State of New York Court of Appeals

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

To be argued Wednesday, January 15, 2014

No. 21 Country-Wide Insurance Company v Preferred Trucking Services Corp.

Filippo Gallina was injured in September 2006 in a construction accident caused by a truck owned by Preferred Trucking Services Corp. and operated by Carlos Arias, a Preferred employee. Preferred and Arias were insured by Country-Wide Insurance Company under a policy that required them to "[c]ooperate with us" in investigating and defending against claims. Country-Wide began investigating Gallina's personal injury claim in February 2007 and made repeated efforts, without success, to obtain the cooperation of Arias and Preferred's president, Andrew Markos. Due to their lack of response, the insurer closed its investigative file in May 2007. It issued a disclaimer of indemnity in October 2007, based in part on their lack of cooperation, but still assumed their defense against Gallina's lawsuit and resumed its efforts to obtain cooperation. After Country-Wide made multiple calls and visits to his home, Arias agreed in August 2008 to participate in a deposition, but the insurer was unable to get him to agree to a schedule and in October 2008 Arias told it that he did not care about the deposition. A Country-Wide investigator reached Preferred's president by phone in October 2007, and Markos asked him to call back to set up a meeting. Country-Wide made repeated calls and visits to his office and home addresses though July 2008, but Markos did not respond or communicate further with the insurer. In November 2008, Country-Wide issued a complete disclaimer of coverage based on non-cooperation and said it would no longer provide a defense. Gallina and his wife ultimately won a $2.55 million judgment against Preferred and Arias.

Country-Wide sought a judgment declaring it is not obligated to defend and indemnify Preferred. Supreme Court granted Gallina's motion for summary judgment declaring that Country-Wide's disclaimers were untimely and the insurer is obligated to indemnify Preferred up to the policy limit of $500,000. The court said, "The undisputed evidence is that after Country-Wide reached Markos in October 2007, he failed to respond to any of [its] attempts to obtain his cooperation.... It was or should have been clear, as of July 2008 when Country-Wide last attempted to contact Markos, that he would not participate in the defense. However, Country-Wide does not offer any explanation for its delay of four months, until November 2008, in issuing the second disclaimer."

The Appellate Division, First Department affirmed, rejecting the insurer's argument that it had no basis for disclaiming coverage until it was clear that Arias, the truck driver, would not cooperate. It said Country-Wide's "diligent conduct prior to the disclaimer, in attempting to secure the cooperation of both [Markos and Arias], shows that [the insurer] believed both had knowledge or information pertaining to the accident and the underlying litigation, and belies [its] representation that its sole concern was with the testimony of the operator of the truck."

Country-Wide argues it would have been premature to disclaim coverage of Preferred in July 2008, when it became clear that Markos would not cooperate, because it was "still seeking in good faith" the cooperation of Arias, Preferred's employee, who had personal knowledge of the accident and "could effectively bind Preferred" under a theory of vicarious liability.

For appellant Country-Wide: Thomas Torto, Manhattan (212) 532-5881
For respondents Filippo and Sherri Gallina: Alexander J. Wulwick, Manhattan (212) 732-6566

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To be argued Wednesday, January 15, 2014

No. 22 People v Cheryl Santiago

On the morning of October 24, 2007, Cheryl Santiago found her 21-month-old stepdaughter dead on her cot in the family's apartment in Wappingers Falls, Dutchess County. Santiago told State Police investigators that on the previous night, as she was putting the child to bed, she had placed her hand over the girl's mouth for 30 seconds to a minute to quiet her because she would not go to sleep. At trial, doctors testified that it would have taken four to six minutes for the infant to suffocate, that an autopsy did not reveal any evidence of asphyxiation by smothering and that, if not for Santiago's statements, they would have classified the child's cause of death as undetermined. The jury convicted Santiago of second-degree murder.

The Appellate Division, Second Department reduced the conviction to second-degree manslaughter. The court found Santiago's motion to suppress her statements was properly denied and her confession was sufficiently corroborated by independent evidence, but it ruled her conviction for intentional murder was against the weight of the evidence. "Initially, we find that an acquittal would not have been unreasonable," it said. "Furthermore, while we find that the evidence, properly weighed, proves beyond a reasonable doubt that the defendant placed her hand over the victim's mouth and nose, and that this act caused the infant's death, it does not prove beyond a reasonable doubt that it was her conscious objective to kill the infant victim.... The evidence supports a finding that the defendant acted recklessly in covering the infant victim's nose and mouth in a misguided effort to quiet the victim in order for her to sleep, but not as a part of a calculated effort to kill the infant victim." The court did not explicitly address Santiago's ineffective assistance of counsel claim.

Santiago argues her trial counsel was ineffective, saying perhaps the "most egregious" of his missteps was his failure to object to a slide show at the end of the prosecutor's summation that lasted six minutes, reflecting the time it would have taken the child to suffocate. The slides, depicting a post-mortem photograph of the dead infant, were changed at 30-second intervals with each slide fading more and more to white. The last slide was pure white with no image. Some slides noted the lapsed time or bore a caption, including "struggle ends" and "brain death occurs." The prosecutor remained silent while the slides were shown to the jury. Santiago says the slides "had no relevance to the issues of the case, did not support the prosecutor's arguments, irreparably tainted jury deliberations and deprived [her] of a fair trial." Among other claims, she argues there was insufficient corroboration of her statements to the police.

For appellant Santiago: Malvina Nathanson, Manhattan (212) 608-6771
For respondent: Dutchess County Assistant District Attorney Kirsten Rappleyea (845) 486-2300

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To be argued Wednesday, January 15, 2014

No. 23 People v Josefina Jimenez

Josefina Jimenez and Alberto Sanchez were arrested for criminal trespass in May 2008, when six police officers responding to a radio call of a burglary in progress at a Bronx apartment building found them in the lobby. The superintendent signaled that they should be stopped and they were unable to explain their reason for being in the building. One of the arresting officers removed Jimenez's purse from her shoulder and, feeling a weight, opened it and found a loaded handgun. Jimenez was then charged with weapon possession.

Supreme Court denied her motion to suppress the gun, finding it was the result of a valid warrantless search incident to arrest based on exigent circumstances, specifically, the safety of the officers. Based on testimony by two officers that the purse was searched before Jimenez was handcuffed, the court said the police "did not have exclusive control of the defendant or her purse at the time they were securing" the purse and the gun.

At trial, Jimenez moved to reopen the suppression hearing after the officer who actually conducted the search testified that she did not search the bag until after Jimenez had been handcuffed and frisked. The trial court denied the motion, finding that exigent circumstances still existed "whether or not she actually was handcuffed." Jimenez was convicted of criminal possession of a weapon in the second degree and criminal trespass and was sentenced to three and a half years in prison.

The Appellate Division, First Department affirmed, saying, "The bag was large enough to contain a weapon and was within defendant's grabbable area at the time of her arrest.... Moreover, the police did not have exclusive control of the bag. The surrounding circumstances here support a reasonable belief in the existence of an exigency justifying a search of the bag, even though the officers did not explicitly testify at the suppression hearing that they feared for their safety." The trial court properly refused to reopen the suppression hearing based on the officer's trial testimony that she searched the bag after Jimenez was handcuffed, the Appellate Division said, because the search "would still have been lawful under the additional facts revealed at trial."

Jimenez argues the lower courts erred in finding the search justified based on the situation at the time of her arrest rather than the time of the search. She cites Arizona v Gant (553 US 332 [2009]), which held the validity of a search incident to arrest depends on the circumstances at the time of the search. In her case, Jimenez says, "The arresting officer was sufficiently unconcerned about the threat appellant posed that she simply placed the pocketbook on the ground while she completed the arrest procedure. Finally, by the time of the search, once appellant had been frisked and handcuffed and was standing there, completely cooperative in the presence of six police officers, there was certainly no exigency to justify the warrantless intrusion."

For appellant Jimenez: Richard Joselson, Manhattan (212) 577-3451
For respondent: Bronx Assistant District Attorney Noah J. Chamoy (718) 838-7142

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To be argued Wednesday, January 15, 2014

No. 24 Melcher v Greenberg Traurig, LLP

James L. Melcher is asking the Court to reinstate his damages claim for attorney deceit under Judiciary Law § 487 against Greenberg Traurig, LLP and a partner in the firm, Leslie D. Corwin. Melcher's claim arises from their defense of Apollo Medical Fund Management and its principal, Brandon Fradd, in a prior action Melcher brought to recover his membership share of profits under Apollo's operating agreement. Melcher alleges Corwin told him and his attorney at a January 27, 2004 meeting that his rights to a share of Apollo's profits had been diminished by a 1998 amendment to the agreement and that he had confirmed the authenticity of the amendment with Jack Governale, the lawyer who was said to have drafted it. Days after the meeting, according to Melcher's complaint, Fradd told Corwin he had accidentally set fire to the two-page amendment while making tea, destroying the first page and singeing the second. Melcher moved to compel production of the signed original of the amendment and, on February 17, 2004, Greenberg and Corwin moved to dismiss the suit against Apollo based on the amendment. In a March 20, 2004 letter to Supreme Court, Melcher's attorney accused Fradd, Greenberg and Corwin of "concealment of material facts" and "misleading representations" regarding the amendment, including its partial destruction. Melcher contends he first learned the amendment was a "back-dated forgery" when Governale was deposed on December 7, 2005 and denied drafting the amendment or having any knowledge of it.

Melcher commenced this action against Greenberg and Corwin on June 25, 2007. Supreme Court, applying a three-year statute of limitations, denied the defendants' motion to dismiss the lawsuit as time-barred.

The Appellate Division, First Department reversed and dismissed the suit on a 3-2 vote. The majority said the March 20, 2004 letter by Melcher's counsel demonstrates that he knew of Greenberg's and Corwin's "alleged deceit concerning Fradd's destruction of the purported amendment more than three years before this action was commenced." It said, "Corwin's concealment from the court of information regarding the claimed incineration of the purported document upon which he based his clients' motion to dismiss the Apollo Management complaint was actionable under [Judiciary Law § 487].... This action is time-barred by reason of plaintiff's admitted awareness of the alleged concealment for more than three years before he filed suit."

The dissenters said the March 20, 2004 letter did not trigger the statute of limitations because it "did not accuse the defendants of collusion or deceit under Judiciary Law § 487," but instead "only accused Fradd and Apollo Management of concealment in connection with an already submitted motion to dismiss and merely accused the defendants of omissions to the court in connection therewith." Melcher's claim is based on Corwin's alleged violation of section 487 on January 27, 2004, when he allegedly told Melcher about the amendment, the dissenters said. Melcher "did not become aware of this alleged deception until December 7, 2005, when Governale was deposed. Therefore, it was not until this date, when all the facts necessary to a cause of action ... were known that plaintiff's cause of action accrued."

For appellant Melcher: James T. Potter, Albany (518) 436-0751
For respondents Greenberg Traurig et al: Roy L. Reardon, Manhattan (212) 455-2000

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To be argued Wednesday, January 15, 2014

No. 25 QBE Insurance Corporation v Jinx-Proof Inc.

This insurance dispute arises from a 2007 altercation at the Beauty Bar, on East 14th Street in Manhattan, between customer Vera Hendrix and Garrett Alarcon, a security guard employed by the bar's owner, Jinx-Proof Inc. Hendrix filed a personal injury suit against Jinx-Proof and Alarcon, alleging claims for assault as well as for violation of the Dram Shop Act and negligent hiring and supervision. Jinx-Proof's general liability policy from QBE Insurance Corporation contained an assault and battery exclusion, and the insurer sent a "reservation of rights" letter in January 2008 informing Jinx-Proof that it would not defend or indemnify it "for the assault and battery allegations." In February 2008, QBE sent another letter to Jinx-Proof, stating, "[W]e are defending this matter under the Liquor Liability portion of the [policy], and under strict reservation of rights for allegations of Assault and Battery. Your policy excludes coverage for assault and battery claims." After Supreme Court dismissed the negligence and Dram Shop claims in April 2010, leaving only the assault claims pending, QBE brought this action for a judgment declaring it is not obligated to defend Jinx-Proof.

Supreme Court granted summary judgment to QBE. It said the insurer's reservation of rights letters "clearly denied" coverage for assault and battery claims and served "as effective written notices of disclaimer."

The Appellate Division, First Department modified by declaring that QBE was not obligated to defend Jinx-Proof, and otherwise affirmed on a 4-1 vote. In one concurrence for the majority, two justices said that until the potentially covered claims in the personal injury action were dismissed, "QBE was obligated to defend the entire action" and "had no choice ... but to reserve its right to invoke the assault-and-battery exclusion at such future time as it might become entitled to do so. Once the potentially covered claims were dismissed, QBE had no further obligations" to cover the remaining claims, "all of which fall within the exclusion, which QBE had timely invoked upon tender of the claim." In a separate concurrence, two justices said the reservation of rights letters "apprised the insured in no uncertain terms that coverage was barred by the assault and battery exclusion contained in the policy."

The dissenter said, "[N]either of plaintiff's admitted reservation of rights letters, which contain contradictory and confusing language, can be construed as an unequivocal and unambiguous disclaimer of coverage. Because plaintiff failed to timely disclaim coverage based on its policy exclusion, it should be obligated to defend Jinx-Proof in the underlying action."

For appellant Jinx-Proof: John M. Denby, Smithtown (631) 724-8833
For respondent QBE: Anthony M. Napoli, White Plains (914) 428-1438