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.

JUNE 3 - 5, 2014 CALENDAR

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

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 Tuesday, June 3, 2014

No. 129 People v John F. Haggerty, Jr.

Political consultant John F. Haggerty, Jr. was accused of stealing campaign funds from Mayor Michael R. Bloomberg during the mayor's 2009 reelection campaign, which was largely self-financed by the mayor. Haggerty persuaded campaign officials to fund, through the Independence Party, an extensive ballot security operation on election day. The Bloomberg Revocable Trust transferred $1.2 million to the Independence Party, with the understanding that the party would use $1.1 million for ballot security and keep the remaining $100,000. The party transferred $750,000 of the money to Haggerty's Special Elections Operations LLC, but trial evidence showed that Haggerty spent only $32,000 on ballot security and used the rest to purchase his childhood home in Queens.

The indictment charged that Haggerty "stole property from Michael R. Bloomberg." At trial, when the defense questioned whether Bloomberg owned and controlled the funds in the Bloomberg Revocable Trust, the prosecution called as a witness the lawyer who drafted the trust agreement to testify that Bloomberg controlled the trust. Supreme Court denied defense counsel's objection that calling the drafting attorney, rather than introducing the trust agreement itself, violated the best evidence rule, which generally prohibits the introduction of secondary evidence unless the original document is lost, destroyed or otherwise unavailable. The prosecution refused to provide a full copy of the trust agreement or enter a redacted copy into the record. Haggerty was convicted of second-degree grand larceny and money laundering. He was sentenced to 1⅓ to 4 years in prison and ordered to pay $750,000 in restitution.

The Appellate Division, First Department affirmed. Rejecting Haggerty's claim that the drafting attorney's testimony about control of the trust violated the best evidence rule, the court cited Schozer v William Penn Life Ins. Co. of N.Y. (84 NY2d 639) without elaboration.

Haggerty argues the drafting attorney's testimony about control of the trust's funds violated the best evidence rule because the trust document "was not lost or missing. It was present in the courtroom, albeit in redacted form. Rather than admit the redacted document, the court excluded it presumably to keep Mayor Bloomberg's financial affairs from public airing." He says the testimony was not justified under Schozer, in which "this Court ruled that secondary evidence -- the testimony of a doctor and his report -- were admissible to prove the contents of an x-ray that had been lost.... Here, by contrast, the trust agreement was not lost. It was in the courtroom, but its owner was unwilling to have the jury see it."

The prosecution argues the best evidence rule was not violated because the drafting attorney "was not called to establish the terms of the Mayor's trust. She was called to testify from her personal knowledge that the Mayor owned the money in the trust account -- a fact she knew independently of the terms of the trust...." Even if the rule was violated, it contends the error was harmless "because the Mayor's ownership of the money was overwhelmingly proved."

For appellant Haggerty: Paul Shechtman, Manhattan (212) 704-9600
For respondent: Manhattan Assistant District Attorney Vincent Rivellese (212) 335-9000

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 Tuesday, June 3, 2014

No. 130 Matter of Wallach v Town of Dryden
No. 131 Cooperstown Holstein Corporation v Town of Middlefield

The primary issue in these appeals is whether New York's Oil, Gas and Solution Mining Law (OGSML) preempts local government zoning ordinances enacted to prohibit the use of high volume hydraulic fracturing, or "hydrofracking," to recover natural gas from underground shale deposits. The lower courts found there was no express or implied preemption.

The Town of Dryden, in Tompkins County, and the Town of Middlefield, in Otsego County, adopted such land use restrictions in 2011, responding to concerns of residents about the potential health and environmental effects of the hydrofracking process. Dryden amended its zoning ordinance to prohibit all activities related to natural gas and petroleum exploration, production or storage. Middlefield enacted a new zoning law which, among other things, categorized all oil, gas and solution mining and drilling as prohibited land uses in the Town.

Norse Energy Corp., USA, which had acquired through predecessor companies oil and gas leases covering 22,200 acres in Dryden, sued the Town to invalidate the new restrictions. Norse Energy has since filed for bankruptcy and its trustee, Mark S. Wallach, has been substituted as the appellant in the case. Cooperstown Holstein Corporation, which operates a dairy farm in Middlefield and entered into two oil and gas leases with an energy development company in 2007, brought a similar suit against Middlefield. Both plaintiffs argued that the gas drilling bans were preempted by the OGSML and, in particular, by its supersession clause (Environmental Conservation Law 23-0303[2]), which states, "The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."

The Appellate Division, Third Department affirmed Supreme Court decisions dismissing both lawsuits. The "plain language" of the supersession clause "prohibits municipalities from enacting laws or ordinances "*relating to the regulation* of the oil, gas and solution mining industries," and the ordinary meaning of "regulation" is "an authoritative rule dealing with details or procedure," it said in case no. 130. "The zoning ordinance at issue, however, does not seek to regulate the details or procedure of" those industries, but "simply establishes permissible and prohibited uses of land within the Town for the purpose of regulating land generally.... While the Town's exercise of its right to regulate land use through zoning will inevitably have an incidental effect upon" the oil and gas industries, "we conclude that zoning ordinances are not the type of regulatory provision that the Legislature intended to be preempted by the OGSML."

The plaintiffs argue the zoning ordinances are preempted because they ban activities "for which control, oversight and regulation are expressly, exclusively and exhaustively delegated" to the state. Wallach says the "unambiguous" language of ECL 23-0303(2) preempts "all local laws or ordinances that purport to regulate the oil and gas industry" and limits local authority "solely to regulation of local roads and the levying of property taxes. Thus, zoning ordinances that regulate where drilling may occur -- which is a subject matter having nothing to do with roads or taxes -- are preempted."

No. 130 For appellant Wallach: Thomas S. West, Albany (518) 641-0500
For respondent Dryden: Deborah Goldberg, Manhattan (212) 845-7376
No. 131 For appellant Cooperstown Holstein: Scott R. Kurkoski, Binghamton (607) 763-9200
For respondent Middlefield: John J. Henry, Albany (518) 487-7600

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 Tuesday, June 3, 2014

No. 132 People v Oliverio Galindo

Oliverio Galindo was arrested on weapon charges in September 2009 after telling a friend that he accidentally shot his cousin, Augustine Castaneda, in the hip. The men had left the Broome Street Bar in Soho, where they both worked, when the incident occurred. Galindo took his cousin to Bellevue Hospital for treatment. Later that day, he returned to the bar and told his friend, bar manager Luis Flores, that Castaneda had been shot "outside the restaurant." He then admitted that he shot his cousin, saying he was "showing the gun" to Castaneda and it "just went off as an accident." He said he dumped the gun in a container near the hospital.

Galindo was charged with two counts of criminal possession of a weapon in the second degree, one alleging he possessed a firearm with intent to use it unlawfully against another person (Penal Law § 265.03[1][b]) and the other alleging he possessed a firearm outside his home or place of business (Penal Law § 265.03[3]). The charge of possession with intent was based on the statutory presumption of unlawful intent in Penal Law § 265.15(4), which states, "The possession by any person of any ... weapon, ... is presumptive evidence of intent to use the same unlawfully against another." Galindo was convicted of both counts based largely on his statements to Flores about an accidental shooting. He was sentenced to concurrent terms of four years in prison.

The Appellate Division, First Department affirmed. Regarding the charge of possession with intent, it said, "the circumstances of defendant's possession of a loaded firearm, viewed in light of the statutory presumption of unlawful intent (Penal Law § 265.15[4]), provided legally sufficient evidence of defendant's intent to use a weapon unlawfully against another. Evidence that defendant's shooting of his cousin was accidental did not warrant a different conclusion, since the People were not required to prove that defendant specifically intended to use the weapon against any particular person." The court said Galindo failed to preserve his claim that there was insufficient evidence to establish possession outside his home or place of business. Alternatively, it said "the only reasonable interpretation" of his statements to Flores "was that the shooting took place outdoors."

Galindo argues, "[I]t is clear that the prosecution did not meet its burden of proving that Mr. Galindo possessed a firearm with the intent to use it unlawfully against another. The prosecution improperly relied solely upon the presumption to prove Mr. Galindo's unlawful intent. Moreover, the prosecution's own evidence and theory of the case -- that Mr. Galindo accidentally shot Mr. Castaneda -- firmly rebutted the notion that Mr. Galindo possessed any unlawful intent, and the prosecution presented no proof at all, let alone beyond a reasonable doubt, that Mr. Galindo possessed the gun at any other moment in time." He also argues he was deprived of effective assistance of counsel when his trial attorney failed to preserve his claim of insufficient evidence to prove he had possession of a weapon outside his home.

For appellant Galindo: Marisa K. Cabrera, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Christopher P. Marinelli (212) 335-9000

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 Tuesday, June 3, 2014

No. 133 People v Mark Garrett

Mark Garrett was charged in Suffolk County with the murder of a 14-year-old girl, whose body was found decomposing in his mother's back yard in 1998. The primary evidence against him was a confession he gave to police. At a pretrial suppression hearing in 1999, he testified that the confession was involuntary and that he signed it only after detectives handcuffed him to a chair and slapped him, hit him, and shocked him twice in the back with a stun gun. A nurse practitioner, who examined him at the jail a week after the interrogation, testified he had two "healing round excoriations" on his back, but she could not tell if they were caused by a stun gun. County Court denied the suppression motion based on testimony of Detective Vincent O'Leary and other investigators that Garrett was not physically abused during the interrogation. In 2000, Garrett was convicted of two counts of second-degree murder and sentenced to 25 years to life.

In 2009, Garrett filed a CPL 440.10 motion to vacate the judgment on the ground that prosecutors violated their obligation under Brady v Maryland (373 US 83) to disclose any material evidence in their possession that would be favorable to the defense. He said prosecutors failed to disclose that a federal civil rights action was brought against Suffolk County and a Detective O'Leary in an unrelated case, which claimed the detective obtained a false confession to arson by striking the handcuffed suspect in the head with a telephone book until he confessed. The federal claim was filed in June 1998, prior to Garrett's arrest, and was settled in March 2001, after he was sentenced. County Court denied Garrett's motion without a hearing.

The Appellate Division, Second Department reversed and remitted for a hearing. "[T]he allegedly suppressed evidence clearly fell within the ambit of the prosecutor's Brady obligation because it constituted impeachment evidence.... Moreover, the People's failure to disclose the existence of the civil action may have denied the defendant the opportunity to conduct an investigation leading to additional exculpatory or impeaching evidence..., for instance, providing a basis for the disclosure of police personnel records otherwise unavailable...." It said a hearing is necessary to determine whether prosecutors had sufficient knowledge of the federal suit to trigger their Brady obligation to disclose it.

The prosecution argues, "The Appellate Division's decision in this case stretched this Court's precedents as to what constitutes Brady beyond any requirement of materiality.... Even if the accusations in the civil complaint bear surface similarity to a defendant's trial claims, this does not convert the naked allegations in the complaint into material for impeachment purposes under the Brady doctrine. Fundamentally, a civil complaint is nothing more than an unsubstantiated allegation, which to be filed does not even require that it is based on good faith. It is hearsay by definition and the mere filing of such accusations does not establish the existence of material evidence" subject to disclosure under Brady.

For appellant: Suffolk County Assistant District Attorney Anne E. Oh (631) 852-2500
For respondent Garrett: Steven A. Feldman, Uniondale (516) 522-2828

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, June 4, 2014

No. 134 Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health and Mental Hygiene

The New York City Department of Health and Mental Hygiene (DOHMH) and Board of Health are asking this Court to reinstate their Portion Cap Rule, which restricts the sale of soda and other "sugary drinks" in containers larger than 16 ounces. Lower courts found the rule was adopted in violation of the separation of powers doctrine.

Then-Mayor Michael Bloomberg proposed the rule -- an amendment to Article 81 of the City Health Code -- in May 2012 to address rising obesity rates. Fourteen City Council members wrote to the mayor opposing the proposal and insisting it should be submitted to the Council for a vote. Instead, DOHMH submitted the amendment to the Board of Health, which held a public hearing. In September 2012, the Board adopted the rule without changes. The rule limits serving size for non-diet soft drinks, sweetened coffee and tea, energy and sports drinks, hot chocolate, and sweetened juices, but excludes alcoholic beverages, milkshakes, fruit smoothies, mixed coffee drinks, mochas and lattes, and 100 percent fruit juices. The so-called "soda ban" applies to restaurants, delis, fast-food franchises, movie theaters, stadiums and street carts, but not to grocery stores, convenience stores, corner markets, gas stations and similar businesses.

Labor unions and associations representing restaurant and theater owners, beverage producers and distributors, and small and minority-owned businesses brought this action to challenge the validity of the rule. Supreme Court declared the rule violated separation of powers principles based on Boreali v Axelrod (71 NY2d 1 [1987]), which struck down regulations adopted by the State Public Health Council to prohibit smoking in most indoor public areas.

The Appellate Division, First Department affirmed, finding the rule ran afoul of all four factors identified in Boreali for determining whether administrative rules violate the separation of powers. First, it said the Board of Health did not act "solely with a view toward public health" because the rule's exemptions "evince a compromise of social and economic concerns, as well as private interests.... By enacting a compromise measure..., the Board necessarily took into account its own non-health policy considerations." Second, the Board "did not fill a gap in an existing regulatory scheme but instead wrote on a clean slate." Third, the City Council and State Legislature "have attempted, albeit unsuccessfully, to target sugar sweetened beverages" and the Portion Cap Rule "addresses the same policy areas as the proposals rejected" by the legislative bodies. Finally, it said, "[W]e do not believe that the Board of Health exercised any special expertise or technical competence.... Indeed, the rule was drafted, written and proposed by the Office of the Mayor...."

The Board of Health and DOHMH argue the separation of powers doctrine does not apply because the Board has legislative authority in the area of public health, which it has previously exercised by requiring fluoridation of the water supply and posting of calorie counts on menus, and by restricting the use of lead paint in residences and trans fats in restaurants. They say the Board's legislative authority "has been confirmed in successive New York City Charters and upheld repeatedly by this and other appellate courts. Further, the adoption of the Portion Cap Rule was well within the Board's regulatory authority.... [W]hether characterized as legislative or regulatory in nature, the Board's authority is broad, and its special structure allows serious issues of public health to be addressed without being subjected to the vagaries of the political process."

For appellant NYC Board of Health et al: Asst. Corporation Counsel Richard Dearing (212) 356-0843
For respondent Plaintiffs: Richard P. Bress, Washington, D.C. (202) 637-2200

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, June 4, 2014

No. 135 People v Jose Maldonado

Jose Maldonado was driving a stolen minivan in April 2009 when police stopped him for a traffic infraction in Greenpoint, Brooklyn. As an officer approached him, he drove away at high speed, weaving through traffic and running red lights, and struck and killed a pedestrian, 37 year old Violetta Kryzak, in a crosswalk. Maldonado drove on at high speed for several blocks until he swerved to avoid an oncoming car and collided with a parked SUV. He was indicted on charges including murder in the second degree (depraved indifference murder) under Penal Law § 125.25(2), which applies "when, under circumstances evincing a depraved indifference to human life, [the defendant] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

At the close of the prosecution's case, Maldonado moved for a trial order of dismissal on the ground there was insufficient evidence to establish that he acted with depraved indifference. Defense counsel said prosecutors "have to show a lot more than recklessness.... I don't believe the People made out that culpable mental state." Supreme Court denied the motion, and Maldonado was convicted of second-degree murder and other charges.

Maldonado renewed his motion after the verdict, which the court again denied, saying, "[T]he People established, and the jury so found, that the defendant drove at speeds in excess of 70 MPH while fleeing the police in a stolen minivan, on crowded streets through a residential neighborhood filled with pedestrians and vehicular traffic, during daytime hours. Defendant drove through several steady red lights, went the wrong way down a one-way street, and did not even apply the brakes when he eventually hit the victim in the crosswalk. This conduct demonstrated a wanton disregard of human life." Maldonado was sentenced to 20 years to life in prison. The Appellate Division, Second Department affirmed.

Maldonado argues the evidence established only recklessness, not depraved indifference. "During the pursuit, as numerous witnesses attested, he repeatedly swerved to avoid striking pedestrians or vehicles. He nevertheless struck and killed a pedestrian during one of these evasive maneuvers.... [A]fter he crashed into a parked vehicle after again swerving to avoid an accident, he told police he had deliberately crashed to avoid hitting anyone else. Rather than showing that appellant acted with the 'utter depravity, uncommon brutality and inhuman cruelty' required for depraved indifference..., this evidence demonstrated that appellant, while concededly operating the minivan recklessly, was not uncaring about whether anyone else lived or died. Therefore, ... like in [People v Prindle (16 NY3d 768)], to which this case was materially identical, appellant's conduct fell far short of that necessary to prove depraved indifference to human life."

For appellant Maldonado: Joshua M. Levine, Manhattan (212) 693-0085 ext. 212
For respondent: Brooklyn Assistant District Attorney Diane R. Eisner (718) 250-2489

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, June 4, 2014

No. 136 In re: Thelen LLP (Geron v Seyfarth Shaw LLP)
No. 137 In re: Coudert Brothers, LLP (Development Specialists, Inc. v K&L Gates LLP)

These federal cases arise from the dissolution of two insolvent New York law firms, Thelen LLP in 2008 and Coudert Brothers LLP in 2005. Partners departing the insolvent firms took many of their unfinished cases with them to their new law firms. Thelen's bankruptcy trustee, Yann Geron, brought a federal suit against Seyfarth Shaw LLP, which had hired 11 former Thelen partners, seeking to recover the value of hourly fee and contingency fee cases that were pending when Thelen dissolved. Geron argued that those unfinished cases were the property of Thelen's estate under the "unfinished business doctrine." The administrator of Coudert's bankruptcy estate, Development Specialists, Inc. (DSI), brought a similar suit against Jones Day and nine other law firms (collectively, the "Firms") that hired former Coudert partners to recover, under the unfinished business doctrine, any profits derived from completing hourly fee matters that were pending when Coudert dissolved.

In each case, judges of U.S. District Court for the Southern District of New York found that pending contingent fee cases are assets of a dissolved partnership under the unfinished business doctrine, but they reached conflicting conclusions about whether New York courts would extend the doctrine to pending hourly fee matters. In Thelen, the court said applying the doctrine to hourly fee cases "would result in an unjust windfall for the Thelen estate, as 'compensating a former partner out of that fee would reduce the compensation of the attorneys performing the work.'.... In an hourly fee case, unlike a contingency fee case, all post-dissolution fees that a lawyer earns are due to that lawyer's 'post-dissolution efforts, skill and diligence.'" In Coudert, the court said, "Although the New York Court of Appeals has not addressed this precise issue, I believe that it would conclude that the method by which the Client Matters were billed does not alter the nature of Coudert's property interest in them."

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the issue in a pair of certified questions: "Under New York law, is a client matter that is billed on an hourly basis the property of a law firm, such that, upon dissolution and in related bankruptcy proceedings, the law firm is entitled to the profit earned on such matters as the 'unfinished business' of the firm? If so, how does New York law define a 'client matter' for purposes of the unfinished business doctrine and what proportion of the profit derived from an ongoing hourly matter may the new law firm retain?"

No. 136 For appellant Geron: Howard P. Magaliff, Manhattan (212) 220-9402
For respondent Seyfarth Shaw: Michael R. Levinson, Chicago, Il. (312) 460-5868
No. 137 For appellant-respondent Law Firms: Joel M. Miller, Manhattan (212) 336-3500
For appellant-respondent Jones Day: Shay Dvoretzky, Washington DC (202) 879-3939
For respondent-appellant DSI: David J. Adler, Manhattan (212) 609-6800

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, June 4, 2014

No. 138 Reis v Volvo Cars of North America

Manuel Reis was injured in May 2002 at the Yonkers home of Americo Silva, who had recently purchased a 1987 Volvo station wagon. The vehicle was not equipped with a starter interlock switch, a safety device that prevents a car with a manual transmission from starting unless the clutch is disengaged. While Reis was inspecting the engine, Silva offered to start it. He reached through the driver's side window and turned on the ignition. The car, which was in gear, lurched forward and crushed Reis's leg against a wall, requiring amputation above the knee.

Reis brought this products liability and negligence action against Volvo Cars of North America and its parent company. Based on testimony of plaintiff's experts that many, but not all major car manufacturers in 1987 installed starter interlock devices in vehicles with manual transmissions, Supreme Court included Pattern Jury Instruction (PJI) 2:16 in its charge, permitting the jury to determine whether the use of starter interlocks was a customary business practice and, if so, to consider that in deciding whether Volvo exercised reasonable care in designing the vehicle. The jury found Volvo was negligent in failing to install a starter interlock switch in the vehicle, but on the strict products liability claim found the vehicle was not defective without the safety device. Reis stipulated to a damages award of $1,145,990.

The Appellate Division, First Department reduced the damages award by $168,000 and otherwise affirmed in a 3-2 decision. "The proof adduced at trial was sufficient to permit a jury to conclude that the practice [of installing starter interlocks] was fairly well defined in the car manufacturing industry. Plaintiffs were not required to prove universal application of the practice in order for the jury to consider this question...," it said. The trial court did not err in charging the jury on customary business practices because the charge "did not confuse the jury or create any doubt as to the principle of law to be applied." The court said, "Defendants' argument that the jury's verdict is inconsistent because it found that the 1987 Volvo was not defective without a starter interlock device, but that defendants were nevertheless negligent in how they designed this vehicle, is a claim not preserved for appeal.... Defendants did not raise this objection before the jury was discharged, although they had the opportunity to do so."

The dissenters argued that a new trial should be ordered on the negligence claim because the trial court erred in charging the jury on customary business practices. "It was undisputed that in 1987, some manufacturers used safety switches, while others did not. Thus, there was no evidence of a customary procedure or policy that was 'reflective of an industry standard or a generally-accepted safety practice'.... Given that the jury's verdict was inconsistent in that it found in favor of Volvo on the strict liability theory of recovery, but against Volvo on the negligence claim, I differ with the majority's view that the charge did not confuse the jury."

For appellant Volvo: Roy L. Reardon, Manhattan (212) 455-2000
For respondent Reis: Steven R. Pounian, Manhattan (212) 687-8181

State of New York Court of Appeals

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

To be argued Thursday, June 5, 2014

No. 106 Matter of Doyle v State Commission on Judicial Conduct

Cathryn M. Doyle, a Surrogate's Court judge in Albany County since 2001, is challenging a determination of the State Commission on Judicial Conduct that she should be removed from office for misconduct that occurred between 2007 and 2010. The Commission found Doyle took judicial action in four estate matters without disclosing that the attorney for the petitioners, Thomas J. Spargo, was a close personal friend or disclosing that he was representing her in two lawsuits during one of the proceedings. It found she took judicial action in four other proceedings in which Matthew J. Kelly represented the petitioners, without disclosing that Kelly had a leadership role in Doyle's 2007 campaign for nomination as a Supreme Court justice and was manager of her 2010 campaign for re-election as surrogate. The Commission found she took judicial action in an estate proceeding without disclosing that the petitioner's attorney, William J. Cade, had represented her less than two years earlier in a disciplinary proceeding before the Commission, which resulted in a censure of Doyle in 2007.

The Commission voted 8 to 2 for removal, saying, "By presiding over multiple matters involving lawyers with whom she had close personal and professional ties, [Doyle] violated well-established ethical standards requiring disqualification in any proceeding in which a judge's 'impartiality might reasonably be questioned' (Rules, § 100.3[E][1]). Her failure to recuse in each of these matters, or even to disclose the relationships that cast doubt on her ability to be impartial, created an appearance of impropriety that undermines public confidence in the integrity of the judiciary as a whole (Rules § 100.2)." It said her misconduct was "exacerbated" by the fact it occurred "within months after her previous censure by the Commission, demonstrating 'an unacceptable degree of insensitivity to the demands of judicial ethics.'"

Two members dissented from the sanction and argued Doyle should be censured. "While she should not have handled these attorneys' cases, it is important to note that for the most part, these Surrogate's Court proceedings were not adversarial, contested matters. There is no allegation or finding that these attorneys or their clients received any special treatment or pecuniary benefit because of her relationships with the attorneys." They said it "is also significant" that the referee "found her to be 'a credible and candid witness' who 'told the truth.'"

Doyle argues the Commission erred in finding misconduct. "Any failure of Judge Doyle to recuse herself was the result of a good-faith misinterpretation of the existing rules, a misinterpretation that was not unreasonable due to the different procedures that applied to surrogate's courts. Additionally, as determined by the Referee, the ethical rules were not entirely clear on the issue of ministerial and/or quasi-ministerial acts, particularly where all interested persons have signed consents and/or otherwise joined in the relief, which was the basis for Judge Doyle to conclude that there was no possibility of partiality." She says removal is excessive even if the finding of misconduct is upheld. "This case, which is solely an 'appearance of impropriety' case and is devoid of those aggravating factors which this Court has relied upon in upholding the sanction of removal, does not rise to the 'truly egregious' level required for removal."

For petitioner Doyle: William J. Dreyer, Albany (518) 463-7784
For respondent Commission: Edward Lindner, Albany (518) 453-4613

State of New York Court of Appeals

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

To be argued Thursday, June 5, 2014

No. 139 People v Marquan M. (*papers sealed)*

Marquan M., a 15-year-old student at Cohoes High School, was arrested in June 2011 for alleged violations of Albany County's recently-enacted "cyber-bullying" law, which makes "cyber-bullying against any minor or person in the County of Albany" a misdemeanor. Marquan had created a "Cohoes Flame Page" on Facebook and posted photos of 10 classmates, along with comments about them that were largely derogatory and sexual in nature.

The local law defines "cyber-bullying" as "any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person." Marquan challenged the validity of the law, arguing it criminalized protected speech and was unconstitutionally vague and overbroad. After Cohoes City Court rejected his constitutional claims and denied his motion to dismiss, Marquan pled guilty to one count of cyber-bullying and was sentenced as a youthful offender to three years of probation.

Albany County Court affirmed. Rejecting the free speech claim, it said, "The law's proscription is limited to conduct -- using mechanical or electronic forms of communication -- that lacks a legitimate purpose.... [T]he law does not circumscribe pure speech directed at an individual but it is directed at words communicated mechanically or in electronic form coupled with intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person, about which the County has a legitimate state interest to prohibit.... In any event, to the extent that pure speech is implicated, constitutional protections are not absolute -- especially where, as here, substantial privacy interests are being invaded in an intolerable manner...." The court said the law is overbroad in prohibiting bullying of any "person," since its history and purpose address only the protection of minors, but it said the offending term could be severed and enforcement limited to bullying of minors. It found the law is not void for vagueness.

Marquan argues the terms of the law "encompass countless emails, text messages, and postings on social networking and other websites, putting thousands of people in Albany County in jeopardy of criminal prosecution for expressing anger, criticism, intimacy, parody, gossip, and opinion. The Cyber-bullying Law is an unconstitutional regulation of speech because its terms reach far beyond the narrow categories of unprotected speech that the government may regulate -- namely, fighting words, incitement, obscenity, and true threats -- and its criminalization of speech based on content fails strict scrutiny." The law "is unconstitutionally vague because several of its terms -- such as 'annoy,' 'abuse,' 'taunt,' 'humiliate,' 'embarrassing,' 'sexually explicit,' 'hate mail' and 'no legitimate private, personal or public purpose' -- are undefined and susceptible of countless interpretations, creating a risk that protected speech will be chilled and that the law will be enforced in an arbitrary or discriminatory manner." While his speech on Facebook "may rightly be punished by parents and educators, it cannot be criminalized because it does not fall into any of the narrowly defined categories of speech unprotected by the First Amendment."

For appellant Marquan M.: Corey Stoughton, Manhattan (212) 607-3300
For intervenor-respondent Albany County: Thomas Marcelle, Albany (518) 447-7110

State of New York Court of Appeals

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

To be argued Thursday, June 5, 2014

No. 140 Matter of Costello v New York State Board of Parole

Pablo Costello and Luis Torres, who had a gun, were robbing a Brooklyn auto parts store in 1978, when Police Officer David Guttenberg spotted a car double-parked in front and went to the store to ask the driver to move it. As the officer approached, Costello walked out, got into the car and drove away. Inside the store, Officer Guttenberg confronted Torres, who shot and killed him. In 1980, Costello was convicted of felony murder and sentenced to 25 years to life in prison. The presentence report contained a statement of the views of the officer's widow.

Costello became eligible for parole in 2003, but was turned down by the Parole Board, as he was in 2005 and again in 2007. The officer's widow and four children did not submit victim impact statements at those hearings or at Costello's fourth hearing in August 2009, when the Board granted him parole on a 2-1 vote. Before his release, the Board received an inquiry from a Daily News reporter asking why the officer's widow was not given an opportunity to make a victim impact statement, and the Police Benevolent Association publically criticized the Board's decision. The Board temporarily suspended Costello's release for "Records Completion," and it received oral and written statements from the officer's wife, children and other family members in October 2009. The Board unanimously rescinded Costello's parole after a rescission hearing in October 2010, finding the "compelling statements" from the officer's family constituted "new and substantial" information. It said releasing Costello "would so deprecate the serious nature of the instant offense as to undermine respect for the law." Costello filed this suit to challenge the decision.

The Appellate Division, Third Department confirmed the Board's determination in a 4-1 decision, finding it was justified by "substantial evidence of significant information not previously known by the Board." Victim statements "are one of the statutorily required considerations for parole release...," it said. "Thus, 'victim impact statements can constitute significant information which, when submitted to [the Board] even after its determination, may justify the temporary suspension or rescission of parole'.... Where victims have not previously submitted statements, the 'argument that these statements are not new information because [the Board] could anticipate the impact of the crimes on the victims is without merit, as their actual subjective experience is clearly significant information previously unknown to [the Board]'.... [T]his is not a situation of rehashing or simply embellishing previously provided victim statements. The victims' voices had been virtually unheard before October 2009."

The dissenter said, "[W]hile the recent statements of the ongoing grief of the officer's family are undeniably compelling, indeed heartbreaking, they are not the type of 'new' information that was 'unknown' to the Board at the time it granted parole, so as to justify either a temporary or a full rescission of parole.... Moreover..., while the Board may waive the requirement, victims ordinarily will be heard prior to -- not after -- a parole determination, and for good reasons.... Courts should be loathe to condone what could become a trend ... in which certain victim impact statements are held back until after a decision to grant parole is made, forcing the Board to confront unabashed media frenzy, public pressure and familial outrage, and to then entertain newly drafted but belated victim impact statements aimed at undoing considered Board decisions awarding parole."

For appellant Costello: Alfred O'Connor, Albany (518) 465-3524
For respondent Parole Board: Senior Assistant Solicitor General Nancy A. Spiegel (518) 474-3197