State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

WEEK OF OCTOBER 18 - 20, 2016

Court of Appeals Hall
20 Eagle Street
Albany, NY

State of New York Court of Appeals

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To be argued Tuesday, October 18, 2016

No. 186 People v Jose Aviles

A New York City police officer arrested Jose Aviles for driving under the influence of alcohol in December 2011 after he struck a police car that was attempting to merge into traffic in the Bronx. The officer said Aviles had a strong odor of alcohol, slurred speech, was unsteady on his feet and told him, in English, "I had a few Coronas about 15 minutes ago, about three Coronas." A breathalyzer showed his blood alcohol level was .06 percent, below the .08 level required for a per se DUI violation. The police did not offer him a physical coordination test due to a "language barrier," based on the Police Department's policy of conducting coordination tests only in English. Aviles moved to dismiss the misdemeanor charges on the ground that the policy is discriminatory and violated his right to equal protection and due process.

Criminal Court granted the motion to dismiss, saying the department's failure to administer a coordination test to Aviles "bears no rational relation to a legitimate governmental purpose" and "constitutes a denial of due process and equal protection." It said, "[B]ecause the reading on the defendant's breathalyzer test was so very low -- the reading was .06 -- there is a strong probability that the results of a physical coordination test would be exculpatory. The failure to provide the defendant -- merely because he speaks only Spanish -- with access to this potentially exculpatory evidence is a denial of his constitutional rights warranting dismissal. Here, where the breathalyzer test result is so very low, the trier of fact -- judge or jury --- is likely to have a heightened interest in seeing a video memorializing the defendant's abilities."

The Appellate Term, First Department, reversed and reinstated the charges, finding the policy of administering coordination tests only to English speaking DWI suspects did not violate the rights of non-English speakers. It relied on the Appellate Division, First Department ruling in People v Salazar (112 AD3d 5 [2013]), which said, "Although Hispanics as an ethnic group constitute a suspect class under equal protection analysis..., the practice ... is facially neutral as to ethnicity. The policy determination as to whether or not to perform physical coordination tests is based on a suspect's ability to speak and understand English, and is not based upon race, religion or national origin.... The police, of course, clearly have an interest in the reliability of coordination tests," which could be compromised by the use of a Spanish interpreter "who was not trained in conducting the test." Salazar concluded that having "qualified interpreters on call on a 24/7 basis would impose unrealistic and substantial financial and administrative burdens. The avoidance of these crushing obligations provides a rational basis for the policy."

Aviles argues, "The NYPD's policy of offering physical coordination tests only in English discriminates on the basis of national origin and is thus subject to strict scrutiny, which it cannot overcome. In addition, the policy is not rationally related to a legitimate governmental purpose, especially here, where the defendant's chemical test provided prima facie evidence that he was not intoxicated." He says there is "a crucial distinction" between Salazar, where "the defendant's BAC was .21, nearly three times the legal limit," and this case, where his BAC was "so low that there is a strong probability" a coordination test would have been exculpatory and the failure to conduct one "severely undermine[d]" his "ability to mount a defense."

For appellant Aviles: Aleksandr Livshits, Manhattan (212) 859-8524
For respondent: Bronx Assistant District Attorney Stanley R. Kaplan (718) 838-7048

State of New York Court of Appeals

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To be argued Tuesday, October 18, 2016

No. 174 Newman v RCPI Landmark Properties, LLC

George Newman, a security guard at Rockefeller Center in Manhattan, was injured when he fell while trying to climb down from a loading dock in April 2012. He had been walking with his partner through a sub-basement of the complex and followed his partner onto the platform of the loading dock, which stood about three feet above the floor. There was a wall-mounted ladder at one side of the loading dock to provide passage between the platform and the floor, but a truck was parked in front of it and Newman testified he was not aware the ladder was there. His partner climbed down from the platform on a stack of plastic milk crates, which were arranged like steps with two crates on the floor and one on top of them. Newman said he believed the crates were the "only accessible form of egress." When he stepped onto the top milk crate, the stack gave way and he fell, injuring his left knee.

Newman and his wife brought this personal injury action against the building owner, RCPI Landmark Properties, and its managing agent, Tishman Speyer Properties. The defendants moved for summary judgment dismissing the complaint, arguing Newman caused his own injury by climbing down on the milk crates instead of the ladder.

Supreme Court denied the motion to dismiss, saying, "Issues of fact exist as to whether [defendants] were negligent in allowing the crates as makeshift steps to remain and whether ... and to what extent plaintiff was also negligent." It said a jury should determine when the crates were stacked in front of the loading dock, "who put them there and what they were used for." It said the issue "is not whether or not there was any safe egress, there were these milk crates positioned as steps and I think it is a question of fact for the jury to determine whether or not the [defendants] knew that they were there being used in that way; and whether or not they put them there or ... truckers had put them there...."

The Appellate Division, First Department reversed and dismissed the suit. "It is undisputed that plaintiff ... was injured when he followed a coworker in climbing down from a loading platform by stepping onto piled up milk crates..., although defendants provided a wall-mounted ladder for use in exiting the platform," it said. "Plaintiff's choice to use the crates rather than the ladder was the sole cause of his injuries.... Whether the ladder was visible behind the trucks that were parked in the area is irrelevant, since plaintiff testified that he did not look for another means of accessing the parking level."

Newman argues that his view of the ladder was blocked by the truck, and "there is nothing in the record here to support a factual finding that Mr. Newman knew that ladders existed on the worksite, knew where the ladders were located, or even whether ladders were meant to be used to descend" from the loading dock. "Whether Mr. Newman had a choice, and thus whether he is the sole cause of his injuries, wholly depends ... on whether the wall-mounted ladder (or any other form of egress from the platform ...) was 'readily available' as that term is understood in the law. Because it cannot be said, as a matter of law, that such means were readily available to Mr. Newman, Mr. Newman cannot be said to have made a 'choice.'"

For appellant Newman: Annie E. Causey, Manhattan (212) 397-1000
For respondents RCPI et al: Glenn A. Kaminska, Albertson (516) 294-5433

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To be argued Tuesday, October 18, 2016

No. 175 People v Timothy Brewer *(papers sealed)*

Timothy Brewer was arrested on the complaints of two girls, the seven- and nine-year-old daughters of a girlfriend, who said he forced them to perform oral sex on him in a closet of his Rochester apartment in 2009. Prior to trial, the prosecution filed a "Molineux proffer" seeking permission to present testimony of the girl's mother as direct evidence of Brewer's "unique habit" of pulling his t-shirt over his head, securing it behind his neck, and receiving oral sex while he smoked crack cocaine in a closet he called the "bat cave." The proposed testimony mirrored descriptions the girls gave of their abuse, and the prosecutor argued the testimony would provide corroboration for their accounts. Supreme Court granted the application, and the mother testified that she frequently performed oral sex on Brewer in the "bat cave" while he smoked crack with his t-shirt pulled over his head. She said she also saw Brewer engage in the same conduct in the closet with another woman. Brewer took the stand and denied the girls' allegations, but acknowledged he sometimes smoked crack in the "bat cave" while receiving oral sex with his shirt over his head. Convicted of predatory sexual assault against a child and first-degree sexual abuse, Brewer was sentenced to 25 years to life in prison.

Brewer argued on appeal that admission of the mother's testimony violated the Molineux rule, which bars the use of prior bad acts or uncharged crimes to prove a defendant's propensity to commit a current crime and, if such evidence is offered for a different purpose, requires that it be more probative than prejudicial.

The Appellate Division, Fourth Department affirmed the conviction, saying, "[E]vidence of defendant's so-called 'sexual proclivities' does not constitute Molineux evidence because it was neither a crime nor a prior bad act for him to receive consensual oral sex from an adult in a closet with his T-shirt pulled over his head. The only evidence of an uncharged crime or prior bad act concerned defendant's use of crack cocaine, which was not overly prejudicial to him in the overall context of the trial given that he was not charged with any drug offenses. In any event, the evidence was not proferred only to show defendant's bad character or propensity toward crime; rather, the stated purpose of the evidence was to corroborate details of the victim's testimony. As the prosecutor argued in her summation, the victims would not likely know of defendant's sexual proclivities unless they were sexually abused by him."

Brewer argues, "The Appellate Division's conclusory holding ... that evidence of Mr. Brewer's daily use of crack cocaine and of his smoking crack cocaine while being sexually serviced orally by women do[] not constitute acts subject to the Court's prohibition against the admission of prior acts to show a defendant's propensity or character, cannot be reconciled with either the purposes of this rule or with the cases ... in which the Court ... and other appellate courts ... have held non-criminal conduct to be acts covered by the rule." He says it was error to admit the mother's testimony "since it did not go to any proper purpose other than propensity and even if it did, the prejudicial impact outweighed its probative value." The trial court "never instructed the jury that it was not to consider this inflammatory and upsetting testimony as evidence that Mr. Brewer had a propensity to commit the charged crimes."

For appellant Brewer: Brian Shiffrin, Rochester (585) 423-8290
For respondent: Monroe County Assistant District Attorney Robert J. Shoemaker (585) 753-4810

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To be argued Tuesday, October 18, 2016

No. 176 Matter of Leo

Donald William Leo was an attorney in Coram, Suffolk County, in January 2004, when he resigned from the bar while under investigation by the Grievance Committee for the Tenth Judicial District for alleged misconduct involving his escrow account. In March 2004, he sold his law practice to his son under an agreement drafted by independent counsel, an attorney who was serving on the Committee on Character and Fitness and had previously chaired the Grievance Committee. The price was set at $100,000, to be paid in annual installments of $10,000 at 6 percent interest. The agreement also provided that Leo would be paid a share of the fees due on outstanding personal injury cases and included a listing of the specific percentage he would receive in each case. At the same time, he notified his clients that he had sold his practice to his son and was moving to Tennessee, and advised them that they could retain new counsel or remain with his son. The letters did not mention disbarment. Three months later, in June 2004, the Appellate Division, Second Department accepted his resignation and disbarred him.

Leo applied for reinstatement June 2011, and the Appellate Division referred the matter to the Committee on Character and Fitness. A subcommittee questioned him at a hearing about the money he received from the sale of his practice, a total of $405,000 from 2007 through 2012, and about whether he obtained court orders fixing the amount of his fees and disbursements as required by the disciplinary rules. Leo said he did not apply for such orders because he was advised by counsel that the sums he received were contractual payments for the sale of his practice: "I was not accepting fees. I was accepting a purchase price from my son." He said he was also advised that he did have to file closing statements for personal injury cases resolved after his resignation, and that he did not have to notify any clients of his disbarment because the order was issued three months after he sold his practice, when he no longer had any clients. The subcommittee indicated it would recommend against reinstatement due to concern he used the sale to evade his duty to obtain court orders fixing his fees, but it granted him a continuance and he filed motions in five counties for orders fixing his fees and for leave to file retroactive closing statements, all of which were granted. The subcommittee then found Leo fit to practice law and "firmly" recommended reinstatement, saying he "believed that all of his actions were proper and in accordance with a detailed business plan designed by attorneys" and when he learned the "plan was flawed, he promptly and thoroughly took action to correct the situation."

The full committee recommended reinstatement be denied, saying it was "concerned that (1) your letter notifying clients that you were retiring did not conform to the rules of the Appellate Division [by telling them he was being disbarred], and (2) that your failure to seek court approval of disbursements and fees..., until after the Subcommittee had noted this irregularity..., did not evidence the present character and fitness required for reinstatement." The Appellate Division denied reinstatement in a single sentence, saying Leo "does not demonstrate the requisite fitness and character to practice law."

Leo argues the Committee on Character and Fitness erred in finding he violated the rule requiring notification to clients of disbarment, since he had no clients when it took effect, and in failing to consider that he acted under the advice of counsel when he did not seek court approval of his fees and disbursements until after the subcommittee raised the issue. He argues the Appellate Division deprived him of due process by failing to specify the reasons why it denied him reinstatement.

For appellant Leo: John F. Clennan, Ronkonkoma (631) 588-6244
For respondent Grievance Committee: Robert H. Cabble, Hauppauge (631) 231-3775

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To be argued Tuesday, October 18, 2016

No. 172 Flo & Eddie, Inc. v Sirius XM Radio, Inc.

Flo & Eddie, Inc., which claims ownership of the recordings of the 1960s rock band "The Turtles," brought this federal class action for copyright infringement against Sirius XM Radio, Inc., the largest radio and internet broadcaster in the country. Flo & Eddie, controlled by two of The Turtles' founding members, acquired the rights to the recordings in 1971 and continues to market them. Sirius XM's broadcasts include songs by The Turtles and other recordings made before February 15, 1972, when the federal Copyright Act was amended to give limited copyright protection to sound recordings. Recordings produced prior to that date are protected, if at all, by state copyright law. Flo & Eddie claims Sirius XM infringed its New York copyright by broadcasting the recordings and making internal reproductions of them to facilitate its broadcasts. It filed similar suits in California and Florida based on the laws of those states. Sirius XM says it pays royalties to the owners of musical compositions, but not to Flo & Eddie or other owners of pre-1972 sound recordings because they have no legal right to demand payment when their recordings are played. It says they are protected from having their recordings reproduced and sold by others and are compensated from the sale of their recordings, but have no "right of public performance" (i.e., the right to control when and where their recordings are played).

The U.S. District Court in the Southern District of New York denied Sirius XM's motion for summary judgment, ruling New York provides a common law right of public performance to copyright holders. "New York courts have long afforded public performance rights to holders of common law copyrights in works such as plays ... and films...," it said. "No New York case recognizing a common law copyright in sound recordings has so much as suggested that right was in some way circumscribed, or ... was less than the bundle of rights accorded to plays or musical compositions." It acknowledged that "this holding is unprecedented ... and will have significant economic consequences. Radio broadcasters -- terrestrial and satellite -- have adapted to an environment in which they do not pay royalties for broadcasting pre-1972 sound recordings. Flo and Eddie's suit threatens to upset those settled expectations."

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issue in the case by answering a certified question: "Is there a right of public performance for creators of sound recordings under New York law and, if so, what is the nature and scope of that right?" The court said, "[W]hether to recognize such a right of public performance is essentially a 'public policy choice[]' appropriately resolved by a New York court. There are clear costs to recognizing a right of public performance in sound recordings.... Still, New York's interest in compensating copyright holders may perhaps outweigh the cost of making such a change. Whatever the merits of such a determination might be as a value judgment, however, it <u>is</u> a value judgment, which is for New York to make."

For appellant Sirius XM: Jonathan D. Hacker, Washington, DC (202) 383-5300
For respondent Flo & Eddie: Caitlin J. Halligan, Manhattan (212) 351-4000

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To be argued Wednesday, October 19, 2016

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

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

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

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

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

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

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

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To be argued Wednesday, October 19, 2016

No. 178 People v Earl Jones

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

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

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

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

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

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

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To be argued Wednesday, October 19, 2016

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

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

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

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

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

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

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To be argued Wednesday, October 19, 2016

No. 180 Rasheed Al Rushaid v Pictet & Cie

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

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

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

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

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

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To be argued Wednesday, October 19, 2016

No. 181 People v Wilson Tardi

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

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

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

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

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For respondent: Erie County Assistant District Attorney Matthew B. Powers (716) 858-2424

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, October 20, 2016

No. 182 Matter of ACME Bus Corp. v Orange County

In May 2013, the Orange County Department of General Services issued a request for proposals (RFP) to provide transportation for disabled preschool children in three separate zones. Pursuant to General Municipal Law § 104-b, the County's RFP established specifications that companies must meet and set up a scoring system for evaluating competing proposals, which awarded points in eight performance categories and one cost category. The cost category, worth 20 out of 100 possible points, provided that the company submitting the lowest-cost proposal would receive the full 20 points and that points would be awarded to its competitors based on a "percentage to points ratio," in which the percentage difference between the low offer and a competing proposal would be multiplied by 20 and the result subtracted from the maximum score of 20. Instead, when the proposals received from three companies were scored, the County awarded 20 points to the lowest-cost offer and deducted two points for each 4 percent increase over the low price for the other proposals, which gave greater weight to the cost factor.

ACME Bus Corp., which held the expiring transportation contract, submitted the highest-cost proposal in all three zones, an average of 27 percent higher than the lowest-cost proposals, and it was awarded eight points in the cost category for each zone. Under the system specified in the RFP, ACME's cost scores would have been 14, 13 and 11. The County awarded three-year contracts to Quality Bus Service, LLC for two zones and to VW Trans, LLC for the third zone, later saying the annual cost of the contracts was about $1.6 million less than ACME's proposals.

ACME brought this article 78 proceeding to annul the determination as arbitrary, capricious and in violation of law because, among other things, the County deviated from its own scoring system for the cost category and because it awarded 4.5 out of a possible 5 points in the financial stability category to VW, which had submitted detailed financial information, but did not submit audited financial statements as required by the RFP.

Supreme Court dismissed the suit. It said ACME failed to show the County's award of the contracts "lacked a rational basis or that an actual impropriety, unfair dealing or some other violation of statutory requirements occurred.... The court declines [ACME's] tacit invitation to redo the [County's] scoring of the proposals. The record indicates that the scorers had a rational basis for their determination and the court's inquiry there ends." The Appellate Division, Second Department affirmed, saying the determination "was not arbitrary and capricious or lacking a rational basis in the record...."

ACME argues the County was legally bound to follow the specifications and scoring provisions of its own RFP and it "acted arbitrarily and capriciously when it deviated" from them. It says, "The County cannot justify its intentional deviation from its own RFP evaluation criteria by claiming that it was in the 'best interests' of the County to save $1.6 million annually.... [T]he County is always free to reject all proposals, revise the RFP and start over if it is displeased with the submissions it received."

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For respondent Quality: David A. Donovan, Goshen (845) 294-9447
For respondent VW: Joseph P. Rones, Newburgh (800) 634-1212
For respondent Orange County: Carol C. Pierce, Goshen (845) 291-3150

State of New York Court of Appeals

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To be argued Thursday, October 20, 2016

No. 185 Kimmel v State of New York

In 1995, former State Trooper Betty Kimmel brought this action under New York's Human Rights Law against the State and the Division of State Police, alleging that she had been subjected to gender discrimination and to sexual harassment and retaliation throughout her 15-year career. In 2007, after 12 years of litigation and multiple appeals to the Appellate Division, Fourth Department, a jury awarded Kimmel $798,000 in compensatory damages. In 2008, Kimmel and her former counsel in the case, Emmelyn Logan-Baldwin, moved for attorneys' fees and expenses under CPLR article 86, the Equal Access to Justice Act (EAJA).

The EAJA provides that "a court shall award to a prevailing party ... fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust" (CPLR 8601[a]). The statute defines "action" as "any civil action or proceeding brought to seek judicial review of an action of the state as defined in subdivision (g) of [CPLR 8602], including an appellate proceeding, but does not include an action brought in the court of claims" (CPLR 8602[a]).

Supreme Court denied the motions for attorneys' fees, ruling that the EAJA "does not apply to a situation where a plaintiff has recovered compensatory damages for tortious acts of the State and its employees," but instead "permits recovery only in those cases where a party 'seeks judicial review of an action of the state.'"

The Appellate Division, Fourth Department reversed in a 3-2 decision and remanded the matter for a determination of the amount of fees and costs. The majority said that, "under a plain reading of the statute, the EAJA applies to this action. The EAJA unambiguously applies to 'any civil action brought against the state'.... [T]here is nothing in the text of the EAJA that limits recovery of attorneys' fees to CPLR article 78 proceedings or to declaratory judgment actions.... We conclude that the phrase 'any civil action' ... means just that -- any civil action, including this action seeking relief pursuant to the Human Rights Law." It said "the legislative history of the EAJA does not reveal a clear legislative intent to exclude the instant action...."

The dissenters argued that, "in drafting the EAJA, the Legislature intended that attorneys' fees and expenses be sought only in civil actions that involve the review of the actions of the State that are administrative in nature.... Our research has revealed more than 70 cases in which the EAJA was applied to award attorneys' fees in cases that involved administrative actions of the State, and none that did not." They said, "In our view, when construing the EAJA as a whole..., the 'spirit and purpose of the legislation'..., as gleaned from the statutory context and the legislative history, is to provide redress for litigants contesting the actions of the State in administrative matters...."

On remand, after four more years of litigation, Supreme Court awarded $498,000 in fees for Logan-Baldwin and $320,000 in fees for Kimmel's current counsel Harriet Zunno.

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For respondents Kimmel and Logan-Baldwin: A. Vincent Buzard, Pittsford (585) 419-8800

State of New York Court of Appeals

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To be argued Thursday, October 20, 2016

No. 183 Matter of Odunbaku v Odunbaku *(papers sealed)*

The parties here are the parents of a child born in 2004 and, in 2008, the father was ordered to pay $236.00 per week in child support to the mother. In 2009, the father filed a petition in Staten Island Family Court requesting a downward modification of his support obligation. Five months later, the mother filed a cross-petition accusing the father of violating the support order. Both parties were represented by counsel.

After a hearing, a support magistrate granted the father's petition and reduced his child support obligation from $236.00 per week to $25.00 per month. The magistrate dismissed the mother's petition in a separate order. Family Court mailed the orders and findings of fact to the parties, but not to their attorneys, on July 24, 2013. Both orders noted that any objections must be filed within 35 days after the mailing. On September 3, 2013 -- 41 days later -- the mother's attorney from Staten Island Legal Services filed objections to both orders.

Family Court denied the mother's objections as untimely under Family Court Act § 439(e), which provides that "objections to a final order of a support magistrate may be filed by either party with the court within ... thirty-five days after mailing of the order to such party or parties." The mother moved for reargument, contending the court misconstrued the service requirements of the statute and should have mailed the orders directly to her attorney.

Family Court adhered to its decision that her objections were untimely and "to its prior finding that the mailing of a copy of the order and findings of fact to a party of the proceedings satisfies the requirements of [Family Court Act] § 439(e) and 22 NYCRR 205.36(b)." It said, "[N]either the Family Court Act nor applicable court rules specifically requires that the Clerk of Court shall mail a copy of the Support Magistrate's order and decision to a party's attorney if a party is represented by counsel."

The Appellate Division, Second Department affirmed, ruling the Clerk of the Court was not required to mail the magistrate's orders to the mother's attorney. "Since there is no provision in Family Court Act § 439(e) that addresses the issue of whether the Clerk of the Court is mandated to mail copies of the findings of fact and orders of the Support Magistrate to a party's counsel when the party is represented, the procedure shall be in accord with 22 NYCRR 205.36(b), which provides ... that at the time of the entry of an order of support, the Clerk of the Court 'shall cause a copy of the findings of fact and order of support to be served either in person or by mail upon the parties to the proceeding or their attorneys,'" it said.

The mother argues the 35-day time limit for filing objections was not triggered because the orders were not mailed to her attorney. She relies on Bianca v Frank (43 NY2d 168 [1977]), which held that "once counsel has appeared in a matter a Statute of Limitations or time requirement cannot begin to run unless that counsel is served with the .. order or judgment sought to be reviewed.... [A]ny general requirement that notice must be served upon the party ... must be read in the accepted sense to require, at least, that notice be served upon the attorney the party has chosen to represent him." She argues that her case is indistinguishable from Bianca and that "important public-policy interests" support its application here.

For appellant mother: Joseph Palmore, Washington, DC (202) 887-1500
For respondent father: Cindy A. Singh, Manhattan (212) 297-0503