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.

WEEK OF JANUARY 5, 6 and 8, 2015

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Monday, January 5, 2015

No. 1 People v Michael Diack

Michael Diack was convicted in 2001 of possessing an obscene sexual performance of a child and, after serving 22 months in prison, he was classified as a level one sex offender under the Sex Offender Registration Act (SORA). After he was discharged from parole, Diack moved into a Nassau County apartment located about 500 feet from a school. He was notified that he was in violation of the County's sex offender residency law, Local Law No. 4-2006, which prohibits all registered sex offenders from residing within 1,000 feet of a school, among other things. When he failed to relocate, he was charged in 2010 with violating the residency restrictions, a Class A misdemeanor. Diack moved to dismiss the charge on the ground that Local Law No. 4-2006 is preempted by state law.

District Court dismissed the charge, finding the local law was preempted by the state's "comprehensive statutory scheme for sex offenders." Noting that local governments throughout the state have enacted similar restrictions, it said, "By the sheer number of these local laws and the rapidity with which they have been enacted, it is evident that it has been and remains a high priority of local legislatures to enact severely restrictive residency ordinances in order to satisfy the 'not in my backyard' concerns of their constituencies. However, where challenged, these laws have consistently been found preempted...." The Court said, "[W]hile there is no express preemption of Local Law 4 by New York State law, there is implied preemption inasmuch as Local Law 4 is inconsistent and conflicts with the objective of New York State's statutory scheme for sex offenders. Local Law 4 essentially usurps New York State's articulated function of protecting vulnerable populations from sex offenders and puts in its stead local legislation which ... improperly places local interests above the interests of a wider constituency."

The Appellate Term, Ninth and Tenth Judicial Districts, reversed and reinstated the charge, finding no express or implied preemption. It said the Nassau County law did not conflict with Penal Law § 65.10 (4-a)(a), which imposes residency restrictions on level three sex offenders and some others as a condition of probation, since Diack is a level one offender and he was not on probation when he moved into the apartment. Regarding express preemption, it said, "The legislature recognized that the 'proliferation of local ordinances imposing residency restrictions upon sex offenders, while well-intentioned, have [sic] made it more challenging for the state and local authorities to address the difficulties in finding secure and appropriate housing for sex offenders'..., and directed [state agencies] to 'promulgate regulations to provide guidance'" for the placement of certain offenders. But it said, "In our opinion, the legislature has chosen to limit its regulations over sex offenders and not to enact a comprehensive legislative scheme in the area of law concerning the residency restrictions of sex offenders who are not on parole, probation, subject to conditional discharge or seeking public assistance. While the legislature has adopted a scheme with respect to registering sex offenders and notifying the public about sex offenders in their communities, we discern no express or implied sentiment by the legislature to occupy the entire area so as to prohibit localities from adopting" residency restrictions.

For appellant Diack: Kathy Manley, Albany (518) 434-1493
For respondent Nassau County: Kenneth L. Gartner, Mineola (516) 742-6200

State of New York Court of Appeals

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To be argued Monday, January 5, 2015

No. 2 Shipley v City of New York

On January 10, 2005, one day after 17-year-old Jesse Shipley was killed in an automobile accident in Staten Island, an autopsy was performed, with the consent of his father, by Dr. Stephen de Roux of the Medical Examiner's Office. Dr. de Roux removed organ tissue samples and the brain, which was preserved for later neuropathologic examination. Jesse's body was released the same day, but his parents were not told that his brain had been retained. They held a funeral and buried him on January 13. About two months later, students from Jesse's high school saw his brain in a jar, labeled with his name, during a field trip to the Staten Island office of the medical examiner. The field trip was cut short and Jesse's sister, a student at the school, soon learned of the situation and informed the parents, Andre and Korisha Shipley, who had thought Jesse's brain was buried with his body. Neuropathologists conducted their examination of the brain a few days later. In October 2005, the brain was returned to the Shipleys, who held a second funeral service and burial. Dr. de Roux later testified that the two-month interval between the autopsy and the examination of Jesse's brain was not uncommon because "I wait months, until I have six brains," before summoning a neuropathologist from Manhattan to examine them.

The Shipleys brought this action for emotional distress against the City and Medical Examiner's Office based, in part, on alleged violation of their common-law right of sepulcher, which gives the next of kin the right to possession of a decedent's body for preservation and burial. Supreme Court denied the City's motion to dismiss the claim, finding there were unresolved questions regarding whether the defendants' failure to inform the Shipleys that their son's brain was not returned with his body interfered with their right of sepulcher.

The Appellate Division, Second Department affirmed that portion of the order. While the Medical Examiner's Office had authority to perform the autopsy and retain the brain for further testing, it said, the office "also has the mandated obligation" under the right of sepulcher and Public Health Law § 4215(1) "to turn over the decedent's remains to the next of kin for preservation and proper burial once the legitimate purposes for the retention of those remains have been fulfilled," a duty that "is clearly for the benefit of, and is owed directly to, the next of kin. Furthermore, it may be satisfied in the present context by the simple act of notifying the next of kin that, while the body is available for burial, one or more organs have been removed for further examination.... This requirement, hardly onerous in nature, strikes an appropriate balance between the fulfillment of the legitimate scientific and investigative duties of the Medical Examiner's Office and the recognition of the long-established rights of next of kin to receive and provide final repose to the remains of their loved ones." After trial, a jury awarded the Shipleys $1 million in damages. The Second Department reduced the award to $600,000.

The City argues that neither the right of sepulcher nor Public Health Law § 4215(1) apply to "those parts of a body that have appropriately been removed during the course of an authorized autopsy. It follows that neither requires the New York City Medical Examiner to turn over such parts to the decedent's next of kin once the legitimate purposes for the retention of the parts have been fulfilled." It says the office satisfied its obligations when it returned Jesse's body to the Shipleys after the autopsy but, even if the office had a duty to return all organs, the Appellate Division had "no basis in statute or common law" for "imposing an additional, newly found duty" to notify the next of kin when any organs are removed for further examination. In any event, the City argues it cannot be held liable because the Shipleys did not demonstrate the existence of a special relationship.

For appellant City: Assistant Corporation Counsel Ronald E. Sternberg (212) 356-0840
For respondent Shipleys: Marvin Ben-Aron, Staten Island (718) 442-9000

State of New York Court of Appeals

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To be argued Monday, January 5, 2015

No. 3 Elmaliach v Bank of China Limited

The plaintiffs are 50 citizens and residents of Israel who were injured or the survivors of persons killed in terrorist bombings and rocket attacks carried out in Israel by Hamas and Palestine Islamic Jihad from 2005 to 2007. They claim Bank of China Limited (BOC) knowingly facilitated the transfer of millions of dollars from leaders of the terrorist organizations to their operatives in Israel, enabling them to plan and conduct the attacks. The wire transfers were routed through BOC's branches in Manhattan. The plaintiffs allege that representatives of the Israeli prime minister warned officials of China's central bank and Ministry of Public Security in April 2005 that the transfers were being used in support of terrorism and demanded that they prevent BOC from executing further transfers. The plaintiffs allege that the Chinese officials conveyed the Israeli warnings and demands to BOC in April 2005, but the bank continued to carry out the wire transfers at least through January 2007.

The plaintiffs allege that BOC's actions in handling the wire transfers were a proximate cause of their injuries. Arguing that Israeli law governs the case, they seek damages for negligence under Israel's Civil Wrongs Ordinance and for breach of statutory duty, based on alleged violations of Israeli statutes that prohibit the provision of material support or services to terrorist organizations. BOC argues the case is governed by the law of New York or China and, thus, it has no duty to protect non-customers from torts committed by its banking customers. Supreme Court denied BOC's pre-answer motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action.

The Appellate Division, First Department affirmed, ruling that Israeli law applies. While New York, Israel and China all have significant contacts, it said, "Israel has a very strong interest in protecting its citizens and residents, who were the intended targets of the terrorist attacks inside Israeli territory.... [W]e hold that Israel, the location of the plaintiffs' injuries, has the greater interest in seeing its laws enforced, and Israeli law should govern this action." This does not violate public policy, although New York does not generally recognize a duty of banks to protect non-customers, it said. In light of allegations that "BOC knowingly facilitated acts of terrorism against innocent civilians, and did so after being put on notice" by Chinese and Israeli officials, "BOC's argument that it was doing nothing more than 'routine' banking services is unpersuasive."

BOC argues the law of China or New York should apply. Under a proper application of the "greatest interest" test, it says, the choice of law depends on where the challenged conduct occurred, not the place of injury. The plaintiffs' "claims are centered on BOC's alleged banking conduct in China, where key meetings and decisions allegedly transpired, where the wire transfers at issue were received.... BOC's alleged banking conduct also occurred to a lesser degree in New York, when wired funds passed through a BOC branch on their way to the customer's accounts in China.... Because BOC does business in China and New York and is subject to the regulatory oversight of those jurisdictions, China and New York are best able to oversee and prevent bank conduct of the type described in Plaintiffs' Complaint."

For appellant Bank of China: Mitchell R. Berger, Washington, DC (202) 457-5601
For respondents Elmaliach et al: Robert J. Tolchin, Brooklyn (718) 855-3627

State of New York Court of Appeals

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To be argued Monday, January 5, 2015

No. 4 People v Terrance Williams *(papers sealed)*

Terrance Williams entered into a sexual relationship with a coworker (complainant) in Syracuse in August 2010. Williams did not disclose that he had human immunodeficiency virus (HIV), telling the complainant that it was "okay" to have anal intercourse without a condom. The complainant later testified before a grand jury that they had unprotected sex four or five times, ending in October 2010. At that time, Williams told him a previous sexual partner had been diagnosed with HIV and suggested he should be tested. Williams said, "I never got tested so I think maybe you should just in case." In April 2011, after learning the complainant had tested positive for HIV, Williams apologized to him and admitted he had been diagnosed with HIV in 2009, before their relationship began. The complainant reported the matter to the police, and Williams was indicted for first-degree reckless endangerment.

Supreme Court reduced the charge to second-degree reckless endangerment, finding the evidence was legally insufficient to establish two elements required by Penal Law § 120.25, which states that a defendant "is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person." The court said there was insufficient proof that Williams acted with depraved indifference or caused a grave risk of death.

The Appellate Division, Fourth Department affirmed, saying, "[A]lthough defendant may have acted with indifference to the victim's health, his conduct lacked the 'wanton cruelty, brutality, or callousness' required for a finding of depraved indifference toward a single victim.... Defendant told the police that he did not disclose his HIV positive status ... because he was 'afraid [the victim] would not want to be with' him, and that he 'loved [the victim] so very much'.... The fact that defendant encouraged the victim to be tested for HIV indicates that defendant 'was trying, however weakly and ineffectively,' to prevent any grave risk that might result from his conduct.... We thus conclude that, 'while the evidence certainly shows that defendant cared much too little about [the victim's] safety, it cannot support a finding that [he] did not care at all." Finding insufficient evidence that William's conduct posed a grave risk of death, it cited testimony of the victim's physician that, due to dramatic advances in the treatment of HIV, "the prognosis today is 'outstanding.'"

The prosecution argues it presented sufficient evidence to support the charge of first-degree reckless endangerment. "Defendant exhibited depraved indifference by selfishly putting his own immediate desire for sexual gratification above the risk of the victim contracting HIV, which is incurable and life-threatening.... Before engaging in the first instance of unprotected anal sexual conduct..., the victim specifically asked defendant four times if it was okay not to use protection and defendant said yes." The lower courts "focused on what defendant did after the fact, but ignored defendant's failure to reveal his HIV positive status when he convinced the victim to engage in unprotected sexual conduct.... [D]espite defendant's post-crime regret, the proof shows his depraved indifference at the time of his actions." The prosecution says, "Despite medical advancements, HIV infection can lead to AIDS and cause death. Thus, defendant's actions exposed his victim to a grave risk of death."

For appellant: Onondaga County Assistant District Attorney James P. Maxwell (315) 435-2470
For respondent Williams: Kristen N. McDermott, Syracuse (315) 422-8191 ext. 0138

State of New York Court of Appeals

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To be argued Tuesday, January 6, 2015

No. 5 BDC Finance L.L.C. v Barclays Bank PLC *(record sealed)*

In May 2005, the hedge fund BDC Finance L.L.C. and Barclays Bank PLC entered into a derivatives transaction, a total return swap, that required BDC to post collateral with Barclays in an amount that fluctuated based on the value of the investment assets. One part of their agreement, the Credit Support Annex (CSA), specified procedures for each party to demand adjustments in the amount of collateral based on those changes in value. It provides that the transfer of collateral must be made by the next business day if the demand is made by 1 p.m., or by the second business day if the demand is made later. In the event of a dispute over a collateral call, the CSA permitted the disputing party to notify the demanding party of the dispute and transfer only the undisputed amount, and the parties were then required to engage in a prescribed dispute resolution process. However, the Delivery of Collateral clause of the parties' Master Confirmation Agreement states, "Notwithstanding anything in the [CSA] to the contrary ... [Barclays] shall Transfer any Return Amounts ... not later than the Business Day following the Business Day on which [BDC] requests the transfer...." BDC argues that this clause supercedes the dispute resolution provision of the CSA, while Barclays argues that it modifies only the timing of transfers for demands made after 1 p.m.

On October 6, 2008, BDC demanded that Barclays transfer to it $40 million in excess collateral. Barclays, contending it owed only $5,080,000, made no payment on October 7. Barclays transferred $5 million to BDC on October 8, and the same day BDC sent a "Notice of Failure to Transfer Return Amount" stating that Barclays had been required to pay either the $40 million demanded or the undisputed amount by October 7. The notice declared a Potential Event of Default and advised Barclays it had two days to cure or it would be in default. On October 13, BDC sent a notice declaring Barclay's in default for failing to transfer the balance of the $40 million during the cure period. BDC terminated the parties' agreements as of the following day and demanded the return of all of its collateral, about $297 million. When Barclays refused, BDC filed this breach of contract action. Supreme Court denied BDC's motion for summary judgment on liability, finding unresolved issues of fact.

The Appellate Division, First Department modified, on a 3-2 vote, by granting summary judgment on liability to BDC. The majority found the CSA required Barclay's to dispute the amount of the collateral call by October 7. "The evidence in the record establishes as a matter of law that Barclays did not do this. Barclays' payment of $5 million on October 8, 2008 was a day late.... Having failed to timely pay the undisputed amount by the deadline, Barclays lost any right it may have had to suspend payment of the full $40 million." In any event, it said, "The plain and unambiguous language of the Delivery of Collateral clause requires Barclays to transfer any Return Amount demanded by BDC no later than the business day following the demand.... Thus, the Delivery of Collateral clause expressly supercedes the form language in the CSA which would have otherwise permitted Barclays to dispute before paying...."

The dissenters argued the Delivery of Collateral clause "should be read as modifying only the Transfer Timing provision of the CSA," not the dispute resolution provisions. "[I]t is illogical that the agreements would require only one party to pay first and dispute later," they said, and "BDC unequivocally advised Barclays that it had the right to pay or dispute" under the CSA at the time of its collateral call. They also said Supreme Court "correctly found issues of fact whether Barclays intended its communications with BDC ... to be a notice of dispute under the CSA, whether they imparted sufficient notice to BDC, and whether BDC complied with the informal dispute mechanism;" and further questions "as to whether there was any undisputed amount owed by Barclays to BDC."

For appellant Barclays: Robinson B. Lacy, Manhattan (212) 558-3121
For respondent BDC: Craig A. Newman, Manhattan (212) 530-1800

State of New York Court of Appeals

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To be argued Tuesday, January 6, 2015

No. 6 People v Michael S. Brumfield

Michael Brumfield was arrested by Rochester police after a traffic stop in 2008. He served notice on the prosecutor of his intention to testify before the grand jury under CPL 190.50, which provides that, "upon signing and submitting to the grand jury a waiver of immunity pursuant to section 190.45, such person must be permitted to testify...." CPL 190.45 does not specify the form the waiver must take, but states that the waiver is a document, signed by the defendant, "stipulating that he waives the privilege against self-incrimination and any possible or prospective immunity to which he would otherwise become entitled, pursuant to section 190.40, as a result of giving evidence in such proceeding."

When the prosecutor gave him a preprinted waiver form, Brumfield crossed out three paragraphs and then signed it. The portions he let stand stated that he was "(a) giving-up my right against self-incrimination, and (b) giving-up any prospective immunity to which I would otherwise be entitled pursuant to Section 190.40 of the Criminal Procedure Law;" and further said he understood "that by signing this document I give up all immunity and privileges to which I would otherwise have been entitled under the provisions of the United States Constitution, the Constitution of the State of New York, as well as any applicable statutory provisions." One paragraph he struck out related to his right to counsel and limits on his counsel's role; another said he understood "that the possible questioning before the Grand Jury will not be limited to any specific subjects, matters or areas of conduct;" and the third said, "I do hereby consent and agree to the use against me of any testimony given by me before the Grand Jury or evidence hereby produced by me upon any investigation, hearing, trial, prosecution or proceeding." When Brumfield refused to sign an unaltered waiver form, the prosecutor refused to let him testify. He was indicted on felony counts of attempted criminal possession of a weapon in the second and third degree and two misdemeanors. Brumfield moved to dismiss the indictment.

County Court denied the motion, saying "the motion to dismiss the indictment must be denied on the ground that the failure of the defendant to testify resulted not from any restrictions placed upon such right by the prosecution, but from defendant's attempt to improperly limit the waiver of immunity to his benefit." Brumfield was convicted after a jury trial and sentenced to seven years in prison on the top count.

The Appellate Division, Fourth Department reversed the conviction and dismissed the indictment with leave to the prosecution to re-present. "[T]he paragraphs in the waiver of immunity form that defendant left intact stated that defendant waived his privilege against self-incrimination and any immunity to which he would otherwise be entitled pursuant to CPL 190.40," it said. "Thus, defendant signed a waiver of immunity form that complied with the requirements of CPL 190.45(1) and was therefore required to be permitted to testify before the grand jury...."

For appellant: Monroe County Asst. District Attorney Kelly Christine Wolford (585) 753-4335
For respondent Brumfield: David R. Juergens, Rochester (585) 753-4093

State of New York Court of Appeals

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To be argued Tuesday, January 6, 2015

No. 7 Margerum v City of Buffalo

The plaintiffs in this appeal, 12 firefighters employed by the City of Buffalo, claim they were victims of reverse discrimination when the City allowed Civil Service promotional lists to expire solely because the plaintiffs, who were next in line for promotion, are Caucasian. The eligibility lists for supervisory positions were based on examinations held in 1998 and 2002, when the City was subject to a 1980 decree by the U.S. Court of Appeals for the Second Circuit finding it had discriminated against African Americans, Hispanics and women and prohibiting the City from engaging in any hiring or promotion practice "which has the purpose or effect of discriminating against any employee or future employee" on the basis of race. Men of Color Helping All Society (MOCHA), an organization of African American firefighters, filed federal class actions challenging the examinations as discriminatory. In 2005, the City's Human Resources Commissioner refused to extend the eligibility lists based on the 2002 examinations for a fourth and final year, allowing them to expire.

Plaintiffs filed this action City in 2007, alleging violations of the Human Rights Law and New York Constitution. They moved for summary judgment holding the City liable based on testimony by the Commissioner that he let the lists expire because there were no African American candidates on them. He said, "The problem is that if we kept those lists in place and the longer we kept them in place, the more white males would be promoted into these positions which would exacerbate the imbalance that we have with regard to the number of minority supervisors." The Appellate Division, Fourth Department denied the motion. It also denied the City's motion to dismiss, ruling the plaintiffs were not required to file a notice of claim.

A few weeks later, in Ricci v DeStefano (557 US 557), the U.S. Supreme Court ruled in favor of white firefighters who brought a similar reverse discrimination case against New Haven, CT. The Court held that, "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action." It said, "An employer may defend against [such] liability by demonstrating that the practice is 'job related for the position in question and consistent with business necessity.'"

Supreme Court granted summary judgment on liability to the plaintiffs based on Ricci. The Appellate Division affirmed, saying the City defendants "did not have a strong basis in evidence to believe that they would be subject to disparate-impact liability if they failed to take the race-conscious action, i.e., allowing the eligibility lists to expire, inasmuch as the examinations in question were job-related and consistent with business necessity (see Ricci ...). After trial, Supreme Court awarded a total of $2.5 million in economic damages and $255,000 for emotional distress to 12 plaintiffs. The Appellate Division reduced the economic damages award to $1.6 million and otherwise affirmed.

The City argues the lower courts misapplied Ricci, which it says provides a "safe harbor" for employers to discontinue an employment practice they believe is having a disparate impact on a protected group of employees. It also argues the plaintiffs' failure to file a notice of claim requires dismissal. The plaintiffs argue the Appellate Division erred in reducing their award.

For appellants-respondents Margerum et al: Andrew P. Fleming, Hamburg (716) 648-3030
For respondent-appellant Buffalo: Jason E. Markel, Buffalo (716) 856-4000

State of New York Court of Appeals

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To be argued Tuesday, January 6, 2015

No. 8 People v Sandra Diaz

Sandra Diaz was arrested with Matias Rivera, a heroin addict and the father of her three children, when police raided her Manhattan apartment in 2009. In a bedroom, the officers found about 30 glassine envelopes containing heroin along with other glassines with heroin residue, unused glassines, an electronic scale, lactose, a strainer and other paraphernalia. Ten of the full glassines were in a cup on a bedside table. The other items were found in drawers. Diaz and Rivera were charged with possession of heroin with intent to sell, criminally using drug paraphernalia, and four misdemeanor counts of unlawfully dealing with a child in the first degree (Penal Law 260.20[1]) based on the presence of Diaz's children and a young niece.

Penal Law 260.20(1) applies to a defendant who "knowingly permits a child less than eighteen years old to enter or remain in or upon a place ... where ... activity involving controlled substances as defined by article two hundred twenty of this chapter ... is maintained or conducted, and he knows or has reason to know that such activity is being maintained or conducted...."

At a joint trial, Diaz and Rivera were acquitted of possession with intent to sell, but convicted of the lesser-included offense of seventh-degree possession, a misdemeanor, and the four counts of unlawfully dealing with a child. Rivera was also convicted of using drug paraphernalia. Diaz was sentenced to three years of probation.

The Appellate Division, First Department affirmed Diaz's convictions, rejecting her claim that there was insufficient evidence. "Although [Diaz's] position was that the drugs and paraphernalia found in her apartment were solely attributable to [Rivera], the evidence supports the conclusion that [Diaz] exercised dominion and control, at least jointly with [Rivera], over the contraband.... The evidence also established the elements of first-degree unlawfully dealing with a child..., including the element of 'activity involving controlled substances.' [Diaz] knew or should have known that a large amount of heroin and drug paraphernalia were in her apartment, where four children under the age of 18 lived."

Diaz argues that simple possession in the home is not "activity involving controlled substances" that "is maintained or conducted" under Penal Law 260.20(1). "The plain meaning of the terms 'activity,' 'maintained,' and 'conducted' points to conduct of an ongoing or commercial nature such that an individual does not simply violate the statute by possessing or knowing that another person possesses small amounts of controlled substances in an adult bedroom while children are present in another part of the home...," she says. "Simple possession for personal use of <u>any</u> substance (controlled or marijuana) was not meant to include additional liability just because a child is present on the same premises." She also argues the prosecution failed to prove she possessed drugs because the "evidence tying her to the room where largely-concealed contraband was found was completely speculative."

For appellant Diaz: Katharine Skolnick, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Karen Schlossberg (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, January 8, 2015 (arguments begin at 10 a.m.)

No. 9 Vargas v City of New York

Jose Vargas was arrested in a drug buy-and-bust operation in Brooklyn on September 1, 2006, and was taken to the 72nd Precinct. A Type I diabetic who relied on daily insulin injections to control his blood glucose level, Vargas said he carried his insulin and syringes with him at all times in a black bag, but the bag was taken from him at the time of his arrest. He said he asked police officers for his insulin at least six times that night, at the precinct and later at Kings County Central Booking, but was disregarded. He was arraigned on September 3 and was remanded to custody when he could not post bail of $2,000. On September 4, Vargas suffered a seizure in his cell at Central Booking and was taken to Long Island College Hospital, where he was diagnosed with diabetic ketoacidosis, a common complication of a lack of insulin. He suffered multiple seizures and was in a coma for eight or nine days, which left him with permanent brain damage. He was released from custody on September 28, after pleading guilty to criminal facilitation in return for a conditional discharge.

Vargas filed a notice of claim with the City, which did not mention a denial of medical care, then brought this action against the City and individual officers for personal injury and civil rights violations under 42 USC § 1983, among other things. In a cause of action for "policy of non-feasance in the protection of plaintiff's civil rights," the complaint alleged the defendants had "deprived [Vargas] of necessary medical treatment." The City moved to dismiss the civil rights claim for failure to state a cause of action. Supreme Court denied the motion, and Vargas went to trial on the theory that the City deprived him of necessary medical care by denying him insulin while he was in police custody. The jury found the City did not have a "custom and/or policy of depriving prisoners of medical care," but determined that the denial of medical care to Vargas did "demonstrate a custom and/or policy of [the City] that violates civil rights." It found Vargas's injuries were a result of the defendants' negligence and awarded him $17.6 million. Supreme Court also awarded him $175,000 in attorneys' fees.

The Appellate Division, Second Department reversed, ruling the civil rights claims under 42 USC § 1983 should have been dismissed for failure to state a cause of action. "To hold a municipality liable under § 1983 for the conduct of employees below the policymaking level, a plaintiff must show that the violation of his or her constitutional rights resulted from a municipal custom or policy.... Here, the complaint failed to allege any facts from which it could be reasonably inferred that the defendants had a policy or custom of depriving medical treatment to persons in police custody...."

Vargas argues that he "certainly alleged deprivation of necessary medical care in the complaint; defendant was fully informed during pre-trial proceedings of the nature of the claim and its essential elements -- that the refusal to permit him access to insulin while in defendant's custody caused diabetic ketoacidosis -- and ... mounted a vociferous defense at trial.... [T]his Court should reverse and hold that the pleadings, when supplemented by the pre-trial discovery afforded the City, sufficed to state a cognizable claim for deprivation of medical care...."

For appellant Vargas: Brian J. Isaac, Manhattan (212) 233-8100
For respondent City: Assistant Corporation Counsel Richard Dearing (212) 356-2500

State of New York Court of Appeals

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To be argued Thursday, January 8, 2015 (arguments begin at 10 a.m.)

No. 10 People v Steven Repanti

Steven Repanti was accused by a neighbor, Carol Goldman, of trying to knock her down a stairway at the Spook Rock Senior Complex in Suffern in 2009. She told police that, as she started up the stairs, Repanti rushed down and bumped her hard with his shoulder, knocking her backward. He was charged with third-degree attempted assault in a misdemeanor information, which alleged that he "purposefully with force used his shoulder to bump into deponent in an attempt to knock deponent down the stairs" and that he acted "with intent to cause physical injury." On the eve of trial, the prosecutor filed a superseding information to add a charge of second-degree harassment. In support of the new charge, the information alleged that Repanti "did purposefully, with force, use his shoulder to bump into Ms. Carol Goldman in an attempt to knock Ms. Goldman down the stairs" and that he acted "with intent to harass, annoy, or alarm" her.

Repanti was convicted on both counts after a nonjury trial in the Town of Ramapo Justice Court and was sentenced to one year of probation and a $250 fine. On appeal, he argued that he could not properly be convicted of both charges because they were based on precisely the same conduct and the only difference between them was the intent element, with attempted assault requiring an intent to cause physical injury and harassment an intent to harass, annoy or alarm.

Appellate Term, Ninth and Tenth Judicial Districts affirmed, rejecting his claim that harassment in the second degree is a lesser included offense of attempted assault in the third degree. "This argument fails, as the Court of Appeals has held that harassment is not a lesser included offense of assault, noting that harassment requires proof of an intent to harass, annoy or alarm, an element that is not required to establish assault (People v Moyer, 27 NY2d 252 [1970]). The foregoing reasoning must extend to the crime involved herein, attempted assault."

Repanti argues, "[T]he 'Stanfield rule' [People v Stanfield (36 NY2d 467)] requires that the charge of harassment in the second degree be treated as a lesser included offense of attempted assault in the third degree because both rely on evidence of the very same conduct, the only difference being whether appellant acted with intent to harass, annoy or alarm, or to cause physical injury. In such a case, the two charges contained in a single instrument must be considered in the alternative.... Quite obviously..., a defendant could not be found guilty of both charges, because one cannot commit a single physical act while having two inconsistent intentions."

For appellant Repanti: William A. Gerard, Palisades (845) 365-3121
For respondent: Rockland County Asst. District Attorney Anthony R. Dellicarri (845) 638-5001

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, January 8, 2015 (arguments begin at 10 a.m.)

No. 12 Matter of Veronica P. v Radcliff A. *(papers sealed)*

In September 2009, 87-year-old Veronica P. filed a family offense petition against Radcliff A., an adult nephew who lived with her in her Manhattan apartment, alleging that he "grabbed and pushed her" during a brief altercation in August. She also alleged that "he is constantly under the influence of alcohol, he frequently screams and curses at her and tells her she cannot put him out of the home," among other things.

Family Court determined that Radcliff had committed acts that constituted harassment in the second degree and granted Veronica a two-year order of protection directing him to stay away from her home and refrain from assault, intimidation, threats and other offenses against her. Radcliff appealed, but work on it was delayed by the illness of his attorney. The order of protection expired in February 2013.

The Appellate Division, First Department dismissed his appeal as moot in October 2013, saying, "Because the order of protection has expired, this appeal is moot...."

Radcliff argues that his appeal from the order of protection did not become moot when the order expired because the underlying factual finding that he committed a family offense created a "stigma" that will have "enduring consequences" for him in the future. "The existence of an order of protection remains both a liability for future adjudication and a blot on the good name of the Family Court respondent when the order expires.... It is self-evident that adjudication of an act of domestic violence against an 87-year-old woman is a stigma." He points out that prior findings of domestic violence are a factor in custody determinations under the Domestic Relations Law and that orders of protection are entered into a statewide computer registry, which is searchable by courts and probation departments, and the orders are not removed when they expire.

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For respondent Veronica P.: Eric Nelson, Staten Island (718) 356-0566