# State of New York
# Court of Appeals

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# NEW YORK STATE COURT OF APPEALS

## Background Summaries and Attorney Contacts

## March 11 thru March 13, 2025

# State of New York
# Court of Appeals



To be argued Tuesday, March 11, 2025, in Binghamton

**No. 35 Matter of Dynamic Logic, Inc. v Tax Appeals Tribunal**

Dynamic Logic, Inc. offers a service to its business clients, AdIndex, designed to measure the effectiveness of their advertising. The service includes surveying consumers and comparing responses from those who have been exposed to the client's advertising campaign with responses from those who have not, and Dynamic Logic then provides the client with a report analyzing the results and making recommendations to improve the effectiveness of its advertising. The report compares the client's advertising results with industry benchmarks in Dynamic Logic's subscription database, MarketNorms, which aggregates anonymized results from prior surveys conducted for other AdIndex clients. The results of the latest surveys are also added to the MarketNorms database for future use.

In 2016, after an audit, the State Department of Taxation and Finance determined that AdIndex was a taxable information service under Tax Law § 1105(c)(1), which imposes sales tax on: "The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons." The Department assessed nearly $2.3 million in sales taxes against Dynamic Logic for its sale of AdIndex services from September 2011 through August 2014. The Division of Tax Appeals upheld the determination and the Tax Appeals Tribunal affirmed.

The Appellate Division, Third Department confirmed the Tribunal's determination that AdIndex provides taxable information services. "While petitioner insists that the services under consideration constitute nontaxable consulting services, the record supports the finding that the primary function of AdIndex is the collection and analysis of information...," the court said. "Although AdIndex reports also include certain advice and/or recommendations to improve the effectiveness of the client's ad campaign..., the record reflects that such recommendations are, for the most part, drawn directly from the data collected." It said AdIndex did not qualify for the tax exclusion for information that is not "substantially incorporated" into reports furnished to others because Dynamic Logic's clients "could purchase access to the MarketNorms database and the raw data contained therein" and because "MarketNorms data is also used by petitioner to prepare AdIndex reports for its customers" comparing their ad results with industry benchmarks.

Dynamic Logic argues that AdIndex is not a taxable information service "because there is no dissemination of information to other persons" and because it is actually a consulting service. "AdIndex provides a unique report to each client that is relevant only to that client and that is never provided to another." It also contends that AdIndex qualifies for the tax exclusion "because a client's information is never 'substantially incorporated' into reports provided to others." It says the survey response data aggregated in MarketNorms is minimal, not substantial.

For appellant Dynamic Logic: Leah Robinson, Manhattan (212) 506-2799
For respondent Tribunal: Assistant Solicitor General Frederick A. Brodie (518) 776-2317

# State of New York
# Court of Appeals



To be argued Tuesday, March 11, 2025, in Binghamton

**No. 30 People v Christopher Farrell**

In September 2021, a building inspector for the City of Kingston found a dog lying immobile in a street and an investigator for the Ulster County Society for the Prevention of Cruelty to Animals picked the dog up as a stray. Four days later the investigator charged the dog's owner, Christopher Farrell, with "failure to provide necessary sustenance" to his dog under Agriculture and Markets Law § 353. In a misdemeanor complaint, the investigator alleged that Farrell "did allow a Black/Tan/White, male Burmese Mountain Dog known as 'Mogley' ... to live with the debilitating medical condition of Spondylosis, causing chronic pain and suffering; as well as being infested with fleas, a mass on his spine and a mass near his heart; denying the animal access to veterinary care. According to Mr. Farrell, he stated the dog has never visited a vet and Mogley is going to die anyway." Farrell moved to dismiss the complaint on the grounds that it was facially insufficient and that section 353 is unconstitutionally vague.

Kingston City Court dismissed the complaint for facial insufficiency, saying the complaint "fails to allege any factual information in non-hearsay form. The investigator verifying the complaint does not allege that he observed the dog known as 'Mogley' nor does he refer to any examination of the dog by a veterinarian." If the term "sustenance" in section 353 "includes veterinarian care as argued by the people, the complaint must set forth what care was mandated but not provided...," it said. "There is nothing to establish what 'sustenance' i.e. veterinary care would entail in the treating of the alleged conditions nor is there any allegation that the defendant refused to provide veterinary care once advised of the alleged conditions."

Ulster County Court reversed and reinstated the complaint. "The hearsay descriptions of Spondylosis and masses, if the only claimed facts in support, would be, standing alone, insufficient to convert the complaint to a triable document," the court said. "However, the factual portion's descriptions of the flea infestation and denial of veterinary care are supported by [the investigator's] direct observations of the dog's condition and defendant's admissions." It concluded that "a failure to provide veterinary care ... may constitute torture or cruelty sufficient to support a charge" under section 353. The court went on to reject Farrell's claim that the statute is void for vagueness, saying that "a person of ordinary intelligence could certainly ... determine whether the act was prohibited and unjustified.... This would assuredly include denial of necessary care where a companion animal plainly suffers from willful neglect."

Farrell argues the complaint is facially deficient because, among other things, it "fails to identify what treatment was available and denied to the dog. There is no allegation that Mr. Farrell was aware, or should have been aware, that the dog had spondylosis or that it had two internal masses." He also contends the failure to provide "necessary sustenance, food or drink," as used in section 353, is unconstitutionally vague because a person of ordinary intelligence would not understand that "sustenance" includes veterinary care and that "failure to discover and treat a latent mass on a dog's spine or near a dog's heart would lead to criminal liability." He says the statute, "precisely because it is silent about veterinary care, provides no guidance as to when ... a person may be criminally charged with 'veterinary neglect.'"

For appellant Farrell: Mitchell H. Spinac, Kingston (845) 331-5777
For respondent: Ulster County Assistant District Attorney Sohil Sharedalal (845) 340-3280

# State of New York
# Court of Appeals



To be argued Tuesday, March 11, 2025, in Binghamton

**No. 32 Matter of Schulze v City of Newburgh Fire Department**

Adam Schulze was a firefighter for the City of Newburgh in April 2012, when he suffered disabling work-related injuries to his neck and back, established a claim for workers' compensation benefits and, in 2015, was classified as permanently partially disabled. The City continued to pay Schulze his full salary during his disability, as required by General Municipal Law (GML) § 207-a(1), and it was reimbursed for those wage payments from his workers' compensation awards pursuant to Workers' Compensation Law (WCL) § 25(4)(a). His application for performance of duty disability retirement was approved in April 2016 and he began receiving a 50% pension. At the same time, the City stopped paying his full wages and, pursuant to GML § 207-a(2), began paying him pension supplements to make up the difference between his pension and the amount of his regular wages. In 2020, Schulze received a new award of workers' compensation benefits retroactive to April 2016 and the City sought reimbursement of the pension supplements it had been paying him under GML § 207-a(2).

The Workers' Compensation Board (WCB) rejected the City's reimbursement claim, ruling that pension supplements paid under GML § 207-a(2) are a retirement benefit, not "wages" that would be reimbursable under WCL § 25(4)(a) or § 30(2).

The Appellate Division, Third Department affirmed based on its 1987 decision in M/O Harzinski v Village of Endicott (126 AD2d 56), which held that "the benefit payments ... under General Municipal Law § 207-a(2) do not constitute wages within the meaning of Workers Compensation Law § 25(4)(a) or § 30(2)," which authorize reimbursement from compensation awards for disability payments made "to an employee in like manner as wages" and for "salary or wages paid." The court said, "Any payments made to [Schulze] after he was granted a retirement allowance ... in April 2016 were made to him as a retiree and not as an employee. Further, once granted disability retirement, [GML] § 207-a(2) states that payment of full wages 'shall be discontinued' and does not characterize the statutory benefits paid thereafter as wages but as 'the difference between the amounts received under such ... pension and the amount of his [or her] regular ... wages.'"

The City argues that it is entitled to reimbursement for the payments it made under GML § 207-a(2) because the purpose of the "statutory structure was to prohibit duplicate payments of compensation." It says, "The statutory framework ... generally ensures firefighters who become disabled ... are fairly compensated by receiving the combined equivalent of their regular full salary and wages. However, this same framework provides for an employer to have a right of reimbursement or a credit against an award of compensation as a result of payments made under § 207-a.... Allowing [Schulze] to directly receive workers' compensation benefits retroactively for over three years, where he was already in receipt of a combination of benefits equivalent to his regular salary and wages, thwarts the intent of the statutory scheme, and bestows a prohibited duplicate benefit on the claimant while harming the employer."

For appellant Newburgh F.D. Lars P. Mead, Binghamton (607) 723-9511
For respondent Schulze: Richard T. Cahill Jr., New Windsor (845) 671-3217
For respondent WCB: Assistant Solicitor General Dustin J. Brockner (518) 776-2017

# State of New York
# Court of Appeals

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To be argued Wednesday, March 12, 2025, in Binghamton

**No. 33 Katleski v Cazenovia Golf Club**

While playing in a golf tournament at the Cazenovia Golf Club in June 2020, David Katleski was seriously injured when he was struck in the left eye by a ball. Katleski was riding in a cart on the seventh fairway when the accident occurred and the ball that struck him had been shanked by a player at "tee A" on the adjacent third fairway. Katleski filed this personal injury action against the Golf Club, alleging that it negligently operated a dangerously designed golf course that increased the risk of being struck by a ball. The Club moved for summary judgment dismissing the suit, arguing that Katleski, by engaging in the sport, had voluntarily assumed the risk of being struck by a mis-hit ball.

Supreme Court denied the Club's motion. It found "Katleski assumed the risk" of being hit by a ball, which is "a foreseeable injury in the sport of golf." But it said his expert evidence – that the proximity of the third and seventh holes, the placement of tee A where it was obscured by a lightening shed, and the lack of barriers created unusual risks -- raised a triable issue of fact "as to whether [the Club] created a danger over and above the inherent dangers of the sport."

The Appellate Division, Third Department reversed and dismissed the complaint on a 3-2 vote. The majority said "the determinative fact is that plaintiff, a highly experienced golfer, knew of the risks involved in playing in the tournament and made an informed decision to keep doing so despite the lack of protective barriers and his asserted concern during the first round about the tee A location at hole three. The risk posed by playing under such suboptimal conditions – i.e., getting hit by a shanked shot – is inherent to the sport of golf and was readily apparent to plaintiff, who acknowledged his appreciation of the dangers involved.... Accordingly, plaintiff assumed the risk of injury, as a matter of law, when he continued to play despite his awareness and appreciation of the danger involved...."

The dissenters argued the suit should not be dismissed because, under this Court's precedents, "if the risks inherent in a sport are either concealed or unreasonably enhanced by the defendant, then the case is not barred by the primary assumption of risk doctrine.... [A] question of fact has been presented here as to whether defendant unreasonably enhanced the risks inherent in the game of golf." They said, "The majority goes astray when it decides that, even if defendant did unreasonably increase the risks inherent in the game of golf, plaintiff's claim is barred by the primary assumption of risk doctrine because plaintiff was aware of the increased risks.... [T]he majority changes the 'or' in the rule ... to an 'and,' requiring plaintiff to establish both that defendant unreasonably enhanced the risks inherent in golf and that the risks were unknown to him."

For appellant Katleski: Kara M. Rosen, Westbury (516) 742-9200
For respondent Cazenovia Golf Club: W. Bradley Hunt, Syracuse (315) 474-7571

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To be argued Wednesday, March 12, 2025, in Binghamton

**No. 34 Maharaj v City of New York**

Parnand Maharaj, a player in the Queens Cricket League, brought this personal injury action against New York City to recover damages for a broken leg he allegedly suffered while playing cricket on the asphalt tennis courts of a Brooklyn park in August 2015. He claimed that as he ran to catch a ball, he stumbled and fell when he stepped in a hole that was two to four inches deep and fractured his lower leg. He said the hole was concealed in a large crack, about seven feet long and three to eight inches wide, in the playing surface. The City moved for summary judgment dismissing the suit on the ground that Maharaj had assumed the risk of his injury by playing in the game. Supreme Court granted the motion to dismiss without opinion.

The Appellate Division, Second Department affirmed, with two justices saying the City's submissions, including Maharaj's deposition "and photographs allegedly depicting the accident site, reveal that the crack in the surface of the subject tennis courts, which allegedly caused the plaintiff's accident, was clearly visible.... In opposition, the plaintiff failed to raise a triable issue of fact as to whether the open and obvious crack concealed the depth and extent of the alleged hole...." They said the suit was properly dismissed based on the assumption of risk doctrine.

Two justices concurred in result under constraint of Second Department precedent, which "compels dismissal of the complaint," but they argued that "Court of Appeals precedent dictates a contrary result." They said, "The doctrine of primary assumption of risk was never intended to allow a landowner to permit a recreational facility to fall into a neglectful state of disrepair, completely relieving it of any duty to sports participants.... In the case at bar, the outdoor tennis court contained cracks that were long-persisting and readily apparent." They said "'the doctrine of assumption of risk does not exculpate a landowner from liability for ordinary negligence in maintaining a premises'," citing Sykes v County of Erie (94 NY2d 912).... "The cracked condition of the tennis court was not a risk inherent in the sport of tennis or cricket. 'Rather, it may qualify as and constitute an allegedly negligent condition occurring in the ordinary course of any property's maintenance[,] ... implicat[ing] typical comparative negligence principles' (Morgan v State of New York [90 NY2d 471])."

For appellant Maharaj: Joshua Annenberg, Manhattan (646) 872-2040
For respondent City: Associate Corporation Counsel Ingrid R. Gustafson (212) 356-2611

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To be argued Wednesday, March 12, 2025, in Binghamton

**No. 29 Flanders v Goodfellow**

Rebecca Flanders was a rural mail carrier for the U.S. Postal Service in December 2018, when she was attacked by a dog owned by Stephen and Michelle Goodfellow as she was delivering packages to their house in the Town of Manlius, Onondaga County. As Flanders approached the porch, Stephen Goodfellow opened the door with a small dog standing beside him. A much larger dog named Murdock, weighing 70 to 75 pounds, then lunged through the doorway and bit her twice on the shoulder, remaining latched on until Goodfellow pulled the dog away. Flanders filed this action against the Goodfellows to recover for her injuries, alleging they were strictly liable because they knew or should have known of Murdock's vicious propensities. She also alleged they were negligent in failing to restrain the dog or warn of the risk he posed.

The Goodfellows moved for summary judgment dismissing the suit, saying they had no reason to know Murdock had vicious propensities and that New York law does not allow negligence claims for injuries caused by domestic animals. They cited Flanders' deposition testimony that the Postal Service system for warning about dangerous dogs contained no warning about Murdock. They said they had received no complaints about Murdock nor seen him growl, bare his teeth, or snap at anyone prior to the incident with Flanders. Flanders submitted affidavits from two fellow mail carriers, one of whom said Murdock was "the most aggressive dog [he had] ever encountered" and would "actually bite the window, as though [he] was trying to bite you." He said Murdock "barked, snarled, and growled" and, "if the dog's owners were home..., they knew or should have known the dog was aggressive and dangerous before the attack." The other carrier testified similarly that Murdock was "different" than other dogs because he "appeared to be attempting to attack me through the glass.... The dog's behavior was extremely loud and created a huge ruckus such that anybody home would have known of it."

Supreme Court dismissed the suit, saying the evidence "established that Defendants had never known Murdock to exhibit aggressive behavior, nor had anyone ever advised them or complained to them about Murdock's behavior.... Further, the fact that the Defendant would open the door ... and not bar the dogs from exiting seems to demonstrate that he 'did not conceive of the possibility that the dog would attack.'" The court said Flanders failed to meet her burden of raising a material question of fact regarding the Goodfellows' prior knowledge of Murdock's propensities. Her fellow mail carriers described the dog "trying to attack them through the glass," but "neither of them reported this dangerous behavior to either the post office, or the defendant homeowners."

The Appellate Division, Fourth Department affirmed, saying the defendants demonstrated "that they neither knew nor had reason to know of the dog's allegedly vicious propensities ... and plaintiff failed to raise a triable issue of fact in opposition." It said the negligence claim was properly dismissed because dog bite cases "may proceed only under a theory of strict liability...."

Flanders argues that her evidence, particularly the affidavits of her fellow mail carriers, raise material question as to whether the defendants had actual or constructive notice of their dog's aggressive behavior. "Over a three-year period, Murdock tried to attack mailpersons outside the front door as they delivered packages. The dog snarled and growled as he tried to bite through the window" so loudly "'that anybody home would have known of it'.... Under these circumstances, a reasonable factfinder could conclude that Murdock's threatening and menacing behavior existed for such a period of time that a reasonably prudent person would have discovered it." She says the defendants' denial of prior knowledge "merely raises credibility questions" for a factfinder to resolve. She also argues the Court should allow negligence claims for injuries caused by domestic animals, overruling Bard v Jahnke (6 NY3d 592), and require the owners to "exercise reasonable care to prevent foreseeable injury."

For appellant Flanders: Matthew J. Kaiser, Rochester (585) 444-4444
For respondent Goodfellows: Michael F. Perley, Buffalo (716) 849=8900

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To be argued Wednesday, March 12, 2025, in Binghamton

**No. 36 People v Kevin Cleveland**

Two police officers were on patrol in Rochester in June 2016 when they saw a woman on a sidewalk throw a glass bottle at a sedan, shattering it against the side. The car stopped and the driver, Kevin Cleveland, stepped out and approached the woman, shouting at her with his fists clenched. The officers exited their vehicle and intervened, ordering Cleveland to stop. One of them later testified that Cleveland looked toward them, "began to back away, and then quickly turned and began digging in the front of his waistband and running" away. He left his car in the street with the driver's door open. As the officers chased him he discarded what appeared to be a small plastic bag. After detaining him they recovered the bag, which contained crack cocaine.

Cleveland moved to suppress the cocaine on the ground that the officers chased and detained him without a reasonable suspicion that he was about to commit a crime. Supreme Court denied his motion and a jury found him guilty of fourth degree criminal possession of a controlled substance and second degree aggravated unlicensed operation of a motor vehicle. He was sentenced to 4 ½ years in prison.

The Appellate Division, Fourth Department affirmed in a 4-1 decision, saying that early in the encounter, "it was reasonable for the officers to suspect that defendant was about to commit a crime because he approached the woman in an aggressive manner with clenched fists while yelling at her. The officers thus properly ordered defendant to stop and could have lawfully frisked him had he not run away. Because the stop was supported by reasonable suspicion, we conclude that the subsequent pursuit was also supported by reasonable suspicion, especially considering that, immediately following the stop, defendant turned his back to the officers, grabbed at his waistband, and then fled on foot, leaving his vehicle in the middle of the street with its driver's door open.... The officers' reasonable suspicion justifying the detention of defendant did not cease to exist when defendant turned and ran."

The dissenter said, "It was certainly reasonable for the officers to suspect that defendant was about to commit a crime as he approached the woman in an 'aggressive manner.' However, once officers directed defendant to stop and he stopped approaching the woman, the reasonable suspicion that defendant was about to commit a crime ceased to exist at that point. Although the majority concludes the reasonable suspicion that existed earlier continued after defendant turned and ran, the majority does not identify any specific circumstances indicative of criminal activity justifying that conclusion...."

For appellant Cleveland: Bradley E. Keem, Syracuse (315) 422-0919
For respondent: Monroe County Asst. District Attorney Martin P. McCarthy, II (585) 753-4674

# State of New York
# Court of Appeals



To be argued Thursday, March 13, 2025, in Binghamton

**No. 37 Nellenback v Madison County**

Michael Nellenback filed this action against Madison County under the Child Victims Act in 2019, alleging the County was liable for negligent hiring and supervision of a caseworker who sexually abused him beginning in 1993, when Nellenback was 11 years old. At that time he had been designated a person in need of supervision and placed in custody of the County's Department of Social Services (DSS). He was assigned to DSS caseworker Karl Hoch, who had been named "Madison County Employee of the Year" in 1990, and he said Hoch began abusing him almost immediately. Hoch's sexual misconduct with other children was reported to the County in 1996 and he was immediately suspended. Hoch was convicted of various sex crimes and sentenced to prison, where he died in 2001.

Supreme Court granted the County's motion for summary judgment dismissing the case, saying it "has made a prima facie showing that Madison County lacked knowledge, actual or constructive, of Karl Hoch's propensity to engage in sexually exploitive and abusive conduct with the children under his care. The record evidence is that Hoch had a lengthy and positive reputation as a County employee."

The Appellate Division, Third Department affirmed on a 3-2 vote, finding the County had met its prima facie burden and Nellenback failed to raise a triable issue of fact regarding his negligent hiring and supervision claims. As for supervision, the majority said, "Plaintiff's reliance on the offhand comment by Hoch's supervisor ... that she could have reviewed Hoch's case notes more carefully does not negate the fact that she regularly met with caseworkers and, more importantly, that there was no indication in any notes, or anywhere else in the record, that would have provided any notice to the supervisor that Hoch was engaged in sexual misconduct." Further, it said "the record is devoid of any proof that would establish the required nexus between the failure by Hoch's supervisor to address any potential inadequacies in Hoch's preparation of case notes and the sexual abuse that Hoch was perpetrating. In light of the lack of evidence signaling a propensity for committing such acts, the suggestion that a more formal review may have revealed some indication of improper interactions with plaintiff amounts to nothing more than hopeful speculation."

The dissenters argued that Nellenback raised a triable question as to whether the County's supervision of Hoch was negligent, saying "Hoch had regular contact with plaintiff over a three-year period and was required, but failed, to document his interactions with the child. The supervisor, in turn, failed to regularly review Hoch's notes..., essentially relying upon Hoch's self-reporting. Had the supervisor actually reviewed Hoch's notes, she would have learned that Hoch failed to document any interaction with plaintiff – an omission that presented a genuine concern as to Hoch's conduct and the safety of the child. As a consequence, Hoch was left in a position to cause foreseeable harm that could have been avoided had more diligent supervision efforts been made. The harm was foreseeable because Hoch was effectively concealing his actual contacts with plaintiff over an extended period of time. Under these circumstances, the record presents a question of fact as to both negligent supervision and causation."

For appellant Nellenback: Hillary M. Nappi, Manhattan (212) 779-0057
For respondent Madison County: Kevin G. Martin, Utica (315) 507-3765

# State of New York
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To be argued Thursday, March 13, 2025, in Binghamton

**No. 38 Carlson v Colangelo**

Kristine Carlson was the long-term romantic partner of Donald Dempsey and, as a registered nurse, served as his caregiver from the time of his cancer diagnosis in 2005 until he died in December 2015. In or about 2005, Carlson transferred $100,000 to Dempsey for the purchase of commercial real estate in Peekskill, which Dempsey created Dempsaco LLC to own. The parties dispute whether the transfer was a loan, which Dempsey partially repaid, or an investment that was to give Carlson a 50% share of Dempsaco. Crissy Colangelo, Dempsey's daughter, is trustee of the Donald P. Dempsey Revocable Trust and executor of his will, and is the principle beneficiary under both instruments. The trust and the will, created shortly before Dempsey's death, contain an in terrorem clause providing that any beneficiary who contests any of their provisions would forfeit any legacies provided for them. The trust provided that the trustee would transfer title to his house in Cortlandt Manor, where he and Carlson lived together, and further stated that it was his "sincere wish and desire that [Colangelo] provide a stream of income, not to exceed [$350,000] in total," to Carlson. Carlson was not informed she was a beneficiary of the trust until two and a half years after Dempsey's death, when she received a letter from Colangelo's attorney telling her that Dempsey "grossly over-estimated the value of Dempsaco LLC.... As such, neither Crissy nor the company has a stream of income or assets with which to pay anything to Kristine." The letter informed Carlson that, in order to receive the house left to her in the trust, she would have to waive all rights to the $350,000 income stream and sign a release indemnifying Colangelo. Carlson filed this suit in January 2019 against Colangelo, as trustee, and Dempsaco, seeking declarations that she was entitled to the house in Cortlandt Manor and the $350,000 income stream and that she was a 50% owner of Dempsaco.

Supreme Court partially granted the defendants summary judgment dismissing Carlson's suit and declaring she violated the in terrorem clause. It said Dempsey had been sole owner of Dempsaco and, pursuant to the trust, "all of [his] interest in Dempsaco went to Colangelo." It said, Carlson "did indeed contest 'any aspect' of the Trust, by ... claiming that she was a 50% member of Dempsaco LLC. This court ultimately determined that Plaintiff is not even a member of Dempsaco LLC. Viewing the totality of the conduct by the parties, it is determined as a matter of law that Plaintiff clearly violated the in terrorem clause of the Trust and, consequently, forfeited her legacies thereunder...." The Appellate Dision, Second Department affirmed.

Carlson argues that the decision below "contravenes both this Court's decision in Matter of Singer [13 NY3d 447] and this State's long-standing public policy of strictly construing *in terrorem* clauses" and, if not reversed, "will result in nullifying the Decedent's intentions: under [Dempsey's] Trust, he wanted [Carlson] to have two pre-residuary bequests: a house and $350,000 in total. She has not received either one." She says Colangelo "abused her fiduciary duties when she sought to force [Carlson] to accept only the house (and to give up the $350,000) bequest)." And her own lawsuit did not violate the in terrorem clause because it sought "to carry out the Decedent's express intentions" under the trust and "never contested any aspect of [Dempsey's] Trust."

For appellant Carlson: Frank W. Streng, White Plains (914) 946-3700
For respondents Colangelo and Dempsaco: Michael Konicoff, Rye (914) 835-6900

# State of New York
# Court of Appeals



To be argued Thursday, March 13, 2025, in Binghamton

**No. 39 Tuckett v State of New York**

Ali Tucker filed this unjust conviction claim against the State under Court of Claims Act § 8-b, asserting that he had been wrongfully convicted of sexually abusing a male relative in Rochester in 2009, when Tuckett was 35 years old and the complainant had just turned 11. After his conviction in 2011, Tuckett was sentenced to 18 years in prison. In 2014, the complainant met with the prosecutor and recanted his accusations, and County Court vacated Tuckett's conviction in 2015.

The Court of Claims dismissed Tuckett's claim after a bench trial, concluding that he failed to establish by clear and convincing evidence that he did not commit the sexual abuse of which he had been convicted. The court found that neither Tuckett's testimony in the civil case nor the complainant's recantation were credible. On appeal, Tuckett contended that the Court of Claims improperly relied on hearsay statements and on documents that were not entered into evidence in the civil case.

The Appellate Division, Fourth Department affirmed in a 3-2 decision. The majority rejected Tuckett's claim that the court improperly considered statements by the complainant's aunt, who did not testify in the civil case, that she was disturbed by an incident in which the complainant had been alone in his bedroom with Tuckett and ran out of the room crying. "But both the complainant and [Tuckett] testified that the aunt saw the complainant coming out of the room crying, and [Tuckett] testified that, at the criminal trial, the aunt may have given such testimony," it said. "There was therefore admissible evidence to support the court's finding...." It said the court, in finding Tuckett's testimony and the complainant's recantation unreliable, did not rely on the complainant's hearsay statements to a police officer and a prosecutor that he 'felt better' after reporting the abuse and was concerned about possible health effects. Instead, it said, the court "gave numerous and detailed reasons based on admissible evidence for making those credibility determinations."

The dissenters said "the Court of Claims erred in considering the grand jury and trial testimony of [the complainant], as well as the trial testimony of complainant's mother and aunt, each of which had been marked for identification, but had not been introduced in evidence.... [I]t is clear from the court's decision that the improperly considered and prejudicial evidence 'substantially affected the verdict.'" They also argued that "the court erred in considering hearsay statements made by complainant to the Assistant District Attorney who had prosecuted the criminal matter.... Inasmuch as the court expressly relied upon the statements as evidence of the credibility of complainant's original accusations, the error cannot be deemed harmless."

For appellant Tuckett: Katie McCarthy, Manhattan (212) 965-9081
For respondent State: Assistant Solicitor General Frank Brady (518) 776-2054

# State of New York
# Court of Appeals



To be argued Thursday, March 13, 2025, in Binghamton

**No. 40 People v Hu Sin**

Hu Sin was charged with forcibly raping a female relative of his wife in her Buffalo apartment in May 2017. The assault was witnessed by the victim's young son and ended when the boy ran out the door. Both Sin and the victim are immigrants from Myanmar and speak only Burmese.

Before trial, the prosecution sought to introduce Molineux evidence of two prior uncharged crimes involving the attempted rape of two other female relatives of his wife. The first incident occurred in Salt Lake City in 2011 or 2012, when Sin entered the woman's home, sent her children outside, and allegedly attempted to rape her. She fought him off until her children returned and knocked on the door, at which point he stopped and urged her to tell no one. She said she did not report the incident at the time because she did not want to violate Burmese cultural norms. The second incident occurred in March 2017, when Sin allegedly attempted to rape the other relative in a house in Buffalo. She, too, fought him off and said he urged and threatened her to tell no one, offering her $500 to keep quiet. She said she told her mother, father and son, about the assault and they convinced her not to report it to the police in order to protect the family's reputation.

County Court granted the Molineux application to admit the testimony about prior uncharged crimes. "Where admitting such testimony establishes an element of the crime charged, such as the forcible compulsion of rape, the probative value exceeds the potential prejudice to the defendant...," it said. "[T]he facts and circumstances surrounding all three incidents have similar fact patterns and do demonstrate a common scheme amongst them." Sin was convicted of first-degree rape and sexual abuse and sentenced to 15 years in prison.

The Appellate Division, Fourth Department affirmed on a 4-1 vote, saying the testimony of the victim's relatives was admissible "'for the purposes of completing the narrative and providing relevant background information of the family dynamic.... [T]he victim and her two [relatives] 'share a specific ethnic background whose culture ... afford[s] men significant power and respect,'" and the testimony "was probative insofar as it helped explain the victim's conduct in the aftermath of the rape as well as why defendant would make such an overt and brazen sexual advance on the victim while her son was present." The majority further found the testimony "was relevant to the element of forcible compulsion" needed to prove the rape and sexual abuse charges. "It was defendant's theory at trial to suggest that defendant and the victim were engaged in rough but consensual sexual acts. Thus, the testimony of the victim's [relatives] was relevant to establish defendant's use of force...."

The dissenter argued that "the prejudicial value of the proffered Molineux evidence outweighed its probative value and adversely affected defendant's ability to have a fair trial." She said, "The testimony provided no additional insights into the parties' relationship, gave no context to explain defendant's conduct, and did not corroborate any particular details of the victim's testimony.... [T]he probative value of defendant's attempted sexual assaults of [her relatives] is nothing more than evidence of defendant's propensity to commit sex crimes."

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