

***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.

**MARCH - APRIL 2004 CALENDAR**

**NEW YORK STATE COURT OF APPEALS**

**Background Summaries and Attorney Contacts**

# *State of New York Court of Appeals*

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To be argued Tuesday, March 23, 2004

## **No. 22 Krohn v New York City Police Department**

Alleging that she had been subjected to sexual harassment and a sexually hostile work environment as a civilian employee of the New York City Police Department in the early 1990s, Alli Katt brought this human rights lawsuit against the City and her former supervisor, Lt. Anthony DiPalma, in federal court in 1995. At the close of trial, a U.S. District Court jury awarded Katt \$400,000 in compensatory damages against both defendants and \$1 million in punitive damages against the City alone.

The trial judge set aside the punitive damages award, concluding that section 8-502(a) of the New York City Human Rights Law (NYCHRL) does not authorize punitive damages against the City. The statute states, "Except as otherwise provided by law, any person claiming to be aggrieved by an unlawful discriminatory practice ... or by an act of discriminatory harassment or violence ... shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages."

On Katt's appeal, the U.S. Court of Appeals for the Second Circuit found the language of the statute "inconclusive." Although section 8-502(a) does include punitive damages, it said "nowhere in the statute do we find an overt indication of intent to subject municipalities to punitive damages awards." Citing "the absence of authoritative state court interpretations" of the provision, along with the important public policy issues at stake, the Second Circuit has asked the New York Court of Appeals to determine whether a discrimination claimant may recover punitive damages from the City under the NYCHRL.

Katt's bankruptcy trustee, Paul A. Krohn, has been added as a plaintiff in the case. He argues that "the most natural reading" of section 8-502(a), together with the statutory scheme and legislative history of the NYCHRL, clearly subjects the City to liability for punitive damages. "The plain and express language of the NYCHRL itself ... provides all of the clarity that is needed to conclude that the City is not meant to be treated differently than any other employer subject to the NYCHRL on any issue, including potential liability for punitive damages," according to his brief.

The City argues that "section 8-502(a) lacks the clear, express language necessary to waive the City's punitive damages immunity. Section 8-502(a) merely creates a private cause of action for 'damages, including punitive damages,' without mentioning the City (or anyone else) as a party from whom plaintiffs may recover punitive damages." It contends that there is nothing in the legislative history to show the City Council intended to waive the City's immunity and that such a waiver would violate the State Constitution's prohibition against gifts of public funds.

For appellant Krohn: David A. Kotler, Princeton, N.J. (609) 620-3200

For respondent City: Assistant Corporation Counsel Scott Shorr (212) 788-1089

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To be argued Tuesday, March 23, 2004

## **No. 48 Notre Dame Leasing, LLC v Rosario**

Notre Dame Leasing, LLC, the owner of an apartment building on Colden Street in Queens, brought this summary proceeding to evict Alexandra Rosario and her family for non-payment of rent from October 1999 to January 2000. Rosario is a welfare recipient and the New York City Human Resources Administration (HRA) pays a portion of her rent directly to the landlord. The landlord alleged Rosario failed to pay her own share of the rent during the period.

Rosario moved to dismiss based on Social Services Law § 143-b, known as the “Spiegel Law,” contending that the New York City Housing and Preservation Department had recorded a number of code violations in the building that were classified as “hazardous” or “immediately hazardous.” Subsection 5(a) of the statute provides, “It shall be a valid defense in any action or summary proceeding against a welfare recipient for non-payment of rent to show existing violations in the building wherein such welfare recipient resides which relate to conditions which are dangerous, hazardous or detrimental to life or health as the basis for non-payment.”

The Appellate Division, Second Department denied Rosario’s motion in a 3-2 decision, concluding that the Spiegel Law defense may be invoked “only where the HRA or other appropriate social services agency has exercised its right to withhold direct rent payments to landlords” due to code violations. The majority conceded that subsection 5 does not expressly limit the defense to such cases, but said its interpretation would “harmonize” the provision with subsections 1 through 4, which authorize the “public welfare department” or “public welfare officials” to make rent payments to landlords, to withhold rent payments due to housing violations, to seek rent reductions when a landlord fails to provide essential services, and to maintain records of building violations. “Together, these sections manifest a clear legislative intent to confer the right to withhold rent on social services officials rather than individual welfare recipients,” it said, and “a ‘sensible and practical over-all construction’ of the statute compels the conclusion that the Spiegel Law defense applies only in cases where the appropriate official has first exercised this right.”

The dissenters argued the ruling “is inconsistent with the plain language of the Spiegel Law, and with its overriding purpose and intent,” which they said was “one of compelling landlords to remedy code violations in buildings occupied by welfare recipients, thereby ameliorating slum conditions.” They said the express references to public welfare officials in the first four subsections “compels the natural conclusion” that the failure to include the same reference in subsection 5 was intentional. If subsection 5 is interpreted as allowing welfare recipients to raise the defense based on code violations, they said, “no provision of the law is inconsistent with another and all tend to serve the general intent of the whole law, which is to ensure decent housing for economically fragile individuals.”

For appellant Rosario: Carl O. Callender, Queens (718) 657-8611

For respondent Notre Dame Leasing: Denise M. May, Queens (718) 459-6000

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To be argued Tuesday, March 23, 2004

## **No. 59 Matter of Pecoraro v Board of Appeals of the Town of Hempstead**

Gregory Pecoraro, a home builder, applied for an area variance to build a single family house on a 40-foot by 100-foot lot in a West Hempstead neighborhood where the minimum lot size is 6,000 square feet. The lot was created by an illegal subdivision in 1959 and a prior application for an area variance was denied in 1969, a denial that was upheld by Supreme Court in 1970.

At a January 2001 hearing held by the Board of Appeals of the Town of Hempstead, an expert retained by Pecoraro testified the project would be in character with the surrounding area and would not adversely affect property values. Sixteen neighborhood residents opposed the variance at the hearing, submitting a petition signed by 214 residents who complained it would “have an adverse effect on the character of the area.” The West Hempstead Civic Association also opposed the variance. The Board denied the variance, finding that there were no other lots as narrow as this one on the street and that, within a 200-foot radius of the Pecoraro project, only 6 out of 35 lots were 40' x 100'.

Lower courts annulled the determination and the Appellate Division, Second Department ordered the Board to issue the variance. “Although the petitioner’s difficulty was self-created, and the requested area variance was, arguably, substantial, there was no evidence presented that granting the variance would have an undesirable effect on the character of the neighborhood, adversely impact on physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community,” it said, noting there were 12 lots within 200 feet that did not meet the 6,000-square-foot area zoning requirement. It said, “The generalized complaints of neighboring property owners” that the variance would hurt the character of the neighborhood “were uncorroborated by any empirical data or expert testimony and were insufficient to counter the evidence presented by the petitioner.”

The Board contends this is “a clear instance in which the lower courts impermissibly substituted their opinions for that of the board, notwithstanding that the Board’s decision was at the very least rational and fairly supported by substantial evidence in the record.” It argues that it was entitled to rely on its analysis of the 200-foot radius map without expert testimony and that the lower courts improperly penalized it for the fact that many residents opposed the variance. The Board points out that it has never granted an area variance in the immediate vicinity of this lot and warns that the decision would effectively rezone the neighborhood to allow 4,000-square-foot lots.

For appellant Board: Senior Deputy Town Attorney Charles S. Kovit (516) 489-5000  
For respondent Pecoraro: Joseph F. Buzzell, Mineola (631) 622-5400

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To be argued Wednesday, March 24, 2004

## **No. 51 Brunı v The City of New York**

Joseph Brunı brought this negligence suit against New York City for injuries he suffered on August 26, 1997, when he tripped and fell in a hole next to a defective sewer catch basin at 62<sup>nd</sup> Street and 11<sup>th</sup> Avenue in Brooklyn. To prove the City had prior written notice of the defect, as required by the "Pothole Law" (Administrative Code § 7-201(c)), he relied on an inspection report and a work order filled out by a foreman in the City Department of Environmental Protection (DEP) five weeks before the accident. The report called for repair of the catch basin, which "is missing bricks on the wall stock due to caving." It also said the site was "safe at this time," but the foreman later testified he considered it safe because he had placed a sawhorse and reflective cones at the site as a warning. The sawhorse and cones disappeared before Brunı's accident. The foreman also testified he did not report the problem to the City Department of Transportation (DOT) because DEP was responsible for repairing catch basins. The catch basin was not repaired until September 16, 1997.

The City moved to dismiss the suit on the ground that Brunı failed to establish notice under the Pothole Law. The City conceded that DEP had notice of the defective catch basin, but it argued the law requires proof of prior notice to the DOT. Paragraph 2 provides, in part, that the City cannot be held liable for injuries caused by a defective street or sidewalk unless "there was written acknowledgment from the city of the defective, unsafe, dangerous or obstructed condition ...." Paragraph 3 requires DOT to keep an index "of all written notices [of defects] which the city receives" and paragraph 4 requires DOT to give written acknowledgment of all notices it receives.

Supreme Court denied the City's motion to dismiss. The jury ultimately found the City entirely responsible for the accident and awarded Brunı \$1.6 million in damages.

The Appellate Division, Second Department reversed the judgment and dismissed the complaint. "Contrary to the plaintiff's contention," it said, "the intra-departmental work order submitted by a supervisor with the NYCDEP, which noted that the catch basin was defective, does not constitute a 'written acknowledgment from the city' of the defective condition within the meaning of the Pothole Law."

Brunı argues that "where a City agency charged with responsibility for making a repair on a street has actual written notice of a defect before it causes plaintiff's accident, such notice constitutes 'prior written notice' under the Pothole Law." He argues that, in his case, the DEP foreman's report and work order satisfied the statute and notice to DOT was not required.

For appellant Brunı: Brian J. Isaac, Manhattan (212) 233-8100

For respondent City: Assistant Corporation Counsel Norman Corenthel (212) 788-1022

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To be argued Wednesday, March 24, 2004

## **No. 52 People v Israel Nieves**

Israel Nieves was arrested for shooting two men, Dario Cuevas Gonzalez and Hector Mendoza, during an altercation outside a Yonkers nightclub in July 2000. He was acquitted of assault and other charges based on a justification defense, but was convicted of a felony charge of criminal possession of a weapon in the third degree.

On October 12, 2001, County Court sentenced Nieves to three years in prison. The court also issued two orders of protection directing him to stay away from Gonzalez and Mendoza and to refrain from communicating or interfering with them. Both orders were set to expire October 12, 2007, three years from the end of his prison term and six years from the date of sentencing.

Criminal Procedure Law § 530.13(4) allows a court to impose a final order of protection on behalf of victims and witnesses in a criminal case, but it limits the duration of the order to five years from the date of conviction or “three years from the date of the expiration of ... the term of a determinate sentence of imprisonment actually imposed.” On appeal, Nieves argued, in part, that the duration of the orders was improperly calculated because he was not given credit for the time he had spent in jail prior to sentencing.

The Appellate Division, Second Department agreed with him on that point, saying, “The County Court’s determination of the duration of the orders of protection issued at sentencing ... should have taken into account the defendant’s jail-time credit.” It remitted the matter to County Court for recalculation of the expiration date, but the Appellate Division rejected all of Nieves’s other claims.

The prosecution argues the Appellate Division had no authority under the Criminal Procedure Law to review the defendant’s claims concerning the duration or scope of the orders of protection on direct appeal from his conviction. It contends the calculation of jail time credit, which is performed by the Department of Correctional Services, cannot be performed until the defendant is actually received in state prison and, if Nieves objects to the DOCS calculation, he should make a post-conviction application to the sentencing court to adjust the expiration date.

Nieves argues in his appeal that the orders of protection exceed the scope of CPL 530.13(4) by requiring him to refrain from communicating or interfering with Gonzalez and Mendoza because they could not be considered victims of the crime of criminal possession of a weapon. Contending they must be considered witnesses to the crime, he argues that he could only be ordered to stay away from them.

For appellant-respondent Nieves:

Salvatore A. Gaetani, White Plains (914) 286-3400

For respondent-appellant:

Westchester County Assistant District Attorney Richard L. Hecht (914) 995-3496

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To be argued Wednesday, March 24, 2004

## **No. 58 Real Holding Corp. v Lehigh**

Real Holding Corp. and Gas Land Petroleum Inc. are seeking a special use permit to operate a gas station on a half acre lot on Route 9 in the Town of Wappinger, Dutchess County, where an existing station has sat closed and vacant since the early 1990s. The local zoning code would allow a gas station at that site as a special use if five criteria are met, but the site failed to satisfy two requirements: that the proposed station be at least 1,000 feet from a residential district and that it be at least 2,500 feet from another gas station.

The Town of Wappinger Zoning Board of Appeals refused to grant the owners a variance in 1995, concluding that it did not have the power to waive compliance with specific special use permit criteria in the zoning code. The owners applied again for a variance in 2000 and the Zoning Board again denied the application on the same ground.

Supreme Court and the Appellate Division, Second Department annulled the determination, holding that Town Law § 274-b(3) expressly authorizes a zoning board of appeals to grant an area variance from setback requirements for approval of a special use permit. Section 274-b(3) provides, "Notwithstanding any provision of law to the contrary, where a proposed special use permit contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to [Town Law § 267-b] without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations."

The Zoning Board argues in its appeal that § 274-b(3) is in apparent conflict with § 274-b(5), which states, in part, "The town board may further empower the authorized board to, when reasonable, waive any requirements for the approval ... of special use permits submitted for approval." The Wappinger Zoning Board argues that the language of § 274-b(5), together with its legislative history and prior case law, establishes that a zoning board of appeals may not grant an area variance from specific special use permit criteria unless it has been granted such authority by the town board.

For appellants Zoning Board: Karen P. MacNish, Wappingers Falls (845) 298-2000

For respondent Real Holding and Gas Land: Judson K. Siebert, White Plains (914) 946-4777

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To be argued Thursday, March 25, 2004

## **No. 53 Galindo v The Town of Clarkstown**

This wrongful death case arose on June 6, 1999, four days after a severe storm uprooted and damaged trees throughout the Town of Clarkstown, Rockland County. In the wake of the storm, homeowner C. Richard Clark noticed that an 80-foot-tall ash tree growing on adjacent property owned by the Town appeared to be leaning toward his house. Clark reported the situation to a member of a Town clean-up crew working in his neighborhood and he left two voice mail messages about the tree for the Town Highway Department, but no action was taken.

When Clark left his house on the morning of June 6, he noticed the car of his housekeeper, Jaqueline Galindo, was parked in his driveway between the ash tree and the house. He said nothing to her about the tree. Before he returned an hour later, the ash tree fell, crushing the car and killing Galindo's husband, Javier Galindo, who was waiting in the vehicle. Galindo brought this wrongful death suit against the Town and Clark, alleging against Clark that he had breached a duty to warn her of the dangerous condition created by the tree.

Supreme Court dismissed the complaint against Clark. The Appellate Division, Second Department affirmed in a 3-2 decision, ruling that "a landowner does not owe a duty to those who are lawfully upon his or her property to warn them against defective or dangerous conditions which emanate from outside that property." "Moreover," the majority said, "it is neither rational nor prudent to impose such a duty to warn upon a property owner. Not only would this duty create an unreasonably onerous burden upon the owner, but it is difficult to discern how the line would be drawn with respect to when a condition existing upon one piece of property becomes a dangerous or defective condition upon the neighboring land."

The dissenters voted to reinstate the claim against Clark. "Our focus is on the duty of a property owner to warn of a known danger that is likely to lead to injury or death on his or her property if the visitor takes up a position in that zone of danger," they said. "It makes no difference that the instrument of injury or death is located on adjacent property if the consequence of its fall is injury or death *occurring on the owner's property*. Under such circumstances, we believe that a duty to warn should be imposed."

For appellant Galindo: Gregory W. Bagen, Brewster (845) 279-7000

For respondent Clark: John C. Couzens Jr., White Plains (914) 686-9010

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To be argued Thursday, March 25, 2004

## **No. 54 Maheshwari v The City of New York**

Ram Krishna Maheshwari, an Indian lawyer and member of the International Society for Krishna Consciousness (ISKCON), is asking the Court to reinstate his suit against New York City and Delsener/Slater Enterprises Inc. for injuries he suffered when he was assaulted outside of the Lollapalooza Festival on Randall's Island in July 1996. The City owns Downing Stadium, where the concert was held, and Delsener/Slater was the festival's producer. Maheshwari, 59, had been in the Sunken Meadows parking area handing out pamphlets describing ISKCON's philosophy to concertgoers. When he returned to the group's van to retrieve some belongings, four drunken young white men cornered and beat him into unconsciousness, leaving him with a fractured skull and facial fractures. None of his attackers was apprehended. Maheshwari contended the City and the promoter provided inadequate security.

The Appellate Division, First Department dismissed the suit in a 3-2 decision, relying on its 2002 ruling in Florman v City of New York (293 AD2d 120), which dismissed the claim of a woman who was struck by a car in a parking lot at the same Lollapalooza Festival.

The majority, quoting Florman, said "[i]t is difficult to understand what measures could have been undertaken to prevent plaintiff's injury except presumably to have had a security officer posted at the precise location where the incident took place or wherever pedestrians were gathered, surely an unreasonable burden .... Even then, it is doubtful that such a random act could have been prevented." Even if there were a lapse in security, it said, "plaintiff's injuries are the result of the independent, intervening [in this case criminal] act ... that did not flow from any lack of security."

The dissenters argued that a jury should decide whether an assault by "a group of intoxicated young men" on a religious pamphleteer outside the heavy metal concert was foreseeable and whether reasonably adequate security was provided. They said, "...the stationing of security guards at regular intervals might have succeeded in keeping a lid on the type of uncontrolled, escalating rowdiness that thrives in such conditions in the absence of a visible peace-keeping force." They argued that the criminal assault on Maheshwari would not be an independent, intervening act absolving the defendants of liability if the jury found such an assault was foreseeable in the circumstances.

For appellant Maheshwari: Edward J. Nitkewicz, Commack (631) 543-7676

For respondent City: Assistant Corporation Counsel Julian L. Kalkstein (212) 788-1030

For respondent Delsener/Slater: Milagros A. Matos, Manhattan (212) 553-1205

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To be argued Thursday, March 25, 2004

## **No. 55 People v Ramon Aponte**

Ramon Aponte was charged with selling \$20 worth of crack cocaine to an undercover detective in East Harlem in September 2000. Convicted at trial of criminal sale of a controlled substance in the third degree, Aponte was sentenced to 6 to 12 years in prison. The Appellate Division, First Department reversed his conviction and ordered a new trial in a 3-2 decision, ruling that supplementary instructions delivered by the trial judge after the jury declared itself deadlocked exerted improper pressure on jurors to return a guilty verdict.

The judge gave the instructions on the second day of deliberations, after the jury sent out its second deadlock note. "The point of the process is to get a result," he told them. "Something happened in this case. It was proven or not. The standard was met or it was not. The tree that fell made a noise or it didn't.... Something hit the bell probably and with nobody around. Only you folks can tell us was there a gong, a ding, a ping or nothing.... [I told] you what the law is to put you in a position to do what you said you would do when we started, which is to decide this case.... Something happened in this case. It was not a nonevent. The standard was met or it was not, and there is no other entity on the face of the earth that can tell us what the answer is to that."

The judge read the jury's deadlock note aloud and then concluded, "Whether there is the rare occurrence – of course, it happens, but it is a rare occurrence – whether there is in this case the rare occurrence of a jury unable to resolve a case is not a factual decision. It's a legal decision. It is not your decision. It is mine. We are nowhere near at the point where I would begin to consider the possibility that you folks might not be able to resolve this case. Continue your deliberations, please." The jury returned with a guilty verdict five minutes later.

The majority at the Appellate Division found the instructions coercive, saying the judge "failed to inform the jurors that, while they each should be open to considering the views of the others, no juror should feel compelled to abandon conscientiously held beliefs. Instead, the instruction simply stressed the need to 'get a result.' A charge that stresses the need for a verdict at the expense of the individual jurors' judgment mandates reversal."

The dissenters said the judge, in his main charge to the jury before deliberations began, had given thorough instructions that no juror should ever abandon a conscientiously held belief and "there was no need to reinstruct the jury on the subject in the supplemental charge." They said, "Each reference to the burden of proof made it clear that the jury was free to conclude that the People had not satisfied the standard for conviction. The supplemental charge was balanced and at no point suggested that the jury reach any particular verdict."

For appellant: Manhattan Assistant District Attorney Frank Glaser (212) 335-9000

For respondent Aponte: James M. Hosking, Manhattan (212) 878-8000

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To be argued Thursday, March 25, 2004

## **No. 18 People v Ricky Mitchell**

Ricky Mitchell, convicted on two counts of first degree robbery for a liquor store holdup in the Bronx, is serving a sentence of three to nine years in prison. Contending he was denied his right to counsel during the police lineup where two victims of the robbery identified him, Mitchell is asking the Court to suppress the lineup and order a new trial.

The robbery occurred on April 5, 1996. Mitchell, who was 15 years old and was represented by counsel on an unrelated charge, was arrested for the robbery on April 24 at Evander Childs High School. The school principal called his mother, Idalle Mitchell, at home to inform her of her son's arrest. Then a police officer called, saying he was going to place her son in a lineup and asking if she could attend. Idalle Mitchell said she could not go to the lineup because she was caring for her newborn child, but she told the officer, "Ricky had a lawyer, do you want a number?" She later testified she could not remember the officer's response "because I was in a rage. I was angry and I was crying a lot." She left a message for her son's lawyer at the Legal Aid Society, but the call was not returned until after the lineup. The lawyer ultimately represented Mitchell through the end of his robbery trial.

The trial judge denied Mitchell's motion to suppress the lineup, saying, "Although Detective DePaolis [who conducted the lineup] was aware of the fact that the defendant had an attorney on an unrelated matter as well as the fact that the defendant was 15 years of age, nonetheless he was not ... statutorily [or] constitutionally obligated to obtain counsel for the defendant for the investigatory lineup in the absence of an explicit request of either the defendant or a parent." The judge said the mother's testimony was "devoid of any specific requests either explicitly or implicitly that the police" notify her son's attorney or delay the lineup so she could notify the attorney. The judge said, "...I am constrained to conclude that the defendant was not denied his right to counsel or access to an attorney, even though I believe that the better practice would have been for Detective DePaolis to have insured counsel's presence. There were no exigent circumstances on April 24<sup>th</sup>, approximately 19 days after the commission of the crime in question." The Appellate Division, First Department affirmed.

Mitchell argues that his mother could legally invoke his right to counsel and that she did so in her phone conversation with the officer. "By communicating to the police that Ricky had a lawyer and that she thought of this lawyer as the person for the police to contact on his new case, Ms. Mitchell conveyed to the police that it was [Michelle] Smith she wanted to represent Ricky on the new case," according to his brief. "Thus, given that weeks had passed since the robbery and there was no need to conduct the lineup immediately, the police should have given Ms. Smith notice of the lineup and a reasonable opportunity to attend."

For appellant Mitchell: Lawrence T. Hausman, Manhattan (212) 403-5282

For respondent: Bronx Assistant District Attorney Andrew N. Sacher (718) 590-6758

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To be argued Tuesday, March 30, 2004

**No. 56 McCormick v The City of New York**

**No. 13 Williams v The City of New York**

In these appeals, the families of three New York City police officers who were killed in the line of duty are asking the Court to reinstate their wrongful death suits against the City. Their claims are based on General Municipal Law § 205(e), which allows police officers or their survivors to recover for line-of-duty injuries caused by a defendant's negligent failure to comply "with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments" or any of their agencies.

Case No. 56 arose on April 27, 1988, when Sergeant John F. McCormick was fatally shot by a fellow narcotics officer while executing a no-knock warrant at an apartment on Sickles Place in Manhattan. After the door was forced open with a battering ram, he entered the apartment with Officers John P. Huvane and James P. Curran. Huvane went into a bedroom and discovered Mercedes Perez, five feet tall and eight months pregnant, holding a revolver. When she pointed the gun at his head, he swatted it upward and it discharged into the ceiling. Huvane fired two shots at Perez, then stumbled backwards onto a bed, firing a third shot as he fell. Curran entered the room and fired two shots at Perez, who still had her revolver. A second shot from her gun struck the floor. McCormick was killed just outside the bedroom, when a bullet fired by one of the officers passed through the door and struck him in the neck.

His wife based her section 205(e) claim, in part, on allegations that Huvane and Curran violated Penal Law provisions relating to the use of physical force, assault and homicide. Supreme Court dismissed her suit and the Appellate Division, First Department affirmed. Noting that the officers "have never been convicted of -- much less charged with -- such crimes," the Appellate Division said, "Merely an 'alleged violation' of those provisions of the Penal Law, which are as yet unproven in a criminal proceeding, cannot serve as a predicate for a civil claim under General Municipal Law § 205(e), as a matter of law." The plaintiff argues the ruling conflicts with the language and purpose of the statute, as well as decisions of the Second and Fourth Departments.

Case No. 13 arose on November 13, 1989, when Detectives Keith Williams and Richard Guerzon were assigned to transport homicide defendant Jay "Stoney" Harrison from Rikers Island to the Queens District Attorney's detective squad. They took him to the locker room, which served as the squad's detention area, and left him cuffed by one hand to a steel pipe that was used to secure prisoners to a table in the center of the room. While alone, Harrison stole a revolver from a detective's locker. As they drove him back to Rikers Island, Harrison, who was handcuffed in the rear of the car, shot and killed both detectives on the Grand Central Parkway.

The plaintiffs claimed the City had violated Labor Law § 27-a(3)(a)(1), which requires employers to provide their workers with "employment and a place of employment which are free from recognized hazards ...." The jury agreed the locker room detention area was unsafe and awarded \$5,260,252 to the Williams family and \$8,975,625 to the Guerzon family. The Appellate Division, Second Department reversed in a 3-2 decision. The majority said, "The alleged hazard was one based not upon a physical condition in the locker room or defect in the facility itself, but rather, upon the practice of holding prisoners in proximity to lockers where firearms were kept.... Labor Law § 27-a(3)(a)(1) encompasses physical and environmental hazards in the workplace, not the use to which a room is put." The dissenters argued that "the routine practice of detaining prisoners in a locker room containing firearms presented a 'recognized' hazard within the meaning of Labor Law § 27-a."

No. 56 For appellant McCormick: Susan J. Levy, Manhattan (212) 962-1965  
For respondent City: Assistant Corporation Counsel Julie Steiner (212) 788-1051

No. 13 For appellant Williams et al: Richard A. Dienst, Manhattan (212) 406-1700  
For respondent City: Assistant Corporation Counsel Barry P. Schwartz (212) 788-1073

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To be argued Tuesday, March 30, 2004

## **No. 46 Hanford v Plaza Packaging Corp.**

In February 1996, Denise Hanford was working for the Plaza Packaging Corp. in the Bronx when one of her supervisors, Morton Landowne, attempted to videotape her in the women's dressing room of the company gym. She discovered the video camera, wrapped in a towel, as she was preparing to take a shower and she confronted Landowne. He eventually admitted his responsibility, apologized and gave her the tape.

Hanford quit her job shortly after the incident and applied for workers' compensation benefits, claiming psychological injuries. In April 1997, the Workers' Compensation Board concluded she had suffered accidental injuries as a result of the videotaping incident and awarded her benefits of \$250 per week over a period of six months. Hanford then brought this suit against Landowne for intentional infliction of emotional distress.

Supreme Court dismissed her suit, ruling it was precluded by the Workers' Compensation Law (WCL). Although the commission of an intentional tort by an employer or fellow worker gives an injured employee the initial option of suing for civil damages or obtaining workers' compensation benefits, the judge said, workers' compensation became Hanford's sole remedy once she applied for and was awarded benefits.

The Appellate Division, First Department affirmed in a 3-2 decision. The majority said that once the Workers' Compensation Board determined Hanford's injury was accidental, she was barred from bringing an intentional tort claim by the doctrine of *res judicata*, which prohibits relitigation of a claim that has been decided by a prior judgment. The dissenters argued that Landowne was not entitled to the protection of the WCL's exclusivity provision because his conduct was intentional and was not within the scope of his employment. They also argued that "*res judicata* logically ought not bar the present action when the finding of accidental causation had applied to the employer rather than to the" intentional conduct of Landowne, "whose liability is predicated on a completely different legal theory."

For appellant Hanford: Alexander J. Wulwick, Manhattan (212) 732-6566

For respondent Landowne: Daniel P. Lund, Manhattan (212) 584-4990

# *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, March 30, 2004

## **No. 57 Matter of Wilson v McGlinchey**

Brian and Linda McGlinchey are the maternal grandparents of Sarah Wilson, who was born in June 1999. They had been estranged from their daughter Carol Wilson, the child's mother, and petitioned Rensselaer County Family Court for an order of grandparental visitation when Sarah was four months old. Carol and her husband, Steven Wilson, initially opposed the petition, but they ultimately agreed to a stipulation of settlement which gave the grandparents a minimum of eight hours of visitation with Sarah each month and required the Wilsons and McGlinchey to attend family counseling.

The parents failed to attend counseling sessions and did not allow the grandparents their full eight hours of visitation. They limited the grandparents' meetings with Sarah to two rooms of the parents' home, where they surreptitiously videotaped the visits and interfered with some of them by removing Sarah from the room or distracting her, among other things. In March 2001, the parents petitioned to terminate the visitation, alleging that a change in circumstances warranted vacating the order. The grandparents cross-petitioned for visitation with Sarah's younger sister, Samantha, who was born in November 2000.

Family Court dismissed the parents' petition after three days of hearings, finding the parents failed to show there had been a substantial change in circumstances and, because of that change, the order no longer served the best interests of the child, as required by the Family Court Act. "Carol Wilson made it very clear that she would never reconcile with her parents. It is clear to the Court that her feelings have not changed from the date the grandparents filed their first petition in this Court," the judge said. "Clearly, [the Wilsons] acted in bad faith when they entered into the order. However, the fact that they never had any intentions of complying with the full extent of the order ... cannot be the only basis upon which to terminate the order of visitation." However, the judge denied the grandparents' petition for visitation with Samantha, finding that "the level of animosity between the parties, coupled with the obvious and extreme dysfunction in this family, mitigates against an award of visitation with Samantha at this time."

The Appellate Division, Third Department reversed on the parents' appeal and vacated the visitation order, saying the parents "have demonstrated such a change in circumstances reflecting that [the grandparents'] visitation with Sarah is not in her best interest. In our view, the finding of Family Court – that 'the level of animosity between the parties, coupled with the obvious and extreme dysfunction in this family, mitigates against an award of visitation with Samantha' – is equally true with respect to Sarah." The court said, "Although animosity between the parties cannot alone provide the basis for denying visitation, the relations between these adults are such that they have been, and in all likelihood will continue to be, incapable of preventing their feelings toward one another from infecting any visitation."

For appellant McGlinchey: Michelle I. Benoit, Albany (518) 432-1245  
For respondent Wilson: William V. O'Leary, Albany (518) 463-9284

# *State of New York Court of Appeals*

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To be argued Wednesday, March 31, 2004

**No. 49 Bower Associates v Town of Pleasant Valley**

**No. 50 Home Depot, U.S.A., Inc. v Dunn**

In these appeals, a housing developer and the Home Depot chain are asking the Court to reinstate civil rights actions under 42 USC § 1983, contending that municipalities violated their right to due process and other rights by denying approval of development projects. The Appellate Division, Second Department dismissed both lawsuits, ruling the plaintiffs did not have a constitutionally protected property interest in the approval of their projects.

In No. 49, Bower Associates sought to build a housing development on 92 acres in Dutchess County, including 89 acres in the Town of Poughkeepsie and 3 acres in the Town of Pleasant Valley. Plans for the Pleasant Valley portion included an access road for the subdivision. The Town of Poughkeepsie approved its part of the project in 1999, but on condition that Pleasant Valley approve the access road. Pleasant Valley denied Bower's application based largely on concerns about the subdivision in Poughkeepsie. When Bower challenged the denial in an article 78 proceeding, Supreme Court ordered Pleasant Valley to approve the project, saying the Town's denial was impermissibly based on its dissatisfaction with the Poughkeepsie subdivision. The Appellate Division affirmed, saying Bower "met all the conditions needed for approval of its subdivision application ...."

Bower then brought this civil rights action seeking \$2 million in damages against Pleasant Valley, claiming the Town had deprived it of a protected property interest in the housing development. Supreme Court refused to dismiss the suit, saying that although Pleasant Valley had "much discretion" in reviewing the project within its borders, it had improperly based its decision on the related project in Poughkeepsie. The Appellate Division reversed and dismissed the suit. It ruled Bower was not deprived of a property interest in the subdivision permit because, until the courts ruled in its favor in the article 78 proceeding, the Town had discretion to grant or deny the permit.

In No. 50, Home Depot signed a contract to purchase property in the Village of Port Chester in 1992 and applied for permits to build a store. In 1994, the neighboring City of Rye successfully challenged Port Chester's initial site plan approval on environmental grounds and then sought a number of traffic mitigation measures, which included widening Midland Avenue in Rye. Port Chester agreed to require Home Depot to widen Midland Avenue, but rejected the other measures, and Rye's court challenge to the plan was rejected. However, Rye refused to approve Home Depot's permit application for the Midland road work in 1997. Home Depot sued and Supreme Court ultimately ruled that Rye's refusal had been arbitrary and capricious, but the corporation's site plan approval expired a month later and it was required to begin a third environmental review. Port Chester again approved the project – without widening Midland Avenue – and the new store opened in 2000.

Home Depot brought this 42 USC § 1983 action seeking \$50 million in compensatory damages against the City of Rye and punitive damages against Mayor Edward Dunn and members of the City Council. Supreme Court ruled the defendants were liable, finding that Home Depot "had a clear entitlement" to approval of the Midland Avenue permit and that the defendants' refusal was a gross abuse of authority. The Appellate Division reversed and dismissed the suit, holding that Home Depot "failed to raise a triable issue of fact that it had a clearly established right to approval" of the permit and ruling the defendants had qualified immunity.

No. 49 For appellant Bower: Andrew W. Gilchrist, Albany (518) 463-3990

For respondent Pleasant Valley: Brendan T. Fitzpatrick, Albertson (516) 294-5433

No. 50 For appellant Home Depot: Philip M. Halpern, White Plains (914) 684-6800

For respondent City of Rye: Robert Hermann, White Plains (914) 421-4100

For respondent Dunn: William P. Harrington, White Plains (914) 949-2700

# *State of New York Court of Appeals*

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To be argued Wednesday, March 31, 2004

## **No. 47 Headriver, LLC v Town Board of the Town of Riverhead**

Headriver, LLC applied to the Town of Riverhead in 2001 for a special use permit to open a Lowe's Home Improvement Center on Route 58. When the Suffolk County Planning Commission recommended denying the application, the five-member Town Board was required by General Municipal Law § 239-m(5) to muster a vote of a majority plus one (i.e., a vote of four to one) to override the recommendation and approve the permit. In February 2002, the Town Board voted by a simple majority of three to two in favor of the application, falling one vote short of approving it.

Headriver then brought this article 78 proceeding to challenge the Town Board's determination as arbitrary and capricious. The Board moved to dismiss, arguing in part that Headriver failed to join the County Planning Commission as a necessary party to the suit. Supreme Court denied the motion, saying the Planning Commission's decision was not binding or final and therefore was not subject to judicial review. Accordingly, the court said, Headriver was not required to join the Commission as a necessary party.

The Appellate Division, Second Department affirmed in a 3-1 decision. The majority said the Planning Commission's decision "was merely an advisory recommendation capable of being rejected by a vote of a majority plus one of the [Town Board's] members. Therefore, it is not subject to review pursuant to CPLR article 78. Rather, the [Town Board], which issued the resolution challenged by [Headriver], is the proper party to the proceeding."

The dissenting judge said, "The problem with this analysis is that the Town Board never rendered a 'decision' denying the petitioner's application. A simple majority of the Town Board voted to grant the application and its resolution sets forth reasons supporting the view of the simple majority." The dissenter contended Headriver's petition should be dismissed because of its failure to include the Planning Commission in the suit, arguing that the permit had been denied by operation of law based on the Commission's recommendation. "When the recommendation of the Planning Commission has final and binding effect, it is subject to judicial review," she said.

For appellant Town Board: Frank Isler, Riverhead (631) 727-4100

For respondent Headriver: Linda U. Margolin, Islandia (631) 234-8585

# *State of New York Court of Appeals*

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To be argued Wednesday, March 31, 2004

## **No. 60 People v Michael Wheeler**

Michael Wheeler was arrested in November 1993, when three Warrant Squad officers from the New York City Department of Probation executed an arrest warrant for his brother-in-law, Gerald Pettigrew, in an apartment on Hunterfly Place in Brooklyn. Finding Pettigrew asleep in the living room with Wheeler and his brother, Eric Wheeler, the officers first approached Pettigrew, woke him and ordered him to show his hands. When he complied, they spotted a loaded automatic handgun and a knife on the floor next to him. The officers then approached Eric Wheeler, ordered him to show his hands, and discovered a loaded automatic handgun and cash on the floor near his head. After arresting and handcuffing the first two men, the officers turned to Michael Wheeler, who was sitting on his hands on the couch, fidgeting and asking what the officers were doing. When the officers ordered him to move and show his hands, they spotted the butt of a loaded 9-millimeter Luger beneath his thigh. He denied the gun was his as he was arrested. Michael Wheeler was convicted of criminal possession of a weapon in the third degree and sentenced to six months in jail, which he has served.

Wheeler contended the Luger and his statement denying possession of the gun should be suppressed as the result of an illegal search and seizure, arguing that the officers had a warrant only for the arrest of Pettigrew and should have left the apartment once they had him handcuffed. The trial court denied the motion based, in part, on the protective sweep doctrine that was adopted by the U.S. Supreme Court in Maryland v Buie (494 US 325) in 1990. The Supreme Court said a protective sweep, conducted incident to a lawful arrest, is “narrowly confined to a cursory visual inspection of those places in which a person might be hiding.”

The trial court found that “the actions taken by the [arresting officer] were reasonable under the circumstances; he had found a sum of currency, weapons on the persons who had been placed under arrest and had to take measures to protect himself. And it is similar to a protective sweep. So ... the Court finds the police officer’s actions to be reasonable and related to the scope of the dangers he was facing.” The Appellate Division, Second Department affirmed.

Wheeler contends the protective sweep doctrine does not apply to his case because the doctrine allows a “limited search of premises,” not persons, and according to the language of Buie the search “may last no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” He argues, “Because appellant was in plain view of the officers and posed no hidden threat to them, the officer’s gunpoint order that he move, shift his position, and show his hands was not a constitutionally permissible protective sweep as defined by the United States Supreme Court.”

For appellant Wheeler: Jessica A. Golden, Manhattan (212) 336-2000

For respondent: Brooklyn Assistant District Attorney Jane S. Meyers (718) 250-2000

# *State of New York Court of Appeals*

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To be argued Thursday, April 1, 2004

**No. 62 Matter of Robert J.**

**No. 63 Matter of Kareem R.**

The primary issue in these appeals is whether the Family Court Act allows juvenile delinquents to be placed in custody for a period extending beyond their 18<sup>th</sup> birthday without their consent. The Appellate Division, Second Department said it does.

In No. 62, Brooklyn Family Court adjudicated 15-year-old Robert J. a juvenile delinquent and placed him on probation for 18 months in March 2001, based on a finding that he had committed an act (possession of a loaded revolver) equivalent to criminal possession of a weapon in the third degree. In April 2002, after finding that Robert had violated his probation, Family Court placed him in custody of the State Office of Children and Family Services for 18 months, a term that would not expire before his 18<sup>th</sup> birthday.

In No. 63, Queens Family Court adjudicated 16-year-old Kareem R. a juvenile delinquent and placed him on probation for two years in January 2001, based on a finding that he had committed an act equivalent to criminal trespass in the third degree. In October 2002, five months after his 18<sup>th</sup> birthday, Family Court found that Kareem had violated probation and placed him in custody of OCFS for one year.

Both juveniles appealed based on Family Court Act § 355.3(6), which states, “Successive extensions of placement under this section may be granted, but no placement may be made or continued beyond the respondent’s eighteenth birthday without the child’s consent and in no event past the child’s twenty-first birthday.”

The Appellate Division rejected the appeals based on its 2002 decision in Matter of Jude F. (291 AD2d 165), which held that the age restriction does not apply to a juvenile delinquent’s initial placement in custody. It said the 18<sup>th</sup> birthday limit in section 355.3 applies only to “extensions of placement.” It said initial placements are governed by section 353.3, which “does not contain an age restriction for placement.”

Robert and Kareem argue that the “plain language” of section 355.3(6) – “no placement may be made or continued beyond the respondent’s eighteenth birthday” without consent – clearly applies to initial placements. They also contend the Appellate Division should have given deference to the view of OCFS, which had argued in Jude F. that the age limit in section 355.3(6) applies to initial as well as extended placements.

For appellants Robert J. and Kareem R.: Raymond E. Rogers, Manhattan (212) 420-6218

For respondent: Assistant Corporation Counsel Dona B. Morris (212) 788-1233

# *State of New York Court of Appeals*

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To be argued Thursday, April 1, 2004

## **No. 61 People v Clayton Stultz**

Clayton Stultz is serving 25 years to life in prison for the murder of Todd Biggins, who was shot to death in the Smith Street Park in Uniondale, Nassau County, in October 1993. Tracy Randleman, a park employee who was the only eyewitness to identify Stultz at trial, testified that she saw Stultz and another man pull out handguns as they walked past her toward Biggins, heard more than seven shots while she bent to shield her young daughter, then saw Biggins lying on the ground and the two assailants running away. A potential defense witness, Michelle Dolberry, told police in a sworn written statement and sworn videotaped statement that she witnessed the murder and that it was committed by a different man, Anthony Anderson. At the trial, however, Dolberry invoked her Fifth Amendment privilege against self-incrimination and refused to testify. Defense counsel did not attempt to introduce into evidence Dolberry's written or taped statements in place of her testimony.

Among other issues raised at the Appellate Division, Second Department, Stultz's appellate counsel argued the defendant was denied his right to a fair trial when the prosecution refused to grant immunity to Dolberry to overcome her claim of privilege, but did not argue that Stultz's trial attorney provided ineffective assistance when he failed to present Dolberry's sworn statements to the jury. The Appellate Division affirmed the conviction in 2001.

In 2002, new appellate counsel applied to the Second Department for a writ of error coram nobis to vacate the affirmance based, in part, on a claim that Stultz was denied effective assistance of appellate counsel on his direct appeal because the attorney did not argue that Stultz had been denied effective assistance of counsel at trial. The Appellate Division denied the application.

Stultz argues the application should be granted and he should be afforded a new direct appeal in which to raise the omitted claims. "The plain record shows that the defendant's right to present a defense was eviscerated when his trial attorney failed to place in evidence the admissible sworn exculpatory statements of an unavailable eyewitness which explicitly identify another person by name as the murderer," he argues. "The plain record further shows that again on appeal the defendant did not have a meaningful day in court when his appellate counsel did not raise – in the Appellate Division or in a leave application to this Court – the clearly arguable claim that trial counsel had failed the defendant when he did not place the sworn exculpatory statements in evidence."

The prosecution argues neither his trial nor appellate counsel can be faulted because there was insufficient legal basis for introducing Dolberry's statements. Even if they were admissible, it argues, "defendant has not shown that [trial] counsel's failure to seek the introduction of this hearsay evidence was inconsistent with the conduct of a reasonably competent attorney, and that this alleged error was so serious or egregious as to have deprived defendant of a fair trial." It argues Stultz also failed to show "that appellate counsel's considered decision not to advance an ineffective-assistance-of-counsel claim ... was inconsistent with the conduct of a reasonably competent appellate attorney" and deprived him of meaningful representation.

For appellant Stultz: Norman A. Olch, Manhattan (212) 964-6171

For respondent: Nassau County Assistant District Attorney Edward Miller (516) 571-3800