State of New York Court of Appeals

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SEPTEMBER 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, September 7, 2004

No. 113 Nicholson v Scoppetta

This federal class action was brought against New York City and its Administration for Children's Services (ACS) on behalf of battered mothers whose children were removed from their custody (subclass A) and on behalf of the children themselves (subclass B). ACS based the removals on the theory that allowing children to witness domestic violence constitutes child neglect.

U.S. District Judge Jack B. Weinstein found that ACS "has systematically and repeatedly removed children of battered mothers for the reason that mothers 'engaged in' domestic violence by being victims of such violence." The judge issued a preliminary injunction to halt the practice, ruling that it violated the constitutional rights of the mothers and children to due process and to be free from unreasonable seizures. "The preliminary injunction can be summed up in plain language: the government may not penalize a mother, not otherwise unfit, who is battered by her partner, by separating her from her children; nor may children be separated from the mother, in effect visiting upon them the sins of their mother's batterer," he said.

The City appealed to the U.S. Court of Appeals for the Second Circuit, which is asking the New York State Court of Appeals to resolve three questions of New York law which lie at the heart of the case. First, the court asks whether the definition of a "neglected child" under the Family Court Act includes cases "in which the sole allegation of neglect is that the [caretaker parent] allows the child to witness domestic abuse against the caretaker?" It asks, "Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent ... constitute 'danger' or 'risk' to the child's 'life or health,' warranting removal under the statute?" Finally, the Second Circuit asks whether the fact that a child witnessed domestic abuse is, by itself, sufficient to show that removal is "necessary" or "in the child's best interests" under the Family Court Act, "or must the child protective agency offer additional, particularized evidence to justify removal?"

The City contends all three questions should be answered in its favor, arguing that an abused parent can be guilty of neglect if she "fails to take appropriate steps to protect her child from actual harm, or the risk thereof, resulting from witnessing the violence," and that the risk of emotional injury to the child can warrant summary removal. Regarding the third question, the City argues that while there is no presumption that a child should be removed, "The potential dangers from witnessing domestic violence are sufficiently well known that a court can infer risk to a child's life or health without expert testimony ...."

Nine amicus curiae briefs have been filed in the case.

For appellant City: Assistant Corporation Counsel Alan G. Krams (212) 788-1031
For respondent mothers: David J. Lansner: Manhattan (212) 349-0900
For respondent children: Judith Waksberg, Manhattan (212) 577-3641

State of New York Court of Appeals

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To be argued Tuesday, September 7, 2004

No. 82 Blue Cross and Blue Shield of New Jersey, Inc. v Philip Morris USA, Inc.

Empire HealthChoice, Inc. (Empire) was among 20 Blue Cross/Blue Shield plans that sued cigarette makers in federal court in 1998 to recover the costs of smoking-related health care they provided to their subscribers. The insurers claimed the tobacco companies had engaged in a scheme to deceive the public about the risks of tobacco use and, as a result, the insurers were required to pay increased costs for medical conditions that were caused or exacerbated by smoking.

A federal judge in Brooklyn directed Empire to proceed to trial alone in 2000, staying the other plans' claims until Empire's claims were resolved. The jury found six tobacco companies liable under a New York consumer protection statute, General Business Law § 349, and awarded Empire $17,782,702 in compensatory damages against Phillip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., Lorillard Tobacco Co., Liggett Group, Inc. and Liggett & Myers, Inc. The trial judge later awarded Empire nearly $38 million in attorneys' fees.

The tobacco companies appealed to the U.S. Court of Appeals for the Second Circuit, arguing that insurers could not recover under section 349 for injuries caused to their subscribers. The statute prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service ...." It also provides that "any person who has been injured by reason of any violation of this section may bring ... an action to recover his actual damages ...."

The Second Circuit is asking the New York Court of Appeals to resolve two key questions about section 349. Saying it is unclear how the phrase "by reason of" should be interpreted, the Second Circuit asks whether claims by a health insurer "to recover costs of services provided to subscribers as a result of those subscribers being harmed by a defendant's ... violation of [section 349 are] too remote to permit suit under that statute?" It also asks, "If such an action is not too remote to permit suit, is individualized proof of harm to subscribers required when a third party payer of health care costs seeks to recover costs of services provided to subscribers as a result of those subscribers being harmed by a defendant's" violation of the statute.

Amicus curiae briefs were filed by the New York Attorney General in support of Empire and by the Product Liability Advisory Council in support of the tobacco companies.

For appellant tobacco companies: Murray R. Garnick, Washington, D.C. (202) 942-5000
For respondent Empire: Paul J. Bschorr, Manhattan (212) 259-8000

State of New York Court of Appeals

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To be argued Tuesday, September 7, 2004

No. 114 Matter of Catherine G. v County of Essex

In August 2000, nine-year-old Brittany told her mother, Catherine G., that she had been touched sexually by her 14-year-old half-brother, Anthony. The mother reported the matter in early September to a psychologist for the Lake Placid Central School District, who referred Brittany to Crisis Center for Clinton, Essex and Franklin Counties for counseling. In October 2000, Catherine contacted Essex County Mental Health, which referred her to a private psychologist for treatment of Anthony.

In January 2001, Brittany and her eight-year-old sister, Melissa, disclosed that Anthony had subjected them both to repeated acts of sodomy and sexual intercourse for several months. Catherine moved the girls out of the house and called the police, who apparently obtained statements from Anthony and the girls recounting the sexual abuse.

In November 2001, Catherine sought to bring suit on behalf of her daughters against the School District, Essex County and each of the agencies and employees she had notified of Anthony's alleged molestation in 2000. She contended they were required by Social Services Law § 413 to file reports about Anthony to the Statewide Central Register of Child Abuse and Maltreatment and that, had they done so, the more severe abuse of 2001 could have been averted. Because the 90-day period for filing a notice of claim had expired more than ten months earlier, she sought and obtained approval from Supreme Court to file a late notice of claim on behalf of Brittany and Melissa.

The Appellate Division, Third Department upheld the late notice for Brittany, rejecting arguments by the School District and County that they could not be held liable for failing to report her allegation of abuse by Anthony in 2000. Section 413(1) requires certain individuals, including all defendants named in this case, to make a report to the Central Register "when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child ...." An "abused child" is defined as one who is less than 18 years old and "whose parent or other person legally responsible for his care" commits sexual offenses or allows such offences to be committed upon the child. The defendants argue the reporting requirement was not triggered because Anthony was not the parent of nor legally responsible for the care of Brittany or Melissa. The Appellate Division said, "A fair reading of the Social Services Law leads to the conclusion that it is the obligation of the Central Register," not mandated reporters, to determine whether a report of abuse is founded under the statute.

The court denied a late notice of claim for Melissa, finding the defendants could not be liable because Melissa was not the subject of any of her mother's molestation reports in 2000. "Indeed," it said, "Anthony's involvement with Melissa did not come to light until [Catherine's] report to the police in January 2001." Catherine argues the definition of an abused child "includes one who is in potential danger" and "if an eight-year-old girl is living in the same household as her nine-year-old sister who is being sexually abused by their older half-brother, the eight-year-old is in danger as well."

For appellant-respondent Catherine G.: Cornelius D. Murray, Albany (518) 462-5601
For respondent-appellant School District: James M. Brooks, Lake Placid (518) 523-1555
For respondent-appellant County: John Dutton Aspland, Glens Falls (518) 745-1400

State of New York Court of Appeals

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To be argued Tuesday, September 7, 2004 Papers sealed

No. 115 Sheehy v Clifford Chance Rogers & Wells, LLP

John H. Sheehy was a 57-year-old partner in the Manhattan law firm of Rogers & Wells in 1995, when he agreed to resign at the request of its executive committee. He brought this breach of contract action against the newly merged firm of Clifford Chance Rogers & Wells five years later, when it refused to begin paying him supplemental retirement payments (SRPs).

Under the Rogers & Wells Partnership Agreement and Retirement Plan in effect when Sheehy left the firm, SRPs were to be paid for life beginning in the fifth year after a partner's retirement, but were generally available only to partners who retired at age 65 or older. The Retirement Plan said SRPs "shall not be paid to a Partner who takes Early Retirement, except at the specific written request of the Executive Committee." Sheehy contends he had an oral agreement with the firm that, in exchange for his departure at the end of 1995, he would be deemed to have taken early retirement at the executive committee's specific written request and would be entitled to SRPs in addition to other benefits. In November 1995, the firm sent Sheehy a memorandum in which it calculated that his SRPs would be about $81,245 per year. When the first SRP became due in January 2000, Clifford Chance Rogers & Wells refused to pay it.

Supreme Court dismissed Sheehy's suit, ruling that his claimed oral agreement was barred by the language of the Partnership Agreement and also by the statute of frauds, since the agreement could not be fully performed within one year.

The Appellate Division, First Department reinstated his breach of contract claim in a 3-1 decision. The majority said an oral agreement to pay SRPs did not conflict with the plan provision that SRPs "shall not be paid to a Partner who takes Early Retirement, except at the specific written request of the Executive Committee." It said, "The phrase 'specific written request' refers to 'Early Retirement,' not the payment of SRPs, and thus the provision should be read as conveying the sentiment that SRPs shall not be paid to a partner who takes early retirement unless the early retirement was at the specific written request of the executive committee; the provision is silent as to whether a written agreement to pay SRPs is required."

It said the statute of frauds does not bar Sheehy's claim because "the alleged oral agreement was to change plaintiff's status from partner to early retirement ... with entitlement to SRPs" and that agreement "was fully performable within one year."

The dissenter said the provision is "clear and unambiguous" in requiring written authorization for payment of SRPs to an early retiree. Even if the majority's interpretation of the provision were correct, he said, the alleged oral agreement would be barred by the statute of frauds because "any agreement to pay SRPs at the end of four years would have been a separate agreement" from the grant of early retirement status and "would not be capable of being performed within one year ...."

For appellant law firm: H. Barry Vasios, Manhattan (212) 513-3200
For respondent Sheehy: Kenneth E. Warner, Manhattan (212) 593-8000

State of New York Court of Appeals

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To be argued Wednesday, September 8, 2004

No. 116 Carvel Corporation v Noonan

This federal case arose in the early 1990s, when Carvel Corporation began wholesaling its ice cream products to supermarkets. Prior to 1992, Carvel distributed its products solely through franchise agreements with owners of Carvel retail stores, who each produced fresh ice cream daily for sale at their stores. After Carvel began its supermarket distribution program, franchisees complained that it violated the terms and spirit of their franchise agreements and that Carvel used unfair and improper means to further its supermarket program at their expense.

In 1994, Carvel filed suit in the U. S. District Court for the District of Connecticut seeking a declaration that its distribution practices did not violate the franchise agreements, which are governed by New York law. Franchisees filed numerous counterclaims for intentional interference with prospective economic relations, breach of contract, and breach of the implied covenant of good faith and fair dealing, complaining Carvel's conduct had forced many franchise stores out of business. After District Court refused to dismiss most of the counterclaims against Carvel, juries in separate trials awarded a total of $439,599 in compensatory damages and $600,000 in punitive damages to the former owners of three Carvel franchises: John and Elizabeth Noonan of Woonsocket, R. I.; Peter Marsella of Pleasantville, N. J.; and Joseph Giampapa of Patterson, N. J.

Carvel appealed to the U. S. Court of Appeals for the Second Circuit, which is asking the New York Court of Appeals to resolve two questions of New York law:

Regarding intentional interference with prospective economic relations, the Second Circuit asks whether the evidence of Carvel's conduct satisfied the requirements for a tortious interference claim. The court says it is unclear whether New York would view a franchisor like Carvel as a competitor of its franchisees and unclear whether such a finding would require the franchisees to prove that Carvel acted "wrongfully," rather than meeting the less stringent standard of showing that Carvel acted improperly. It also says, "Although Carvel exerted economic pressure on its franchisees, it is unclear whether, under New York law, that pressure falls within the 'degrees' of pressure that constitute tortious conduct."

Regarding the punitive damages award, the Second Circuit asks, "Is public harm required for a punitive damages claim by a franchisee against its franchisor for tortious interference with the franchisee's prospective economic relations with its customers?"

For appellant Carvel: Mitchell A. Karlan, Manhattan (212) 351-4000
For respondent franchisees: J. Manly Parks, Philadelphia, Pa. (215) 979-1342

State of New York Court of Appeals

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To be argued Wednesday, September 8, 2004

No. 117 State of New York v Speonk Fuel, Inc.

Local Wrench Service Station, Inc. owned and operated a gas station in East Quogue, Suffolk County in 1985, when one of its five underground gas storage tanks failed a tightness test. The State removed the leaking tank and began a clean-up of the contamination in January 1986. Two months later, in March 1986, Speonk Fuel, Inc. bought the gas station and underground storage system from Local Wrench. Speonk's president, Thomas Mendenhall, bought the real property where the station was located.

On September 26, 1996, after completing a 10-year remediation project, the State commenced this action under Navigation Law article 12 to recover its clean-up costs, which totaled $554,363.93 plus interest. The statute provides, "Any person who had discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained." Local Wrench defaulted and the complaint against Mendenhall as landowner was dismissed, but Speonk Fuel was held liable as owner of the gasoline storage system. Supreme Court ultimately awarded the State $518,742.68, limiting its recovery to costs the State incurred within six years of the date it filed the suit.

The Appellate Division, Third Department affirmed, ruling that the six-year statute of limitations is triggered each time the State makes a payment for clean-up of a petroleum spill. The court rejected the State's argument that the limitations period begins to run with the last payment, which would have made all of its costs recoverable, and rejected Speonk's argument that it begins to run with the first payment, which would have made the entire action time-barred.

The Appellate Division ruled Speonk could not challenge the reasonableness of the State's clean-up costs because, "[a]s a discharger, Speonk is strictly liable to [the State] for 'all cleanup and removal costs and all direct and indirect damages.'" Speonk argues in its appeal that it is entitled to a hearing on the reasonableness of the costs under the discovery provisions of the Civil Practice Law and Rules. Speonk also argues it cannot be held liable as a discharger under the Navigation Law because the gasoline leak was discovered, the tank was removed and remediation was begun before it purchased the storage tanks.

For appellant Speonk Fuel: Nicholas J. Damadeo, Smithtown (631) 382-7900
For cross-appellant State: Assistant Solicitor General Edward Lindner (518) 474-9755

State of New York Court of Appeals

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To be argued Wednesday, September 8, 2004 Papers sealed

No. 119 Matter of Norman D. v Commissioner of the NYS Office of Mental Health

Norman D. (anonymous) was living in a trailer in Ulster County with his wife and children in April 1997, when he became enraged, assaulted his wife and set fire to a couch. His family escaped, but he had to be physically removed from the trailer. Ten months later, Ulster County Court accepted his plea of not responsible by reason of mental disease or defect.

After psychiatric examinations and a court hearing, County Court found that Norman D. suffered from a dangerous mental disorder and issued an initial commitment order placing him in custody of the Commissioner of the State Office of Mental Health for confinement at a secure psychiatric facility for six months. The finding of "dangerous mental disorder" placed Norman D. in the category of track one insanity acquittees, who are subject to the strictest level of supervision under the Criminal Procedure Law (CPL). Track two acquittees (who are found to be mentally ill, but not dangerous) are initially placed in non-secure facilities, and future proceedings concerning their retention and release are governed by civil provisions of the Mental Hygiene Law. For track one acquittees, CPL 330.20 requires a court order before they can be transferred to a non-secure facility or granted a furlough, conditional release or a discharge. It also allows district attorneys to object to such orders at a hearing.

In July 1998, Norman D. sought a rehearing and review of the initial commitment order, including his track one status. While that proceeding remained pending, the Commissioner of OMH applied in February 2001 for an order to transfer Norman D. to a non-secure facility on the ground that he no longer suffered from a dangerous mental condition. However, the Commissioner contended that insanity acquittees could not challenge their track status in a rehearing and review proceeding. Supreme Court agreed, ordering Norman D. transferred to a non-secure facility, but ruling that he would remain in track one subject to the CPL.

The Appellate Division, Second Department affirmed, holding that Norman D. remained subject to CPL 330.20 "despite the improvement in his condition." The statute permits insanity acquittees to obtain appellate review of their track status by appealing the initial commitment order, it said; rehearing and review proceedings are meant to determine whether there is an ongoing need for confinement of an acquittee, not to provide a substitute for appellate review. Norman D. argues, in part, that track placement may be challenged in a rehearing and review of an initial commitment order because determinations made in the proceeding "replace or supercede the determinations made in the original order," including the acquittee's mental condition.

For appellant Norman D.: Lisa Volpe, Mineola (516) 746-4373
For respondent Commissioner: Senior Counsel Peter H. Schiff (518) 474-3654 (AG's Office)

State of New York Court of Appeals

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To be argued Wednesday, September 8, 2004

No. 164 Matter of Gross v Albany County Board of Elections

This appeal focuses on the validity of absentee ballots cast in close races for two seats on the Albany County Legislature during a special general election held on April 27, 2004. The election, which ordinarily would have been conducted on November 4, 2003, was delayed by Voting Rights Act litigation over the Legislature's redistricting plan, so special primary and general elections for County Legislature were held pursuant to federal court order. For the March 2 primary, U.S. District Court directed the Albany County Board of Elections to send an absentee ballot to any voter who had filed an application for an absentee ballot for the 2003 primary or general election. However, for the April 27 general election, the court directed that the process for obtaining absentee ballots "shall be governed by Article 8 of the New York Election Law," which requires voters to file an application for an absentee ballot indicating the specific reason they would be absent from the county on the day of the election.

The Board of Elections did not comply with the order, but instead mailed absentee ballots for the April 27 general election to any voters who had applied for an absentee ballot for the 2003 election. In post-election litigation, Democratic candidates Richard A. Gross and Gene Messercola argued those absentee ballots should not be counted because applications submitted for the 2003 election were not valid for the special general election in 2004. Republican candidates William B. Hoblock and Lee R. Carman argued the ballots should be counted because the voters were entitled to rely on the Board of Elections and they should not be disenfranchised by the Board's error. Supreme Court ruled the absentee ballots were void.

The Appellate Division, Third Department affirmed in a 3-2 decision. The majority said, "The Board's conduct, which was in complete derogation of the federal order as well as all statutory authority ..., cannot be countenanced by a determination that the error was merely ministerial. While we are loathe to disenfranchise any qualified voters, we cannot condone this violation of both a court order and all statutory mandates. To hold otherwise would abrogate the purpose of the Election Law, which is to avoid fraud and illegality in the election process."

The dissenters observed that there was no evidence of "fraud or manipulation" in the absentee voting. "While we do not condone the error made by the Board in mailing absentee ballots for the special general election based on applications made the year before, rather than requiring new applications as contemplated by the federal order and Election Law article 8, we find it unacceptable and unjust to disenfranchise innocent voters who acted in understandable reliance on the Board's actions when they cast their votes utilizing absentee ballots sent to them by the Board," the dissenters said.

For appellants Hoblock and Carman: Paul DerOhannesian II, Albany (518) 465-6420
For respondents Gross and Messercola: A. Joshua Ehrlich, Albany (518) 334-1502

State of New York Court of Appeals

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To be argued Thursday, September 9, 2004 Papers sealed

No. 120 People v Kenneth H. Payne

In April 1998, Kenneth Payne and Curtis Cook were neighbors and longtime friends living on Shelter Island. A month earlier, Cook, 44 years old, had been arrested on charges of sexually abusing an 8-year-old local girl. Both men had been drinking on the night of April 27, when Payne said he called Cook and they argued. Payne testified that Cook threatened to kill him and to sexually assault his girlfriend and one of his daughters. Payne took a 12-gauge shotgun from his trailer, went next door to Cook's cabin and shot him in the stomach, killing him. Payne was charged with two counts of second-degree murder in what was believed to be Shelter Island's first murder case in 350 years.

A jury acquitted Payne of the intentional murder count, but found him guilty of depraved indifference murder in the second degree, finding that he engaged in conduct "evincing a depraved indifference to human life" which "created a grave risk of death." He was sentenced to 25 years to life in prison. The Appellate Division, Second Department affirmed, rejecting Payne's claims that his oral, written and videotaped statements should have been suppressed, that the jury should have been instructed on the defense of justification, and that there was insufficient evidence to support his conviction on the depraved indifference charge.

Payne's attorney argues, in part, that the evidence in this case could support only a theory of intentional murder because "no reasonable view of the evidence can support the theory that the shooting of the victim at point-blank range with a shotgun was reckless." Since Payne was acquitted of intentional murder, his conviction should be reversed, according to the brief. It describes the shooting as a "quintessential intentional attack with a powerful shotgun that appellant described as an 'elephant gun.' Clearly, there was not a semblance of depraved indifference murder."

The prosecution argues there was evidence for both murder theories. "Although the trial evidence supported a case for intentional murder, there was also sufficient evidence presented in the prosecution's case that both refuted the intent theory and supported a conviction for depraved indifference murder," according to its brief. "A reasonable view of the evidence established that defendant concluded that Cook posed an imminent threat against him and his family and, instead of dealing with this 'threat' reasonably, defendant loaded a shotgun, went to Cook's home to confront him, and then recklessly shot him."

Payne filed a pro se brief.

For appellant Payne: Robert B. Kenney, Riverhead (631) 852-1660
For respondent: Suffolk County Assistant District Attorney Steven A. Hovani (631) 852-2500

State of New York Court of Appeals

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To be argued Thursday, September 9, 2004

No. 121 People v Michael Henriquez

In March 1994, Michael Henriquez carried his infant daughter up to a police officer in the Bronx and said he had just killed his wife. He later explained in oral, written and videotaped statements that he had returned to his apartment on the Grand Concourse at about 3 p.m. and caught his wife in a compromising position with another man. Henriquez went to a closet to get his .22 caliber automatic, he said in the written statement. "The guy brushed by me while I was at the closet and ran out the door. I turned towards her with the gun, loading the gun with the clip, and she yells to me: I got the baby, I got the baby. She was getting up off the bed .... I pushed the baby to the side and she fell to the bed. And I point the gun at my wife and pulled the trigger. I don't know how many shots there were. There were a lot. I grabbed my coat and little girl and left."

After jury selection was complete, Henriquez ordered his attorney to "do nothing." The attorney told the trial judge that "he is directing me not to cross-examine any witnesses, not to object to any line of questioning ... – to go even further, not to approach the bench, not to participate in any bench conferences or side bars, not to have any defense in this case, not to call any witnesses, not to sum up, not to do anything. He has indicated to me he just wants me to sit here and do nothing." Henriquez confirmed this decision, despite repeated warnings from the judge. Because Henriquez said he did not want to represent himself, the judge refused to relieve his attorney, but the defender followed his client's orders and did nothing to contest the prosecution's case.

Henriquez was convicted of second degree murder, criminal possession of a weapon and endangering the welfare of a child and was sentenced to 25 years to life. The Appellate Division, Second Department affirmed, saying, "Defendant, who chose not to represent himself, but also insisted, despite the court's extensive warnings and efforts to persuade him to change his mind, that his attorney do nothing to defend him, is solely responsible for the manner in which his trial was conducted, and both his attorney and the court acted properly in all respects." The court said Henriquez "knowingly, intelligently and voluntarily waived" his trial rights.

The defendant's appellate attorney argues that trial counsel is responsible for deciding how trial rights should be exercised and that Henriquez is entitled to a new trial because his trial attorney provided ineffective assistance of counsel by following his orders. "Because appellant neither waived nor forfeited his right to counsel, appellant was denied his Sixth Amendment right ... to the effective assistance of counsel by counsel's failure, despite his better judgment, to make opening or closing arguments, cross-examine witnesses, make any objections or motions, or, in general, to do anything to defend appellant – all of which undermined the reliability of the trial process by which appellant's convictions were obtained."

Henriquez filed a pro se brief.

For appellant Henriquez: Allen Fallek, Manhattan (212) 440-4310
For respondent: Bronx DA Chief Appellate Attorney Peter D. Coddington (718) 590-6640

State of New York Court of Appeals

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To be argued Thursday, September 9, 2004

No. 122 People v Ana Marie Santi
No. 123 People v Peter Corines

Ana Marie Santi, a trained anesthesiologist, was barred from practicing medicine in March 1998, when the State Department of Health summarily suspended her license. She continued to work under the title of "medical assistant" in a Queens surgical clinic owned and operated by Dr. Peter Corines for the rest of 1998 and into 1999, when both defendants were indicted on four felony counts of unauthorized practice of medicine under Education Law § 6512(1). Santi was accused of administering anesthesia to patients on four occasions while her license was suspended. Corines was charged with aiding and abetting Santi's illegal practice of medicine by allowing her to administer anesthesia when he knew she was unlicensed.

The defendants conceded at trial that Santi's license was suspended and that Corines knew it, but they contended Santi merely prepared the patients by inserting intravenous lines with a glucose saline solution, which a medical assistant is permitted to do. They said Corines would then administer the anesthesia by injecting it into the IV line. The prosecution called as witnesses three patients, who testified to the "classic symptoms" of anesthesia they experienced when only Santi was present. Both defendants were convicted on all counts and were sentenced to five year terms of probation.

Corines moved to set aside the verdict and dismiss the indictment against him. He argued that, as a properly licensed physician, he could not be prosecuted for aiding and abetting an unlicensed practitioner under Education Law § 6512(1), which reads: "Anyone not authorized to practice under this title who practices or offers to practice or holds himself out as being able to practice in any profession in which a license is a prerequisite to the practice of the acts, or who practices any profession as an exempt person during the time when his professional license is suspended, revoked or annulled, or who aids or abets an unlicensed person to practice a profession ... shall be guilty of a class E felony." Corines argued that, in an aiding and abetting case, the statute imposes criminal liability only on "Anyone not authorized to practice ... who aids or abets an unlicensed person to practice a profession." The trial judge denied the motion, ruling the statute should be construed to apply to "Anyone ... who aids or abets an unlicensed person to practice a profession."

The Appellate Division, Second Department affirmed the convictions, rejecting claims of both defendants that they were entitled to a new trial due to alleged misconduct by a juror who worked as a nurse and to the trial judge's failure to respond directly to a note from the jury asking whether Santi was "permitted to introduce an IV to a patient," among other issues.

For appellant Santi: Lynn W. L. Fahey, Manhattan (212) 693-0085
For appellant Corines: Mark M. Baker, Manhattan (212) 750-7800
For respondent: Assistant Attorney General Laurie M. Israel (212) 416-8370

State of New York Court of Appeals

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To be argued Thursday, September 9, 2004

No. 124 People v Rene Valencia

Rene Valencia was arrested in the Bronx in May 1999 after selling heroin to an undercover officer at 140th Street and Grand Avenue – within 1,000 feet of a school. He pled guilty to a felony charge of selling a controlled substance in or near school grounds under an agreement that, if he completed a long term drug treatment program, he would be allowed to plead guilty to a misdemeanor drug possession charge in place of the felony plea and would be released. The judge warned Valencia that "if you commit any further crime or should you leave treatment before you have finished treatment," he would be sentenced to five to ten years in prison.

Valencia left four successive treatment programs in 2000 without completing any of them. He offered various reasons, including a lack of Spanish interpreters, an accidental injury to his hand and an altercation with another resident. He left the fourth program to attend his father's funeral in October 2000. He said the program refused to readmit him when he returned the next day, telling him to "wait to hear from the court." He was arrested on a bench warrant two months later at his home.

At a court conference to determine whether Valencia would be given another chance for treatment or be sent to prison, the prosecutor said he would not be allowed to re-enter treatment and asked that he be sentenced as provided in the plea agreement. Valencia denied that he violated the treatment program's rules and asked for an evidentiary hearing to resolve factual disputes about his conduct.

The judge denied the hearing request, determined Valencia had violated the terms of his plea agreement, and sentenced him to five to ten years. The Appellate Division, First Department affirmed, saying the lower court had made "sufficient inquiry." Valencia argues that he "was not properly terminated from [the treatment program] and that the imposition of the prison sentence without a prior hearing and findings supporting that determination violated appellant's right to due process in sentencing."

For appellant Valencia: Kerry Elgartin, Manhattan (212) 440-4310
For respondent: Bronx Assistant District Attorney Jonathan Zucker (718) 590-2156

State of New York Court of Appeals

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To be argued Monday, September 13, 2004

No. 125 Matter of Bauer v State Commission on Judicial Conduct

Henry R. Bauer, a City Court judge in Troy since 1994, is asking the Court to reject a determination of the State Commission on Judicial Conduct that he be removed from office for misconduct in 38 cases from 2000 to 2002 that "demonstrated a pattern of disregarding basic, fundamental rights of defendants." The Commission found he repeatedly ignored rights to counsel, set excessive bail of $20,000 to $50,000, and coerced pleas on such charges as loitering, trespassing and harassment; motor vehicle, bicycle and open container violations; and petit larceny, marijuana possession and disorderly conduct.

The Commission said Bauer "ignored well-established law requiring judges to advise defendants of the right to counsel and to take affirmative action to effectuate that right. In numerous cases he set exorbitant, punitive bail for defendants charged with misdemeanors and violations, even where incarceration was not an authorized sentence. He coerced guilty pleas from incarcerated, unrepresented defendants who, if they refused to accept [his] plea offer, faced continued incarceration because of the unreasonably high bail he had set. He imposed illegal sentences in four marijuana cases, and on two separate occasions he convicted an incarcerated defendant in the defendant's absence by announcing that the case was 'a plea and time served,' although the defendant had not pled guilty. [His] failure to recognize the impropriety of his procedures compounds his misconduct and suggests that defendants in his court will continue to be at great risk."

The Commission split on the question of sanction, with six members voting for removal and three for censure. One dissenter said Bauer "did not demean or disparage defendants and there is no indication that he presumed their guilt or elicited incriminating admissions at arraignment.... I believe that he will adjust his practices as guided by our determination." Another said, "In carrying out his duties, [Bauer] has not demonstrated that he acted with malicious intent, but acted with misguided zeal in protecting his community."

Bauer argues his conduct in the setting of bail and assignment of counsel involved appropriate exercise of judicial discretion and "both have review procedures within the Criminal Procedure Law, none of which were ever implemented, used or utilized in the cases which form the basis of the Commission's complaint." Bauer contends he "has been, according to the testimony of all those who testified on his behalf, a zealous guardian of the rights of those who appear before him. He is always courteous and punctiliously polite, a fact which was acknowledged even by counsel for the Commission in the oral argument which took place in New York City in open forum." He also argues that, even if the finding of misconduct is upheld, the sanction of removal is unjustified.

For petitioner Bauer: Robert P. Roche, Albany (518) 436-9370
For respondent Commission: Robert H. Tembeckjian, Manhattan (212) 809-0566

State of New York Court of Appeals

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To be argued Monday, September 13, 2004

No. 128 Kazakhstan Investment Fund Limited v Manolovici

Kazakhstan Investment Fund Limited (KIF) was incorporated in the Cayman Islands in 1996 to make investments in the former Soviet Republic of Kazakhstan. Gerard Manolovici, a fund manager with expertise in emerging markets, served as a member of KIF's board of directors and as the sole disinterested member of its investment committee. In 1997, KIF made major investments in three ventures – a cement company, a power company and a start-up hotel chain – that it says fared poorly. Manolovici resigned from his positions at KIF in 1999. KIF commenced this action against Manolovici in November 2001, seeking $21 million in damages for alleged breach of fiduciary duty and negligence in overseeing the investment manager who made the three unfortunate investments.

Supreme Court held that a three-year statute of limitations applied to the suit and dismissed it as time-barred, rejecting KIF's argument that it was entitled to a six-year limitations period under CPLR § 213(7). Section 213(7) applies to "an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith."

The court said, "Contrary to KIF's contention, its claims do not sound in corporate waste. KIF seeks to recover damages for Manolovici's alleged misconduct, which consists of Manolovici's violation of his duty of loyalty and care as a director and a member of the investment committee to discover and explore independently the potential risks involved with certain investments. Such claims for breach of fiduciary duty based on negligence are governed by a three year statute of limitations if monetary relief is sought and a six year statute of limitations if equitable relief is sought.... KIF seeks only to recover monetary relief, thus the three year statute of limitations applies." The Appellate Division, First Department affirmed.

KIF argues, in part, that section 213(7) was enacted to provide a uniform six-year limitations period "for <u>all</u> suits by corporations against directors." It argues, "While section 213(7) refers specifically to claims for 'waste or for an injury to property,' every conceivable claim by a corporation against a director alleges 'an injury to property,' i.e. damage to corporate assets. It is therefore a true statement that section 213(7) governs <u>all</u> suits by corporations against present and former directors."

For appellant KIF: Peretz Bronstein, Manhattan (212) 697-6484
For respondent Manolovici: Jonathan P. Graham, Washington, DC (202) 434-5000

State of New York Court of Appeals

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To be argued Monday, September 13, 2004

No. 136 People v Francisco Carranza

Francisco Carranza was already represented by the Legal Aid Society of Orange County on an unrelated assault charge when he became a suspect in the fatal stabbing of Jose Enriquez Cruz at a Newburgh bar on February 17, 2001. On February 22, after learning that Carranza had been arrested in Monticello, Legal Aid faxed a letter to the local State Police barracks and the Orange County District Attorney's Office at 12:29 p.m. informing them that Carranza was represented by counsel and directing that he not be questioned about the murder case. Legal Aid had not consulted with Carranza or his family about the new case nor received a court assignment to represent him on the murder. It did not notify the Newburgh Police Department.

Newburgh Detective Rolando Zapata said he was not aware of the Legal Aid letter when he went to Monticello to pick up Carranza on February 22. He advised Carranza of his Miranda rights at the Monticello police station at 4:48 p.m. and, after waiving his rights to be silent and to have counsel present, Carranza told the detective he had stabbed Cruz in self defense. After taking Carranza back to Newburgh, Zapata repeated the Miranda warnings at 6:45 p.m. and Carranza made additional oral and written statements about the stabbing.

County Court refused to suppress the statements, ruling there was no violation of Carranza's right to counsel. "The only issue is whether defendant was actually represented by counsel at the time the statements were made and therefore could not waive his rights in the absence of counsel," it said. "Prior to initiating the letter to the New York State Police and the District Attorney's Office, the Legal Aid Society did not speak to defendant or consult with any member of his family. They, in effect, undertook to represent defendant unilaterally. Contrary to defendant's argument, representation of defendant by the Legal Aid Society on a pending unrelated matter does not create an obligation to represent defendant on other matters, nor does it create an attorney/client relationship where it otherwise does not exist," the court said, citing People v Bing (76 NY2d 331). It also said that even if there were an attorney/client relationship, "the City of Newburgh Police Department was unaware of any representation and was not chargeable with that knowledge. Therefore, defendant was free to waive his right to an attorney in the manner in which he did."

Carranza was convicted of second-degree murder and sentenced to 25 years to life in prison. The Appellate Division, Second Department affirmed.

Among other issues, Carranza argues the questioning violated his right to counsel under People v Rogers (48 NY2d 167), which held, "Once an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel." He argues, "Counsel told police and the district attorney that his client should not be questioned and did so in a timely manner, hours before questioning took place. This is not a case of a third-party contacting an attorney for possible representation of a defendant. This is a situation where an attorney already representing a defendant in a criminal matter and with a legal, ethical and contractual duty as The Legal Aid Society to continue to represent him specifically invoked his client's right against self-incrimination."

For appellant Carranza: Mark Diamond, Manhattan (212) 889-0897
For respondent: Orange County Assistant District Attorney Daniel M. Reback (845) 291-2100

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To be argued Tuesday, September 14, 2004

No. 129 Forrest v Jewish Guild for the Blind

Paula Forrest, an African-American, was hired in 1985 as a music therapist by the Jewish Guild for the Blind in Manhattan. She took an educational leave in 1990 and returned to work at the Guild in 1991. In July 1994, the Guild granted her request for a three-month leave of absence to care for her father in Florida, contingent on her submitting medical documentation of his condition. On November 2, 1994, after what the Guild describes as a series of failed attempts to contact Forrest and after learning from her father that she had left his home several weeks earlier, the Guild sent a letter terminating her employment "due to job abandonment." The letter cited her failure to substantiate the nature of her father's illness and failure to notify the Guild that she was no longer assisting in his care. Two days later, the Guild received a letter from Forrest dated October 22, 1994, in which she resigned her job due to extenuating circumstances, including the need to care for her father. She also filed a complaint with the New York City Commission on Human Rights, contending she had been treated in a discriminatory manner since 1991.

Forrest brought this suit against the Guild, its director of personnel and her supervisors, claiming she had been subjected to racial discrimination and to retaliation for her discrimination complaints in violation of the State and City Human Rights Laws.

Supreme Court refused to dismiss her complaint, ruling that she had established a prima facie case of discrimination and that disputed issues of fact must be resolved at trial. "In addition to claims of egregiously inappropriate statements made by the individual defendants and the humiliation suffered during staff meetings, she alleges that she was transferred to other positions and given additional duties and responsibilities not assigned to other employees who were not African-American," the judge said. "The court cannot conclude that ... the allegations do not constitute racial discrimination as a matter of law. Whether or not the explanations offered by defendants for transferring plaintiff to different departments and changing her responsibilities are pretextual also cannot be determined as a matter of law ...."

The Appellate Division, First Department reversed and dismissed the suit, finding the defendants "have established a legitimate and nondiscriminatory basis for almost all of the conduct of which plaintiff complains...." It said, "Specifically, when we cull through plaintiff's claims in light of the evidentiary submissions, it becomes apparent that ... many of plaintiff's allegations are unsupported by, or actually disproved by, evidentiary materials," and that the alleged discriminatory conduct "was based upon legitimate and nondiscriminatory reasons, unrelated to any racial animus. In response, plaintiff offers nothing tending to show that the proffered nondiscriminatory explanations are pretextual. All that then remains of plaintiff's claims are the hotly disputed allegations of racial epithets, which are simply insufficient by themselves to support her claim of race discrimination."

Forrest argues, in part, that the Appellate Division erred in weighing evidence and assessing credibility on a summary judgment motion to resolve questions of fact that should have been left for a jury.

For appellant Forrest: William J. Sipser, Manhattan (212) 766-9100
For respondent Guild et al: Lauren Reiter Brody, Manhattan (212) 880-6000

State of New York
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To be argued Tuesday, September 14, 2004

No. 126 Covington v Walker

Rhonda Covington and Carlton Walker were married in May 1983 in Brooklyn. Walker was arrested for murder in January 1984. A year later, he was convicted of second degree murder and was sentenced to 25 years to life in prison. Covington was arrested in February 1985 for the same murder, charged as Walker's accomplice. She was convicted of second degree murder and sentenced to 20 years to life. Walker and Covington have been continuously incarcerated since their arrests.

Covington filed this action for divorce in April 2000 based on Domestic Relations Law § 170(3), which provides that a husband or wife may seek a divorce due to "the confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant."

Walker opposed the action, relying in part on the statute of limitations. Domestic Relations Law § 210 provides that no action for divorce can be maintained on a ground which "arose more than five years before the date of the commencement" of the action.

Supreme Court dismissed the suit as time-barred, rejecting Covington's argument that the limitations period runs from the date of the defendant spouse's release from prison. The court said that "the imprisonment ground for divorce arises once the defendant spouse has been incarcerated for three (3) years" and that, "unless the divorce action is commenced by the time the defendant has been incarcerated for eight (8) years, the statute of limitations may be properly asserted as a defense."

The Appellate Division, Second Department affirmed on a 3-2 vote, holding the statute of limitations expired eight years after Walker was jailed in 1984. The majority said, "Contrary to the plaintiff's contention, the failure of the Legislature to exempt the imprisonment ground from the operation of the statute of limitations was not a matter of oversight since the statutory framework does provide such exemption for the abandonment and adultery grounds." It said, "Moreover, 'it is a fundamental canon of statutory construction' that courts not judicially legislate an exception to an otherwise unambiguous statute, even to mitigate a potentially harsh result."

The dissenters argued the statutes were ambiguous because the phrase "three or more" years in section 170 "could be interpreted as meaning that the imprisonment ground is a continuing ground which terminates upon the imprisoned person's release from prison." They said, "It is difficult to believe ... the Legislature intended that the unimprisoned spouse must forego hope of release of the imprisoned spouse and file an action for divorce at the eight year point in order to avoid the permanent loss of any ground for divorce. In my opinion, a more logical interpretation would be that the long parted spouses would have at least five years after the imprisoned spouse's release to determine whether the relationship is still viable."

For appellant Covington: Philip M. Genty, Manhattan (212) 854-3123
For respondent Walker: Alan J. Pierce, Syracuse (315) 471-3151

State of New York Court of Appeals

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To be argued Tuesday, September 14, 2004

No. 131 Bonnette v Long Island College Hospital

Tanya Bonnette brought this medical malpractice suit on behalf of her daughter, Majhan Wiggins, against Long Island College Hospital (LICH), Dr. Richard Thomas Bergeron and other defendants for alleged negligence in failing to diagnose and treat the child's brain tumor over a period of more than six years. Other defendants settled claims against them for $950,000.

Shortly before the trial was scheduled to begin in 1998, Bonnette agreed to settle her claims against LICH for $3 million and to discontinue the action against Bergeron. LICH designated the Pension Company to prepare a structured annuity contract and, after Bonnette approved it, LICH funded the settlement by paying the cost of the annuity contract to the Pension Company in March 2000. Attorneys executed closing documents needed for the settlement but, as they awaited the required infant compromise order from Supreme Court, Majhan suffered a seizure and died in July 2000. In December 2000, LICH notified Bonnette that the hospital's insurance carriers "have determined that, pursuant to CPLR 2104, the alleged settlement in [this case] has not been appropriately entered into and consequently the carriers take the position that there has been no settlement of this matter."

CPLR 2104 says, "An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in writing subscribed by him or his attorney or reduced to the form of an order and entered."

Supreme Court granted Bonnette's motion to enforce the settlement and directed LICH to pay her the full amount of $3 million.

The Appellate Division, Second Department reversed the order and denied enforcement of the settlement in a 3-1 decision, saying, "Although the parties agreed in principle to settle this action, the terms of that settlement were not made definite and complete in open court, nor was there a definite agreement in writing enforceable pursuant to CPLR 2104.... Moreover, the sudden death of the plaintiff's decedent before a structured settlement was finalized and reduced to a signed writing altered the status quo and impacted upon the future damages payable under the proposed structured settlement. The [defendants] were thus within their rights to withhold final consent to the settlement before their contractual obligations became fixed."

The dissenter said, "'The parties' failure to rigidly adhere to the technical requirements of CPLR 2104' does not prevent a court from enforcing the terms of a stipulation under all circumstances ... where, as here, there is no dispute between the parties as to the terms of the agreement...." She said, "In this case, the action was removed from the trial calendar. The parties had in fact agreed upon a 'definite and complete' settlement .... which was funded by LICH. Stipulations of discontinuance and waiver of rights pursuant to CPLR 5003-a were executed and the stipulation discontinuing the action against Bergeron was so-ordered by the Supreme Court and filed with the County Clerk. The [defendants] were 'waiting for the Compromise Order' which was the final step before consummation of the settlement. In view of the foregoing, the Supreme Court's enforcement of the stipulation was proper."

For appellant Bonnette: Thomas Torto, Manhattan (212) 532-5881
For respondent LICH and Bergeron: Edward J. Guardaro, White Plains (914) 448-0200

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To be argued Tuesday, September 14, 2004

No. 132 Miceli v State Farm Mutual Automobile Insurance Company

This insurance case arose in November 1995, when Mary Miceli was injured in a collision with a Jeep Cherokee driven by Paul Bresciani in the Village of Williamsville, Erie County. The Jeep was owned by Bresciani's girlfriend, Valerie Haywood, and he was allegedly driving it without her permission. Bresciani was also being chased at high speed by Orchard Park police, who believed the Jeep was stolen.

In 1996, Miceli filed a personal injury suit against Bresciani and Haywood. Bresciani's insurer, State Farm Mutual Automobile Insurance Company, sent Bresciani a letter disclaiming coverage on the ground that the Jeep he was driving was not covered by his policy. The policy provided that "liability coverage extends to the use, by an insured, of a newly acquired car, a temporary substitute car or a non-owned car" but, in defining a "non-owned car," it said, "The use has to be within the scope of consent of the owner or person in lawful possession." State Farm did not notify Miceli of its disclaimer.

In 1998, Miceli commenced this action against State Farm for a declaration that the policy it issued to Bresciani covered the injuries she suffered in the accident. Miceli moved for summary judgment, arguing State Farm was obligated to provide coverage because it failed to notify her of its disclaimer pursuant to Insurance Law § 3420(d). Supreme Court granted the motion and declared State Farm must defend and indemnify Bresciani in the personal injury action.

The Appellate Division, Fourth Department affirmed, rejecting State Farm's argument that it was not required to notify Miceli under section 3420(d) because it denied coverage based on a lack of inclusion in the policy rather than a policy exclusion. The Appellate Division held that "State Farm's assertion that there is no coverage because the use of the vehicle by Bresciani was non-permissive is [] based on a policy exclusion."

For appellant State Farm: Stuart M. Bodoff, Uniondale (516) 357-3000
For respondent Miceli: Laurence D. Behr, Buffalo (716) 856-1300

State of New York
Court of Appeals

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To be argued Tuesday, September 14, 2004

No. 118 Pappas v His Eminence Archbishop Demetrios

This case arises from a dispute over the pension owed to former Archbishop Spyridon of the Greek Orthodox Archdiocese of America. In June 1999, the Executive Committee of the Archdiocese adopted a resolution to fully vest him in its retirement plan and in the Supplemental Bishops Pension Plan, which would have entitled him to pension benefits of about $112,000 per year. Two months later, in August 1999, Archbishop Spyridon resigned at the direction of the Holy Synod of the Ecumenical Patriarchate of Constantinople, the governing body of the Greek Orthodox Church, and the Holy Synod elected Archbishop Demetrios as his successor. Spyridon was placed into retirement when he refused a transfer to the Holy Metropolis of Chaldias, Turkey, and Ecumenical Patriarch Batholomew, the head of the worldwide Greek Orthodox Church, directed the Archdiocese of America to provide Spyridon with a lifetime allowance not to exceed $80,000 per year. Archbishop Demetrios complied with the order.

In July 2000, one day before his term on the Executive Committee expired, Harry J. Pappas commenced this action under Not-for-Profit Corporation Law § 720 to require Archbishop Demetrios to pay the higher pension benefit to former Archbishop Spyridon. In January 2001, the Executive Committee rescinded its 1999 vesting resolution for Spyridon on the ground that it had addressed "matters outside the powers and authorities of the Executive Committee."

Supreme Court dismissed Pappas's complaint, holding that he did not have standing or authority to commence the lawsuit under section 720 or the Religious Corporations Law. Under section 720, the judge said, "standing is only conferred where a corporation does not have members, where the suit is against a third party, and the suit is in favor of the corporation. This does not appear to be the case here." The judge also said Archbishop Demetrios was not a proper defendant and Pappas was not a proper plaintiff because it was former Archbishop Spyridon, not Pappas, who was aggrieved.

Pappas argues the decision would leave no one in a position "to hold the trustees, officers or directors of not-for-profit religious corporations accountable for their conduct as fiduciaries of their organizations ...." He contends Supreme Court "abrogated a statutory right granted by [section 720], which authorizes actions by a trustee/director for the benefit of the corporation against trustees, officers or directors and instead, created a new standard that deprives religious corporations of statutory tools of corporate governance available to other not-for-profit corporations."

For appellant Pappas: James A. Shifren, Manhattan (212) 806-5400
For respondent Archbishop: Glenn M. Kurtz, Manhattan (212) 819-8200