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.

WEEK OF FEBRUARY 10 - 12, 2015

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, February 10, 2015 (arguments begin at 2:30 p.m.)

No. 25 People v Benny Garay
No. 26 People v Lee Carr
No. 27 People v Walter Cates, Sr.

The defendants in these appeals argue they were deprived of their right to counsel when trial courts, in the absence of defense counsel, discharged a sick juror in Garay (No. 25) and held ex parte, untranscribed discussions with a key prosecution witness who claimed he was too sick to testify in Carr (No. 26) and Cates (No. 27).

Benny Garay and six others were charged in 2008 with cocaine trafficking at the Dyckman Houses in Manhattan. Nearly four weeks into Garay's joint trial with the alleged head of the drug ring, a juror called in sick. Supreme Court reported the matter to both defense attorneys and the prosecutor, then spoke with the juror off the record. Later in the day, when Garay's attorney was late in returning, the court said it had decided to replace the ill juror with an alternate. Counsel for the codefendant objected and said Garay's counsel joined in the objection, but the court said more jurors could be lost if the trial were delayed. Garay's counsel then entered the courtroom and the court seated the alternate juror. Garay, who had been jailed for 26 months, was convicted of fifth-degree drug possession and sentenced to time served.

The Appellate Division, First Department affirmed, saying Garay's "constitutional challenges to his attorney's momentary absence from a brief discussion ... about whether to replace an ill juror are unpreserved..., and we decline to review them in the interest of justice.... [T]he circumstances accorded counsel ample opportunity to preserve this issue." Alternatively, it rejected his claims on the merits.

Lee Carr and Walter Cates, Sr. were charged with fatally beating and strangling Matharr Cham in Cates' Bronx apartment in 2006. At their joint trial, the prosecution's only eyewitness failed to appear on the day he was to testify. After the jury was dismissed, detectives brought the witness to court and the judge spoke with him, off the record and in the absence of the defense attorneys, and ordered him to testify five days later. The witness appeared that day, but said he was unable to testify. The court spoke with him, off the record and without defense counsel, and reported that the witness said he had a migraine and denied that he was on drugs or alcohol. The court also disclosed its prior ex parte meeting with the witness. The witness testified the next day. Carr and Cates were convicted of second-degree murder and sentenced to 25 years to life.

The Appellate Division, First Department affirmed. Rejecting defense claims that the trial court's ex parte meetings with the witness violated their right to counsel, it said in Carr, "This inquiry was not a hearing, nor part of the trial, and it did not involve the determination of any issue requiring input from defendant or his counsel...."

All three appellants argue the trial judge in each case committed a mode of proceedings error requiring reversal regardless of whether the issue was preserved by objection. They say their defense attorneys were improperly excluded because the discharge of a sworn and seated juror, and an examination into a prosecution witness's mental and medical capacity to testify, are material stages of trial. Carr and Cates also argue they properly preserved their claims.

No. 25 For appellant Garay: Adam J. Bernstein, Manhattan (212) 373-3000
For respondent: Manhattan Assistant District Attorney Patricia Curran (212) 335-9000
No. 26 For appellant Carr: Amy Donner, Manhattan (212) 577-3487
No. 27 For appellant Cates: Bruce D. Austern, Manhattan (212) 577-2523 ext. 514
For respondent: Bronx Assistant District Attorney Melanie A. Sarver (718) 838-6280

State of New York Court of Appeals

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To be argued Tuesday, February 10, 2015 (arguments begin at 2:30 p.m.)

No. 28 Matter of Powers v St. John's University School of Law *(papers sealed)*

David Powers applied for admission to St. John's University School of Law in November 2005. In response to a question asking if he had "ever been charged with, pleaded guilty to, or been found guilty of any crime," he explained he had been arrested in New Jersey "shortly after a drug deal" in 1999, accepted a plea bargain for a sentence to probation and rehabilitation, and pled guilty to possession of a controlled dangerous substance. He certified on the application that he understood "the failure to provide truthful answers ... may result in denial of admission, dismissal, or rescission of an awarded degree." His criminal record had been expunged by court order two weeks earlier. St. John's admitted Powers and he enrolled for the Fall 2006 semester. After completing three semesters, Powers took a leave of absence and petitioned the Appellate Division for an advance ruling on his application for admission to the New York bar. During that process, St. John's officials learned he had originally been charged with distribution of LSD and possession of LSD and Ecstasy with intent to distribute, rather than simple possession. The law school required him to amend his application for admission to provide a full account of the criminal case, which he did, admitting he had "sometimes" sold drugs to others. St. John's rescinded his admission, noting that Powers' original application included "material omissions and misrepresentations" about the charges and that he acknowledged he had been charged with and was guilty of drug distribution. Powers brought this proceeding to challenge the decision.

Supreme Court dismissed the suit, finding that "St. John's actions were neither arbitrary nor capricious" and the school made a rational distinction "between applicants with a history of drug use and those with a history of drug dealing." It also said, "Because the 'material omissions and misrepresentations' occurred before Mr. Powers was admitted as a student at St. John's, the formal grievance process outlined in the Student Handbook does not apply...."

The Appellate Division, Second Department affirmed on a 3-1 vote, saying, "The law school's determination was made on the grounds of the petitioner's misrepresentations and omissions on his application..., and was based upon the exercise of discretion after a full review. Despite the petitioner's subsequent disclosure..., and in light of the true nature of the petitioner's prior criminal activity, the law school's determination to rescind his acceptance was not arbitrary and capricious, and does not warrant judicial intervention.... Since the petitioner disclosed, subsequent to his admission, that he was originally charged with and was guilty of distributing ... a controlled dangerous substance, we do not consider the penalty imposed to be 'so disproportionate to the offense ... as to be shocking to one's sense of fairness'...."

The dissenter said the school's decision "to retroactively deny an admitted student's application for admission after he had successfully completed more than 1½ years of course work, without following the grievance process established in its student handbook, was arbitrary and capricious and in violation of lawful procedure." It was also based, in part, on "impermissible grounds" because the application did not seek disclosure "of every uncharged crime that an applicant may have engaged in" or require Powers to say "whether he was actually guilty of charges that were later dropped."

For appellant Powers: Roland R. Acevedo, Manhattan (212) 371-4500
For respondent St. John's: Michael J. Keane, Great Neck (516) 393-2200

State of New York Court of Appeals

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To be argued Tuesday, February 10, 2015 (arguments begin at 2:30 p.m.)

No. 29 Matter of Kickertz v New York University

On the eve of her graduation from New York University's College of Dentistry in May 2009, a faculty member informed Katie Kickertz that her graduation was "uncertain." She had passed all of her academic courses, competency exams and the National Board Dentistry Examinations, but was told she did not have enough clinical practice credits to graduate. After unsuccessful and apparently unharmonious efforts to resolve the matter, she was charged by a student Peer Review Board with falsifying patient records to obtain the necessary credits. The board recommended dismissal, but NYU withdrew the determination because Kickertz had not been afforded a hearing as required by its ethics code. After a hearing, the board again voted to dismiss her and a faculty review board confirmed the decision. The dean of the dental college rejected her appeal and she was dismissed from the school without the possibility of readmission in November 2009.

Kickerts brought this article 78 proceeding to annul the determination alleging, among other things, that NYU failed to follow its own disciplinary rules and denied her due process by not allowing her to cross-examine its witnesses. Rather than answer, NYU moved to dismiss the petition. Supreme Court granted the motion and dismissed the suit, finding that NYU "substantially complied" with the procedures in its 2009 Code of Ethics.

The Appellate Division, First Department reversed on a 3-2 vote and granted Kickertz's petition. The court agreed unanimously that Kickertz's lawsuit should not have been dismissed, but split on whether it should be remanded to permit NYU to serve and file an answer. CPLR 7804(f) provides that in an article 78 proceeding, when a pre-answer motion to dismiss is denied, "the court shall permit the respondent to answer, upon such terms as may be just...."

The majority relied on an exception for cases where "the facts are so fully presented ... that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer." The majority said facts in the record "establish that NYU did not substantially comply with its own published guidelines and policies, whether judged under the 2005 Code [of Ethics] or the 2009 Code. In violation of both codes, petitioner was not afforded substantial justice. Significantly, among other things, she was not given a fair opportunity to cross-examine her accusers, and key procedural rulings were made and/or influenced by [an assistant dean). Under these circumstances, we need not remand to allow NYU to interpose an answer; we can annul the determination expelling petitioner...."

The dissenters argued that "this case does not fall within that exception.... There are a number of disputed issues of fact in the record as presently developed, including, but not limited to, whether a 2005 or 2009 code of ethics governed the challenged disciplinary proceedings and whether petitioner falsified a patient's chart.... Curiously, by today's ruling, the majority grants all of the requested relief even though it acknowledges an issue as to whether petitioner falsified patient records as alleged in the underlying disciplinary proceeding."

For appellant NYU: Ira M. Feinberg, Manhattan (212) 918-3000
For respondent Kickertz: Bryan Arbeit, Carle Place (516) 873-9550

State of New York Court of Appeals

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To be argued Wednesday, February 11, 2015

No. 30 Matter of Trenasia J. (and other proceedings) *(papers sealed)*

The New York City Administration for Children's Services (ACS) brought these child protective proceedings against Frank J. under Family Court Act article 10, alleging that he attempted to sexually abuse his 11-year-old niece, Brije D., who was staying overnight at his Brooklyn home to play with his two daughters in January 2011. ACS alleged that Frank entered the bathroom while Brije was taking a shower, asked if she wanted to make $5, and began taking off his pants. Brije ran out of the bathroom, threw on clothes, and left the house. Based on this conduct, ACS also claimed Frank derivatively neglected his own three children, two of whom were in the house at the time.

Frank, supported by the attorney for his own children, moved to dismiss the petitions for lack of jurisdiction on the ground he was not a person legally responsible for Brije. The Family Court Act authorizes agencies to bring abuse and neglect proceedings against "any parent or other person legally responsible for a child's care...." Section 1012(g) defines "person legally responsible" as "the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child...." In Matter of Yolanda D. (88 NY2d 790), this Court said the term applies to those who "serve as the functional equivalent of parents."

Family Court denied the motion, saying, "Under the Matter of Yolanda D. I don't believe there's any serious question that [Frank] is a person legally responsible" under the statute. "The evidence establishes that the subject child had an ongoing and close familial relationship with [Frank], the child regularly saw [him] over the course of the year preceding the incident and indeed common sense requires the conclusion that they had a normal uncle, niece relationship." The court noted that it relied on hearsay statements, but deemed them admissible.

After a fact-finding hearing, Family Court found that Frank abused Brije by attempting to sexually abuse her and, thereby, derivatively neglected his own children. While ACS conceded that Frank did not touch Brije, the court said "it is not necessary to actually have a completed touching in order to make out a finding of attempted sexual abuse in the second degree.... Here it is plain that an attempt was made, it was for purposes of sexual gratification, that the child was under the age of fourteen and, therefore, the finding is warranted." The Appellate Division, Second Department affirmed, ruling, in part, that Frank was "a person legally responsible for his niece" within the meaning of section 1012(g).

Frank D. argues, "The Article 10 petition ... should have been dismissed because he was not a Person Legally Responsible..., and thus, the Family Court had no jurisdiction to hear the case." He was not Brije's parent or guardian, and "evidence supports that Appellant was not Brije's custodian; Appellant and Brije were never 'continually or at regular intervals found in the same household.'" He says his relationship was of a kind "excluded from Article 10 jurisdiction" by Yolanda D., which said the statute does not apply to "persons who assume fleeting or temporary care of a child such as a supervisor of a play-date or an overnight visitor...." He also argues there was insufficient evidence of attempted sexual abuse and derivative neglect.

For appellant Frank J.: Maxine H. Park, Manhattan (347) 788-0579
For the children of Frank J.: Barbara H. Dildine, Brooklyn (718) 522-3333
For respondent ACS: NYC Assistant Corporation Counsel Kathy Chang Park (212) 356-0855
For the child Brije D.: Marcia Egger, Manhattan (212) 577-3562

State of New York Court of Appeals

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To be argued Wednesday, February 11, 2015

No. 31 Nicometi v The Vineyards of Fredonia, LLC

Marc Nicometi was injured on a construction site in Fredonia in January 2006, while working for a subcontractor at a newly built apartment complex owned by The Vineyards of Fredonia, LLC. He was working on stilts, which raised him three to five feet above the floor, installing insulation between ceiling rafters above his head when his stilts slipped on a 16-square-foot patch of ice and he fell. Nicometi brought this negligence action against Vineyards, general contractor Winter-Pfohl, Inc., and another contractor, Western New York Plumbing.

Supreme Court granted Nicometi's motion for partial summary judgment on liability under Labor Law § 240(1), which imposes liability on owners and contractors who fail to provide safety devices to protect workers from elevation-related risks. "The issue of whether or not the plaintiff was told by the foreman not to work in an icy area does not raise a question of fact; providing safety instructions is not a substitute for furnishing proper safety devices...," the court said. It denied a defense motion to dismiss, rejecting the argument that an icy floor is not an elevation-related risk covered by the statute.

The Appellate Division, Fourth Department modified by denying Nicometi's summary judgment motion in a 3-2 decision. It said the lower court properly found that his fall was the result of an elevation-related risk. However, it said "there is a triable issue of fact whether plaintiff's actions were the sole proximate cause of his injuries" based on "evidence that he was directed not to work in the area where the ice was located. Thus, "'[u]nlike those situations in which a safety device fails for no apparent reason, thereby raising the presumption that the device did not provide proper protection within the meaning of Labor Law § 240(1), here there is a question of fact [concerning] whether the injured plaintiff's fall [resulted from] his own misuse of the safety device and whether such conduct was the sole proximate cause of his injuries"'...."

The dissenters voted to affirm, arguing that, because the statute was violated, Nicometi "cannot be solely to blame" for the accident. "The nondelegable duty ... under Labor Law § 240(1) 'is not met merely by providing safety instructions..., but [rather is met] by furnishing, placing and operating such devices so as to give [plaintiff] proper protection'.... In our view, 'stilts on ice' is the wrong device from which to work at an elevation, and we thus conclude that plaintiff was not furnished with a proper safety device as a matter of law...." Even if he "was provided with proper protection, we further conclude that his actions cannot be the sole proximate cause of the accident because ... the stilts were not 'so ... placed ... as to give proper protection to plaintiff,...."

For appellant-respondent Nicometi: Michael J. Hutter, Jr., Albany (518) 465-5995
For respondent-appellant Winter-Pfohl: Robert D. Leary, Buffalo (716) 853-3801
For respondent-appellant Vineyards: Laurence D. Behr, Buffalo (716) 856-1300
For respondent-appellant WNY Plumbing: Arthur Joseph Smith, Hicksville (516) 997-7330

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To be argued Wednesday, February 11, 2015

No. 32 People v Darius Dubarry

In December 2007, Darius Dubarry and Herburtho Benjamin engaged in a gunfight on Eastern Parkway in Brooklyn. Neither of them was wounded, but a bullet from Dubarry's gun struck and killed a bystander, Carol Simon. Dubarry was charged with two counts of second-degree murder for the death of Simon: depraved indifference murder, alleging that he recklessly engaged in a shoot-out in a public place under circumstances evincing a depraved indifference to human life; and intentional murder based on a theory of transferred intent, alleging that he killed Simon while intending to kill Benjamin.

Supreme Court submitted the depraved indifference and intentional murder counts to the jury in the conjunctive, permitting it to consider whether he was guilty of both reckless and intentional murder, rather than the alternative. The court also allowed the prosecution to use the grand jury testimony of an unavailable witness, finding the witness was frightened out of testifying by threats against his family. Dubarry was convicted of depraved indifference and intentional murder, along with related charges, and was sentenced to 20 years to life in prison.

The Appellate Division, Second Department affirmed, ruling the trial court properly submitted the depraved indifference and intentional murder counts to the jury in the conjunctive. "'Where, as here, more than one potential victim was present at the shooting, a defendant may be convicted of both counts because he or she may have possessed different states of mind with regard to different potential victims' (People v Page, 63 AD3d 506 [1st Dept] ...)," it said. "To the extent that the Appellate Division, Third Department, held differently in [People v Molina (79 AD3d 1371)], we disagree and decline to follow that holding." It also held the grand jury testimony of an unavailable prosecution witness was properly admitted. "The People established by clear and convincing evidence that the witness's unavailability was procured by misconduct on the part of the defendant...."

Dubarry argues the trial court violated due process by submitting the murder charges in the conjunctive and "instructing the jury to render a verdict on intentional murder regardless of its verdict on depraved indifference murder. The verdict convicting appellant of both counts thereby multiplied his criminal liability for a single death, and relieved the jury of its responsibility to decide whether appellant acted intentionally or recklessly, depriving him of due process and a fair trial." He says use of a transferred intent theory "does not justify imposing double liability for the death of a single bystander.... To hold otherwise would be contrary to the general prohibition against multiple convictions for a single criminal act." He says admission of a witness's grand jury testimony violated his right to confrontation because "[t]here was no evidence that appellant had communicated with anyone ... who could have conveyed a threat."

For appellant Dubarry: Denise A. Corsi, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Thomas M. Ross (718) 250-2534

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To be argued Wednesday, February 11, 2015

No. 33 Barreto v Metropolitan Transportation Authority

Raul Barreto, an employee of PAL Environmental Safety Corp., was injured in January 2005 while working on an underground asbestos removal project for the Metropolitan Transportation Authority (MTA) and New York City Transit Authority (NYCTA) in Manhattan. PAL, the general contractor, retained IMS Safety Corp. as a consultant. PAL employees gained access to the work sites through manholes and, at the start of each shift, they would build a wooden structure covered with plastic sheeting around the manhole to contain any asbestos. Two workers would then remove the manhole cover and set it outside the enclosure. On the date of the accident, Barreto and two coworkers climbed out of a manhole on Lafayette Street at the end of their shift. Without first replacing the manhole cover, they began dismantling the enclosure and Barreto fell into the open manhole. He said in a deposition that his supervisor told him earlier in the day to cover the manhole before breaking down the enclosure, but he did not check to see if the manhole was still open "because the supervisor is supposed to do that." Alleging violations of Labor Law §§ 240(1) and 241(6), among other claims, he brought this negligence action against the MTA, NYCTA, IMS, and the City of New York as owner of the site.

Supreme Court denied Barreto's motion for summary judgment on liability and granted defense motions to dismiss the suit, finding that his failure to wait until the manhole was covered was the sole proximate cause of his injuries.

The Appellate Division, First Department affirmed on a 3-1 vote. Regarding the Scaffold Law claim (section 240[1]), it said Barreto "was provided with the perfect safety device, namely, the manhole cover, which was nearby and readily available. He disregarded his supervisor's explicit instruction given that day to replace the cover before dismantling the enclosure.... There is no reason that other devices were necessary ... or that the manhole cover was inadequate. Moreover, neither a guardrail, netting nor a harness would have prevented the accident as they would have been opened or removed to allow the workers to exit the manhole and to deconstruct the enclosure." It said the Industrial Code violations Barreto alleged in his claim under section 241(6) "did not proximately cause the accident."

The dissenter agreed that IMS was not liable, but said Barreto should have been granted summary judgment on liability against the others because they "failed to provide safety devices adequately protecting him from falling through the hole." Citing testimony that a metal guardrail would typically be placed around an open manhole under OSHA regulations, he said, "I do not find sufficient support in the record for the majority's statement that, had this guardrail been provided, it would have been opened or removed from the manhole before the accident occurred and therefore would not have prevented plaintiff's injuries.... At the very least, these facts raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his accident.... Even if plaintiff's [conduct] was a contributing cause..., [h]is actions merely amount to comparative negligence, and do not provide a defense to his Labor Law § 240(1) claim...."

For appellant Barreto: John M. Shaw, Manhattan (212) 267-9222
For respondent IMS: Clifford I. Bass, Scarsdale (914) 472-2300
For respondent City: Assistant Corporation Counsel Susan Paulson (212) 356-0821
For respondents MTA and NYCTA: Patrick J. Lawless, Manhattan (212) 490-3000

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To be argued Thursday, February 12, 2015 (arguments begin at noon)

No. 51 Matter of Lopez v Evans *(some papers sealed)*

Edwin Lopez was convicted of murder for fatally shooting a man during an attempted robbery in 1973 and was sentenced to 15 years to life in prison. He was released on lifetime parole in 1994. In August 2008, while he was a patient at the South Beach Psychiatric Center, he was charged with misdemeanor assault after an altercation with a fellow patient. After a court-ordered psychiatric examination, two psychologists found that he suffered from dementia and was unfit to stand trial. Based on those findings, Criminal Court dismissed the case and committed Lopez to the custody of the Office of Mental Health. At the same time, the State Division of Parole initiated a parole revocation proceeding against him based on the alleged assault at South Beach. The Parole Board found Lopez had violated his parole and imposed an assessment of at least 24 months of additional imprisonment.

On his administrative appeal, Lopez argued that because he was found mentally unfit for a criminal trial, he was likewise unfit to assist in his defense in the parole revocation proceeding. The Appeals Unit affirmed the decision, saying "mental illness is not an excuse for a parole violation." Lopez brought this article 78 proceeding against Andrea Evans, as chairwoman of the Division of Parole, arguing the Parole Board violated due process by proceeding against him after he was found mentally unfit for trial on the same criminal charge.

Supreme Court, Bronx County granted the Division of Parole's motion to dismiss the suit based on precedent from the Appellate Division, Third Department, which held that a finding of mental incompetency does not bar a parole revocation proceeding, although the Parole Board should consider the issue of competency as a "possibly mitigating or excusing" factor in the revocation process.

The Appellate Division, First Department reversed, granted Lopez's petition, and reinstated him to parole. "We agree with petitioner that the basic requirements of due process applicable to a parole revocation proceeding ... should now be construed to preclude going forward with such a proceeding in the event it is determined that the parolee is not mentally competent to participate in the hearing or to assist his counsel in doing so," it said, opining that otherwise, "the minimal due process rights" afforded in such proceedings "would be rendered useless." It declined to follow contrary rulings from the Third and Fourth Departments.

The Division of Parole urges this Court to "adopt the flexible approach followed for decades by the Third and Fourth Departments, as well as the federal parole system," which "allows revocation proceedings to go forward in cases of mental incompetence, so long as (a) counsel and other protections are provided, and (b) evidence as to the parolee's mental condition receives appropriate consideration by the administrative decision-maker.... In a range of other civil proceedings where a person's liberty is at stake -- including civil commitment, sex offender civil management, and deportation proceedings -- the assistance of counsel and other procedural safeguards have been held sufficient to satisfy due process in the case of a mentally incompetent individual."

For appellant Evans (Div. of Parole): Assistant Solicitor General Won S. Shin (212) 416-8808
For respondent Lopez: Elon Harpaz, Manhattan (212) 577-3300

State of New York Court of Appeals

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To be argued Thursday, February 12, 2015 (arguments begin at noon)

No. 35 Saint v Syracuse Supply Company

At the time of his accident, Joseph Saint worked for Lamar Advertising of Penn, LLC, installing and removing advertisements from large billboards. In April 2003, he was assigned to work on a billboard on property in Tonawanda owned by Syracuse Supply Company and leased to Lamar. The billboard, which rose 59 feet above the ground, had upper and lower catwalks to provide access. There were safety cables on all of the catwalks, but only the lower ones had guardrails. Saint's crew was told to remove the existing vinyl advertisement and extend the side of the billboard to accommodate a larger one. They made an extension from plywood, bolted angle iron onto the back to attach the extension to the existing structure, and raised it up to the billboard with a boom lift. Saint was on the lower catwalk and two coworkers were on the top one when they began to install the new advertisement, but he went up to help them when they struggled to control it in a high wind. He detached his lanyard from the safety cable to get around one of the workers and, before he could reattach it, a gust of wind struck the vinyl and knocked him off the catwalk.

Joseph Saint and his wife brought this personal injury action against Syracuse Supply as owner of the work site, alleging that the failure to place guardrails on the upper catwalk violated Labor Law §§ 240(1), 240(2) and 241(6). Section 240(1), which requires owners and general contractors to provide safety devices necessary to protect workers from elevation-related risks, applies when an employee is engaged in "altering ... a building or structure;" and section 240(2) requires safety rails on "scaffolding or staging" more than 20 feet from the ground. Section 241(6) requires owners and contractors "to provide reasonable and adequate protection and safety" for employees in "[a]ll areas in which construction ... work is being performed." Syracuse Supply moved to dismiss the suit, arguing the Labor Law did not apply because Saint was engaged in maintenance, not construction or alteration of the billboard.

Supreme Court denied the motion, saying Saint "was engaged in work ancillary to construction/alteration within the meaning of the statute at the time of the accident. The work crew ... had removed vinyl from one side of the billboard, were in the process of flipping the remaining vinyl to the other side so as to permit the crew to construct and install extensions on the remaining side.... It was in the course of their activities that plaintiff fell." The court found there was a question of fact as to whether Saint's failure to reattach his lanyard to the safety cable was the sole proximate cause of his fall.

The Appellate Division, Fourth Department reversed and dismissed the suit. "We agree with defendant that applying a new advertisement to the face of a billboard does not constitute the 'altering' of a building or structure for purposes of section 240.... Rather, that activity is 'more akin to cosmetic maintenance or decorative modification,' and is thus not an activity protected under section 240...." It said section 241(6) did not apply because Saint "was not engaged in construction work."

For appellants Joseph and Sheila Saint: Timothy Michael Hudson, Buffalo (716) 852-1000
For respondent Syracuse Supply: Brian P. Crosby, Buffalo (716) 856-4200

State of New York Court of Appeals

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To be argued Thursday, February 12, 2015 (arguments begin at noon)

No. 36 People v William Brown
No. 37 People v Patrick Thomas

Three officers in the New York Police Department's Cabaret Unit were patrolling near Times Square in December 2010 when they saw William Brown and Patrick Thomas run across Broadway looking back over their shoulders. They knew Brown by name and had arrested him twice; they knew Thomas by sight. Several hours earlier, one of the officers had encountered Brown in front of the nearby Lace nightclub and ordered him to leave. Two officers stopped and detained Brown and Thomas while their sergeant drove around the corner to Lace, where he found a man who said his watch had been stolen. The sergeant drove him to where the defendants were being held and he identified them as the thieves. An officer asked, "Where's the watch?," and Thomas pulled the victim's silver Rolex from his pocket. The officers also recovered $185 in cash from Thomas and $10 from Brown.

Supreme Court denied defendants' motions to suppress the identification, finding their brief detention was justified because the police had a reasonable suspicion that they had committed a crime. "I find that based on the knowledge the officers had..., that an ordinarily prudent and cautious man ... would have believed that criminal activity was at hand. The fact that Mr. Brown and Mr. Thomas were running at 4:30 in the morning and looking over their shoulders behind them would lead someone knowing of Mr. Brown and his prior criminal activities to believe that he had engaged in some sort of scam, and was fleeing a scene." Both defendants were convicted of grand larceny in the third and fourth degrees and fraudulent accosting. They were sentenced to 3½ to 7 years in prison.

The Appellate Division, First Department reversed in a pair of 3-2 decisions, ruling the forcible stop was unjustified. "No crime had been reported, the officers did not see anyone chasing the two men, and no apparent contraband was visible...," it said. "The officers' knowledge of [Brown's] prior criminality in the same neighborhood was not sufficient to give rise to reasonable suspicion.... The fact that the officers' observed [Brown] and Thomas running does not elevate the level of suspicion. Flight, accompanied by equivocal circumstances, does not supply the requisite reasonable suspicion.... The police did not observe conduct indicative of criminality, nor did they even possess information that a crime had occurred in the area."

The dissenters said, "A defendant's criminal history, or even an officer's recognition of a defendant from an earlier investigation, may be a factor in assessing reasonable suspicion.... Similarly, '[f]light, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity,' may provide the necessary predicate to stop and detain a defendant.... The officers ... knew that [Brown] had a history of operating scams and victimizing tourists in the vicinity of the Lace nightclub, and they knew Thomas to associate with other people who engaged in such scams. This knowledge made it more reasonable for the officers to conclude that the two men were running away from the scene of a crime they had just committed in the vicinity of Lace...."

For appellant: Manhattan Assistant District Attorney David M. Cohn (212) 335-9000
For respondent Brown: Bruce D. Austern, Manhattan (212) 577-2523 ext. 514
For respondent Thomas: Hector Gonzalez, Manhattan (212) 698-3500

State of New York Court of Appeals

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To be argued Thursday, February 12, 2015 (arguments begin at noon)

No. 38 Matter of State Farm Mutual Automobile Insurance Company v Fitzgerald

New York City Police Officer Patrick Fitzgerald was riding in a Police Department vehicle driven by fellow officer Michael Knauss in January 2011, when an underinsured motorist collided with it, injuring Fitzgerald. He sought benefits under the supplementary uninsured/underinsured motorist (SUM) endorsement of Knauss's personal automobile policy from State Farm Mutual Automobile Insurance Company. The SUM endorsement defined an "insured" to include the policy's named insured, Knauss, and "any other person while occupying ... any other motor vehicle while being operated by [Knauss]." Fitzgerald demanded arbitration. State Farm refused to pay his claim and commenced this proceeding to stay arbitration, arguing he was not an "insured" for SUM coverage because a police vehicle is not a "motor vehicle" under the Vehicle and Traffic Law.

Supreme Court granted State Farm's petition to permanently stay arbitration, ruling Fitzgerald was not an "insured" within the meaning of the SUM endorsement of Knauss's policy. "Since a police vehicle is specifically excluded from the definition of motor vehicle as it appears in Vehicle and Traffic Law section 388(2), [Fitzgerald] is not an insured under the Knauss policy (see Matter of State Farm Mut. Auto. Ins. Co. v Amato (72 NY2d 288 [1988])," the court said.

The Appellate Division, Second Department reversed, ruling Fitzgerald was entitled to coverage "because he was a person occupying a 'motor vehicle' being operated by Knauss." It distinguished Amato and said that case did not require it to apply the definition of "motor vehicle" in Vehicle and Traffic Law § 388(2), which excludes police vehicles. Instead, it used Vehicle and Traffic Law § 125 to define "motor vehicle" as it appears in the SUM endorsement because the statute "is a general provision that defines the relevant terminology for the entire Vehicle and Traffic Law.... Police vehicles fall within the definition of a 'motor vehicle' under Vehicle and Traffic Law § 125 because they constitute a 'vehicle operated or driven upon a public highway which is propelled by any power other than muscular power'.... [T]his interpretation is consistent with common experience and the reasonable expectations of the average policyholder...."

State Farm argues Fitzgerald is not entitled to SUM benefits under Knauss's policy because a police vehicle is not a "motor vehicle" within the meaning of the endorsement. "Although the SUM endorsement does not define the term 'motor vehicle,' 'the neutral sources that brought [the SUM endorsement] into being' -- the text of the statute mandating the SUM endorsement (Insurance Law § 3420[f]), the statutory scheme, the statutory purpose of Insurance Law § 3420(f) -- all indicate that the Legislature intended to exclude police vehicles from the definition of 'motor vehicle.'"

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