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 APRIL 26 - 28, 2016

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be reargued Tuesday, April 26, 2016

No. 74 People v Terrance Mack

Terrance Mack was charged with gang assault in the first degree for his alleged participation in a September 2007 brawl, during which Latasha Shaw was beaten and stabbed to death by a large number of people in Rochester. Only one eyewitness identified Mack as a participant. During jury deliberations, County Court declared a recess and told the attorneys they would address any questions or concerns raised by the jury when they returned. The jury sent the court three notes during the recess. The first note said "we would like to have the instructions regarding the importance of a single witness in a case versus multiple witnesses and the instructions about the meaning of reasonable doubt read back to us." The second note asked "to hear [the eyewitness's] testimony regarding Terrance Mack's leaving of the crime scene" and requested "more jury request sheets." The third asked for a smoking break. Upon reconvening, the court read the notes into the record and indicated it would read the requested instructions, but before it did so, the jury sent another note saying it had reached a verdict. The court recessed for 16 minutes, then accepted the jury's guilty verdict without responding to the notes. Mack was sentenced to 25 years in prison.

The Appellate Division, Fourth Department reversed and ordered a new trial in a 3-1 decision, finding that "the core requirements" of CPL 310.30 were triggered by the jury's requests for readbacks of legal instructions and "a portion of the testimony of the sole witness who had identified defendant," and that Mack was "seriously prejudiced" by the trial court's failure to respond. "[A]lthough defense counsel failed to object to the court's procedure of accepting the verdict without responding to the jury's notes, the failure of the court to provide a meaningful response to the substantive requests of the jury is a mode of proceedings error for which preservation is not required...." It said the "request for a readback of the instruction on reasonable doubt, the determination of which is the crux of a jury's function, and for a readback of the instruction regarding 'the importance of a single witness in a case versus multiple witnesses,' 'demonstrates the confusion and doubt that existed in the minds of the jury with respect to ... crucial issue[s].... The jury is entitled to the guidance of the court and may not be relegated to its own unfettered course of procedure'...."

The dissenter said the jury, "by issuing a note stating that it had reached a verdict, impliedly rescinded its outstanding notes requesting a readback of certain instructions and certain testimony, and County Court therefore did not err in concluding that 'the jury had resolved its questions and was no longer in need of the requested information'...." He also argued that any error was unpreserved. "Although providing a meaningful response to notes from the jury is clearly among the court's 'core responsibilities' under CPL 310.30..., the statute does not expressly require the court to respond to a note that is followed by an announcement from the jury that it has reached a verdict.... In my view, the court's failure to respond to the outstanding jury notes, even if error, was not so significant or prejudicial as to constitute a fundamental flaw in the criminal process."

For appellant: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674
For respondent Mack: Nicolas Bourtin, Manhattan (212) 558-4000

State of New York Court of Appeals

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To be argued Tuesday, April 26, 2016

No. 69 People v Ronald D. Rossborough

Ronald Rossborough was charged in 2010 with engaging in a criminal scheme in several Western New York and Southern Tier counties, using stolen checks to buy jewelry, stereo equipment and other expensive merchandise at stores, then returning the items for cash refunds. In Wyoming County, he pled guilty to a felony count of third-degree grand larceny in exchange for a sentence of three to six years in prison, to run concurrently with sentences imposed in other jurisdictions, and an order to pay $2,500 in restitution.

At his plea proceeding in Wyoming County Court, Rossborough orally agreed to waive his right to be present at his sentencing after the court told him he had "an absolute right to be here for the sentencing." He also executed a written waiver of his right to appeal, a waiver the judge explained would include "anything surrounding your arrest, your conviction here today or the sentence that I impose as long as I stay within the agreed time." The court later imposed the promised sentence in his absence.

On appeal, Rossborough contended the court violated CPL 380.40 by sentencing him in absentia. The statute states, "The defendant must be personally present at the time sentence is pronounced," but contains an exception allowing a defendant's written waiver of the right to be present "[w]here sentence is to be pronounced for a misdemeanor or for a petty offense."

The Appellate Division, Fourth Department affirmed, saying, "Defendant's valid waiver of the right to appeal encompasses his contention that County Court erred in sentencing him in absentia.... In any event, defendant's contention lacks merit. The record establishes that defendant waived his right to be present at sentencing, having specifically requested at the plea proceeding that he be permitted to waive his personal appearance at sentencing...."

Rossborough argues that "a plain reading of the statute prohibits courts from allowing a defendant to waive his presence for sentencing on a felony." The terms of CPL 380.40 "are plain, clear, and unambiguous, and nothing is left for interpretation: the statute requires the presence of a defendant for sentencing proceedings, and the only exception to this rule applies to misdemeanors and petty offenses -- not felonies."

For appellant Rossborough: Christine Seppeler, Rochester (315) 573-4077
For respondent: Wyoming County Assistant District Attorney Eric R. Schiener (585) 786-8822

State of New York Court of Appeals

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To be argued Tuesday, April 26, 2016

No. 100 People v Anthony Parson, Jr.

Anthony Parson, Jr. was charged with second-degree criminal possession of a weapon after police stopped his car for vehicle infractions in Buffalo in October 2011. The arresting officer testified at a suppression hearing that, as he approached Parson's car from the opposite direction on Fillmore Avenue at about 11 pm, he saw the windshield was cracked and something was hanging from the rearview mirror, which would violate the Vehicle and Traffic Law. When he stopped the car and Parson rolled down his window, the officer said he smelled "burnt marijuana" and asked Parson, who admitted he had been smoking. The officer and his partner frisked Parson, finding a bag of marijuana in his pocket, then searched the car and found a .22 caliber revolver and several blunts. Defense counsel did not cross-examine the officer about a vehicle inventory form, prepared after Parson's arrest and signed by the officer, which said there was "no damage" to the car.

Erie County Court denied Parson's motion to suppress his statements and the gun, saying the officer's observation of "a large crack in the windshield" provided "sufficient grounds for stopping the vehicle." Parson subsequently pled guilty to the weapon charge and was sentenced to three and a half years in prison.

The Appellate Division, Fourth Department affirmed in a 4-1 decision, saying the officer "properly stopped defendant's vehicle upon observing violations of Vehicle and Traffic Law § 375 (22) and (30)." Rejecting Parson's claim that his attorney provided ineffective assistance in failing to cross-examine the officer about the vehicle inventory form, it said the form "is not a part of the record on appeal, and therefore defendant's contention must be raised in a motion pursuant to CPL article 440...." It found defense counsel otherwise provided effective assistance, saying Parson "received an advantageous plea inasmuch as he received the minimum sentence for his conviction. Defense counsel cross-examined the officer about the object that was hanging from the vehicle's mirror, and asked the officer if the lighting conditions were 'enough' to 'be able to see the cracked windshield.' In addition, defense counsel made a persuasive argument ... that the officer's testimony regarding the cracked windshield was not credible and that there 'was really no probable cause for the stop of that vehicle.' The fact that the court did not agree with defense counsel's assessment ... does not amount to ineffective assistance of counsel."

The dissenter said the vehicle inventory form "directly contradicts" the officer's testimony that a crack "covered most of the windshield," but he agreed with the majority that defense counsel's failure to pursue it must be raised in a CPL 440 motion. However, he argued defense counsel "did not adequately explore the circumstances of the subject traffic stop. In particular..., he did not inquire in detail concerning the lighting conditions present at the time of the stop; the proximity of the vehicle defendant was driving to a streetlight; the weather at the time of the traffic stop; or the location of [Parson's car] in relation to the officer's location when he allegedly observed the crack in the windshield. I thus conclude that defense counsel's deficient cross-examination was tantamount to a failure to supply County Court with a rationale to grant suppression..., and that defendant was denied effective assistance of counsel thereby...."

For appellant Parson: Deborah K. Jessey, Buffalo (716) 853-9555
For respondent: Erie County Assistant District Attorney Ashley R. Lowry (716) 858-2424

State of New York Court of Appeals

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To be argued Tuesday, April 26, 2016

No. 76 People v Leroy Carver

In July 2009, Leroy Carver was the front seat passenger in a car that was stopped at about 4:30 a.m. in the Village of Fairport by a police officer who said he had seen an object hanging from the rear-view mirror and a sticker on the windshield, both traffic infractions. Neither Carver nor the driver could produce identification and both gave false names, birth dates and addresses. When the officer returned to his patrol car to check the information, the driver fled and the officer detained Carver. During a frisk, the officer found a camera in Carver's coat pocket, and inside the car he found a wallet, two laptops, more cameras, binoculars, a cell phone and other items that were later found to have been stolen from nearby houses burglarized that morning. A DNA test linked Carver to gloves found in the car. His defense attorney did not move to suppress any of the evidence. Carver testified that he had been drinking with two companions the night before, fell asleep in the car, and woke up shortly before the traffic stop, unaware that his friends had been breaking into houses. He was convicted of two counts of second-degree burglary and sentenced to 15 years in prison.

Carver argued on appeal that he was deprived of effective assistance of counsel by his attorney's failure to seek suppression of the evidence, among other errors. He contended the evidence was seized after an illegal traffic stop and his unlawful detention and arrest.

The Appellate Division, Fourth Department affirmed on a 3-2 vote. There was no basis to challenge the stop in view of the officer's testimony that he observed traffic infractions that would justify a stop, it said. Carver's detention was justified by circumstances -- the driver had fled, Carver tried to flee, they had no identification, and the car contained bags of property and gloves, "unusual" in mid-summer -- which provided reasonable suspicion he had committed a crime. It rejected the dissenters' argument that the standard for gauging an attorney's ineffectiveness in failing to file a motion is whether the motion "had more than little or no chance of success." While "the Court of Appeals has repeatedly stated that '[t]here can be no denial of effective assistance ... arising from counsel's failure to "make a motion ... that has little or no chance of success...,"" it said, "the Court was explaining what does not constitute ineffective assistance of counsel.... [T]he Court has made clear in other cases that the standard to be applied is whether defense counsel failed to file a "colorable motion...." Adopting a federal definition of colorable claim as one with "a fair probability or a likelihood ... of success," it said "we do not believe that a motion to suppress evidence as the product of an unlawful arrest would likely have been granted."

The dissenters, citing People v Caban (5 NY3d 143), argued the proper test for the ineffective assistance claim "is whether the motion at issue had more than little or no chance of success and, if so, whether there is no strategic ... explanation for the failure to bring that motion...." They concluded Carver was denied effective assistance by "his counsel's failure to seek suppression of the evidence seized as a result of the alleged traffic infraction. We note that the officer ... allegedly observed the items giving rise to the alleged ... traffic infractions while the vehicle ... was moving and under the cloak of darkness. Given the totality of the circumstances here, we conclude that the motion had more than little or no chance of success...." They said there was no strategic reason not to file a suppression motion, which "could have been dispositive of the entire proceeding."

For appellant Carver: Janet C. Somes, Rochester (585) 753-4329
For respondent: Monroe County Assistant District Attorney Scott Myles (585) 753-4541

State of New York Court of Appeals

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To be argued Tuesday, April 26, 2016

No. 86 People v Martesha Davidson

Martesha Davidson was employed at the Finger Lakes Residential Center, a state facility for male juvenile delinquents in Tompkins County, when she was accused of striking a 14-year-old resident in the face in December 2013. The special prosecutor of the Justice Center for the Protection of People with Special Needs, a state agency created in 2012, charged Davidson with misdemeanor counts of endangering the welfare of a child and second-degree harassment in Town Court for the Town of Lansing. Executive Law § 552(2)(a) gives the special prosecutor "the duty and power ... to investigate and prosecute offenses involving abuse or neglect ... committed against vulnerable persons by custodians...."

Davidson moved to dismiss the charges, arguing the special prosecutor lacked authority to prosecute cases in local justice courts based on Executive Law § 552(2)(c). The provision states, "The special prosecutor ... may, after consultation with the district attorney as to the time and place of such attendance or appearance, attend in person any term of the county court or supreme court having appropriate jurisdiction ... or appear before the grand jury thereof, for the purpose of managing and conducting in such court or before such jury a criminal action or proceeding...." Because the provision mentions only County Court and Supreme Court, Davidson said it limits the special prosecutor's powers to those two courts. The special prosecutor argued that an amendment to CPL 1.20(32) included the Justice Center's special prosecutor in the definition of "district attorney" and that Executive Law § 552(2)(a) expressly authorized her to investigate and prosecute the abuse or neglect of vulnerable persons in any court in the state.

Town Court dismissed the charges, holding that the language of section 552(2)(c) permits the special prosecutor to prosecute cases only in County Court and Supreme Court. "I believe the lack of jurisdiction is presently provided by statute," it said.

Tompkins County Court reversed and reinstated the charges, saying "Rather than a limitation on the special prosecutor's authority, the language [of section 552(2)(c)] is an additional grant of authority permitting participation in and prosecution of felonies before the grand jury and the appropriate superior court. The requirement that the special prosecutor consult with the district attorney about time and place serves only to assure that the proceedings are conducted properly, particularly regarding the activities of the grand jury." The court did not address Davidson's claim that the authorizing statute was an unconstitutional delegation of prosecutorial authority to an unelected official, saying the claim was raised for the first time on appeal.

The Attorney General, as amicus curiae, argues that "if the Act is read to grant independent prosecutorial power to the Special Prosecutor, it would violate the Constitution's commitment of the State's prosecutorial power to County District Attorneys and the Attorney General. Long-standing constitutional rules bar the Legislature from transferring essential functions of elected constitutional officers to officers selected by appointment." He says this Court should construe the statute to require the special prosecutor to act with the consent of an elected district attorney. He also says the special prosecutor may be able to act in cases like this one under the common law authority of law enforcement officers to prosecute non-felony offenses with the consent of the district attorney.

For appellant Davidson: Robert R. LaLonde, Ithaca (607) 277-6863
For amicus curiae Attorney General: Solicitor General Barbara D. Underwood (212) 416-8022
For respondent Special Prosecutor: General Counsel Robin A. Forshaw (518) 549-0200

State of New York Court of Appeals

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To be argued Wednesday, April 27, 2016

No. 77 Matter of Westchester Joint Water Works

From 2002 to 2010, Westchester Joint Water Works brought these tax certiorari proceedings against the Assessor of the City of Rye to challenge property tax assessments for two adjacent parcels it owns in the city. One of them, designated lot 200-1-9, is located in the Rye Neck Union Free School District (the Rye Neck lot); and the other, lot 200-1-10, is in the Rye City School District. Water Works notified the Rye City School superintendent when it commenced each proceeding, as required by RPTL 708(3), but it did not notify the Rye Neck school superintendent, mistakenly believing both parcels were in the City School District. When Water Works reached a settlement with the City in 2011, its attorney learned he needed consent from the Rye Neck District before it could be approved. The Rye Neck District refused to consent and, instead, moved to intervene and dismiss the proceedings for failure to comply with RPTL 708(3). Water Works opposed the motion and also cross-moved for leave to recommence the proceedings pursuant to CPLR 205(a), in the event the proceedings were dismissed. CPLR 205(a) provides, "If an action is timely commenced and is terminated in any other manner than by ... a failure to obtain personal jurisdiction over the defendant ... or a final judgment upon the merits, the plaintiff ... may commence a new action" within six months.

Supreme Court granted the Rye Neck District's motion to dismiss the proceedings, but denied the City's similar motion, saying Water Works did not show good cause for failing to notify the Rye Neck superintendent. The court denied Water Works' motion to recommence the proceedings under CPLR 205(a) on the ground that its failure to give notice to the Rye Neck District "has prejudiced [the District] permanently, by forever foreclosing it from planning for an eventual judgment in the instant matters by depositing" money in its tax certiorari reserve fund. It said the District could be forced to pay any judgment from its operating budget or a bond issue.

The Appellate Division, Second Department modified by dismissing the proceedings against the City regarding the Rye Neck lot. It said Supreme Court properly dismissed the proceedings against the Rye Neck District, and should have granted the City's motion to dismiss the same proceedings, based on Water Works' conceded lack of good cause for its failure to comply with RPTL 708(3). Holding that Water Works' motion to recommence was properly denied, it said, "Since a dismissal pursuant to RPTL 708(3) operates as a dismissal upon the merits, the relief afforded by CPLR 205(a) is unavailable...."

Water Works argues it is entitled to commence new proceedings under CPLR 205(a) because its failure to notify the Rye Neck District, or to show good cause for the failure, is "unrelated in any substantive way" to the merits of its tax assessment challenge. It says Court of Appeals precedent favors CPLR 205(a) relief when a proceeding is dismissed for reasons unrelated to the merits.

For appellant Westchester Joint Water Works: Stephen Davis, White Plains (914) 946-3700
For intervenor-respondent Rye Neck School District: Marc E. Sharff, Valhalla (914) 741-9870
For respondent Assessor of City of Rye: Darius P. Chafizadeh, White Plains (914) 683-1200

State of New York Court of Appeals

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To be reargued Wednesday, April 27, 2016

No. 98 People v Scott Barden

In February 2010, Scott Barden stayed five nights at the Thompson LES Hotel in Manhattan at the expense of a business associate, Anthony Catalfamo, who authorized the hotel in a third-party billing agreement to charge up to $2,300 to his American Express card. He did not give his credit card information to Barden. Although Catalfamo made clear to the hotel that he would not agree to additional charges and wrote on the agreement that he was authorizing "one swipe one charge ONLY!," the hotel did not delete his card information when Barden checked out and the card remained linked to Barden's account on the hotel's computer system. After their business relationship soured a month later, Barden stayed at the hotel for three days in March 2010 and told the staff to charge it to the American Express card on file, which was Catalfamo's. He returned to the hotel at the end of that month, beginning a stay of nearly six weeks, and he continued to tell the staff to bill the charges to the American Express card. Catalfamo discovered the unauthorized charges in mid-April 2010 and American Express notified the hotel it was declining more than $10,000 in charges. The hotel then mistakenly linked Barden's account to the Visa card of another guest, who had the same last name, and Barden told the staff to bill that card. The other guest discovered the charges and Visa notified the hotel it was declining them in mid-May 2010, when the unpaid charges totaled about $50,000 for both cards. The hotel then called the police.

Barden was convicted of first-degree identity theft and fourth-degree criminal possession of stolen property, both based on the charges made to Catalfamo's American Express account, and two misdemeanor counts of theft of services. He was sentenced to concurrent terms of 2⅓ to 7 years for identity theft and 1⅓ to 4 years for possession of stolen property.

The Appellate Division, First Department vacated the identity theft conviction, for lack of proof that Barden ever assumed Catalfamo's identity, and otherwise affirmed. It rejected the argument that the stolen property statute (Penal Law § 165.45[2]) applies only to possession of a tangible credit card, not to an intangible credit card number. "[T]he mention of 'tangible property' in [Penal Law §] 10.00(8) cannot strictly apply to criminal possession of stolen property, because to do so would thwart the legislative intent to criminalize the knowing possession of certain types of intangible stolen property," including "any ... computer data, computer program" or "thing of value" under Penal Law § 155.00, it said. "It is irrelevant whether defendant had physical or constructive possession of a tangible credit card, because he had access to the full value of Catalfamo's account as if he had possessed the credit card itself."

Barden argues that, "for purposes of the stolen property statute, 'credit card' is defined as an actual, physical card, and not merely its number. Moreover, the law requires possession of 'tangible' property; the unlawful possession of personal identifying information, such as a credit card number, is a separate chargeable offense, but it is not criminal possession of stolen property." Even if possession of the card number could suffice, he says, he "never even knew the credit card number, and certainly did not possess it."

For appellant Barden: Richard M. Greenberg, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney David M. Cohn (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, April 27, 2016

No. 78 People v Baasil Reynolds

Baasil Reynolds was arrested in December 2008 for threatening his father and half-sister with a knife in their Manhattan apartment. After spending six months in pretrial detention, he agreed to a plea bargain in which he pled guilty to felony weapon possession and misdemeanor menacing with an opportunity to later withdraw his felony plea and substitute a plea to misdemeanor weapon possession, if he met certain conditions. First, he would have to serve six more months in jail, then spend a year on release without being arrested or violating orders of protection issued for his father and half-sister. If he did not comply, he would be sentenced to two to four years in prison on the felony.

Reynolds was released from jail in December 2009, after serving the six additional months, and Supreme Court adjourned his sentencing to December 2010. In October 2010, he was arrested for possession of mace and pled guilty to a misdemeanor. Rather than sentence him on the felony as provided in the plea deal, the court extended the no-arrest condition for six more months. In June 2011, on the day he was scheduled to finally withdraw his felony plea and receive a sentence of time served on a misdemeanor count, Reynolds got into an altercation on a basketball court and was arrested for assault, though he was not charged. He argued, at a hearing held pursuant to People v Outley (80 NY2d 702), that there was no "legitimate basis" for his arrest because the complainant had maliciously lodged false charges against him. The court found there was "a sufficient basis" for the arrest based on the arresting officer's testimony that the complainant was bleeding through his hospital bandages and identified Reynolds as his attacker. In August 2011, the court ruled Reynolds had violated the no-arrest condition of his plea deal and sentenced him to two to four years, with credit for the year he had already served.

The Appellate Division, First Department affirmed, ruling that Reynolds' guilty plea was not conditioned on an illegal sentence. "Regardless of what the court may have intended, and regardless of the merits of this arrangement, the period of presentencing detention was not part of the sentence," it said. "As a matter of law, the only sentence was the undisputedly legal sentence imposed on August 23, 2011, against which all prior detention was credited. The presentencing detention was based, instead, on a securing order" which was not reviewable. It also ruled the lower court properly determined that Reynolds violated the no-arrest condition, saying he "has not established that the hearing court employed a different standard from the 'legitimate basis for the arrest' standard set forth in Outley...."

Reynolds argues his plea "was invalid because it was premised on an illegal pre-sentence condition" that he serve six months in jail before he was sentenced. He says "the Appellate Division improperly avoided deciding the legality of the plea agreement ... by mischaracterizing the nature of the claim." He also argues Supreme Court erroneously applied a probable cause standard at the Outley hearing, instead of the legitimate basis for arrest standard, "because it focused only on whether the police had authority to arrest [him] rather than the sole disputed issue of whether the complainant maliciously and baselessly lodged the charges."

For appellant Reynolds: Michael S. Woodruff, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Vincent Rivellese (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, April 27, 2016

No. 5 Red Zone LLC v Cadwalader, Wickersham & Taft LLP

In 2005, Cadwalader, Wickersham & Taft represented Red Zone LLC in connection with its effort to gain control of the board of directors of Six Flags, Inc, the amusement park chain, or a controlling share of its stock. UBS Securities LLC provided financial services to Red Zone, which agreed to pay UBS a fee of $10 million if Red Zone gained control of Six Flags. Red Zone's managing member, Washington Redskins owner Daniel Snyder, later reached an oral agreement with UBS to limit the fee to $2 million if Red Zone took control of Six Flags' board, but did not obtain a majority of its stock. At Red Zone's request, Cadwalader prepared a side letter agreement that was intended to memorialize the oral agreement capping UBS's fee. Red Zone gained control of the Six Flags board, but not its stock, by end of 2005 and paid $2 million to UBS. Cadwalader provided no further advice to Red Zone regarding Six Flags.

In 2007, UBS sued Red Zone for breach of contract, demanding the remaining $8 million of its original fee. Cadwalader did not defend Red Zone in the action, but consulted with Red Zone and its defense counsel throughout the litigation. The Appellate Division, First Department granted summary judgment to UBS in 2010, saying Red Zone's claim that the side letter drafted by Cadwalader capped UBS's fee at $2 million "is belied by a reading of the document itself."

Red Zone brought this legal malpractice action against Cadwalader, alleging the law firm was negligent in preparing the side letter. Cadwalader replied that Red Zone's claim was barred by the statute of limitations, since the suit was filed more than five years after the side letter was drafted, and barred by the doctrine of comparative negligence, among other things. The law firm later sought to amend its answer to assert the defense of assumption of risk, based largely on an affidavit from a Cadwalader partner who said he warned Snyder that the side letter "did not expressly provide a 'cap' on UBS's fee" and advised him not to sign it. Supreme Court denied Cadwalader's motion to amend its answer, in part because the partner's affidavit "starkly contradicts" his prior deposition testimony in the UBS suit. The court ultimately granted summary judgment to Red Zone and awarded it $17.2 million in damages.

The First Department affirmed, saying Cadwalader's attempt to add an assumption of risk defense was properly rejected because the partner's affidavit "directly contradicts his earlier deposition testimony in the UBS litigation that the side agreement unambiguously capped [Red Zone's] fees...." The continuous representation doctrine tolled the statute of limitations because Cadwalader "provided legal advice throughout the UBS litigation from 2007 through late 2010.... In doing so, defendant apparently sought to rectify its earlier alleged malpractice...." The side letter "was intended to cap UBS's fees at $2 million," it said. "Given our prior finding in the UBS litigation that the side agreement failed to do just that..., summary judgment is warranted."

Cadwalader argues the lower courts "disregarded admissible evidence" that it "advised Red Zone as to the risks" of the side letter, "drew inferences in favor of Red Zone," and "over-extended the rule about disregarding contradictory testimony." It says the First Department misapplied the continuous representation doctrine, in part because Red Zone did not show there was a "mutual understanding" of a need for further representation by Red Zone.

For appellant Cadwalader: David R. Marriott, Manhattan (212) 474-1000
For respondent Red Zone: Jeffrey A. Jannuzzo, Manhattan (212) 932-8524

State of New York Court of Appeals

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To be argued Thursday, April 28, 2016 (arguments begin at noon)

No. 79 Dryden Mutual Insurance Company v Goessl

AP Daino Plumbing & Heating sent Stanley Goessl and one of its apprentices to perform plumbing work at a private home in Central Square, Oswego County, in 2009. The house apparently caught fire while Goessl was using a blow torch and the homeowners sued AP Daino and Goessl for negligence, alleging that Goessl was acting as AP Daino's employee.

AP Daino's liability insurer, The Main Street America Group, disclaimed coverage for Goessl on the ground that he was working as an independent contractor. Main Street's policy limited its liability coverage to "employees ... for acts within the scope of their employment by [AP Daino] or while performing duties related to the conduct of your business." Goessl did plumbing work under the name S&K Plumbing, Inc. and had his own business liability policy from Dryden Mutual Insurance Company, which covered him "only with respect to the conduct of a business of which he ... is the sole proprietor." Dryden disclaimed coverage on the ground that Goessl was working as AP Daino's employee at the time of the fire. Dryden brought this action against Main Street and AP Daino, seeking a declaration that Main Street, not Dryden, was obligated to defend and indemnify Goessl.

After a bench trial, Supreme Court declared Main Street must provide coverage because Goessl was AP Daino's employee, not an independent contractor. It cited testimony that Goessl reported to AP Daino's office every morning to receive his assignment, trained its apprentices, used its vehicles and tools, performed the same work as AP Daino employees and usually introduced himself as an employee. "[I]n all respects, [AP Daino] directed the work, told him where to go, told him what to do...," it said. "Regardless of the agreement they may have made, the key issues are the method and manner of employment, the use of tools, the directions, [that determine] whether there was an employer/employee relationship."

The Appellate Division, Fourth Department reversed on a 4-1 vote and ruled Dryden, not Main Street, must provide coverage because Goessl was an independent contractor. It said "the Dryden policy unambiguously provides coverage" because "Goessl was the sole proprietor of S&K Plumbing and..., at the time of the fire, he was engaged in the conduct of his 'trade, profession, or other occupation' as a plumbing subcontractor for AP Daino." Goessl and AP Daino "intentionally structured their business relationship as a long-term subcontracting arrangement," it said, noting that the company did not provide him health insurance, withhold taxes or pay social security or unemployment taxes for him; and Goessl set his own hourly rate, billed AP Daino on behalf of S&K Plumbing, received a form 1099 for miscellaneous income instead of a W-2 wage statement, and obtained his own liability insurance. "Inasmuch as ... AP Daino and Goessl intentionally entered into a business arranagement whereby Goessl was an independent contractor rather than an employee, we conclude ... that neither AP Daino nor Goessl expected that Goessl would be considered an 'employee' under the [Main Street] policy."

The dissenter said, "[T]he majority's rejection of the court's factual finding that Goessl was an employee of AP Daino is not only contrary to the well-settled standard that we apply when reviewing nonjury verdicts, but it is also contrary to the overwhelming evidence presented at trial and the strong public policy that militates against the improper and unscrupulous classification of employees as independent contractors."

For appellant Dryden: Peter W. Knych, Syracuse (315) 472-1175
For respondents AP Daino and Main Street: Jessica L. Foscolo, Buffalo (716) 853-3801

State of New York Court of Appeals

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To be argued Thursday, April 28, 2016 (arguments begin at noon)

No. 81 People v Glenford C. Hull

Glenford C. Hull was charged with second-degree murder after shooting his downstairs neighbor, Chance Caffery, during an altercation in their apartment house in Meridale, Delaware County, in February 2006. The men were engaged in a longstanding feud and on the night of the shooting Caffery was disturbed by noise Hull was making with a wooden mallet as he tenderized meat for chicken fried steaks. Caffery pounded on Hull's door and shouted threats, and Hull shouted back at him through the door, then retrieved a handgun from his bedroom. When Caffery went back to his apartment, Hull went out onto the stair landing with his gun and may have shouted something more. Caffery returned up the stairs in a rage. As he reached the landing, Hull pointed the gun at him and it discharged after Caffery made contact with it, striking him in the forehead.

Hull was initially found guilty of murder, but the conviction was reversed due to ineffective assistance of counsel. At his second trial, Supreme Court submitted the lesser included offense of first-degree manslaughter to the jury. Hull was acquitted of murder, but convicted of first-degree manslaughter and sentenced to 23 years in prison. On appeal, he argued the court erred in submitting the lesser included offense to the jury because no reasonable view of the evidence would support a finding that he intended to cause serious physical injury to Caffery rather than to kill him.

The Appellate Division, Third Department affirmed in a 3-1 decision, saying, "A reasonable view of this evidence is that an armed defendant emerged from his apartment with the intention of confronting his longtime nemesis and causing him harm. The evidence could reasonably support the further finding that defendant intended to seriously injure and not kill the victim. Defendant, had he wished to kill the victim, could have easily shot the victim as the victim screamed and pounded on defendant's apartment door or when the victim was ascending the stairs.... The victim was instead shot once during what the trial evidence suggests was a struggle for the gun...." It noted that, after shooting Caffery, Hull "performed first aid on him and summoned the authories...."

The dissenter said, "While defendant maintains that the shooting was accidental and he never intended to shoot the victim, he asserts that it is not possible to intentionally fire a weapon into a person's forehead from point blank range with only the intent to seriously injure but not kill. Here, in addition to the deteriorating relationship between the victim and defendant and the escalating verbal exchange preceding the event, the evidence shows that, during the brief encounter between the victim and defendant at the top of the stairway, the victim was shot in the forehead from a range of only a few inches. As such, I perceive no reasonable view of the evidence to support a finding that defendant intended only to cause serious physical injury...."

For appellant Hull: Jonathan I. Edelstein, Manhattan (212) 871-0571
For respondent: Delaware County Assistant District Attorney John L. Hubbard (607) 832-5299

State of New York Court of Appeals

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To be argued Thursday, April 28, 2016 (arguments begin at noon)

No. 82 Matter of Columbia County Support Collection Unit v Risley *(papers sealed)*

In 2005, Family Court in Columbia County entered a child support order requiring Joshua Risley to make biweekly payments of $166.23 to the mother of his two children. The mother filed a violation petition in 2009, alleging that Risley was not meeting his support obligations. The proceeding was transferred in 2010 to Family Court in Ulster County, where the mother had moved. That court found Risley willfully violated the support order and committed him to jail for six months, but it suspended the commitment order. In 2012, after the mother filed another violation petition, Family Court again found Risley in willful violation of the support order and committed him to jail for six months, but again suspended the commitment order.

In 2013, after an inquest on another violation petition, the court found Risley willfully violated support orders and committed him to jail for six months, unless he paid child support arrears of $23,487.28. The court also revoked the suspensions of the two prior orders of commitment and ordered that the three six-month jail terms run consecutively.

On appeal, Risley argued that Family Court Act § 454(3)(a) does not authorize consecutive commitments to jail for violations of child support orders. For willful violations of support orders, the statute permits a court to "commit the respondent to jail for a term not to exceed six months." It also states, "Such commitment does not prevent the court from subsequently committing the respondent for failure thereafter to comply with any such order."

The Appellate Division, Third Department affirmed the commitment orders imposing consecutive terms, citing section 454(3). It said there was no "merit to the father's contention that consecutive sentences were unauthorized.... Given the father's failure to contest the amounts due and his willful refusal to voluntarily pay them despite repeated opportunities afforded to him over more than three years, we find no abuse of discretion in the determination to run the sentences consecutively."

Risley argues that section 454(3) prohibits the imposition of consecutive commitments to jail and that the "plain language of the statute" limits terms of incarceration to a maximum of six months. "An overarching objective of the Family Court Act is to ensure that parents financially support their children," he says. "Therefore, it is reasonable to conclude that the Act contemplates concurrent sentences so that an obligor is punished for nonfeasance, on the one hand, and then freed to find employment and to meet her or his support obligation on the other."

For appellant Risley: Theodore J. Stein, Woodstock (845) 679-4953
For respondent Ulster County DSS: Daniel Gartenstein, Kingston (845) 334-5290

State of New York Court of Appeals

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To be argued Thursday, April 28, 2016 (arguments begin at noon)

No. 80 Ambac Assurance Corporation v Countrywide Home Loans, Inc.

Ambac Assurance Corp. guaranteed payments on residential mortgage backed securities issued by subsidiaries of Countrywide Financial Corp. between 2004 and 2006. After Countrywide merged with a Bank of America subsidiary, Red Oak Merger Corp., in 2008, Ambac brought this action against Countrywide, alleging that it fraudulently induced Ambac to insure the transactions by misrepresenting the quality of the underlying mortgages and that it breached the terms of the insurance agreements. Ambac asserted secondary claims against Bank of America, contending the bank would be liable for any judgment as Countrywide's successor-in-interest as a result of the merger.

When Ambac sought discovery of hundreds of communications between Countrywide, Bank of America, and their respective attorneys leading up to the merger and subsequent sales of Countrywide assets to Bank of America entities, the bank claimed they were protected by attorney-client privilege. While disclosure to a third party of a communication between counsel and client generally deprives it of confidentiality, an exception called the common-interest privilege can preserve the confidentiality of a legal communication when disclosure is made to further a nearly identical legal interest shared by the client and the third party. The bank argued it had a "shared legal interest" with Countrywide "in closing the merger" and completing "the many necessary intermediate steps for two heavily regulated entities."

A special referee granted Ambac's motion to compel discovery of the documents, saying the bank's view of the common-interest doctrine "is much too broad." The common-interest privilege "must be limited to communication between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation in which the joint consulting parties have a common legal interest. The attorney-client privilege, even as expanded by the 'common interest' exception, may not be used to protect communications that are business oriented or are of a personal nature." Supreme Court denied the bank's motion to vacate the order, saying the referee "correctly held that New York law does not allow a privilege claim under the common-interest doctrine unless there is pending or reasonably anticipated litigation."

The Appellate Division, First Department reversed. While "New York courts have taken a narrow view of the common-interest privilege, holding that it applies only with respect to legal advice in pending or reasonably anticipated litigation," it said this view is no longer viable. "We hold that, in today's business environment, pending or reasonably anticipated litigation is not a necessary element of the common-interest privilege. Our conclusion holds particularly true in this case, where the parties have a common legal interest because they were engaged in merger talks during the relevant period and now have a completed and signed merger agreement. Indeed, the circumstances presented in this case illustrate precisely the reason that the common-interest privilege should apply -- namely, that business entities often have important legal interests to protect even without the looming specter of litigation."

Ambac argues, "[T]here is no sound policy justification for throwing out the litigation requirement. For years, businesses have organized their affairs in joint settings and have negotiated a variety of business combinations under existing privilege law." The Appellate Division's ruling could have "serious consequences..., such as concealing frauds from regulators, keeping secret unlawful attempts to monopolize through business combinations and covering up actions that injure consumers."

For appellant Ambac: Stephen P. Younger, Manhattan (212) 336-2000
For respondent Bank of America: Jonathan Rosenberg, Manhattan (212) 326-2000