparable sales were built and the square footage, size and unit prices of the comparable sales. Thus, there was sufficient information provided in the appraisal to allow [the Town] to prepare for cross-examination of petitioner's expert on any differences between the comparable sales and the complex." And while the expert based the income and expense information for the comparable sales on "forecasts" rather than actual income and expenses, "there was sufficient information in the appraisal to allow [the Town] to explore the absence of historical financial information ... on cross-examination." Questioning "the frequency and ease with which an appraiser is able to obtain *private* and often *proprietary* income data" for comparable properties, the court concluded that, "under these circumstances, disturbing the order based on the failure of petitioner's expert to provide 'hard' data with respect to all of the comparable sales used in his capitalization analysis would stifle the ability to challenge a tax assessment."

The dissenters would have adopted the $5,080,000 assessment in the Town's trial appraisal, saying "the conclusion of petitioner's appraiser with respect to his capitalization rate is legally and factually flawed, and each flaw is independently fatal to petitioner's case." They said, "The legal flaw ... is that he relied on his 'personal exposure' to at least three of the four comparable properties to justify the financial figures that he used to calculate his capitalization rate.... An appraiser cannot simply list financial figures of comparable properties in his or her appraisal report that are derived from alleged personal knowledge; he or she must subsequently 'prove' those figures to be facts at trial (22 NYCRR 202.59[g][2]...). Petitioner's appraiser, however, failed to offer any factual support for the great majority of his figures.... [W]e see no occasion here to take a plain failure of proof and to extrapolate from it a new, relaxed evidentiary standard in tax assessment cases based on the assumption that to do otherwise would stifle petitions challenging tax assessments."

For appellants Town of Amherst et al: Craig A. Leslie, Buffalo (716) 847-8400
For respondent French Oaks: B. P. Oliverio, Buffalo (716) 852-1300

State of New York Court of Appeals

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To be argued Monday, March 24, 2014

No. 67 People v Floyd L. Smart

Floyd Smart was charged with breaking into a house in the Town of Greece, Monroe County, in October 2008. His girlfriend, Sherry Grant, testified before the grand jury that she stayed in the car and slept while Smart and another man went in to rob the house and that she honked the horn to warn them when the homeowner returned. On the eve of Smart's trial, prosecutors were unable to locate Grant and they sought to introduce her grand jury testimony as part of their direct case, arguing that she was unavailable to testify due to Smart's misconduct.

County Court held a Sirois hearing on the issue. Based on the testimony of investigators and Smart's taped phone calls from jail, the court found the prosecution "established by clear and convincing evidence" that Smart, "acting in concert with his mother pressured the witness's unavailability up to today through threats and chicanery, among other things, encouraging his mother to keep [Grant] away from trial." The court cited testimony that Smart encouraged his mother "to hide her out, take her out of town..., drive her around, give her drugs, keep her high." Before the hearing ended, Grant was arrested on unrelated charges and was subpoenaed to testify at Smart's trial. Grant's attorney appeared at the hearing and informed the court that she would invoke her Fifth Amendment right to remain silent. The court found this was irrelevant to the Sirois issue, saying, "The fact she is here is moot. [Grant's attorney] stated on the record she is not going to testify. She is so unavailable." The court granted the prosecution request to admit her grand jury testimony at trial. Smart was convicted of second-degree burglary and sentenced to 20 years to life in prison.

The Appellate Division, Fourth Department reduced the sentence to 15 years to life and otherwise affirmed, rejecting Smart's claim that the admission of Grant's grand jury testimony violated his Sixth Amendment right to confront and cross-examine her. "The People presented clear and convincing evidence establishing that misconduct by defendant and his mother, who acted at defendant's behest, caused the witness to be unavailable to testify at trial," it said, citing People v Geraci (85 NY2d 359 [1995]).

Smart argued that, "because Sherry Grant refused to testify based upon Fifth Amendment grounds, her unavailability was, as a matter of law, not due to Mr. Smart's misconduct, but due to her own choice to make herself unavailable by invoking the Fifth Amendment privilege." She had valid reasons to remain silent since she faced four sets of pending charges and the prosecution refused to give her immunity for her testimony, Smart says, arguing that her assertion of the privilege "breaks the causal connection between Defendant's alleged misconduct and her refusal to testify" and excludes his case from the Geraci exception to the right of confrontation.

For appellant Smart: Mark D. Funk, Rochester (585) 325-4080
For respondent: Monroe County Assistant District Attorney Matthew Dunham (585) 753-4627

State of New York Court of Appeals

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To be argued Tuesday, March 25, 2014

No. 68 Williams v Weatherstone

This negligence action arose in March 2008, when Rhonda Williams' 12-year-old daughter was struck by a car while trying to get to the school bus that was to pick her up. The girl, a sixth grade student in the Jordan-Elbridge Central School District in Onondaga County, had been waiting at her regular bus stop at the end of her driveway when the bus driver inadvertently passed by her. The bus continued a short distance, then turned around and approached her on the opposite side of the road. The bus driver testified at his deposition that he intended to turn around again so he could pick up the child at her driveway, but the girl crossed the road in an effort to reach the bus on the opposite side and a vehicle driven by Sharon Weatherstone struck her. Williams brought this personal injury action against the School District and Weatherstone.

The School District moved for summary judgment dismissing the complaint on the ground, among others, that it owed no duty of care to the child because she was not in its custody or control when the accident occurred. Supreme Court denied the motion.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, saying, "We ... conclude under the facts presented here that the child was within the orbit of defendant's authority such that defendant owed a duty to the child based upon the actions of defendant; i.e., the bus arrived at the bus stop, passed it, and the driver turned around to pick up the child. Thus, 'the injury occurred during the act of busing itself, broadly construed'...." It said, "Where, as here, it was reasonably foreseeable that the child would be placed 'into a foreseeably hazardous setting [defendant] had a hand in creating,' defendant owed a duty to the child...."

The dissenters argued, "At the time of the accident, defendant had not assumed physical custody of the child and she thus remained 'out of the orbit of its authority'.... Defendant thus owed no duty to the child in this situation, 'and, absent duty, there can be no liability'.... We reject plaintiff's contention that defendant assumed a duty to the child as a consequence of the 'potentially hazardous situation' allegedly created by the school bus driver in turning the bus around after missing the bus stop.... Plaintiff has cited no cases ... where a school district was found to owe a duty of care to a child who was not in its custody at the time of the injury or who was not released from the school district's custody into a hazardous condition that caused the child's injury."

For appellant School District: Christine Gasser, Uniondale (516) 542-5900
For respondent Williams: A. Vincent Buzard, Pittsford (585) 419-8800

State of New York Court of Appeals

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To be argued Tuesday, March 25, 2014

No. 69 Matter of Handler v DiNapoli
No. 70 Matter of South Island Orthopaedic Group v DiNapoli

Marvin H. Handler, M.D., P.C. and South Island Orthopaedic Group -- nonparticipating (or out-of-network) medical providers under the Empire Plan, the primary health insurance plan for state and local government employees -- brought these actions to challenge the authority of State Comptroller Thomas DiNapoli to examine their billing records as part of an audit of United Healthcare Insurance Company of New York. The state contracts with United Healthcare to process and pay claims under the Empire Plan, using premiums paid by the state. When an Empire Plan member is treated by a nonparticipating provider, United generally pays 80 percent of the fee, if reasonable, and the provider is responsible for collecting the remaining 20 percent from the member. In 2009, the Comptroller audited United's claim payments to determine if nonparticipating providers had improperly waived the 20 percent out-of-pocket cost for plan members, which would have the effect of artificially inflating the share of the fees paid by United and, ultimately, the state. The auditors concluded that Handler and South Island had routinely waived the out-of-pocket costs and, as a result, United made overpayments of about $900,000 on Handler claims and about $800,000 on South Island claims. The Comptroller recommended that United recover the overpayments from the providers and take steps to prevent them from waiving out-of-pocket costs in the future.

In these actions, the providers sought to set aside the audit and to preclude the Comptroller and Empire from implementing its recommendations, including recoupment of any overpayments. Supreme Court granted their petitions, in large part, finding the Comptroller lacked authority to audit the providers under article V, section 1 of the State Constitution because they are private entities that do not directly receive state funds. In South Island, the court said, "[I]t appears that payments by the State were made to United who made payments to petitioner's patients who were beneficiaries of the Empire Plan; the patients were then obligated to make payments to petitioner. Hence,... the monies paid to United lost the imprimatur of 'State funds' before that money reached petitioner."

The Appellate Division, Third Department reversed, saying, "[T]he fact that state funds passed through United's hands en route to [the providers] did not negate the Comptroller's audit authority to confirm that the payments made by the state were proper.... United is reimbursed in full with state funds for all claims that it has paid" and any overpayments "are charged directly to the state.... In order to determine the propriety of those payments, an examination of nonparticipating providers' billing records regarding services provided to Empire Plan members is necessarily required...." The Comptroller did not conduct a "performance audit" of the providers, it said, and his "limited examination of [the providers'] billing records is incidental to his mandated audit of United and, accordingly, proper...."

For appellants Handler and South Island: Matthew F. Didora, Uniondale (516) 663-6600
For respondent DiNapoli: Assistant Solicitor General Zainab A. Chaudhry (518) 474-3429
For respondent United Healthcare: Cynthia E. Neidl, Albany (518) 689-1400 (papers only)

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To be argued Tuesday, March 25, 2014

No. 71 Golden v Citibank, N.A.

The issue here is whether Citibank -- which issued a $300,000 cashier's check payable to "Richard Golden as attorney" in December 2009 -- must honor the cashier's check in the absence of fraud, or may it refuse payment on a showing that it received no consideration for issuing the check and that the party demanding payment, Golden, was not a holder in due course.

The cashier's check was obtained from Citibank by XOX Solutions Inc., and it was to be drawn upon the proceeds of a $335,600 check that XOX had deposited in its account at Citibank. The next day, Golden deposited the cashier's check into his attorney escrow account at JP Morgan Chase Bank, to be held for the benefit of his client, James Tilton. Golden also drew a $102,083 check at Tilton's request to satisfy an overdue mortgage. At about the same time, XOX's $335,600 check was dishonored due to an improper endorsement, and Citibank stopped payment on the $300,000 cashier's check that was issued to Golden. As a result, his $102,083 check for the mortgage payment was returned for insufficient funds in his escrow account, which triggered an investigation by the attorney grievance committee. Six days later, XOX's $335,600 check was redeposited with proper endorsement, but Citibank says an XOX official made other arrangements to pay Golden's client and did not ask it to issue another cashier's check to him.

Golden brought this action against Citibank to compel payment of the $300,000 cashier's check, among other things. He argued that Citibank could not stop payment on the check in the absence of fraud and that its only remedy was to recover the funds from XOX. Citibank argued it properly stopped payment because it received no consideration from XOX for issuing the check and because the payee, Golden, had given no value for it and, thus, was not a holder in due course. Supreme Court denied Golden's motion for summary judgment as premature, since discovery had not been completed.

The Appellate Division, Second Department reversed and granted Golden's motion. "Once a bank issues a cashier's check, it cannot thereafter stop payment, even upon a request from its customer, unless there is evidence of fraud...," it said. Golden was entitled to summary judgment based on "evidence of the existence and due issuance of the cashier's check, that it was drawn by Citibank, on itself, and made payable to [Golden], and that the check was deposited into his Chase attorney escrow account, but that it ultimately was not paid to him because Citibank improperly issued a stop payment order.... In opposition, Citibank did not submit any evidence that the check was fraudulently issued or obtained...."

Citibank argues, "It is well established both in New York and other jurisdictions that a bank has the legal right to stop payment on a cashier's check when there has been a failure of consideration to the bank for the issuance of the cashier's check, and the party seeking the proceeds of such check is not a holder in due course because he gave no value for it. This well-established defense to payment was recognized by the Third Department in" Gates v Manufacturers Hanover Trust Co. (98 AD2d 829 [1983]), which "is in accord with case law from other jurisdictions outside of New York."

For appellant Citibank: Barry J. Glickman, Manhattan (212) 223-0400
For respondent Golden: Richard N. Golden (pro se), Forest Hills (718) 261-2600

State of New York Court of Appeals

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To be argued Tuesday, March 25, 2014

No. 72 People v Raphael Golb

Raphael Golb, a lawyer and writer with a doctorate in comparative literature, was accused of impersonating and harassing scholars in an academic dispute over the origin of the Dead Sea Scrolls that he waged over the Internet from 2006 to 2009, when he was arrested at his Greenwich Village apartment. His father, Norman Golb, a University of Chicago professor and expert on the ancient scrolls, espoused a theory that the texts had been gathered from libraries in Jerusalem around 70 A.D. and hidden in caves near Qumran to protect them during a Roman invasion. This challenged the more widely held theory that the scrolls were produced by a Jewish sect called the Essenes. Using a wide array of pseudonyms, Raphael Golb produced a stream of online comments, blogs and emails to support his father's views and undermine his detractors. He also sent emails in the names of rival scholars, including one purporting to be sent from a New York University professor to his colleagues and students in which he appeared to admit plagiarizing ideas of Golb's father 15 years earlier.

Golb was convicted of two felony counts of second-degree identity theft and multiple misdemeanor counts of criminal impersonation, forgery, aggravated harassment, and unauthorized use of a computer. He was sentenced to six months in jail.

The Appellate Division, First Department vacated one felony identity theft conviction for lack of proof of intent to defraud anyone of property in excess of $1,000 and otherwise affirmed. It said the evidence established that Golb intended the recipients of his deceptive emails to believe "the purported authors were the actual authors" and "intended that the recipients' reliance on this deception would cause harm to the purported authors and benefits to defendant or his father.... The [trial] court was under no obligation to limit the definitions of 'injure' or 'defraud' -- terms used in the forgery and criminal impersonation statutes -- to tangible harms such as financial harm.... [T]he evidence established that defendant intended harm that fell within the plain meaning of the term 'injure,' and that was not protected by the First Amendment, including damage to the careers and livelihoods of the scholars he impersonated.... Defendant was not prosecuted for the content of any of the emails, but only for giving the false impression that his victims were the actual authors of the emails."

Golb argues the trial court's failure to limit the criminal statutes to tangible injuries and benefits rendered them void for vagueness and violated his free speech rights. "The trial court's definition of the terms 'benefit,' 'harm,' and 'fraud' required the jury to find Raphael Golb guilty precisely because his online impersonations called attention to, condemned, and mocked alleged wrongdoing on the part of the Scroll monopolists and exhibitors..., thereby 'benefitting' Raphael Golb's view that these people were perpetuating a fraud on the American public and the academic community, and 'harming' those whom he perceived to be mendacious and engaged in unethical conduct. These types of benefits and harms are fully protected by the First Amendment; they are not legally cognizable in the criminal justice system."

For appellant Golb: Ronald L. Kuby, Manhattan (212) 529-0223
For respondent: Manhattan Assistant District Attorney Vincent Rivellese (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, March 26, 2014

No. 64 Clemente Bros. Contracting Corp. v Hafner-Milazzo

Clemente Bros. Contracting Corp. opened three accounts in 2007 at North Fork Bank, which later merged with Capital One. To meet the requirements of North Fork's rules and as a condition for opening the accounts, Clemente Bros. passed a corporate resolution providing that the bank would not be liable for payments made on altered or forged checks unless Clemente Bros. notified it of the errors within 14 days of receiving its monthly account statements. In 2009, Clemente Bros. obtained a $200,000 loan and $1 million line of credit from Capital One. The loans were personally guaranteed by Jeffrey Clemente, the president of Clemente Bros., and the promissory notes permitted Capital One to demand immediate payment of the unpaid balances based on, among other things, "an event which, in the judgment of the Bank, adversely affects the [borrower's] ... ability to repay." In February 2010, Clemente Bros. notified Capital One that its bookkeeper, Aprile Hafner-Milazzo, had been embezzling funds by forging Clemente's signature to draw on the line of credit and forging his endorsement on checks to take those funds from the company's operating account. Clemente Bros. alleged she took about $386,000 from January 2008 through December 2009. Capital One demanded full payment of both loans. Clemente Bros. and Clemente brought this action against Capital One and Hafner-Milazzo to recover its losses from the forgeries and to prevent the bank from enforcing any claims based on the loans.

Supreme Court granted Capital One's motion for summary judgment, dismissed the complaint against it and awarded it $1,146,262.90 on its counterclaims for payment of the loans. UCC 4-406(4) places a one-year limit on the right of a customer to recover from a bank for payment on a forged check, measured from the date the account statement and canceled check are made available to the customer. The court found that Clemente Bros. and the bank had, by agreement when the account was opened, reduced the one-year statutory period to 14 days, and that Clemente Bros. failed to report any of the forgeries within that period. It also ruled Capital One had established its entitlement to payment of the loans.

The Appellate Division, Second Department affirmed, saying banks and their customers "may shorten the one-year notice period by agreement.... Here, the parties, by agreement, shortened the one-year period to 14 days."

Clemente Bros. and Clemente argue, in part, that the lower court rulings conflict with rulings of the Third and Fourth Departments and with UCC 4-103, which states, "The effect of the provisions of this Article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care...." They claim Capital One did not exercise ordinary care or comply with its own procedures, which made possible the bookkeeper's thefts. They also urge this Court to rule, on policy grounds, that parties may not reduce the statutory one-year limit on reporting forgeries to 14 days.

For appellants Clemente Contracting et al: Matthew Dollinger, Carle Place (516) 747-1010
For respondent Capital One: Mara B. Levin, Manhattan (212) 592-1400

State of New York Court of Appeals

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To be argued Wednesday, March 26, 2014

No. 65 People v Jonai Washington

Jonai Washington struck and killed a pedestrian with her car on Uniondale Avenue in Nassau County in August 2010. After administering field sobriety tests, Nassau County police officers placed her under arrest at 2:40 a.m. and took her to the Central Testing Section at police headquarters. At about the same time, her family arranged for an attorney, Anthony Mayol, to represent her. At 3:30 a.m., Washington signed a consent form for a chemical breath test to determine her blood alcohol content. At 3:31 a.m., Mayol called the police headquarters, spoke with a dispatcher, and was transferred to a sergeant in the detention unit at 3:32 a.m. Mayol testified at a suppression hearing that he informed the sergeant that he represented Washington and said, "You have to stop all questioning and we're not consenting to any form of testing whatsoever." Washington's breath sample was taken for the chemical test at 3:39 a.m., the same time that Mayol's phone call with the sergeant ended. Washington was charged with second-degree manslaughter, second-degree vehicular manslaughter, and two counts of driving under the influence of alcohol.

Supreme Court granted Washington's motion to suppress the results of the chemical breath test. "There was a denial of access to the lawyer to his client by the police department," the court said. "That is proven beyond a reasonable doubt."

The Appellate Division, Second Department affirmed on a 3-1 vote, saying, "[W]hen the police are aware that an attorney has appeared in a case where a motorist has consented to a chemical breath test, the police are obligated to exercise reasonable efforts to inform the motorist of counsel's appearance if such notification will not substantially interfere with the timely administration of the test." It said Washington's state constitutional right to counsel attached at 3:31 a.m., before the test, when Mayol told the police he represented her, and "safeguarding the right to counsel requires a reasonable effort to provide notification of counsel's appearance.... Where there is no evidence that the police made any efforts to notify a motorist that counsel has appeared in the matter, we must presume that a motorist would have requested to speak with counsel and would have withdrawn her consent to submit to a chemical breath test."

The dissenter argued Washington had no constitutional right to counsel regarding the chemical test, but only a "limited right" to consult with counsel before deciding whether to refuse the test, a right that must be invoked by express request. Since Washington did not request counsel before giving her consent, she "validly waived her qualified statutory right to refuse the test, and her uncounseled waiver provides no basis for suppressing the test results." He said, "In the absence of case law on point, the majority has taken guidance from decisions outside the area of law governing chemical BAC tests which concern the 'indelible right to counsel' under the State Constitution with respect to a suspect's decision to waive his or her privilege against self-incrimination.... [T]his line of cases as no application to ... a motorist's waiver of the qualified statutory right to refuse a chemical test."

For appellant: Nassau County Assistant District Attorney Yael V. Levy (516) 571-3800
For respondent Washington: Frederick K. Brewington, Hempstead (516) 489-6959

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To be argued Wednesday, March 26, 2014

No. 82 People v V. Reddy Kancharla
No. 83 People v Vincent Barone

Principals and employees of Testwell Laboratories, Inc., once a leading construction materials testing company in the New York City area, were charged in 2008 with criminal schemes to systematically falsify strength tests and inspection reports for concrete and steel used in projects throughout the city, including the Freedom Tower, Jet Blue facilities at JFK Airport, and the new Yankee Stadium. Company officials were accused of using computer-generated estimates, rather than physical testing, to determine the strength of concrete mixtures; altering results and falsifying reports on other concrete strength tests and inspections; and double-billing for inspections of structural steel. V. Reddy Kancharla, the owner and chief executive officer of Testwell, and Vincent Barone, the company's vice president of engineering, were convicted at a joint trial of enterprise corruption and multiple lesser counts including scheme to defraud and offering a false instrument for filing. Kancharla was sentenced to 7 to 21 years in prison and Barone to 5⅓ to 16 years.

The Appellate Division, First Department modified by vacating the enterprise corruption convictions on a 4-1 vote, saying prosecutors "failed to produce any evidence that either defendant knew that test results and inspection reports were fabricated, much less that the defendants spearheaded a criminal enterprise." It vacated two of Kancharla's false filing convictions, but otherwise affirmed the remaining convictions, and it reduced the sentences of both defendants to 1⅓ to 4 years in the interest of justice. Regarding the top count, the majority said, "[T]he evidence necessary to establish the elements of enterprise corruption was wholly missing from the People's proof. Indeed, the entire theory of the People's case is made of conjecture, surmise and innuendo rather than proof beyond a reasonable doubt.... Simply put, the People failed to introduce any evidence of a leadership structure, overall planning of the criminal enterprise, or any communications between Kancharla, Barone, and any of the Testwell employees in furtherance of the criminal enterprise...."

The dissenter on that issue argued the evidence "more than sufficiently established the enterprise corruption counts," showing "a pervasive scheme involving systematic falsification of concrete data testing at many levels of the company, and defendants' participation in the manipulation of the data." She said, "[T]he structure of defendants' enterprise was largely based on the corporate structure of Testwell Laboratories, as is often true of defendants operating within the structure of a legitimate enterprise in order to conceal their crimes.... The fact that defendants were not personally charged in connection with every one of Testwell's schemes or convicted of every count in which they were charged does not mean that they were in the dark about the criminal enterprise.:

Another justice, in a partial dissent, argued the remaining convictions should be reversed due, in part, to the effects of "the People's unsupported (and now vacated) enterprise corruption counts.... This use of Testwell as a criminal enterprise allowed the People to link for the jury all of the individual defendants to crimes with which they were not charged," and "any viable defenses" they had to the actual charges against them "were consumed by the vision conjured by the People of Testwell as a continuing criminal enterprise." He also argued the trial court's refusal to admit evidence that other laboratories employed similar testing methods and that the contractors that retained Testwell were "well aware" of its methods "tainted the entire proceedings."

For appellant-respondent Kancharla: Paul Shechtman, Manhattan (212) 704-9600
For appellant-respondent Barone: Andrew M. Lankler, Manhattan (212) 812-8910
For respondent-appellant: Manhattan Asst. District Attorney Amyjane Rettew (212) 335-9000

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To be argued Wednesday, March 26, 2014

No. 77 Matter of Empire Center for New York State Policy v New York State Teachers' Retirement System
No. 78 Matter of Empire Center for New York State Policy v Teachers' Retirement System of the City of New York

The Empire Center for New York State Policy is an Albany-based think tank that posts information about state and local government spending on its website, SeeThroughNY. In 2012, it submitted Freedom of Information Law (FOIL) requests to the New York State Teachers' Retirement System (NYS-TRS) and the Teachers' Retirement System of the City of New York (TRS-NYC) seeking the names of retirees and the amount of their pension benefits, among other things. Both retirement systems provided all of the requested information except the names of retired members. They relied on a FOIL provision, Public Officers Law § 89(7), which states, "Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment."

The Empire Center challenged the determinations in separate article 78 proceedings. In each case, Supreme Court dismissed the petition based on section 89(7) and prior case law interpreting the provision. In the suit against TRS-NYC, the court also relied on Public Officers Law § 87(2)(b), which exempts from disclosure information that "would constitute an unwarranted invasion of personal privacy."

The Appellate Division affirmed, the Third Department in Case No. 77 and the First Department in Case No. 78. The Third Department said, "Well-settled principles of statutory construction lend support to the interpretation advanced by petitioner.... Yet we are bound by the Court of Appeals' decision in Matter of New York Veteran Police Assn. v New York City Police Dept. Art. I Pension Fund (61 NY2d 659 [1983]), wherein the Court interpreted [section] 89(7) as exempting from disclosure both the names and home addresses of retirees of a public employees' retirement system."

The Empire Center argues the lower courts misread Veteran Police and section 89(7), which "narrowly authorizes taxpayer-funded pension systems to withhold the names of 'beneficiaries' of deceased retirees, but not the names of all 'retirees' currently drawing public pensions. The plain language of the exemption allows only the addresses of 'retirees' to be withheld." It also contends disclosure would not be an "unwarranted" invasion of privacy.

For appellant Empire Center: Alia L. Smith, Manhattan (212) 850-6100
For respondent NYS-TRS: Assistant Solicitor General Jeffrey W. Lang (518) 474-1394
For respondent TRS-NYC: Assistant Corporation Counsel Elizabeth I. Freedman (212) 356-0836

State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Thursday, March 27, 2014

No. 79 Webb-Weber v Community Action for Human Services, Inc.

Wendy Webb-Weber filed this whistleblower lawsuit against her former employer, Bronx-based Community Action for Human Services, Inc. (CAHS), claiming she was fired in retaliation for reporting "issues endangering the safety and welfare of those persons who entrusted their care to CAHS." Webb-Weber was chief operating officer of CAHS, a private nonprofit corporation that provides health care and social services to indigent mentally and physically disabled adults. She says she began voicing her concerns to the CAHS Board of Directors and Chief Executive Officer David Bond in 2001, including allegations of "false and intentionally inaccurate reporting of revenue and expenses to government auditors, falsifying medical records, misdirection of funding resulting in a lack of proper maintenance of facilities, lack of proper supervision of patients/residents, lack of adequate medical nursing, unpaid federal and state taxes, knowingly bouncing payroll checks, lack of fire alarms and sufficient emergency egress, and failing to pay vendor bills for ... food, transportation, rent, gas and electric." In 2008, she reported her concerns to the State Office of Mental Retardation and Developmental Disabilities (OMRDD), which found violations and imposed sanctions. CAHS terminated her employment in 2009.

Among other claims, Webb-Weber alleged the defendants violated Labor Law § 740(2)(a), which provides, "An employer shall not take any retaliatory personnel action against an employee because such employee ... discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and represents a substantial and specific danger to the public health or safety." CAHS and Bond moved to dismiss the section 740 claim on the ground that Webb-Weber failed to state a cause of action because she did not identify the specific "law, rule or regulation" she claims they violated.

Supreme Court denied the motion, saying, "While plaintiff does not recite the specific rules, regulations and laws she claims were violated by defendants, given a liberal construction and affording plaintiff the benefit of every possible favorable inference, the allegations in the complaint are sufficient" to state a cause of action under section 740. The Appellate Division, First Department reversed and dismissed the claim, ruling Webb-Weber failed to state a cause of action because she "does not identify a specific law, rule or regulation that defendants purportedly violated (Labor Law § 740[2][a]...)."

Webb-Weber says, "Nothing in the plain language of Labor Law § 740 requires plaintiffs to cite precisely the laws and regulations that defendants violated." She argues her amended complaint was sufficient because it alleged the defendants violated laws and regulations intended to safeguard the health and safety of their clients and gave defendants "fair notice of plaintiff's claim that she was terminated for speaking out on health, safety and fraud violations."

For appellant Webb-Weber: Stephen Bergstein, Chester (845) 469-1277
For respondents CAHS and Bond: Dennis A. Lalli, Manhattan (646) 253-2300

State of New York Court of Appeals

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To be argued Thursday, March 27, 2014

No. 80 Village of Ilion v County of Herkimer

This case stems from the decision of Herkimer County and its municipalities to terminate the Herkimer County Self-Insurance Plan for Workers' Compensation claims at the end of 2005 due to rising costs. The self-insurance plan had been created in 1956 pursuant to article 5 of the Workers' Compensation Law. To provide for future coverage of existing claims after termination of the plan, the County created an "abandonment plan" under which each municipality was required to pay its share of the estimated cost of those future compensation benefits, which were expected to be paid over the next 30 to 50 years. The Village of Herkimer and other municipalities brought this action against the County to challenge the validity of its actuarial estimate of the self-insurance plan's future liabilities and the fairness of its apportionment of those liabilities to plan participants, among other things. The County counterclaimed against the Village for breach of contract, and Supreme Court granted summary judgment on liability to the County.

At the trial on damages, Supreme Court refused to instruct the jury to discount its damage award to present value. The jury awarded the County $1,617,528 against the Village of Herkimer, representing the Village's share of the self-insurance plan's future liabilities as of the termination date, December 31, 2005. The court also granted the County's motion for prejudgment interest on the undiscounted award at the maximum statutory rate of 9 percent, assessing $833,580 in prejudgment interest against the Village.

The Appellate Division, Fourth Department affirmed, saying the trial court properly refused to discount the verdict to present value and properly awarded prejudgment interest on that verdict. "[T]he County's award of damages did not actually constitute compensation for future losses; by its verdict, the jury found that [the Village] owed the County $1,617,528 as of December 31, 2005, a sum that it thereafter wrongfully withheld. Inasmuch as there is no basis for discounting the award of damages, the court's award of prejudgment interest on those damages is neither a windfall nor a penalty.... Rather, it is fair compensation for the period in which [the Village] held money that rightfully belonged to the County...."

The Village of Herkimer argues the lower courts erred in refusing to discount the verdict to present value and then awarding prejudgment interest on the undiscounted verdict, resulting in a windfall for the County. It says the jury verdict necessarily includes future damages, and therefore should have been reduced to present value, because it is based on an actuarial estimate of the Village's share of future liabilities that will be paid over several decades. It argues the County will be able to earn interest on both the damages awarded and the prejudgment interest assessed for many years before the last compensation benefits are actually paid.

For appellant Village of Herkimer: Martha L. Berry, Syracuse (315) 422-9295
For respondent County of Herkimer: Albert J. Millus, Jr., Binghamton (607) 723-5341

State of New York Court of Appeals

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To be argued Thursday, March 27, 2014

No. 75 Matter of State of New York v John S. *(papers sealed)*
No. 76 Matter of State of New York v Charada T. *(papers sealed)*

John S. and Charada T. are challenging court determinations under Mental Hygiene Law article 10 that they are dangerous sex offenders requiring confinement after the expiration of their criminal sentences. In both cases, the issues include whether the trial courts erred in admitting hearsay evidence through expert testimony and, if so, whether those errors were harmless.

John S. pled guilty to forcibly raping a college student in Central Park in 1996, and he was sentenced to 12½ years in prison. Prior to his release in 2009, the State filed an article 10 petition for civil management and at his jury trial, Supreme Court allowed the State's psychiatric experts to testify about sex offense allegations from 1968 and 1978. John S. had been charged with three rapes and two robberies in 1968, and he pled guilty to one count each of first-degree rape and robbery in full satisfaction of the charges. The convictions were vacated by federal district court in 1977, on the ground he was not mentally competent when he entered the pleas, and the records were sealed. He was arrested for two rapes in 1978 and a jury convicted him of first-degree rape for one of them, but he was never indicted or convicted in the second incident and the records were sealed. The court said the allegations were "key to understanding the basis of" the expert opinions, but barred testimony about the vacated convictions.

Charada T. admitted forcibly raping two women in Manhattan in 1997, pleading guilty to first-degree rape and other charges. In the presentence report, he admitted being in the vicinity of a third rape, suggesting he might be the perpetrator, but he was never charged in that case. In 2002, based on a DNA match, he was linked to a 1996 rape, pled guilty, and was sentenced to 13 years in prison. Before his release, the State filed a petition for civil confinement and Supreme Court permitted the State's psychiatric expert to testify about the uncharged rape in 1997 and about evaluations of Charada's unsuccessful participation in a sex offender treatment program by members of it staff.

The Appellate Division, First Department affirmed both confinement orders, saying in John S. that the State's experts could testify about hearsay allegations from 1968 and 1978 because the records were "of a kind accepted in the profession as reliable in forming a professional opinion." In Charada T., it said the trial court erred in allowing expert testimony about Charada's admission concerning the uncharged rape in his presentence report, but it said "this error was harmless given the expert's reliance on two brutal sexual assaults to which [he] pleaded guilty and a third that he admitted committing...."

John S. and Charada T. argue, in part, that their due process rights were violated when the State's experts were allowed to testify about hearsay concerning uncharged crimes, vacated convictions, and the views of treatment program staff because they had no opportunity to cross-examine their accusers. They say the State failed to demonstrate that this hearsay "basis testimony" is reliable and that its probative value "substantially outweighs its prejudicial effect," as required by Matter of State v Floyd Y. (22 NY3d 95 [decided 11/19/13]).

For appellants John S. and Charada T.: Deborah P. Mantell, Manhattan (646) 386-5891
For respondent State in John S.: Asst. Solicitor General Andrew W. Amend (212) 416-8022
For respondent State in Charada T.: Asst. Solicitor General Claude S. Platton (212) 416-6511

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To be argued Thursday, March 27, 2014

No. 81 CDR Créances S.A.S. v Maurice Cohen; CDR Créances S.A.S. v Leon Cohen

CDR Créances S.A.S. brought these actions against Maurice Cohen and his son, Leon, as well as Maurice's wife and several family-controlled companies and employees, to recover loan funds allegedly diverted from a failed hotel project in Manhattan more than 20 years ago. CDR's predecessor, Societe de Bank Occidentale (SDBO), in 1991 entered into a loan agreement, governed by French law, with a Cohen-controlled entity, Euro-American Lodging Corp. (EALC), to provide $82.7 million for the project. There was a falling out among the parties in 1992 and SDBO, alleging default on the loan, sued EALC in France. In 2003, a French court awarded CDR a $95.8 million judgment against EALC. The French judgment was recognized in a New York court proceeding in 2005, and Supreme Court granted judgment to CDR in the same principal amount. CDR brought these related actions in 2003 and 2006, including claims for fraud and conversion, alleging that Maurice and Leon Cohen orchestrated a conspiracy to strip EALC of its assets and conceal the proceeds of the 1991 loan in order to avoid repaying it. While these cases were in discovery, the Cohens were convicted in 2010 of federal tax fraud charges for failing to report and pay taxes on the same funds that CDR is seeking to recover, and they were each sentenced to 10 years in prison.

CDR moved to strike the defendants' pleadings and for a default judgment pursuant to CPLR 3126, alleging they violated discovery obligations and committed a fraud upon the court, based largely on evidence in the federal tax prosecution that the Cohens committed perjury and submitted forged documents in CDR's case and induced others to give false testimony to conceal the Cohens' ownership or control of assets that were the subject of CDR's civil claims.

Supreme Court granted the motion after an evidentiary hearing. It found, "on the basis of clear and convincing evidence," that the Cohens had committed a fraud on the court by wilfully providing false evidence and concealing evidence. The court subsequently awarded CDR $135,359,331.39 in compensatory damages and another $50,965,529.62 in prejudgment interest.

The Appellate Division, First Department affirmed in a 4-1 decision, saying, "We agree with Supreme Court's overall conclusion that these defendants have exhibited no less dishonesty before the courts as in their dealings with business associates and the federal taxing authorities." It found there was sufficient evidence to meet the "clear and convincing" standard, and said even a preponderance of the evidence standard would suffice. It said the factual issues were properly resolved by the hearing court, rather than a jury, and no inquest on damages was required because the amount was based on a foreign judgment recognized in New York and, thus, was a ministerial matter.

The dissenter said the motion court applied "the 'clear and convincing' standard set by some federal courts," but the governing standard in the First Department requires that a fraud on the court be "conclusively demonstrated," meaning "deceit must be admitted or undisputed." He said the defendants disputed the evidence of fraud -- particularly the testimony of two Cohen employees who testified for the prosecution in the federal case in exchange for immunity, and admitted they lied in the CDR case. This raised a question of material fact regarding the alleged fraud "that must be resolved by a jury."

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For respondent CDR: Douglas A. Kellner, Manhattan (212) 889-2821