State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of September 11 - 13, 2012

State of New York Court of Appeals

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To be argued Tuesday, September 11, 2012 (2:30 p.m.)

No. 170 Matter of Galasso *(papers sealed)*

This attorney disciplinary proceeding against Garden City lawyer Peter J. Galasso (Galasso) stems from thefts of client funds by his brother, Anthony Galasso (Anthony), a non-lawyer who was office manager and bookkeeper for his law firm, Galasso & Langione (now Galasso, Langione, Catterson & LoFromento). Anthony stole more than $5 million in client funds from the firm's escrow and IOLA accounts from June 2004 to January 2007, some $4.5 million of it from escrow funds of a matrimonial client. Anthony forged bank documents to obtain access to the firm's accounts and hid his thefts with fabricated bank statements he submitted to Galasso. To conceal other thefts, Anthony transferred funds from the matrimonial client's escrow account to other firm accounts, which were later used to pay salary and Galasso's share of the purchase of an office condominium. When Anthony confessed his thefts to the firm in January 2007, Galasso secured the funds remaining in the escrow accounts, notified victimized clients, and reported the thefts to the Nassau County Police Department. Anthony pleaded guilty to grand larceny and other charges and was sentenced to 2½ to 7½ years.

The Grievance Committee for the Ninth Judicial District brought ten charges of professional misconduct against Galasso. A special referee sustained all ten, including eight charges that he breached his fiduciary duty by failing to safeguard client funds, provide a proper accounting, and promptly pay escrow funds to clients, and that he failed to supervise a non-lawyer employee. The referee also sustained charges that he was unjustly enriched by use of stolen client funds and failed to timely comply with the Committee's demands for information.

The Appellate Division, Second Department confirmed the referee's report and suspended Galasso for two years, saying he "failed to properly supervise" his brother's work as bookkeeper and "failed to properly review, audit, and reconcile" his law firm's bank accounts. It said, "In the exercise of reasonable management and supervisory authority, [Galasso] would have been aware of the unlawful and improper transfers and disbursements of the Baron funds so that remedial action could have been taken to avoid or mitigate the misappropriations of same." In imposing the suspension, it acknowledged his efforts to improve his business practices, his cooperation with the criminal prosecution of his brother, and his pro bono lawsuits to recover his clients' money. "However, we find that [Galasso] failed to maintain appropriate vigilance over his firm's bank accounts, resulting in actual and substantial harm to clients...," it said.

Galasso contends the evidence does not support the charges, arguing that he exercised appropriate oversight over the firm's accounts, did not cede his fiduciary duties to Anthony, and he "should not be held vicariously liable for the criminal conduct of a rogue employee" whose "practiced duplicity and deft document fabrication fooled everyone." He says he was not accused of intentional or reckless misconduct, but "only allegedly negligent behavior, that can be properly challenged in a civil action but which should have no place in a Disciplinary proceeding. Whether Appellant's objectionable conduct here adversely reflects on his fitness to practice law is highly dubious; how it justified his suspension is incomprehensible." He argues the order unfairly makes lawyers "insurers of their escrow accounts" and strictly liable for client losses.

For appellant Galasso: Jeffrey L. Catterson, Garden City (516) 222-6500
For respondent Grievance Committee: Matthew Lee-Renert, White Plains (914) 824-5070

State of New York Court of Appeals

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To be argued Tuesday, September 11, 2012 (2:30 p.m.)

No. 171 Matter of Bronx Committee for Toxic Free Schools v New York City School Construction Authority

The Bronx Committee for Toxic Free Schools and several individuals brought this article 78 proceeding to challenge the environmental review conducted by the New York City School Construction Authority (SCA) for its Mott Haven School Campus project, which is partially located on a contaminated industrial site in the Bronx. SCA identified hazardous organic compounds and metals at the site, enrolled the most heavily contaminated portion in the State Department of Environmental Conservation's Brownfield Cleanup Program, and devised remedial measures that included removing contaminated soil and placing a barrier of clean soil over the surface. SCA issued its final environmental impact statement (EIS) in October 2006. The EIS did not include consideration of a long-term site maintenance and monitoring plan, which SCA said it would prepare as part of the brownfield cleanup process.

Supreme Court ruled for the Committee for Toxic Free Schools, in part, by ordering SCA to prepare a supplemental EIS detailing its plan for long-term maintenance and monitoring of remediation measures for contaminated soil and groundwater. It said the final EIS was incomplete without the plan and SCA did not take the "hard look" at long-term environmental concerns required by the State Environmental Quality Review Act (SEQRA).

The Appellate Division, First Department affirmed, ruling that "the long-term monitoring measures, developed and implemented in their entirety after the final EIS was issued in October 2006, constituted 'changes proposed for the project'" and triggered the need for a supplemental EIS under SEQRA. "By failing to make any mention of the need for long-term monitoring in the initial EIS, SCA frustrated the purpose of SEQRA, which is to subject agency actions with environmental impact to public scrutiny...," it said. "Indeed, there is no record evidence that SCA took the requisite 'hard look' at the issue of long-term maintenance and monitoring of remediation measures until 2008, when it issued its final site management plan...." It said SCA's participation in the Brownfield Cleanup Program "did not exempt the project's environmental impacts from SEQRA scrutiny, and under SEQRA it was impermissible for SCA to omit a known remediation issue from the EIS with the idea of taking up that issue at a later date...."

SCA argues that its long-term monitoring plan "did not constitute a change in the construction project that was the subject of SEQRA review. Rather, the Final EIS explained the SCA's participation in the [brownfield program], and disclosed the remedial steps to mitigate the potential adverse impact on soil and groundwater conditions. The Site Management Plan was prepared after the remediation, in accordance with the [brownfield] regulations. It described the long-term monitoring of environmental controls but did not contain any new remedial measures or controls. In addition, the Plan fulfilled SEQRA's purpose of public involvement, because it was finalized after extensive public comment."

For appellant SCA: Assistant Corporation Counsel Janet L. Zaleon (212) 788-1020
For respondent Committee: Gregory Silbert, Manhattan (212) 310-8067

State of New York Court of Appeals

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To be argued Tuesday, September 11, 2012 (2:30 p.m.)

No. 172 Matter of State of New York v Shannon S. *(papers sealed)*

The State brought this proceeding for civil management of Shannon S. under Mental Hygiene Law article 10 in 2009, when he completed his prison sentence for third-degree rape and criminal sexual act involving his 16-year-old girlfriend. They began dating in August 2002, when he was 29, and their relationship was discovered after she became pregnant at the end of the year. His lengthy criminal record included two other sex crimes involving underage girls. At age 24, he pleaded guilty to sexual misconduct after having intercourse with a 15-year-old girlfriend who was intoxicated on beer and marijuana. At age 26, he was charged with forcibly raping and sodomizing his sister's 13-year-old babysitter and pleaded guilty to second-degree rape. An Office of Mental Health psychologist, Dr. Jacob Hadden, interviewed him prior to his 2009 release and diagnosed him as having "paraphilia not otherwise specified" (paraphilia NOS), as described in the Diagnostic and Statistical Manual (DSM), as well as antisocial personality disorder and alcohol abuse. Dr. Hadden concluded that Shannon S. "demonstrated a deviant sexual interest in adolescents below the age of consent" and posed a high risk of recidivism.

At trial, Dr. Hadden and another State expert, Dr. Stuart Kirschner, presented their diagnosis of paraphilia NOS and said Shannon S. suffers from a mental abnormality as defined in Mental Hygiene Law § 10.3(i). They conceded that paraphilia does not explicitly include statutory rape and the DSM does not contain a category for paraphilic arousal involving coercion or nonconsent, but they said paraphilia NOS is a catch-all category for unspecified conditions that could include attraction to "children or other nonconsenting persons." Dr. Kirschner said Shannon S. was not a pedophile, but "more of a hebephile" because he was attracted to early pubescent females. The defense expert, Dr. Charles Ewing, described Shannon S. as a "career petty criminal" likely to commit nonsexual crimes, but said he did not have a mental disorder and was not predisposed to commit sexual offenses. He said hebephilia is not a paraphilia because, while statutory rape is illegal, an attraction to teenage girls is not statistically abnormal since "most males are sexually attracted to fully formed pubescent women."

Supreme Court found that Shannon S. suffered from a mental abnormality under section 10.3(i) and, after a dispositional hearing, held there was clear and convincing evidence that he was a dangerous sex offender requiring confinement at a secure treatment facility.

The Appellate Division, Fourth Department affirmed. It said the testimony of the State's psychologists that Shannon S. suffered from paraphilia NOS, was predisposed to committing sex offenses, and had serious difficulty controlling such conduct provided legally sufficient evidence to support the determination. It said Dr. Ewing's testimony "merely raised a credibility issue."

Shannon S. argues there is legally insufficient evidence that he suffers from a mental abnormality "without proof of a diagnosis from the Diagnostic and Statistical Manual." He says, "When the drafters of the DSM meant to exclude statutory rape from the list of paraphilias that a psychologist could diagnose..., this Court should not allow [the State's] experts, who purport to rely on the DSM, to circumvent the DSM ... by labeling the diagnosis as 'not otherwise specified.'" He also argues that civil confinement may not be ordered without a finding that no less restrictive alternative would suffice.

For appellant Shannon S.: Mark C. Davison, Canandaigua (585) 394-5222
For respondent State: Assistant Solicitor General Kathleen M. Treasure (518) 473-7712

State of New York Court of Appeals

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To be argued Tuesday, September 11, 2012 (2:30 p.m.)

No. 173 Dean v Tower Insurance Company of New York

In March 2005, Douglas and Jona Dean obtained a homeowner's insurance policy from Tower Insurance Company of New York to cover a house they intended to buy on Mountain Road in Irvington. In their application, they said the house was their primary dwelling. The policy stated that it covered physical loss to the "residence premises," which it defined as "[t]he one family dwelling, other structures, and grounds ... where you reside." After closing on the house, the Deans discovered that its support beams had been heavily damaged by termites, requiring that much of the house be gutted and rebuilt. Without informing Tower, they continued to live in their old home and worked on the repairs themselves with the help of family and friends. In March 2006, the policy was renewed for a second year. The Deans were still living in their old home and working on the new one in May 2006, when the Mountain Road house was destroyed by a fire of unknown origin. Tower disclaimed coverage on the grounds that, because the Deans never moved into the house, it was not a "residence premises" as defined in the policy, and that they misrepresented in their application for the policy that they occupied the house as their primary dwelling. The Deans brought this action to compel coverage of the fire loss.

Supreme Court granted Tower's motion for summary judgment dismissing the complaint, holding that the house was not a "residence premises" under the policy. "Giving the words 'where you reside' their 'plain and ordinary meaning,' the policy covered a dwelling where the Deans lived for a permanent or extended period of time...," it said. "Here, plaintiffs do not allege that they ever lived at the Mountain Road house. At best, plaintiffs have established ownership of the house and presence in it to perform certain renovations, and a stated intent of living there." It said, "[T]here is insufficient evidence of plaintiffs' physical presence and permanency to demonstrate that they resided in the premises at any time prior to the date of loss."

The Appellate Division, First Department modified by denying Tower's motion and reinstating the complaint. "Because the 'residence premises' insurance policy fails to define what qualifies as 'resides' for the purposes of attaching coverage, the policy is ambiguous in the circumstances of this case, where the [Deans] purchased the policy in advance of closing but were then unable to fulfill their intention of establishing residency at the subject premises due to their discovery and remediation of termite damage that required major renovations," it said. "... the ambiguity in the policy must be construed against defendant under the facts of this case, and precludes the grant of summary judgment in its favor...." It also said there is an "issue of fact as to whether plaintiffs misrepresented their intention to reside" in the house.

For appellant Tower: Max W. Gershweir, Manhattan (212) 655-4000
For respondent Deans: Robert D. Meade, White Plains (914) 949-2700

State of New York Court of Appeals

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To be argued Tuesday, September 11, 2012 (2:30 p.m.)

No. 174 People v Calvin Harris *(papers sealed)*

Calvin Harris is serving 25 years to life in prison for the murder of his wife, Michele, who was last seen on September 11, 2001. Neither her body nor any murder weapon was ever found. Harris and Michele were involved in an acrimonious divorce action at the time, but were both still living with their four young children at their home in Spencer, Tioga County. On the night she disappeared, Michele finished her shift as a waitress at about 9 p.m., had a drink with two co-workers, then visited her boyfriend at his apartment. She left the apartment to go home at about 11 p.m., but Harris said she never arrived. Police found recent bloodstains spattered in the kitchen and on the garage floor of the house. DNA analysis determined the blood was Michele's. Prosecutors also presented evidence of prior threats by Harris, including testimony of a hairdresser who, two months before the disappearance, overheard a cell phone conversation in which Harris told his wife: "Drop the divorce proceedings. I will fucking kill you, Michele. Do you hear me? I will fucking kill you. I can make you disappear...."

Based wholly on such circumstantial evidence, Harris was convicted of second-degree murder at his first trial in 2007, but hours after the verdict a new witness, Kevin Tubbs, came forward to say he had seen a woman resembling Michele and a younger man, who was not Harris, standing in front of her house at about 5:30 a.m. on September 12, 2001. County Court set aside the guilty verdict and ordered a new trial. Another man, John Steele, then informed the court in a letter that he and a companion had witnessed "a scene very similar to the account given by Mr. Tubbs" on the early morning of September 12. Steele died before Harris's second trial in 2009 and the court excluded from evidence Steele's letter and affidavit as hearsay. Harris was again convicted of second-degree murder.

The Appellate Division, Third Department affirmed in a 3-1 decision, holding there was legally sufficient evidence. "[T]he People presented evidence of defendant's motive, expressed intent to kill the victim and make her disappear, opportunity to do so on the night that the victim vanished, and evidence of his consciousness of guilt. This proof, in addition to the hundreds of still-red stains caused by the spattering of the victim's blood, provided sufficient circumstantial evidence for the jury to infer that, after the victim's return home, defendant incapacitated her in the kitchen and repeatedly struck her ... with an object that was placed on the throw rug, and that he then took her to the garage where she bled an additional amount that was largely wiped away while the blood was still moist."

The dissenter said "the blood spatter testimony was too inconclusive from which to infer ... that Michele was in the house on the night of September 11, 2001, much less violently and fatally attacked there. The threats, which were made months and years prior to [her] disappearance, are insufficient to support the People's suggested inference that defendant created a plan to kill [her] and then waited months to carry it out.... Finally, defendant's actions after [her] disappearance were neither inherently suspect nor give rise to any logical inferences of defendant's consciousness of guilt." He said the trial court made a series of errors warranting reversal, including its refusal to strike a juror who admitted a preexisting opinion on the issue of guilt and its exclusion of John Steele's affidavit. "[I]t seems that ... defendant was presumed guilty by the police, the District Attorney, and [Michele's] family and friends and that, at trial, the burden of proof was shifted to defendant to prove his innocence," he said.

For appellant Harris: William T. Easton, Rochester (585) 423-8290
For respondent: Tioga County District Attorney Gerald A. Keene (607) 687-8650

State of New York Court of Appeals

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To be argued Wednesday, September 12, 2012

No. 175 Knapp v Hughes

This case stems from a dispute over title to 12 acres of land beneath Perch Pond in the Town of Colesville, Broome County, and with the title, the right to swim, fish and otherwise make use of the pond. In the early 1960s, all of the property involved in this case, including the 12 acres underlying the western half of the pond, belonged to Charles Juriga. In 1968, Juriga sold more than 100 acres abutting the pond's west side to Anthony Furlano. Furlano's deed stated that the parcel bordered "along the edge of Perch Pond" and, in a separate clause, said Juriga "further conveys any rights which he may have in and to the lands under the waters of Perch Pond which bound and abut onto the lands hereinabove conveyed." In 1973, Furlano sold most of this property, including 1,500 feet of lakefront, to two partners doing business as Robil. The "Robil deed," which is the focus of this case, described the boundaries as running "to a point at the waters edge" and "along the waters edge of Perch Pond." It used the same language to describe the small parcel reserved to Furlano. Plaintiffs James and Linda Knapp, who subsequently purchased the Furlano parcel, trace their deed to the 1973 Robil deed, as do the ten defendants who own the adjoining waterfront parcels.

In 2003, the Knapps brought this action under Real Property Actions and Proceedings Law (RPAPL) article 15, claiming they own sole title to the land beneath the pond and, thus, have the exclusive right to use the pond. The defendants counterclaimed, asserting that they own the pond bottom abutting their respective properties

Supreme Court granted summary judgment in favor of the defendants, saying, "[T]here is a presumption that lands under waters of ponds belong to the owners of the adjoining lands and that a transfer of land adjacent to a pond conveys title to that abutting landowner running from shore line to center of the pond as an incident of ownership.... This presumption may only be rebutted by express reservation...." It said the use of the words "waters edge" in the 1973 Robil deed "clearly establishes a description running to the water line and, in the absence of any express reservation, thereby result[ed] in a transfer of pond rights." It said the provision of the Robil deed reserving Furlano's parcel "reserved those same pond rights..., but no more."

The Appellate Division, Third Department modified by reversing the order granting summary judgment to the defendants and partially granting the Knapps' motion. It held that the defendants' deeds, as traced to the Robil deed, "did not convey littoral rights" to the pond. The court acknowledged the presumption that land beneath a pond belongs to the adjoining landowners, "unless otherwise specifically and clearly restricted." However, it said "a boundary description which runs the title along dry land, such as the bank or the shore, constitutes such a restriction and excludes or reserves title to the body of water.... Here, the description contained in all the conveyances emanating from the 1973 Robil deed clearly set the boundaries at the edge of the pond, a phrase which touches the land and not the water...."

For appellant defendants Hughes et al: Brian Shoot, Manhattan (212) 732-9000
For respondent Knapps: Patrick J. Kilker, Binghamton (607) 238-1176

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To be argued Wednesday, September 12, 2012

No. 176 Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Services, Inc.

The plaintiffs, Whitebox Concentrated Convertible Arbitrage Partners, L.P. and 14 other investors, own 54,000 shares of preferred stock issued by Superior Well Services, Inc. in November 2008. The certificate of designations for the stock, a contract governed by Delaware law, provides that in the event of a "fundamental change," Superior Well must make an offer to repurchase the preferred stock at a price of $1000 per share plus accrued dividends. Its definition of "fundamental change" includes, in clause (i), the acquisition by a person or group of more than 50 percent of the company's common stock, "provided that this clause ... shall not apply to a transaction covered in clause (iii) below, including any exception thereto." Clause (iii) provides that fundamental change occurs when Superior Well merges or consolidates with another entity, "other than a merger, consolidation or other transaction in which [Superior Well] is the surviving entity." In August 2009, Superior Well and Nabors Industries, Ltd. announced a merger and acquisition agreement under which Nabors would make a tender offer for Superior Well's common stock through Diamond Acquisition Corp., a subsidiary Nabors had created two weeks earlier. Once Diamond acquired more than 90 percent of the common stock, it merged into Superior Well and ceased to exist. Superior Well, which had been a publicly traded company, emerged as a wholly-owned subsidiary of Nabors.

The preferred stock investors brought this action against Superior Well, seeking a declaration that Nabors' acquisition of Superior Well was a "fundamental change" under the contract and, therefore, it was required to make an offer to repurchase their preferred stock. Superior Well moved to dismiss, arguing the transaction was not a fundamental change because it involved a merger with Diamond that left Superior Well as "the surviving entity."

Supreme Court denied the motion to dismiss in an oral ruling, observing that "the net result of the transaction ... was that Nabors ends up owning one hundred percent of Superior." It said the defense would argue on appeal "that no matter what the ultimate transaction was[,] because there was a merger with Diamond that they get an out of jail free card."

The Appellate Division, First Department reversed and dismissed the suit, saying, "Defendant established by documentary evidence that the acquisition of more than 50% of its stock and the subsequent merger with Diamond ... did not constitute a 'Fundamental Change' as defined in the certificate of designations.... The tender offer for common shares and defendant's subsequent merger into Diamond, with defendant being the surviving entity, were two consecutive steps in a single, integrated transaction...."

The investors argue the contract's use of the term "transaction" is ambiguous and the Appellate Division "failed to give [them] the benefit of every doubt as required on a motion under CPLR 3211." Even if this case involves a "transaction" under clause (iii), they say the acquisition of Superior was still a "fundamental change" because Nabors emerged as the owner of all of its common stock and Superior was not the sole "surviving entity."

For appellant investors Whitebox et al: John B. Orenstein, Minneapolis, Minn. (612) 436-9800
For respondent Superior Well: Bruce D. Angiolillo, Manhattan (212) 455-2000

State of New York Court of Appeals

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To be argued Wednesday, September 12, 2012

No. 177 Stephenson v City of New York

Jayvaun Stephenson was a 13-year-old Bronx middle school student on October 22, 2003, when he had a fistfight with fellow student Lorenzo McDonald on school grounds. School officials suspended Stephenson for one day and suspended McDonald, who started the fight, for one to two weeks. Neither the school nor Stephenson informed his mother of the incident. Two days later, McDonald and three others assaulted Stephenson two blocks from the school. Two accomplices held his arms while McDonald and the third accomplice repeatedly punched him in the face, fracturing his jaw in two places.

Stephenson's mother brought this action on his behalf against New York City and its Board of Education, alleging that the October 24 assault was a foreseeable continuation of the October 22 fistfight and that school officials were negligent in failing to notify his mother of the initial fight or take other action to prevent the October 24 assault. Supreme Court sanctioned the City for failure to comply with discovery orders, including its failure to provide investigative reports on either incident or McDonald's records, by ruling that "the issue of prior notice to the defendants of the October 24, 2003 incident is resolved in plaintiff's favor and defendants are precluded from raising any issue with respect thereto."

Supreme Court granted Stephenson's motion for summary judgement on liability, saying, "The issue of prior notice has been resolved in plaintiff's favor.... Therefore, defendants were on notice of the previous assault, the threat to plaintiff, as well as the assailant's history of violence" and "it was foreseeable that the assailant would continue the assault and even escalate it." It said, "Normally, where a student is injured off school grounds there can be no breach of duty.... However, defendant breached a duty it had to plaintiff inside the school, during school hours, by never notifying plaintiff's parent of the October 22 incident."

The Appellate Division, First Department reversed and dismissed the suit in a 3-2 decision, saying, "[T]he mother's claim that she could have prevented the assault is entirely speculative. McDonald could have attacked Stephenson at any time, possibly weeks later, or at any place, and the mother's presence would not necessarily have been a deterrent to what after all was a targeted attack." The court found it is "unreasonable to impose a duty on the school to notify a parent about a fight between two students when the school has already affirmatively addressed the misconduct." It said, "Although here the first fight occurred on school grounds..., the risk of danger arose from potential conduct away from school by a third party, not from anything the school did or failed to do."

The dissenters said, "When a student assaults another student during school hours and on school property, and then assaults the same student again two days later off school grounds, the school may, in appropriate circumstances, be liable for the victim's injuries arising from the second assault, if the second incident was foreseeable and the school failed to take appropriate action to prevent it." They said, "[T]he lack of a specific statutory duty requiring schools to inform parents about acts of violence against students does not preclude a common-law obligation. Schools' undisputed common-law duty, arising because they stand in loco parentis, already requires them to take such affirmative steps as a reasonably prudent parent ... would take to protect students in their care."

For appellant Stephenson et al: Jonathan M. Cooper, Cedarhurst (516) 791-5700
For respondent City et al: Assistant Corporation Counsel Susan B. Eisner (212) 788-6775

State of New York Court of Appeals

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To be argued Wednesday, September 12, 2012

No. 178 Matter of County of Erie v Civil Service Employees Association, Local 815

In 2009, Civil Service Employees Association, Local 815 (CSEA) filed a class action grievance on behalf of election clerks at the Erie County Board of Elections alleging that the schedules for clerks working on school board elections were changed to avoid overtime pay in violation of the collective bargaining agreement (CBA). The Board of Elections denied the grievance, and CSEA notified Erie County that it intended to take the grievance to arbitration.

The County brought this special proceeding to permanently stay arbitration and asserted, among other things, that the election clerks were not covered by its contract with CSEA. It cited Election Law § 3-300, which states, "Every board of elections shall appoint, and at its pleasure remove, clerks, voting machine technicians, custodians and other employees, fix their number, prescribe their duties, fix their titles and rank and establish their salaries within the amounts appropriated therefor by the local legislative body and shall secure in the appointment of employees of the board of elections equal representation of the major political parties...."

Supreme Court granted the County's application to stay arbitration. "New York State Election Law gives the Board of Elections the power to appoint and remove employees at its pleasure. It also has the power to fix rules, prescribe duties, determine salaries, etc. In other words, the employees serve 'at will'.... The employees do not work for the petitioner county." It also said "the Board of Elections is not a signatory to the parties['] collective bargaining agreement and therefore not subject to its terms. The Board played no part in the collective bargaining process. The county cannot usurp the authority of the Board of Elections by the simple inclusion [of] election job titles in the parties' agreement." The Appellate Division, Fourth Department affirmed for the reasons stated by Supreme Court.

CSEA, which has represented election clerks in Erie County since 1971, argues that section 3-300 gives boards of elections broad authority to appoint and remove employees, but nothing in it prohibits collective bargaining for election workers on "topics outside of those specifically enumerated in the statute." It says the lower courts' interpretation "is in direct conflict with New York's strong policy of extending coverage under the Taylor Law to all public employees. CSEA also argues that even if the Board of Elections is not bound by the CBA, the County is bound by its contract with CSEA to pay the agreed-to overtime to election clerks. "The County should not be allowed to successfully argue that a statutory provision protects them from providing bargained-for benefits to Election Clerks, when the County freely and knowingly chose to accept the terms of a CBA which explicitly included Election Clerks," it says.

For appellant CSEA: Diane M. Perri Roberts, Buffalo (716) 849-1333
For respondent Erie County: R. Scott DeLuca, Getzville (716) 568-7325

State of New York Court of Appeals

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To be argued Thursday, September 13, 2012

No. 179 People v Sandy Fernandez

In 2009, Sandy Fernandez was arrested and arraigned on an accusatory instrument charging him with aggravated unlicensed operated of a motor vehicle in the third degree. Fernandez pleaded guilty to the charge, and was convicted upon his guilty plea.

On appeal, Fernandez contended that the accusatory instrument is a complaint, and that it is jurisdictionally defective because the factual portion fails to allege facts establishing that he had reason to know that he was driving with a revoked license. The Appellate Term, Second, Eleventh and Thirteenth Districts, affirmed the judgment of conviction, stating that, "although the accusatory instrument is denominated a 'complaint/information,' it is a sufficient simplified traffic information since it designates the offense charged, substantially conforms to the form prescribed by the Commissioner of Motor Vehicles (CPL 100.40 [2]; Regulations of Commissioner of Motor Vehicles [15 NYCRR] § 91) and provides the court with sufficient information to establish that it has jurisdiction to hear the case . . ."

Fernandez argues that the accusatory instrument is a jurisdictionally defective misdemeanor complaint. He contends that it cannot be a sufficient simplified traffic complaint/information where the instrument alleges evidentiary facts purporting to establish the offense charged but omits facts supporting "reasonable cause" to believe that he knew or had reason to know that he was driving with a revoked or suspended license. The People argue that the accusatory information was a facially sufficient simplified traffic information, because it substantially complied with the form prescribed by the Commissioner of Motor Vehicles and designated the traffic offense charged.

For appellant: Svetlana M. Kornfeind, Manhattan (212) 577-3478
For respondent: Kings County Asst. Dist. Attorneys Leonard Joblove and Terry-Ann Corniffe (718) 250-3905

State of New York Court of Appeals

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To be argued Thursday, September 13, 2012

No. 180 Matter of Town of Walkill v Civil Service Employees Association, Inc. (Local 1000, AFSCME, AFL-CIO, Town of Wallkill Police Department Unit, Orange County Local 836), et al.

In 2006, the Court of Appeals held that police discipline in local municipalities "may not be a subject of collective bargaining under the Taylor Law" where there exists a statute pre-dating the enactment of sections 75 and 76 of the Civil Service Law and "provid[ing] expressly for the control of police discipline by local officials" (Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd., 6 NY3d 563, 573). A collective bargaining agreement between the Town of Wallkill and the Town's police officers requires, among other things, arbitration as the final stage of a disputed disciplinary action. In 2007, the Wallkill Town Board enacted Local Law No. 2, which set forth disciplinary procedures different than those in the collective bargaining agreement, culminating in a final determination by the Town Board reviewable in a CPLR article 78 proceeding "in accord with Town Law § 155."

The individual respondents/defendants are each police officers or sergeants facing disciplinary charges. They filed requests for arbitration of those charges pursuant to the collective bargaining agreement, prompting the Town to commence these hybrid proceedings and actions seeking to stay the arbitrations and for a judgment declaring that Local Law No. 2 is valid and affords the Town the right to prescribe the manner of all police disciplinary determinations. The union and individual officers cross-petitioned to compel arbitration and counterclaimed for a judgment declaring Local Law No. 2 invalid.

Supreme Court denied the Town's petitions, granted the cross petitions and declared Local Law No. 2 invalid insofar as it was inconsistent with the disciplinary provisions of the collective bargaining agreement. Supreme Court concluded that the Court of Appeals, in Matter of Patrolmen's Benevolent Assn., "intended to limit its holding to specific laws such as the Rockland County Police Act," rather than general laws such as Town Law § 155.

The Appellate Division reversed, permanently stayed arbitration and declared that Local Law No. 2 affords the Town the right to prescribe the manner of police discipline within its jurisdiction. The court reasoned that Town Law § 155, "upon which Local Law No. 2 was based, was enacted prior to Civil Service Law §§ 75 and 76. As such, Town Law § 155 was an existing general law that committed the matter of police discipline to the Town . . . [making] the matter of discipline . . . a prohibited subject of collective bargaining . . . ."

The police officers and the union argue that Matter of Patrolmen's Benevolent Assn. is a narrow public policy decision. They further argue that Civil Service Law § 76 (4) is not the basis for that decision, and the bargaining prohibition in Matter of Patrolmen's Benevolent Assn. is effected only by special state laws that supercede Civil Service Law §§ 75 and 76. They argue that, if the Appellate Division decision is affirmed, and the reasoning of Matter of Patrolment's Benevolent Assn. is extended to Town Law § 155, the matter of police discipline will be a prohibited subject of collective bargaining in all towns in the State.

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For amicus curiae NY State Public Empl. Relations Bd.: David P. Quinn, Albany (518) 457-2678
For amicus curiae NY State Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO, Ennio J. Corsi, Albany (518) 489-8424

State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Thursday, September 13, 2012

No. 181 People v Robert C. Halter *(papers sealed)*

Robert C. Halter was convicted, after a nonjury trial, of sexual abuse in the first degree, rape in the second degree, criminal sexual act in the second degree, and endangering the welfare of a child.

During trial, the People sought to limit defense counsel's questioning of the victim pursuant to the Rape Shield Law (CPL 60.42), arguing that the victim's sexual contact with another person was irrelevant. County Court granted the motion in limine and, in sustaining the People's objections during trial, limited defense counsel's questioning of the victim.

The Appellate Division affirmed the conviction, concluding that it was not against the weight of the evidence and that County Court properly applied the Rape Shield Law to preclude the defense from introducing evidence of alleged prior sexual conduct of the victim. The court also said that, "[r]egardless of whether the [Rape] Shield Law applied, the connection between the proffered evidence and the victim's motive or ability to fabricate sodomy charges against defendant was so tenuous that the evidence was entirely irrelevant . . . ." The Appellate Division rejected Halter's additional arguments as unpreserved.

Halter argues that the trial court's refusal to allow the introduction of evidence establishing the primary complainant's motive to fabricate was an abuse of discretion and violated his federal and state constitutional right to confront the witness against him. Halter also argues that, by precluding defense counsel from eliciting evidence regarding the primary complainant's motive to fabricate, the trial court denied him his constitutional right to present a defense. The People argue that the trial court properly exercised its discretion in applying the Rape Shield Law to preclude questioning about victim's sexual conduct.

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For respondent: Monroe County Senior Asst Dist Attorney Geoffrey Kaeuper (585) 753-4674

State of New York Court of Appeals

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To be argued Thursday, September 13, 2012

No. 182 People v Lonnie Meckwood

In 2010, Lonnie Meckwood was convicted, upon his guilty plea, of attempted robbery in the first degree. Before sentencing, Meckwood challenged the proposed use of a prior Pennsylvania conviction as a predicate felony for enhanced sentencing purposes. He argued that he was 18 years old when he committed the Pennsylvania crime and, had he done so in New York, he would have been eligible for youthful offender status; a youthful offender adjudication in New York would not have served as a predicate felony for an enhanced sentence.

Upon sentencing, the People presented County Court with a predicate violent felony conviction statement regarding Meckwood's Pennsylvania conviction. Meckwood did not contest the legality or constitutionality of that conviction, but he argued that the court should apply New York law and policy with respect to the application and effect of the prior conviction. County Court sentenced Meckwood as a second violent felony offender, stating "[w]hat we have is a judgment of conviction entered in Pennsylvania as an adult against this . . . Defendant . . ."

The Appellate Division affirmed the judgment of conviction, stating, "[w]here youthful offender treatment is not accorded in a foreign jurisdiction, the fact that the defendant would have been eligible for youthful offender treatment had the offense been committed in New York does not preclude the use of such conviction in New York as a predicate felony for enhanced sentencing . . ." The Appellate Division also rejected Meckwood's equal protection constitutional challenge to the provision that tolls the 10-year look-back period used to calculate whether a prior conviction qualifies as a predicate felony, reasoning that the tolling provision is rationally related to the goal of determining whether a convicted felon "can function in society in a law-abiding manner" and "time in prison has a limited value in determining whether a convicted felon can function in society as a law-abiding citizen . . . ." Finally, the court rejected, as unpreserved, Meckwood's challenge to the content of the predicate felony statement filed by the People and his claim that it failed to conform with CPL 400.15.

Meckwood argues that his adjudication as a second violent felony offender directly conflicts with this Court's ruling in People v Carpenteur (21 NY2d 571 [1968]). He also contends that Penal Law § 70.04 (b) is unconstitutional because it requires application of New York law to foreign convictions to establish the elements of a felony conviction, but does not provide for or require application of the New York youthful offender statute. Meckwood contends that tolling the ten-year look-back period during periods of incarceration violates his right to equal protection of the law. Lastly, Meckwood argues that the People's statement as to predicate violent felony conviction was defective for failure to comply with CPL 400.15 (2).

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