

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, April 28, 2015 (arguments begin at noon in White Plains)

No. 74 Matter of McGovern v Mount Pleasant Central School District

The Mount Pleasant Central School District in Westchester County hired Elizabeth McGovern as a probationary special education teacher at Westlake High School in 2008. Her three-year probationary period began on September 1, 2008, and her classroom work was observed by school administrators four times each year. At the end of her probation, on the recommendation of the District's superintendent, the Board of Education denied McGovern tenure and terminated her employment effective June 30, 2011.

McGovern brought this article 78 proceeding to challenge the determination, arguing it was arbitrary, capricious and made in bad faith. She sought reinstatement with tenure and back pay. The School District, among other affirmative defenses, argued that her suit must be dismissed because she failed to file a notice of claim pursuant to Education Law § 3813(1).

Supreme Court reinstated McGovern to probationary status with back pay and ordered the Board of Education to hold a hearing on her claim that she was terminated in bad faith. It ruled she was exempt from the notice requirement because she "is 'seeking mandamus relief through the enforcement of a legal right derived through enactment of a positive law.' When an employee is not entitled to a hearing in connection with his or her discharge, then the remedy is by way of mandamus [] review.... Therefore..., there is no need for a notice of claim in this case, as [McGovern] is exempt, and is not seeking monetary damages outside of back pay and reinstatement to her position." On the merits, the court found "the record indicates that the petitioner did receive many satisfactory evaluations for most of her three-year probationary status. Here, the nature of the differences in the evaluations calls into question whether there may have been an irrational basis."

The Appellate Division, Second Department reversed, ruling McGovern's suit must be dismissed because she failed to file a notice of claim as required by Education Law § 3813(1). "Although the notice of claim requirement does not apply when a litigant seeks only equitable relief..., or commences a proceeding to vindicate a public interest..., here the petitioner seeks damages in the form of back pay as well as equitable relief, and has not commenced this proceeding to vindicate a public interest. Moreover, while a litigant who seeks 'judicial enforcement of a legal right derived through enactment of positive law' is exempt from the notice of claim requirement..., that exemption is inapplicable here...."

McGovern argues she was exempt from the notice of claim requirement "because she sought equitable relief in the form of reinstatement to her position with tenure," and her "request for back pay was merely incidental to her request for equitable relief." She also argues she is exempt "because she sought to enforce her right to tenure, which is a legal right derived through enactment of positive law."

For appellant McGovern: Jason M. Wolf, Bronx (718) 410-0653

For respondent School District: Emily J. Lucas, Harrison (914) 777-1134

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No. 75 Viviane Etienne Medical Care, P.C. v Country-Wide Ins. Co.

Viviane Etienne Medical Care, P.C., treated Alem Cardenas for injuries he allegedly sustained in an automobile accident in June 2004. Cardenas, who had an automobile liability policy from Country-Wide Insurance Company, assigned his right to collect no-fault benefits to Viviane Etienne. In 2005, Viviane Etienne brought this action against Country-Wide to recover no-fault insurance benefits, asserting that it timely submitted bills and claim forms to the insurer with proper verification, that Country-Wide did not pay or deny its claims within 30 days as required by Insurance Law § 5106(a), and that the claims remained unpaid. Viviane Etienne moved for summary judgment in 2008, submitting bills and verification forms documenting its claims for more than \$6,000 for treatment of Cardenas from June through October 2004. It also submitted proof of mailing and attached an affidavit from the president of its billing company, who said he personally mailed the bills to Country-Wide and they were not paid.

Civil Court in Brooklyn denied the summary judgment motion "for failure to establish a prima facie case." Appellate Term for the Second, Eleventh, and Thirteenth Judicial Districts affirmed, saying Viviane Etienne "failed to make the necessary showing that its billing company incorporated plaintiff's medical records into its own and relied upon them" and, thus, "plaintiff's medical records do not meet the test of the business records exception to the hearsay rule."

The Appellate Division, Second Department modified in a 3-2 decision and granted summary judgment to Viviane Etienne on all of its claims but one (a \$139 claim that Country-Wide timely denied). The majority held that where an insurer fails to timely deny a claim for no-fault benefits, the plaintiff is not required to establish the merits of its claim as part of its prima facie burden on a summary judgment motion. In such a case, "the plaintiff makes a prima facie showing of entitlement to judgment as a matter of law by submitting evidence ... that the prescribed statutory billing forms were mailed to and received by the defendant insurer, which failed to either pay or deny the claim within the prescribed 30-day period." It overruled its 2008 decision in Art of Healing Medicine, P.C. v Travelers Home & Mar. Ins. Co. (55 AD3d 644) to the extent it "imposes a 'business record' requirement obliging the plaintiff to establish the truth or the merits of the plaintiff's claim."

The dissenters said, "There is nothing in the no-fault provisions of the Insurance Law, its implementing regulations, or the applicable case law that permits a party seeking no-fault benefits to recover reimbursement for economic loss without affirmatively establishing the merits of its claim pursuant to Insurance Law § 5102(a)(1) and (b). Neither the Court of Appeals nor this Court has ever previously held that a plaintiff's prima facie burden is diminished or otherwise altered by an insurer's failure to comply with the relevant time periods set forth in the regulatory framework of the No-Fault Law."

For appellant Country-Wide: Thomas Torto, Manhattan (212) 532-5881

For respondent Viviane Etienne: David M. Gottlieb, Brooklyn (718) 438-1200

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No. 76 People v Richard Gonzalez

Richard Gonzalez was arrested for possession of a gravity knife in a Manhattan subway station in April 2011. Police said he began shouting obscenities and gesticulating at a sergeant and two officers when he stepped off a train, accusing them of blocking a stairway to the upper platform. They said Gonzalez continued to swear at them as he went up the stairs and the sergeant followed, intending to issue him a summons for disorderly conduct. The sergeant spotted the handle of a knife in his back pocket. It was a "Husky" brand utility knife that Gonzalez had purchased at Home Depot for his work as a maintenance man. The sergeant determined that it operated as a gravity knife by flicking his wrist to snap the blade open and lock it in place. He was indicted on a charge of third-degree criminal possession of a weapon under Penal Law § 265.02(1).

At trial, in response to a note from the jury, Supreme Court instructed jurors that, in order to convict, they need only find that Gonzalez knowingly possessed the knife, not that he knew it was a gravity knife. Defense counsel objected that jurors should be told "the defendant has to know that he possessed an instrument having [the] characteristics of a gravity knife," but the court replied that the statute imposes strict liability and that it was bound by First Department precedent. Gonzalez was convicted and sentenced to 3½ to 7 years in prison.

The Appellate Division, First Department affirmed, saying, "The court properly instructed the jury that the knowledge element would be satisfied by proof establishing defendant's knowledge that he possessed a knife in general, and did not require proof of defendant's knowledge that the knife met the statutory definition of a gravity knife...." It said Gonzalez's motion to suppress the knife was properly denied because the police had probable cause to arrest him for disorderly conduct. "At the very least, defendant recklessly created a risk of 'public inconvenience, annoyance, or alarm' ... in a crowded subway station by loudly and angrily cursing police officers, violently waving his arms, screaming at passersby to complain of the police officers' conduct, and forcing subway riders to get out of his way."

Gonzalez argues he was deprived of due process by the court's instruction that his conviction did not require proof that he knew he possessed an illegal gravity knife. He was convicted and sentenced "simply because the jury found he possessed, while on his way to work, a common workman's utility knife that he bought legally and openly at Home Depot in 2009....," he says. "Possessing such a knife for innocent purposes could hardly be considered 'extraordinary and unusual,' as it would be for a true 'per se' weapon.... Nothing in its outward appearance would put the possessor on notice of potential regulation, nor was Home Depot required to provide notice to the tens of thousands of customers to whom it had sold the knives that the District Attorney's office began to criminalize in June 2010." He also argues the police search was illegal "as there is no basis ... for characterizing [his] actions as 'disorderly conduct,' nor can the police actions rationally be characterized as merely a level one or two DeBour stop."

For appellant Gonzalez: Robert S. Dean, Manhattan (212) 577-2523

For respondent: Manhattan Assistant District Attorney Malancho Chanda (212) 335-9000

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No. 77 People v Ricky A. Lynch

In June 2009, Ricky A. Lynch (Lynch) obtained a non-driver identification card from a state Department of Motor Vehicles (DMV) office in Suffolk County by submitting a fraudulent application, on which he used the name, birth date, and social security number of his son, Ricky A. Lynch, Jr. In November 2009, when Lynch was stopped for a traffic infraction in Westchester County, he gave the police officer the fraudulent ID card with his son's name and birth date. He was arrested for possession of a forged instrument, among other things. Lynch pled guilty to a misdemeanor charge of criminal possession of a forged instrument in the third degree in Rye City Court and was sentenced to 90 days in the Westchester County jail. When he returned to Suffolk County in 2010 -- after his son discovered Lynch's fraudulent use of his identity and reported the matter to the Suffolk County Police Department -- Lynch was arrested on forgery charges based on his possession and submission of the false application for a DMV ID card.

Lynch moved to dismiss the charges on double jeopardy grounds under CPL 40.20, which generally prohibits separate prosecutions "for two offenses based upon the same act or criminal transaction...." Supreme Court denied the motion, saying Lynch "was found in Westchester County with the alleged fruits of his forgery, an alleged forged identity card," and pled guilty. "The defendant is not charged in Suffolk County with possession of the identity card and thus the 'res' of the crime is a completely different instrument. Although related, the alleged crimes in Suffolk were complete with the defendant filing his application. That the defendant possessed the fruits of that crime [in Westchester] is a separate and distinct act which is not subject to a defense of double jeopardy...." Lynch was convicted of second-degree criminal possession of a forged instrument and first-degree counts of identity theft and offering a false instrument for filing. He was sentenced to 3½ to 7 years in prison.

The Appellate Division, Second Department affirmed, finding there was no statutory double jeopardy violation. "The crimes for which the defendant was prosecuted in Suffolk County were not based upon the same criminal transaction as the crime for which he was prosecuted in Westchester County.... The Westchester County prosecution involved a separate offense, which arose out of the defendant's possession of a different forged instrument than the one at issue in the Suffolk County prosecution."

Lynch argues the Suffolk County charges should have been dismissed under CPL 40.20. "[T]he act of completing and presenting the [application] to obtain the Non-Driver ID Card, using a false identification when completing the [application], presenting the false identification in order to obtain the Non-Motorist ID card, as well as the subsequent possession of the ID card, are so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture."

For appellant Lynch: Edward Smith, Central Islip (631) 853-5212

For respondent: Suffolk County Assistant District Attorney Ronnie Jane Lamm (631) 852-2500