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COURT OF APPEALS

STATE OF NEW YORK

MICHAEL GRUCCI,

Appellant,

-against-

No. 196

CHRISTINE GRUCCI,

Respondent.

20 Eagle Street
Albany, New York 12207
October 16, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 196, Grucci v.
2 Grucci.

3 Counsel, would like any rebuttal time?

4 MR. GRASECK: Could I have three minutes?

5 CHIEF JUDGE LIPPMAN: Three minutes. Sure,
6 go ahead.

7 MR. GRASECK: Thank you. This case was
8 marred by interference with the right of full cross-
9 examination. And that interference affected ability
10 to undermine the credibility of the respondent, as
11 well as bearing upon the ability to demonstrate that
12 the respondent was the one who caused the
13 commencement of the prosecution.

14 Through remarkable rulings made by the
15 court - - -

16 CHIEF JUDGE LIPPMAN: What about the ADA's
17 testimony about how the prosecution went forward, as
18 to who made the decision? Is that important?

19 MR. GRASECK: It - - - he doesn't know - -
20 - in other words, if you lie to police or prosecutor,
21 the law, as I understand it, indicates that you can
22 be deemed to have commenced the prosecution. And the
23 fact that he believes this witness - - - in other
24 words, he makes a decision based on the believed
25 truth of the witness. So I don't believe his

1 testimony was very compelling on this issue.

2 JUDGE CIPARICK: So where was the abuse of
3 discretion here? How did the court abuse its
4 discretion? By not - - -

5 MR. GRASECK: One of the things the court
6 did, it wouldn't permit us to explore through Anthony
7 Grucci evidence of vicious, malicious conduct on the
8 part of the respondent; deemed it hearsay. When we
9 invited the court's attention to the definition of
10 hearsay, it simply said well, I don't usually change
11 my rulings. And in very fundamental ways, the court
12 interfered with - - -

13 JUDGE SMITH: What was it that the judge
14 found to be hearsay?

15 MR. GRASECK: There was a report circulated
16 by the respondent that the appellant was covered in
17 blood and some woman was missing - - -

18 JUDGE SMITH: I wasn't - - - I admit, I had
19 trouble figuring out what the judge was ruling. You
20 think he really said that something that Mrs. Grucci
21 said was inadmissible hearsay?

22 MR. GRASECK: Yes. Well, in other words,
23 Anthony Grucci was attempting to testify that Mrs.
24 Grucci, in a tape-recorded conversation told the - -
25 -

1 JUDGE SMITH: Yes, I - - - you could also
2 read that as being an authentication - - - that he
3 thought it wasn't authenticated? Didn't the judge
4 have an authentication problem with the tape?

5 MR. GRASECK: That was with res - - - well,
6 there are two separate issues. One is the tape. We
7 think the tape should have gone in evidence. We
8 should have been permitted to have the witness
9 authenticate the voices.

10 JUDGE PIGOTT: Your opponent makes the
11 point, I think, that you never had it marked as an
12 exhibit, let alone moved it into evidence?

13 MR. GRASECK: That's true. We failed to do
14 that. But - - -

15 JUDGE PIGOTT: How do we then review that?

16 MR. GRASECK: The defense counsel objected
17 to the tape going into evidence and had a lengthy
18 declaration about what the problems with it were. It
19 was obvious that he knew what we were talking about.

20 JUDGE SMITH: You did make an offer of
21 proof?

22 MR. GRASECK: We didn't. We made an offer
23 - - -

24 JUDGE SMITH: I thought you did. There's
25 an offer of proof as to what's on the tape, isn't

1 there?

2 MR. GRASECK: We indicated what the tape
3 included, particularly including that the witness was
4 told by the respondent that the reason she caused the
5 arrest of the appellant was that she was frustrated
6 she couldn't put him in a hospital, and he was
7 disturbing to her, because he had some emotional
8 problems. So she caused his arrest.

9 JUDGE READ: In your view, what's the
10 standard for proving that this prosecution was
11 initiated by the - - - I guess it's the defendant in
12 this case? What should our standard be - - -

13 MR. GRASECK: That - - -

14 JUDGE READ: - - - or what is our standard?

15 MR. GRASECK: - - - a post-indictment
16 malicious prosecution case depends upon proof that
17 the complainant lied to police or to the grand jury.
18 And the court wouldn't even let us put in the grand
19 jury minutes which was the essence of the lies that
20 caused the prosecution.

21 JUDGE READ: So this is the - - - well,
22 there was a jury instruction, right?

23 MR. GRASECK: There was.

24 JUDGE READ: To which both parties agreed
25 that if she knowingly gave false information to the

1 police, she should be considered to have initiated
2 the prosecution?

3 MR. GRASECK: Yes, the court - - -

4 JUDGE READ: And in your view, that's the
5 right standard?

6 MR. GRASECK: It is. The court belatedly
7 came to that conclusion, during summation. It
8 undermin - - - how to put it - - - it granted an
9 objection to appellant's attorney saying that that
10 was the law and indicated by its ruling that it was
11 not the law. So it was a very cloudy picture that
12 was presented to the jury.

13 There was a charge. There was also a
14 summation during the course of which the court
15 indicated to the jury that you can't - - - you don't
16 commence a prosecution by lying to police or grand
17 jurors.

18 I was going to mention that we attempted to
19 place a document in evidence, a report given by the
20 respondent to a police officer. And while we were
21 attempting to authenticate the report, the judge said
22 to the witness, don't look at that document, it's not
23 in evidence. And if that were the standard, I don't
24 suppose anybody would ever get anything into
25 evidence.

1 Similarly, there were objections: Don't
2 cross-examine this witness on her criminal trial
3 testimony. And for whatever reason, the court seemed
4 to accept that claim, that assertion as to - - -

5 JUDGE SMITH: What about the original
6 complaint, the complaint on which the order of
7 protection was entered. You tried to show that that
8 was a fabricated complaint?

9 MR. GRASECK: Yes. We tried to call Mrs.
10 Romandi (ph.), and with respect to her we did make an
11 offer - - - we asked that she be permitted to testify
12 out of the - - -

13 JUDGE SMITH: Well, you did say that she
14 would say - - - that you were trying to prove that it
15 was fabricated?

16 MR. GRASECK: She - - - yes. She would
17 have contradicted the story that enabled the
18 respondent to - - -

19 JUDGE SMITH: What was the theory on which
20 that was kept out of evidence?

21 MR. GRASECK: I'm not sure I understand it.
22 I guess it was a separate incident or something. But
23 they were related incidents in that the order of
24 protection was obtained in that way. And then one of
25 the two charges in issue was based on that order of

1 protection. And we also think there was a modus
2 operandi that the respondent regularly did this kind
3 of thing, misusing the criminal justice system.

4 I was going to mention that we attempted to
5 cross-examine the respondent with respect to a
6 statement she gave to police. She was the first
7 witness. And defense counsel said well, you can't
8 question her about that statement, because it's not
9 in evidence. And so in various ways, our efforts to
10 - - -

11 THE COURT: Okay, counselor. You'll have
12 some rebuttal time. Thanks, counsel.

13 MR. GRASECK: Thank you.

14 THE COURT: Counselor, proceed.

15 MR. HILL: Good afternoon, Your Honors.

16 JUDGE CIPARICK: Were there errors made
17 here by the trial court, for example, the one that
18 counsel just raised about cross-examining the witness
19 on her prior statements, which could have been
20 statements against penal interests, et cetera? Why
21 shouldn't that have come in?

22 MR. HILL: There were no errors made. And
23 there were no errors - - - there were no harmful
24 errors made. The ques - - -

25 JUDGE PIGOTT: How about harmless errors?

1 MR. HILL: There were no errors. And if
2 there were, they were certainly harmless errors.

3 JUDGE SMITH: Well, isn't he enti - - - if
4 he has a tape of your client telling, a few days
5 after the incident on which the suit is based,
6 telling what he says is another fabricated false
7 story about his client, isn't he entitled to put that
8 in evidence?

9 MR. HILL: He would be, if he had the tape,
10 if it actually said what he said it says, and if it
11 was - - -

12 JUDGE SMITH: Well, he made a proffer. He
13 described what it said - - - what he said it said.

14 MR. HILL: The tape would need to be
15 authenticated.

16 JUDGE SMITH: He said he said the witness
17 will authenticate it during his testimony.

18 MR. HILL: But he made no effort to
19 actually proceed through that line of questioning.

20 JUDGE PIGOTT: Well, I think that's because
21 you jumped the gun. I mean, before he even got a
22 chance, weren't the People saying this can't come in,
23 it's not authenticated, it's not this, it's not that?

24 MR. HILL: No. Because there was no
25 objection raised to a question that was attempting to

1 authenticate - - -

2 JUDGE PIGOTT: But no. My point is this.
3 Somebody said something that the judge then said you
4 can't admit the tape. And whatever - - - however
5 that happened, it happened before this attorney said
6 I'd like to have this marked for identification,
7 even. And all of a sudden it just went away. And it
8 seems to me that before you make an objection to
9 something, it should have been marked. Then it could
10 have been offered. Then there would have been an
11 objection, and it would have been sustained or
12 overruled.

13 But in this case, it seemed like the People
14 - - - or excuse me, the defendants, got it wiped out
15 before it even was marked as an exhibit.

16 MR. HILL: I don't think so. I think - - -

17 JUDGE PIGOTT: It was marked as an exhibit?

18 MR. HILL: - - - with respect - - - no, it
19 certainly wasn't marked as an exhibit. And that's a
20 problem, because there's - - - it's not been
21 preserved for review. There's no - - - it's not in
22 the trial record. It's not in the Appellate Division
23 record.

24 JUDGE PIGOTT: Why not?

25 MR. HILL: It's not in the record before

1 this - - -

2 JUDGE CIPARICK: You could have had a voir
3 dire, right? You could have just a voir dire on this
4 issue.

5 MR. HILL: Yes. There's a number of ways
6 that this could have been handled better.

7 JUDGE PIGOTT: Don't you make the argument
8 that it was not authenticated?

9 MR. HILL: It was not authenticated.

10 JUDGE PIGOTT: How do you know that?

11 MR. HILL: Because the - - -

12 JUDGE PIGOTT: It's not marked. How do you
13 know?

14 MR. HILL: There was no questioning of a
15 witness who may have - - -

16 JUDGE SMITH: But you can authenticate a
17 tape by having one of the participants in the
18 conversation say yes, that's my voice on there, can't
19 you?

20 MR. HILL: Absolutely.

21 JUDGE SMITH: I mean, I guess what I'm
22 really getting at is, putting aside whether it's
23 marked, whether it's not marked, who made a cr - - -
24 what possible basis is there for keeping this tape
25 out of evidence? Isn't this something the jury's

1 supposed to hear?

2 MR. HILL: Respectfully, I believe that
3 counsel folded on this effort to have this before he
4 needed to.

5 JUDGE SMITH: The judge did say the word
6 "sustained". I mean, he didn't withdraw the offer?

7 MR. HILL: Right. Because the sustained -
8 - -

9 JUDGE SMITH: What was the judge sustaining
10 when he said "sustained"?

11 MR. HILL: He was sustain - - - I'm sorry.
12 He was sustaining the objection which was to
13 counsel's request to play the tape, out of the blue,
14 without any questioning along the lines of
15 authentication of the tape. He said we'd like to
16 play the tape.

17 JUDGE SMITH: So you read the record as
18 saying that he wanted - - - that before - - - he did
19 say the witness will authenticate it during his
20 testimony, but you read the record as being saying he
21 wanted the jury to hear it before the authentication
22 happened?

23 MR. HILL: Correct. It's in the record.

24 JUDGE SMITH: I mean, isn't that - - - is
25 that really a good - - - isn't it unfortunate the

1 tape doesn't come into evidence for a reason like
2 that? I mean, surely that's a problem that could
3 have been straightened out?

4 MR. HILL: It could have been straightened
5 out. Counsel could have gone through those
6 questions. But as soon as - - -

7 JUDGE SMITH: I mean, as you read the
8 record, the Judge was perfectly receptive to having
9 the tape in; it's just that it wasn't done the right
10 way?

11 MR. HILL: Yes. And the problem is that -
12 - -

13 JUDGE SMITH: But what about - - - what
14 about the - - - go ahead. I'm sorry. I cut you off.

15 MR. HILL: I think it highlights part of
16 the problem, though, is that we're sitting here up in
17 Albany a couple years later, and we're reviewing a
18 transcript - - -

19 JUDGE PIGOTT: We do it all the time.

20 MR. HILL: And a trial judge has the
21 discretion to make these decisions.

22 JUDGE PIGOTT: You got the impression,
23 though, that the judge had very little patience
24 during this trial. And it seemed like things that
25 you would normally expect would get marked and

1 discussed and objected to and a ruling made didn't
2 get that far. And I know you're going to get to the
3 grand jury issue at some point, but wouldn't you
4 agree that if I lie to a police officer and say that
5 you struck me and you get indicted, that I can't hide
6 behind the cop and say he's the one that initiated
7 the action, it wasn't me?

8 MR. HILL: Well, I think there's two issues
9 there. A civil - - -

10 JUDGE SMITH: Could you start with a yes or
11 no to that?

12 MR. HILL: Yes. But there needs to be some
13 respect for a civil complainant who makes a report to
14 police and they take it from there. And then it goes
15 through another vetting process with the District
16 Attorney - - -

17 JUDGE SMITH: But the jury's entitled - - -
18 the jury has to decide whether she's telling the
19 truth or not.

20 MR. HILL: And there was a week's worth of
21 trial. She was on the - - -

22 JUDGE PIGOTT: Mr. Grucci wasn't suing the
23 police.

24 JUDGE SMITH: And her grand jury testimony
25 isn't admissible?

1 MR. HILL: Her grand jury testimony was
2 used. She was cross-examined with her statements to
3 the grand jury.

4 JUDGE PIGOTT: Was she called as part of
5 the plaintiff's case?

6 MR. HILL: I'm sorry?

7 JUDGE PIGOTT: She was called as part of
8 the plaintiff's case?

9 MR. HILL: Yes.

10 JUDGE PIGOTT: And the grand jury testimony
11 came in?

12 MR. HILL: It was used - - - it was - - -

13 JUDGE CIPARICK: To impeach her.

14 MR. HILL: - - - not admitted as an
15 exhibit, as a paper document.

16 JUDGE PIGOTT: But isn't that important,
17 because as part of malicious prosecution, he's got to
18 show you were prosecuted?

19 MR. HILL: Well, there was - - - that
20 element of the case was not in dispute.

21 JUDGE PIGOTT: Was a given?

22 MR. HILL: Yes. So there was a - - -

23 JUDGE PIGOTT: And then to show that - - -

24 MR. HILL: - - - prosecution - - -

25 JUDGE PIGOTT: - - - she lied during the

1 grand jury, you're saying that that was done how?

2 MR. HILL: Counsel was permitted to use the
3 grand jury testimony to examine her on that
4 testimony. The only limitation was that it would not
5 go in in toto.

6 JUDGE PIGOTT: And why not?

7 MR. HILL: Well, I think there was a number
8 of reasons. It possibly is something that the jury
9 would dwell on or give - - -

10 JUDGE PIGOTT: It might have been the
11 smoking gun. It might have been my testimony that
12 you struck me, where all the proof is exactly the
13 opposite - - -

14 MR. HILL: But that - - -

15 JUDGE PIGOTT: - - - so that you could win
16 your case. But if the judge said you can't bring in
17 Judge Pigott's testimony before the grand jury
18 because we're going to decide now whether or not - -
19 - not whether or not he said that but whether or not
20 the People were justified in prosecuting you, you'd
21 say that's not fair, because my whole point is that
22 Judge Pigott was lying when he said I hit him.

23 MR. HILL: Yes. But the grand jury
24 testimony, the relevant portions that were in the
25 complaint itself, which went in with the jury, it was

1 used during the questioning - - -

2 JUDGE PIGOTT: But don't - - - how do you
3 make - - -

4 MR. HILL: - - - and then - - -

5 JUDGE PIGOTT: - - - don't you put in
6 evidence when you're in a criminal case of sometimes
7 two and three times, only in different versions or
8 forms? I mean, isn't that normal?

9 MR. HILL: Yes. But the other point is
10 that my client, at no point during this civil trial,
11 didn't disavow her testimony during that grand jury
12 trial. She stood by it.

13 MR. HILL: It was up to this jury - - -

14 JUDGE SMITH: Well, what about - - - he
15 tried to question her, to cross-examine her about
16 whether she had told the truth at the trial. An
17 objection to that was sustained. What's the basis
18 for that?

19 MR. HILL: I don't recall the particular
20 instance you're referring to.

21 JUDGE SMITH: Well, maybe it's not as clear
22 as I'm saying. He certainly asked a question, "But
23 did you testify as follows," at the trial, and the
24 judge sustained an objection.

25 MR. HILL: I believe there was - - - again,

1 I'm not specifically sure, but there was a hesitation
2 to replay the criminal trial - - -

3 JUDGE PIGOTT: Well, and there was a lot of
4 - - -

5 JUDGE SMITH: Yes, but - - -

6 JUDGE PIGOTT: - - - "asked and answered"s.

7 JUDGE SMITH: - - - how could there be a
8 hesitation to replay the criminal trial in a
9 malicious prosecution case? It doesn't seem right to
10 me.

11 MR. HILL: Because there's a different
12 burden of proof. The parties are inverted. One is a
13 criminal defendant that's allotted great deference,
14 as we see in the case that was before the court here
15 just before this one.

16 JUDGE SMITH: One more. What about,
17 shouldn't he have been allowed to prove the previous
18 incident, the incident that led to the order of
19 protection - - - to prove that that was fabricated as
20 part of a course of conduct?

21 MR. HILL: No. I don't think so. I think
22 that was kept out on a number of grounds, including
23 relevance. That was an order of protection. That
24 was not in dispute here. When that - - -

25 JUDGE SMITH: Well, the order of prote - -

1 - the existence of the order of protection wasn't in
2 dispute, but whether she had got it by - - - I mean,
3 if I get an order of protection against you by
4 swearing falsely to something, and then you - - - and
5 then I swear again falsely that you violated the
6 order of protection, you're saying that the first lie
7 doesn't come in, in the malicious prosecution suit?

8 MR. HILL: The then-defendant did not
9 oppose the order of protection. There was no - - -

10 JUDGE PIGOTT: But that's not uncommon in a
11 lot of these cases, just because, you know, they
12 always say somebody's going to jail, you know, when
13 the police show up in these domestic violence cases
14 and things like that. Something occurs, and quite
15 often there's mutual orders of protection, there's an
16 order of protection.

17 But he wanted to put in proof that the
18 neighbor said he never got out of the car on the date
19 that she says that this incident occurred. Why would
20 that not have been relevant?

21 MR. HILL: Because that's not what this
22 case was about. This case was about a phone call
23 that violated that order of protection. And the jury
24 heard from both sides, in what admittedly is a he-
25 said she-said - - -

1 JUDGE PIGOTT: Wouldn't that have had some
2 evidentiary value, if he was trying to show that she
3 was lying about this whole - - - this whole episode
4 and said on this date, when she says this happened,
5 it did not happen; and here's the - - - you know, a
6 disinterested interest who was there and says I saw
7 him. He came, he went, and never left the car. And
8 therefore this lady is not as credible as you may
9 have thought before this lady testified.

10 MR. HILL: It could go to credibility. But
11 I don't believe it's relevant. And I believe it
12 would be confusing to this jury who had one question
13 - - - credibility determination to make, which was
14 who was telling the truth about what happened on that
15 phone call that violated the order of protection.

16 JUDGE SMITH: But the fact that she told a
17 similar lie - - - I mean, the issue is who's telling
18 the truth. Shouldn't the jury know if it's the fact
19 that she had lied about him for a similar purpose on
20 - - - a lie on the same - - - the same person on a
21 similar subject in the recent past, leading directly
22 to this event? How can that be irrelevant?

23 MR. HILL: Because this was about this
24 prosecution. And there was credible testimony from
25 this client about what happened to violate this order

1 of protection. To bring in that, it brings in - - -
2 obviously, if the ultimate issue is who's telling the
3 truth, then every circumstance - - -

4 JUDGE SMITH: Every lie she told in her
5 life is theoretically relevant. But isn't this one a
6 little more relevant than most of them?

7 MR. HILL: I don't think so. And it's
8 perhaps more confusing to a jury to replay something
9 that was adjudicated in a completely different
10 context and have it as - - -

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MR. HILL: - - - new fodder.

13 CHIEF JUDGE LIPPMAN: Thank you.

14 Counselor, rebuttal?

15 MR. GRASECK: Could I just briefly make one
16 - - -

17 CHIEF JUDGE LIPPMAN: Yes, you have some
18 rebuttal time. Go ahead.

19 MR. GRASECK: Among the issues, the cutting
20 short of cross-examination that we experienced was we
21 asked the respondent about a statement - - - I'm
22 trying to think of the - - - there was an objection
23 to a question. We were trying to put in evidence of
24 reports she made to police. And she said well,
25 that's my signature, but it's barely legible. This

1 document's barely legible.

2 Then we pursued trying to put the document
3 in evidence, and defense counsel says, oh, she said
4 it's not legible. And the court just accepted that
5 which was a misstatement. And it appeared that any
6 objection was - - -

7 JUDGE SMITH: But that document did
8 eventually get in, didn't it?

9 MR. GRASECK: It did not. There were two
10 police statements.

11 JUDGE SMITH: Oh, there were two.

12 MR. GRASECK: And the second one did not
13 get in. Thank you.

14 CHIEF JUDGE LIPPMAN: Okay, thank you both.
15 Appreciate it.

16 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Michael Grucci v. Christine Grucci, No. 196 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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Date: October 23, 2012