# 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, October 19, 2016

**No. 177 Ace Fire Underwriters Insurance Company v Special Funds Conservation Committee**

Carlos Ramirez injured his neck, back and shoulder in a work-related accident while employed by the Coca Cola Bottling Company in March 2007. A workers' compensation law judge found Ramirez sustained compensable injuries and ultimately awarded him benefits of $375 per week for up to 375 weeks. The judge also determined the claim was subject to Workers' Compensation Law § 15(8)(d), which entitles the employer's workers' compensation insurance carrier -- in this case, Ace Fire Underwriters Insurance Company -- to obtain partial reimbursement of its benefit payments from the Special Disability Fund of the Special Funds Conservation Committee (SFCC).

Ramirez also brought a personal injury action against a third-party based on the same injuries. The suit was settled for $500,000 in May 2012 after Ramirez obtained consent for the settlement from Ace, as required by Workers' Compensation Law § 29(5), but Ace did not seek consent from SFCC. The settlement was placed on the record in December 2012 and the workers' compensation law judge directed the parties to produce letters of consent. In February 2013, Ace for the first time sought SFCC's retroactive consent for the settlement, which SFCC refused to provide. It told Ace that "consent was required at the time of settlement" and, without it, reimbursement by SFCC was forfeited.

Ace then brought this proceeding against SFCC in Manhattan Supreme Court, seeking an order directing SFCC to consent retroactively. Supreme Court denied the petition, saying Ace "must seek an administrative determination by the NYS Workers Compensation Board, whether [retroactive] or otherwise, of its application for approval of ... reimbursement from [SFCC]."

The Appellate Division, First Department affirmed. Since SFCC is "governed by the Workers' Compensation Law and subject to the authority of the Workers' Compensation Board, we find that [Ace] should seek a determination as to appropriate relief from the Board, which has already determined the injured claimant's entitlement to certain payments and [Ace's] entitlement to reimbursements under Workers' Compensation Law § 15(8)(d)...."

Ace argues that a workers' compensation carrier "should be afforded the relief available to the injured worker who fails to obtain prior written consent" for a settlement under Workers' Compensation Law § 29(5), which requires injured workers to obtain judicial approval of a settlement from the trial court where the personal injury action was commenced. "It is well settled that the Workers' Compensation Board does not have the authority to issue a consent order [retroactively]." Ace says the First Department's decision here "is in direct conflict with the ... Second Department's decision in Empire State Transportation Workers' Compensation Trust v Special Funds Conservation Committee (125 AD3d 967)," which held, "A request to compel [retroactive] consent to a settlement is addressed to the discretion of the Supreme Court" pursuant to Workers' Compensation Law § 29(5).

For appellant Ace: Lisa Levine, Syosset (516) 433-6677
For respondent SFCC: Jill B. Singer, Albany (518) 438-3585

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To be argued Wednesday, October 19, 2016

**No. 178 People v Earl Jones**

In February 2012, a plainclothes police officer saw Earl Jones approach a Federal Express delivery truck parked at the corner of 129th Street and Fifth Avenue in Manhattan. The officer watched Jones climb briefly into the driver's compartment -- "five seconds maybe" -- and then walk out of sight behind the truck. When the officer reached the back of the truck, Jones was walking away about halfway up the block. He said an unidentified woman said to him, "Did you see he was trying to get in the back of the truck? Are you going to get him?" The officer arrested Jones minutes later as he emerged from a building under construction on 130th Street.

Before the trial began, the prosecutor sought to admit the unidentified bystander's statement through testimony of the officer under the "excited utterance" and "present sense impression" exceptions to the hearsay rule. Supreme Court granted the request to introduce the statement "either as an excited utterance or present sense impression." Jones was convicted of third-degree burglary for entering the FedEx truck and misdemeanor trespassing for entering the building. He was sentenced to three to six years in prison.

The Appellate Division, First Department affirmed, saying, "The evidence supports the conclusion that defendant entered a truck with intent to commit a crime.... Defendant entered the truck after looking in all directions, he moved his head up and down in the truck in a manner suggesting that he was looking for items to steal, and there is no evidence to suggest that he had any noncriminal purpose for entering the truck. Since defendant's objection to evidence of an unidentified woman's exclamation to a police officer did not articulate any of the arguments raised on appeal, those arguments are unpreserved.... As an alternative holding, we reject them on the merits."

Jones argues the statement was improperly admitted. "There were no hallmarks of an excited utterance.... It was not clear that the bystander made that utterance based upon what she saw, but even if she did, such an observation is hardly a startling event." As for present sense impression, he says the bystander "did not speak to the officer while she was ostensibly perceiving the event or immediately afterward" and "no evidence corroborated what [she] claimed to have seen. The truck obscured the officer's view of anything other than the bottom of appellant's leg...." He says admission of the statement violated his right to confrontation under Crawford v Washington (541 US 36); and argues there was insufficient proof "where the entirety of the evidence that [he] intended to commit a crime ... was that he climbed through an open door with a tool and a duffel bag, stayed inside for five seconds, took some unelaborated action at the back of the truck, and then walked away with nothing other than his own possessions."

The prosecution argues the statement was admissible as an excited utterance, where the bystander "was plainly under the stress of observing the startling event of defendant's criminal conduct when she made the statement," and as a present sense impression, where she "made the challenged statement to the officer immediately after observing defendant's conduct, and there was sufficient corroboration of her statement." Jones' confrontation rights "were not implicated because the passerby's volunteered statement was not testimonial."

For appellant Jones: Jody Ratner, Manhattan (212) 577-2523 ext.525
For respondent: Manhattan Assistant District Attorney Jared Wolkowitz (212) 335-9000

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To be argued Wednesday, October 19, 2016

**No. 179 Matter of Entergy Nuclear Operations, Inc. v New York State Department of State**

Entergy Nuclear Operations, Inc., the owner of Indian Point Nuclear Generating Plant Units 2 and 3 on the Hudson River in Westchester County, brought this action against the New York Department of State (State) seeking a declaration that its application to renew the plants' operating licenses is exempt from consistency review under the state's Coastal Management Program (CMP). Federal authorities issued 40-year operating licenses for Indian Point 2 in 1973 and for Indian Point 3 in 1975, and Entergy applied to the Nuclear Regulatory Commission (NRC) for 20-year renewals of both licenses in 2007. In the meantime, State established the CMP in 1982 pursuant to the federal Coastal Zone Management Act (CZMA), which requires applicants for federal licenses affecting coastal zones to provide "a certification that the proposed activity complies with the enforceable policies of the [CMP] and ... will be conducted in a manner consistent with" the CMP. If a state objects to the certification, the license may not be issued unless the Secretary of Commerce finds the proposed activity is consistent with the CZMA "or is otherwise necessary in the interest of national security." However, New York's CMP exempts from consistency review "those projects for which a final Environmental Impact Statement [FEIS] has been prepared prior to the effective date of the" CMP regulations in 1982 and "those projects identified as grandfathered pursuant to [the State Environmental Quality Review Act (SEQRA)] at the time of its enactment in 1976." Entergy, noting that FEISs were prepared for the Indian Point plants in 1972 and 1975 pursuant to the National Environmental Policy Act (NEPA), sought a ruling from State that both exemptions applied to its renewal application. State concluded the application was not exempt. Entergy then sought a declaratory judgment that it was exempt.

Supreme Court denied Entergy's request and dismissed the suit, finding State's conclusion was rational and entitled to deference. While the FEIS exemption "may have applied" when the plants' original licenses were in effect, it said, the "pending license renewal applications ... are not exempt from consistency review" where the plants' operations "have never been subject to review pursuant to the CZMA." It said the plants were not exempt under the grandfathering provision because they were not among "those actions that were specifically identified and 'deem[ed] to [be] approved' ... during SEQRA's phased implementation" in 1976 and 1977.

The Appellate Division, Third Department reversed and declared both plants exempt because their FEISs were completed prior to the 1982 effective date of the CMP regulations. It rejected State's argument that the exemption did not apply because the FEISs were not prepared pursuant to SEQRA, saying, "There is simply no basis in the law for injecting such a requirement." It said the SEQRA regulatory regime "permits the use of [FEISs] prepared under NEPA.... Indeed, SEQRA is modeled upon NEPA, and there is no indication that the [FEISs] prepared for [the plants] would not have complied with SEQRA...."

State argues, in part, that "the relicensing of a nuclear reactor is a new proceeding requiring new EISs and federal consistency review;" and that "material changes to Indian Point's operation" since the original licenses were issued require consistency review of the application.

For appellant Department of State: Solicitor General Barbara D. Underwood (518) 776-2317
For respondent Entergy: Kathleen M. Sullivan, Manhattan (212) 849-7000

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**No. 180 Rasheed Al Rushaid v Pictet & Cie**

Saudi Arabian businessman Rasheed Al Rushaid and two Saudi companies, Al Rushaid Petroleum Investment Corp. (ARPIC) and Al Rushaid Parker Drilling, Ltd. (ARPD), brought this action against Pictet & Cie, a private Swiss bank based in Geneva, and nine of its Swiss officers and partners, alleging they aided and abetted three rogue ARPD employees in laundering money from a bribery and kickback scheme involving oil drilling projects in the Middle East. The plaintiffs allege that the bank helped the ARPD employees create a Virgin Islands shell company and set up accounts for the company and themselves at Pictet, and that the employees directed corrupt vendors in the Middle East to wire bribe money to Citibank NA, one of Pictet's correspondent banks in New York, for deposit in the shell company's account in Geneva. They alleged that Pictet then transferred the money to the employees' accounts. The plaintiffs said the evidence showed that "from July 2006 through October 2008, Pictet repeatedly used its New York correspondent accounts to effect over a dozen transactions moving more than $4 million in unlawful bribes on behalf of" the ARPD employees. The Saudi plaintiffs asserted that Pictet's use of the correspondent account gave New York courts jurisdiction under the state's long-arm statute, CPLR 302(a)(1), which confers personal jurisdiction over a non-domiciliary who "transacts any business within the state" for claims "arising from" those transactions.

Supreme Court granted Pictet's motion to dismiss for lack of jurisdiction, saying the bank's "use of the correspondent accounts was passive, not purposeful." While there was proof "that defendants knew of the third-party money transfers from a New York correspondent account for the benefit of the Pictet accounts...," it said, "This passive receipt of funds [did] not constitute 'volitional acts' by defendants and, as such, defendants did not 'avail[] [themselves] of the privilege of conducting activities within the forum State....'" It said the plaintiffs also failed to satisfy the second prong of CPLR 302(a)(1) because their claims "do not arise from defendants' use of the New York correspondent bank account.... Plaintiffs' injuries stem from the [ARPD] employees' fraudulent scheme" and the wire transfers through the New York account were "'merely coincidental.'" It denied the plaintiffs' motion for jurisdictional discovery.

The Appellate Division, First Department affirmed. Unlike the foreign bank in Licci v Lebanese Can. Bank, SAL (20 NY3d 327), "which was alleged to have 'deliberately used a New York account again and again to effect its support' of a foundation through which money was funneled to a terrorist organization," it said, the Pictet defendants "are alleged to have been 'directed' by plaintiffs' former employees 'to wire the bribe/kickback money to Citibank NA, New York, in favour of Pictet..., for the credit of' an account they controlled. Thus..., defendants merely carried out their clients' instructions and have not been shown to have 'purposefully availed [themselves] of the privilege of conducting activities in New York.'"

The plaintiffs argue that Pictet's actions, including "over a dozen wire transfers through Pictet's New York ... accounts to funnel over $4 million" in "illicit funds" to its clients' accounts in Switzerland and its assistance in creating the shell corporation, "constituted a purposeful transaction of business in New York" and was sufficient to establish long-arm jurisdiction under Licci. They say the lower court rulings undermine the "repeated use standard" of Licci.

For appellants Al Rushaid et al: Gary P. Naftalis, Manhattan (212) 715-9100
For respondents Pictet & Cie et al: Maeve L. O'Connor, Manhattan (212) 909-6000

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**No. 181 People v Wilson Tardi**

Wilson Tardi was arrested for shoplifting at a Target store in Cheektowaga in January 2013, after store surveillance cameras recorded him taking a Nintendo gaming system and other items. Target security personnel pointed out his Jeep to Cheektowaga police officers and asked them to remove it from the store's parking lot. The officers impounded the vehicle, used Tardi's keys to unlock it, conducted an inventory search at the scene and found a handgun in a canvas bag behind the driver's seat. Tardi was charged with weapon possession as well as petit larceny.

Erie County Court denied Tardi's motion to suppress the weapon, saying store personnel asked the police to remove his Jeep "apparently in an effort to limit any potential liability in protecting same from damage and to allow employees and customers access to the parking space. These legitimate reasons for impoundment along with the arrest of the defendant ... provided sufficient exigent circumstances for the justification of impoundment of the vehicle.... As to the inventory search..., there is ample evidence that the search was conducted pursuant to the previously established reasonable written procedures of the Cheektowaga Police Department" and "there was no showing that the two officers who started the search exercised any arbitrary decision making about what to search and/or seize...." After the ruling, Tardi pled guilty to second-degree weapon possession and petit larceny and was sentenced to four years in prison.

The Appellate Division, Fourth Department affirmed, rejecting Tardi's claim that the department's policy on inventory searches was unconstitutional and the officers acted improperly in impounding his car. "It is well settled that '[w]hen the driver of a vehicle is arrested, the police may impound the car, and conduct an inventory search, where they act pursuant to "reasonable police regulations relating to inventory procedures administered in good faith"'...," the court said. "'Such searches, conducted as routine procedures, are permitted to protect an owner's property while it remains in police custody, to protect the police against false claims for missing property and to protect the police from potential danger.... Here, the police officers properly impounded the vehicle that defendant drove to the scene of the crime and performed an inventory search ... pursuant to a reasonable Cheektowaga Police Department procedure...." It said his second claim, that the search violated the department's policy, was unpreserved.

Tardi argues that the provision of the policy requiring officers to impound a vehicle "[w]hen the driver of such vehicle has been arrested and taken into custody" is unconstitutional as applied to him. "The Arrest Provision gives the Cheektowaga Police the authority to remove vehicles from private property without giving consideration to any constitutionally permissive reason to take the vehicle, whether pursuant to probable cause or a 'caretaking function,'" such as removal of vehicles that jeopardize public safety or impede traffic, he says. The seizure and search of his Jeep were unconstitutional because his arrest was unrelated to the vehicle and because his car, parked and locked in a commercial lot, "did not impose any burdens upon traffic or safety of others."

For appellant Tardi: Thomas J. Eoannou, Buffalo (716) 885-2889
For respondent: Erie County Assistant District Attorney Matthew B. Powers (716) 858-242