State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

March 21 thru 23, 2017
March 28 and 29, 2017

State of New York Court of Appeals

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To be argued Tuesday, March 21, 2017

No. 46 Connaughton v Chipotle Mexican Grill, Inc.

Kyle Connaughton, a well-known chef, conceived an idea for a fast food restaurant chain that would serve ramen cuisine in 2010, and he presented the concept to Chipotle Mexican Grill, Inc. and its founder and chief executive officer, Steven Ells. In January 2011, Chipotle hired Connaughton as its culinary director to develop and implement the concept under an at-will employment agreement that gave both parties the option of ending his employment "at any time, with or without notice or cause." The contract provided him with a base salary and a promise that he would receive a substantial amount of company stock after three years. At the end of his first year, he received an annual bonus and additional stock grants, and in September 2012 a lease was signed for a flagship ramen restaurant in Manhattan. Connaughton alleges that one month later he learned from Chipotle executives that Ells had entered into an agreement in 2008 with David Chang, the owner of Momofuku Noodle Bar in Manhattan, to develop a similar ramen restaurant concept and that a nondisclosure agreement required Ells to keep Chang's business plans confidential. Connaughton says the executives told him that, after the agreement with Chang fell apart, Chipotle took his design work without payment for its own use and that Chang would sue when Ells opened Connaughton's restaurant. Connaughton confronted Ells, who ordered him to proceed with his planning. He was terminated in November 2012.

Connaughton sued Chipotle and Ells for fraudulent inducement, claiming that by failing to disclose their prior agreement with Chang, the defendants omitted a material fact that would undermine his ability to implement his own ramen concept. He alleged that Chipotle staff must have communicated to him plans and ideas developed by Chang, thus involving him in their violation of the nondisclosure agreement and threatening to ruin his professional reputation by creating the appearance that he had stolen Chang's ramen concept. He sought compensatory damages for his promised Chipotle stock and for lost business opportunities, as well as punitive damages. Supreme Court granted the defendants' motion to dismiss the suit under CPLR 3211.

The Appellate Division, First Department affirmed in a 3-2 decision, saying Connaughton did not adequately allege that he suffered actual damages due to fraud. "When a claim sounds in fraud, the measure of damages is governed by the 'out-of-pocket' rule, which states that the measure of damages is 'indemnity for the actual pecuniary loss sustained as the direct result of the wrong'...," it said. "Here..., the allegations at best suggest that, depending on the future actions of Chang and Momofuku, plaintiff might suffer injury. Not only is there no suggestion or indication that actual pecuniary damages were sustained..., but the complaint does not allege facts from which actual damages can be inferred...."

The dissenters argued, "[D]amages need not be demonstrated at the pleading stage as long as the possibility of damages may reasonably be inferred.... Here, it is implicit from the allegations contained in the ... complaint ... that the position in which plaintiff was placed due to defendants' conduct may cause him, or may have already caused him, compensable damages, particularly the possibility of damage to his reputation, and perhaps even future legal expenses."

For appellant Connaughton: Daniel J. Kaiser, Manhattan (212) 338-9100
For respondents Chipotle and Ells: Jean-Claude Mazzola, Manhattan (646) 663-1860

State of New York Court of Appeals

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To be argued Tuesday, March 21, 2017

No. 36 Kimmel v State of New York

In 1995, former State Trooper Betty Kimmel brought this action under New York's Human Rights Law against the State and the Division of State Police, alleging that she had been subjected to gender discrimination and to sexual harassment and retaliation throughout her 15-year career. In 2007, after 12 years of litigation and multiple appeals to the Appellate Division, Fourth Department, a jury awarded Kimmel $798,000 in compensatory damages. In 2008, Kimmel and her former counsel in the case, Emmelyn Logan-Baldwin, moved for attorneys' fees and expenses under CPLR article 86, the Equal Access to Justice Act (EAJA).

The EAJA provides that "a court shall award to a prevailing party ... fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust" (CPLR 8601[a]). The statute defines "action" as "any civil action or proceeding brought to seek judicial review of an action of the state as defined in subdivision (g) of [CPLR 8602], including an appellate proceeding, but does not include an action brought in the court of claims" (CPLR 8602[a]).

Supreme Court denied the motions for attorneys' fees, ruling that the EAJA "does not apply to a situation where a plaintiff has recovered compensatory damages for tortious acts of the State and its employees," but instead "permits recovery only in those cases where a party 'seeks judicial review of an action of the state.'"

The Appellate Division, Fourth Department reversed in a 3-2 decision and remanded the matter for a determination of the amount of fees and costs. The majority said that, "under a plain reading of the statute, the EAJA applies to this action. The EAJA unambiguously applies to 'any civil action brought against the state'.... [T]here is nothing in the text of the EAJA that limits recovery of attorneys' fees to CPLR article 78 proceedings or to declaratory judgment actions.... We conclude that the phrase 'any civil action' ... means just that -- any civil action, including this action seeking relief pursuant to the Human Rights Law." It said "the legislative history of the EAJA does not reveal a clear legislative intent to exclude the instant action...."

The dissenters argued that, "in drafting the EAJA, the Legislature intended that attorneys' fees and expenses be sought only in civil actions that involve the review of the actions of the State that are administrative in nature.... Our research has revealed more than 70 cases in which the EAJA was applied to award attorneys' fees in cases that involved administrative actions of the State, and none that did not." They said, "In our view, when construing the EAJA as a whole..., the 'spirit and purpose of the legislation'..., as gleaned from the statutory context and the legislative history, is to provide redress for litigants contesting the actions of the State in administrative matters...."

On remand, after four more years of litigation, Supreme Court awarded $498,000 in fees for Logan-Baldwin and $320,000 in fees for Kimmel's current counsel Harriet Zunno.

For appellant State: Mitchell J. Banas, Jr., Buffalo (716) 856-0600
For respondents Kimmel and Logan-Baldwin: A. Vincent Buzard, Pittsford (585) 419-8800

State of New York Court of Appeals

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To be argued Tuesday, March 21, 2017

No. 37 Matter of Loehr v Administrative Board of the Courts of New York State

Three State Supreme Court justices brought this suit to challenge a policy adopted in 2013 by the Administrative Board of the Courts, composed of the Chief Judge and the four Presiding Justices of the Appellate Division, which bars retired Supreme Court justices who receive judicial pension benefits from being certified to continue serving as justices beyond age 70. The State Constitution imposes a mandatory retirement age of 70 on judges, but it and Judiciary Law § 115 permit Supreme Court justices to seek certification from the Administrative Board to serve as retired justices until age 76 "upon findings (a) that he has the mental and physical capacity to perform the duties of such office and (b) that his services are necessary to expedite the business of the supreme court." The Board found that granting certification to justices who would receive a full salary and a judicial pension "conveys an impression to the public that the court system is insensitive to and neglectful of the State's current fiscal distress" and "creates difficulties for court administrators and advocates in negotiating effectively with the Legislature and the Executive Branch," which had criticized this double-dipping, on the court system's budget and other issues "of crucial importance to the Judicial Branch," according to an affidavit from the Chief Administrative Judge. The Board concluded that "judges who would be 'double-dipping' following certification were not 'necessary to expedite the business of the court,'" and its policy would require them to defer receipt of their judicial pensions before they could be certified.

Supreme Court dismissed the suit, saying neither the Constitution nor section 115 "precludes [the Board's] ability to impose conditions, such as the one at issue herein, as part of [its] constitutionally and statutorily mandated determination that [a] candidate's services are 'necessary.'" The Board "has 'nearly unfettered discretion in determining whether to grant applications'" for certification, it said, quoting Marro v Bartlett (46 NY2d 674). Rejecting a claim that the policy violates Retirement and Social Security Law § 212, which states that "any retired person may continue as retired and, without loss, suspension or diminution of his or her retirement allowance, earn" a salary "in public service," the court said the statute "provides that a retired person 'may' collect their retirement allowance and return to public service," but "it does not create a right to return to public service nor does it bar [the Board] from considering petitioners' pension statuses in determining whether an appointment will be made." Finding no violation of NY Constitution article V, § 7, which says membership in the state retirement system "shall be a contractual relationship, the benefits of which shall not be diminished or impaired," it said the Board's policy does not "diminish or impair petitioners' right to receive their benefits," but instead "imposes a condition to certification to which petitioners have no right" under Marro.

The Appellate Division, Third Department reversed, finding the policy unconstitutional and illegal. "The language of Retirement and Social Security Law § 212 explicitly allows New York public employees -- including Justices of the Supreme Court -- to retire in place and continue to work while collecting their state pension" and it "grants this right to public employees without mention of employers or an employer's discretion to condition recertification upon suspension of a statutory right...," it said. "While Judiciary Law § 115 provides [the Board] with its power in regard to certification, it does not empower [the Board] to make a certificated judgeship a lesser class of employment than a noncertificated judgeship." It said Marro "is easily distinguishable" because it addressed the certification of one judge "and does not deal with a statewide policy directive. While we can agree that Marro allows for unfettered discretion in ... individual certification decisions, it does not authorize [the Board] to change the requirements for certification" by imposing a condition that applicants defer their pensions. It said pension status is unrelated to a justice's eligibility for certification, which must be based on necessity under the Constitution and Judiciary Law.

For appellant Administrative Board: Lee Alan Adlerstein, Manhattan (212) 428-2150
For respondents Loehr et al: Robert A. Spolzino, White Plains (914) 323-7000

State of New York Court of Appeals

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To be argued Wednesday, March 22, 2017

No. 3 People v Shawn J. Sivertson

Employees of a Buffalo convenience store called 911 to report that a man with a knife had stolen cash from their charity collection jar in November 2012. The store's shift manager told responding police officers that she had followed the robber as he fled behind a building across the street. Two residents told officers that Shawn Sivertson matched the description of the perpetrator and that he lived in the lower rear apartment of the building. Looking through his window, officers saw Sivertson watching television and they saw a pair of gloves like those worn by the robber. They knocked on the window and the door, shouting for him to open the door. When he did not respond, they forced the door open, arrested him, and seized the gloves, a knit cap, and three knives from the kitchen. Sivertson remained largely silent after his arrest.

After a suppression hearing, Supreme Court found the warrantless entry and search were justified by exigent circumstances. At trial, defense counsel did not object when the prosecutor suggested during summation that Sivertson's failure to declare his innocence when the police burst into his apartment was evidence of his guilt. Sivertson was convicted of first-degree robbery and sentenced as a persistent violent felony offender to 20 years to life in prison.

The Appellate Division, Fourth Department affirmed, finding "there was an urgent need that justified the warrantless entry in this case." It said the police "reasonably believed that they had located the perpetrator, who was still armed, as they observed defendant in his apartment unit from the outside" and they "did not know if defendant had access to the remainder of the building," which might provide a means of escape. The court said, "We agree with defendant that certain comments made by the prosecutor during summation were improper, particularly those reflecting upon defendant's silence or demeanor following his arrest.... We conclude, however, that the prosecutor's comments 'were not so pervasive or egregious as to deprive defendant of a fair trial'" and defense counsel did not render ineffective assistance by failing to object.

Sivertson argues there were no exigent circumstances, in part because the officers "had a viable alternative to forcibly entering appellant's apartment: one or more of the many officers involved in this investigation could have been posted outside of appellant's door and windows, ready to arrest him if he sought to leave his home," while others obtained a warrant. And even if they had probable cause, he said, "no officer testified that he saw a knife or any other sort of weapon in the apartment when looking from the outside." He also argues that his attorney's failure to object to the prosecutor's comments about his post-arrest silence was not harmless because "the evidence was not overwhelming" in this case, where the store clerks saw only the eyes of the robber, whose face was covered by a scarf, and only one of them said he had a knife.

For appellant Sivertson: Timothy P. Murphy, Buffalo (716) 853-9555
For respondent: Erie County Assistant District Attorney Ashley R. Lowry (716) 858-7922

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To be argued Wednesday, March 22, 2017

No. 38 People v John Stone

John Stone was charged with stabbing his estranged wife's boyfriend, Lance Smallwood, as the couple was crossing a Bronx street in February 2010. The wife, who was divorced from Stone by the time of trial, refused to testify against him and the only eyewitness identification was made by Smallwood. The prosecutor called to the stand a detective who testified that he "conducted a telephone interview of a witness," Stone's wife, on the morning after the stabbing and then "did several computer checks on the person that had been indicated as a suspect, John Stone." Supreme Court struck the detective's testimony from the record and instructed the jury to disregard it, but denied Stone's motion for a mistrial. Stone was convicted of first-degree assault.

Prior to sentencing, Stone moved to set aside the verdict on the ground of juror misconduct based on an interaction between Smallwood and one of the jurors after the verdict was announced. In support, Stone attached an affidavit of his girlfriend, who said a group of the jurors was standing together outside the courthouse when Smallwood approached and spoke to one of them in a manner that indicated they had a prior personal relationship. The prosecutor responded with a affidavit by Smallwood, who said he approached the jurors and thanked them for "making the right decision." He denied that he knew any of the jurors personally. The court, finding Smallwood's account "is clearly more consistent with reality than defendant's girlfriend's assertions," denied the motion without a hearing. Stone was sentenced to 22 years in prison.

The Appellate Division, First Department affirmed, saying the trial court "properly exercised its discretion in denying defendant's mistrial motion, made after a detective gave testimony that may have implied that a nontestifying declarant had implicated defendant. The court prevented any prejudice by striking the testimony and instructing the jury to disregard it, an instruction that the jury is presumed to have followed...." It ruled Stone was not entitled to a hearing on his CPL 330.30 motion to set aside the verdict due to juror misconduct. "The events described in the affidavit" submitted by Stone, "standing alone, did not constitute any basis for setting aside the verdict," it said. "The affidavit related an ambiguous remark by the victim that allegedly suggested the possibility of an undisclosed prior relationship between the victim and one of the jurors. However, the People supplied an affidavit from the victim denying any relationship, and explaining that he was simply thanking the jurors for reaching what he believed to be a just verdict."

Stone argues the detective's testimony, which gave the "clear implication" that his ex-wife identified him as the perpetrator, violated his right to confront witnesses and to a fair trial. He says the detective's statements constituted testimonial hearsay, and the court's curative instruction could not "rectify the error of admitting such devastatingly prejudicial evidence." He also argues that he was entitled to a hearing on his mistrial motion under CPL 330.40(2) because he asserted a legal basis, juror misconduct, supported by a witness's sworn allegations. "No more is required to make out a showing for a hearing, and yet the trial court summarily denied the motion in the apparent belief that it could simply credit the prosecution's account over the defense's...."

For appellant Stone: Lisa A. Packard, Manhattan (212) 577-2523 ext. 528
For respondent: Special District Attorney Robert A. Spolzino, White Plains (914) 323-7000

State of New York Court of Appeals

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To be argued Wednesday, March 22, 2017

No. 39 Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, National Association v Nomura Credit & Capital, Inc. (and three other actions)

These cases stem from four residential mortgage-backed securities transactions sponsored by Nomura Credit & Capital, Inc. in 2006 and 2007. Nomura sold the loans through mortgage loan purchase agreements (MLPA) to an affiliate, which transferred them to four trusts pursuant to pooling and servicing agreements (PSA) and sold interests in the pooled loans to investors. In section 7 of each MLPA, Nomura warranted that the statements and reports it furnished in connection with the transactions "do not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements contained therein not misleading." In section 8, Nomura made specific representations regarding the quality of the mortgage loans. Section 9(a) of the MLPAs provides that, upon discovery "of a breach of any of the representations ... contained in Section 8," Nomura must cure the breach or repurchase the affected loan at the purchase price; and section 9(c) states that Nomura's obligation to cure or repurchase defective loans "constitute the sole remedies of the Purchaser against the Seller respecting ... a breach of the representations ... contained in Section 8." The PSA's contain similar "sole remedies" language regarding breaches of representations "set forth in ... Section 8" of the MLPA. In 2012, with investors claiming breaches of Nomura's warranties affected thousands of the pooled loans, HSBC Bank USA, as trustee of the four trusts, brought these actions seeking repurchase of the loans by Nomura or damages for its breach of that obligation, and damages for its alleged violation of the No Untrue Statement provision.

Supreme Court denied Nomura's motion to dismiss claims based on its repurchase obligation, but dismissed claims for damages under the No Untrue Statement provision, saying "the relief available to plaintiff is limited by the sole remedy provision ... to specific performance of the repurchase protocol, or if loans cannot be repurchased, to damages consistent with its terms." The court relied on its prior ruling in a related action against Nomura, which said, "The complaint does not allege any breach of the No Untrue Statement provision that was not also a breach of the Mortgage Representations to which the sole remedy provisions apply.... [T]he sole remedy provision establishing the repurchase protocol for breaches of Mortgage Representations would be rendered meaningless if the duplicative representations in the Mortgage Loan Schedule were not subject to that protocol, and could support an independent breach of the No Untrue Statement provision."

The Appellate Division, First Department modified by reinstating the claims for breach of the No Untrue Statement provision in section 7 of the MLPA. It said, "By its plain language, section 9(c) says that "[t]he obligations of the Seller [Nomura] ... to cure or repurchase a defective Mortgage Loan ... constitute the sole remedies of the Purchaser against the Seller *respecting a missing document or a breach of the representations and warranties contained in Section 8*" (emphasis added)." It said, "Had these 'very sophisticated parties' desired to have the sole remedy provisions apply to both section 8 and section 7 breaches, 'they certainly could have included such language in the contracts. They did not do so....' In any event, section 13 of the MLPA provides that remedies are cumulative."

For appellant Nomura Credit & Capital: Joseph J. Frank, Manhattan (212) 848-4000
For respondent Trustee for NHELI 2006-FM2 and NHELI 2007-3:
Christopher P. Johnson, Manhattan (212) 506-1700
For respondent Trustee for NHELI 2007-2 and NAAC 2006-AF2:
Michael S. Shuster, Manhattan (646) 837-5151

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To be argued Thursday, March 23, 2017

No. 40 Matter of Acevedo v New York State Department of Motor Vehicles
No. 41 Matter of Carney v New York State Department of Motor Vehicles
No. 42 Matter of Matsen v New York State Department of Motor Vehicles

These petitioners, drunk driving offenders whose driver's licences were revoked pursuant to the Vehicle and Traffic Law, are challenging restrictive regulations the Department of Motor Vehicles adopted in 2012 for issuing new licenses to recidivist drunk or impaired drivers. The petitioners were convicted and applied for new licenses prior to 2012, but DMV held their applications in abeyance until it adopted the emergency regulations in 15 NYCRR part 136, which it then applied to deny or restrict their driving privileges. The Appellate Division, Third Department rejected their challenges in three split decisions.

Kevin Acevedo was convicted of driving while intoxicated in 2008, his third alcohol-related driving offense in 10 years. DMV denied his license application under 15 NYCRR 136.5(b)(3), which provides that, for at least five years after the statutory revocation period expires, it must deny the application of anyone with three alcohol-related offenses, but no "serious driving offense," during a 25-year look-back period. After five years, if DMV grants an application, it must issue a restricted license "for a period of five years and shall require the installation of an ignition interlock device."

Michael Carney was convicted of DWI in 2011. It was his sixth alcohol-related offense, but he was treated as a first time offender under the Vehicle and Traffic Law because his prior convictions were more than 10 years old. DMV denied his application under 15 NYCRR 136.5(b)(1), which requires it to deny relicensing if an applicant "has five or more alcohol- or drug-related driving convictions or incidents ... within his or her lifetime."

The Appellate Division ruled the regulations cases were valid in separate 3-2 decisions, finding DMV did not exceed its regulatory authority because "it did not act on its own ideas of public policy, but rather implemented the Legislature's policies of promoting highway safety," and because the regulations represent "an appropriate discretionary determination" to deny relicensing to persons who pose a danger to the public. It ruled the regulations did not conflict with governing statutes and were not impermissibly applied retroactively. The dissenters argued the DMV Commissioner exceeded her authority by "abdicat[ing] her statutory mandate to exercise her discretion" on a case-by-case basis "in favor of a hard and fast rule, waivable only under extremely limited circumstances."

Caralyn Matsen was convicted of DWI in 2010, her third offense in 10 years. DMV denied her relicense application for life under 15 NYCRR 136.5(b)(2) because she had "three or four alcohol- or drug-related driving convictions ... and ... one or more serious driving offenses within the 25 year look back period." The regulations define "serious" offense as "(i) a fatal accident; (ii) a driving-related Penal Law conviction; (iii) conviction of two or more violations for which five or more points are assessed...; or (iv) 20 or more points from any violations." Matsen had two prior six-point speeding convictions.

The Appellate Division said the Commissioner's inclusion of a conviction of two or more five-point violations "in the definition of 'serious driving offense' has a rational basis and is well within her discretionary authority. This rational determination cannot be rendered irrational by the fact that the definition also includes other types of offenses with more serious practical consequences." The dissenter said the "categories that make up a 'serious driving offense' are far too broad. While one can readily comprehend including a 'fatal accident' within the definition, it is extraordinary and irrational to equate two five-point violations with a fatal accident...."

For appellants Acevedo, Carney and Matsen: Eric H. Sills, Albany (518) 456-6456
For respondent DMV: Asst. Solicitor Gen. Jeffrey W. Lang (518) 776-2027 (Acevedo & Matsen)
Assistant Solicitor General Jonathan D. Hitsous (518) 776-2044 (Carney)

State of New York Court of Appeals

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To be argued Thursday, March 23, 2017

No. 43 People v Omar A. Smalling

Omar Smalling was at a party in Queens with his wife and a friend in January 2009 when a fight broke out and they fled with a crowd into the street, then got into Smalling's car and he began to drive away. Police officers heard gunshots, and one of them saw muzzle flashes coming from the driver's side of Smalling's car. They pulled Smalling over and found a .380 caliber handgun with one live round on the ground outside the car. They also found a spent shell casing on the driver's side of the windshield and another inside the car. Smalling, who was driving, was charged with criminal possession of a weapon in the second and third degrees, among other things. His friend, who had been in the rear seat of the car, testified at trial that Smalling fired shots into the air through his side window. Smalling's wife, who was estranged from him over his relationship with another woman, testified that she saw a gun in his lap, then heard shots and saw a flash in his direction. When the officers activated their lights and siren, she said, Smalling tossed her the gun and told her to throw it out the window, which she did.

At the pre-charge conference the prosecutor, who had presented evidence that Smalling himself possessed and fired the gun, asked Supreme Court not to instruct the jury on constructive possession and the court agreed. The court instructed the jury that possession means "to have physical possession or otherwise exercise dominion or control over property, in this case, the gun." During deliberations, when jurors asked for the definition of "dominion and control," the court read them the definition from the CJI charge on constructive possession, saying, "Under our law, a person exercises dominion or control over property not in his physical possession when that person exercises a level of control over the area in which the property is present which is sufficient to give him the ability to use or dispose of the property. Additionally, the law recognizes the possibility that two or more individuals can jointly have property in their possession ... when they each exercise dominion or control over the property...."

Smalling was convicted of both weapon possession counts and sentenced to three and a half years in prison. The Appellate Division, Second Department affirmed, saying the trial court "did not err when it gave a supplemental instruction regarding constructive possession of a weapon in response to a note from the jury...."

Smalling argues, "The court violated appellant's rights to due process and the effective assistance of counsel when it (A) issued a constructive possession and acting-in-concert charge in response to a jury note, having previously assured the parties that such a charge would not be given, thereby permitting the jury to find appellant guilty based on a theory for which there was no evidence and that defense counsel had no opportunity to contest; and (B) failed to apprise the parties that it intended to give the instruction prior to doing so, thereby violating the established procedure for responding to jury notes and depriving defense counsel of the ability to influence the court's response."

The prosecution argues, "[D]efendant failed to monitor the charge and object to the concept of dominion and control, and failed to request to see the proposed definition of the concept, but now attempts to lay the blame for those inactions on the trial court.... Moreover, the jury was entitled to a definition of the term the court had used, three times without objection, and the court gave one that even defendant concedes was legally correct."

For appellant Smalling: Jenin Younes, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Jill A. Gross-Marks (718) 286-5882

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To be argued Thursday, March 23, 2017

No. 44 Coffed v McCarthy

James Coffed was killed when the bicycle he was riding collided with a dump truck in the Village of Lancaster, Erie County, in July 2012. Coffed and the truck, driven by John McCarthy, had been traveling in the same direction on Walden Avenue when the truck stopped at an intersection for a red light, then began to make a right turn. Coffed, riding in a bike lane to the right of the truck, struck the side of the truck as it made the turn, suffering fatal injuries. Police investigators cited McCarthy for equipment violations, including an inoperative right rear turn signal, but found no criminal culpability and concluded "this incident was simply a tragic accident.... It is believed that a combination of sun glare, the dump truck's height and the bicyclist's geographical position relative to the dump truck prevented Coffed from observing the red light.... Coffed did proceed through a solid red light and struck the dump truck who had the right of way."

Coffed's wife brought this negligence action on behalf of his estate against McCarthy and the owner of the truck, Gasperino Fulfaro. Supreme Court denied the defendants' motion for summary judgment dismissing the complaint.

The Appellate Division, Fourth Department reversed and dismissed the suit on a 3-2 vote, saying Coffed's failure to stop for the red light was the sole proximate cause of the accident. The majority said, "Defendants established that [McCarthy] came to a complete stop at the red light and cautiously entered the intersection to make a legal right turn..., that [McCarthy] was unable to see decedent approaching the intersection ... and that decedent was negligent as a matter of law in proceeding into the intersection against the red light" in violation of Vehicle and Traffic Law § 1111(d)(1). It said "the allegedly inoperable condition of the right rear turn signal ... was not a proximate cause of the accident.... The record establishes that there was an operable right turn signal on the truck's dump box that was activated and would have been visible from behind the truck, and further establishes that decedent was riding with his head down and not paying attention to his surroundings."

The dissenters argued there are questions for a jury to resolve. They said the plaintiff "submitted evidence concerning the position of the bicycle after the accident that raised an issue of fact whether decedent proceeded into the intersection at all, thereby raising an issue of fact whether he violated" section 1111(d)(1) by riding through the red light. "Even assuming ... that decedent was negligent..., we conclude that a jury should resolve the issue whether decedent's negligence was the sole proximate cause of the accident" because there was also evidence McCarthy could have been negligent. McCarthy "testified that he saw decedent in the bicycle lane a mile before the intersection where the collision occurred. Even if we credit [his] further testimony that he did not see decedent immediately before the accident, we conclude that triable issues of fact remain whether [McCarthy] 'failed to see what was there to be seen through the proper use of his senses'" and whether he "should have anticipated that a bicyclist would be in the bicycle lane." They said a jury should also decide whether the truck's broken turn signal was a proximate cause of the accident.

For appellant Coffed: Angelo S. Gambino, Buffalo (716) 681-7190
For respondents McCarthy and FulFaro: Nicole B. Palmerton, Williamsville (716) 810-1320

State of New York Court of Appeals

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To be argued Tuesday, March 28, 2017

No. 45 People v Jose Valentin

Manhattan narcotics detectives watched Jose Valentin and Jose Barrios walking together around Harlem in May 2010 when, after about 40 minutes, Barrios handed money to Valentin, who crossed the street and went into an apartment building. Valentin emerged minutes later and handed some small wrapped objects to Barrios. The two men then resumed walking together. The detectives stopped and searched them a block away, finding two glassines of heroin on Barrios and $8.00 on Valentin. Both were arrested on drug charges.

At trial, after the prosecution presented its case, Valentin's attorney asked Supreme Court to instruct the jury on the defense of agency. Defense counsel did not present any evidence, but argued that the prosecution's evidence supported the view that Valentin was acting as an agent of Barrios -- that he did not sell heroin to Barrios, but bought two glassines for them to use together. The court agreed to give the instruction, but also allowed the prosecutor to rebut the agency defense with evidence that Valentin had a prior drug sale conviction in 1997. The jury found Valentin guilty of criminal sale of a controlled substance in the fifth degree and he was sentenced to four years in prison.

The Appellate Division, First Department affirmed, saying, "Upon granting the defense request for an agency defense based upon aspects of the People's evidence, the court properly allowed the People to introduce evidence of defendant's prior drug sale conviction (see People v Small, 12 NY3d 732, 733 [2009]).... [W]e see no reason to draw a distinction between the situation where a defendant testifies or otherwise elicits evidence to support an agency defense, and the situation where, as here, the defendant essentially adopts those portions of the evidence elicited by the People that support such a defense; in each instance, the People have the right of rebuttal."

Valentin argues, "The trial court erred in conditioning the jury charge on agency on the introduction of Mr. Valentin's prior drug sale conviction where the agency charge was supported entirely by the prosecution's case-in-chief, and there was no defense presentation to rebut." He says, "The purpose of rebuttal evidence is just that -- to rebut the case presented by the defense. When the defense presents nothing in support of its position, there is nothing to rebut. In these rare instances in which a prosecution's case undermines itself, a defendant should be free to argue the best defense reasonably drawn from the evidence without fear that a past conviction would unfairly tip the scales. Weak cases would not be unfairly converted into a trial of a defendant's character."

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State of New York Court of Appeals

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To be argued Tuesday, March 28, 2017

No. 35 Griffin v Sirva, Inc.

The primary question in this federal case is whether a company that was not a fired worker's direct employer can be held liable for discrimination under the New York State Human Rights Law, specifically Executive Law § 296(15), which prohibits the denial of employment on the basis of a criminal conviction. Section 296(15) provides, "It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association ... to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of 'good moral character' which is based upon his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-A of the correction law."

Trathony Griffin was hired by Astro Moving and Storage Co. in 2008 and Michael Godwin was hired in 2010, both of them as laborers who packed household goods and moved them in and out of customers' homes. Astro obtained 70 to 80 percent of its business through an agency contract with Allied Van Lines, Inc. The contract prohibited Astro from using employees who had been convicted of certain specified crimes, including felony sex offenses, on any Allied jobs, and required Astro to ensure that all of its employees working on Allied jobs underwent criminal background checks by a contractor hired by Allied's corporate parent, Sirva Worldwide, Inc. Background checks conducted in 2011 found that Griffin pled guilty to first-degree child abuse and sexual misconduct in 1997, that Godwin pled guilty to first-degree rape and sexual abuse in 1999, and that both were designated sexually violent offenders. The contractor informed Allied, which informed Astro, which terminated their employment in February 2011. Griffin and Godwin brought this action in the Eastern District of New York against Astro, Allied and Sirva, alleging Human Rights Law violations under section 296(15).

U.S. District Court granted summary judgment motions by Allied and Sirva to dismiss the complaint against them, ruling they could not be held liable under the statute because they were not the direct employers of Griffin and Godwin. It found that section 296(15) applies only to an aggrieved party's "employer" because "to 'deny employment,' the denying entity must be an employer as understood by the caselaw interpreting the [Human Rights Law]."

The U.S. Court of Appeals for the Second Circuit, finding that neither the statutory language nor existing case law clearly settle the scope of liability under the statute, is asking this Court to resolve the issue in three certified questions: "(1) Does Section 296(15) ... limit liability to an aggrieved party's 'employer'? (2) If Section 296(15) is limited to an aggrieved party's 'employer,' what is the scope of the term 'employer' for these purposes, i.e., does it include an employer who is not the aggrieved party's 'direct employer,' but who, through an agency relationship or other means, exercises a significant level of control over the discrimination policies and practices of the aggrieved party's 'direct employer'? (3) Does Section 296(6) ..., providing for aiding and abetting liability, apply to § 296(15) such that an out-of-state principal corporation that requires its New York State agent to discriminate in employment on the basis of a criminal conviction may be held liable for the employer's violation of § 296(15)?"

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For amicus curiae State of New York: Assistant Solicitor General Philip V. Tisne (212) 416-6073
For respondents Sirva and Allied: George W. Wright, Manhattan (201) 342-8884

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To be argued Tuesday, March 28, 2017

No. 47 Carlson v American International Group, Inc.

After his wife was killed in a 2004 collision with a commercial van owned by MVP Delivery and Logistics, Inc. in Niagara County, Michael Carlson obtained a $7.3 million wrongful death judgment against MVP and its van driver. MVP's insurer paid its policy limit of $1.1 million, the only money Carlson has so far recovered.

DHL Express (USA), Inc. had a freight delivery contract with MVP at the time of the accident and Carlson argued MVP and its driver were insured under the "hired auto" provisions of DHL's insurance policies. He sued DHL and its insurers -- American Alternative Insurance Co. (AAIC), National Union Fire Insurance Company of Pittsburgh, and American International Group (AIG) -- to recover the unpaid portion of the judgment under Insurance Law § 3420(a)(2), which permits a prevailing plaintiff to sue a responsible insurer to satisfy a judgment if the insurer's policy was "issued or delivered in this state." The "hired auto" provisions of DHL's policies defined an insured as anyone "using with your permission a covered auto you own, hire or borrow," or similar language.

Supreme Court denied AAIC's motion to dismiss the suit, rejecting its argument that Carlson could not assert a direct claim under Insurance Law § 3420 because its policy was not issued or delivered in New York. The court said, "The law is clear that the location of the insured and the risk to be insured are the determinative factors rather than where a policy is actually delivered or issued.... Here, it is undisputed that the accident took place in New York State while the named insured was doing business within the state." In a separate decision, it rejected the insurers' claims that the MVP van was not a "hired auto" under DHL's policies. "[T]he record reflects a substantial amount of supervision and control exerted by DHL over the operations of MVP; including but not limited to, the fact that MVP's office was located inside a DHL facility; all of MVP's vehicles were garaged in DHL's facility; and DHL's managers provided daily instructions to employees of MVP," it said.

The Appellate Division, Fourth Department reversed and dismissed the suit, saying Carlson "may not recover against AAIC pursuant to section 3420(a)(2) because the policy was not 'issued or delivered in this state.' The parties and the court have improperly conflated the phrase 'issued or delivered' with 'issued for delivery,' which was used in the former version of Insurance Law § 3420(d), and therefore the definition of 'issued for delivery' is not relevant here.... The policy here was issued in New Jersey and delivered in Seattle, Washington, and then in Florida." In a separate decision, it ruled the insurers could not be sued under the "hired auto" provision because the delivery contract "does not show that DHL had sufficient control over the MVP vehicle in order for it to be deemed a 'hired' automobile. Rather, it showed that DHL hired MVP as an independent contractor to provide delivery services.... Moreover, inasmuch as DHL did not have control over the MVP vehicle, 'it cannot be said in any realistic sense that ... [DHL] could grant [MVP] permission to use it,'" the court said, quoting Dairylea Coop. v Rossal (64 NY2d 1).

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For respondent DHL Express: Patrick J. Lawless, Manhattan (212) 490-3000
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To be argued Wednesday, March 29, 2017

No. 48 People v Everett B. McMillan

Everett McMillan was arrested on a parole warrant in his Queens apartment in July 2009 by two police detectives assigned to the Joint Apprehension Warrant Squad, which tracks down and apprehends parole violators. A woman informed the detectives by phone that he was at his residence and that her son had told her McMillan had a gun in his car. After the arrest, one of the detectives used McMillan's key to get into his car and conducted a warrantless search, finding a handgun and ammunition in a backpack under the driver's seat. The detective had McMillan's certificate of release to parole supervision, which included his consent to the search and inspection of his person, residence and property by his parole officer. Supreme Court denied McMillan's motion to suppress the gun and ammunition, finding the search was valid. He was convicted of criminal possession of a weapon in the second degree and related charges, and was sentenced as a persistent violent felony offender to 20 years to life in prison.

On appeal, McMillan argued that the police detective's warrantless search of his car was not authorized under People v Huntley (43 NY2d 175), which held that a search or seizure "which may be unreasonable with respect to a parolee if undertaken by a police officer may be reasonable if undertaken by the parolee's own parole officer," and that the validity of a search of a parolee turns on "whether the conduct of the parole officer was rationally and reasonably related to the performance of the parole officer's duty." The Court said the reasonableness of a police officer's search of a parolee would be determined by "the familiar requirement of a showing of probable cause."

The Appellate Division, Second Department found the search justified and affirmed the conviction. "Under the circumstances of this case, the detective's search of the car was 'rationally and reasonably related to the performance of the parole officer's duty' by dint of the detective's parole responsibilities as a member of the Joint Apprehension Warrant Squad," it said, quoting Huntley. Here, no relevant distinction exists between the detective and the defendant's parole officer.... At the time of the search, the detective was aware that the defendant had violated the terms of his parole, that as a result a warrant had been issued for the defendant's arrest..., that the defendant had consented in writing to a search of his person and property," and that "a known source had said that she had been told that the defendant had just been in the car with a gun...."

McMillan argues the detective "had no parole supervision responsibility and had never even spoken with appellant's parole officer. The conditions of appellant's parole did not permit parole searches to be conducted by anyone other than his own parole officer.... Since appellant's parole officer was not present for, let alone involved in, the warrantless search of his car, and the search was initiated for an investigative purpose -- a 'gun call' -- that was unrelated to appellant's parole supervision, the search fell outside the Huntley exception."

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For respondent: Queens Assistant District Attorney John M. Castellano (718) 286-5801

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To be argued Wednesday, March 29, 2017

No. 49 People v Stanley Hardee

In July 2010, three Manhattan police officers stopped Stanley Hardee on Lexington Avenue for speeding and weaving through traffic without signaling. When the officers surrounded his car, they said Hardee appeared to be nervous and kept looking around from them to his front-seat passenger and to the empty back seat. They asked him to stop looking around and to step out of the car, but he did not comply until they repeated the request two or three times. They frisked him, finding no weapon or contraband, and he continued to look over his shoulder toward the back seat of the car. One officer testified that Hardee's behavior suggested he might fight or flee so he decided to handcuff him but, with one wrist cuffed, Hardee began to resist. Another officer testified that Hardee's demeanor, repeated glances at the back seat, and refusal to follow directions led him to believe there was a weapon in the car. The officer picked up a shopping bag from the floor behind the passenger seat and, feeling something heavy, he looked in and saw a handgun. After Supreme Court denied his motion to suppress the gun, Hardee pled guilty to criminal possession of a weapon in the second degree and was sentenced as a persistent violent felony offender to 16 years to life in prison.

The Appellate Division, First Department affirmed in a 4-1 decision. "The testimony supports the trial court's finding that the facts available to the officers, including defendant's furtive behavior, suspicious actions in looking into the back seat on multiple occasions and refusal to follow the officers' legitimate directions, went beyond mere nervousness," the majority said. "Rather, defendant's actions both inside and outside of the vehicle created a 'perceptible risk' and supported a reasonable conclusion that a weapon that posed an actual and specific danger to their safety was secreted in the area behind the front passenger seat, which justified the limited search of that area, even after defendant had been removed from the car and frisked...."

The dissenter said, "Evidence that ... defendant behaved in a very nervous manner, looked several times toward the back seat of the car, and failed to comply with the officers' directives, was not sufficient to lead to a reasonable conclusion that a weapon located within the car presented an actual and specific danger to the officers' safety so as to justify a limited search of the car after defendant had been removed from the car and frisked without incident. There was no testimony that defendant looked in the specific direction of the bag or even the floor.... In the absence of objective indicators that could lead to a reasonable conclusion that there was a substantial likelihood that a weapon was located in defendant's car, the search was unlawful since no actual and specific danger threatened the safety of the officers...."

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To be argued Wednesday, March 29, 2017

No. 50 People v Andrew R. Bushey

Andrew Bushey was charged with driving while intoxicated, aggravated unlicensed operation of a vehicle, and driving with a suspended registration after he was stopped by a Buffalo State College police officer in August 2014. He had made a mistaken, but legal turn from Elmwood Avenue onto the circular driveway leading to the Albright-Knox Art Gallery, where the officer was parked. Bushey continued around the circle and turned back onto Elmwood. As he passed by, the officer ran his license plate number through a Department of Motor Vehicles database and found that his registration was suspended for unpaid parking tickets. The officer stopped Bushey and arrested him after he failed field sobriety tests.

Buffalo City Court dismissed the charges, finding the officer had "no reasonable suspicion or cause for the stop." The court said, "[T]here were no traffic violations committed by Mr. Bushey. He was driving appropriately. The only unusual thing he did was he turned into the entrance and the loop to the art gallery..., which the officer has testified is not an uncommon mistake in that block on Elmwood Avenue. He continued to drive appropriately out of the circle, made two right-hand turns and pulled over appropriately when the officer signaled. And I do not believe that the officer had any cause to run his license plate or any reasonable suspicion to stop Mr. Bushey, and that he was looking for possible reasonable suspicion by running the plate, and I find that to be violative of the principles under [People v] Ingle [36 NY2d 413]."

Erie County Court reversed and reinstated the charges, saying "the plate check of the defendant's vehicle was lawful, and therefore, the defendant's vehicle was lawfully stopped."

The prosecution argues that running Bushey's plate number through the database was not an unlawful search. Ingle "dealt with an arbitrary stop of a motor vehicle for a routine traffic check. This court held that such an intrusion was inappropriate absent some justification for the stop. The facts in the instant case, which involved a mere plate check, are distinguishable.... An officer's observation of a defendant's license plate cannot be considered a search since a license plate is open to the public view.... The defendant has no expectation of privacy with respect to the license plate...."

Bushey argues, "Allowing law enforcement officers to search for personal information on a restricted electronic database *without a warrant or any suspicion whatsoever* to *manufacture* the reasonable suspicion necessary to stop (and seize) a vehicle results in an unacceptable invasion of the constitutionally protected right to be free from unreasonable searches and seizures." He says the "date of birth, social security number, medical restrictions" and other "personal information contained on electronic databases ... is entitled to some level of privacy, even if minimal, because the expectation in the privacy of such personal information would be accepted as reasonable by contemporary society."

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