

*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.

FEBRUARY 2007 CALENDAR

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

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 Wednesday, February 7, 2007

No. 26 Beal Savings Bank v Sommer

In 1998, the Sommer Trust invested in construction of the Aladdin Resort & Casino in Las Vegas, Nevada by Aladdin Gaming LLC, which obtained \$410 million for the project through a syndicated loan from various lenders. The Credit Agreement governing the loan provided that lenders would appoint an administrative agent to act on their behalf and authorized the agent "to exercise such powers ... specifically delegated to or required of the Administrative Agent by the terms of [any loan document], together with such powers as may be reasonably incidental thereto." A Keep-Well Agreement, executed at the same time, required sponsors of Aladdin to make contributions to maintain the borrower's financial ratios and to guarantee payment in the event Aladdin's obligations were accelerated.

The Sommer Trust became a sponsor under the Keep-Well Agreement in 2000, to enable Aladdin to obtain an additional \$50 million in loans. Aladdin filed for bankruptcy in late 2001, defaulting on the loan, and Beal Savings Bank subsequently obtained an interest in 4.5 percent of Aladdin's remaining debt. A year later, 36 of the 37 lenders -- all of them except Beal -- settled with the Sommer Trust and two other sponsors on their obligations under the loan documents and directed the administrative agent not to pursue legal action to enforce the Keep-Well Agreement.

Beal commenced this breach of contract action against trustees of the Sommer Trust in 2005, seeking its share of payments due under the Keep-Well Agreement. The Trust moved to dismiss, contending the Credit Agreement precludes a lender from individually suing sponsors for a judgment under the Keep-Well. The trust cited a section of the Credit Agreement, which provides that "the Administrative Agent upon direction of the [lenders holding two-thirds of the outstanding debt] may ... exercise any and all rights and remedies at law or in equity ... including [to] recover judgment on the Keep-Well Agreement either before, during or after any proceedings for the enforcement of the Lenders' rights and remedies hereunder or under the other Loan Documents." Beal contended that express language in the loan documents permitted it to sue. Beal cited a section of the Keep-Well Agreement which provided that it "shall inure to the benefit of and be enforceable by the Administrative Agent and each Lender and their respective successors, transferees and assigns...."

Supreme Court agreed with the Sommer Trust and dismissed the suit, concluding the loan documents "created a scheme of collective lender action that restricts a minority lender, such as Beal, from acting unilaterally to recover a judgment." The Appellate Division, First Department affirmed. Beal argues, in part, that the Keep-Well Agreement expressly authorizes enforcement by an individual lender and that the Credit Agreement does not preclude it.

For appellant Beal: Robert B. Gilbreath, Dallas, Texas (214) 855-4500

For respondents Sommer et al: Scott D. Musoff, Manhattan (212) 735-3000

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 Wednesday, February 7, 2007

No. 27 Matter of Park v Kapica

No. 43 Matter of Park v Kapica

These cases focus on General Municipal Law § 207-c, which requires municipalities to pay full salary and medical costs for police officers who are disabled by line-of-duty injuries. Both proceedings were brought by John Park, who was employed as a police officer and sergeant by the Town of Greenburgh for 23 years. Beginning in 1994, he suffered a series of on-the-job injuries to his right shoulder which required surgery in 1996 and again in 2002. Park was certified as disabled under section 207-c after the second surgery, but on reexamination in 2003 an orthopedist found him fit for light duty.

When the Chief of Police ordered him to report for light duty in April 2003, Park challenged the order and sought a hearing. He then commenced his first article 78 proceeding (Case No. 27) to enjoin the Town from delegating the hearing to a hearing officer, arguing it must be held before the Board of Police Commissioners. Supreme Court denied his request. The hearing officer ultimately found that Park had improperly refused to return to work and recommended the Town recoup all salary it had paid him since his refusal. Park commenced his second article 78 proceeding (Case No. 43) to annul the determination retroactively divesting him of his section 207-c benefits. Supreme Court granted his petition, ordering the Town not to recoup disability benefits Park received prior to the conclusion of the hearing process on August 4, 2003. Park retired in September 2003.

The Appellate Division, Second Department affirmed both Supreme Court orders. In Case No. 27, the Appellate Division said the Town could properly appoint a hearing officer for the section 207-c hearing under Civil Service Law § 75(2), which "expressly authorizes the delegation of evidentiary hearings to 'a deputy or other person designated.'" Park argues the ruling conflicts with Westchester County Police Act § 7, which prohibits the delegation of police disciplinary hearings and requires they be conducted by the town board or board of police commissioners.

In Case No. 43, the Appellate Division ruled the Town could not recoup benefits it paid prior to the conclusion of Park's hearing because "the right of a disabled police officer to receive disability benefits under [section 207-c] is a property interest giving rise to procedural due process protection under the Fourteenth Amendment to the Constitution of the United States before those benefits are terminated." The Town argues that a police officer has no property interest in continued receipt of section 207-c benefits after he has been found fit for duty and that the Constitution does not prohibit recoupment of "erroneous overpayments of public funds."

For appellant/respondent Park: Thomas J. Troetti, White Plains (914) 946-1875

For respondent/appellant Town: Vincent Toomey, Lake Success (516) 358-5690

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 Wednesday, February 7, 2007

No. 40 Matter of Palm Management Corporation v Goldstein

Palm Management Corporation owns the Hedges Inn, a 136-year-old inn and restaurant in the Village of East Hampton that operates as a preexisting nonconforming use in a residential zone. After acquiring the property in 1986, Palm made improvements to a barn, which it uses as a dormitory for employees, and installed an awning over a patio, which enabled the inn to provide outdoor dining. In this appeal, Palm and two of its neighbors dispute whether the doctrine of res judicata, which bars relitigation of claims when there has been a prior final judgment on the merits, now precludes the village's Zoning Board of Appeals (ZBA) from determining the legality of those uses and improvements.

In 2000, when neighboring residents first complained the improvements constituted an illegal expansion of a nonconforming use, the village code enforcement officer responded in a letter that the patio awning had been approved in a 1987 building permit and the barn's use as a dormitory authorized in a prior certificate of occupancy. The neighbors appealed to the ZBA, which concluded it lacked jurisdiction to entertain the matter in a 2001 decision. The ZBA said the 60-day statute of limitations had expired for appeals from the "underlying determinations which aggrieve the applicants": the 1987 permit for the awning and a 1989 certificate of occupancy for the dormitory. The ZBA said the code enforcement officer's letter "essentially acknowledges the existence of these documents. It does not constitute a new determination from which an appeal can be taken."

In 2003, the code enforcement officer issued Palm a new certificate of occupancy which again said the patio had an awning and the barn was used as a dormitory and also, for the first time, noted that the patio was used for outdoor dining. Five neighbors, including appellants Patricia Handal and Katherine Graham, appealed. The ZBA agreed with them that the new certificate was an appealable determination and that outdoor dining and the dormitory were not preexisting uses, and it annulled portions of the certificate of occupancy authorizing those uses and improvements.

Palm commenced this proceeding to challenge the determination, invoking res judicata based on the 2001 ZBA decision. Supreme Court denied Palm's petition, saying the same issues were not litigated in the two ZBA appeals because "the present proceeding does not involve the 1989 certificate of occupancy or the 1987 building permit, but a certificate of occupancy issued in 2003." It said, "Moreover, estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results...."

The Appellate Division, Second Department upheld only the portion of the ZBA decision that annulled authorization for outdoor dining, ruling that the ZBA's determinations on the patio awning and dormitory use of the barn were barred by res judicata. It said the 2001 ZBA decision "specifically rejected the challenges to those matters on the ground that they were barred by the statute of limitations.... As the ZBA's 2001 dismissal of the challenges as untimely constituted a final determination on the merits, those same challenges could not be raised in this proceeding, nor could the ZBA revisit them."

For appellants Handal and Graham: William W. Esseks, Riverhead (631) 369-1700

For appellant ZBA: Matthew E. Pachman, Commack (631) 543-2200

For respondent Palm: David M. Dubin, Riverhead (631) 727-2180

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 Wednesday, February 7, 2007

No. 22 Kolnacki v State of New York

Betty Kolnacki filed this negligence claim against the State after she slipped and fell at Artpark in Lewiston, Niagara County, in July 2000. Her claim stated that she suffered a fractured kneecap, dental damage and other injuries, the full extent of which she said were not yet known, but her claim and bill of particulars failed to specify the dollar amount of damages she sought.

The Court of Claims granted the State's motion to dismiss the claim for failure to comply with one of the pleading requirements of Court of Claims Act § 11(b), which provides, "The claim shall state ... the total sum claimed." Citing Lepkowski v State of New York (1 NY3d 201), the court said the statute must be strictly construed and held that Kolnacki's failure to address the damage question rendered her claim jurisdictionally defective.

The Appellate Division, Fourth Department reversed the order and reinstated the claim in a 3-2 decision, saying the failure to state damages was not fatal to her claim. The majority said, "The claimants in Lepkowski sought damages for unpaid overtime compensation (see 1 NY3d at 208), and thus their damages were definite and ascertainable. Here, claimant sustained a fractured patella as a result of her fall and her damages from that injury are more difficult to ascertain, particularly in view of the fact that she was required to file her claim before the extent of her damages was definite and ascertainable...." The majority concluded Kolnacki "alleged sufficient information" to allow the State to assess its potential liability.

The dissenters said, "As in Lepkowski, claimant here was 'required, at the very least, to specify ... the total sum of damages sought' (id. at 208-209). Claimant's undisputed failure to comply with Court of Claims Act § 11(b) renders the claim 'jurisdictionally defective for nonconformity with [the statute's] substantive pleading requirements' (Lepkowski, 1 NY3d at 209)."

For appellant State: Assistant Solicitor General Michael S. Buskus (518) 474-6697

For respondent Kolnacki: Thomas Theophilos, Buffalo (716) 447-7899

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, February 8, 2007

No. 29 Nyack Hospital v General Motors Acceptance Corporation

Allen Zadwydas was injured in a motor vehicle accident on July 15, 2003, and was treated at Nyack Hospital from that date through August 6, 2003. Zadwydas's automobile insurance from General Motors Acceptance Corporation and GMAC Insurance Company Online, Inc. (collectively GMAC) provided basic economic loss coverage of \$50,000 per person and optional basic economic loss (OBEL) coverage of \$25,000 per person.

The hospital submitted a claim for \$74,489.28 in no-fault medical payments for its treatment of Zadwydas, which GMAC received on August 20, 2003. GMAC requested verification of the claim on September 12 and, while awaiting the hospital's response, it received and paid 17 bills totaling \$29,811.12 from other health care providers that treated Zadwydas after his release from Nyack Hospital. GMAC received the hospital's verification on October 20. In November, Zadwydas elected to apply his OBEL coverage to lost earnings rather than medical costs. On December 12, 2003, GMAC paid to Nyack Hospital the \$19,325.67 remaining on the policy, and denied payment of the balance of the claim (\$55,163.61) on the ground that the policy had been exhausted.

Nyack Hospital immediately commenced this action for payment of its claim contending, in part, that GMAC violated 11 NYCRR 65-3.15, an insurance regulation governing priority of payments, by paying subsequent no-fault claims from other health care providers for services rendered after the hospital's initial treatment of Zadwydas. The regulation states, "When claims aggregate to more than \$50,000, payments for basic economic loss shall be made to the applicant ... in the order in which each service was rendered or each expense was incurred, provided claims therefor were made to the insurer prior to the exhaustion of the \$50,000." It also states an insurer is not liable if it "pays the \$50,000 before receiving claims for services rendered prior in time to those which were paid."

Supreme Court dismissed the suit and the Appellate Division, Second Department affirmed. Although Nyack Hospital's August 20 claim was the first one submitted to GMAC, the Appellate Division said "plaintiff's initial claim for payment was premature, and was not complete until [GMAC] received additional verification of the claim on October 20, 2003." Therefore, it said, GMAC's payments to providers that rendered later treatment and filed later claims did not violate the regulation.

The hospital argues that its August 20 claim, although subject to verification, constituted a claim for priority purposes under 11 NYCRR 65-3.15 and GMAC violated the regulation by paying other claims first. The hospital contends that, once it filed its claim, GMAC "had a duty to hold the proceeds for the plaintiff's bill in reserve pending receipt of the requested verification."

For appellant Nyack Hospital: Joseph Henig, Bellmore (516) 785-3116

For respondents GMAC et al: Craig J. Freiberg, Manhattan (212) 252-9550

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, February 8, 2007

No. 30 People v Magnus Dallas

Magnus Dallas is asking the Court to suppress marijuana that Syracuse police discovered when they searched his apartment without a warrant and without his consent. Lower courts ruled the search was justified under the emergency doctrine.

Police went to Dallas's Ballantyne Road apartment building in December 2002 in response to a report about a "suspicious person with a gun." When they found no one in the building's common areas, they interviewed the man who called in the complaint. He said he had seen the gun through his peep hole after hearing a knock on the door, either his or the door to Dallas's adjacent apartment, but was not able to see who was holding the gun.

During this conversation, an officer posted outside the building reported that someone in the adjacent apartment had attempted to drop two large bags of marijuana out the window. Officer Bruno Danielle said he "banged" on Dallas's door, identified himself and drew his weapon. When Dallas opened the door several minutes later, officers handcuffed him in the hallway and went inside. Officer Danielle testified that they believed "there was possibly a person inside with a gun." They found no one else in the apartment, but did find a large garbage bag of marijuana on a kitchen counter and loose marijuana in and around the toilet. The officers then stopped to obtain a search warrant before resuming their search and seizing the evidence.

Syracuse City Court denied Dallas's motion to suppress the evidence, finding the search was justified by "emergency or exigent circumstances." The court said, "[T]here's no requirement for the police to go get a search warrant when they have information there's a man with a gun. They don't have ESP. They are allowed to go through the apartment and make sure there's no one else in there that presents any danger to them. Once they make that determination, they leave the apartment, and they did the right thing and went and got a search warrant."

After his motion was denied, Dallas pleaded guilty to a misdemeanor charge of criminal possession of marijuana in the fourth degree and was sentenced to a one year conditional discharge. Onondaga County Court affirmed the conviction.

Dallas argues the emergency doctrine did not apply because the report of a person with a gun was insufficient to create an emergency situation. Even if it did, he contends it would not justify entering Dallas's apartment. "There would be no limit to such a search," he says. "If allowed, the police could search any private apartment in the building, or any private apartment in the adjoining buildings, on the whim that the 'suspicious person with a gun' *might* have taken refuge there." He also argues the search was illegal because "the primary motive of the police ... was not to protect someone in the apartment, but to seize a suspect or evidence of a crime."

For appellant Dallas: Bruce R. Bryan, Syracuse (315) 476-1800

For respondent: Onondaga County Chief Asst. District Atty. James P. Maxwell (315) 435-2470

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, February 8, 2007

No. 31 People v William P. Havrish

When William Havrish complied with an order of protection by turning over to police an unlicensed handgun, he was charged with illegal possession of the unlicensed weapon. He contends in this appeal that the manner in which police obtained the evidence of his guilt violated federal and state constitutional protections against self-incrimination, among other things.

The case arose in April 2005, when Havrish was arrested in Delaware County on unrelated charges and Delhi Town Court issued an order of protection directing him to "Surrender any and all firearms owned or possessed...." He posted bail the same day and allowed Delaware County sheriff's deputies to accompany him to his home in the Town of Jefferson, Schoharie County, to pick up his rifles and shotguns. During the trip, he told the deputies that he had given a pistol to his former wife. When they called her the following day, she said she didn't have the pistol and also said Havrish didn't have a license for it. Havrish called the sheriff's office a short time later to say he had found the pistol at his home and they could pick it up. The deputy who made that trip said that, while he was writing out a receipt for the .44 magnum revolver, Havrish asked whether he would need a permit to get it back. This information was forwarded to the Schoharie County Sheriff's Department, which used it to charge Havrish with criminal possession of a weapon in the fourth degree.

Jefferson Town Court granted his motion to suppress the evidence and dismiss the charge, finding that Havrish "was required to provide self-incriminating evidence against himself in violation of his rights under the Fifth Amendment" and its state constitutional counterpart.

Schoharie County Court reversed the order and reinstated the charge. Citing People v Berg (92 NY2d 701), the court said "to the extent, if any, that defendant was compelled to turn over his handgun, it is now well settled that 'a person can be forced to produce real or physical evidence' without violating his or her 5th amendment rights...." Quoting United States v Hubbell (530 US 27), the court said compulsory production of incriminating tangible evidence does not violate the privilege "because 'the prohibition of compelling a man to be witness against himself is a prohibition of the use of ... compulsion to extort communications from him, not an exclusion of evidence when it may be material.'"

Havrish says none of the cases cited by the court "deal with the present situation where a person is directed by the government to deliver something to the police, the possession of which will, in and of itself, subject him or her to arrest and prosecution." He argues, "It is unconstitutional for the government to place an individual in a position where he has no choice but to commit a criminal offense [contempt] or admit to a different criminal offense [possession of a weapon], and to then prosecute him for committing one or the other of such offenses. That is just what happened in this case."

For appellant Havrish: Patrick J. Cannon, Stamford (607) 652-7511

For respondent: Schoharie County Assistant District Attorney Thomas F. Garner (518) 295-8257

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, February 8, 2007

No. 24 People v Racky Ramchair

A cabdriver, robbed at gunpoint by two passengers in Queens in April 1995, told police that one of the men was a Guyanese Indian. Seven weeks later, when the victim viewed a line-up at the 109th Precinct, Racky Ramchair was the only Guyanese Indian in it. At least two of the five fillers in the line-up were beardless, unlike Ramchair, so a detective gave them carbon paper to rub on their faces. The cabdriver identified Ramchair as one of the robbers.

Supreme Court denied Ramchair's motion to suppress the identification on the ground that the line-up was unduly suggestive. After two mistrials, Ramchair was tried a third time and the fairness of the line-up was a crucial issue. The prosecutor elicited testimony from a detective that Ramchair's trial counsel had been present at the line-up and had raised no objections to the way it was conducted, a point the prosecutor reemphasized in her summation. Defense counsel objected to this questioning and then sought permission to testify, saying he should be allowed to explain why he would not object at the scene of an unfair line-up in order to dispel the implication that he thought it was fair. After the court denied his request, he moved for a mistrial, which the court also denied. Ramchair was convicted of first- and second-degree robbery and sentenced to 10 to 20 years in prison.

The Appellate Division, Second Department affirmed. Ramchair was represented on the appeal by new counsel, who argued the trial court's preclusion of defense counsel's testimony deprived Ramchair of his right to present a defense. The Appellate Division concluded that, "since the defense counsel never requested to withdraw as the defendant's attorney so that he could be the defendant's witness, it was proper for the trial court to preclude his testimony." Appellate counsel did not argue that the trial court erred by refusing to grant a mistrial.

Ramchair petitioned for a writ of habeas corpus in federal court, which appointed new counsel (Frank Handelman) to represent him. U.S. District Court found that a claim of ineffective assistance of appellate counsel "appears to have considerable merit." The court said trial counsel's mistrial motion "should have been granted by the trial court, and its error in denying the motion deprived Ramchair of a fair trial. However, appellate counsel failed to make that argument to the Appellate Division. By contending only that [trial counsel] should have been permitted to testify, and not that a mistrial should have been declared, [appellate] counsel failed to present to the state court an argument that, in my view, would have succeeded in getting Ramchair a new trial."

Since the ineffective assistance claim was not raised in state court, the federal judge held the habeas proceeding in abeyance to permit Ramchair to pursue the claim by applying for a writ of error coram nobis at the Appellate Division. That court denied the application without explanation, and Ramchair now appeals.

The prosecution argues the claim should be rejected, saying, "There is no meaningful difference between the claim that appellate counsel actually did raise -- that the court should have allowed defense counsel to testify -- and the claim that defendant now claims that she should have raised -- that the court should have granted defense counsel's motion for a mistrial because it did not allow defense counsel to testify." It says, "The Appellate Division had before it the substance of the claim, and could have reversed were it at all inclined to do so."

For appellant Ramchair: Frank Handelman, Manhattan (212) 422-0500

For respondent: Queens Assistant District Attorney Jennifer Hagan (718) 286-5902

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 Tuesday, February 13, 2007

No. 33 Oboler v The City of New York

Alan D. Oboler filed this suit against New York City to recover for shoulder fractures and other injuries he sustained in May 2000, when he tripped and fell over a manhole cover on Madison Avenue between 92nd and 93rd Streets in Manhattan. He alleges that he caught his foot on asphalt pavement that protruded above the surface of the manhole cover.

Photographs were taken of the accident scene the following day and Oboler retained an engineer as an expert witness, who inspected the site in February 2004 and who was prepared to testify that improper repaving of the street had created a defective condition. He found that the street surface rose about 1½ inches above the manhole cover, while the City's rules and regulations require that street paving be flush with the covers.

Supreme Court precluded the testimony, finding there was a "woefully inadequate" basis for the expert's opinion. At the conclusion of the plaintiff's case at trial, the court dismissed the suit, saying there was no evidence "indicating that the City repaired Madison Avenue" and created the defect. Oboler conceded the City had no prior written notice of the hazard.

The Appellate Division, First Department affirmed on a 3-2 vote. Ruling the expert's testimony was properly precluded, the majority said there was no evidence regarding when the accident scene photographs were taken and the photographs did not show the height differential between the asphalt and the manhole. "Moreover," it said, "plaintiff's expert did not visit the scene until four years after the accident. Thus, his opinion would have been based on pure speculation." The court also said "...there was no evidence as to when or whether the street -- where the manhole cover was located -- had been repaved, much less whether any such work had been negligently performed, or as to how long the allegedly defective condition existed."

The dissenters said the preclusion of the expert witness "was not based upon the substance of the expert's intended testimony, but merely on the passage of time between the incident and the expert's inspection of the site. However, the passage of time ... is irrelevant here, and his assessment of the condition is as relevant as if he had made his observations at the time the original photographs were taken." They also argued the suit was improperly dismissed, saying, "[W]here there is reason to conclude that negligent repaving had occurred, the City's failure to provide documentation demonstrating that the repaving work was performed by another entity, should have been left for the jury to decide whether it should be inferred that the City performed the work which created the defect."

For appellant Oboler: Abraham Reingold, Brooklyn (718) 875-4805

For respondent City: Assistant Corporation Counsel Susan Paulson (212) 788-1362

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 Tuesday, February 13, 2007

No. 34 328 Owners Corp. v 330 West 86 Oaks Corp.

New York City acquired the five-story, eight-apartment brownstone at 330 West 86th Street through tax foreclosure and, due to its deteriorated condition, the City's Department of Housing Preservation and Development (HPD) decided in 1997 that it should be sold "as is" under the Urban Development Action Area Act (UDAAA). The act, codified in General Municipal Law article 16, authorizes municipalities to dispose of certain real property without public auction or sealed bids. Tenants of the building, given a right of first refusal, agreed to buy the building at the City's offering price of \$340,000 and formed 330 West 86 Oaks Corp. to take title. The sale was completed in June 1999, after a public hearing and approvals by the City Council and the Mayor.

The deed contains a recital paragraph that states: "the project to be undertaken by [330 West 86 Oaks Corp.] consists solely of the rehabilitation or conservation of existing private or multiple dwellings or the construction of one to four unit dwellings without any change in land use permitted by existing zoning." The deed required the tenants' corporation to remove any Housing Maintenance Code or Buildings Department violations within six months, but it failed to clear any violations. In February 2001, about a year and a half after it bought the building, 330 West 86 Oaks Corp. sold it for \$1 million to 330 West 86th Street, LLC.

Plaintiff 328 Owners Corp., the owner of the adjacent apartment building, had already brought this action to challenge the sale by the City to the tenants' corporation. After the tenants' sale to 330 West 86th Street, LLC, 328 Owners Corp. amended its complaint to add the new owner as a defendant, alleging that 330 West 86th Street, LLC intended to demolish the brownstone and erect a high rise apartment building. Plaintiff sought a declaration that use of the property is limited to rehabilitation or conservation of the existing building or construction of one- to four-unit dwellings. Plaintiff also sought an injunction barring the new owner and any successors or assigns from using the property in any other manner. The City brought similar cross-claims against the new owner.

Supreme Court ruled for the plaintiff and City. The Appellate Division, First Department reversed in a 3-2 decision. The majority ruled the deed restrictions were binding only on the initial buyer, 330 West 86 Oaks Corp., not on new owner 330 West 86th Street, because the restrictions did not qualify as covenants running with the land under Neponsit Prop. Owners' Assn., Inc. v Emigrant Indus. Sav. Bank (278 NY 248). The majority said, in part, "While the City ... now claims it intended that this property be rehabilitated and conserved as a [five]-story residential building, it failed to state this intent clearly in the deed, which it drafted. Certainly, subsequent events make it plain that 330 West 86 Oaks Corp. did not share an intent that the property be so restricted." The dissenters said, in part, "The majority's holding, which would permit the demolition of the existing five-story brownstone and the construction of a high rise 'needle' apartment building in its place, rather than effectuating the legislative intent for the program, perpetuates a fraud against the public fisc."

For appellant City: Assistant Corporation Counsel Tahirih M. Sadrieh (212) 788-0778

For appellant 328 Owners Corp.: Scott E. Mollen, Manhattan (212) 592-1400

For respondent 330 West 86th Street LLC: Edward B. Safran, Manhattan (212) 308-1770

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 Tuesday, February 13, 2007

No. 35 People v Jonathan Dean

Jonathan Dean's wife called the Cambridge-Greenwich Police Department in July 2004 after finding a videotape he had allegedly made, which included surreptitious footage of a neighbor and her two daughters naked in a bathroom. Dean's wife gave officers permission to search their home in the Village of Cambridge, Washington County, in the course of which they seized a computer and other videotapes. Dean was charged in two seven-count indictments and, in satisfaction of both, ultimately pleaded guilty to three counts of possessing a sexual performance by a child. Those charges were based on three digital photographs found on his computer depicting female children engaged in sexual conduct. As agreed in his plea bargain, Dean was sentenced to three consecutive terms of one to three years, for an aggregate sentence of three to nine years.

The Appellate Division, Third Department affirmed his conviction and sentence, rejecting Dean's claim that consecutive sentences were not authorized by Penal Law § 70.25. The court said consecutive terms were not illegal "as they are authorized for multiple offenses which are committed through separate and distinct acts even though part of a single criminal transaction (see People v Lynch, 291 AD2d 582, 583 [2002]). As each image which formed the basis for the separate counts to which defendant pleaded was created at a separate and distinct time, each constitutes a separate and distinct act for which the imposition of consecutive sentences is proper...."

Dean argues consecutive sentences were unauthorized because "nothing in the indictment or allocution shows how or when he downloaded to his computer the three photographic images.... Thus, it is entirely possible that he did so at the same time -- perhaps even through a single keystroke ... or a single click of his computer mouse." He cites Lynch in support of his argument that the sentences should be modified to run concurrently.

For appellant Dean: Jaime C. Louridas, Schenectady (518) 469-6449

For respondent: Washington County Asst. District Attorney Katherine G. Henley (518) 746-2549

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 Tuesday, February 13, 2007

No. 23 Rosenberg v MetLife, Inc.

Chaskie J. Rosenberg was hired by MetLife, Inc. in 1997 to work as a Financial Services Representative in its All-Boro Agency in Brooklyn. Most of the staff of the agency were, like Rosenberg, Hasidic Jews and the focus of their business was selling insurance to the local Hasidic community. The following year, MetLife began a series of internal investigations into reports of improper sales practices at the All-Boro Agency. These included the sale of speculative insurance, in which an unrelated third-party pays the premiums on a life insurance policy as a form of investment, expecting to collect on the policy when the insured dies.

MetLife fired Rosenberg in April 2003 and filed a Form U-5 with the National Association of Securities Dealers (NASD) stating the reasons for his termination: "An internal review disclosed Mr Rosenberg appeared to have violated company policies and procedures involving speculative insurance sales and possible accessory to money laundering violations." The same statement was made on U-5 forms filed for five other Hasidic Jews terminated by the company. Rosenberg brought an action against MetLife in federal court for employment discrimination and libel, among other claims, alleging that he was investigated and terminated because of his religion and that the statement on his Form U-5 was defamatory.

U.S. District Court granted summary judgment to MetLife dismissing the libel claim, holding that "statements in a Form U-5 are absolutely privileged" under New York law and, therefore, MetLife was immune from liability. The court said in a footnote that, although the U.S. Court of Appeals for the Second Circuit applied a qualified privilege to U-5 statements in Fahnestock & Co. v Waltman (935 F2d 512 [1991]), "the overwhelming authority" of subsequent New York court rulings applied an absolute privilege and Fahnestock "can no longer be regarded as good law." A jury later found MetLife not liable on the discrimination claims.

Rosenberg appealed the dismissal of his libel claim to the Second Circuit, arguing that statements on U-5 forms are accorded only a qualified privilege under New York law. The Second Circuit concluded the issue in unclear and, in this certified question, asks the New York Court of Appeals to resolve it. The Second Circuit said:

"The issue presented by this appeal is not simply unsettled; it is also important. Resolution of the question presented will determine whether the interests of those involved with New York's financial markets are best served by an absolute privilege, which would provide for candid disclosure of brokers' conduct but leave former employees without a remedy in tort for even the most egregious and abusive statements made by former employers, or a qualified privilege, which would provide for a limited remedy in tort but potentially subject employers to extensive litigation, both meritorious and frivolous.... The State's highest court is the proper tribunal to weigh these important, and potentially competing, interests and to select the policy that most appropriately advances the interests of the people of New York."

For appellant Rosenberg: Maurice W. Heller, Manhattan (212) 685-7600
For respondents MetLife et al: Steven Obus, Newark, NJ (973) 274-3200

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 Wednesday, February 14, 2007

No. 36 Matter of LaCroix v Syracuse Executive Air Service, Inc.

Marie LaCroix, an employee of Syracuse Executive Air Service, Inc., slipped on an ice-covered ramp while loading luggage at her workplace in November 2002, breaking her left wrist and spraining her shoulder. The Workers' Compensation Board (WCB) determined she had suffered a work-related injury and ordered weekly payments for lost wages. LaCroix, her employer and the State Insurance Fund (SIF), the employer's insurance carrier, eventually stipulated to the extent of her injuries, agreeing that she had sustained a permanent partial disability equivalent to a 75 percent loss of use of her left arm. In October 2004, a Workers' Compensation Law Judge calculated LaCroix's benefits based on the schedule in Workers' Compensation Law § 15 and determined that, after subtracting payments already made, she was entitled to \$33,018.83. The law judge also granted her request that the award be paid in a lump sum "rather than spreading it out in the future as the old decisions used to do."

SIF objected to the lump sum payment, arguing that WCL § 25(1)(a) requires that awards "be paid periodically and promptly in like manner as wages." If the WCB determines that periodic payments should be commuted to a lump sum "in the interests of justice," pursuant to WCL § 25(5)(b), SIF argued the statute requires that the amount of the award be reduced to present value. The WCB upheld the order requiring lump sum payment of the award without reduction to present value.

The Appellate Division, Third Department affirmed, citing its 1956 decision in Matter of Lynch v Bd. of Educ. of City of New York (1 AD2d 362), which said "there simply is nothing in [WCL] §§ 15, 25 or 27 that expressly mandates that a schedule award be paid over a defined period of time.... Liability for the schedule award comes into existence on the date of the accident." Rejecting SIF's argument that a lump sum payment must be reduced to present value, the court said, "...because a schedule award does not represent a periodical payment, there is nothing to commute to present value." Citing WCL § 142(1), which authorizes the WCB to "determine the time for payment of compensation," and the power granted it in WCL § 25(1)(b) to "determine that any payments may be made monthly or at any other period, as it may deem advisable," the court concluded that "regardless of whether the Board previously may have treated a schedule award as one to be paid out over time, we are satisfied that the case law, as it subsequently has evolved, coupled with the general powers granted to the Board by [sections 25(1)(b) and 142(1)], supports the Board's decision" to order lump sum payment.

SIF argues the Appellate Division ruling "disregarded over eight decades of precedent and practice, and ignored the Workers' Compensation statutory law when it affirmed the Board's new policy of directing the entire [schedule] award to be paid in a lump sum, without a threshold showing required by WCL § 25(5)(b) that justice so requires and without commuting the ... award to its present value."

For appellants State Insurance Fund et al: Susan B. Marris, Liverpool (315) 453-6530

For respondent LaCroix: Michael P. Oot, East Syracuse (315) 449-4306

For respondent WCB: Assistant Solicitor General Patrick Barnett-Mulligan (518) 474-1394

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 Wednesday, February 14, 2007

No. 37 Matter of Nilsson v Department of Environmental Protection of City of New York

In December 2002, S. Elof Nilsson sought permission to build a four-bedroom house with a subsurface sewage treatment system (SSTS) on a 3.73 acre parcel in the Sedgewood Club subdivision in the Town of Kent, Putnam County, which is located in the West Branch Reservoir drainage basin of the New York City Watershed. The City Department of Environmental Protection (DEP) denied his application for the SSTS because he proposed to use more than 42 inches of fill, which is prohibited by section 18-38(a)(2) of the Watershed Regulations.

Nilsson applied for a variance and complied with DEP's requirement that he devise mitigation measures to reduce contamination from the septic system. Because approval of the variance would permit development of the site, DEP also asked him to mitigate stormwater runoff from the residence, driveway and septic area; and, to support his claim that denial of the variance would cause substantial hardship, it asked for information regarding his other real estate holdings in the vicinity. Nilsson did not comply with the two additional requests, instead telling DEP that mitigation of stormwater runoff was not required under the regulations and that his "real estate holdings and prosperity have no merit in the case of demonstrating hardship."

DEP denied the variance in May 2004, saying, "While the application has proposed adequate mitigation for the SSTS itself," it did not offer adequate mitigation of stormwater runoff from the new residence, driveway and septic system. DEP said, "Because in the absence of a variance for the SSTS, no home or driveway can be constructed on this lot, [15 RCNY §] 18-61(a)(1)(iii) requires mitigation measures to address" such impacts. DEP also said Nilsson failed to demonstrate substantial hardship because he did not provide information about his other properties. It said, "This information is directly relevant" to the issue of substantial hardship because, "to the extent economic hardship can ever satisfy this criterion, the demonstration of such hardship must be comprehensive, considering the totality of an applicant's holdings in the vicinity of the lot in question."

Nilsson and co-owners Alan and Maria Matzkin filed this article 78 proceeding to compel DEP to grant the variance. Supreme Court dismissed the petition, ruling that DEP's stormwater mitigation requirement was rational "[g]iven the broad purposes of the Watershed Regulations, the particular concern about nonpoint source pollution and impervious surfaces and the foreseeable impacts on water quality that would result from the petitioners' proposed SSTS." The court also said they failed to provide "competent financial evidence" of hardship.

The Appellate Division, Second Department reversed the order and directed DEP to grant the variance. "Having determined that the petitioners' proposal for an alternative SSTS was adequate, under the guise of interpreting its governing regulation, [DEP] acted outside the scope of its authority conferred by the applicable regulations when it considered storm runoff issues and impervious surface impacts, for which no variance was required.... Furthermore, the petitioners' noncontiguous real estate holdings are irrelevant to the issue of whether the subject property is entitled to relief" due to substantial hardship.

For appellant DEP: Assistant Corporation Counsel Alan Beckoff (212) 788-1042
For respondents Nilsson et al: Robert C. Lusardi, Carmel (845) 225-8404

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 Wednesday, February 14, 2007

No. 38 Highland Capital Management LP v Schneider

Four members of the Schneider family sold their clothing companies, Jeri-Jo Knitwear and Jaimie Scott, Inc., to McNaughton Apparel Group, Inc. in April 1998 and, as part of the purchase price, ultimately accepted eight promissory notes with a total face value of \$69 million. The notes, each stamped "subordinated promissory note," were subordinate to senior creditors and were convertible to stock if McNaughton dissolved. Each note was made payable to an individual Schneider, but they were fully transferrable as long as McNaughton complied with securities registration requirements.

To market the notes, which were considered high risk due to McNaughton's poor financial condition, the Schneiders engaged Glen Rauch Securities, Inc., which in turn engaged RBC Dominion Securities Corp. as broker. RBC began negotiations with Highland Capital Management LP in early 2001, and Highland claims it agreed to buy \$45.4 million worth of the notes at 52.5 cents on the dollar. Highland alleges that Rauch informed RBC on March 14, 2001 that the Schneiders had agreed to the sale, and the parties entered into an oral agreement by telephone to carry out the trade. Highland also alleges that the Schneiders learned at about the same time that Jones Apparel Group intended to acquire McNaughton, which would require that the notes be paid off in full. The Schneiders did not sell their promissory notes, the takeover of McNaughton was announced in April 2001, and the Schneiders received full payment.

Highland brought this breach of contract action against the Schneiders, who denied they ever agreed to sell the notes and asserted a defense under the statute of frauds, which sharply limits the enforceability of oral agreements for the sale of personal property. U.S. District Court dismissed the suit, finding that the promissory notes were not "securities" under New York law and, therefore, were subject to the statute of frauds.

In a certified question, the U.S. Court of Appeals for the Second Circuit is asking the New York Court of Appeals to resolve whether the promissory notes issued by McNaughton to the Schneiders "fall within the definition of a 'security' in Section 8-102(15) of the New York Uniform Commercial Code (U.C.C.), and therefore are exempt from application of the New York statute of frauds...." The Second Circuit said, ""[P]romissory notes like the ones in this case are undoubtedly 'securities' for purposes of the Martin Act and the Securities and Exchange Acts of 1933 and 1934.... But the few New York cases that have addressed the issue have said that the definition of a 'security' for purposes of the New York U.C.C. is more narrow than the definition of a 'security' for federal and state regulatory purposes.... Imposing such uncertainty upon the financial community risks deterring the trading of promissory notes in financial markets, thereby restricting the free flow of capital. This is an undesirable result anywhere, but particularly here in New York, the financial capital."

For appellant-respondent Highland: Paul B. Lackey, Dallas, Texas (214) 560-2201

For respondents-appellants Schneider: Katherine C. Ash, Manhattan (212) 704-6000

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 Wednesday, February 14, 2007

No. 39 People v Nico LeGrand

In June 1991, cab driver Joaquin Liriano was stabbed to death on Morningside Drive in Manhattan. Witnesses heard the cab crash into a parked car, saw Liriano and his assailant fighting inside and outside the cab, and saw the assailant take property from the cab and flee. Four witnesses contributed to the creation of a composite sketch, but no witnesses were identified. Nico LeGrand was questioned about the murder two years later, when an officer who arrested him for burglary said he resembled the 1991 sketch, but the matter was not pursued. The murder investigation was reopened in April 1998, when LeGrand was again arrested for burglary in the same precinct. One witness identified LeGrand as the killer in a photo array and a lineup. Another witness picked out LeGrand's photo as a "close, if not exact match," and a third described it as "similar." LeGrand was indicted for second degree murder in April 1999. His first trial ended with a hung jury.

Before LeGrand's retrial in 2001, the Court of Appeals decided People v Lee (96 NY2d 157), holding that expert testimony about the reliability of eyewitness identification may be admitted if the trial court concludes it would aid the jury in assessing identification evidence and is sufficiently accepted within the scientific community. LeGrand moved to admit such testimony at his trial. After holding a Frye hearing, Supreme Court denied the motion on the ground that the proffered expert testimony was not generally accepted within the relevant scientific community. LeGrand was found guilty of second degree murder and sentenced to 25 years to life in prison.

The Appellate Division, First Department affirmed, rejecting LeGrand's claims that he was deprived of due process by the eight-year delay in charging him and that the expert identification testimony was improperly excluded. "The record supports the court's determination ... that the proffered expert testimony was not generally accepted by the relevant scientific community. In any event, 'even without expert testimony, defendant was able to attack thoroughly the People's identification testimony through cross-examination and summation arguments,'" the court said, citing People v Lopez (1 AD3d 168).

LeGrand contends that exclusion of the expert testimony deprived him of due process and a fair trial. "Here, the trial court determined that the proposed testimony of the defense expert on eyewitness identification was a 'good fit' with the facts of the case. Moreover, the accuracy of the witnesses' identifications of appellant was the only issue at trial, as there was no physical evidence connecting him to the crime." He argues the trial court erred in holding a Frye hearing, a decision that "squarely contradicts this Court's previous decisions" in Lee and People v Young (7 NY3d 40).

For appellant LeGrand: Jan Hoth, Manhattan (212) 577-2523

For respondent: Manhattan Assistant District Attorney Meredith Boylan (212) 335-9000

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, February 15, 2007

No. 28 People v Orlando Melendez

Samuel Cruz and Carmen Stupia returned to their home in Rochester one night in October 2001 to find the kitchen window shattered and bloodstains on the glass. Cruz saw that a jewelry box in the master bedroom was open, then he followed a trail of blood drops to another bedroom where he found Orlando Melendez, a neighborhood panhandler, in the closet. Melendez was charged with second degree burglary.

For the trial, the court appointed an interpreter for the defense to enable Melendez to follow the proceedings and communicate with his attorney. The prosecution provided another interpreter to translate for Cruz, who testified in Spanish, and defense counsel objected that some of these translations were inaccurate. The defense's interpreter said she noticed several inaccuracies, including rendering "a chain" as "jewelry" and "sofa" as "furniture." Melendez claimed the prosecution's interpreter made a more significant mistake when he said Cruz testified that "I kept asking the defendant why did he rob my house" and that Melendez responded, "Please forgive me, I won't do it again." Melendez claimed Cruz actually testified that he had asked, "Why did you go inside my house," not "Why did you rob my house."

After a brief hearing, the trial court dismissed the prosecution's interpreter, but denied the defense motion for a mistrial. The court denied a defense request to have Cruz re-answer the questions that had been translated by the dismissed interpreter, telling defense counsel he could clarify any inaccuracies during cross-examination. The court also declined to appoint a new interpreter for the prosecution, instead directing the defense's interpreter to stand at the back of the courtroom and translate for both the defendant and the jury.

Melendez was convicted of second degree burglary and sentenced to 16 years to life in prison as a persistent felony offender. The Appellate Division, Fourth Department affirmed, saying Melendez "failed to establish that he was prejudiced by the alleged errors in translation."

Melendez argues that "permitting the allegedly erroneous and extremely prejudicial interpretations to remain for the jury, without determining their accuracy, rendered the trial fundamentally unfair so as to violate due process." Once the trial court dismissed the prosecution's interpreter, he says, the court was obligated to ensure that an accurate translation was received by the jury and that he "should not have been asked to assume the risky burden of establishing, through the complainant, what had been said." He also argues the court, by ordering his interpreter to translate for the jury, effectively deprived him of the means of communicating with his attorney in violation of his rights to counsel and to participate in his own defense.

For appellant Melendez: Brian Shiffrin, Rochester (585) 753-4667

For respondent: Monroe County Assistant District Attorney Arthur G. Weinstein (585) 753-4658

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, February 15, 2007

No. 41 Thyroff v Nationwide Mutual Insurance Company

Louis Thyroff, an agent for Nationwide Mutual Insurance Company for 21 years, signed an agent's agreement in 1988 that was terminable by either party without notice. Thyroff was also required to sign a lease for Nationwide's Agency Office Automation (AOA) computer system, which served as the primary means of communication between Nationwide and its agents and for which the company provided the hardware and software. Each day, Thyroff and his staff entered business data as well as personal information onto the AOA computers in his office, and each night, Nationwide uploaded that information onto its central computers.

In September 2000, Nationwide cancelled the agent's agreement with Thyroff, cut off his access to the AOA system and reclaimed its computers from his office. In the process, it took Thyroff's own software programs, including Microsoft Word, PowerPoint and Excel, and took personal information, including email, documents and assorted data, that he had stored on the system. Nationwide also seized customer information Thyroff had compiled that he would need in order to retain their business when his relationship with the company ended.

Thyroff sued Nationwide in federal court for conversion, among other claims, contending that neither the agent's agreement nor the AOA lease gave the company the right to take his personal or business information from the computers. Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. U.S. District Court dismissed the suit, finding Thyroff failed to state a claim for conversion of personal data because he did not allege that Nationwide exercised dominion over the data to the exclusion of Thyroff. The court found that he failed to state a claim for conversion of business records on the AOA because Nationwide owned the AOA.

The U.S. Court of Appeals for the Second Circuit rejected the trial court's rationale, finding Thyroff met his burden by alleging that Nationwide unlawfully took possession of his records, files and programs, that Nationwide has denied him access to the information, and that the information cannot be replaced. "Therefore," it said, "assuming conversion is cognizable for electronic data, Thyroff has alleged all of the elements for a claim of conversion..."

However, the Second Circuit said it is unclear whether electronic data may be the subject of a conversion claim under New York law, and in a certified question it is asking the New York Court of Appeals to resolve the issue. The Second Circuit cited Sporn v MCA Records, Inc. (58 NY2d 482 [1983]), which said "an action for conversion will not normally lie, when it involves intangible property," and Shmueli v Corcoran Group (9 Misc 3d 589 [2005]), which said "electronically written 'documents' should not be treated with less dignity of ownership for conversion purposes, than ink written 'documents.'"

For appellant Thyroff: William P. Tedards, Jr., Washington, DC (202) 797-9135

For respondents Nationwide et al: Ben M. Krowicki, Hartford, CT (860) 240-2700

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, February 15, 2007

No. 42 People v John N. Rowland

John Rowland shot Anthony Tagliarino to death in Rowland's home in the Town of Wilton, Saratoga County on June 19, 2003. Rowland, who claimed he acted in self defense, was indicted on nine counts including second degree murder and first degree manslaughter. During the fifth day of his trial, he entered an Alford plea to criminally negligent homicide and criminal possession of a weapon; he did not admit guilt, but acknowledged there was sufficient evidence to make conviction likely. The plea agreement called for him to receive consecutive sentences of two to four years on each count, aggregating to four to eight years. It also called for those sentences to run concurrently with sentences previously imposed for two unrelated convictions: two to four years for criminal possession of stolen property, and one to three years for violation of probation.

Five months after he was sentenced, Rowland's prior stolen property conviction was reversed by the Appellate Division, Third Department. Rather than face a new trial, Rowland pleaded guilty to a misdemeanor charge in exchange for a sentence of time served.

Rowland then moved to vacate his Alford plea on the ground that, because his sentences for criminally negligent homicide and weapon possession could no longer run concurrently with the two-to-four-year sentence that had been imposed on his overturned stolen property conviction, his plea bargain could no longer be fulfilled. He relied, in part, on People v Pichardo (1 NY3d 126), in which the defendant had been convicted of murder and sentenced to 20 years to life, then pleaded guilty to an unrelated drug charge in return for a one-to-three-year sentence that would run concurrently with the murder term. After the murder conviction was reversed, the Pichardo Court ruled the narcotics conviction should be vacated because "when a guilty plea is induced by the court's explicit promise that the defendant will receive a lesser sentence to run concurrently with a sentence in another case, and that conviction is overturned, the defendant may withdraw his plea and face the indictment since the promise cannot be kept."

Saratoga County Court denied the motion to vacate the plea and the Appellate Division affirmed, saying, "Defendant's previous convictions were neither charged nor resolved contemporaneously with the challenged plea.... Additionally, the promise of concurrent sentences did not amount to an understanding that, by virtue of the plea, defendant would avoid additional prison time.... Moreover, the record indicates that defendant's decision to enter the challenged plea was induced by a desire to avoid the possibility of serving a much lengthier sentence if he was convicted at trial of murder in the second degree." The court said that, "since the plea was entered voluntarily and intelligently following several days of trial, there is no reason to permit defendant to profit from the reversal of a conviction on an unrelated charge...."

For appellant Rowland: Paul J. Connolly, Delmar (518) 439-7633

For respondent: Special Prosecutor Nicholas E. Tishler, Niskayuna (518) 372-1357

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, February 15, 2007

No. 6 People v Davor Gomcin

During a police investigation of a Queens social club on the evening of January 31, 1997, an undercover officer radioed to the detective in charge of the operation that a tall white male with a ponytail had approached her and asked "if she wanted to take a hit of cocaine." About six hours later, backup officers went into the club, ordered everyone out, and searched them. They recovered a packet of cocaine and a .38 caliber handgun from Davor Gomcin, a tall white male with a ponytail. He was charged with third degree criminal possession of a controlled substance and criminal possession of a weapon.

Supreme Court suppressed the gun and cocaine, finding there was insufficient evidence to establish probable cause for Gomcin's arrest. The court said the undercover officer's report of Gomcin's inquiry about cocaine "doesn't mean at the time of the search, there's probable cause to believe he possessed cocaine, even if there was probable cause to believe it at the time of the transmission." The court also said, "[M]ore likely to me, it's an inquiry as to her desire and state of mind, and it's not enough to give probable cause to believe that he possessed drugs."

The Appellate Division, Second Department affirmed in a 3-2 decision. The majority said the detective's "bare-bones recitation" of the undercover officer's radio transmission was "wholly inadequate to provide probable cause," since it gave no context for Gomcin's inquiry about cocaine. "The defendant's statement was made in a social club, where casual conversation is rampant," the court said. "The defendant may have been attempting to strike up a conversation with a female. Conduct which falls within the statutory definition of a sale of cocaine constitutes a crime, whatever the defendant's motive, but casual conversation does not." Citing People v Mike (92 NY2d 996), the court said, "To constitute a sale, there must be evidence to indicate an ability and intent on the part of the defendant to complete the transaction.... A promise to deliver drugs at some point in the 'near future' is insufficient, as a matter of law, to constitute a sale."

The dissenters contended that "it clearly and reasonably appeared more probable than not to the officers that when the defendant asked the undercover officer if she wanted 'a hit' of cocaine, he was offering her an immediate opportunity to ingest the drug," giving them "ample probable cause to place the defendant under arrest for the completed offense of criminal sale of a controlled substance." They argued the majority misapplied People v Mike because that decision focused on whether there was sufficient proof to sustain a conviction beyond a reasonable doubt, not on whether police had probable cause to make an arrest.

For appellant: Queens Assistant District Attorney John M. Castellano (718) 286-5801
For respondent Gomcin: Theodore S. Green, White Plains (914) 948-5656