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 MAY 3 - 5, 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, May 3, 2016

No. 90 People by Schneiderman &c. v Greenberg

In 2005, the New York Attorney General filed this civil enforcement action against two former executives of American International Group (AIG), former Chairman and Chief Executive Officer Maurice R. Greenberg and former Chief Financial Officer Howard I. Smith, alleging they violated the Martin Act and Executive Law § 63(12) by conducting two fraudulent reinsurance transactions five years earlier in order to conceal from investors the declining financial condition of AIG, which was then the largest insurance company in the world. The Attorney General alleged that a sham transaction with General Reinsurance Corporation (GenRe) was designed to conceal a decline in AIG's loss reserves and a transaction with CAPCO Reinsurance Company, Ltd., was designed to mischaracterize underwriting losses as capital losses. After Greenberg and Smith left the company in 2005, AIG acknowledged improprieties in both transactions and restated its financial statements for 2000 through 2004.

The Appellate Division, First Department denied the defendants' summary judgment motion to dismiss the suit in 2012. While the defendants appealed to this Court, the Attorney General dropped his claim for money damages for AIG shareholders, but sought equitable relief -- including injunctions banning the defendants from working in the securities industry or serving as officers or directors of public companies -- and disgorgement of any performance-based bonuses related to the GenRe and CAPCO transactions.

This Court affirmed (21 NY3d 439 [2013]), saying, "We have no difficulty in concluding that, in this civil case, there is evidence sufficient for trial that both Greenberg and Smith participated in a fraud. The credibility of their denials is for a fact finder to decide.... [W]e cannot say as a matter of law that no equitable relief may be awarded. There is no doubt room for argument about whether the lifetime bans that the Attorney General proposes would be a justifiable exercise of a court's discretion; but that question, as well as the availability of any other equitable relief that the Attorney General may seek, must be decided by the lower courts in the first instance."

The defendants moved again for summary judgment dismissing the suit, arguing, among other things, that neither disgorgement nor injunctions barring participation in the securities industry or on corporate boards are authorized by the Martin Act or Executive Law § 63(12). They said disgorgement is barred by releases provided by AIG and its shareholders in settlements of other litigation; and the State established no basis for a permanent injunction against them.

Supreme Court denied the motion and the Appellate Division affirmed, saying, "The State's disgorgement claim was legally viable, despite the settlement of actions brought by [AIG] shareholders and by [AIG], and the accompanying releases...." The defendants failed to demonstrate that they received no bonuses "as a result of the sham transactions," or that "the claim for a permanent injunction under the Martin Act was not warranted...," it said. "The existence of a federal consent judgment imposing a similar but more lenient injunction ... does not preclude the injunction sought here by the State."

For appellant Greenberg: David Boies, Armonk (914) 749-8200
For appellant Smith: Vincent A. Sama, Manhattan (212) 836-8000
For respondent State: Solicitor General Barbara D. Underwood (212) 416-8016

State of New York Court of Appeals

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To be argued Tuesday, May 3, 2016

No. 87 People v Perry C. Griggs

Perry Griggs was charged with robbing Buffalo cab driver Christopher Hulett of $30 with what appeared to be a handgun in May 2010. Griggs asked to testify before the grand jury, where he was shackled during his testimony and the prosecutor improperly cross-examined him. He also asked that his girlfriend be called to testify, but she did not appear and the prosecutor did not inform the grand jury of his request.

Griggs and Hulett both testified at the grand jury that Griggs paid $30 in advance for a one-hour ride to several stores in Buffalo and, when the hour was nearly over, Griggs got out of the cab and told Hulett to take his girlfriend home. Hulett testified that, when he realized there was not enough time left on the meter, the girlfriend told him to return to Griggs for more money. Hulett said Griggs got into the back of the cab, accused him of "trying to play his girl," and demanded his money back. Hulett said he handed over the $30 after Griggs pulled a gun from his backpack. Griggs testified that when he got back in the cab Hulett asked for $15 more, Griggs insisted $10 was enough for the additional fare, and the men argued. Griggs said he was fed up and refused to pay anything more, then got out of the cab with his girlfriend and went home. The grand jury indicted Griggs on one count of first-degree robbery.

Griggs represented himself at trial. He was convicted of the robbery charge and given an enhanced sentence of 20 years in prison pursuant to Penal Law § 60.07 because the victim "was operating a for-hire vehicle."

The Appellate Division, Fourth Department affirmed, saying "Although we agree with defendant that he should not have been shackled when he testified before the grand jury..., the prosecutor's cautionary instructions to the grand jury were sufficient to dispel any potential prejudice...." It said Griggs failed to preserve his claims that the prosecutor engaged in misconduct during the grand jury proceeding by improperly cross-examining him and by failing to inform the jurors that he had asked that his girlfriend be called. "In any event..., there was no 'likelihood [or] possibility of prejudice' inasmuch as the witness did not observe the criminal transaction at issue." It ruled the conviction was supported by legally sufficient evidence.

Griggs argues "the concerted effects of various errors impaired the integrity of the [grand jury] proceeding" and the failure of his pretrial counsel to move for dismissal of the indictment based on those errors "rendered his performance ineffective." He also argues he was deprived of a fair trial by "severe and persistent" misconduct by the prosecutor at trial, and says the evidence was legally insufficient to establish his guilt.

The prosecution concedes that Griggs was "improperly shackled" during his grand jury testimony; that the prosecutor "used inappropriate tactics" in cross-examining him; and that the prosecutor failed to call his girlfriend to testify, did not mention his request for her testimony to the grand jury, and then "mistakenly represented to the defense" that she had appeared before the grand jury and identified Griggs from a photograph. However, it argues the "errors did not so impair the integrity of the grand jury proceeding as to compel reversal."

For appellant Griggs: Alan Williams, Buffalo (716) 853-9555
For respondent: Erie County Assistant District Attorney Michael J. Hillery (716) 858-2424

State of New York Court of Appeals

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To be argued Tuesday, May 3, 2016

No. 83 M/O New York City Asbestos Litigation (Dummitt v A.W. Chesterton Co.)
No. 84 M/O Eighth Judicial District Asbestos Litigation (Suttner v A.W. Chesterton Co.)

The common question in these asbestos cases is whether a manufacturer had a duty to warn of the latent dangers of component parts used in its equipment, where the company did not manufacture or sell the components.

The defendant in both appeals, Crane Co., manufactured steam valves that, when sold, included asbestos-containing gaskets and packing that were produced by other companies. During the relevant period, Crane's specifications called for replacement of gaskets and packing with similar asbestos-containing products, although it did not produce or sell such products.

The plaintiffs are the estates and survivors of two men who died of mesothelioma after years of exposure to asbestos dust while changing gaskets and packing on Crane valves, which was a regular part of their duties. The plaintiffs contended Crane was negligent in failing to warn of the dangers inherent in the asbestos products used in its valves.

Ronald Dummitt was a boiler technician in the Navy who was assigned to maintain steam systems on naval vessels, which were largely controlled by Crane valves. At trial, his estate presented evidence that Crane worked with the Navy on instruction manuals calling for the use of asbestos gaskets and tried unsuccessfully to sell asbestos gaskets to the Navy. Crane sought to present testimony by a naval officer that the Navy would not have allowed it to put asbestos warnings on the nameplates of its valves, but Supreme Court precluded it. The court instructed the jury that "a manufacturer's duty to warn extends to" dangers "of the uses of the manufacturer's product with the product of another manufacturer if such use was reasonably foreseeable." The jury found Crane 99 percent liable for Dummitt's death, and the court set damages at $8 million.

The Appellate Division, First Department affirmed on a 3-2 vote. It agreed unanimously that Crane had a duty to warn, finding the company had influenced the Navy's decision to use asbestos gaskets in its valves. The justices agreed that "mere foreseeability" did not give rise to a duty to warn, but said a new trial was not necessary. The court split on the issue of proximate cause, with the dissenters arguing that errors relating to that issue required a new trial.

Gerald Suttner was a pipefitter at a General Motors engine plant in Tonawanda and maintained the plant's steam system, including Crane valves. A jury found Crane 4 percent liable for Suttner's death and awarded his estate total damages of $3 million, resulting in a $121,145 judgment against Crane.

Crane moved to set aside the verdict, arguing it had no duty to warn because it did not manufacture the gaskets or place them into the stream of commerce and it derived no benefit from their sale. Supreme Court denied the motion, saying Crane had a "duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known." The Appellate Division, Fourth Department affirmed.

For appellant Crane Co. (Nos. 83 & 84): Caitlin J. Halligan, Manhattan (212) 351-3909
For respondent Dummitt: Seth A. Dymond, Manhattan (212) 681-1575
For respondent Suttner: John N. Lipsitz, Buffalo (716) 849-0701

State of New York Court of Appeals

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To be argued Tuesday, May 3, 2016

No. 85 M/O New York City Asbestos Litigation (Konstantin v 630 Third Avenue Assoc.)

This case was tried jointly with M/O New York City Asbestos Litigation (Dummitt v A.W. Chesterton Co.), [see No. 83, to be argued here on the same day]. Tishman Liquidating Corporation (TLC), challenges the consolidation of the cases under CPLR 602(a) and the reasonableness of the $8 million verdict for the plaintiff in Konstantin. CPLR 602(a) provides, "When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

David Konstantin was a carpenter from 1973 to 1977 on two Manhattan construction projects where Tishman Realty & Construction, TLC's predecessor, was the general contractor. He often worked near drywall crews who sanded joint compound containing asbestos and he was exposed to the dust. Konstantin alleged that TLC took no steps to protect workers from the asbestos dust. He was diagnosed with testicular mesothelioma in 2010, and it spread to his lungs. He died in 2012, after bringing this action against TLC for negligence and workplace liability under Labor Law § 200 for failing to supervise the drywall workers.

Supreme Court consolidated the case with an action by Ronald Dummitt, a Navy boiler technician who was exposed to asbestos while replacing gaskets and packing in steam valves aboard naval ships from 1960 to 1977. Most of the valves were produced by Crane Co. He was diagnosed with mesothelioma of the lungs in 2010 and brought this products liability action against Crane for failure to warn of the danger of asbestos.

The jury found TLC 76 percent liable for Konstantin's death and awarded $19 million in damages, which the court reduced to $8 million. The same jury found Crane 99 percent liable for Dummitt's death and awarded his estate $32 million, which the court reduced to $8 million.

The Appellate Division, First Department affirmed, noting that, "in asbestos cases, it has been 'routine' to join cases together for a single trial." Three justices said, "We recognize that a shipboard boiler room is a different physical environment than a building under construction, and that the work performed by [Konstantin and Dummitt] was somewhat different. Fundamentally, however, [they] were both exposed to asbestos in a similar manner ... by being in the immediate presence of dust that was released at the same time they were performing their work. TLC has failed to articulate why the differences in the environments and job duties had such an impact on the manner of exposure that it was necessary for the evidence of exposure to be heard separately.... [T]he exposure periods are sufficiently common" and "ended in 1977, meaning that the state of the art was the same for both cases." The plaintiffs asserted different legal theories, but "both theories ultimately required a showing that defendants failed to act reasonably" in preventing exposure to asbestos. In a concurrence, two justices would not address the issue because TLC did not provide "any of the papers upon which the consolidation order was made."

TLC argues the cases "involved no common questions of law or fact ... and in any event consolidation prejudiced TLC's substantial right to a fair trial. The lengthy and disjointed trial confused the jury and allowed each plaintiff's claims to bolster the other's, resulting in an outsize verdict of over $51 million. Only under an unstated 'asbestos exception' to CPLR 602(a) could the consolidation below be sustained, and dramatic changes in the landscape of asbestos litigation in the past several decades warrant this Court's clarification that such distortion of the statute is no longer acceptable and that consolidation in asbestos actions should no longer be 'routine.'"

For appellant Tishman Liquidating Corp.: Kathleen M. Sullivan, Manhattan (212) 849-7000
For respondent Konstantin: Seth A. Dymond, Manhattan (212) 681-1575

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To be argued Wednesday, May 4, 2016

No. 88 People v Gary Wright *(papers sealed)*

After Gary Wright was charged with attempting to rape a neighbor in the Town of Berne in July 2008, he was initially represented by attorney Thomas Spargo. In February 2009, Wright retained James Long as defense counsel to replace Spargo. For the next seven months, Long made pretrial court appearances, prepared Wright for his testimony before the grand jury, filed motions to suppress Wright's statement to police and to dismiss the indictment, among other things, and obtained an offer to resolve the case with a misdemeanor plea, which Wright rejected. In September 2009, two months before his trial, Wright fired Long and hired new defense counsel. Wright was convicted of first-degree attempted rape and sexual abuse in Albany County Court and was sentenced to seven years in prison. His conviction was affirmed in 2011.

In 2014, Wright filed this CPL 440 motion to vacate his conviction, alleging that Long provided ineffective assistance due to a conflict of interest. Wright claimed that, while representing him, Long was simultaneously representing Albany County District Attorney David Soares, whose office was prosecuting him. In support, he offered evidence that in October 2008 Long sent a letter to the Albany County Board of Elections on behalf of Soares' reelection campaign regarding the omission of Soares' name from the Independence Party line on absentee ballots for the 2008 election. He also submitted evidence that Long represented Soares in a professional misconduct proceeding in April 2011 and later represented him in several personal matters. In response, Assistant District Attorney Christopher Horn said in an affidavit that Long's letter to the Board of Elections was sent about four months before Wright retained him, and he denied that Long represented Soares at anytime during the period Long was defending Wright. County Court denied Wright's motion without a hearing.

The Appellate Division, Third Department affirmed, saying Wright failed to show the existence of an actual conflict of interest. It took note of Long's 2008 letter on behalf of Soares' campaign, but said the record "is bereft of any evidence ... that Long represented Soares or his campaign at any other time during the period leading up to and through his representation of" Wright. While Long represented Soares in subsequent matters beginning in April 2011, it said this "occurred well after the attorney-client relationship between Long and defendant ended" and "has no bearing on whether Long was operating under a conflict." Since a defendant has the burden of proving a conflict exists, it said, Wright was not entitled to an adverse inference based on the prosecution's failure to submit an affidavit from Soares himself instead of Horn.

Wright argues, "From at least October 2008 on, [Long and Soares] had a retainer like relationship covering a variety of matters, all spanning the time frame" of Wright's criminal case. "This created an actual and inherent conflict of interest which resulted in the denial to Mr. Wright of his constitutional right to the effective assistance of counsel...." He says Horn's affidavit denying there was a conflict "has no probative value" because "it was made without personal knowledge of the facts." Without a response from Soares himself, the prosecution did not effectively deny the existence of a conflict and a "failure to dispute facts constitutes an implied concession of those facts," Wright says, citing People v Ciaccio (47 NY2d 431).

For appellant Wright: Michael Katzer, Slingerlands (518) 478-0006
For respondent: Assistant District Attorney Christopher D. Horn (518) 487-5460

State of New York Court of Appeals

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To be argued Wednesday, May 4, 2016

No. 89 People v Lennie Frankline *(papers sealed)*

Lennie Frankline was charged with attempted murder for assaulting his former girlfriend at her mother's house in the Bronx in July 2008. She testified at trial that Frankline entered the house, dragged her to the living room by the hair and squirted a liquid that smelled like gasoline in her face. When he flicked his lighter, she ran outside and he chased her down, poured more gasoline on her and set her hair on fire, which she extinguished with her hands. He hit her twice in the eye before her brother and bystanders intervened.

The trial court also allowed the complainant to testify at length about a more extended assault that occurred 10 days earlier in the apartment she had shared with Frankline in Niagara Falls. She said that, when she admitted she was seeing another man, Frankline hit her in the face, repeatedly kicked her in the stomach, tied her hands behind her back, poured gasoline on her, and forced her to perform oral and anal sex, which he videotaped. When she resisted, she said, "he took the gasoline, and he doused it on top of me again, and asked me was that what I wanted. I had to choose to have either anal sex or be set on fire." He took her to a hospital the next night.

The Bronx court denied defense counsel's mistrial motion, saying the testimony was admissible as background -- to explain their relationship -- and as proof of motive and intent. Frankline was convicted of second-degree attempted murder, first-degree burglary, and related charges. The court sentenced him to 25 years in prison to run consecutively to the 50-years-to-life term he received in Niagara County, where he had been convicted of multiple sexual assault, kidnapping and assault charges.

The Appellate Division, First Department affirmed the Bronx judgment, ruling the testimony about the Niagara County case was properly admitted. "As defendant concedes, this evidence was admissible as background evidence to complete the narrative," it said. "Moreover, contrary to defendant's unpreserved claims, this evidence was also probative of defendant's motive.... We do not find that the amount of such evidence was excessive or inflammatory. Furthermore, the court's thorough instructions minimized any prejudice." It said any error "was harmless in light of the overwhelming proof of defendant's guilt."

Frankline argues he was denied a fair trial because "the nature and scope of the excessive, largely irrelevant, and highly inflammatory testimony about the prior assault spilled over all proper bounds and made it impossible for the jury to fairly and objectively assess the evidence of the [Bronx] incident for which [he] was being tried." Instead of "roughly 25 pages" of testimony, he says, "a couple of sentences would have been enough for [the complainant] to explain why and how her relationship with [Frankline] ended in Niagara Falls and why ... [he] pursued her to the Bronx."

For appellant Frankline: Allen Fallek, Manhattan (212) 577-3566
For respondent: Bronx Assistant District Attorney Jordan K. Hummel (718) 838-7322

State of New York Court of Appeals

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To be reargued Wednesday, May 4, 2016

No. 97 Aetna Health Plans v Hanover Insurance Company

Luz Herrera was injured in an accident on the Hutchinson River Parkway in the Bronx in April 2008 while driving a car insured by Hanover Insurance Company. Hanover provided no-fault benefits, paying medical bills that were submitted to it by Herrera or her doctors. However, some of her medical providers erroneously billed Aetna Health Plans, Herrera's medical insurer, instead of Hanover for treatment of her accident-related injuries. Aetna paid $19,649.10 for such treatment in 2008. After Hanover stopped providing no-fault benefits in 2009, Aetna paid an additional $23,525.73 for continuing treatment of Herrera's injuries through 2011. Herrera submitted documentation for some of those costs to Hanover in 2010 and demanded reimbursement for bills paid by Aetna that should have been paid by Hanover.

When Hanover did not respond, Herrera commenced a no-fault arbitration against Hanover. The arbitrator denied her claim, saying the medical records she submitted to Hanover to document the bills paid by Aetna "were not bills" because she had no legal obligation to pay them. "[I]f any person and/or entity [has] a claim against [Hanover] in this matter it is [Aetna], not [Herrera]." Herrera assigned her right to recover no-fault benefits to Aetna, which brought this action against Hanover to recover the $43,174.83 it had paid for her treatment.

Supreme Court dismissed Aetna's complaint, saying its claim was barred by 11 NYCRR 65-3.11(a), which provides for the payment of no-fault benefits "directly to the applicant ... or, upon assignment by the applicant ... to [the] providers of health care services." The court said Aetna, "a health insurer, is not a 'provider of health care services' contemplated under 11 NYCRR 65-3.11." Aetna's breach of contract claim fails because it "is not in privity of contract" with Hanover, it said, and Aetna "cannot sustain a cause of action under subrogation principles" because there is "no authority permitting a health insurer to bring a subrogation action against a no-fault insurer for sums the health insurer was contractually obligated to pay to its insured."

The Appellate Division, First Department affirmed, saying Aetna "is not a 'health care provider' under [under 11 NYCRR 65-3.11], but rather a health care insurer.... While the No-Fault Law provides a limited window of arbitration between no-fault insurers (see Insurance Law §§ 5105, 5106[d] ...), the statutory language does not pertain to a health insurer such as Aetna. Thus, Aetna cannot maintain a claim against defendant under the principle of subrogation.... Nor may Aetna assert a breach of contract claim..., since it is not in privity of contract with Hanover, and there has been no showing that it was an intended third-party beneficiary of the contract."

Aetna argues it is entitled to recover from Hanover "under the doctrines of subrogation, indemnification, or both" because it paid the medical costs of Herrera, which Hanover was obligated to pay, and it therefore stands in place of Herrera with the same rights she would have to recover from Hanover. Even though it is not a "health care provider," Aetna says 11 NYCRR 65-3.11 does not bar its claim because it is Herrera's subrogee and has the same right to payment from Hanover as she has under the regulation. It argues, "Privity of contract is not required where, as here, the health insurer's claim is made under principles of subrogation or indemnity."

For appellant Aetna: Jonathan A. Dachs, Mineola (516) 747-1100
For respondent Hanover: Barry I. Levy, Uniondale (516) 357-3000

State of New York Court of Appeals

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To be argued Wednesday, May 4, 2016

No. 75 CRP/Extell Parcel I, L.P. v Cuomo

CRP/Extell Parcel I, L.P. is the sponsor of the Rushmore Condominium on Riverside Boulevard in Manhattan. Its offering plan and purchase agreements gave buyers of condominium units the right to rescind their agreements if the first unit sale did not close by September 1, 2008, a deadline CRP missed by more than five months. When CRP did not return the purchaser's deposits, along with interest earned while they were is escrow, more than 40 buyers filed complaints with the State Attorney General's Office. In April 2010, the attorney general issued an administrative determination directing CRP and its escrow agent to release $16 million in down payments. CRP sought reformation of the offering plan and agreements on the ground that the 2008 deadline was a scrivener's error and the intended deadline was September 1, 2009. The attorney general rejected the argument.

CRP filed this article 78 proceeding to challenge the determination and seek reformation of the purchase agreements. In their response, the purchasers demanded that CRP release their down payments "together with prejudgment interest," but they did not assert any counterclaims for a money judgment for the down payments or challenge any part of the attorney general's award. In January 2012, Supreme Court denied CRP's petition, dismissed the proceeding, and ordered the down payments released "together with any accumulated interest." The Appellate Division, First Department affirmed in December 2012.

In February 2012, while CRP's appeal was pending, the purchasers moved for an award of statutory interest at 9 percent under CPLR 5001. They argued that having their down payments, which ranged from $110,000 to nearly $1.1 million, held in escrow for years was causing financial hardship. Supreme Court granted the motion in September 2012, saying, "The [purchasers] are clearly being deprived of the use of their money. Under such circumstances, the undertaking [to cover interest costs] must be increased to ensure that the purchasers are made whole." It ordered "that the prejudgment interest shall accrue at the statutory rate" and directed CRP to post $6 million to cover it. In response to subsequent motions, the court rejected CRP's argument that it lacked jurisdiction to order statutory interest. "Clearly, the court has subject matter jurisdiction to hear an Article 78 proceeding," in which it awarded prejudgment interest, it said. "And further, this court has jurisdiction to enforce its orders."

The Appellate Division reversed and vacated the judgment that awarded statutory interest at 9 percent, saying "the motion court did not have jurisdiction to issue the money judgments after the underlying proceeding had been dismissed...." It said, "CPLR 5001(a) 'mandates the award of interest to verdict in breach of contract actions' ... or where an act or omission deprives or interferes with title to, or possession or enjoyment of property.... [The purchasers], however, never asserted a breach of contract claim, or a claim for interference with property [in the article 78 proceeding]. Indeed, they made no affirmative claim for relief at all, but solely opposed the petition for reversal of the Attorney General's determination.... [T]he motion court exceeded its jurisdiction by deciding the parties' dispute regarding a proper rate of interest after the action had been fully resolved."

For appellant purchasers: John A. Coleman, Jr., Manhattan (212) 829-9090
For respondent CRP: Jason C. Cyrulnik, Armonk (914) 749-8200

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To be argued Thursday, May 5, 2016

No. 93 S.L. v J.R. *(papers sealed)*

The parties in this child custody case, S.L (the mother) and J.R. (the father), were married in 1997 and have two minor children. The father was a partner in a Manhattan law firm and the mother practiced law part-time in White Plains, near their home. The father moved out of the home in May 2012 and the mother sued for divorce in September 2012. Also in September, the mother texted the father threatening to burn down his house and set his clothes on fire, then sent him photographs of piles of his burning clothes. He went home to find broken windows in his house and his burned clothing in the driveway. He obtained an order of protection against her and she was charged with misdemeanor harassment, but the charge was later dropped when he failed to appear to testify at her trial. When he sought temporary sole custody of the children, she admitted her involvement in the clothing fire and several other incidents, including a 2008 suicide attempt for which she was hospitalized, and that she was charged with aggravated harassment in 2011 for emailing nude photographs of a former lover to members of his family.

In October 2012, Supreme Court found there were "enough red flags" to justify granting the father's motion for temporary custody of the children, with visitation for the mother supervised by Supervised Visitation Experts (SVE). Her visitation and family therapy were suspended in April 2013 by SVE and the therapist, who found it would not be in the children's best interest to continue unless the mother entered anger management therapy.

In October 2013, the court awarded sole physical and legal custody to the father without a hearing. "In consideration of the history of this case and all the facts present here...," it said, "[a] hearing is not necessary ... since the allegations are not controverted." Among other things, it said the mother "has been charged in three criminal cases in the Integrated Domestic Violence part, all of which are still pending. Two of those cases involve alleged violations of orders of protection" that prohibit her from having any contact with the children or father.

The Appellate Division, Second Department affirmed. "Although a custody determination generally may only be made following a full and comprehensive evidentiary hearing..., no hearing is necessary where, as here, 'the court possesses adequate relevant information to enable it to make an informed and provident determination as to the child's best interest,'" it said, citing its 2004 ruling in Matter of Hom v Zullo (6 AD3d 536).

The mother argues that "a parent's constitutional due process rights mandate a full and fair opportunity to present evidence" at a hearing in a contested custody case. She also contends the "adequate relevant information" standard is "impermissibly vague" and undefined. "Because a thorough and comprehensive evaluation of the facts as derived from the evidence is not performed when this standard is employed," she says, "children may be wrongly deprived of the companionship and guidance of both parents or placed in the custody of an ill-suited parent who is simply a better litigant."

For appellant S.L. (mother): Harold R. Burke, West Harrison (203) 219-2301
For respondent J.R. (father): John Rogers, Manhattan (212) 808-2727
For the children: John A. Pappalardo, White Plains (914) 761-9400

State of New York Court of Appeals

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To be argued Thursday, May 5, 2016

No. 94 People v Anthony Berry

Anthony Berry was arrested in October 2008 when narcotics officers executed a search warrant at the Brooklyn apartment of a friend, T.H., who supported herself by dealing drugs. Berry, who was not mentioned in the warrant, was homeless and occasionally spent the night there. He was sleeping in the living room with T.H. and three of her minor children when the police entered and seized quantities of loose and bagged cocaine. Berry was charged with three counts of unlawfully dealing with a child in the first degree under Penal Law § 260.20(1), as well as various drug possession charges.

T.H. admitted the drugs belonged to her, pled guilty is exchange for a sentence of probation, and testified on Berry's behalf at his trial. She said that Berry had no authority over her children and she had never told him about the drugs in her apartment. Berry was acquitted of the drug charges, but convicted of three counts of first-degree unlawfully dealing with a child. He was sentenced to a year in jail.

On appeal, Berry argued there was insufficient evidence to prove his guilt under Penal Law § 260.20(1), which applies when a defendant "knowingly permits a child less than eighteen years old to enter or remain in or upon a place ... where ... activity involving controlled substances ... is maintained or conducted...." He said there was no proof he had any authority to permit T.H.'s children to stay in her apartment and no proof he had assumed a parental role, so he had no legal duty to act on their behalf.

The Appellate Division, First Department affirmed. "The evidence supports a reasonable inference that defendant 'permit[ted]' several underage children to 'enter or remain' in a place of drug activity..., even though, in permitting the children to enter or remain, defendant may be viewed as having acted jointly with his codefendant," it said. "The statute does not require a defendant to have a legal responsibility for the care or custody of the child (compare Penal Law § 260.10[2]), and defendant's guilt was not negated by the fact that the codefendant may have been even more blameworthy, by virtue of her relationship with the children."

Berry argues there was insufficient evidence to sustain his convictions because he "did not have control over the apartment necessary to commit the required statutory act of 'permit[ing]' the children to enter or remain on the premises, nor did he have the legal duty that the law requires to impose criminal liability for his failure to act to remove them from their home.... [T]he Appellate Division effectively imposed an unprecedented duty on non-parents to take action with respect to other people's children whenever they are aware of certain illicit activities or face criminal prosecution themselves."

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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, May 5, 2016 *(papers sealed)*

No. 95 Wally G. v NYC Health and Hospitals Corporation (Metropolitan Hospital)

In June 2005, Wally G. was born prematurely at 26 or 27 weeks' gestation (40 is the norm) at Metropolitan Hospital, a New York City Health and Hospitals Corporation (HHC) facility in Manhattan. He was delivered by emergency cesarean section, due to his mother's medical condition and signs of fetal distress, and was treated in the hospital's neonatal intensive care unit (NICU) for nearly two months.

His mother brought this medical malpractice action against HHC on his behalf, claiming he suffers from cerebral palsy, seizures, and speech and cognitive defects due to the hospital's negligent medical care of her prior to the birth and of Wally in the NICU. The notice of claim was not served on HHC until more than a year after the 90-day notice period expired. Four years later, in January 2011, his attorney moved for permission to file a late notice of claim, asserting that the hospital's own records put HHC on notice soon after his birth that Wally's injuries might have been caused by negligent medical care.

Supreme Court denied the motion and dismissed the suit, finding the plaintiff "failed to prove that the medical records alone evince that [HHC], by its acts or omissions, inflicted injuries on the infant-plaintiff.... There is insufficient evidence to support the finding that the infant's condition upon delivery and the subsequent issues that developed during his admission to the NICU were caused by any malpractice as opposed to the infant's extremely premature birth, which could not have been avoided."

The Appellate Division, First Department affirmed in a 3-2 decision. "In view of the fact that plaintiff's injuries are typical of children born as prematurely as he was, as well as HHC's undisputed lack of fault for the necessity of a preterm delivery, we ... are not persuaded by plaintiff's argument ... that the medical records put HHC on notice that plaintiff's injuries may have been caused by the alleged deviations from the standard of care that plaintiff's experts perceive to be documented in the record, rather than by the unavoidable necessity of delivering the child only 27 weeks into the pregnancy...," the court said. "Given that the medical records, even as interpreted by plaintiff's experts, do not yield a nonspeculative basis for determining whether the deficits of this prematurely born child would have been less severe absent the alleged deviations, it cannot be said that the medical records put HHC on notice of the claim."

The dissenters argued, "[T]he hospital chart demonstrates that HHC had actual notice of the essential facts constituting the claim within 90 days of accrual or a reasonable time thereafter.... Notably, the medical records need not conclusively demonstrate that malpractice caused the injury...," but "merely need to suggest injury attributable to malpractice.... The defendant's delay in performing an emergency cesarean section and in providing immediate ventilation through intubation, and its discussion of subsequent neurological sequelae with the parents..., suggest injury attributable to medical malpractice...." That HHC's experts "provided a different interpretation of the medical records does not show that the hospital lacked actual knowledge of the records. Instead, it shows that there is an issue as to the merits of the claim."

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State of New York Court of Appeals

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To be argued Thursday, May 5, 2016

No. 96 Littleton Construction Ltd. v Huber Construction, Inc.

Littleton Construction and Huber Construction formed a joint venture in 2007 to carry out a series of renovations at Buffalo public schools. The memorandum of understanding and amending rider (collectively, MOU) that govern the joint venture provide that Huber is entitled to a nine percent management/overhead fee on the renovation projects. Littleton claims it is entitled to a share of the management fees proportional to the share of work it performed for the joint venture. Its claim is based on an operating agreement that it says was executed after the MOU by both companies. Huber contends the operating agreement is fraudulent and was never signed by its president. Littleton concedes the operating agreement is "a cut and paste" of prior documents executed by the parties, but denies creating it and argues that it is valid because it was duly executed by both companies. When Huber refused to share the management fees, Littleton brought this breach of contract action against Huber and the joint venture.

Supreme Court denied Huber's summary judgment motion to dismiss Littleton's claim to a share of the management fees, finding that "a triable issue of fact exists as to the validity of the allegedly fraudulent" operating agreement.

The Appellate Division, Fourth Department reversed and dismissed Littleton's claim in a 3-2 decision. "Huber's president tendered an affidavit in which he averred that he had never signed or even seen the operating agreement at issue, and that Huber had never had a copy of it. He further averred that, despite those facts, the signatures, dates, and notary stamp on the allegedly fraudulent operating agreement were identical to those on the MOU that he had in fact signed," the court said. Based on that and other evidence, it concluded, "defendants' submissions were sufficient to meet their initial burden of establishing that the operating agreement at issue was forged and is therefore void.... In opposition to defendants' motion, [Littleton] failed to raise a triable issue of fact either that the allegedly fraudulent operating agreement was not forged, or that the MOU was ambiguous with respect to management/overhead fees, thereby requiring extrinsic evidence to determine the parties' intentions concerning such fees...."

The dissenters said, "In support of their motion for summary judgment..., [Huber] submitted, inter alia, deposition testimony from [Littleton's] owner, in which he stated that he signed the allegedly fraudulent operating agreement. 'It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)'.... Consequently, we cannot conclude as a matter of law that the operating agreement at issue is a forgery."

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