

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

MATTER OF NORMAN BEZIO,

Respondent,

-against-

No. 65

LEROY DORSEY,

Appellant.

-----

20 Eagle Street  
Albany, New York 12207  
March 19, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

SHANNON STOCKWELL, ESQ.  
MENTAL HYGIENE LEGAL SERVICE  
THIRD JUDICIAL DEPARTMENT  
Attorneys for Appellant  
40 Steuben Street  
Suite 501  
Albany, NY 12207

ANDREA OSER, ESQ.  
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK  
Attorneys for Respondent  
The Capitol  
Albany, NY 12224

Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Matter of Bezio,  
2 number 65.

3 Okay, counselor, go ahead. Do you want any  
4 rebuttal time, counselor?

5 MR. STOCKWELL: Yes, please. Two minutes,  
6 please.

7 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

8 MR. STOCKWELL: May it please the Court,  
9 I'm Shannon Stockwell on behalf of appellant, Leroy  
10 Dorsey.

11 CHIEF JUDGE LIPPMAN: Counselor, let me ask  
12 you a question. What - - - what issues did you raise  
13 at the trial court in relation to the issues that the  
14 Appellate Division ultimately ruled on?

15 MR. STOCKWELL: Your Honor, it was the  
16 public defender that represented Mr. Dorsey at trial.  
17 And truly, none of the issues with respect to - - -

18 CHIEF JUDGE LIPPMAN: I mean, did the  
19 Appellate Division take up an issue that really  
20 wasn't raised below?

21 MR. STOCKWELL: The - - - Mr. Dorsey is a  
22 competent adult. He's objecting to the State's  
23 application to force-feed him - - -

24 JUDGE SMITH: Are you re - - - are you  
25 saying, really, that the personal autonomy argument

1           that you're making now is almost inherent in a guy  
2           saying you can't do this to me, and that's all he has  
3           to say?

4                         MR. STOCKWELL:  I am, Your Honor.  A  
5           competent adult has a constitutionally protected  
6           liberty interest that permits him or her to refuse  
7           unwanted medical treatment.  But - - -

8                         JUDGE PIGOTT:  It seemed - - - it seemed to  
9           me, when it really got down to it here, that DOCCS,  
10          with the extra C, is saying we're not going to do  
11          what this person wants unless you, Judge, order us to  
12          do it, and then we're more than happy to do it.  I  
13          didn't understand why the judiciary is involved in a  
14          situation where the Department of - - - well, DOCCS,  
15          I'll keep calling them - - - while DOCCS says we're  
16          not going to give them the liquid supplement because  
17          we don't give steak and lobster to our inmates.  But  
18          if you, Judge, order this tube to be put down his  
19          nose, and he says, in the alternative, we'll take the  
20          supplement, then we will give it to him.  I'm missing  
21          the - - -

22                         MR. STOCKWELL:  Well, Mr. Dorsey wasn't - -  
23          - this case didn't come about because Mr. Dorsey was  
24          sitting in his cell saying I want a milkshake.

25                         JUDGE PIGOTT:  Right.

1 MR. STOCKWELL: He - - - this case came  
2 about because he was on a hunger strike. The issue  
3 of Ensure as a less restrictive means to feed Mr.  
4 Dorsey didn't come up until trial.

5 JUDGE PIGOTT: He said he would - - - at  
6 that point he said he would take it.

7 MR. STOCKWELL: He certainly did.

8 JUDGE PIGOTT: And they said, we're not  
9 going to give it to you unless the court orders it.  
10 And then the court orders - - - I'm just wondering  
11 why we're wasting judicial time on something that  
12 could have been handled by a policy in the - - - in  
13 the - - -

14 MR. STOCKWELL: Well, I - - -

15 JUDGE PIGOTT: - - - the prison.

16 MR. STOCKWELL: - - - that's - - - that is  
17 - - - that's true. I mean - - -

18 JUDGE PIGOTT: Maybe the question - - -

19 MR. STOCKWELL: - - - DOCC's - - -

20 JUDGE SMITH: He was - - - I mean, has he  
21 ever - - - has it ever been the State's position that  
22 he can have Ensure, he can have the supplement,  
23 without eating also some solid food?

24 MR. STOCKWELL: No. Well, that was at  
25 trial, too. There was a concern that DOCCS didn't

1 want to give the liquid supplement to Mr. Dorsey so  
2 he could continue his hunger strike for - - -

3 JUDGE SMITH: But what I - - - what I  
4 understood them to be saying, although I admit it's  
5 confusing, is I read them as saying, look, we're not  
6 going to give you Ensure as a way of letting you  
7 remain on the hunger strike. If you'll end the  
8 hunger strike, we'll give you whatever we need, and  
9 it might include the supplement.

10 MR. STOCKWELL: It is - - - it's admittedly  
11 confusing, Judge. I - - - all I know is there was a  
12 concern that Mr. Dorsey would continue his - - - if  
13 the judge were just to say to Mr. Dorsey you are - -  
14 - or enter an order saying that DOCCS is hereby  
15 authorized to force-feed him, and then DOCCS' policy  
16 kicks in, and they can give the Ensure, that this  
17 would go on forever. And it's almost a battle of  
18 wills - - -

19 JUDGE SMITH: Let me - - -

20 JUDGE GRAFFEO: Your client went from 241  
21 pounds to 145 pounds. Is the correctional system to  
22 sit back and not intervene at any juncture?

23 MR. STOCKWELL: Well, they do have - - -  
24 it's not our position that the - - - let me take - -  
25 - take one step back. DOCCS has an interest in

1 preserving the health and safety of all the inmates  
2 in its custody. They have this policy, Directive  
3 4309, that says when an inmate announces that he's on  
4 a hunger strike, that if his weight gets to a certain  
5 level, we'll take him to court to seek to force-feed  
6 him. We don't have an issue with the policy.

7 JUDGE GRAFFEO: Well, his - - - his hunger  
8 strike was paired with because I want to be  
9 transferred.

10 MR. STOCKWELL: That's - - -

11 JUDGE GRAFFEO: So - - -

12 MR. STOCKWELL: - - - some - - -

13 JUDGE GRAFFEO: - - - if - - -

14 MR. STOCKWELL: - - - that's one of his  
15 goals.

16 JUDGE GRAFFEO: - - - if he's successful in  
17 that attempt, what if the next month fifty or a  
18 hundred other inmates say I would also like to  
19 transfer out of this facility?

20 MR. STOCKWELL: Well, at - - - one thing,  
21 Judge, is that Judge Hall at the Supreme Court, had  
22 no ability to order Dorsey's transfer. Mr. Dorsey  
23 was engaging in - - -

24 JUDGE SMITH: Well, what - - -

25 MR. STOCKWELL: - - - his hunger strike - -

1 -

2 JUDGE SMITH: - - - but what do you say the  
3 institution should have done? Let him die?

4 MR. STOCKWELL: Not the inst - - - no. I  
5 think - - - I think, Mr. Dorsey - - - they have this  
6 po - - - I have no issue - - - Dorsey has no issue  
7 with Directive 4309 that says we take hunger striking  
8 inmates to court to get an order to force-feed them.  
9 Then, when they get in court, this - - - the State  
10 has to prove that its interests are compelling and  
11 that they outweigh Mr. Dorsey's - - -

12 JUDGE SMITH: Well, I mean - - -

13 MR. STOCKWELL: - - - liberties.

14 JUDGE SMITH: - - - you say it was okay for  
15 the State to begin this proceeding, but that they  
16 shouldn't - - - but they should lose it?

17 MR. STOCKWELL: That's exactly right. They  
18 didn't prove - - -

19 JUDGE SMITH: Well, if they - - - if they -  
20 - - well, if they lose the proceeding, how are they  
21 better off than if they never brought it?

22 MR. STOCKWELL: We - - - it's - - - it's  
23 due process. Mr. Dorsey has a protected - - -  
24 constitutionally protected liberty interest - - -

25 JUDGE SMITH: Well, you really say that his

1           - - - his constitutionally protected interest goes to  
2           the point that the State may not force-feed him even  
3           if he's going to die?

4                   MR. STOCKWELL:  If they can't sustain their  
5           burden, yes, that's - - -

6                   JUDGE SMITH:  Well, what's the burden they  
7           have to sustain?

8                   MR. STOCKWELL:  They - - - they - - - in  
9           Fosmire v. Nicoleau, this Court found that when  
10          there's a constitutionally protected interest in  
11          refusing unwanted medical treatment, that the State  
12          has to invoke the jurisdiction of the courts, bring a  
13          person in, and then prove that its interests outweigh  
14          the interest of the - - -

15                   JUDGE SMITH:  Well, why - - - maybe - - -  
16          maybe just the question I'm asking is why isn't the  
17          interest in preventing a hunger striker from  
18          manipulating the system to get a transfer, why isn't  
19          that interest good enough?

20                   MR. STOCKWELL:  I submit that it isn't.  
21          There - - - the - - - New York State's liberty  
22          interest in refusing unwanted medical treatment as  
23          protected by the New York State - - - there's a state  
24          constitutional protection.  It's a - - - it's a high  
25          - - - high liberty interest.

1 CHIEF JUDGE LIPPMAN: Why do you think the  
2 Appellate Division dealt with this altogether? It  
3 was moot by the point they got it, right?

4 MR. STOCKWELL: It was - - - I think it was  
5 moot in the sense that at oral argument in the case,  
6 one of the judges pointed out that as soon as the  
7 trial judge issues a force-feeding order, it's all  
8 over with. And these cases evade review, because as  
9 soon as you start force-feeding the inmate, there's -  
10 - - that's the end of the problem.

11 CHIEF JUDGE LIPPMAN: Yeah, but on what  
12 basis do you think the Appellate Division did what  
13 they did? Their interest of justice power?

14 MR. STOCKWELL: No. I think this is - - -

15 CHIEF JUDGE LIPPMAN: Well, what basis do  
16 they do it in a case that's basically moot - - -

17 MR. STOCKWELL: This issue - - -

18 CHIEF JUDGE LIPPMAN: - - - by the time - -  
19 -

20 MR. STOCKWELL: - - - this is a - - - I'll  
21 repeat - - - at the risk of repeating myself, this is  
22 a competent adult. He's got the right to direct the  
23 course of his own medical treatment. And just by  
24 virtue of his objection to the - - -

25 JUDGE SMITH: You're also saying the

1 mootness exception applies here, right?

2 MR. STOCKWELL: Certainly. It does, yes.

3 CHIEF JUDGE LIPPMAN: But why - - - yes,  
4 but can you have the mootness exception and at the  
5 same time, the Appellate Division takes it - - -  
6 what's the basis of their ruling? I mean, if it's -  
7 - - if it's - - - it's a mootness exception,  
8 therefore we're going to consider it, and exercise  
9 what power?

10 MR. STOCKWELL: It's - - - it's just a - -  
11 - the well-recognized mootness exception; capable of  
12 repetition but evading review - - -

13 JUDGE PIGOTT: You're making an argument  
14 that you have no problem with them bringing this  
15 lawsuit, right?

16 MR. STOCKWELL: No, and Dorsey - - -

17 JUDGE PIGOTT: You think - - -

18 MR. STOCKWELL: - - - he wanted his day in  
19 court. And he got exactly what he wanted.

20 JUDGE PIGOTT: And you're saying that the  
21 rule by which they bring it is fine with you?

22 MR. STOCKWELL: That's correct.

23 JUDGE PIGOTT: And so bring me into court  
24 so that I can complain about the system.

25 MR. STOCKWELL: Um-hum.

1 JUDGE PIGOTT: But that's it. But don't  
2 give them any other relief. And this judge ordered  
3 force-feeding.

4 MR. STOCKWELL: Um-hum.

5 JUDGE PIGOTT: Could they, in your view,  
6 then, have said we're not giving you the Ensure. We  
7 can put the tube down your nose, and that's what  
8 we're going to do?

9 MR. STOCKWELL: There's no obligation for  
10 the judge to fashion a less restrictive - - -

11 JUDGE PIGOTT: I didn't ask you that. I'm  
12 saying if the judge - - - if the judge had said they  
13 have the right to force feed this person, they can do  
14 it - - -

15 MR. STOCKWELL: I think - - -

16 JUDGE PIGOTT: - - - with a nasogastric  
17 tube?

18 MR. STOCKWELL: I - - - they had - - -  
19 Judge Hall had every ability to make that - - -

20 JUDGE PIGOTT: And that is no problem for  
21 your client. He has no - - - I'm mystified. That's  
22 why I'm - - -

23 MR. STOCKWELL: His hunger strike was over  
24 as soon as the judge - - -

25 JUDGE PIGOTT: I don't care about that.

1 MR. STOCKWELL: - - - issued that order.

2 JUDGE PIGOTT: I mean the fact of the  
3 matter is, the judge is saying yes, put a nasogastric  
4 tube down and that way he won't ever - - - ever go on  
5 a hunger strike again.

6 MR. STOCKWELL: But I think if he said - -  
7 - put his hands up and said, hey, I'm going to eat, I  
8 think - - - I don't think there's that - - - that the  
9 tube is going in.

10 JUDGE PIGOTT: Was that in the order?

11 MR. STOCKWELL: I think it does - - - it  
12 does say unless he accepts other - - - other  
13 nourishment.

14 JUDGE PIGOTT: Okay.

15 CHIEF JUDGE LIPPMAN: Okay, counsel,  
16 thanks.

17 Counsel?

18 MS. OSER: May it please the Court, Andrea  
19 Oser for the superintendent, here.

20 CHIEF JUDGE LIPPMAN: What - - -

21 MS. OSER: I think - - -

22 CHIEF JUDGE LIPPMAN: - - - what are your  
23 interests here? What - - -

24 MS. OSER: Well, I think - - -

25 CHIEF JUDGE LIPPMAN: What do you want to

1           achieve - - -

2                   MS. OSER:   - - - a lot of the questions are

3           - - -

4                   CHIEF JUDGE LIPPMAN:   - - - what do you

5           want to achieve?

6                   MS. OSER:   An affirmance.

7                   CHIEF JUDGE LIPPMAN:   Oh, I know that.

8                   MS. OSER:   Okay.  I think what you're

9           seeing is, is that this is a very poor vehicle for

10          some of the very interesting questions that are - - -

11          that are lurking in this case.  And - - -

12                   CHIEF JUDGE LIPPMAN:   So if it's a poor

13          vehicle, why - - - why are we - - -

14                   MS. OSER:   Well - - -

15                   CHIEF JUDGE LIPPMAN:   - - - why are we

16          determining - - -

17                   MS. OSER:   - - - I think - - -

18                   CHIEF JUDGE LIPPMAN:   - - - why did the

19          Appellate Division - - -

20                   MS. OSER:   - - - perhaps you should dismiss

21          the appeal, yes.

22                   CHIEF JUDGE LIPPMAN:   - - - why did the

23          Appellate Division do this based on the record that

24          we have here?

25                   MS. OSER:   Well, I can't read their minds,

1 but I will - - - I will disclose that, regrettably,  
2 we did not raise preservation at the Appellate  
3 Division level. So that issue wasn't - - - it wasn't  
4 briefed; it wasn't addressed. And I don't think you  
5 can read their decision - - -

6 JUDGE SMITH: Well, was anyone - - -

7 MS. OSER: - - - as having ruled on it.

8 JUDGE SMITH: - - - was anyone really - - -  
9 is that perhaps because no one - - - everyone really  
10 understood from the beginning that what he was really  
11 saying was look, I can - - - if I don't want to eat,  
12 I don't have to eat? I mean, isn't that - - -

13 MS. OSER: I think that's - - -

14 JUDGE SMITH: - - - it's that argument - - -  
15 -

16 MS. OSER: - - - right, he - - -

17 JUDGE SMITH: - - - implicit in - - -

18 MS. OSER: - - - he was - - - he was using  
19 a hunger strike as a means to get a transfer.

20 JUDGE SMITH: Yes, but isn't - - -

21 MS. OSER: Yes.

22 JUDGE SMITH: - - - I mean, but he's saying  
23 - - - he's saying I don't want to eat. You're saying  
24 I'm going to force you to eat. He's saying you can't  
25 force me. I understand that sometimes we're more

1 picky about preservation, but isn't that enough to  
2 raise the basic question of whether you have the  
3 right to force him or not?

4 MS. OSER: I would say no for two reasons.  
5 One is because, you know, arguably, he affirmatively  
6 waived a claim based on a right to refuse medical  
7 treatment, because he said I'll do whatever the court  
8 says. He even said that at the administrative level.

9 JUDGE PIGOTT: Well, that makes it - - -

10 MS. OSER: You order the treatment, I'll  
11 take it.

12 JUDGE SMITH: But willingness to obey a  
13 court order isn't waiver of a claim.

14 JUDGE RIVERA: It's avoiding a little  
15 contempt, there, isn't it?

16 MS. OSER: Well, but you know, in other  
17 words, one way of looking at it is he wasn't really  
18 aggrieved by the court's order.

19 JUDGE PIGOTT: Doesn't this make it - - -

20 MS. OSER: But he also - - -

21 JUDGE PIGOTT: - - - almost collusive? He  
22 wants to go to court. You could have given him the  
23 liquid nutritional substitute, it seems, but you  
24 won't do that because, you know, as your person  
25 testified, they don't want to give steak and lobster

1 to the prisoners. But then the court says either do  
2 it or - - - you know, you can do this - - - and then  
3 you do exactly what you could have done, but for  
4 coming to court.

5 MS. OSER: Well, we had - - - we don't - -  
6 - we haven't done quite exactly the same thing. Let  
7 me see if I can clear up the issue of the Ensure  
8 here, because it's confusing on the record, and I  
9 realize that.

10 As a general matter, inmates can't be  
11 allowed to choose Ensure any more than any other  
12 specialty item. We can't run a prison that way where  
13 inmates just say if you don't give me X, I won't eat  
14 until I get it.

15 JUDGE RIVERA: Unless they have certain  
16 dietary needs or religious dietary needs?

17 MS. OSER: Of course, of course.

18 JUDGE RIVERA: So it's not true that - - -

19 MS. OSER: I'm talking about - - -

20 JUDGE RIVERA: - - - it's never the case -

21 - -

22 MS. OSER: - - - special items - - -

23 JUDGE RIVERA: Okay.

24 MS. OSER: - - - like brands and - - -

25 JUDGE RIVERA: Okay.

1 MS. OSER: - - - okay. However, once we  
2 reach a point where a hunger strike is now  
3 threatening imminent, serious harm or death, we're in  
4 a different - - - we're in a different ball game.  
5 And what DOCCS needs at that point is authority to  
6 medicate over objection.

7 JUDGE PIGOTT: I don't think you do. I  
8 think if he says he'll take the liquid nutritional  
9 supplement, you're wasting judicial time and effort  
10 to begin a petition that you know that what - - - the  
11 order's going to do what he wants, and what you want  
12 to do, because you want to keep him alive. And so  
13 you - - -

14 MS. OSER: I understand - - -

15 JUDGE PIGOTT: - - - tie up a - - -

16 MS. OSER: - - - that. I understand that  
17 view. The other side of that point - - -

18 JUDGE PIGOTT: - - - you tie up a judge for  
19 two days. You go to the Appellate Division for,  
20 let's say, a day. And you prepared to come here.  
21 And have you gotten - - - what does that add up to,  
22 about thirteen judges that are now going to rule on  
23 whether or not you could have given this guy a can of  
24 Ensure in lieu of his hunger strike?

25 MS. OSER: I appreciate that view, Your

1 Honor. The problem is - - -

2 JUDGE PIGOTT: How do we get around it?

3 MS. OSER: - - - that we're now - - - we're  
4 now at an emergency. And we don't want to rely on  
5 the inmate's promise to drink Ensure. What DOCCS  
6 wants is the range of medical options.

7 JUDGE PIGOTT: Why don't you just give it  
8 to him and see if he drinks it?

9 MS. OSER: We'll give it to him. That's  
10 certainly one of the options. No one's going to put  
11 a tube down his nose if he'll drink it voluntarily.

12 JUDGE PIGOTT: No, I mean before you even  
13 come to court? I mean if he doesn't drink the liquid  
14 nutritional - - -

15 MS. OSER: Well, once we get to that urgent  
16 - - -

17 JUDGE PIGOTT: - - - supplement, then - - -

18 MS. OSER: Yes.

19 JUDGE PIGOTT: - - - then you'd say okay,  
20 we tried our best, and now we're going to come in.  
21 I'm just looking at judicial economy. I'm just kind  
22 of amazed.

23 MS. OSER: I understand. I understand.  
24 And this is only the second hunger strike that's made  
25 it, even, to the Appellate Division. Because

1 usually, the emergency is alleviated once the order  
2 is given. And not because, necessarily, tube feeding  
3 follows, because some kind of - - - if someone's  
4 willing to swallow a supplement, that will take care  
5 of the - - - possibly, unless there's some other  
6 impediment.

7 But once we're in an urgent situation like  
8 that, DOCCS just simply wants authority to medicate  
9 over objection so it's got the full - - -

10 JUDGE PIGOTT: Did you think - - -

11 MS. OSER: - - - panoply - - -

12 JUDGE PIGOTT: - - - this was urgent?

13 Because it struck me, when this whole thing was going  
14 on, that he's standing there. I mean, it's not like  
15 he's, you know, curled up in a fetal position in his  
16 - - - in his cell, no longer able to eat.

17 MS. OSER: There was a factual finding that  
18 it was urgent, and that was affirmed in the Appellate  
19 Division. It's not challenged.

20 JUDGE PIGOTT: Well, not urgent. He just  
21 said, you know, there's a danger that he could have,  
22 you know, certain things. But he's walking around.

23 MS. OSER: Well, DOCCS - - - DOCCS goes to  
24 court when it - - - when a doctor believes there's an  
25 imminent risk of death or - - -

1 JUDGE PIGOTT: He didn't even bring - - -

2 MS. OSER: - - - irreversible - - -

3 JUDGE PIGOTT: - - - the medical records  
4 with him.

5 MS. OSER: Also - - -

6 JUDGE PIGOTT: It was a pretty thin record  
7 that - - - well - - -

8 MS. OSER: He was very familiar with his  
9 care. He had been the personal treating physician on  
10 a daily basis. And it had been a month.

11 JUDGE PIGOTT: But, I mean, when he asked  
12 for his medical records, they didn't have them, and  
13 no one gave an adjournment to see them. I - - -

14 MS. OSER: That's true.

15 JUDGE PIGOTT: - - - I guess it - - - I  
16 just - - -

17 MS. OSER: Yes.

18 JUDGE PIGOTT: - - - get kind of surprised.

19 MS. OSER: Yes.

20 JUDGE RIVERA: So, counsel, what - - - is  
21 your compelling interest limited to this - - - just  
22 this inmate, or was there compelling interest beyond  
23 the care or the danger of this inmate getting sick or  
24 potentially dying? Is there something else?

25 MS. OSER: Well, I think, in general, in

1           these hunger strike cases, in addition to the general  
2           State interests that are involved in preserving life  
3           and preventing suicide, there are two prison  
4           interests.

5                         JUDGE RIVERA: All right.

6                         MS. OSER: One is assuring the orderly  
7           operation of the prisons.

8                         JUDGE RIVERA: Okay.

9                         MS. OSER: And the other, the health and  
10          safety of the inmates - - -

11                        CHIEF JUDGE LIPPMAN: What - - -

12                        MS. OSER: - - - in the State - - -

13                        CHIEF JUDGE LIPPMAN: - - - what's the - -  
14          -

15                        JUDGE RIVERA: Did you make those up? Did  
16          you make those up?

17                        MS. OSER: I believe that it was not  
18          necessary for the State to establish its - - - those  
19          interests with record - - - with evidence here.  
20          Preliminarily, the State's interests are well  
21          established in legislation and case law. The - - -

22                        CHIEF JUDGE LIPPMAN: But why is this dan -  
23          - - why would this be dangerous to the prison  
24          population or to the effective running of the prison?

25                        MS. OSER: Well, I - - -

1 CHIEF JUDGE LIPPMAN: What possible - - -  
2 what possible problem is there?

3 MS. OSER: Allowing inmates to - - - to  
4 assert control over their custodians by making  
5 demands.

6 JUDGE PIGOTT: Didn't you throw Brer Rabbit  
7 in the briar patch, here? He wanted to go to court.  
8 He want - - - he wanted you to do exactly what you  
9 did. You did it. He got on the stand to say what he  
10 wanted to say. And the net result - - - I hate to  
11 say it on the record - - -

12 MS. OSER: Well, yes, I know.

13 JUDGE PIGOTT: - - - the net result is that  
14 you gave him a can of stuff that you could have given  
15 him before any of this came about.

16 MS. OSER: Well, and he wanted a facility  
17 transfer, which - - -

18 JUDGE PIGOTT: I don't know if he got that,  
19 but - - -

20 MS. OSER: Well - - -

21 JUDGE PIGOTT: - - - it certainly wasn't  
22 part of the order.

23 JUDGE RIVERA: But he didn't want that just  
24 because he didn't want - - - he argued that there  
25 were reasons for that: his mistreatment and so forth

1 - - -

2 MS. OSER: Yes.

3 JUDGE RIVERA: - - - so just to clarify  
4 that part of it - - -

5 MS. OSER: Yes, that's absolutely - - -

6 JUDGE RIVERA: - - - that's correct?

7 MS. OSER: - - - correct. That's  
8 absolutely correct. And he had grievances pending,  
9 he had a federal lawsuit pending. DOCCS provides  
10 many, many avenues for - - -

11 JUDGE SMITH: Well, let me - - -

12 MS. OSER: - - - requests of those kinds of  
13 serious - - -

14 JUDGE SMITH: - - - let me ask you this.

15 MS. OSER: Yes?

16 JUDGE SMITH: Putting aside the - - - some  
17 of the odd things about this case - - -

18 MS. OSER: Yes.

19 JUDGE SMITH: - - - there's a basic  
20 question of whether you're entitled to do this or  
21 not.

22 MS. OSER: Um-hum.

23 JUDGE SMITH: Is that not an important  
24 enough question to be dealt with under the mootness  
25 exception?

1 MS. OSER: That is a very important  
2 question. And I think that - - - that generally,  
3 when this Court has addressed issues like that, it  
4 has been under the mootness exception.

5 JUDGE SMITH: Well, is there - - - are you  
6 - - - are you saying we should not invoke the  
7 mootness exception here, or are you saying we should?

8 MS. OSER: I think that - - - I think the  
9 mootness exception is reasonably invoked if the  
10 Court's reached the merits, if it finds that the  
11 issues are adequately preserved. I mean, we - - -

12 CHIEF JUDGE LIPPMAN: And what - - -

13 MS. OSER: - - - argue that they were not.

14 CHIEF JUDGE LIPPMAN: - - - well, how did  
15 the Appellate Division do what they did? Did they  
16 invoke the mootness exception and then - - - what are  
17 they doing? Under what power are they doing this?  
18 Is it interest of justice, or what is it?

19 MS. OSER: That it's an issue that's - - -  
20 that evades review; capable of repetition but evades  
21 review, as these orders routinely do. So I think,  
22 you know, the Appellate Division is basically putting  
23 out the appropriate test, which is a balancing test,  
24 that has to pay - - - give proper deference to the  
25 prison interests that are implicated in a prison

1 case.

2 JUDGE SMITH: Did they - - - did they say  
3 or give you any reason to think they were exercising  
4 their interest of justice power to reach an  
5 unpreserved issue?

6 MS. OSER: No, it wasn't - - - it was not  
7 addressed at the Appellate Division. So I don't  
8 think it's - - - I think you really have to look at  
9 whether the issue was preserved at the trial court,  
10 which is what - - - is what determines this Court's  
11 jurisdiction.

12 JUDGE SMITH: So if there - - - so if we  
13 find the preservation was adequate, we can reach the  
14 issue, and if we don't, we can't?

15 MS. OSER: Correct.

16 JUDGE SMITH: And that's all there is to  
17 it?

18 JUDGE READ: When you say this - - - you  
19 started out by saying this was a poor vehicle, is  
20 that what you were referring to, is preservation - -  
21 - lack of preservation?

22 MS. OSER: Yes. Yes.

23 JUDGE READ: Did that - - - did that affect  
24 the development of the record in any way?

25 MS. OSER: Well, yes, because one of his -

1           - - one of the claims here is that the State didn't  
2           make a record of its interests at the hearing.

3                   CHIEF JUDGE LIPPMAN: The doctor didn't  
4           even bring his report, right, in this case?

5                   MS. OSER: Well, that's medical evidence.  
6           I'm talking about the State's interest in assuring  
7           the orderly operation of its prisons.

8                   CHIEF JUDGE LIPPMAN: This is not a record  
9           - - - do you think there's a good record for  
10          determining a weighty issue like this?

11                  MS. OSER: I'm sorry?

12                  CHIEF JUDGE LIPPMAN: Do you think this is  
13          a good record for determining a weighty issue - - -

14                  MS. OSER: Well, I don't - - -

15                  CHIEF JUDGE LIPPMAN: - - - like this?

16                  MS. OSER: - - - I don't think the prison -  
17          - - the State's interests - - -

18                  CHIEF JUDGE LIPPMAN: Such a serious issue?

19                  MS. OSER: - - - require a record, because  
20          they are established in case law and it should be  
21          self-evident that DOCCS can't run a prison - - -

22                  JUDGE SMITH: Do you - - -

23                  MS. OSER: - - - if it's being manipulated.

24                  JUDGE RIVERA: So then I thought you said  
25          it was a poor vehicle because you couldn't develop

1           that record.

2                   MS. OSER: But he also cut off the State's  
3           questioning on the issue, as he concedes.

4                   JUDGE RIVERA: I just want to - - -

5                   MS. OSER: So our ability to create that  
6           record was precluded.

7                   JUDGE RIVERA: So it's a clar - - - I'm  
8           just - - -

9                   MS. OSER: Yes.

10                  JUDGE RIVERA: - - - I just want to clarify  
11           your position on this. So are you saying that the  
12           State does not need to establish what otherwise - - -  
13           I think I hear you saying that these  
14           nonindividualized correctional facility interests,  
15           that those are - - -

16                  MS. OSER: I think that's right.

17                  JUDGE RIVERA: - - - given, they exist, so  
18           you just need to raise them, or a judge should know  
19           about them?

20                  MS. OSER: Well, there, the interests are  
21           established.

22                  JUDGE RIVERA: Um-hum.

23                  MS. OSER: Whether they're served in this  
24           case - - -

25                  JUDGE RIVERA: Um-hum.

1 MS. OSER: - - - is a separate question.

2 And on that - - -

3 JUDGE SMITH: But you're - - -

4 MS. OSER: - - - I think you can take  
5 judicial notice or you can say it's self-evident or  
6 you can say we - - -

7 JUDGE SMITH: - - - you're essentially  
8 saying that - - - that any - - - in any - - - any  
9 prisoner in any prison who does exactly what Mr.  
10 Dorsey did can be force-fed?

11 MS. OSER: I think so. I think this is a  
12 very strong case where you have an otherwise healthy  
13 inmate. The State's interest in protecting the  
14 health and safety of that inmate are strong. And  
15 when you have an inmate who's trying to use a hunger  
16 strike for seemingly manipulative purposes, the  
17 individual interests are somewhat diminished.

18 CHIEF JUDGE LIPPMAN: Even on this record,  
19 we can make that kind of a decision?

20 MS. OSER: I think you can. You can. But  
21 you can also dismiss the appeal for lack of  
22 preservation.

23 CHIEF JUDGE LIPPMAN: Okay, thank you both.  
24 Schlessinger v. Valspar.

25 MR. STOCKWELL: I'm sorry, Judge, I had - -

1 - I had two minutes.

2 CHIEF JUDGE LIPPMAN: Oh, I'm sorry. Did  
3 you - - - go ahead.

4 MR. STOCKWELL: Thank you. I have some - -  
5 - some serious concerns about the concept that Mr.  
6 Dorsey's manipulative intent and bringing - - - going  
7 on a hunger strike somehow diminishes his liberty  
8 interest here. There's no authority for it. And I  
9 think it's anathema to - - -

10 JUDGE PIGOTT: Well, except he wanted it.

11 MR. STOCKWELL: - - - to the justice system  
12 - - -

13 JUDGE PIGOTT: And that's - - -

14 MR. STOCKWELL: Pardon?

15 JUDGE PIGOTT: - - - the funny thing. I  
16 mean, he wanted to go to court, and he stands up in  
17 court and says, well, you know, they shouldn't be  
18 here because I'm not really going to kill myself. I  
19 mean, it's an odd case.

20 MR. STOCKWELL: It certainly is odd. But I  
21 would - - - I would really - - -

22 JUDGE SMITH: Well, do you say that an  
23 inmate can go on a hunger strike for any reason he  
24 wants and that the prison cannot respond with  
25 forcible feeding?

1                   MR. STOCKWELL: I'm not saying that at all,  
2 Your Honor. I'm saying the first part: an inmate  
3 can go on a hunger strike. But not - - - DOCCS has -  
4 - -

5                   JUDGE SMITH: When can they force-feed him  
6 and when can't they?

7                   MR. STOCKWELL: I think they have to have a  
8 court order. Upon - - - upon a determination.

9                   JUDGE SMITH: Well, that they got. They  
10 got a court order. Why are you saying we should  
11 reverse the order?

12                   MR. STOCKWELL: The record's deficient.  
13 There's not enough proof that the State's interests  
14 outweigh Dorsey's liberty interest.

15                   JUDGE SMITH: What proof would be ne - - -  
16 would have - - - would be necessary? What's the  
17 proof that's lacking?

18                   MR. STOCKWELL: Some of the factors that  
19 were identified in the Von Holden v. Chapman case;  
20 perhaps the - - - that that impact on the orderly  
21 oper - - - procedures within the facilities, maybe  
22 other inmates taking up the hunger strike technique.

23                   JUDGE SMITH: So is the disagreement  
24 between you and your adversary really just about  
25 whether we - - - you have to prove that in this case

1 or whether the - - - a court can take judicial notice  
2 that any prison needs to have this kind of  
3 discipline?

4 MR. STOCKWELL: I think that's exactly  
5 right. I mean, there certainly are cases - - -

6 CHIEF JUDGE LIPPMAN: What's exactly right?  
7 What's your answer to the question?

8 MR. STOCKWELL: That these - - - these  
9 interests need - - - that the - - - that they're  
10 implicated and to what extent they're implicated need  
11 to be proven at trial. The court should not take  
12 judicial notice of that because these cases are sui  
13 generis. Mr. Dorsey - - -

14 CHIEF JUDGE LIPPMAN: Yes, but, you agree  
15 there's not a great record here, is there, to  
16 determine this kind of issue?

17 MR. STOCKWELL: There's - - - that  
18 objection to that line of questioning was sustained.  
19 But in any event, there's a lack of - - - it's - - -  
20 there's a lack of proof. And I think that Judge Hall  
21 erred in sustaining - - - or in granting the petition  
22 on an insufficient record.

23 CHIEF JUDGE LIPPMAN: Okay.

24 MR. STOCKWELL: Thank you.

25 CHIEF JUDGE LIPPMAN: Thank you both.

(Court is adjourned)

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Norman Bezio v. Leroy Dorsey, No. 65 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: March 25, 2013