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.

NOVEMBER 12 - 14, 2013 CALENDAR

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Tuesday, November 12, 2013

No. 212 Auqui v Seven Thirty One Limited Partnership

Jose Verdugo was injured in December 2003, while working as a deliveryman for a restaurant, when a sheet of plywood fell from a building under construction at 731 Lexington Avenue in Manhattan and struck him on the head. He was granted Workers' Compensation benefits for treatment of his head, neck and back injuries, as well as post-traumatic stress disorder and depression. Verdugo and his wife brought this personal injury action against the building's owner, Seven Thirty One Limited Partnership; the construction manager, Bovis Lend Lease LMB, Inc.; and the concrete subcontractor, North Side Structures, Inc.

Two years after the accident, the restaurant's insurance carrier sought to discontinue Verdugo's Workers' Compensation benefits on the ground that he was no longer disabled. After a hearing, a Workers' Compensation Law Judge found that Verdugo suffered from "no further causally related disability since January 24, 2006" and terminated his benefits as of that date. On administrative appeal, the Workers' Compensation Board upheld the determination.

In 2009, Seven Thirty One and the other defendants in this case moved for an order precluding Verdugo from litigating the issue of his accident-related injuries beyond January 24, 2006, on the ground that the issue had already been decided in the Workers' Compensation proceeding. Supreme Court granted the defendants' motion to preclude, saying Verdugo "had a full and fair opportunity to address the issue of ongoing causally-related disability" and was collaterally estopped from relitigating it. Shortly thereafter, a different judge appointed Maria Auqui as guardian of Verdugo's property, and Verdugo moved to renew the preclusion motion on the ground the guardianship order raised a triable issue of fact regarding his ongoing disability. Supreme Court adhered to its prior decision.

The Appellate Division, First Department reversed in a 3-2 decision, saying, "The determination that workers' compensation coverage would terminate as of a certain date for plaintiff's injuries ... is not, nor could it be, a definitive determination as to whether plaintiff's documented and continuing injuries were proximately caused by defendants' actions. While factual issues necessarily decided in an administrative proceeding may have collateral estoppel effect, it is well settled that 'an administrative agency's final conclusion, characterized as an ultimate fact or mixed question of law and fact, is not entitled to preclusive effect'" because it "is imbued with policy considerations as well as the agency's expertise." The Appellate Division also concluded the 2009 guardianship order "raises an issue of fact as to the cause of plaintiff's ongoing disability sufficient to warrant denial of defendants' motion."

The dissenters took the position that plaintiff "should be precluded from relitigating the issue of continuing disability" since "the duration of [his] disability was an evidentiary determination fully and fairly litigated by him at the Workers' Compensation proceeding terminating his benefits." Additionally, "the uncontested appointment of a guardian for the plaintiff more than three years later does not raise a triable issue of fact as to when his work-related disability ended."

The Court of Appeals reversed in a 4-1 decision (20 NY3d 1035) in February 2013, granting the defense motion to preclude the plaintiffs from litigating Verdugo's accident-related disability beyond January 24, 2006. In June 2013, the Court granted reargument.

For appellants Seven Thirty One et al: Richard J. Montes, Woodbury (516) 487-5800
For respondents Auqui & Verdugo: Annette G. Hasapidis, South Salem (914) 533-3049

State of New York Court of Appeals

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To be argued Tuesday, November 12, 2013

No. 213 People v Anthony S. Pignataro

In November 2000, when Anthony Pignataro pled guilty in Erie County to first-degree attempted assault in satisfaction of attempted murder and assault charges, Supreme Court told him he would face a determinate sentence of between 5 and 15 years. The court did not inform him prior to his plea that he would also face a mandatory 5-year term of post-release supervision (PRS) after his release from prison, nor did it pronounce the term of PRS when it sentenced him to 15 years in prison in February 2001.

In 2005, the Court of Appeals ruled in People v Catu (4 NY3d 242) that mandatory PRS is a direct consequence of a conviction and that a court's failure to advise a defendant of a statutorily-required term of PRS prior to his guilty plea renders the plea involuntary. In 2008, the Court held in People v Sparber (10 NY3d 457) that only the sentencing judge may impose a term of PRS and that the "sole remedy" for a judge's failure to do so would be resentencing. The State Legislature responded by enacting Penal Law § 70.85, effective June 30, 2008, which provides that a trial court may, with consent of the district attorney, resentence a defendant to the original prison term "without any term of [PRS], which then shall be deemed a lawful sentence."

In May 2010, Pignataro was brought back to Supreme Court for resentencing pursuant to Penal Law § 70.85 on an application by prosecutors, who said they were consenting to a sentence without PRS that would give him the benefit of his original plea bargain. Pignataro moved to vacate his plea on the ground it was involuntary because he was not informed before he entered it that PRS would be mandatory. He also argued that section 70.85 violated due process because it denied him the right to withdraw his involuntary plea.

Supreme Court denied Pignataro's motion and resentenced him to 15 years in prison with no PRS. The Appellate Division, Fourth Department affirmed.

Pignataro argues Penal Law § 70.85 is unconstitutional because "neither the Legislature nor the Courts may compel a Defendant to accept a plea that was unconstitutionally obtained.... [T]he issue goes to the integrity of the plea itself, and not whether Mr. Pignataro received the benefit of [his] negotiated plea. Section 70.85 forces him to retroactively accept an unconstitutional plea." He says he should be given a new hearing and an opportunity to vacate his plea.

The prosecution and the State Attorney General, as intervenor, argue the statute is valid. The Attorney General says Pignataro was resentenced "to his originally promised 15-year term without PRS. As a result, PRS was never part of defendant's sentence, and the plea court's failure to mention PRS did not render defendant's plea involuntary. Alternatively, if defendant's guilty plea is deemed involuntary *ab initio* because PRS was mandated by statute but not mentioned at the plea proceeding, vacatur nonetheless is not required" because "the remedy afforded defendant under Penal Law § 70.85 -- specific performance of his plea agreement -- fully protected defendant's constitutional right to due process."

For appellant Pignataro: Charles J. Greenberg, Amherst (716) 695-9596
For respondent: Erie County Assistant District Attorney Michael J. Hillery (716) 858-2424
For intervenor Attorney General: Assistant Attorney General Jodi A. Danzig (212) 416-8820

State of New York Court of Appeals

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To be argued Tuesday, November 12, 2013

Nos. 214 to 223 Town of Oyster Bay v Lizza Industries, Inc. (and nine other actions)

These cases stem from major sewer construction projects undertaken by Nassau and Suffolk Counties beginning in the 1970s. Local municipalities were named as third-party beneficiaries in the counties' contracts for the sewer projects, which were completed between 1973 and 1987. In 2009, the Town of Oyster Bay and the Villages of Lindenhurst and Babylon brought these actions seeking damages for continuing public nuisance against five of the sewer contractors, alleging that faulty excavation and backfilling of the sewer lines caused the ground to settle, damaging roads, sidewalks, curbs and nearby water lines.

In separate proceedings, Supreme Court granted the defendant contractors' motions to dismiss the complaints as untimely, relying on the Appellate Division, Second Department's 2010 ruling in Town of Islip v H.T. Schneider Associates (73 AD3d 1029), a similar action arising from the counties' sewer projects. The Second Department, citing City School Dist. of City of Newburgh v Stubbins & Assoc. (85 NY2d 535), said in Town of Islip, "Since the alleged continuing nuisance 'has its genesis in the contractual relationship of the parties,' the cause of action sounding in continuing nuisance accrued when the construction work pursuant to the contract was substantially completed."

The Appellate Division, Second Department affirmed the dismissals of these ten actions, ruling they were time-barred whether they were governed by the three-year statute of limitations for injury to property or the six-year statute of limitations for breach of contract. In Village of Lindenhurst v J.D. Posillico, Inc. (Case No. 223), it said the Village's cause of action accrued "upon substantial completion of the work 'irrespective of when the damage was actually discovered.'" "'[N]o matter how a claim is characterized in the complaint -- negligence, malpractice, breach of contract -- an owner's claim arising out of defective construction accrues on the date of completion, since all liability has its genesis in the contractual relationship of the parties,'" it said, quoting Newburgh. "This rule applies to actions alleging breach of contract commenced by a third-party beneficiary to the contract...."

The municipalities argue the Newburgh accrual rule does not apply here because, unlike the school district in Newburgh, they were never meant to become owners of the sewer projects, they had no role in approving plans for the projects or the construction process, they had no control over the budget and change orders, and thus their relationship with the counties and contractors was not the "functional equivalent of privity." They say their status as third-party beneficiaries was intended only to require the counties' contractors "to repair damages to preexisting adjacent municipal property caused during the course of the sewer installation."

For appellants Oyster Bay et al: Michael F. Ingham, Farmingdale (516) 249-3450
For respondents Lizza Indus. & Hendrickson Bros.: John M. Denby, Smithtown (631) 724-8833
For respondent S. Zara and Sons: Robert J. Cosgrove, Manhattan (212) 267-1900
For respondent J.D. Posillico: Joseph P. Asselta, Mineola (516) 248-9880
For respondent Marvec Allstate: Jared T. Greisman, Manhattan (212) 487-9700

State of New York Court of Appeals

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To be argued Tuesday, November 12, 2013

No. 224 Doe v Guthrie Clinic, Ltd.

This federal case arose in July 2010, when John Doe (anonymous) went to Guthrie Clinic Steuben, a private medical facility in the City of Corning, for treatment of a sexually transmitted disease. While he was there, a nurse accessed his files and sent text messages to his girlfriend, who was the nurse's sister-in-law, disclosing the nature of his disease. The girlfriend forwarded the messages to Doe while he was still waiting for treatment at the clinic. Six days later, after Doe complained about the incident, the clinic fired the nurse and the president of Guthrie Clinic, Ltd., sent him a letter confirming that his confidential information had been disclosed and that disciplinary action had been taken. Doe brought this action in U.S. District Court for the Western District of New York against nine entities affiliated with the clinic in Corning, alleging breach of the fiduciary duty of confidentiality, among other claims.

U.S. District Court granted the defendants' motion to dismiss the suit, finding they could not be vicariously liable for the nurse's actions that were outside the scope of her duties. The court refused to follow the Appellate Division, Third Department's 3-2 decision in Doe v Community Health Plan-Kaiser Corp. (268 AD2d 183 [2000]), which said a corporation could be liable for an employee's disclosure about treatment the plaintiff received from a psychiatric social worker. The Appellate Division said, "To hold otherwise would render meaningless the imposition of such a duty [of confidentiality] on a medical corporation, since the wrongful disclosure of confidential information would never be within the scope of the employment of its employees."

On the appeal in this case, the U.S. Court of Appeals for the Second Circuit found that "existing state caselaw" regarding a medical corporation's liability for a breach of confidentiality by a non-physician employee "is extremely sparse." The Third Department's decision "remains the only relevant signpost on the question," it said, and it was hesitant "to rely on it exclusively" because direct corporate liability for the conduct of employees is generally limited to cases where the employees act within the scope of their employment. The court also said, "[A] number of New York state statutes govern the disclosure of personal health information, and how to regulate New York-based health care providers in this area is generally best left to the sound value judgments of New York's courts and legislature." The Second Circuit has asked this Court to resolve the issue in a certified question:

"Whether, under New York law, the common law right of action for breach of the fiduciary duty of confidentiality for the unauthorized disclosure of medical information may run directly against medical corporations, even when the employee responsible for the breach is not a physician and acts outside the scope of her employment?"

For appellant Doe: T. Andrew Brown, Rochester (585) 454-5050
For respondents Guthrie Clinic et al: Martha B. Stolley, Manhattan (212) 309-6000

State of New York Court of Appeals

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To be argued Tuesday, November 12, 2013

No. 225 People v Paul Cortez

Paul Cortez was charged with fatally stabbing his estranged girlfriend, Catherine Woods, in November 2005 at her apartment on East 86th Street in Manhattan, where Woods was living with another boyfriend. At Cortez's trial, Supreme Court allowed the prosecutor to introduce entries from Cortez's diaries, written between 1999 and 2002, in which he expressed his pain and anger toward two other ex-girlfriends, neither of whom he physically harmed, and toward women in general. He described one of the women as "poisonous" and "dangerous" and the other as a "sly whore," but said he was "unable to kill" and "unable to find retribution." The journals contained frequent references to knives, death, and cut throats. On the second day of trial, the court discussed with Cortez a potential conflict of interest on the part of one of his two defense attorneys, who was facing felony prosecution by the Manhattan District Attorney's Office for allegedly smuggling drugs to a different client in jail. Cortez waived any conflict. He was convicted of second-degree murder and sentenced to 25 years to life in prison.

The Appellate Division, First Department affirmed, finding the journal entries about prior girlfriends were not impermissible evidence of uncharged crimes or bad acts "because the entries only reflected hostile thoughts." It said Cortez's "hostility toward women, not limited to the victim, had a bearing on motive and was not unduly prejudicial (see People v Moore, 42 NY2d 421, 428 [1977])," and concluded that any error was harmless. A concurring justice expressed "concern" about the prosecutor's statements in summation "that these diary entries, of questionable relevance, demonstrated that defendant had become increasingly more 'hostile to women,' and that previous rejections had caused a 'murderous rage' to develop in defendant. I believe that these 'psychological opinions' went beyond fair comment on the evidence." Regarding the co-counsel's conflict of interest, the Appellate Division said, "After the court conducted a sufficient inquiry..., defendant made a valid waiver of the conflict" and, in any event, "there is no record evidence of prejudice."

Cortez argues the trial court committed reversible error "in admitting dated writings and drawings expressing defendant's violent thoughts and fantasies about unharmed ex-girlfriends -- without Molineux analysis, prejudice-probity balancing, limiting instruction or evidentiary foundation for the junk science propensity theory they launched." He says proof of prior bad thoughts should be subject to the same analysis as prior bad acts under People v Molineux (168 NY 264 [1901]). He also argues that his waiver of his co-counsel's conflict was invalid because the court conducted an inadequate inquiry, failing to explain the risks the conflict posed for him and giving him insufficient opportunity to consider and discuss those risks with unconflicted counsel. He urges the Court to provide clearer guidelines for conflict inquiries to ensure that "waivers are knowing and intelligent."

For appellant Cortez: Marc Fernich, Manhattan (212) 446-2346
For respondent: Manhattan Assistant District Attorney David M. Cohn (212) 335-9000

State of New York Court of Appeals

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To be argued Tuesday, November 12, 2013

No. 245 Matter of Holmes v Winter

James Holmes, who is charged with murdering 12 people and wounding many more in a shooting rampage at a movie theater in Aurora, Colorado, in July 2012, is seeking to compel New York-based reporter Jana Winter to appear in a Colorado court to identify her confidential sources for an article she wrote for FoxNews.com five days after the shootings. Citing two unnamed law enforcement officers, Winter reported that Holmes mailed a notebook "'full of details about how he was going to kill people' to a University of Colorado psychiatrist before the attack." Attorneys for Holmes sought sanctions in the District Court of Arapahoe County, asserting that the officers violated the court's pre-trial gag order by leaking the information. The court held a hearing at which 14 law enforcement officials testified they had some knowledge of the notebook's contents, but denied disclosing it to the media. Finding that Winter "has become a material and necessary witness in this case," the court issued to Holmes a certificate requiring Winter to testify in the Colorado proceeding pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.

Holmes then commenced this proceeding in Manhattan Supreme Court pursuant to CPL 640.10, the New York statute that codifies the Uniform Act, seeking a subpoena compelling Winter to testify in Colorado and to produce her notes on her confidential sources. The court granted the subpoena, rejecting Winter's claim that the information was privileged under New York's Shield Law, Civil Rights Law § 79-h(b). "[T]hose are all issues for the Colorado court," the justice said, concluding that Winter was a material and necessary witness and that her appearance in Colorado would not be an undue hardship.

The Appellate Division, First Department affirmed on a 3-2 vote, saying Holmes "demonstrated that [Winter's] testimony was 'material and necessary'..., and that she would not suffer undue hardship because [Holmes] would pay the costs of her travel and accommodations." It said Winter "is entitled to assert whatever privileges she deems appropriate before the Colorado District Court," but any assertion of Shield Law privilege is "irrelevant" to the New York proceeding "since admissibility and privilege remain within the purview of the demanding State rather than the sending State." It said the facts "do not establish with absolute certainty that the Colorado District Court will require the disclosure of confidential sources. As such, it calls into question whether this matter truly embodies a conflict between evidence privileged under New York law and evidence that is unprotected in the demanding State."

The dissenters said, "New York's public policy, as reflected in this state's Shield Law ..., is violated when a court of this state directs a reporter to appear in another state, where the purpose of requiring her appearance is to obtain from her the identity of her confidential sources, and where there is a substantial possibility that the demanding court will issue such a directive.... [T]he majority fails to acknowledge the near certainty that the Colorado court will reject [Winter's] privilege claim and compel her to provide the identities of her confidential sources, leaving her to face either a contempt order and incarceration, or the loss of her reputation as a journalist." They said Winter also established that she would suffer undue hardship that is "far more than three days of travel, a hotel stay, and missing work; it is nothing short of undermining her career, the very means of her livelihood."

For appellant Winter: Christopher T. Handman, Washington, D.C. (202) 637-5719
For respondent Holmes: Daniel N. Arshack, Manhattan (212) 582-6500

State of New York Court of Appeals

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To be argued Wednesday, November 13, 2013

No. 226 People v Torrel Smith

Torrel Smith was charged with robbing a man at gunpoint in Yonkers in August 2009. The victim gave police a description of the robber, identified Smith in a lineup when he was arrested six days later, and identified him again at trial as the man who robbed him. The victim recounted his initial description of the robber during his trial testimony. The prosecution sought to present police testimony about the description the victim gave them immediately after the robbery "for the purpose of allowing the jury to assess whether or not the witness had an opportunity to observe the crime."

Supreme Court granted the prosecution request, ruling the police testimony was admissible "since ID is the issue in this case.... It is relevant pursuant to People v Huertas (75 NY2d 487 [1990]," which allowed a crime victim to testify about the initial description of her assailant that she had given to police. At Smith's trial, two police officers then recounted the initial description the robbery victim had given them. Smith was convicted of first-degree robbery and sentenced to 15 years in prison.

The Appellate Division, Second Department affirmed. It said Smith's claim that the police testimony served to improperly bolster the victim's identification testimony was unpreserved and, in any event, was meritless. "The challenged testimony was properly admitted to assist the jury in evaluating the complainant's opportunity to observe the perpetrator at the time of the crime and the jury was instructed to consider the testimony for this purpose alone...."

Smith argues that Huertas limits this type of description testimony to crime victims and, "in this one witness identification case," the police testimony about the victim's initial description deprived him of a fair trial. During the testimony of the two officers and the victim, he says, "the jury heard [the victim's] description of the perpetrator repeated four times.... Once [the victim] recounted the description he gave to police, any relevant, legitimate, nonhearsay testimony sanctioned by Huertas, was accomplished. Further police testimony that repeated the description served but one purpose, which was to buttress the complainant's identification. This amounted to bolstering and as such constituted an impermissible and unwarranted extension of Huertas...."

For appellant Smith: Salvatore A. Gaetani, White Plains (914) 286-3400
For respondent: Westchester County Assistant District Attorney Maria I. Wager (914) 995-3497

State of New York Court of Appeals

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To be argued Wednesday, November 13, 2013

No. 227 Caronia v Philip Morris USA, Inc.

Marcia Caronia and two other long-term New York smokers brought this putative class action against cigarette maker Philip Morris USA, Inc. in 2006 in U.S. District Court for the Eastern District of New York, alleging that its products had significantly increased their risk of developing lung cancer, although none of them had been diagnosed with lung cancer. They asserted claims of negligence, strict liability, and breach of the implied warranty of merchantability. Instead of compensatory or punitive damages, they sought to have Philip Morris fund a court-supervised program of medical monitoring for class members, using a recently developed medical surveillance technique known as Low Dose CT Scanning that they said would provide an effective means of detecting lung cancer at an early stage.

U.S. District Court dismissed the negligence and strict liability claims as time-barred, but allowed the plaintiffs to amend their complaint to plead a free-standing equitable claim for medical monitoring. The court subsequently dismissed the breach of warranty claim because "the plaintiffs concede their knowledge of the dangers of cigarettes" and, thus, there was no "implied warranty that Philip Morris breached." The court also dismissed the independent cause of action for medical monitoring, although it predicted that New York courts would recognize such a claim, because the plaintiffs did not allege that the company's failure to produce a safer cigarette is the reason they require a medical monitoring program.

The U.S. Court of Appeals for the Second Circuit affirmed the dismissal of the negligence, strict liability and breach of warranty claims, but found it was unclear whether the independent claim for medical monitoring is viable. "If ... New York recognizes an independent cause of action for medical monitoring, and if, as recognized, that claim is viewed as accruing when an effective monitoring test becomes available -- and if plaintiffs' allegations as to the availability and effectiveness of [Low Dose CT scans] and as to the lack of effectiveness of prior tests are proven -- the statute of limitations likely will not have run on that independent cause of action." The Second Circuit is asking this Court to resolve the issue in a certified question:

"(1) Under New York law, may a current or former longtime heavy smoker who has not been diagnosed with a smoking-related disease, and who is not under investigation by a physician for such a suspected disease, pursue an independent equitable cause of action for medical monitoring for such a disease? (2) If New York recognizes such an independent cause of action for medical monitoring, (A) What are the elements of that cause of action? (B) What is the applicable statute of limitations, and when does that cause of action accrue?"

For appellants Caronia et al: Victoria E. Phillips, Manhattan (212) 388-5100
For respondent Philip Morris: Kenneth J. Parsigian, Boston, Mass. (617) 880-4510

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To be argued Wednesday, November 13, 2013

No. 228 People v Andre Collier

Andre Collier was indicted in 2005 on charges arising from knife-point robberies of five stores in Albany County. He accepted a plea bargain in which he pled guilty to two counts of first-degree robbery in exchange for a promise that he would be sentenced to 25 years on one count and five years on the other. Albany County Court sentenced him as a second felony offender to consecutive terms of 25 years and five years. The Appellate Division, Third Department affirmed on his direct appeal, finding Collier had waived his right to challenge the sentence as harsh and excessive.

Meanwhile, in 2006, the Department of Correctional Services informed County Court that the five-year sentence was illegal because Penal Law § 70.04(3)(a) required a minimum term of ten years on each count. Collier moved to withdraw his guilty plea on the ground that the sentence was illegal. County Court denied the motion. The Third Department modified by vacating the entire sentence and remitting the case to County Court "to either resentence defendant in a manner that ensures that he receives the benefit of his sentencing bargain or permit both parties the opportunity to withdraw from the plea agreement...."

County Court denied Collier's request to withdraw his plea and resentenced him to concurrent terms of 25 years and 10 years. The Appellate Division affirmed, rejecting Collier's claim that the lower court rendered his plea involuntary by resentencing him to 10 years on the second count, which was longer than the five-year term he agreed to in the plea bargain. The Third Department said, "In fact, defendant actually received a lesser sentence under the resentence than the one he agreed to under the plea agreement because County Court directed that the sentences run concurrently, instead of consecutively, thereby reducing his aggregate prison exposure from 30 to 25 years. Thus, defendant received a sentence that was better than 'the benefit of his bargain' upon resentencing, and County Court was not required to allow him to withdraw his plea...."

Collier argues that, "because both sentences were part of Mr. Collier's plea bargain, and the plea bargain cannot be legally fulfilled, both sentences must be vacated and Mr. Collier must be given the opportunity to withdraw his plea in its entirety. Further, prior to accepting a defendant's guilty plea, a court must ensure that the defendant fully understands the consequences of the plea. The court's failure to do so violates the defendant's right to due process because the plea was not knowing, voluntary and intelligent. *See* People v Hill, 9 NY3d 189...." He says that he "is clearly losing a benefit that was expressly promised to him and was a material inducement to his guilty plea: a 5-year sentence on count five, which has now been doubled by the Trial Court to a 10-year sentence despite Mr. Collier's request to withdraw his plea."

For appellant Collier: Claude Castro, Manhattan (212) 810-2710
For respondent: Albany County Assistant District Attorney Steven M. Sharp (518) 487-5460

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To be argued Wednesday, November 13, 2013

No. 229 William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh

Albert Rabizadeh made the winning bid of $400,000 by telephone for a 19th century Russian silver-and-enamel covered box at a public auction held in September 2008 by William J. Jenack Estate Appraisers and Auctioneers, Inc., in Chester, New York. When Rabizadeh refused to pay for it, Jenack brought this breach of contract action against him. Rabizadeh raised a defense based on the statute of frauds, contending that the sale documents provided by Jenack did not comply with General Obligations Law § 5-701(a)(6) because they did not include the name of the buyer or "the name of the person on whose account the sale was made." Because he was participating by telephone, Rabizadeh submitted in advance an absentee bid form that contained his name and address, credit card number, items he intended to bid on, and his signature. The "clerking sheets," which recorded the winning bid for each item as the auction was conducted, identified the bidder and seller by number. The seller of the Russian box was identified only as consignor number 428.

Supreme Court granted Jenack's motion for summary judgment on the issue of liability, saying "the designation of the consigner and the bidder ... in the clerking sheets by reference to the number assigned to each was sufficient to satisfy" the written memorandum requirement of section 5-701(a)(6). It said Jenack established that Rabizadeh "requested and received permission to bid at the auction by telephone, that the defendant did in fact bid ... and was the winning bidder on [the Russian box] in the amount of $400,000, and that the defendant refused to pay for the item despite due demand." Jenack was awarded $402,398 after a non-jury trial.

The Appellate Division, Second Department reversed and dismissed the suit, holding the statute "requires that the necessary memorandum, be it in one writing or multiple writings, reveal the identity of, not merely a number assigned to, the parties to the contract." The absentee bid form and clerking sheets adequately identified the purchaser, but not the seller because Jenack "failed to produce any writing identifying consignor '# 428' by name...," it said. "While it may be true that auction houses commonly withhold the names of consignors..., this court is governed not by the practice in the trade, but by the relevant statute.... [T]he statute clearly and unambiguously requires that the '*name* of the person on whose account the sale was made' ... be provided in the memorandum, which plainly means that the memorandum must contain information revealing the identity of that party."

Jenack argues that the clerking sheets constitute a valid and enforceable sale agreement for the Russian box under Hicks v Whitmore (12 Wend 548 [1834]), which held that the language of a predecessor statute did not require "the name of the vendor or owner, but of the person on whose account the sale was made, which may well be complied with, by inserting the name of the agent, factor or consignee" of the owner. In the same way, it says, "[i]nsertion of a consignor's number or other identifying mark decipherable by reference to other records would suffice... The clerking sheets and consignor number list, together, satisfy the statute." He also argues that inclusion of the name of the Jenack auction house on the clerking sheets, as agent for the owner, satisfies the statute of frauds.

For appellant Jenack: Benjamin Ostrer, Chester (845) 469-7577
For respondent Rabizadeh: Michael S. Winokur, Flushing (718) 264-7400

State of New York Court of Appeals

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To be argued Wednesday, November 13, 2013

No. 230 People v Cavell Craig Tyrell
No. 231 People v Cavell Craig Tyrell

Cavell Craig Tyrell is challenging the validity of his guilty pleas to two misdemeanor marijuana charges in separate cases in Manhattan, arguing that the records of the plea proceedings do not establish that his pleas were knowing, intelligent and voluntary.

Case No. 231 arose in February 2009, when Tyrell was charged with fourth-degree sale and fifth-degree possession of marijuana. At his arraignment in Criminal Court, Tyrell's attorney waived "the readings, not the rights" and the prosecutor offered a "plea to the charge" in exchange for "time served." After the prosecutor rejected his request for an adjournment in contemplation of dismissal, defense counsel said, "We have a disposition. At this time [Tyrell] authorizes me to ... enter a plea of guilty" to fifth-degree possession. The court replied, "Time served. Enter judgment." No questions were asked of Tyrell and he did not speak during the proceeding.

Case No. 230 arose in October 2009, when Tyrell was charged with fourth-degree sale of marijuana. At arraignment, his attorney waived "the readings, not the rights" and the prosecutor offered a "plea to the charge" with a sentence of 15 days, which defense counsel rejected. The court denied defense counsel's request for a sentence of time served, but said it would "give him 10 days" for a guilty plea. Defense counsel said Tyrell was willing to accept the offer and authorized him to enter the plea. The court described the terms of the deal directly to Tyrell -- a plea to fourth-degree sale for a jail sentence of 10 days, a mandatory surcharge, and a 6-month license suspension -- and asked, "Is that what you want to do?" Tyrell replied, "Yes, your honor." The court then asked, "Is it true that on October 15, 2009 in New York County at 25 Sheraton Square that you waited with an undercover officer while someone else went to get marijuana that was exchanged with that individual, is that true?" Tyrell replied, "Yes, sir."

The Appellate Term, First Department affirmed both convictions, ruling his challenges to the adequacy of the plea allocutions were unpreserved, since he did not move to withdraw the pleas, and also ruling his claims were meritless. In Case No. 231, the court said his "counseled guilty plea" -- in satisfaction of a charge that was "potentially punishable by a one-year jail sentence -- was knowing, intelligent and voluntary. Further, a plea of guilty will be sustained in the absence of a factual allocution where, as here, there is no indication" the plea "was improvident or baseless." It said Tyrell "clearly understood the nature of the charges to which he was pleading and willingly entered his plea to obtain the benefit of the bargain he had struck."

Tyrell argues that preservation is not required where "the face of the allocution itself" casts doubt on the voluntariness of the plea. On the merits, he argues in Case No. 231 that, because no questions were posed to him and he did not speak during the plea proceeding, "the record does not demonstrate that appellant understood his rights or court rules or courtroom procedure. Nor does the record establish that appellant was aware of the possible sentence he was facing or the consequences of his guilty plea," or that he "understood or was even aware of the important constitutional rights he was waiving by virtue of his guilty plea."

For appellant Tyrell: Harold V. Ferguson, Jr., Manhattan (212) 577-3548
For respondent: Manhattan Assistant District Attorney Ryan Gee (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, November 14, 2013

No. 249 Matter of Honorable Glen R. George v State Commission on Judicial Conduct

Glen R. George, a justice of the Middletown Town Court in Delaware County since 1985, is challenging a determination of the State Commission on Judicial Conduct that he should be removed from office for dismissing a friend's ticket for a seatbelt violation and for engaging in ex parte communication with a prospective litigant in a small claims matter, which the Commission found had the effect of discouraging the litigant from filing a claim against a long-time acquaintance of the judge. George's friend with the seatbelt ticket, Lynn Johnson, appeared before him at a regularly scheduled court session in June 2009. The ticket stated that Johnson was driving was a 2000 Mercedes Benz, but Johnson showed George his certificate of title to a 1976 Mercedes and said the ticket was incorrect. George dismissed the ticket based on that discrepancy, without disclosing his long relationship with Johnson and members of his family, including the fact he had been employed part-time by the Johnson family business until the previous day. Neither the prosecutor not the trooper who issued the ticket were present.

The Commission voted 8-2 to remove George from office, saying he "engaged in serious misconduct by dismissing a ticket issued to his former employer and long-time friend, contrary to fundamental ethical precepts and procedural rules. Such behavior 'demonstrate[s] an unacceptable degree of insensitivity to the demands of judicial ethics'...." It said the fact that he was cautioned by the Commission in 2000 for presiding over cases involving another member of the Johnson family "exacerbates his misconduct." His handling of the ticket and the small claims matter "bear the unmistakable taint of favoritism, which damages public confidence in his integrity and impartiality and in the judiciary as a whole...."

Two members concurred in the finding of misconduct, but argued that George should be censured. His handling of his friend's seatbelt ticket, "while undeniably creating an appearance of impropriety and deserving of a severe rebuke, falls well short of the standard set by the Court of Appeals for imposing the extreme sanction of removal from office 'only in the event of truly egregious circumstances'..., they said. [R]emoving this judge under these circumstances lowers the bar for removal too much and sets a troubling precedent for the future."

George, a retired state trooper whose term expires at the end of this year, argues his sanction should be reduced to censure because his "conduct did not rise to the level of being 'truly egregious.' It was the product of poor or extremely poor judgment...." He handled the seatbelt violation, "a zero point charge that is not a speeding ticket," in open court and "properly recorded the entire proceeding," he says. The ticket contained an error "for which documentary evidence existed. The Judge was hard on clerical errors ... and it was well known that he dismissed tickets with clerical errors. This minimizes or eliminates any question that Johnson received special treatment not associated with the case."

For petitioner George: Thomas K. Petro, Kingston (845) 338-1162
For respondent Commission: Edward Lindner, Albany (518) 453-4613

State of New York Court of Appeals

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To be argued Thursday, November 14, 2013

No. 232 People v Wendell Payton

Wendell Payton was charged with robbing a man in Riverhead in 2007. Two weeks before his trial began in Suffolk County Court in February 2008, the Suffolk County District Attorney's Office executed a search warrant at the office of Payton's assigned counsel, Robert Macedonio. Neither the district attorney nor Macedonio informed the trial court or Payton of the search. The trial proceeded to verdict and Payton was found guilty of second-degree robbery. Two months later, when Payton appeared for sentencing, County Court was informed of the investigation of Macedonio and, at Payton's request, adjourned the sentencing and assigned him new counsel. Payton filed a CPL 330.30 motion to set aside the verdict on the ground that the criminal investigation of his trial counsel created a conflict of interest that deprived him of his right to effective assistance of counsel. The court denied the motion, ruling that the investigation created only "a potential conflict of interest" and that Payton failed to show that it affected the conduct of his defense in view of "the fully competent manner in which trial counsel represented" him. Payton was sentenced to 13 years in prison. He then filed a CPL 440.10 motion to vacate the conviction on the ground of conflict of interest, which the court denied. In December 2008, two months after the sentencing, Macedonio was arrested on a felony charge of criminal possession of a controlled substance in the fifth degree. He pled guilty the same day pursuant to a sealed plea agreement that called for a conditional discharge, admitting that he possessed at least 500 milligrams of cocaine in 2004.

The Appellate Division, Second Department affirmed, in a 3-1 decision, Payton's conviction and the denial of his CPL 440.10 motion. It said, "[E]ven if it is assumed that trial counsel was aware that he was a target of the investigation so as to [create a potential conflict], the defendant has failed to come forward with any evidence establishing that the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation.... [W]e decline to adopt the per se rule advocated by the dissent, which would require reversal absent a showing of any effect which the conflict may have had on the representation, as expressly contrary to clear and established precedent...."

The dissenter said, "Given the conflict alleged by the defendant in this case, he need not satisfy the prejudice prong of Strickland (466 US 668 [1984]) to demonstrate that he was deprived of the effective assistance of counsel.... Simply stated, when defense counsel is under indictment or the subject of a criminal investigation by the same office prosecuting his or her client, absent a valid waiver by the client, there is a per se conflict of interest. As the facts of this case well demonstrate, a per se rule is appropriate inasmuch as an attorney's decision to conceal such matters from the client demonstrates that the attorney has already placed his or her own self-interest before the interests of the client...."

For appellant Payton: Kirk R. Brandt, Riverhead (631) 852-1650
For respondent: Suffolk County Assistant District Attorney Glenn Green (631) 852-2500

State of New York Court of Appeals

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To be argued Thursday, November 14, 2013

No. 233 People v Donald O'Toole

Donald O'Toole and an accomplice were charged with robbing the manager of a Harlem barbershop at gunpoint in 2004. The barber testified that the accomplice pointed a pistol at him. At O'Toole's first trial, the jury acquitted him of first-degree robbery, which requires proof that the defendant or an accomplice displayed what appeared to be a gun, but it convicted him of second-degree robbery. He was sentenced to 14 years in prison. The Appellate Division, First Department reversed, based on an error during jury selection, and ordered a new trial on the second-degree robbery count.

At his retrial, O'Toole moved to preclude evidence relating to the gun based on the doctrine of collateral estoppel, arguing that the jury at his first trial, in acquitting him of first-degree robbery, had determined that no gun was displayed. Supreme Court denied the motion and evidence of the gun was allowed. O'Toole was again convicted of second-degree robbery and was sentenced to 15 years in prison.

The Appellate Division, First Department reversed and ordered a third trial, ruling that Supreme Court erred in allowing evidence of the gun at the second trial. Because O'Toole's first jury acquitted him of first-degree robbery, "the People were barred by collateral estoppel from presenting evidence at the retrial that defendant's accomplice pointed what appeared to be a pistol at the complaining witness during the alleged robbery.... 'The doctrine of collateral estoppel ... operates in a criminal prosecution to bar relitigation of issues necessarily resolved in [a] defendant's favor at an earlier trial,'" the court said, citing People v Acevedo (69 NY2d 478).

The prosecution argues, "Because the essential element of 'force' with respect to both the first- and second-degree robbery charges filed against defendant was predicated on display of a gun by defendant's accomplice, when defendant was initially acquitted on the first charge and convicted on the second, the People could not properly be collaterally estopped from presenting evidence about the display of the gun at a retrial.... The acquittal on the first-degree count -- which very well might have resulted from an exercise of mercy on the part of the jurors -- ... cannot be interpreted as a specific factual finding of 'no gun' that is binding in defendant's retrial...."

For appellant: Manhattan Assistant District Attorney Timothy C. Stone (212) 335-9000
For respondent O'Toole: Katheryne M. Martone, Manhattan (212) 577-7993

State of New York Court of Appeals

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To be argued Thursday, November 14, 2013

No. 234 Ragins v Hospitals Insurance Company, Inc.

When Dr. Herzl Ragins was sued for malpractice in the Bronx, he had a primary professional liability insurance policy that provided coverage of up to $1 million per incident. The "supplementary payments" provision of the primary policy required the insurance company to pay "all expenses incurred by the company, all costs taxed against the insured in any suit defended by the company and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company had paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon." Dr. Ragins also had an excess liability policy, issued by Hospital Insurance Company, Inc. and HANYS Insurance Company, Inc. (collectively HIC), that provided additional coverage of $1 million per incident. The excess policy required HIC to pay "all sums in excess of the limits of liability of the Underlying Policy ... but only up to a total amount of the limits of liability provided herein."

The jury in the malpractice action returned a $1.1 million verdict against Dr. Ragins. Because his primary insurer was in liquidation, the state insurance superintendent paid $1 million toward the verdict, representing the full limit of the primary policy. HIC paid the remaining $100,000 of the verdict. The trial court subsequently entered an amended judgment against Dr. Ragins to impose $390,728.16 in accumulated interest and costs. HIC paid $35,418.46 toward the amended judgment, asserting that because it paid one-eleventh of the principal amount of the underlying judgment, it was required to pay only one-eleventh of the accrued interest. Dr. Ragins brought this action against HIC in Westchester County, alleging that the insurer breached the excess policy by refusing to pay the full amount of accrued interest and costs after the limit of the primary policy was exhausted.

Supreme Court denied HIC's motion to dismiss the suit, finding there were issues of fact regarding HIC's liability for the remaining portion of the amended judgment that was in excess of the primary policy. "HIC mistakenly contends that the primary policy required payment of interest in addition to and above the limit of $1 million, and therefore that a 'void [was] left by [the primary insurer's] insolvency'...," it said. "[T]he primary professional liability policy does not establish unambiguously that [the primary insurer] was required to make payment of pre and post-judgment interest and costs after the policy limit had been exhausted in satisfaction of the judgment."

The Appellate Division, Second Department reversed, holding that HIC met its obligations under the excess policy. "HIC was only responsible for prejudgment interest on that portion of the underlying judgment which it was obligated to pay under its policy..., and the excess policy conclusively established that HIC had no obligation to pay post-judgment interest or costs."

For appellant Ragins: Joseph T. Pareres, Manhattan (212) 557-1818
For respondents HIC et al: Christopher Simone, Lake Success (516) 488-3300

State of New York Court of Appeals

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To be argued Thursday, November 14, 2013

No. 235 Kolbe v Tibbetts

After the Newfane Central School District imposed significant increases in prescription drug co-payments for retirees and active employees in January 2010, pursuant to its new collective bargaining agreement (CBA) with the Civil Service Employees Association, Herbert Kolbe and three other retired employees brought this action for breach of contract and declaratory judgment against the School District and its officials. They argued the District was required to maintain health insurance coverage equivalent to the coverage that was in effect at the time each of them retired. In the "retirement benefits" portion of the CBAs in effect from 1990 through 1996, section 6.5.3 states, "The coverage provided shall be the coverage which is in effect for the unit at such time as it is provided to the employee." In subsequent CBAs, section 6.5.3 states, "The coverage provided shall be the coverage which is in effect for the unit at such time as the employee retires." Section 6.4 of the CBAs provides that retirees are eligible to "continue group health insurance" upon payment of a monthly premium to the District, sets forth the health plans that are available, and specifies prescription co-pay amounts.

Supreme Court granted the plaintiffs' motion for summary judgment. It found the language of the contracts is "plain and unambiguous," refused to consider parol evidence of the parties' intent, and declared that the School District is obligated to maintain health insurance coverage for the plaintiffs that is equivalent to the coverage they had when they retired.

The Appellate Division, Fourth Department reversed on a 3-2 vote and granted summary judgment for the District. The majority found the language of the CBAs was "unequivocal," and held that section 6.5.3 did not prevent the District from changing the prescription co-pays set forth in section 6.4. "The unambiguous language in section 6.5.3 provides that, at the time of his or her retirement, the retiree is entitled to the same coverage that is provided to the bargaining unit," it said. "The language does not specify that an equivalent level of coverage will continue during retirement...."

The dissenters argued that the language in section 6.5.3 is ambiguous and that it conflicts with the language in section 6.4, suggesting that section 6.5.3 "may have given retirees additional rights to health insurance coverage in addition to those provided in section 6.4" They said the matter "should be remitted to Supreme Court for a hearing at which parol evidence may be presented to establish the parties' intent."

For appellants Kolbe et al: Terry M. Sugrue, Buffalo (716) 856-0277
For respondents Newfane School District et al: Karl W. Kristoff, Buffalo (716) 856-4000

State of New York Court of Appeals

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To be argued Thursday, November 14, 2013

No. 236 People v Anthony Oddone

In August 2008, on ladies night at the Publick House in Southampton, Anthony Oddone was dancing with a woman on a table and a bouncer, Andrew Reister, asked him to get down. When Oddone refused, Reister pulled him down, the men began to scuffle, and Oddone placed Reister in a headlock or chokehold. Witnesses gave differing accounts of how long Oddone maintained his hold. When he released it, Reister fell to the floor and had no pulse. Reister was resuscitated at Southampton Hospital, but died two days later of cardiac arrest caused by overstimulation of the carotid sinus nerves in his neck. Oddone was charged with murder.

At trial, the prosecution's forensic pathologist testified that, in his opinion, Reister's neck must have been compressed for a period of two to four minutes. Oddone moved to strike the expert's testimony on the ground that his opinion was not based on generally accepted medical principles. County Court denied the motion to strike the testimony without holding a Frye hearing. The court denied, again without a Frye hearing, a defense request to present expert testimony on the psychology of eyewitness observations; in particular, that eyewitnesses often overestimate the duration of short, stressful events. The court said the topic was "well within the ordinary experience and knowledge of the average juror. After nine days of deliberations, the jury acquitted Oddone of murder and convicted him of first-degree manslaughter. He was sentenced to 22 years in prison.

The Appellate Division, Second Department reduced his sentence to 17 years and otherwise affirmed, finding that Frye did not apply to the pathologist's testimony about the duration of the chokehold. "Frye is only implicated where a question as to whether the expert's methodologies or deductions are based upon principles that are sufficiently established to have gained general acceptance as reliable...," it said. "The expert testified and made conclusions based on his personal observations and experiences as a forensic pathologist for many years. The defendant's factual disagreement with the expert's theory regarding the cause of the petechiae on the outside surface of the victim's eyelids and the fact that his face turned purple immediately after the incident did not require a Frye hearing."

Oddone argues that the trial court erred in refusing to strike the pathologist's testimony about the duration of the neck compression and in precluding the defense expert's testimony about the fallibility of eyewitness time estimates. He says his objection to the pathologist's testimony was not based on disagreement with the expert's "personal 'theory,'" but "with the fact that the medical principles [the expert] relied upon in making his 2- to 4-minute claim have been uniformly rejected by his peers." Among other claims, he argues that the trial court erred in refusing to give the jury an intoxication charge and that he was denied his right to an impartial jury, saying one juror was "biased by her mid-trial hiring by the Suffolk County Police Department" and another "was biased by the pending prosecution of her son by the Suffolk County District Attorney.

For appellant Oddone: Marc Wolinsky, Manhattan (212) 403-1000
For respondent: Suffolk County Assistant District Attorney Anne E. Oh (631) 852-2500