

***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 MARCH 22 - 24, 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 argued Tuesday, March 22, 2016

## **No. 48 Beck Chevrolet Co, Inc. v General Motors LLC**

This federal case stems from disputes between General Motors LLC and Beck Chevrolet Co., a franchised Chevrolet dealer in Yonkers, over GM's performance standards for car dealers and changes GM made to Beck's assigned territory. GM's franchise agreements require dealers to meet performance goals measured by a Retail Sales Index (RSI), in which a Chevrolet dealer's actual sales are measured against its expected sales based on an adjusted statewide average market share for Chevrolet products. The RSI formula takes into account Chevrolet's statewide market share for different types of vehicles and the relative popularity of each type of vehicle in the dealer's Area of Primary Responsibility, a non-exclusive sales territory. However, it does not consider local brand popularity, so downstate dealers like Beck do not receive a downward adjustment in their expected sales goal even though Chevrolet products are more popular in upstate markets. A dealer achieves an "average" or "satisfactory" score when actual sales equal expected sales, a threshold Beck consistently failed to reach, which could subject it to remedial actions or termination of its franchise by GM. In 2011, GM extended Beck's franchise agreement for a year, but it also increased Beck's territory in Westchester and Fairfield Counties by four census tracts and reduced it by seven tracts in the Bronx, which had the effect of increasing Beck's expected sales number.

Beck brought this suit alleging, in part, that GM violated New York's Franchised Motor Vehicle Dealer Act (Vehicle and Traffic Law §§ 460-473) by using unreasonable performance standards and, in unilaterally altering Beck's territory, modifying the franchise agreement without due cause. Section 463(2)(gg) of the Dealer Act prohibits car makers from using "an unreasonable, arbitrary or unfair sales or other performance standard in determining a franchised motor vehicle dealer's compliance with a franchise agreement." Section 463(2)(ff) limits the ability of franchisors to "modify the franchise" and it defines "modification" as "any change or replacement of any franchise if such change or replacement may substantially and adversely affect the new motor vehicle dealer's rights, obligations, investment or return on investment."

U.S. District Court dismissed Beck's suit, ruling GM's RSI formula "is not unreasonable, arbitrary or unfair in measuring sales performance by Beck." It said the use of statewide sales data was administratively convenient, objective, and easily understood; and GM's formula adequately adjusted for local conditions by considering the popularity of different vehicle types in dealers' own territories. While this case was pending on appeal and after GM moved to terminate Beck's franchise, an administrative law judge reached the opposite conclusion, finding "the RSI standard of GM is unreasonable" for downstate dealers, in part because "it does not realistically reflect the Chevrolet sales challenges that Beck and other New York metropolitan dealers face" due to the relative unpopularity of Chevrolet products in their region.

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issues in a pair of certified questions: "(1) Is a performance standard that requires 'average' performance based on statewide sales data in order for an automobile dealer to retain its dealership 'unreasonable, arbitrary or unfair' under ... section 463(2)(gg) because it does not account for local variations beyond adjusting for the local popularity of general vehicle types? (2) Does a change to a franchisee's Area of Primary Responsibility ... constitute a prohibited 'modification' of the franchise under section 463(2)(ff), even though the standard terms of the Dealer Agreement reserve the franchisor's right to alter the Area of Primary Responsibility ... in its sole discretion?"

For appellant Beck Chevrolet: Russell P. McRory, Manhattan (212) 484-3900  
For respondent General Motors: James C. McGrath, Boston, MA (617) 946-4800

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To be argued Tuesday, March 22, 2016

## **No. 49 Matter of Highbridge Broadway, LLC v Assessor of the City of Schenectady**

Highbridge Broadway, LLC made improvements to its commercial property in the City of Schenectady in 2005 and applied in 2008 for a business investment property tax exemption under RPTL 485-b, which exempts a gradually decreasing percentage of assessed value attributable to such improvements for ten years after they are completed. Although the city assessor approved the exemption, Highbridge brought this RPTL article 7 proceeding to challenge its assessment on the 2008 tax roll, contending the assessor had undervalued the amount of the exemption. Highbridge served the petition on the Schenectady City School District, but the District did not appear. Supreme Court held in favor of Highbridge in 2011, ruling it was entitled to the exemption for seven years in amounts ranging from \$176,260 in 2008 to \$25,180 in 2014, the final year, and ordering the assessor to refund excess taxes paid since 2008. The city and county issued refunds to Highbridge, but the School District did not.

Highbridge then moved to hold the District in civil contempt based on its failure to refund excess tax payments. The District argued Highbridge was not entitled to refunds for taxes paid for 2009 to 2011 because it did not bring separate article 7 proceedings to challenge those assessments while its 2008 challenge was pending. It cited Matter of Scellen v Assessor for City of Glens Falls (300 AD2d 979 [3d Dept 2002]), which held that "the statutory scheme underlying RPTL article 7 evinces a clear legislative intent that a separate proceeding be timely commenced to challenge each tax assessment for which relief is sought."

Supreme Court denied the contempt motion because the 2011 judgment did not expressly direct the District to issue refunds, but it ordered the District to refund excess taxes Highbridge paid from 2009 to 2011, saying RPTL 726(1)(c) made the 2011 judgment binding on the District. "[T]here is not any statutory authority ... that would require [Highbridge] to file a separate petition for each year of the 10-year period in order to be entitled to the exemption," it said. "Because the District was served with the 2008 petition seeking application of the RPTL 485-b exemption, which by its terms is 10 years in duration, the court is not persuaded that the District was not on notice that [Highbridge] was seeking an exemption for years subsequent to 2008."

The Appellate Division, Third Department reversed the refund order based on Scellen. "We are mindful that an RPTL 485-b exemption may be obtained upon a single application...", it said. "The separate point here, however, is that property owners must preserve their right to relief through annual challenges to the assessment pending a determination of the original assessment challenge. Since [Highbridge] failed to do so here, Supreme Court lacked jurisdiction to direct the District to refund payments made based on the 2009 through 2011 assessments...."

Highbridge argues that "Scellen may apply to every 'annual' assessment matter," but not to RPTL 485-b exemptions, which provide 10 years of benefits based on one application. It notes the Fourth Department has rejected Scellen, although the Second Department adopted it.

For appellant Highbridge Broadway: Brian D. Mercy, Schenectady (518) 280-8872

For respondent Schenectady City School District: Jonathan P. Nye, Albany (518) 487-7600

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## **No. 1 Finerty v Abex Corporation**

Raymond Finerty was born in Ireland in 1953 and worked as a mechanic there in the 1970s, repairing vehicles on his family's farm and at a nearby garage. He moved to New York in 1985. In 2009, he was diagnosed as suffering from peritoneal mesothelioma, a disease primarily caused by exposure to asbestos. Finerty and his wife brought this action against, among others, the Ford Motor Company (Ford USA) and its English subsidiary, Ford Motor Company, Ltd. (Ford UK), alleging he was exposed to asbestos in Ford brakes, clutches, and engine parts while working on Ford tractors, cars, and trucks in Ireland.

Supreme Court denied Ford USA's motion for summary judgment dismissing the complaint. "Plaintiffs have shown that Ford USA exercised significant control over [Ford UK and its Irish subsidiary] and had a direct role in placing the asbestos-containing products to which Mr. Finerty was exposed into the stream of commerce," it said. "Such activities go far beyond the level of advice and consultation, and raise a question whether Ford USA could have required [Ford UK] to either manufacture asbestos-free products and/or sell replacement parts which warned of the hazards associated with asbestos."

The Appellate Division, First Department dismissed the complaint against Ford UK for lack of personal jurisdiction and otherwise affirmed. It agreed with Ford USA that "there is no basis for piercing the corporate veil. However, the record demonstrates that Ford USA acted as the global guardian of the Ford brand, having a substantial role in the design, development, and use of the auto parts distributed by Ford UK, with the apparent goal of the complete standardization of all products worldwide that carried the signature Ford logo. Thus, issues of fact exist whether Ford USA may be held directly liable as a result of its role in facilitating the distribution of the asbestos-containing auto parts on the ground that it was 'in the best position to exert pressure for the improved safety of products' or to warn the end users of these auto parts of the hazards they presented...."

Ford USA argues, "It has long been settled under New York law that strict products liability extends *only* to the manufacturer, distributor, or seller of the defective product. That rule cannot be reconciled with the Appellate Division's holding that Ford [USA] could be held liable for Mr. Finerty's injuries -- even though Ford [USA] did not manufacture or distribute or sell the products that allegedly injured him -- merely because Ford [USA] could have 'exert[ed] pressure' on its subsidiaries to improve the safety of the defective products or the warnings given about the dangers of those products. The Appellate Division's holding also contradicts the fundamental corporate law principles of limited liability and corporate separateness, which preclude holding a parent corporation liable for the acts of its subsidiary even when the parent exercises control over that subsidiary.... Under the correct legal standard, strict liability cannot extend beyond the distribution chain, absent veil-piercing that concededly cannot be shown here."

For appellant Ford Motor Company: Anton Metlitsky, Manhattan (212) 326-2000

For respondent Finerty: James M. Kramer, Manhattan (212) 605-6200

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## **No. 51 People v Bobby Wallace**

Bobby Wallace was accused of beating an Hispanic man with a metal rod or pipe outside of a Manhattan Pathmark store in June 2010. Police officers received a radio report of "a dispute with a weapon ... a metal stick" and, when they arrived at the scene, a woman pointed out Wallace as the assailant. An officer said, "I need to speak with you," and asked him what happened. Wallace replied, "He just kept fucking with me, I was tired of him fucking with me." The officer asked where the weapon was. Wallace said he had hit the victim with his hand, then volunteered that "Mexicans come here and try to take our jobs." Asked again about the weapon, Wallace at first repeated, "I hit him with my hand," but ultimately led the officers to the pipe and they arrested him. Up to that point, the officers had not given him Miranda warnings.

Wallace moved to suppress the pipe and the statements he made to the officers, arguing they should have read his Miranda rights before asking him about the location of the weapon. Supreme Court denied the motion, saying the officers' questions "were not ... made during an interrogation but were investigative in nature in order to determine what had happened, in order to determine whether or not there was probable cause for an arrest." Wallace was convicted of second-degree assault as a hate crime and sentenced to 3½ years in prison.

The Appellate Division, First Department affirmed. "Under the circumstances, the police were not required to provide Miranda warnings prior to making investigatory inquiries of defendant as they arrived at the scene of the incident," it said. "A reasonable innocent person in defendant's position would not have thought he was in custody.... In any event, to the extent there was an investigatory stop, it did not require Miranda warnings.... Furthermore, there was no interrogation requiring warnings because the officer's inquiries were made to clarify the situation..., or were permissible efforts to locate a weapon in the interest of public safety..."

Wallace argues he was in custody for purposes of Miranda as soon as he confessed to criminal wrongdoing by admitting he hit the victim with his hand. "No person who confesses to a crime to police would feel free to leave that encounter." He says the officers should have informed him of his Miranda rights at that point, but instead continued to question him about the weapon, and in response he made his comment about Mexicans and other incriminating statements, and led them to the pipe. He says the questioning was interrogation because it "was designed to elicit an incriminating response." He contends the public safety exception does not apply because the officers "were not and reasonably should not have been concerned for their or the public's safety; the officers knew the missing instrumentality was a metal stick or pipe, rather than an inherently dangerous weapon, and there is no evidence to suggest that the pipe was hidden on Mr. Wallace's person or anywhere nearby."

For appellant Wallace: Katherine Kelly Fell, Manhattan (212) 373-3000

For respondent: Manhattan Assistant District Attorney Ellen Stanfield Friedman (212) 335-9000

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To be argued Wednesday, March 23, 2016

**No. 52 Larabee v Governor of the State of New York**

**No. 53 Silverman v Silver**

New York trial court judges initially brought these actions against the State, the Legislature, and elected officials in 2007 and 2008, claiming their failure to enact any increase in judicial salaries since 1998 violated the State and Federal Constitutions. In Matter of Maron v Silver (14 NY3d 230 [2010]), resolving appeals in three cases, the Court of Appeals declared that "under the circumstances of this case," in which judicial salaries had been linked to legislators' salaries and other political issues, such as campaign finance reform, "the State defendants' failure to consider judicial compensation on the merits violates the Separation of Powers Doctrine." It rejected the specific remedies of inflation-indexed raises and retroactive compensation, leaving those issues to the Legislature. "By ensuring that any judicial salary increases will be premised on their merits, this holding aims to strike the appropriate balance between preserving the independence of the Judiciary and avoiding encroachment on the budget-making authority of the Legislature," the Court said. "Therefore, judicial compensation, when addressed by the Legislature in present and future budget deliberations, cannot depend on unrelated policy initiatives or legislative compensation adjustments. Of course, whether judicial compensation should be adjusted, and by how much, is within the province of the Legislature. It should keep in mind, however, that whether the Legislature has met its constitutional obligations in that regard is within the province of this Court (see Marbury v Madison, 1 Cranch [5 US] 137, 177 [1803])."

In response to Maron, the Legislature created the Commission on Judicial Compensation in 2010 to consider future pay increases for judges, the first phase of which took effect in 2012, but it did not authorize the commission to consider retroactive compensation. The plaintiffs in these cases then sought money damages for "lost pay," arguing that the Legislature, in creating a commission to consider only prospective pay raises, failed to provide any remedy for its prior constitutional violations found in Maron. Supreme Court denied them relief in both cases.

The Appellate Division, First Department affirmed on a 3-2 vote, saying that Maron implicitly rejected "a particular monetary remedy, retroactively tied to the cost of living," and that the Legislature, "abandoning linkage," had complied with the ruling by considering judicial raises on the merits. Two justices said in a concurrence that if courts were to award damages "in the form of back pay, we would be effectively arrogating the budgeting power to the judiciary under the guise of remedying a constitutional violation.... Such a decision would clearly violate the Separation of Powers Doctrine."

Two dissenting justices argued "the past constitutional violations identified by the Court of Appeals in [Maron] warrant retroactive monetary damages" because "the legislature failed to fully comply" with the ruling. "The legislature was obligated to consider the merits of retroactive compensation free of any linkage, based on the Court's finding that the first violation of the Separation of Powers Doctrine occurred in 2006....," they said. "Relief from defendants' past constitutional violations can only be provided by way of monetary damages."

For appellants Larabee et al: Thomas E. Bezanson, Manhattan (212) 957-7600

For appellant Silverman: Arlene R. Silverman (pro se), Manhattan (212) 534-8016

For respondent State: Deputy Solicitor General Anisha S. Dasgupta (212) 416-6325

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To be argued Wednesday, March 23, 2016

**No. 54 Matter of Kenneth Cole Productions, Inc., Shareholder Derivative Litigation.  
Erie County Employees Retirement System v Blitzer**

This shareholder class action stems from an effort by Kenneth D. Cole, the controlling shareholder and chairman of the board of Kenneth Cole Productions, Inc. (KCP), to buy out minority shareholders and take the company private in a going-private merger. Founded by Cole in 1982, KCP designs and markets footwear, handbags and apparel. When he made his initial buyout offer of \$15 per share in February 2012, Cole already held 46 percent of KCP's common stock and 89 percent of its voting power by virtue of his ownership of all of its Class B shares, which entitled the holder to 10 votes per share. Cole, who said he would not consider any other offers to buy KCP, conditioned his own offer on approval by a special committee of the board of directors and approval by the minority shareholders. The board appointed four directors to the committee, which retained legal counsel and negotiated with Cole until June 2012, when a merger agreement was announced at a price of \$15.25 per share. Three months later, more than 99 percent of the minority shareholders voted to approve the transaction.

Shareholders who opposed the deal, including the Erie County Employees Retirement System (ECERS), brought several actions against Cole and five members of KCP's board of directors, among others, claiming they breached their fiduciary duties by approving a price that was unfair to minority shareholders. The cases were consolidated and ECERS was named lead plaintiff. It asserted that, while the individual directors were not financially interested in the transaction, they were not independent because Cole elected a majority of them to the board, including two members of the special committee, and thus they were controlled by Cole.

Supreme Court dismissed the complaint for failure to state a cause of action, saying "plaintiffs point to no authority for the assertion that a director lacks independence solely on the ground that he or she is elected by a controlling shareholder." Rejecting the claim that the directors breached their duties by failing to get the highest possible price, it found they were protected by the business judgment rule, which generally shields corporate directors from liability for actions taken with due care and in good faith on behalf of the corporation. It said the committee "negotiated with Cole over a period of months and obtained an increase in the price he would pay..., where the original price represented a premium over the stock's most recent selling price." Regarding Cole, it said ECERS "failed to put forth any cases demonstrating that a controlling shareholder is prohibited from acting in his own economic interest, as long as his actions do not constitute unfair self dealing."

The Appellate Division, First Department affirmed, saying Supreme Court "was not required to apply the 'entire fairness' standard to the transaction" and properly dismissed the suit under the business judgment rule."

ECERS argues that, because a "transaction in which the majority shareholder squeezes out the minority shareholders involves an inherent conflict of interest," and in view of Cole's "control" of KCP's directors, the "deferential" business judgment rule should not apply and the deal should be subject to entire fairness review, requiring "Cole to prove, on an evidentiary record, both 'fair dealing' and 'fair price.'"

For appellant ECERS: Lee D. Rudy, Radnor, PA (610) 667-7706

For respondents Cole et al: Tariq Mundiya, Manhattan (212) 728-8000

For respondents Blitzer et al (KCP directors): Andrew W. Stern, Manhattan (212) 839-5300

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To be argued Wednesday, March 23, 2016

## **No. 30 Sadek v Wesley**

In October 2006, Kamal Sadek was driving a limousine and about to enter the Manhattan end of the Lincoln Tunnel when he was allegedly sideswiped by a Greyhound bus and struck his head against his side window. Both drivers got out of their vehicles and engaged in an angry verbal altercation. Sadek became faint and dizzy and returned to his car to sit down. He became unresponsive and was transported to St. Luke's Roosevelt Hospital, where he was found to have suffered an embolic stroke. Sadek brought this action against Greyhound Lines and the driver of the bus, Aaron Jenkins (incorrectly sued as Jenkins A. Wesley), claiming the driver was negligent and the accident precipitated his stroke.

Sadek's neurological expert, Dr. Nabil Yazgi, said in a September 2010 report that there was a "probable causal relationship" between the accident and the stroke, based on medical tests conducted two days after the accident which found a large blood clot (a thrombus) in Sadek's left subclavian artery and plaque in his aortic arch. Dr. Yazgi issued a supplemental report in June 2011 based on medical tests conducted in November 2006, eight weeks after the initial tests, which found the blood clot and plaque were no longer evident. Dr. Yazgi said, "This is physiologically unlikely" and suggested the prior tests were incorrect, but he concluded, "Assuming this clot was present on the first report, trauma could feasibly have dislodged it, or a portion of it, causing an embolic stroke."

Supreme Court granted a defense motion to preclude Dr. Yazgi from testifying, saying the theory of causation in his first report was negated by his supplemental report, and the second report failed to establish causation because he said only that trauma "could ... have" caused the stroke. Sadek retained another neurologist, Dr. Sang Jin Oh, who adopted the opinion in Dr. Yazgi's first report and said he was prepared to testify the trauma of the accident or a resulting spike in blood pressure caused Sadek's stroke. The court ordered a Frye hearing and then precluded Dr. Oh from testifying, saying he failed to show his theories were generally accepted in the medical community or they were untimely raised. When Sadek conceded he could not establish causation without the expert testimony, the court dismissed his suit.

The Appellate Division, First Department reversed in a split decision, holding the expert testimony should not have been precluded. A three-justice majority said, "The essence of these witnesses' position on causation -- the unremarkable premise that the physical trauma caused by the motor vehicle collision was a competent producing cause of [the] stroke -- did not require a formal Frye hearing. Moreover, even if a Frye hearing was appropriate, the evidence ... was sufficient under Frye to avoid preclusion of the testimony." A fourth justice concurred in a separate opinion, disagreeing only with the conclusion that no hearing was necessary.

The dissenter said, "In permitting a jury of laypersons to speculate as to the medical cause of plaintiff's stroke and decide the issue as a question of fact, the majority simply ignores Frye and dispenses with the analysis it requires."

For appellants Greyhound et al: Gerald T. Ford, Newark, NJ (973) 623-2700  
For respondent Sadek: Robert A. Skoblar, Hackensack, NJ (201) 816-9226

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To be argued Thursday, March 24, 2016 (arguments begin at noon)

## **No. 55 Friends of Thayer Lake LLC v Brown**

Friends of Thayer Lake LLC, the Brandreth Park Association and individual plaintiffs are the owners of a large tract of Adirondack land in the Town of Long Lake, Hamilton County. The land has been in the hands of the Brandreth family since an ancestor bought it from the State in 1851. It is bordered on the north by the Whitney Wilderness Area, acquired by the State in 1998, which contains a network of lakes, ponds and streams called the Lila Traverse that allows canoeists to travel between Little Tupper Lake on the Wilderness Area's eastern side and Lake Lila on the western side. A two-mile stretch of shallow ponds and streams known as the Mud Pond Waterway crosses the plaintiffs' property, although an 0.8-mile carry trail on state land permits canoeists to bypass the waterway.

Phil Brown, editor of the Adirondack Explorer, tested the public's right of access to the Mud Pond Waterway by canoeing through it in May 2009. He used a trail to portage around 500 feet of rapids. The owners responded by posting more "no trespassing" signs, roping off the waterway at both ends, and installing surveillance cameras. They also brought this action against Brown, seeking damages for trespass and a declaration that the waterway is not navigable-in-fact under New York common law. The State intervened as a defendant and, with Brown, sought a declaration that the waterway is navigable-in-fact and, thus, open for public travel by boat. Supreme Court granted summary judgment to Brown and the State, declaring the waterway navigable-in-fact and the owners' efforts to deter access a public nuisance.

The Appellate Division, Third Department affirmed in a 3-2 decision, ruling the waterway is subject to a public right of navigation under Adirondack League Club v Sierra Club (92 NY2d 591) based on "the capacity of the river for transport, whether for trade or travel," even though its past use "has been almost exclusively private and recreational rather than commercial.... [T]he test examines a waterway's capacity for use and not merely its actual use." It said, "[N]either the portage around the relatively short Mud Pond rapids nor the presence ... of other incidental obstacles such as beaver dams and fallen trees renders the Waterway nonnavigable.... [T]he presence of such occasional obstructions in a navigable-in-fact waterway gives rise to a public right to circumvent them by 'mak[ing] use, when absolutely necessary, of ... the right to portage on riparian lands'...." It said "no showing of necessity for public use of the Waterway is required.... The standard is practical utility, not necessity...."

The dissenters argued that "recreational use alone is insufficient to establish that a body of water" is navigable-in-fact. "[W]e cannot agree that the feasibility of using the Waterway for recreation and the fact that the public is capable of reaching it through a series of lakes, ponds, streams and portages render it a practical means of transportation so as to be navigable-in-fact. To conclude that they do would, in our view, unnecessarily expand our navigability-in-fact doctrine and destabilize settled expectations of private property ownership by opening up remote, unpopulated, privately owned bodies of water as long as the public has some way, however arduous and recently acquired, of gaining access to them."

For appellants Friends of Thayer Lake et al: Dennis J. Phillips, Glens Falls (518) 792-1174

For respondent Brown: John W. Caffry, Glens Falls (518) 792-1582

For respondents State and DEC: Assistant Solicitor General Brian D. Ginsberg (518) 776-2040

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## **No. 56 Sherman v New York State Thruway Authority**

In February 2011, State Trooper Rodney Sherman slipped and fell on an icy sidewalk at the Troop T barracks in Newburgh, striking his head. He brought this personal injury action against the New York State Thruway Authority, the owner of the property, claiming it was negligent in failing to remove the ice or sand the sidewalk. At his examination before trial, he said there was an ice storm the night before his accident, which had become a "wintry mix" of snow, ice, sleet and rain when he drove to the barracks for his 7 a.m. shift. By about 8:15 a.m., when he fell, he said the weather was warmer with a light rain. Authority truck drivers recorded weather conditions in their log books as "lt. rain, snow & ice" at 11 p.m. the night before, and as "lt. rain" at 7 a.m. on the morning of the accident.

The Thruway Authority moved for summary judgment dismissing the claim on the ground, among others, that it was not liable because there was a storm in progress when Sherman fell. It submitted deposition testimony from Sherman and its employees, along with a certified weather report showing there had been continuous rain from 10:45 p.m. the night before to 3:45 p.m. on the day of the accident, with temperatures ranging from 34 to 36 degrees. It argued, "As there was still precipitation at the time of [the] accident, the storm in progress doctrine applies and the case should be dismissed as the 'storm' had not stopped and [the Authority] did not have a reasonable time to remedy any situation." Sherman responded that "there are no cases which hold that mere rain, rather than freezing rain, constitutes a storm in progress."

The Court of Claims denied the motion, saying "there are multiple issues of fact that must be resolved before the court can conclude, as a matter of law, that there was a storm in progress when claimant fell...."

The Appellate Division, Second Department reversed and dismissed the claim, saying the Authority "established that there was a storm in progress at the time of the accident. The deposition testimony of [Sherman], which was supported by certified climatological data, demonstrated that precipitation was falling when the claimant allegedly slipped and fell on ice..., and for a substantial period of time prior to the accident. Inasmuch as the weather condition in question was in progress when the claimant's accident occurred, the [Authority] demonstrated its prima facie entitlement to judgment as a matter of law dismissing the claim...."

Sherman argues the Appellate Division has split over how to apply the storm in progress doctrine when precipitation continues, but not as snow or ice. "Courts in the First, Third and Fourth Departments ... have applied a reasoned approach to this problem and consider the storm in progress to have ended, and the property owner's duty to ameliorate the slippery condition to begin, when the falling precipitation is not causing an appreciable accumulation of snow and ice." He says this rule should be adopted and his claim reinstated.

For appellant Sherman: Norman M. Block, Hawthorne (914) 769-3100

For respondent Thruway Authority: Andrew Zajac, Jericho (516) 822-8900

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## **No. 57 Plotch v Citibank, N.A.**

In 2000, the owner of a Staten Island condominium unit took out a \$54,000 line-of-credit loan from Citibank secured by a mortgage on his apartment. In 2001, he obtained an additional loan of \$38,000 from Citibank secured by a second mortgage on his unit. On the same day, the borrower and Citibank executed a consolidation agreement combining the two mortgages "into a single mortgage lien" in the amount of \$92,000. More than seven years later, after the borrower failed to pay common charges owed to the condo's board of managers, the board filed a lien against his apartment in 2009, then brought an action to foreclose and auction the unit. Citibank, named as a defendant in the action, did not answer. Supreme Court granted judgment to the board and ordered that the unit be sold at auction subject to "[t]he first Mortgage of record."

Adam Plotch purchased the unit at auction for \$15,100 in 2010, then commenced this action against Citibank seeking a declaration that the \$38,000 second mortgage was subordinate to the condo board's common charges lien under Real Property Law § 339-z and, thus, was extinguished by the foreclosure. Citibank answered that the 2001 consolidation agreement combining the mortgages was the first mortgage of record and had priority over the condo board's lien pursuant to the statute. Real Property Law § 339-z provides, "The board of managers [of a condominium] ... shall have a lien on each unit for the unpaid common charges thereof ... prior to all other liens except only ... all sums unpaid on a first mortgage of record.... Upon the sale or conveyance of a unit, such unpaid common charges shall be paid out of the sale proceeds." Supreme Court granted Citibank's cross motion for summary judgment, declaring the consolidated mortgages constitute the first mortgage of record.

The Appellate Division, Second Department affirmed. "Since Real Property Law § 339-z is in derogation of the common-law principle of 'first in time, first in right,' the statutory right to priority must be narrowly construed..." it said. "Moreover, Citibank's second mortgage comes within the ambit of the statutory priority accorded to all sums unpaid on a first mortgage of record over a lien for unpaid common charges.... Thus, the common charges lien does not have priority over the consolidation agreement."

Plotch argues the ruling conflicts with the language and intent of section 339-z to ensure access by condo boards to the equity in their units, which enables them to enforce their liens and collect unpaid common charges "that are so crucial to the financial viability of condominium associations." Noting that the condo board was not a party to the consolidation agreement and did not agree to give up its statutory priority, he says the ruling permits mortgage holders to "unilaterally elevate the priority" of a second mortgage by consolidating it with a first mortgage. He argues consolidated mortgages should retain their separate character and priority.

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For respondent Citibank: Paul A. Levine, Albany (518) 433-8800

# *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, March 24, 2016 (arguments begin at noon)

**No. 58 People v Wayne Henderson**

*(papers sealed)*

Wayne Henderson was 15 years old in January 2010, when he and his girlfriend were accused of repeatedly stabbing a 12-year-old friend in Queens, allegedly in retaliation for the victim informing his mother that Henderson and his girlfriend used marijuana. At trial, Henderson's attorneys contended the victim pulled a knife on Henderson first and his girlfriend inflicted the stab wounds, and they raised a defense of diminished capacity caused by mental illness, alcohol and drugs. In support, they called as an expert witness a physician who specialized in forensic and child psychiatry. He noted that Henderson had been placed at a residential center for psychiatric treatment of adolescents in 2008, although he was not placed on psychotropic medication until his arrest in this case. The expert diagnosed Henderson as suffering from schizophreniform disorder exacerbated by marijuana use. He described Henderson's conduct as "bizarre" and cited the random nature of the stab wounds as evidence of his lack of intent. On cross-examination, the expert conceded that he never reviewed photographs of the wounds or the victim's medical records, saying he instead relied on defense counsel's description, and said he was not told of the possible motive for the attack. He conceded this information could have changed his opinion. In summation, defense counsel said she did not show photographs of the stab wounds to the expert because he was not hired "as a medical doctor" to diagnose the victim's injuries. Henderson was convicted of second-degree attempted murder and two counts of first-degree assault and was sentenced to 6 $\frac{2}{3}$  to 20 years in prison.

The Appellate Division, Second Department reversed, finding Henderson was deprived of effective assistance of counsel. "The People argue that defense counsel limited disclosure of information to her own expert as a trial strategy, because if the expert knew all the facts, he 'could not have testified in a manner helpful to the defense.' However, the defendant had a psychiatric history, and there was evidence ... that he favorably responded to psychotropic medication. The expert's explanation of the significance of these facts would have formed an adequate defense..." it said. "The so-called strategic decision to withhold information from the expert allowed the prosecutor to demonstrate to the jury that the expert was ill-informed. Further, defense counsel's explanation during summation for her failure to disclose the nature of the complainant's injuries to the expert was not logical and indicated that the failure to disclose was intentional, and possibly misleading. Assuming that the failure to disclose was a strategic decision, it was not consistent with the actions of a reasonably competent attorney."

The prosecution argues, "Counsel's representation, based on a well-prepared multi-pronged defense against overwhelming proof of guilt, was effective, and the Appellate Division's contrary conclusion -- founded exclusively on what was at most a lone, strategically-motivated tactical trial decision as to one aspect of a single witness's testimony -- was fatally flawed.... The court failed to heed this Court's admonitions about single errors, used hindsight to substitute its tactical choices for counsel's, and never even attempted to perform a prejudice analysis or assess whether the error was 'dispositive.'"

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