NEW YORK LAW SCHOOL

NYLS Law Review
Vols. 22-63 (1976-2019)

Volume 45 | Issue 3 Article 4

January 2001

Case Compilations

Haley A. Meade

Marina Rabinovich

Jennifer Cesarano

Kostos Cheliotis

Richard W. Gaeckle

See next page for additional authors

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review

Part of the Law Commons

Recommended Citation

Haley A. Meade, Marina Rabinovich, Jennifer Cesarano, Kostos Cheliotis, Richard W. Gaeckle, Adam Taylor, Thomas E. Kemble, Nicholas Kappas, Alifya Vasi, Christopher DeCicco, Christopher Massaro, Douglas D. Zhang, Gregory G. Gomez, Erin L. Roberts, Amy S. Wichowski, Gail Goldfarb, Jeffrey Dodes, Courtney E. McGuinn, Princess M. Tate, Stacey Mesler, Nicole M. Fantigrossi, Robert F. Jordan, Monique D'Errico, Samuel C. Gardner, Paul A. Kemnitzer, Andrea J. Sessa & Cynthia Mitchell, *Case Compilations*, 45 N.Y.L. SCH. L. REV. 463 (2001-2002).

This Case Comments is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

Case Compilations

Authors

Haley A. Meade, Marina Rabinovich, Jennifer Cesarano, Kostos Cheliotis, Richard W. Gaeckle, Adam Taylor, Thomas E. Kemble, Nicholas Kappas, Alifya Vasi, Christopher DeCicco, Christopher Massaro, Douglas D. Zhang, Gregory G. Gomez, Erin L. Roberts, Amy St. Jude Wichowski, Gail Goldfarb, Jeffrey Dodes, Courtney E. McGuinn, Princess M. Tate, Stacey Mesler, Nicole M. Fantigrossi, Robert F. Jordan, Monique D'Errico, Samuel C. Gardner, Paul A. Kemnitzer, Andrea J. Sessa, and Cynthia Mitchell

This case comments is available in NYLS Law Review: https://digitalcommons.nyls.edu/nyls_law_review/vol45/iss3/4

GOLD EX REL GOLD V. UNITED HEALTH SERV. HOSP.[1]

(decided February 15, 2001)

I. SYNOPSIS

In a majority decision, the New York Court of Appeals held that where a state or city social services agency is relying on unique recoupment provisions specific to Medicaid, Social Services Law § 104(2) does not apply, therefore allowing state and city social services agencies to place a lien on the entire amount of a personal injury judgment or settlement.[2] Furthermore, the court held that Social Services Law § 104(1) continues to be a recoupment mechanism when forms of medical assistance other than Medicaid are involved and consequently when public welfare officials rely solely on § 104(1), the limitation in § 104(2) continues to apply.[3]

II. BACKGROUND

Two issue-related proceedings were merged by the court of appeals for this decision. In the first case, Kimberly Santiago, an infant, was allegedly poisoned by lead paint in her apartment.[4] Kimberly's mother sued the landlord on behalf of herself and Kimberly.[5] The case settled for $140,000, and after the deduction of attorney's fees and expenses, the Santiagos netted close to $90,000, which they proposed to deposit in a supplemental needs trust.[6] The New York City Department of Social Services asserted a lien on the settlement proceeds to recoup the $12,877 in health care benefits that Kimberly had received under Medicaid, and demanded that the lien be satisfied before the Santiagos funded the trust.[7] The Santiagos moved to vacate the lien in the supreme court, and argued that Social Services Law §104(2) prevents the City from recovering from an infant.[8] The su-

1. 95 N.Y.2d 683 (2001).
2. *See id.* at 691.
3. *See id.*
4. Santiago v. Craigbrand Realty Corp., 706 N.Y.S.2d 87 (1st Dep't 2000).
5. *Gold,* 95 N.Y.2d at 687.
6. *Id.*
7. *Id.*
8. *Id.*

preme court agreed with the Santiagos and vacated the lien.[9] The City appealed, and the appellate division reversed, holding that the City may recoup wholly notwithstanding Social Services Law § 104(2).[10] The appellate division concluded that because the Department for Social Services' right to recoupment did not come from New York Social Services Law § 104(1), the limitations set forth in § 104(2) did not apply.[11] The appellate division also granted the Santiagos' leave to appeal to the court of appeals.[12]

In the second action, Kathleen Gold suffered a grand mal seizure during her pregnancy, and her baby, Abraham, was delivered prematurely by an emergency Caesarean section.[13] Abraham now suffers from spastic quadriplegic cerebral palsy.[14] Kathleen Gold, on behalf of herself and her child, sued her doctor and the hospital, alleging that they negligently failed to treat the seizure.[15] The jury's verdict significantly exceeded $5,000,000; however, the parties had entered into a "high-low" agreement during jury deliberations which provided a $5,000,000 defense liability cap and a base amount of $450,000 that plaintiffs would receive in the event of a defense verdict or a lower award.[16]

Since his birth, Abraham has received Medicaid benefits for medical assistance and custodial care.[17] The Broome County Department of Social Services and the New York Office of Mental Retardation and Developmental Disabilities asserted liens on the settlement proceeds to recoup their expenditures in the amounts of $62,410 and $1,707,884, respectively.[18] In the supreme court, the Golds moved for an order proportionally reducing the liens according to the ratio the settlement bore to the jury's verdict. Therefore, according to the Gold's proposal, the supreme court would have allocated $103,000 of the settlement to satisfy the liens fully, and the remainder would go toward attorney's fees and a supplemental needs trust for Abraham.[19]

---

9. *Id.*
10. *Id.*
11. *Id.* at 691.
12. *Id.* at 688.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

However, the supreme court rejected the Gold's motion and allocated the proceeds as follows: $705,359 for attorney's fees, $1,784,680 for the Medicaid liens, $2,173,626 for a reserve to pay for Abrahams post-verdict medical and custodial care, and $336,335 for a supplemental needs trust for Abraham.[20] The Gold's appealed and the appellate division affirmed, holding that notwithstanding Social Services Law § 104(2), the Medicaid liens must be fully satisfied. The appellate division held that since Medicaid's assignment, subrogation, and recoupment rights derived from New York Social Services Law §§ 366(4)(h)(1), 367-a(2)(b), neither of which contain a provision demonstrating an intent to treat infants differently regarding the recoupment of expenditures for their care, the trial court was correct in deeming the entire settlement amount available to satisfy the Medicaid liens.[21] Also, the appellate division held that the supreme court did not abuse its discretion by reserving $2,173,626 for Abraham's post-verdict medical and custodial needs.[22] The court of appeals granted the Golds leave to appeal.[23]

III. Discussion

As mentioned above, the appellants in each case argue that the appellate division erred by allowing the Medicaid agencies to satisfy the full amount of their liens from the settlement proceeds. Appellants contend that because they are infants, Social Services Law § 104(2)[24] prohibits the agencies from recouping their expenses.[25]

The court of appeals began its discussion by addressing whether Social Services Law § 104(1)[26] and § 104(2) apply to the cases at bar.[27]

---

20. *Id.*

21. Gold v. United Health Services Hospitals, 701 N.Y.S.2d 123, 126 (3d Dep't 1999).

22. *Id.* at 127.

23. *Id.* at 123.

24. New York Social Services Law § 104(2) provides in pertinent part:

> "No right of action shall accrue against a person under twenty-one years of age by reason of the assistance or care granted to him unless at the time it was granted the person was possessed of money and property in excess of his reasonable requirements, taking into account his maintenance, education, medical care and any other factors applicable to his condition."

N.Y. Soc. Serv. Law § 104(2) (McKinney 2001).

25. *Gold*, 95 N.Y.2d at 688.

26. *Id.*, N.Y. Soc. Serv. Law § 104(1) (McKinney 2001) authorizes public welfare officials to bring proceedings against recipients of various forms of public assistance who receive property within ten years after receiving such benefits.

The court held that Social Services Law § 104(2), which restricts an agency's ability to recover under § 104(1) when the public assistance recipient is under 21 years of age, does not apply when the Medicaid agencies are relying on Medicaid's own assignment, subrogation, and recoupment provisions.[28]

The court rejected the appellants' argument that Social Services Law § 104(2) provides a blanket limitation on Medicaid's assignment, subrogation, and recoupment provisions when the Medicaid recipient is an infant.[29] Relying heavily on *Baker v. Sterling*, appellants contend that Medicaid can only recover that portion of the judgment or settlement specifically designated for past medical expenses.[30] In *Baker*, the New York City Department of Social Services attempted to recoup from an infant's personal injury settlement the amount it had expended for the infant's medical assistance.[31] The Department relied on the recoupment provisions in Social Services Law § 104(1). The court in *Baker* concluded that § 104(2)'s limitation on recoupment from infants under § 104(1) was applicable, and the Department of Social Services could not recoup any portion of the settlement representing compensation for the infant's personal injuries since such compensation could not be considered "money or property in excess of his reasonable requirements."[32] Therefore, the appellants argued that Medicaid can only recover that portion of the judgment or settlement specifically appropriated for past medical expenses.

However, the court noted that since it decided *Baker*, the relevant regulatory scheme has undergone significant development, and Federal law now requires the states to "take all reasonable measures to ascertain the legal liability of third parties to pay for care and services available under the plan" and seek reimbursement from them.[33] Furthermore, the court noted that Congress and the Legislature have added unique Medicaid provisions pertaining to assignment, subrogation, and recoupment.[34] And "as a condition of eligibility, ap-

27. *Id.*

28. *See* N.Y. SOC. SERV. LAW § 366(4)(h)(1) and § 367a(2)(b) (McKinney 2001); N.Y. COMP. CODES R. & REGS. tit. 18, § 360-7.4(a)(4), (6) (2002).

29. *Gold*, 95 N.Y.2d at 690.

30. Baker v. Sterling, 39 N.Y.2d 397 (1976).

31. *Baker*, 39 N.Y.2d at 400.

32. *Id.* at 405; N.Y. SOC. SERV. LAW § 104(2) (McKinney 2001).

33. *See Gold*, 95 N.Y.2d at 690, citing 42 U.S.C. § 1396a (a)(25)(A)-(B).

34. *See Gold*, 95 N.Y. 2d at 690 (citing Pub. L. 103-66, tit. XIII, § 13622, 107 US Stat 312 at 632; L 1981, ch. 319, §§ 1-2).

plicants must assign to the appropriate Medicaid agency their rights to seek reimbursement from third parties up to the amount of medical assistance paid by Medicaid."[35] As a result of the statutory scheme, the court noted that the Medicaid agency "obtain all of the rights that the recipient has against the third party to recover for medical expenses, including the ability to immediately pursue those claims against the third party."[36]

In rejecting the appellants' argument, the court relied heavily on the decisions in *Cricchio v. Pennisi*[37] and *Calvanese v. Calvanese.*[38] In *Cricchio*, adult Medicaid recipients took a similar position to that of the appellants'.[39] They argued that Social Services Law § 104(3), another restriction on recoupment under § 104(1), limited the Department's ability to place a Medicaid lien against a personal injury settlement.[40] The court of appeals, rejecting that argument, held "[t]he right to recover from responsible third parties at issue is not derived from § 104, but rather from [Medicaid's own] assignment, subrogation, and recoupments provisions. Accordingly, any limitations found in § 104 are not relevant here."[41]

The court of appeals reiterated this point in *Calvanese*, stating that the Department of Social Services had "broad authority to pursue any amount of third-party reimbursement to which [the recipient's] are entitled" and that the Department's authority to enforce a lien is "correspondingly broad".[42]

Therefore, the court concluded that when Medicaid agencies are relying on Medicaid's own assignment, subrogation, and recoupment provisions,[43] the agencies have broad authority to satisfy the lien from the entire amount of the personal injury judgment or settlement.[44]

35. *See id.* (citing 42 U.S.C. § 1396k (a)(1)(A); 42 CFR 433.146 (c); N.Y. SOC. SERV.LAW § 366 (4)(h)(1) (McKinney 2001); N.Y. COMP. CODES R. & REGS. tit. 18, § 360-7.4 (a)(4) (2002)).

36. *See id.* (citing Cricchio v. Penisi, 90 N.Y.2d 296 (1997)); *see also* Calvanese v. Calvanese, 93 N.Y.2d 111 (1999).

37. Cricchio v. Penisi, 90 N.Y.2d 296 (1997).

38. Calvanese v. Calvanese, 93 N.Y.2d 111 (1999).

39. *See Cricchio*, 90 N.Y.2d 296.

40. *See Gold*, 95 N.Y.2d 683, citing *Cricchio*, 90 N.Y.2d at 305.

41. *Id.*

42. *Calvanese*, 93 N.Y.2d 117 n.38 (1999).

43. *See Gold*, 95 N.Y.2d 683 n.40 (citing N.Y. SOC. SERV. LAW § 366(4)(h)(1); § 367-a(2)(b) (McKinney 2001); 18 N.Y.C.R.R. 360-7.4(a)(4), (6) (2002)).

44. *Id.* at 691.

The court went on to say that its holding does not read the limitation in Social Services Law § 104(2) out of existence.[45] Instead, the court noted that § 104(1) continues to be a recoupment mechanism when forms of public assistance other than Medicaid are involved.[46] Therefore, when public welfare officials rely solely on § 104(1), the limitation in § 104(2) continues to apply.[47]

Lastly, the court addressed the issue of whether the Supreme Court abused its discretion in *Gold* by setting aside over $2,000,000 from the settlement proceeds as a reserve for Abraham's future medical and custodial needs.[48] The Golds argued that the court should have placed these funds in a supplemental needs trust therefore preserving Abraham's continued Medicaid eligibility.[49] The court concluded that under CPLR 1206, the trial court has the discretion to invest or disburse the proceeds of an infant's recovery if it serves the infant's best interests. However, the trial court, without citing any authority, mathematically apportioned an amount of the settlement proceeds based on the proportional share of the various items in the jury's verdict. The court of appeals remitted the matter to the supreme court for exercise of its discretion pursuant to CPLR 1206 as to the amount of the settlement proceeds to be placed in a supplemental needs trust.[50]

IV. CONCLUSION

In *Gold*, the New York Court of Appeals held that when Medicaid agencies are relying on Medicaid's own assignment, subrogation and recoupment provisions, they have broad authority to satisfy a lien from the entire amount of the personal injury judgment or settlement. Therefore, if Medicaid agencies are not relying on Social Services Law § 104(1), then the limitation on recoupment from infants in § 104(2) is not applicable.

Haley A. Meade

45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Gold*, 95 N.Y.2d at 691.
50. *Id.*

SECURITIES INVESTOR PROTECTION CORPORATION V. BDO SIEDMAN, L.L.P.[1]

(decided February 20, 2001)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that a plaintiff cannot recover against an accountant for fraudulent misrepresentation made to a third party where the third party did not communicate those misrepresentations to the plaintiff, but where the defendant knew that the third party was required to communicate any negative information to the plaintiff and the plaintiff relied to his detriment on the absence of any such communication.[2] In addition, the court held that a plaintiff may not recover against an accountant for negligent misrepresentation where the plaintiff had only minimal direct contact with the accountant, but where the transmittal to the plaintiff of any negative information the accountant reported was the "end and aim" of the accountant's performance.

II. BACKGROUND

This case was brought to the United States District Court for the Southern District of New York by Securities Investor Protection Corporation ("SIPC") and James W. Giddens as Trustee ("Trustee") for the liquidation of the business of securities broker-dealer A.R. Baron & Co., Inc. ("Baron") against defendant BDO Siedman, L.L.P. ("Siedman"), seeking damages for numerous state law causes of action, including negligence, fraud, and breach of contract.

Defendant, Siedman, is an independent certified public accounting firm that audited financial statements for Baron for the years 1992 through 1995.[3] In 1996, Baron filed for bankruptcy. In a subsequent investigation it was revealed that Baron's management team had engaged in conduct that violated securities laws.[4] In a separate proceeding, thirteen of Baron's employees were convicted of crimes for

1. 95 N.Y.2d 702 (2001).

2. *Id.*

3. Securities Investor Protection Corp. v. BDO Seidman, 49 F.Supp.2d 644, 647 (S.D.N.Y. 1999).

4. S*ee id.*

activities they conducted while at the brokerage firm.[5] Baron himself pleaded guilty to one count of enterprise corruption.[6]

Plaintiffs contended that Siedman was liable for their failure to adequately audit Baron's financial statements for the years 1992 through 1995. Plaintiffs seek recovery for: "(1) Seidman's alleged multiple misrepresentations as Baron's certified public accountant; (2) Siedman's failure to conduct a year-end audit of Baron in accordance with generally accepted auditing standards ("GAAS"); (3) Seidman's failure to disclose that Baron did not present fairly its year-end financial statements in accordance with generally accepted accounting principles ("GAAP"); and (4) Seidman's failure to comply with the rules and regulations of the Securities and Exchange Commission ("SEC") governing the practices of independent certified public accountants for SEC registrants."[7] Seidman's failure to disclose its lack of an adequate reporting system and internal controls to detect or prevent fraud as Baron's certified independent accountant was one of the most damaging of Seidman's alleged acts.[8] Furthermore, the plaintiffs' claim alleged that "Seidman's failure to disclose this information permitted the Bressman Team to hide the true financial state of Baron."[9]

The SIPC brought this action on its behalf and as the suborgee to the net equity claims of Baron's customers, which were paid by SIPC. This action was brought by the Trustee as "(1) bailee of the fund of customer property entrusted to Baron by customers; (2) as assignee of the rights and claims of customers whose net equity claims have been paid by the Trustee; and (3) as the representative of the estate of Baron in liquidation."[10]

Defendant filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6). The United States District Court of the Southern District of New York granted both motions.[11]

To have standing, "a plaintiff must allege a personal injury that is fairly traceable to the defendant's allegedly unlawful conduct and which is likely to be redressed by the requested relief."[12] The court held that the Trustee did not have standing. Under SIPC, a trustee is

5. *See id.*
6. *See id.*
7. *Id.*
8. *Id.*
9. *Id.* at 647.
10. *Id* at 648.
11. *Id.*at 646.
12. Hirsch v. Arthur Anderson & Co., 72 F.3d 1085, 1091 (2d Cir. 1995).

vested with the same power and title with respect to the debtor and the property of the debtor, (including the same rights to avoid preferences) as a trustee in a case under Title 11.[13] Thus, "when a bankruptcy trustee brings a claim, it stands in the shoes of the bankrupt corporation and has standing to assert a claim that the bankrupt corporation could have instituted had it not petitioned for bankruptcy."[14] The court concluded that since Baron pled guilty on one of the counts, the Trustee had no standing to sue. However, the holding also suggested that the Trustee could replead this claim to allege the existence of an innocent member of Baron's management who could have prevented the fraud.[15]

The court further held that SIPC did not have standing to sue because it did not have the power to assert this claim on its own behalf under § 78ccc(b) and because it did not have the subrogation powers under § 78fff to bring this claim against third parties.[16]

The court further held that "plaintiffs failed to state a claim pursuant to Fed.R.Civ.P. 12(b)(6)."[17] In *First Fed. Savings and Loan Assoc. v. Oppenheim, Appel, Dixon & Co.*, the court held that in order to plead a claim for common law fraudulent misrepresentation properly, a plaintiff must allege the "misrepresentation of a material fact made with scienter that induces reliance to the detriment of the party to whom the misrepresentation is directed."[18] The plaintiffs could not make such an allegation here because Baron's customers did not receive, read, or review any financial statements certified by Seidman. Thus, the court dismissed plaintiffs' claim for fraudulent misrepresentation or common law fraud due to the absence of any allegation of reliance on supposed misrepresentation.[19]

The court also dismissed plaintiffs' claim for negligent misrepresentation.[20] In *Credit Alliance Corp. v. Arthur Anderson & Co.*,[21] the court held that a relationship sufficiently approaching privity must be established. To establish this relationship three criteria must be met:

13. COMMERCE AND TRADE, 15 U.S.C. § 78 fff-1 (2001).
14. *BDO Siedman*, 49 F.Supp.2d at 650.
15. *Id.*
16. *Id.* at 652.
17. *Id.* at 654.
18. 629 F.Supp. 427, 435 (S.D.N.Y. 1986).
19. *BDO Siedman*, 49 F.Supp.2d at 656.
20. *See id.*
21. 65 N.Y.2d 536 (1985).

> (1) the accountant must have been aware that the financial reports were to be used for a particular purpose; (2) in furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to the allegedly relying party, evincing the accountant's understanding of that party's reliance.[22]

The court held that since plaintiffs have failed to allege sufficient "linking conduct" between Seidman and Baron's customers, they have failed to state a claim for negligent misrepresentation on behalf of SIPC in its own right or on behalf of Baron's customers.[23]

Plaintiffs appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals held that SIPC had standing to sue on its own behalf, but not as subrogees of Baron's customers.[24] However, the court certified SIPC's claims for fraudulent misrepresentation and negligent misrepresentation to the New York Court of Appeals.

The court found that SIPC had standing to sue as subrogee because "at common law, an insurer may be subrogated 'to any right of action which the insured may have against a third person whose negligence or wrongful act caused the loss,' and that nothing in the SIPA exempted the SIPC from this general rule."[25] The court further held that SIPC has standing to sue on its own behalf, disagreeing with the district court's reasoning that if this ability is not in § 78ddd, then Congress did not intend it.[26]

The court relied on the reasoning of the district court in dismissing the claim of fraudulent misrepresentation. However, the court found that two prongs of the *Credit Alliance Corp. v. Arthur Anderson & Co.*[27] test were not satisfied by plaintiffs' allegation.[28] The second criteria mandates that a "known party" must have relied on the reports. To qualify as "known parties," under New York law, plaintiffs must be members of "a known group possessed of vested rights, marked by a definable limit and made up of certain components."[29] The court held that because the reports were filed with the SEC and NASD, and that

22. *BDO Siedman*, 49 F.Supp.2d at 656.
23. *See id.* at 655.
24. *See* Securities Investor Protection Corp. v. BDO Seidman, 222 F.3d 63 (2d Cir. 2000).
25. *Id.* at 63, 68.
26. *See id.* at 69-70.
27. Credit Alliance Corp. v. Arthur Anderson & Co, 65 N.Y.2d 536, 551 (1985).
28. *BDO Seidman*, 222 F.3d at 74.
29. *BDO Seidman*, 222 F.3d at 75.

there was no allegation that Siedman knew Baron's investors, Baron's customers did not comprise a group of "known parties," regardless of whether it can be shown that they relied on these reports.

The court also found that the third prong, which requires a "linking conduct" between Seidman and Baron's customers sufficient to impose negligent liability on Seidman, of the *Credit Alliance* test was not satisfied.[30] The court held that "to demonstrate 'linking conduct,' a plaintiff generally must show some form of direct contact between the accountant and the plaintiff, such as a face-to-face conversation, the sharing of documents, or other 'substantive communication' between the parties."[31] Thus, since no such "linking conduct" had been demonstrated, this prong of the *Credit Alliance* test was not satisfied.[32]

In regard to SIPC's claim on its own behalf for fraudulent and negligent misrepresentations the court certified the following questions to the New York Court of Appeals:

> 1. May a plaintiff recover against an accountant for fraudulent misrepresentations made to a third party where the third party did not communicate those misrepresentations to the plaintiff, but where the defendant knew that the third party was required to communicate any negative information to the plaintiff and the plaintiff relied to his detriment on the absence of any such communication?
> 2. May a plaintiff recover against an accountant for negligent misrepresentation where the plaintiff has only minimal direct contact with the accountant, but where the transmittal to the plaintiff of any negative information the accountant reported was the "end and aim" of the accountant's performance?[33]

III. Discussion

One issue that came before the Court of Appeals was whether SIPC has a claim on its own behalf against Seidman for fraudulent misrepresentation and for negligent misrepresentation.[34]

---

30. *BDO Seidman*, 49 F.Supp.2d at 656.
31. *BDO Seidman*, 222 F.3d at 75.
32. *BDO Seidman*, 49 F.Supp.2d at 656.
33. *BDO Seidman*, 222 F.3d at 81.
34. Securities Investor Protection Corp. v. BDO Seidman, 95 N.Y.2d 702, 709 (2001).

In its determination of whether the SIPC had a claim for fraudulent misrepresentation, the court stated that the "plaintiff cannot sustain a cause of action for fraud if defendant's misrepresentation did not form the basis of reliance."[35] The court further noted that SIPC relied to its detriment on the implication of the NASD's silence, and not on the representation from Seidman. The court concluded that NASD has a significant role in choosing what information it wants to receive and, in addition, what it deems worthy of communicating.[36] The court stated that in such a situation SIPC's reliance upon NASD's silence cannot be equated with its reliance on any affirmative misrepresentation or concealment of material fact by Seidman. Thus, the court held that the SIPC did not have a claim against Seidman or BDO for fraudulent misrepresentation.[37]

The next question the court addressed was whether the SIPC has a claim on its own behalf of negligent misrepresentation.[38] The court identified three critical criteria for imposing liability. In deciding

> "whether liability can be imposed by a non-privity third party, we ask whether the accountant was aware that the reports were to be used for a particular purpose, whether in furtherance of such purpose a known party was intended to rely and, finally, whether there was some 'linking conduct' which evinced the accountant's understanding of that party's reliance."[39]

The court held that there was no "linking conduct" that created a relationship of privity between SIPC and Seidman since Seidman's audits were not prepared for the specific benefit of SIPC, were not sent to SIPC, were not read by SIPC and, as a result, did not place SIPC in a relationship significantly different from anyone else in the regulatory community or the investing public at large."[40] Thus, the court held that SIPC did not have a claim against Seidman for negligent misrepresentation.[41]

---

35. *Id.* at 709.
36. *Id.* at 710.
37. *Id.*
38. *Id.* at 709.
39. *Id.* at 711.
40. *Id.* at 712.
41. *Id.*

IV. Conclusion

In *BDO Seidman* the New York Court of Appeals held that a plaintiff may not recover against an accountant for fraudulent misrepresentations made to a third party where the third party did not communicate those misrepresentations to the plaintiff, but where the defendant knew that the third party was required to communicate any negative information to the plaintiff and the plaintiff relied to his detriment on the absence of any such communication. Furthermore, a plaintiff may not recover against an accountant for negligent misrepresentation where the plaintiff has only minimal direct contact with the accountant, but where the transmittal to the plaintiff of any negative information the accountant reported was the "end of aim" of the accountant's performance.

Marina Rabinovich

CHASE SCIENTIFIC RESEARCH, INC. V. NIA GROUP, INC. GIUSEPPE GUGLIOTTA, V. APOLLO ROLAND BROKERAGE, INC.[1]

(decided March 22, 2001)

I. SYNOPSIS

The Appeal in the first action was granted by permission of the New York Court of Appeals, from an order of the Appellate Division, Second Department.[2] The order was entered May 15, 2000, which, inter alia, affirmed a judgment of the Supreme Court, Westchester County, dismissing the complaint as time barred.[3]

The Appeal in the second action was granted by permission of the New York Court of Appeals, from an order of the Appellate Division, Second Department.[4] The order was entered on July 31, 2000, which modified, on the law, and affirmed a judgment of the Supreme Court, Rockland County, inter alia, granting a motion by defendants to dismiss the complaint against defendant Apollo Roland Brokerage, Inc. as time barred.[5] The modification reinstated a cause of action against another defendant.[6]

II. BACKGROUND

In the first case, plaintiff Chase engaged defendants, insurance brokers, to procure property insurance for its business. Several months later, a severe storm damaged plaintiff's warehouse and inventory.[7] Defendant's moved to dismiss the entire action as time barred under CPLR 214 (6), contending that the claim was one for malpractice, that it accrued on the policy date, and that more then three years had elapsed.[8] Plaintiff countered that the action was governed by the six-year statute of limitations applicable to contract actions (CPLR 213 (2)), and that, even applying the three-year statute of limitations

---

1. 95 N.Y.2d 762 (2000).
2. Chase Scientific Research v. NIA Group, 708 N.Y.S.2d 128, 129 (2d Dep't 2000).
3. *Id.*
4. Gugliotta v. Apollo Roland Brokerage, 712 N.Y.S.2d 398 (2d Dep't 2000).
5. *Id.*
6. *Id.*
7. *Chase Scientific Research*, 708 N.Y.S.2d at 129.
8. *Id.* at 129.

(CPLR 214 (6)), the claim was timely because it accrued on the date of loss.[9] The supreme court agreed with defendants and dismissed the complaint. The appellate division affirmed.

In the second case, defendant Apollo, through its insurance agent, procured insurance for plaintiff's commercial building.[10] A man slipped and fell in the building. Only after the accident did plaintiff discover that he lacked general liability coverage.[11] After counsel failed to appear, a default judgment was entered.[12] Claiming both negligence and breach of contract, plaintiff commenced an action for failure to procure adequate insurance coverage, which defendants sought to dismiss as timed-barred under CPLR 214 (6).[13] As in *Chase*, the supreme court determined that CPLR 214 (6) was the applicable statute of limitations, rendering plaintiff's claims untimely, and the appellate division affirmed.[14] The court of appeals was left to determine the applicable statute of limitations.

III. DISCUSSION

Under CPLR 214 (6), a three-year statute of limitations is applicable in non-medical malpractice actions, regardless of whether the underlying theory is based in contract or tort.[15] The appeals before the court raised the novel issue of who is "professional" within the section.[16] The question arises in the context of insurance agents and brokers.

"Defining 'professional' is a task engaging many courts for many purposes."[17] The court's objective, as always in matters of statutory interpretation, is to "carry out the legislature's will."[18] This difficult task was further convoluted because, in C.P.L.R. 214 (6), "malpractice" is undefined and "professional" unmentioned.[19]

---

9. *Id.*

10. Chase Scientific Research, Inc. v. NIA Group, Inc., 725 N.Y.S.2d 592, 594 (Ct. App. 2001).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *See* N.Y. C.P.L.R. 214 (6) (Consol. 2001).

16. *Chase Scientific Research*, 725 N.Y.S.2d at 593.

17. *Id.* at 165 (citing from Michael J. Polelle, *Who's On First, And What's A Professional?*, 33 U.S.F. L. REV. 205 (1999).

18. *Id.*

19. *Id.*

Professional is a term in wide usage, commonly understood to have several meanings.[20] "For example, it denotes a measure of quality, as in professional dry cleaners; a distinction from trade or business-people, and from amateur status, as in professional golfers."[21] Most likely, the legislature sought to award the protections of CPLR 214 (6) on a relatively small group of defendants. Support for this proposition lies in the fact that if their goal had been otherwise, the legislature surely would have shortened the six-year breach of contract period to three years for all contracts for services.[22]

It was the legislature's intent that particular groups receive a benefit. In *Karasek v. LaJoie*, for example, the court refused, absent legislative clarification, to include licensed psychologists within the category of "medical" services subject to the truncated limitations of CPLR 214-a.[23]

"The term 'professional' is also commonly understood to refer to the learned professions, exemplified by law and medicine."[24] Doctors were the original professionals granted with the two and three-year malpractice statutes of limitation, and soon thereafter attorneys and accountants enjoyed the same privilege.[25] In 1996, when CPLR 214 (6) was before the legislature for amendment, the New York State Bar Association referred specifically to architects, engineers, lawyers or accountants when speaking of professional malpractice.[26]

To conclude, a "professional" is one who has had extensive formal learning and training, is subject to licensure and regulation indicating a qualification to practice, is bound by a code of conduct imposing standards beyond those accepted in the marketplace, and is exposed to a system of discipline for violation of those standards.[27] Furthermore, a professional alliance is one of faith and trust, which entails a duty to counsel and advise clients.[28]

---

20. *Id.*
21. *Id.*
22. *See* N.Y. C.P.L.R. 214 (6), book 7B at 214 (McKinney Supp. 2001).
23. Karasek v. LaJoie, 92 N.Y.2d 171 (1998).
24. *Chase Scientific Research*, 725 N.Y.S.2d at 597.
25. *Id.*
26. Legis. Rep. No. 76-B of N.Y. State Bar Ass'n., Bill Jacket, L 1996, ch. 623 at 13-14.
27. *In re* Accounting of Lincoln Rochester Trust Co., 34 N.Y.2d 1, 5-6 (1974); *see also* BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 389-390 (1999).
28. Murphy v. Kuhn, 90 N.Y.2d 266, 269-70 (1997); Kimmell v. Schaefer, 89 N.Y.2d 257, 262-63 (1996).

The court was mindful that its definition ideally should establish a bright line so that, absent legislative clarification, it can be fairly and uniformly applied.[29] With the rise of large numbers of skilled "semi-professionals," any broader definition would make it hard to draw meaningful distinctions in the future, and the groups covered by CPLR 214 (6) would quickly proliferate.[30]

A six-year statute of limitations is generally attached to breach of contract actions.[31] When the legislature amended CPLR 214 (6) to affix a three-year limitations period to all non-medical malpractice actions, whether based on tort or contract, it ended one controversy but unveiled another: who are the "professionals" whose malfeasance toward clients is subjected to the abbreviated limitations interval?[32]

In 1962, the legislature replaced the two-year limitations period contained in Civil Practice Act § 50 (1) with CPLR 214 (6), bringing the statute of limitations for malpractice actions in line with the limitations period for general negligence.[33] Leaving CPLR 214 (6) in place, in 1975, in response to a perceived health care crisis affecting medical malpractice insurance, the Legislature shortened the statute of limitations for medical malpractice actions to two and one-half years.[34] This again created a disparity among professionals as to their period of exposure to a malpractice suit.[35]

The court thereafter confronted non-medical malpractice claims grounded on a breach of contract theory, and it exercised the six-year contract statute of limitations.[36] Common to all of these "contractual" malpractice cases, the determinative factor of the court's analysis centered on the character of the claim asserted by the plaintiffs—tort or contract—in deciding the befitting statute of limitations.[37] "While the cases involved architects, lawyers and insurance brokers, no issue was

---

29. Polelle, *supra* note 14, at 205.

30. *Id.*

31. Kenneth R. Kirby, *The Six Year Legal Malpractice Statute of Limitations: Judicial Disruption of the Legislative Prerogative*, 66 N.Y. St. B.J. 14 (1994).

32. Legis. Rep. No. 76-B of N.Y. State Bar Ass'n., Bill Jacket, L 1996, ch. 623 at 13-14.

33. Sixth Report of Sen. Fin. Comm. on Revision of Civ. Prac. Act, 1962, N.Y. Legis. Doc., No. 8, at 92-93.

34. Bleiler v. Bodnar, 65 N.Y.2d 65, 66-67 (1985).

35. *Chase Scientific Research*, 725 N.Y.S.2d at 596.

36. *See* Sears, Roebuck & Co. v. Enco Assocs., 43 N.Y.2d 389 (1977); Video Corp. v. Flatto Assocs., 58 N.Y.2d 1026 (1983); National Life Ins. Co. v. Hall & Co., 67 N.Y.2d 1021 (1986); Santulli v. Englert, Reilly & McHugh, 78 N.Y.2d 700 (1992).

37. *Chase Scientific Research*, 725 N.Y.S.2d at 596.

raised—and none decided—as to whether those actors were capable of malpractice within the contemplation of CPLR 214 (6)."[38]

The legislature recently amended 214 (6) as a reply to the *Sears* line of cases, in order to make clear that the limitations period in non-medical malpractice claims is three years, "whether the underlying theory is based in contract or tort."[39] The purpose of this change was to curtail potential liability of insurers and corresponding malpractice premiums, and to make the term in which all professionals would remain subjected to a malpractice suit more evenhanded.[40] It has been said that "there is no rationale for subjecting professional malpractice by an architect, engineer, lawyer, or accountant to a statute of limitations over twice as long as that applied to doctors, dentists and podiatrists."[41] In addition, in *Brothers v. Florence*, the court concluded that the amended statute applied retroactively to bar certain claims accruing prior to the effective date of the statute.[42]

These two actions were brought to recover damages against insurance agents and brokers arising out of an alleged failure to provide proper insurance coverage.[43] The court held that they are governed not by the malpractice statute of limitations (CPLR 214 (6)) applicable to "professionals," but by the limitations periods applicable to negligence actions (CPLR 214 (4)) and breach of contract actions (CPLR 213 (2)).[44]

The court reversed in *Chase*, reinstating both causes of action, and modified in *Gugliotta*, reinstating the breach of contract claim.[45]

The court comes to the decision that insurance agents and brokers are not within the scope of CPLR 214 (6). Agents and brokers must be licensed; but more importantly, they are not indebted to take part in any expansive specialized education and teaching.[46] Contrasting, someone who has been habitually employed by an insurance company, agent or broker for at least one year during the three years preceding the date of his or her license application may meet the re-

38. *Id.*
39. N.Y. C.P.L.R. 214 (6), as amended by L 1996, ch 623.
40. Letter from N.Y. State Ins. Dept., July 16, 1996, Bill Jacket, L 1996, ch 623m at 9-10.
41. Legis. Rep. No. 76-B of N.Y. State Bar Assn., Bill Jacket, at 13-14.
42. Brothers v. Florence, 95 N.Y.2d 290, 298 (2000).
43. *Chase Scientific Research*, 725 N.Y.S.2d at 593.
44. *Id.* at 598.
45. *Id.* at 599.
46. *Id.* at 598.

quirements to be a broker.[47] It is not untrue that lawyers, engineers, architects and accountants can also get around the formal education criteria of their corresponding fields, however, they must transcend far higher obstacles.[48] Nor are insurance agents and brokers bound by a standard of conduct for which discipline might be imposed.[49] Moreover, as this court recently made clear, an insurance agent has a common-law duty to obtain requested coverage, but generally not a continuing duty to advise, guide or direct a client based on a special relationship of trust and confidence.[50] The main point is that insurance agents and brokers are held to high standards of education and qualification, but these criteria are simply not as rigorous as those embraced as professionals within CPLR 214 (6).[51]

IV. CONCLUSION

Thus, in both cases, the court concluded that "the actions against defendant agents and brokers are governed not by CPLR 214 (6), but by the limitations periods applicable to negligence actions (CPLR 214 (4)) and breach of contract actions (CPLR 213 (2))."[52] In *Chase*, the plaintiff argues that its negligence cause of action should be reinstated, regardless of whether or not CPLR 214 (4) is utilized.[53] The court agreed. Both parties are in agreement as to the fact that that the plaintiff's action was commenced within three years of the accrual date for the negligence claim.[54] The pertinent statute of limitation was the exclusive issue before the court in both cases.

Jennifer Cesarano

---

47. N.Y. INS. LAW § 2104 (c) (1) (B) & (C) (McKinney 2001).
48. *Chase Scientific Research*, 725 N.Y.S.2d at 598.
49. *See, e.g.*, 22 N.Y. C.R.R. 603 (attorney discipline).
50. Murphy v. Kuhn, 90 N.Y.2d 266, 269-70 (1997).
51. N.Y. INS. LAW § 2103–04.
52. *Chase Scientific Research*, 725 N.Y.S.2d at 598.
53. *Id.* at 599.
54. *Id.*

KELLY V. SAFIR[1]

(decided March 22, 2001)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that judicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law.[2] The court reversed and held that a penalty must be upheld unless it is so disproportionate to the offense as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law.[3]

II. BACKGROUND

Two issue-related proceedings based on CPLR Article 78 were merged by the Court of Appeals for this decision.[4] In the first case, Petitioner Timothy Kelly was dismissed from his job as a police sergeant with the New York City Police Department after twenty-nine years of service.[5] The specifications charged Kelly with violations of the Patrol Guide and the Penal Law.[6] Following a hearing, the Police Commissioner determined that Kelly engaged in unauthorized off-duty employment as a New York State Certified Instructor for Security Guard Training.[7] He also determined that Kelly issued and sold false certificates stating that two armed security guards employed by Fortunoff had completed the required firearms training and, with intent to defraud, offered the false instruments for filing with the State Division of Criminal Justice Services.[8] As a result, Kelly was dismissed from service as a police officer.[9]

1. Kelly v. Safir, 96 N.Y.2d 32 (2001).
2. *Id.* at 38.
3. *Id.* at 40.
4. *Id.* at 36.
5. *Id.*
6. *Id.* at 37; *see also* N.Y. PENAL LAW §§ 175.40, 210.45 (Consol. 2001).
7. *Kelly*, 96 N.Y.2d at 37.
8. *Id.*
9. *Id.*

Kelly commenced this proceeding seeking to annul the determination.[10] After transfer from the supreme court, the Appellate Division, First Department, modified the determination "on the facts" by vacating the penalty of dismissal and remanding the matter to respondent for the imposition of a lesser penalty.[11] Although the appellate division concluded that substantial evidence supported the determination, it found that the penalty of dismissal was disproportionate in view of Kelly's service record and his numerous awards.[12] The appellate division also indicated that the two security guards involved were licensed to carry firearms and were otherwise qualified for the certificates.[13] The appellate division further noted that Kelly would lose his pension as a result of the dismissal.

In the second case, Justin Meagher, a police officer with the New York City Police Department, was assigned to a tour of duty with Officer Edward Ryan.[14] Meagher assisted Ryan in the April 1996 arrest of complainant, Constantine Moratos, for a parking violation.[15] Moratos later claimed that he was wrongfully arrested and that the two officers used excessive force.[16] Ryan accepted a plea offer of command discipline with a minimum penalty of forfeiture of five vacation days.[17] Meagher rejected the same offer and proceeded to administrative trial.[18]

The Administrative Law Judge found Meagher guilty of the charge of using excessive force. The Police Commissioner adopted the findings and recommendations of the ALJ and imposed a penalty of forfeiture of ten vacation days.[19]

Meagher then commenced this CPLR article 78 proceeding. Upon transfer, the appellate division modified the determination "on the law, the facts and in the exercise of discretion" by reducing the penalty imposed to forfeiture of five vacation days.[20] Again, as in Kelly, the appellate division noted that substantial evidence supported the

10. *Id.*
11. Kelly v. Safir, 706 N.Y.S.2d 113 (1st Dep't 2000).
12. *Id.*
13. *Id.*
14. *Kelly*, 96 N.Y.2d at 37.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. Meagher v. Safir, 707 N.Y.S.2d 422 (1st Dep't 2000).

determination but concluded that the penalty was disproportionate to the offense.[21] The appellate division determined that no record basis existed for the different penalties accorded Meagher and Ryan. In addition, the court ruled that Meagher's election to pursue an administrative trial could not be used as justification for a higher penalty and that since "petitioner's brief discloses that the Department has also withdrawn its scholarship support for his law school tuition . . . the penalty is disproportionate to the offense."[22]

III. Discussion

The court of appeals began its analysis by describing the precedential weight that courts must afford administrative penalties and determinations: "[j]udicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law."[23] The court noted that the appellate division is subject to the same constraints with respect to administrative determinations as the court of appeals, namely, "a penalty must be upheld unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law."[24]

The court stated that such a determination involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or to the harm to the agency or the public in general.[25] However, the court noted that the appellate division does not have discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Police Commissioner.[26]

Further, the court emphasized the significant role of the Police Commissioner in matters concerning police discipline.[27] The court said that "great leeway" must be accorded to the Commissioner's determinations concerning the appropriate punishment in such matters,

21. *Id.* at 423.

22. *Id.*

23. *Kelly*, 96 N.Y.2d at 38; *see also* Featherstone v. Franco, 95 N.Y.2d 550, 554 (2000).

24. *See Kelly*, 96 N.Y.2d at 38; *see also* Pell v. Bd. of Educ., 34 N.Y.2d 222, 237 (1974); In re Verney v. N.Y. State Liquor Auth., 94 N.Y.2d 779 (1999);Gillen v. Smith Town Library Bd. of Trustees, 94 N.Y.2d 776 (1999).

25. *Kelly*, 96 N.Y.2d at 38; *see also Pell*, 34 N.Y.2d at 234.

26. *Id.*; *see also Featherstone*, 95 N.Y.2d at 554.

27. *Kelly*, 96 N.Y.2d at 38.

because the Commissioner, not the courts, must be held accountable to the public "for the integrity of the Department."[28]

Turning to the first action, *Kelly*, the court stated that the appellate division could not have modified the Commissioner's determination "on the facts."[29] The Court stated that the scope of the appellate division's fact-review powers of an administrative agency determination is limited to whether substantial evidence supports the determination.[30] The court reasoned that the facts were established at the disciplinary hearing and reconfirmed in the appellate division's "substantial evidence" review, and that once established, the factual record on which the penalty was assessed was no longer subject to appellate alteration.[31] Specifically, the court stated that the appellate division correctly noted that substantial evidence supported the Commissioner's determination.[32] The Commissioner determined that, in exchange for money, Kelly falsely certified that the two men in question had successfully completed a mandatory state certificate course on the use of deadly force and firearms, and that Kelly filed this false information with the State Division of Criminal Justice Services.[33]

Further, the court stated that the appellate division ignored this principle by relying on facts outside the record in concluding that Kelly should not have been dismissed because, among other things, the two security guards were "then currently licensed to carry firearms, as well as qualified for the certificates in all other respects."[34] Such facts were never raised directly before the administrative agency and thus were not within the scope of the appellate division's review.[35] The appellate division could not rely upon the post-determination submissions in its assessment of Kelly's penalty because, as the court noted, "[t]he review of an administrative determination is limited to the facts and record adduced before the agency."[36]

Furthermore, the court held that the appellate division erred in its failure to apply the *Pell* standard in reviewing the penalty imposed by

28. *Id; see also In re* Berenhaus, 70 N.Y.2d 436, 445 (1987).
29. *Kelly v. Safir*, 96 N.Y.2d at 38.
30. *Id.*
31. *Id.* at 38-39.
32. *Id.* at 39.
33. *Id.* at 39.
34. *Id.; see also* Kelly v. Safir, 706 N.Y.S.2d 113 (1st Dep't 2000).
35. See *Kelly*, 96 N.Y.2d at 39.
36. *Id.; see also* Featherstone v. Franco, 95 N.Y.2d 550, 554 (2000).

the Commissioner.[37] The court criticized the appellate division for substituting its own judgment in weighing the facts and their implications against Kelly's prior service record, stating that "[g]iving due deference to administrative proceedings and the Commissioner's obligation to protect the integrity of our law enforcement community, we cannot endorse the appellate division's balancing test."[38]

The court endorsed the *Pell* standard as the applicable standard of law.[39] Under *Pell*, factors such as the loss of a pension and length of service might be significant in the consideration of whether a penalty shocks "one's sense of fairness" where there is no "grave moral turpitude and grave injury to the agency involved or to the public."[40] The court noted that this is not such a situation because Kelly issued false certificates that authorized the two guards to carry firearms and permitted them to work security in a department store.[41] The court stated Kelly's misrepresentations undermined his credibility as a law enforcement officer and could have jeopardized public safety. Despite his commendations and service, the court concluded that the penalty of dismissal imposed by the Commissioner did not shock the judicial conscience.[42]

Similarly, in the second action, *Meagher*, the court held that forfeiture of ten vacation days is not so disproportionate as to shock "one's sense of fairness" under the *Pell* standard.[43] The court first stated that the appellate division erred by modifying the penalty "on . . . the facts and in the exercise of discretion."[44] The court reiterated that the appellate division's powers are limited to fact review using the "substantial evidence" standard.[45] The appellate division held, and the court agreed, both that there was substantial evidence that Meagher had an unblemished disciplinary record prior to the incident and that Meagher engaged in excessive force in the arrest of complainant.[46]

37. *Kelly*, 96 N.Y.2d at 39.

38. *Id.*

39. *See id.*

40. *See id.; see also* Pell v. Bd. of Ed., 34 N.Y.2d 222, 233, 235 (1974).

41. *Kelly*, 96 N.Y.2d at 39.

42. *Id.* at 39-40.

43. *Id.* at 40; *see also Pell*, 34 N.Y.2d at 233.

44. *Kelly*, 96 N.Y.2d at 40; *see also* Meagher v. Safir, 707 N.Y.S.2d 422 (1st Dep't 2000).

45. *Kelly*, 96 N.Y.2d at 40.

46. *Id.*

The court stated that although Officer Ryan forfeited five vacation days as part of a plea arrangement, Meagher should have anticipated the possibility of a harsher penalty in opting for an administrative trial: "Given that the *quid pro quo* of the bargaining process will almost necessarily involve offers to moderate sentences that ordinarily would be greater . . . it is also to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea."[47]

Finally, the Court noted that there is no record evidence to support the appellate division's determination that the Commissioner imposed an additional penalty of forfeiture of Meagher's police department law school scholarship as part of the sanction.[48] Thus, the appellate division could not extend its powers of review to such facts that were not presented before the administrative agency.[49] Accordingly, the court held that the appellate division erred in considering this "fact" as part of the penalty imposed.[50]

IV. CONCLUSION

The New York Court of Appeals upheld the Police Commissioner's determination—which was remanded by the appellate division—ruling that the dismissal of an officer from duty after twenty-nine years of service was not an abuse of discretion in light of the fact that the officer, in exchange for money, falsely certified that two men had completed a mandatory State Certificate Course on the use of deadly weapons. In the second action, the court held that the forfeiture of ten vacation days for an officer who elected not to plea-bargain, while his partner plea-bargained for the forfeiture of only five vacation days, was not so disproportionate as to shock one's sense of fairness. In both cases, the court held that each penalty must be upheld because it was not so disproportionate to the offense as to be shocking to one's sense of fairness, and thus did not constitute an abuse of discretion as a matter of law.

Kostos Cheliotis

---

47. *Id.; see also* People v. Pena, 50 N.Y.2d 400, 412 (1980).
48. *Kelly*, 96 N.Y.2d at 40; *see also Meagher*, 272 A.D.2d at 114.
49. *Kelly*, 96 N.Y.2d at 40.
50. *Id.*

DJL REST. CORP. V. CITY OF NEW YORK[1]

(decided March 29, 2001)

I. Synopsis

In a unanimous decision, the New York Court of Appeals held that the Amended Zoning Resolution (AZR) of the City of New York did not conflict with, and therefore was not preempted by the New York State Alcoholic Beverage Control Law (ABC Law)[2] despite the existence of overlapping requirements of the ABC Law and the AZR.[3]

II. Background

Plaintiff-appellants, DJL Restaurant Corp., doing business as "Shenanigans," WESJOE Restaurant Corp., doing business as "New York Dolls," and 320 West 45th Street Restaurant, Inc., doing business as "Private Eyes," are all establishments which provide adult entertainment in the form of topless dancing and which are all licensed to dispense alcoholic beverages.[4] In 1993, the New York City Department of City Planning commenced a study on such establishments, which examined the impact they had on the quality of urban life.[5] The study concluded that such establishments had a negative impact on city life includeding "increased crime rates, reduced property values, neighborhood deterioration and inappropriate exposure of children to sexually oriented environments."[6] In response to the study, the City of New York amended its zoning ordinance.[7]

The relevant section of the AZR required that establishments such as those operated by plaintiffs would be restricted only to the city's high density commercial zoning districts and manufacturing districts.[8] Additionally, the amendments required that such establishments could not operate within 500 feet of a school or place of worship.[9] The ABC

1. 96 N.Y.2d 91 (2001).
2. *See id.* at 91.
3. *See id.* at 97-98.
4. *See id.* at 93.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *See id.* at 96.

Law, on the other hand, had its own provisions concerning nudity and alcohol and required only 200 feet in distance between such establishments and a school or place of worship.[10]

Plaintiffs sought a declaratory judgment that the City's amendments to the zoning laws were preempted by the State's ABC Law.[11] The City responded by filing a motion to dismiss.[12] On or about February 10, 1999, the Supreme Court, New York County treated the City's motion as one for summary judgment and declared that the AZR was not preempted by the ABC Law.[13] Plaintiffs appealed.

On April 13, 2000, in a memorandum decision, the Supreme Court, Appellate Division, First Department affirmed the decision of the lower court.[14] The appellate division found that the State's ABC Law was "surely preemptive."[15] However, the court espoused that such establishments were "[not] necessarily exempt from local laws of general application," simply because such establishments sell alcoholic beverages.[16] The court continued that the City's amendments were "local laws of general application with a legitimate governmental purpose."[17] Thus, any affect on licensed establishments were only "incidental, and not a result of an attempt by the [C]ity to regulate the sale, distribution or consumption of alcohol."[18] Additionally, the appellate division rejected plaintiffs' constitutional argument that topless dancing is a protected form of entertainment.[19] The court recognized that the court of appeals had upheld the constitutionality of the AZR with respect to freedom of expression challenges.[20]

Plaintiffs then appealed the issue whether the AZR was preempted by the ABC Law to the New York Court of Appeals, pursuant to C.P.L.R. 5601(b). The court of appeals unanimously affirmed the appellate division's decision noting that "[a] liquor licensee wishing to provide adult entertainment must do so in a location authorized by the

10. *Id.*
11. *See id.* at 92.
12. *Id.*
13. *See* DJL Rest. Corp. v. City of New York, 706 N.Y.S.2d 395, 395-96 (1st Dep't 2000).
14. *See id.* at 396.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *See id.*; *see also* Stringfellows of New York, Ltd. v. City of New York, 91 N.Y.2d 382 (1998).

AZR — not because it is selling liquor, but because it is providing *adult* entertainment."[21] The court explained that while the AZR and the ABC Law may "have some overlapping requirements [it] is merely peripheral and involves no more than . . . a zoning ordinance's inevitable exertion of some incidental control over a particular business."[22]

III. DISCUSSION

As noted above, the plaintiffs contended that the AZR conflicted with and was therefore preempted by the State's ABC Law. In beginning its discussion the court reviewed the relationship between the legislative powers of the state and local governments.[23] The court noted that the local governments had only those powers to enact local laws that the state's legislature had granted them and that zoning was an exercise of such local lawmaking power.[24] The court explained that the state Constitution provides that "every local government shall have power to adopt and amend local laws *not inconsistent* with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law."[25] The court continued that the legislative enactment of the Municipal Home Rule Law[26] specifically authorized municipalities to establish local laws for the "protection and enhancement of its physical and visual environment" and for "government, protection, order, conduct, safety, health and well-being of persons and property therein."[27] Furthermore, municipalities are authorized to "adopt, amend and repeal zoning regulations," by virtue of the Statute of Local Governments.[28] Thus, the court concluded that given the constitutional and statutory scheme, municipalities are authorized to enact zoning laws, unless such laws are in conflict with state law, in which case they would be preempted.[29]

The court then discussed whether, and under which circumstances a local law would be preempted by the ABC Law. The court identified two situations in which state preemption of a local law would

21. *See DJL Rest. Corp.*, 96 N.Y.2d at 97.
22. *See id.* at 98.
23. *See id.* at 94.
24. *Id.*
25. *See id.* at 94, (citing NY CONST. art. IX, § 2(c)(ii)).
26. N.Y. MUN. HOME RULE § 1 et seq.(West 1994 & Supp. 2001).
27. *See DJL Rest. Corp.*, 96 N.Y.2d at 94.
28. *Id.*
29. *See id.* at 94-95.

occur: first, where a local law directly conflicts with state law, and second, where the local law has invaded a field in which the state has expressly or implicitly intended to occupy for full regulatory control.[30] The court explained that an implied intent to occupy the field may be apparent through "a declaration of State policy by the State Legislature . . . or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area."[31] In such case, the municipality would not be authorized to legislate unless clearly and explicitly authorized.[32] The court concluded that it was well settled that the state implicitly intended to preempt the field with the enactment of its ABC Law.[33]

In this respect, the plaintiffs asserted that the AZR is unenforceable because it intruded in a field preempted by the ABC Law.[34] Specifically, plaintiffs noted that the ABC Law has its own requirements as to nudity in premises licensed to serve alcohol, and that the AZR requires an adult entertainment establishment to be located at least 500 feet from a school or place of worship where the ABC Law requires only 200 feet.[35] Accordingly, the plaintiffs contended that the AZR conflicts with the ABC Law.[36]

Conversely, the city argued that the AZR is a law of general application which applies to all adult entertainment establishments regardless of whether they sell alcohol.[37] Furthermore, the purpose of the AZR is to mitigate the secondary effects of adult entertainment establishments and that any consequence such regulations have on those establishments which serve alcoholic beverages are merely incidental.[38]

In agreeing with the City, the court explained that the ABC Law was enacted "to promote temperance in the consumption of alcoholic beverages."[39] Consequently, in regulating the sale and distribution of

30. *See id.* at 95.

31. *See id.* (citing Consolidated Edison Co. v. Town of Red Hook, 60 N.Y.2d 99, 105 (1983)).

32. *See DJL Rest. Corp.*, 96 N.Y.2d at 94.

33. *Id.*

34. *See id.* at 95-96.

35. *See id.* at 96.

36. *See id.* at 95-96.

37. *See id.* at 96.

38. *Id.*

39. *Id.*

alcoholic beverages, the ABC Law preempts the field.[40] However, as the court noted, alcohol is not land.[41] Accordingly, the ABC Law and the AZR are aimed at two completely separate activities.[42]

The court espoused that a local government's enactment of zoning ordinances is one of its most important functions.[43] Relying on an earlier decision, *Matter of Frew Run Gravel Prods. v. Town of Carroll*,[44] in which the court held that the "purpose of a municipal zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally,"[45] the court concluded that "[t]he AZR does just that, and stands in contrast to laws that regulate alcoholic beverages."[46] The court recognized that such regulation may "inevitably exert an incidental control" over the use or business such as those operated by plaintiffs.[47] However, such a local law of general application, directed toward legitimate local concerns, enforcement of which only incidentally transgresses the preemptive field, will not be preempted.[48]

By way of example, the court explained that a local law which dealt "solely with the actions of patrons of establishments which sell alcoholic beverages," was preempted by the ABC Law.[49] In contrast, such an establishment would not be excused from a local law "requiring smoke alarms in all business premises, or one forbidding dumping of refuse on city sidewalks, or one prohibiting disorderliness."[50] Here, the court concluded that the AZR regulates the actual location of the adult entertainment establishments regardless of whether or not the establishments sell alcohol.[51] The fact that the plaintiffs do in fact sell alcoholic beverages brings them within both regulations; however, each involves an "independent realm of governance."[52] Thus, in order to provide adult entertainment, the establishment must do so in a loca-

40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. 71 N.Y.2d 126 (1987).
45. *See DJL Restaurant Corp.*, 96 N.Y.2d at 96, (citing Frew Run Gravel Prods. v. Town of Carroll, 71 N.Y.2d 126, 131 (1987)).
46. *See DJL Restaurant Corp.*, 96 N.Y.2d at 96-97.
47. *See id.* at 97 (citing *Frew Run Gravel*, 71 N.Y.2d at 131).
48. *See DJL Rest. Corp.*, 96 N.Y.2d at 97.
49. *See id.*; *see also* People v. DeJesus, 54 N.Y.2d 465, 471 (1981).
50. *See DJL Rest. Corp.*, 96 N.Y.2d at 97; *see also DeJesus*, 54 N.Y.2d at 471.
51. *See DJL Rest. Corp.*, 96 N.Y.2d at 97.
52. *See id.*

tion as specified by the AZR.[53] Similarly, in order to dispatch alcoholic beverages, a licensee must do so in accordance with the ABC Law.[54] The fact that some provisions may overlap is "merely peripheral" and involves no greater control over the business than the situation described in *Matter of Frew Run Gravel.*[55]

IV. Conclusion

The New York Court of Appeals held that the amended zoning regulation of the City of New York did not conflict with the state Alcoholic Beverage Control Law and, therefore, was not preempted thereby.[56] The fact that there existed overlapping regulations was merely peripheral and involved only an incidental control over the licensees' businesses.[57]

Richard W. Gaeckle

53. *Id.*
54. *Id.*
55. *See id.* at 97-98.
56. *See id.* at 91.
57. *See id.* at 97-98.

RANGOLAN V. COUNTY OF NASSAU[1]

(decided March 29, 2001)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that New York Civil Practice Law and Rules § 1602(2)(iv) ("CPLR 1602(2)(iv)")[2] does not preclude a defendant from seeking apportionment for non-economic damages among joint tortfeasors where liability arises from a breach of a non-delegable duty.[3]

II. BACKGROUND

Neville Rangolan, plaintiff, was incarcerated at the Nassau County Correctional Center ("NCCC") where he was seriously beaten by Steven King, a fellow inmate.[4] Rangolan and King were housed together by the Nassau County Housing and Assignment Unit even though their information history forms stored in the NCCC's computer system indicated that the two should not be in contact.[5] A NCCC correction officer failed to notice the warning that King was not to be housed with Rangolan.[6]

Rangolan and his wife brought the following claims against Nassau County and the Nassau County Sheriff's Department ("the County") in United States District Court for the Eastern District of New York: (i) a § 1983 claim,[7] alleging a violation of Rangolan's Eighth Amendment rights due to the County's deliberate indifference of his safety; (ii) a negligence claim under New York law, for breaching duties to protect Rangolan; and (iii) a claim for Mrs. Rangolan's loss of her husband's services.[8] The District Court dismissed plaintiff's § 1983 claim, but granted his motion for judgment as a matter of law on his negligence

1. 96 N.Y.2d 42 (2001).
2. N.Y. C.P.L.R. § 1602(2)(iv) (McKinney 1997).
3. *Rangolan*, 96 N.Y.2d at 49.
4. *Id.* at 45.
5. *Id.* (Rangolan had cooperated as a confidential informant against King, and it was feared that King would retaliate against Rangolan).
6. *Id.*
7. 42 U.S.C. § 1983 (1994).
8. *See* Rangolan v. County of Nassau, 51 F.Supp.2d 236, 238 (E.D.N.Y. 1999).

claim and ordered a trial on damages.[9] In addition, the District Court denied the County's motion for judgment in the loss-of-services claim.[10]

At the close of evidence, the County requested a jury instruction concerning the apportionment of damages with King in accordance with New York Practice Law and Rules § 1601 ("CPLR 1601").[11] CPLR 1601 provides, in part, the following:

> When a verdict . . . in an action . . . for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable . . . and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss . . . .[12]

The County contended that, pursuant to this statute, the jury should determine the culpability of the assailant.[13] However, the plaintiff argued that the County is not entitled to the protection of CPLR 1601 because CPLR 1602(2)(iv) makes CPLR 1601 inapplicable where a defendant's liability arises by breach of a "non-delegable" duty.[14] CPLR 1602(2)(iv) provides that "the limitations set forth in this article [16] shall . . . not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict . . . any liability arising by reason of a non-delegable duty or by reason of the doctrine of respondeat superior."[15]

The district court denied the County's request that the jury should determine the culpability of the assailant.[16] The district court concluded that CPLR 1602(2)(iv) rendered apportionment under article 16 unavailable where the County's liability arose from a breach of a

9. *See id.* at 238.

10. *See id.*

11. *See Ragolan,* 51 F.Supp.2d at 233-234; *see also* N.Y. C.P.L.R. § 1601 (McKinney 1997).

12. *Rangolan,* 51 F.Supp.2d at 234; *see also* N.Y. C.P.L.R. § 1601 (McKinney 1997).

13. *See Rangolan,* 51 F.Supp.2d at 233-34.

14. *See id.*

15. *Rangolan,* 96 N.Y.2d at 46; *see also* N.Y. C.P.L.R. § 1602(2)(iv) (McKinney 1997).

16. *See Rangolan,* 51 F.Supp.2d at 235-236.

non-delegable duty.[17] The court stated that the County's liability arose by reason of a breach of its non-delegable duty to protect prisoners within its custody.[18]

The jury awarded Rangolan $300,000 in past pain and suffering, $1.25 million in future pain and suffering, and $60,000 to Rangolan's wife on her loss-of-services claim.[19] On the County's motion for a new trial, the District Court ordered a new trial on damages unless the plaintiff agreed to a reduced award.[20] The plaintiff accepted the award, and both parties appealed to the United States Court of Appeals for the Second Circuit, which affirmed the dismissal of Rangolan's § 1983 claim.[21] However, noting the absence of controlling precedent interpreting CPLR 1602(2)(iv), the Second Circuit certified to the New York Court of Appeals the following question:

> "whether a tortfeasor such as the County can, in the facts and circumstances of this case, seek to apportion its liability with another tortfeasor such as King pursuant to N.Y.C.P.L.R. § 1601, or whether N.Y.C.P.L.R. § 1602(2)(iv) precludes such a defendant from seeking apportionment."[22]

III. Discussion

The New York Court of Appeals began its opinion with a discussion on the common law rule of joint and several liability.[23] Prior to the enactment of Article 16 of New York's Civil Practice Law and Rules, "a joint tortfeasor could be held liable for the entire judgment, regardless of its share of culpability."[24] However, the court stated that the enactment of article 16 modified this common law rule by limiting a joint tortfeasor's liability in certain circumstances.[25] Although "article 16 was intended to remedy the inequities created by joint and several liability on low-fault, "deep pocket" defendants, it is nonetheless subject to various exceptions that preserve the common law rule."[26]

17. *See id.*
18. *See id.*
19. *See Rangolan,* 51 F.Supp.2d at 238.
20. *See id.* at 244.
21. *See* Rangolan v. County of Nassau, 217 F.3d 77, 78 (2d Cir. 2000).
22. *Id.* at 80.
23. *See Rangolan,* 96 N.Y.2d at 46.
24. *Id.* (citing Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 556 (1992)).
25. *See id.*
26. *Id.* at 46.

Therefore, the issue is whether CPLR 1602(2)(iv) is such an exception to the apportionment rule.[27] If it is, then the common law rule of joint and several liability applies.[28]

In determining whether CPLR 1602(2)(iv) was an exception to the apportionment rule, the court began its analysis by stating that the section preserves principles of vicarious liability.[29] CPLR 1602(2)(iv) "ensures that a defendant is liable to the same extent as its delegate or employee, and that CPLR article 16 is not construed to alter this liability."[30] As an example, the court cited *Faragiano v. Town of Concord*,[31] a case decided the very same day. In *Faragiano*, the court held that a municipality that delegates a duty for which the municipality is legally responsible (such as the resurfacing of its roads) to an independent contractor remains vicariously liable for the contractor's negligence.[32] Therefore, the town could not rely on CPLR 1601 to apportion liability between itself and the contractor.[33] However, the *Rangolan* court noted that "nothing in N.Y.C.P.L.R. § 1602(2)(iv) precludes a municipality, landowner, or employer from seeking apportionment between itself and other tortfeasors for whose liability [it] is not answerable."[34]

Next, the court analyzed the statutory scheme of CPLR 1602.[35] CPLR 1602 includes several exceptions to the apportionment rule, all of which provide that article 16 shall "not apply" in certain circumstances.[36] However, CPLR 1602(2)(iv) does not contain this language.[37] Rather, this section provides that the "limitations on liability shall *not be construed* to impair, limit or modify any liability arising from a non-delegable duty or respondeat superior."[38] Therefore, the court stated that "given the precise 'shall not apply' language chosen by the Legislature to describe the exceptions, the absence of such language in CPLR 1602(2)(iv) indicates that the Legislature never intended to in-

---

27. *See id.*
28. *See id.*
29. *See id* at 47.
30. *Id.*
31. 96 N.Y.2d 776 (2001).
32. *See id.* at 778.
33. *See id.*
34. *Rangolan*, 96 N.Y.2d at 47 (citing *Faragiano*, 96 N.Y.2d at 777).
35. *See id.*
36. *See id*; *see also* N.Y. C.P.L.R. § 1602(3)-(11)(McKinney 1997).
37. *See* N.Y. C.P.L.R. § 1602(2)(iv).
38. *See Rangolan*, 96 N.Y.2d at 47; *see also* N.Y. C.P.L.R. § 1602(2)(iv) (emphasis added).

clude an exception for liability based on a breach of a non-delegable duty."[39]

Finally, the court took a detailed look at article 16's purpose.[40] If CPLR 1602(2)(iv) were to be read as an exception, then it would impose "joint and several liability on municipalities, landowners and employers, who often owe a non-delegable duty or are vicariously liable for their agents' actions."[41] These are "precisely the entities that article 16 was designed to protect."[42] Construing CPLR 1602(2)(iv) as an exception to the apportionment rule "would defeat the legislative goal of benefiting low-fault, "deep-pocket" defendants by imposing joint and several liability whenever a defendant's liability is based on a non-delegable duty or respondeat superior."[43]

After a detailed analysis of CPLR 1602(2)(iv), the court concluded that CPLR 1602(2)(iv) does not preclude apportionment where a defendant's liability arises from a breach of a non-delegable duty.[44] In the process, the court rejected the interpretations of other New York courts holding that CPLR 1602(2)(iv) creates a non-delegable duty exception to article 16.[45] The court stated that these cases did not involve "any meaningful analysis of CPLR 1602(2)(iv); rather, they assume[d], without explanation, that CPLR 1602(2)(iv) precludes application of CPLR 1601."[46]

IV. Conclusion

The New York Court of Appeals held that CPLR 1602(2)(iv) is not an exception to apportionment under CPLR article 16.[47] Rather, it is a savings provision that preserves the principles of vicarious liability.[48] Therefore, CPLR 1602(2)(iv) does not preclude the County of Nassau,

---

39. *Rangolan*, 96 N.Y.2d at 47-48.

40. *See id.* at 48.

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.* at 49.

45. *See id.* (*see*, e.g., Nwaru v. Leeds Management Co., 654 N.Y.S.2d 338 (1st Dep't 1997); Cortes v. Riverbridge Realty Co., 642 N.Y.S.2d 692 (2d Dep't 1996)).

46. *Id.*

47. *See id.* at 48.

48. *See id.*

based on the facts and circumstances of this case, from seeking apportionment.[49]

Adam Taylor

---

49. *See id.* at 49.

HAMILTON V. BERETTA U.S.A. CORP.[1]

(decided April 26, 2001)

I. Synopsis

In a unanimous decision, the New York Court of Appeals held that gun manufacturers do not owe shooting victims a duty to exercise reasonable care in the marketing and distribution of the guns they manufacture.[2] Additionally, the court held that liability against gun manufacturers can not be apportioned on the basis of a market share theory.[3]

II. Background

In January 1995, two plaintiffs, relatives of people killed by illegal firearms,[4] filed suit in the United States District Court for the Eastern District of New York against numerous handgun manufacturers.[5] They alleged negligent marketing, design defect, ultrahazardous activity and fraud.[6] A number of the defendants jointly moved for summary judgment and the court dismissed the products liability and fraud claims, but allowed the plaintiffs to proceed on a negligent marketing theory.[7]

Other parties intervened, including a plaintiff named Stephen Fox, who was shot by a friend and permanently disabled.[8] The gun was never found and the shooter had no recollection of how he obtained it. However, other evidence indicated that he purchased it out of the trunk of a car from a seller who said it came from the "south."[9]

Eventually, seven plaintiffs went to trial against twenty-five gun manufacturers.[10] They asserted that the defendants distributed their products negligently so as to create and support an illegal, underground market in handguns, one that supplied the weapons to the

1. Hamilton v. Beretta, U.S.A. Corp., 96 N.Y.2d 222 (2001).
2. *Id.* at 240.
3. *Id.* at 242.
4. *See* Hamilton v. Accu-Tek, 935 F. Supp. 1306, 1313 (E.D.N.Y. 1996).
5. *See* Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 810 (E.D.N.Y. 1999).
6. *See Hamilton*, 96 N.Y.2d at 229.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

shooters in this lawsuit.[11] Because only one of the guns was recovered, the plaintiffs were permitted, over defense objections, to proceed on a market share theory of liability.[12] They argued that the defendants were severally liable for failing to use safe marketing and distribution procedures, and that this failure sent a high volume of guns into the underground market.[13]

After a four-week trial, the jury returned a special verdict finding that fifteen of the twenty-five gun manufacturers had failed to use reasonable care in the distribution of their guns.[14] Nine of the fifteen were found to have proximately caused the deaths of the decedents of two of the plaintiffs, but no damages were awarded against them.[15] Damages were only awarded to the surviving shooting victim, Stephen Fox, and his mother, Gail Fox, against three of the defendants—American Arms, Inc., Beretta U.S.A. Corp. and Taurus International Manufacturing, Inc.[16]

The jury calculated $3.95 million in damages for Fox's injuries and $50,000 for his mother and apportioned liability to each of three defendants based on their share of the national handgun market.[17] As a result, American Arms was found liable for 0.23 percent of the damages (or $9,200);[18] Beretta was found liable for 6.03 percent of the damages (or $241,200);[19] and Taurus was found liable for 6.80 percent of the damages (or $272,000).[20]

Following the verdict, the gun manufacturers unsuccessfully moved for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure.[21] The district court offered several theories for imposing a duty on the defendants "to take reasonable steps available at the point of their sale to primary gun distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them."[22]

---

11. *Id.*
12. *Id.* at 229-30.
13. *Id.*
14. Hamilton v. Beretta U.S.A. Corp., 222 F.3d 36, 40 (2d Cir. 2000).
15. *Id.* at 41.
16. Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 808 (E.D.N.Y. 1996).
17. *Hamilton*, 222 F.3d at 41.
18. *Id.*
19. *Id.*
20. *Id.*
21. *See Hamilton*, 96 N.Y.2d at 230.
22. *Id.* (quoting Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 825 (E.D.N.Y. 1999)).

The district court concluded that the gun manufacturers had the unique ability to detect and guard against foreseeable risks associated with their products, and that ability created a special "protective relationship" between the defendants and potential victims of gun violence.[23] The court further noted that the relationship of handgun manufacturers with their downstream distributors and retailers gave them the authority and the ability to control the latter's conduct for the protection of prospective crime victims.[24] Relying on *Hymowitz v. Eli Lilly & Co.*,[25] the district court concluded that apportionment of liability among the defendants on a market share basis was appropriate and that it was not necessary for the plaintiffs to connect Fox's shooting to the negligence of a particular manufacturer.[26]

Following this decision, the defendants filed an appeal with the United States Court of Appeals for the Second Circuit claiming that the district court erred in denying their Rule 50(b) motion.[27] The defendants argued that they did not owe a duty to the plaintiffs and that absent such a duty they could not be held liable for failing to use reasonable care in the marketing of their handguns.[28] They also asserted that even if they did owe the plaintiffs a duty, apportioning liability on a market share basis was impermissible under New York law.[29]

The Second Circuit concluded that the case presented questions of duty and causation that required certification to New York's highest court.[30] Accordingly, the court certified the following two questions to the New York Court of Appeals:[31]

(1) "Whether the defendants owed plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture?"[32]
(2) "Whether liability in this case may be apportioned on the market share basis, and if so, how?"[33]

---

23. *Id.* (quoting *Hamilton*, 62 F. Supp. 2d at 821).
24. *Id.*
25. *See* 73 N.Y.2d 487 (1989).
26. *See Hamilton*, 96 N.Y.2d at 230.
27. *See* Hamilton v. Beretta U.S.A. Corp., 222 F.3d 36, 41 (2d Cir. 2000).
28. *Id.*
29. *Id.*
30. *Id.* at 39.
31. *Id.*
32. *Id.*
33. *Id.*

The New York Court of Appeals accepted the certification[34] and answered both questions in the negative.[35]

III. Discussion

The court began its analysis of the duty question by identifying five factors that New York courts have traditionally used to balance the duty equation.[36] First, the courts consider the reasonable expectations of the parties and society in general.[37] Second, the courts consider the possible proliferation of claims.[38] Third, the courts consider the likelihood of creating unlimited or insurer-like liability.[39] Fourth, the courts consider the issues of disproportionate risk and reparation allocation.[40] And fifth, the courts consider public policies affecting the expansion or limitation of new channels of liability.[41] The court noted that the duty determination required courts to be mindful of the precedential, consequential and future effects of their rulings and to limit the legal consequences of wrongs to those that can be controlled.[42] The court also observed that foreseeability alone does not define duty[43] and that the expansion of duty is only appropriate when its social benefits will outweigh its costs.[44]

In reviewing the district court's analysis, the court observed that the district court imposed a duty on the defendants because they were in a position "to take reasonable steps at the point of sale to primary distributors to reduce the possibility that these instruments would fall into the hands of those likely to misuse them."[45] But the court cautioned against extending liability this far.[46] Relying on *D'Amico v. Christie*, the court said that "[a] defendant generally has no duty to control

34. *See* Hamilton v. Beretta U.S.A. Corp., 95 N.Y.2d 878 (2000).

35. *See Hamilton*, 96 N.Y.2d at 230.

36. *Id.* at 231 (citing Palka v. Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579, 586 (1994); Strauss v. Belle Realty Co., 65 N.Y.2d 399, 402-03 (1985)).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* (citing Pulka v. Edelman, 40 N.Y.2d 781, 785 (1976); Eiseman v. State of New York, 70 N.Y.2d 175, 187 (1987)).

44. *Id.* at 232 (citing Waters v. New York City Hous. Auth., 69 N.Y.2d 225, 230 (1987)).

45. *Id.* (quoting Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 825 (E.D.N.Y 1999)).

46. *Id.*

the conduct of third persons so as to prevent them from harming others, even where as a practical matter [the] defendant can exercise such control."[47]

The court did acknowledge that a duty could arise in cases when a special relationship exists between a defendant and a third person.[48] It observed that courts have long recognized a duty of care in suits involving a master and servant, a landlord and tenant, a parent and child, and a common carrier and passenger.[49] However, the court said that this special duty was limited to these specific classes of relationships and held that it did not extend to the community at large.[50]

In analyzing the relationship between the plaintiffs and defendants in this case, the court relied heavily on *Waters v. New York City Housing Authority*.[51] In *Waters*, the court held that the owner of a housing project did not owe a duty to a woman passerby to keep his building's door locks in good repair after she was dragged into the building by an assailant and sexually assaulted.[52] The court said that imposing such a duty would do little to reduce crime and that the social benefits to be gained did not warrant extending a landlord's duty to maintain a secure premises to the millions of people who use the sidewalks of New York City each day.[53]

Applying a similar rationale here, the court noted that imposing a duty on the gun manufacturers would expose them to a very large pool of possible plaintiffs—potentially, any of the thousands of victims of gun violence each year.[54] The court concluded that the connection between the gun manufacturers, criminal wrongdoers and the plaintiffs was too remote.[55] It held that such broad liability should not be imposed without a more tangible showing that the defendants were a direct link in the chain of events that resulted in the plaintiffs' injuries.[56] Thus, the court ruled that even giving the plaintiffs' evidence

47. *Id.* (quoting D'Amico v. Christie, 71 N.Y.2d 76, 88 (1987); citing Purdy v. Public Adm'r of County of Westchester, 72 N.Y.2d 1, 8 (1988), *rearg. denied* 72 N.Y.2d 953 (1988)).

48. *Id.*

49. *Id.* (citing Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 518-19 (1980).

50. *Id.* (citing Waters v. New York City Hous. Auth., 69 N.Y.2d 225, 23-31 (1987)).

51. *Id.*

52. *Id.*

53. *Id.* (citing *Waters*, 69 N.Y.2d at 230).

54. *Id.*

55. *Id.* at 234.

56. *Id.*

every favorable inference, they had not shown that the gun used to harm Fox came from a source amenable to the imposition of a duty of care upon the defendants.[57]

The plaintiffs, relying on three cases involving hazardous materials, argued in the alternative that a duty did arise because the gun manufacturers had a special ability to detect and guard against the risks associated with their products.[58] But, the court observed that the cases cited by the plaintiffs were based on products liability theory and were therefore distinguishable.[59] In dismissing the plaintiffs' argument, the court noted that in this case "[the] defendants' products are concededly not defective—if anything, the problem is that they work too well."[60]

The plaintiffs further argued that a duty of care arose out of the gun manufacturers' ability to reduce the risk of illegal gun trafficking by controlling the marketing and distribution of their products.[61] The district court accepted this argument and suggested a number of changes in the defendants' marketing procedures that might reduce the chance that guns would reach the hands of criminals.[62] In rejecting the district court's rationale, the court noted that such changes would have the unavoidable effect of eliminating a large number of lawful sales to "responsible" buyers by "responsible" federal firearm licensees.[63]

The court observed that the plaintiffs presented no evidence showing any significant statistical relationship between particular classes of gun dealers and gun crimes.[64] It said that imposing a duty of care on gun manufacturers under these circumstances would conflict with the *Waters* principle that a duty must be based upon an assessment that the social benefits will outweigh the burdens and costs imposed by

---

57. *Id.*

58. *Id.* at 234-35 (citing Hunnings v. Texaco, Inc., 29 F.3d 1480 (11th Cir. 1994); Blueflame Gas, Inc. v. Van Hoose, 679 P.2d 579 (Colo. 1984); Flint Explosive Co. v. Edwards, 66 S.E.2d 368 (Ga. 1951)).

59. *Id.* at 235.

60. *Id.*

61. *Id.*

62. These proposed solutions included limiting the volume of sales to weak gun control states to prevent firearms from reaching the illicit market; restricting distribution to established retail stores; franchising retail outlets; and barring sales at unregulated gun shows. *See Hamilton*, 96 N.Y.2d at 236 n.3.

63. *Id.* at 235.

64. *Id.*

it.[65] The court concluded that such a duty would create both an indeterminate class of plaintiffs and an indeterminate class of defendants whose liability might have little relationship to the benefits of controlling illegal guns.[66]

Completing its duty analysis, the court also rejected the plaintiffs' final argument that because the gun manufacturers had authority over their "downstream distributors and retailers" a duty arose under the doctrine of negligent entrustment.[67] The court observed that negligent entrustment liability applies when a supplier of a potentially dangerous instrument has or should have reason to know that the receiver of the instrument has a propensity for hazardous use.[68] The court noted that the plaintiffs failed to present any evidence that the gun manufacturers had reason to know that specific distributors were engaged in the illegal gun trade.[69] Thus, it concluded that the plaintiffs were attempting to impose a duty based on broad categories of lawful sales that occurred within the entire gun manufacturing industry and held that such an extension of duty went too far.[70]

The court began its analysis of the market share question by reviewing *Hymowitz v. Eli Lilly & Co.*, the first case in which it examined and adopted the market share theory of liability.[71] At the outset, the court noted that market share theory is an exception to the general rule, which states that a plaintiff must prove that a defendant's conduct was the cause-in-fact of their injury.[72]

The court acknowledged that in *Hymowitz*, plaintiffs who were injured by the miscarriage prevention drug DES were not required to prove which drug manufacturer injured them.[73] But it observed that market share liability was necessary in that case because DES was a fungible product and identification of the actual manufacturer that caused the plaintiffs' injuries was impossible.[74] The court noted that

65. *Id.* (citing Waters v. New York City Hous. Auth., 505 N.E.2d 922, 924 (N.Y. 1987)).
66. *Id.*
67. *Id.* at 237 (quoting Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 821 (E.D.N.Y. 1999)).
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 240 (citing Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487 (1989)).
72. *Id.*
73. *Id.* at 240-41.
74. *Id.* Approximately 300 drug companies produced DES and marketed it over a 24 year period for the purpose of preventing miscarriages. The offspring of mothers

market share liability was appropriate in the DES situation for three reasons.[75] First, the manufacturers acted in a parallel manner to produce a generically identical product.[76] Second, the plaintiffs manifested injuries many years after the product had been ingested.[77] And third, the state legislature passed a special bill to revive DES claims that would otherwise have been time-barred.[78]

The court concluded that the circumstances in this case were markedly different.[79] It held that, unlike DES, guns are not fungible products;[80] and that it is often possible to identify the caliber and manufacturer of the handgun that caused injury to a particular plaintiff.[81] The court further observed that the plaintiffs failed to assert that the defendants' marketing techniques were uniform.[82] The court distinguished the gun manufacturers' conduct from that of the defendants in *Hymowitz* by noting that here the defendants engaged in a wide variety of market-based activity thereby creating varying degrees of risk.[83] Thus, the court concluded that a manufacturer's share of the national handgun market did not necessarily correspond with the amount of risk created by its conduct.[84] While recognizing the difficulty in proving which manufacturer caused a plaintiff's injuries in gun crime cases, the court held that the inability to locate evidence did not alone justify the extraordinary step of applying market share liability.[85]

Having answered both certified questions in the negative, however, the court expressed a willingness to revisit the issue.[86] As the court noted in its conclusion, while the record before it was unconvinc-

---

who took the drug did not manifest cancer-related injuries until many years later. *See* Hymowitz, 73 N.Y.2d at 503.

75. *Id.* at 240 (citing *Hymowitz*, 73 N.Y.2d at 507).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* (citing Healey v. Firestone Tire & Rubber Co., 87 N.Y.2d 596, 601 (1996); Matter of New York State Silicone Breast Implant Litigation, 631 N.Y.S.2d 491 (1st Dep't 1995), *aff'd*, 650 N.Y.S.2d 558 (1st Dep't 1996).

86. *Id.* at 242.

ing in this instance, whether a duty would arise in a different case remained a question for the future.[87]

IV. CONCLUSION

In *Hamilton*, the New York Court of Appeals held that gun manufacturers did not owe a duty of care to shooting victims injured by the handguns they manufacture and distribute.[88] In addition, the court held that the evidence in this case did not support the imposition of market share liability on gun manufacturers.[89]

Thomas E. Kemble

87. *Id.*
88. *Id.* at 240.
89. *Id.* at 242.

TENNESSEE GAS PIPELINE CO. V. URBACH[1]

(decided May 1, 2001)

I. Synopsis

In a unanimous decision, the New York Court of Appeals reversed the Appellate Division and held that the Natural Gas Import Tax (Tax Law § 189),[2] which imposed a tax on the importation of gas into the state for the importer's own use or consumption, violated the Commerce Clause.[3] The court found that the law failed to provide any offsetting credit for out-of-state taxes assessed against the importer and would thus cause the importer to incur double taxation.[4]

II. Background

Tennessee Gas Pipeline Company ("Tennessee Gas" or "Company"), a natural gas pipeline company, transports its customers' natural gas through pipelines originating in Texas and Louisiana, passing through New York, onto consumers in New England.[5] In order to transport the gas through the pipes, the Company maintains a number of "pumping facilities along its pipeline that increase the pressure on the line. Ten of these facilities are located in New York. The compressors are powered by natural gas . . . that is drawn off the line."[6]

The New York State Department of Taxation and Finance ("Tax Department") determined that Tennessee Gas had failed to pay any tax, under Tax Law § 189, on the natural gas compressor fuel consumed in New York State during the years 1991-1996 and assessed the Company $1.6 million in back taxes, as well as interest and penalties.[7] The Company subsequently requested a withdrawal of the Tax Department's assessment, claiming that the tax violated the Commerce

1. 96 N.Y.2d 124 (2001).
2. N.Y. Tax Law § 189 (McKinney 2001) (to be repealed on Jan 1, 2005).
3. *See Tenn. Gas Pipeline Co.*, 96 N.Y.2d at 134; *see also* U.S. Const., art. I, § 8, cl. 3.
4. *See Tenn. Gas Pipeline Co.*, 96 N.Y.2d at 134.
5. *Id.* at 128.
6. *Id.* at 128-29.
7. *See id.* at 129.

Clause of the U.S. Constitution.[8] The Tax Department refused to withdraw its assessment.[9]

Rather than bringing a proceeding before the state Tax Tribunal, Tennessee Gas initiated a declaratory judgment action against the Tax Department in New York State Supreme Court, contesting both the Company's status as a "gas importer" under Tax Law § 189 and the facial constitutionality of the law itself.[10] Tennessee Gas argued that the tax discriminated against interstate commerce by imposing an unfair tax burden on out-of-state purchasers of natural gas consumed in New York that was not equally shared by in-state purchasers of natural gas.[11]

The Supreme Court granted the Tax Department's motion for summary judgment, holding that Tennessee Gas had neither shown the tax to be facially unconstitutional nor had it adequately pursued all available administrative remedies before initiating its declaratory action.[12] Tennessee Gas appealed.

The Appellate Division affirmed the granting of summary judgment,[13] recognizing that the tax was in fact designed to "equalize[ ] the tax treatment of out-of-state and in-state suppliers of natural gas."[14] The court reiterated that "taxing statutes enjoy a presumption of validity and the burden is on the party challenging the statute to demonstrate its unconstitutionality."[15] Here, the court found that the factual record was insufficient to sustain a facial attack on the law's constitutionality.[16] Moreover, the Appellate Division agreed that Tennessee Gas should have pursued the necessary administrative remedies before seeking a declaratory judgment regarding the constitutionality of the tax law itself, since the Company's claim, according to the court, "is

---

8. *See id.*

9. *See id.*

10. *See Tenn. Gas Pipeline Co.*, 96 N.Y.2d at 129; *see also* N.Y. TAX LAW § 189 (1)(b) (McKinney 2001) (to be repealed on Jan 1, 2005) (defining a "gas importer" as "every person who imports or causes to be imported into this state gas services which have been purchased outside the state for its own use or consumption in this state.").

11. *See Tenn. Gas Pipeline Co.*, 96 N.Y.2d at 129-30.

12. *See id.*; *see also* Tenn. Gas Pipeline Co. v. Urbach, 708 N.Y.S.2d 193, 195, 197(3d Dep't 2001), *rev'd* 96 N.Y.2d 124 (2001).

13. *See* Tenn. Gas Pipeline Co. v. Urbach, 708 N.Y.S.2d 193 (3d Dep't 2001), *rev'd* 96 N.Y.2d 124 (2001).

14. *Id.* at 196.

15. *Id.*

16. *See id.* at 197.

with the manner in which the [tax] was applied to its activities during the tax years at issue."[17] Tennessee Gas appealed.

III. DISCUSSION

The Court of Appeals began its analysis with a brief inquiry into the legislative purpose and practical effect of Tax Law § 189.[18] The court then considered the arguments set forth by both Tennessee Gas and the Tax Department in light of the appropriate United States Supreme Court test for determining the constitutionality of a purported compensatory tax such as § 189.[19] The court held that, under Supreme Court jurisprudence, § 189 was indeed a valid compensatory tax.[20] However, the court ultimately determined that § 189 violated the Supreme Court's "fair apportionment" test and was therefore an unconstitutional burden on interstate commerce.[21]

A. *The Natural Gas Import Tax (Tax Law § 189): Purpose And Effect*

Tax Law § 189 was passed to close a tax loophole that had been in existence since Congress deregulated the natural gas industry in 1978.[22] Before deregulation, New York imposed two taxes on state natural gas utilities. First, Tax Law § 186 imposed a corporate franchise tax of .75% on state public utilities formed for the primary purpose of supplying natural gas through pipes.[23] Second, Tax Law § 186-a assessed a tax of 3.5% on the "gross income" from the sale of natural gas "for ultimate consumption or use" in New York.[24] The utilities, while not allowed to disclose the existence of these taxes to consumers, ultimately passed the costs of both taxes onto their consumers in the form of higher gas rates.[25]

After deregulation, consumers in New York (primarily industrial consumers) were able to bypass the higher rates charged by in-state utilities by purchasing and importing natural gas from out-of-state sellers.[26]

---

17. *Id.*
18. *See Tenn. Gas Pipeline Co.*, 96 N.Y.2d at 127-28.
19. *See id.* at 129-33.
20. *See id.* at 133.
21. *See id.* at 133-35.
22. *See id.* at 127-29.
23. *Id.* at 127-28.
24. *Tenn. Gas Pipeline Co.*, 96 N.Y.2d at 127-28.
25. *Id.* (noting the common phrase for such a tax is a "pass through" tax).
26. *Id.*

Tax Law § 189 was designed to "recapture those taxes and to 'equalize' the tax burden on all consumers"[27] by imposing "'on every gas importer a monthly privilege tax . . . on the privilege or act of importing gas services or causing gas services to be imported into this state for its own use or consumption.'"[28] The tax was therefore intended to bring equity into the tax structure by subjecting consumers of out-of-state gas to a tax equivalent to those "pass through" taxes imposed upon in-state consumers.[29]

B. Analysis

As a preliminary matter, Tennessee Gas argued, and the Tax Department conceded, that § 189 discriminates against interstate commerce by assessing a specific tax exclusively on out-of-state purchases of gas to be consumed in New York while not imposing the same tax on gas purchased in-state.[30] Thus, the court agreed that under these circumstances, Commerce Clause jurisprudence demands that such a facially discriminatory state law is "per se invalid."[31]

However, the court noted that even discriminatory laws may still be constitutional if they serve a legitimate state objective and no other reasonable alternative exists to further that objective.[32] The Tax Department argued that just such an objective underlies Tax Law § 189; that is, the tax compensates for the "pass through" taxes imposed upon in-state purchasers of natural gas by §§ 186, 186-a, thereby equalizing the tax burden among consumers of natural gas in New York.[33]

To determine whether a compensatory tax, such as § 189, is consistent with the Commerce Clause, the court applied the United States Supreme Court's analysis in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*.[34] This analysis sets forth three criteria that a

27. *Id.* at 128.

28. *Id.* (quoting N.Y. TAX LAW § 189 (2)(a)(McKinney 2001)(to be repealed on Jan 1, 2005)).

29. *See id.*

30. *Tenn. Gas Pipeline Co.*, 96 N.Y.2d at 129-30.

31. *Id.* at 130 (quoting Oregon Waste Sys. v. Department of Envt'l. Quality, 511 U.S. 93, 99 (1994)).

32. *See id.* (citing *Oregon Waste Sys.*, 511 U.S. at 101).

33. *Id.*

34. 511 U.S. 93 (1994). In *Oregon Waste*, the State of Oregon imposed a differential fee structure for out-of-state and in-state solid waste disposal. Out-of-state waste was subject to a $2.25 per ton fee while in-state waste was subject to only an $.85 per ton fee. The Supreme Court held such differential treatment to be facially unconstitutional. *See id* at 108.

compensatory tax must satisfy in order to comply with the Commerce Clause:

> First, a compensatory tax must identify the intrastate tax burden for which it attempts to compensate. Second, the interstate tax must 'roughly approximate,' but not exceed, the amount of the tax on intrastate commerce. Third, the events on which both taxes are imposed must be 'substantially equivalent;' that is they must be sufficiently similar in substance to serve as mutually exclusive 'proxies' for each other.[35]

Regarding the first criterion, Tennessee Gas conceded that the purpose of Tax Law § 189 was to "equalize" the tax burden on gas purchasers "regardless of the location of their gas source."[36]

Tennessee Gas argued, however, that § 189 is not a valid compensatory tax under the second criterion because it does not 'roughly approximate' the amount of tax imposed on intrastate commerce by §§ 186, 186-a, since the former is directly assessed on the importer-consumer while the latter are imposed on the utility-seller and then passed through to the consumer.[37] Therefore, according to the Company, the two taxes are not "'imposed' on consumers in both instances" and cannot be said to "roughly approximate each other."[38]

The Tax Department contended, however, that under such a scenario, the "economic incidence" of both taxes was the same.[39] Tennessee Gas responded that even assuming the "economic incidence" were the same, this kind of approach would require the court to engage in a complicated, quantitative market analysis in order to determine if the interstate tax burden 'roughly approximated' the intrastate tax burden; a difficult task that the court would not be equipped to perform.[40]

The court recognized that both taxes are assessed against the same activity – the consumption of natural gas in New York.[41] Moreover, the court noted that since the "pass through" taxes are based on income from gas sales - thus reflecting the cost of gas purchased in New York - and are imposed on a receipt tax basis, they could never be

35. *Tenn. Gas Pipeline Co.*, 96 N.Y.2d at 130 (citing and quoting *Oregon Waste Sys.*, 511 U.S. at 103).

36. *Id.* at 130.

37. *Id.* at 131.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Tenn. Gas Pipeline Co.*, 96 N.Y.2d at 131.

less than the § 189 import tax on similar quantities of gas.[42] Therefore, the "practical effect of the statutes is the same – consumers carry the tax burden for the use of natural gas in New York."[43] Such an effect, the court reasoned, relieves it of the need to engage in comparative market analysis in order to determine whether the two taxes roughly approximated each other for Commerce Clause purposes.[44]

The court next considered the third criterion of a valid compensatory tax: whether the "events" upon which the taxes are imposed are "substantially equivalent."[45]

Tennessee Gas argued that § 186 and § 186-a are franchise taxes (assessed against a corporation for the privilege of doing business in New York) while § 189 is an import tax.[46] Thus, the Company contended, the two taxes are imposed upon significantly different economic events.[47]

In contrast, the Tax Department compared § 186 and § 186-a to a sales tax and § 189 to a use tax.[48] Under this comparison, while "the taxing events are different (purchase or use), they completely cover one area of economic activity – the taxation of all tangible property used or consumed within the State regardless of where the property is acquired."[49] The court, however, was reluctant to approve such a classification because it would essentially create a new category of compensatory tax.[50]

Instead, the court noted that a new category was not needed, since, as it had pointed out previously, the taxes concerned two "substantially equivalent" events: "the sale of gas in New York and the use of imported gas in New York."[51] Yet, they were also "mutually exclusive; the consumer either buys the gas in-State or imports it" – and therefore could not overlap.[52] The court held that Tax Law § 189 met the third criterion for a valid compensatory tax because it concerned a substantially similar economic event yet did not overlap with §§ 186, 186-a[53] so as to give rise to multiple taxation of the same transaction. Consequently, the court determined that Tennessee Gas had failed to

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 132.
46. *Id.*
47. *Tenn. Gas Pipeline Co.*, 96 N.Y.2d at 131.
48. *Id.*
49. *Id.* at 132-133.
50. *See id* at 133.
51. *Id.*
52. *Id.*
53. 96 N.Y.2d at 131.

overcome the Tax Department's showing that Tax Law § 189 was a valid compensatory tax.

C. *Fair Apportionment*

Tennessee Gas' final Commerce Clause attack on the import tax was based on the principle of "fair apportionment."[54] The purpose of fair apportionment scrutiny is "'to ensure that each State taxes only its fair share of an interstate transaction,'"[55] thus reducing the prospect of multiple taxation of a single interstate transaction.

To determine whether a tax violates the principle of fair apportionment – in other words, whether it is 'malapportioned' - the United States Supreme Court uses either an "internal" or "external" consistency test.[56] Tennessee Gas argued that Tax Law § 189 violated the internal consistency test.[57] Under this analysis, a tax does not violate internal consistency if

> the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test . . . simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.[58]

A tax that violates internal consistency demonstrates that the sponsoring state is attempting to take more than its fair share of an interstate transaction, in violation of the Commerce Clause.[59]

Under this test, the court assumed hypothetically that each state had a tax identical to that of § 186.[60] If a company such as Tennessee Gas were then to buy gas in a state other than New York, it would be subject to a similar "pass through" tax "even though [it] exported the gas to New York and consumed it here."[61]

---

54. *Id.*

55. *Id.* (quoting Goldberg v. Sweet, 488 U.S. 252 (1989)).

56. *See id.* (citing Oklahoma Tax Commn. v. Jefferson Lines, Inc. 514 U.S. 175, 185 (1995)).

57. *Id.*

58. *Id.* (quoting Oklahoma Tax Commn., 514 U.S. at 185).

59. *Tenn. Gas Pipeline Co.*, 96 N.Y.2d at 133; *see also* Oklahoma Tax Commn., 514 U.S. at 185.

60. *Tenn. Gas Pipeline Co.*, 96 N.Y.2d at 133-34.

61. *Id.* at 134.

The court concluded that under this scenario, § 189 caused the importer to incur double taxation – first, at the point of purchase out of state (through the out-of-state "pass through" tax) and second, at the moment it is imported into and consumed in New York.[62] Because it provided no credit for an out-of-state tax imposed on the purchase of gas out of state but imported into New York, Tax Law § 189 violated internal consistency.[63]

The court rejected the Tax Department's argument that a provision in the tax law – apparently anticipating such a problem – which would allow a court to formulate an offsetting credit for any out-of-state tax incurred, effectively "saves" the law from being judged unconstitutional.[64] The court found the provision invalid because it calls for the judiciary to assume legislative powers – by rewriting the law in order to save it – and was thus inconsistent with separation of powers principles.[65]

Accordingly, the court held that Tax Law § 189 was inconsistent with the principle of fair apportionment and impermissibly burdened interstate commerce.[66]

IV. CONCLUSION

In *Tennessee Gas Pipeline Co. v. Urbach*, the New York Court of Appeals held that the Natural Gas Import Tax (New York Tax Law § 189) violated the Commerce Clause of the United States Constitution.[67] The court held that the law, which imposed a tax on the importation of natural gas into New York for the importer's own use or consumption, was inconsistent with the principle of fair apportionment because it failed to provide an offsetting credit for taxes imposed on the out-of-state purchase of natural gas.[68]

Nicholas Kappas

62. *See id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Tenn. Gas Pipeline Co.*, 96 N.Y.2d at 133-34.
67. *Id.*
68. *Id.* at 128-35.

CLARA C. V. WILLIAM L.[1]

(decided May 3, 2001)

I. SYNOPSIS

In writing for the majority, Judge Ciparick, of the New York Court of Appeals, held that a putative father cannot invoke Family Court Act § 516 ("FCA") to prevent a mother from seeking additional child support when the parties had previously entered into a support agreement that failed to account for the child's needs.[2] After rendering its decision, the court remitted the case back to the family court for further proceedings in accordance with the judgment.[3]

II. BACKGROUND

Petitioner, Clara C., brought a claim against William L. seeking a declaration of paternity and a modified order of support.[4] In response, William filed a motion to dismiss the claim, asserting that the Family Court Act § 516 barred Clara's claims.[5]

Over ten years ago, in 1986, Clara had commenced an earlier paternity proceeding against William.[6] At that time William made a motion ordering blood tests to ascertain whether he was the father of Clara's son Thomas.[7] Those tests revealed a ninety-nine percent probability of William's paternity of Thomas.[8] Despite the results of the blood test, rather than filing a paternity action, Clara and William entered into an Agreement to settle the support claims.[9]

Under the Support Agreement ("Agreement"), William, without admitting paternity, agreed to pay Clara $275 per month for child support, until Thomas' 21st birthday.[10] In return, Clara agreed to dismiss the pending suit and to neither seek child support nor commence any

1. 96 N.Y.2d 244 (2001) ("Clara C. II").
2. *See id.* at 247.
3. *See id.* at 251.
4. *See Clara C. v. William L.*, 692 N.Y.S.2d 569, 572 (Fam. Ct. 1999) ("Clara C. I").
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See Clara C. I*, 692 N.Y.S.2d at 572.

other paternity actions against William.[11] After the Agreement was made, William submitted it to the family court requesting approval, as required by FCA § 516.[12] The application for verification of the agreement was heard both in open court and at a proceeding where the parties, parties' counsel and a representative from Social Services appeared.[13]

In this instant case, where Clara sued William for additional support, William asserted that the Agreement executed between himself and Clara ten years ago contained language barring future support actions and that FCA § 516 prevented prosecution of Clara's suit.[14] A Hearing Examiner reviewed William's claims and granted his motion to dismiss.[15] The Hearing Examiner agreed that FCA § 516 barred Clara's claims.[16]

Clara appealed to the family court.[17] During the course of the appeal, the court appointed a Law Guardian for Thomas.[18] Both the Law Guardian and Clara alleged that William failed to comply with the terms of the initial Agreement, as he was delinquent with his payments.[19] Second, Clara argued that the judicial process by which the family court approved the Agreement was inaccurate because the court did not determine whether the Agreement was adequate for Thomas and because the court failed to provide Thomas with a law guardian.[20] Clara's most significant argument was that FCA § 516 unconstitutionally violates the Equal Protection clause of the Fourteenth Amendment.[21]

After hearing these contentions the family court affirmed the findings of the Hearing Examiner and dismissed Clara's case.[22] Although

---

11. *Id.* Specifically the agreement stated that Clara "will not in the future institute paternity proceedings in any court in any jurisdiction to establish that William L. is the natural father of the child." *Id.*

12. *See id.*

13. *See id.*

14. *See id.* FCA § 516(c) states that "The complete performance of the agreement or compromise, when so approved, bars other remedies of the mother or child for the support and education of the child." *Id.*

15. *See Clara C. I*, 692 N.Y.S.2d at 572.

16. *See Clara C. II*, 96 N.Y.2d at 248.

17. *See Clara C. I*, 692 N.Y.S.2d at 572.

18. *See id.*

19. *See id.* at 574.

20. *See id.*

21. *See id.*

22. *See Clara C. I*, 692 N.Y.S.2d at 572.

the family court acknowledged that the Agreement's verification might be inadequate, the court refused to invalidate the agreement because of the strong policy favoring finality of settlements.[23] The court also noted that William's non-compliance with the agreement was immaterial, and that § 516 was constitutional.[24]

Clara then appealed to the Appellate Division of the Second Department. That court affirmed the decision of the family court,[25] but granted Clara leave to appeal to the New York Court of Appeals.[26]

On appeal to the New York Court of Appeals was the issue of whether a father may invoke FCA § 516 to bar a mother or child from seeking additional support where there was an initial agreement that was approved without consideration of the child's needs.[27]

III. Discussion

The court analyzed two topics to determine the outcome of the case. First, the court looked at the requirements of FCA § 516 concerning approval of agreements.[28] Second, the court addressed the constitutionality of § 516.[29] The court found that the Agreement between Clara and William did not meet the requirements of FCA § 516 because the lower court failed to examine the adequacy of the Agreement. Because the court settled the case on that issue, the court found no reason to look at the constitutionality of FAC § 516.

1. *The Adequacy of the Agreement*

FCA § 516 allows an unmarried mother and a putative father to enter into a binding support agreement in order to settle child support.[30] This agreement waives future support actions.[31] However, FCA § 516 makes clear that the support agreement will only be enforced when a court has reviewed the agreement and determined that ade-

---

23. *See Clara C. II*, 96 N.Y.2d at 248.
24. *See id.*
25. *See Clara C. v. William L.*, 716 N.Y.S.2d 573 (2d Dep't 2000).
26. *See Clara C. v. William L.*, 716 N.Y.S.2d 859 (2d Dep't 2000).
27. *See Clara C. II*, 96 N.Y.2d at 247.
28. *See id.* at 249-50.
29. *See id.* at 250-51.
30. *See* N.Y. Fam. Ct. Act § 516 (Consol. 2002). *See also Clara C. II*, 96 N.Y.2d at 248.
31. *See* N.Y. Fam. Ct. Act § 516(c). *See also Clara C. II*, 96 N.Y.2d at 249.

quate support for the child has been made.[32] New York requires this review because of its longstanding policy of protecting children born out of wedlock.[33] This review also ensures that unmarried mothers do not "contract away" the needs of their children.[34]

FCA § 516 does not provide a specific test for courts to use in order to ascertain whether an agreement adequately provides for a child.[35] Nonetheless, courts generally look at factors such as "financial positions, the child's support and educational needs throughout childhood, and the interests of the State" in arriving at a decision.[36] These factors ensure that a court arrives at the conclusion that the agreement is both fair and adequate for the child.[37]

In this case, the court determined that the record did not indicate whether the lower court considered the adequacy of the Agreement when it approved the Agreement.[38] Rather, the family court made a perfunctory approval that neither considered the parties' financial situations nor whether the settlement adequately covered Thomas' needs throughout childhood.[39] Without court approval any agreement for child support made between a mother and putative father "will not be enforced to preclude a later modification of support."[40]

Furthermore, because the family court improperly approved the Agreement, it is irrelevant that Clara did not raise any objection to the Agreement for ten years.[41] Without proper court approval, FCA § 516 bars the support agreement from precluding further challenges, so any lapse in time is irrelevant.[42] Consequently, William was unable to use FCA § 516 to prevent Clara from bringing her suit requesting a decla-

32. *See Clara C. II*, 96 N.Y.2d at 249. Indeed, other jurisdictions have also determined that there must be judicial scrutiny of these agreements. *See e.g.*, *Willerton v. Bassham*, 889 P.2d 823 (Nev. 1995); *Tuer v. Niedoliwka*, 285 N.W.2d 424 (Mich. 1979); *Fox v. Hohenshelt*, 528 P.2d 1376 (Or. 1974).

33. *See Clara C. II*, 96 N.Y.2d at 249. Before § 516 was enacted settlement agreements for children born out of wedlock were made by local welfare officials and did not require any court approval. Over time the Legislature became increasingly concerned that these settlements were inadequate to support the child. As such, the Legislature enacted § 516 to require judicial approval. *See id.*

34. *See Clara C. II*, 96 N.Y.2d at 249.

35. *See id.* at 250.

36. *See id.*

37. *See id.*

38. *See id.*

39. *See Clara C. II*, 96 N.Y.2d at 250.

40. *Id.*

41. *See id.*

42. *See id.*

ration of paternity and an increased support order to account for Thomas' increasing educational needs.[43]

2. *The Constitutionality of § 516*

After determining that the Agreement does not comply with FCA § 516's requirements, the court turned to the constitutionality of § 516.[44] The court concluded that there was no need to revisit their holding in *Bacon v. Bacon*[45] and reevaluate whether FCA § 516 infringes upon the Equal Protection Clause.[46]

Although the majority opinion declined to address the constitutionality of § 516, Judge Levine's concurrence explored the constitutionality of § 516. Judge Levine found that FCA § 516 does violate the Equal Protection Clause.[47] Judge Levine argued that although judicial restraint encouraged courts not to address constitutional issues, there are some instances where the public interest warrants that the court address constitutional matters.[48]

Attacking the constitutionality of FCA § 516 is not a new claim. Twenty-two years ago a similar attack was brought in *Bacon*.[49] In *Bacon*, the court rejected the equal protection attack, concluding that the discriminatory statutory treatment of non-marital children in FCA § 516 was substantially related to a permissible state interest.[50] Part of the reason for the decision in *Bacon* arose from the fact that twenty-two years ago there were no reliable methods of concluding paternity, and where paternity could not be ascertained, the determination turned on witness credibility.[51] Thus, the court believed that it had to protect against the inadequacies of science at that time.

In *Clara II*, Judge Levine concludes, in his concurrence, that in an intermediate level review of FCA § 516, the developments in the law

---

43. *See id.*

44. *See id.*

45. 46 N.Y.2d 477.

46. *See Clara C. II*, 96 N.Y.2d at 250. The court reasoned that they were bound by judicial restraint not to consider constitutional questions unless their decision is necessary to decide the issue on appeal. Since, the court resolved the issue by finding that the requirements of § 516 were not properly upheld there was no need for them to address the constitutionality of § 516. *See id.*

47. *See id.* at 251.

48. *See id.*

49. *See Bacon*, 46 N.Y.2d 477; *see also Clara C. II*, 96 N.Y.2d at 251.

50. *See Bacon*, 46 N.Y.2d at 480; *Clara C. II*, 96 N.Y.2d at 251-52.

51. *See Matter of Commissioner of Social Servs. v. Phillip De G.*, 59 N.Y.2d 137, 141-42 (1983).

and genetic technology negate the State's substantial interests.[52] Science has now developed to the point where genetic testing can, with almost certainty, establish paternity—thus, problems of proof are now virtually eradicated and *Bacon's* premise unfounded.[53] Additionally, Judge Levine notes that the unconstitutionality of FCA § 516 is so clear that it remains unconstitutional even where the adequacy requirements of the statute are met.[54]

Similar to other statutes that have been found unconstitutional, FCA § 516 draws distinctions between children of married and unmarried parents. A child of married parents is "never precluded from enforcing a statutory right of support from its father."[55] The child is also "not precluded from enforcing a statutory right to additional support by way of modification of the child support terms."[56] Conversely, a child of unmarried parents is "forever barred from seeking either an initial order of support" or from seeking a modification of that order.[57]

Indeed, even the United States Supreme Court began to strike down statutory classifications that treat children of married parents more favorably than children of unmarried parents.[58] This began with a decision in *Levy v. Louisiana*.[59] The jurisprudence of the Supreme Court illustrates that "a classification based on illegitimacy is unconstitutional unless it bears an "evident and substantial relation to the particular. . . interests [the] statute is designed to serve."[60]

The Supreme Court's recent direction and scientific developments do not make the state's interest in assuring parental support and avoiding paternity litigation substantial enough to survive an intermediate level equal protection review of FCA § 516.[61] The states' interests are now too attenuated to allow different treatment of marital and

52. *See Clara C. II*, 96 N.Y.2d at 252.

53. *See id.* at 255-56.

54. *See id.* at 252.

55. *Clara C. II*, 96 N.Y.2d at 253.

56. *Id.*

57. *See id.*

58. *See Clara C. II*, 96 N.Y.2d at 252.

59. 391 U.S. 68 (1968).

60. Pickett v. Brown, 462 U.S. 1, 7-8 (1983) (quoting United States v. Clark, 445 U.S. 23, 27 (1980)).

61. *See Clara C. II*, 96 N.Y.2d at 256.

non-marital children.[62] Consequently, Judge Levine finds that FCA § 516 is unconstitutional.[63]

Despite Judge Levine's persuasive argument, the majority fails to address the constitutionality issue, thus leaving § 516 and *Bacon's* precedent intact. Although the court reasoned that judicial restraint precluded them from deciding the constitutionality, the court's failure to address the issue neglects the fact that the statute is rooted and premised on uncertainty in determining paternity. However, DNA testing allows certainty concerning paternity, thus negating primary reasons behind § 516. Moreover, New York recognizes the certainty of DNA testing in other statutes that permit DNA testing by allowing admission of DNA results to prove or disprove paternity.[64]

As a result of not addressing FCA § 516, New York retains a statute that impermissibly creates a different standard for children of unmarried parents. Under both the modern Supreme Court's precedents and scientific advancements § 516 no longer serves substantial State interests. And Judge Levine was correct in finding it unconstitutional.

IV. Conclusion

In *Clara C. II* the New York Court of Appeals found that where a family court had improperly approved a support agreement between a mother and putative father, the mother was not barred by § 516 from filing a subsequent suit for paternity declaration and a modified support order.[65] However, because the court resolved the case based upon the Agreement's inadequate approval the court did not consider FCA § 516's constitutionality.[66]

Alifya Vasi

62. *See id.* at 257.
63. *See id.* at 258.
64. *See id.* at 256; *see also* N.Y. Fam. Ct. Act § 532.
65. *See Clara C. II*, 96 N.Y.2d at 247.
66. *See id.* at 250.

ALIESSA V. NOVELLO[1]

(decided June 5, 2001)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that N.Y. Soc. Serv. Law section 122 violated Article XVII, section 1 of the New York State Constitution and the Equal Protection clauses of both the United States Constitution and the New York State Constitution. Section 122 eliminated State Medicaid for legally admitted aliens until they have been in the country for five (5) years.[2] The court first held that the scheme violated Article XVII, section 1 of the New York State Constitution. Utilizing a strict scrutiny analysis, the court also held that the law violated Equal Protection. The court also suggested that the Supremacy Clause of the United States Constitution gives the federal government sole control over immigration matters, control that cannot be delegated to the states.

II. BACKGROUND

New York Social Services Law section 122 was enacted as part of the New York State Welfare Reform Act, responding to the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"),[3] passed by Congress in 1996. Title IV of PRWORA deals with benefits to aliens and Congress stressed that its goals were to promote self-sufficiency and to discourage aliens from immigrating to the United States to take advantage of welfare and other benefits.[4] By passing PRWORA, Congress restricted the eligibility of aliens for federally funded public assistance and encouraged the states to do the same.[5]

New York responded to PRWORA by enacting Social Services Law section 122.[6] Title IV divided aliens into two categories – qualified and

1. 96 N.Y.2d 418 (2001).
2. N.Y. SOC. SERV. LAW § 122 (McKinney 1997).
3. The Personal Responsibility and Work Opportunities Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 26 (codified in scattered sections of 8 and 42 U.S.C.) (1996).
4. *See Aliessa*, 96 N.Y.2d at 425; 8 U.S.C. § 1601(1)-(2) (1996).
5. *See Aliessa*, 96 N.Y.2d at 425.
6. *Id.* at 427.

non-qualified aliens.[7] Qualified aliens include, *inter alia*, green card holders, those granted asylum, Cuban and Haitian entrants and victims of battering.[8] Qualified residents were further divided into two (2) categories, the first includes those aliens that were lawfully residing in the United States before August 22, 1996.[9] The second category included those who entered the country on or after August 22, 1996. This category was deemed ineligible for Federal Medicaid benefits for five (5) years. Furthermore, Title IV authorized the states to extend this period.[10]

All other aliens, including permanent residents under color of law ("PRUCOL's"), were deemed to be non-qualified.[11] Section 122 terminated Medicaid benefits for all non-qualified aliens.[12] The law did not, however, deny benefits to PRUCOL'S who as of August 4, 1997 were receiving Medicaid and were diagnosed with AIDS or residing in licensed residential health care facilities.[13] Section 122(1)(b)(i) provided Medicaid benefits to those aliens that entered the United States before August 22, 1996. Those who entered after that date under section 122 would now have to wait five (5) years for coverage, including all lawfully admitted permanent resident plaintiffs.[14]

Plaintiffs were twelve aliens who resided in New York.[15] These aliens fell into two groups. Some were lawfully admitted residents to the United States under the Immigration and Nationality Act (they held green cards),[16] the other group were PRUCOL's.[17] The Plaintiffs brought a class action suit claiming that section 122 violated Article XVII, sections 1 and 3 of the New York State Constitution and the Equal Protection clauses of the United States and New York Constitutions.[18] The New York Supreme Court partially granted plaintiff's motion for summary judgment and declared that section 122 violated

7. *Id.* at 425; 8 U.S.C. § 1641.

8. *See Aliessa*, 96 N.Y.2d at 425; 8 U.S.C. § 1641 (b)-(c).

9. *See Aliessa*, 96 N.Y.2d at 426; 8 U.S.C. § 1612(b)(2) provides Federal Medicaid to some, but not all, of this group.

10. *See Aliessa*, 96 N.Y.2d at 426; *see also* 8 U.S.C. §§ 1613(a) and 1612(b)(1).

11. *See Aliessa*, 96 N.Y.2d at 426.

12. *Id.* at 427; N.Y. SOC. SERV. LAW § 122 (McKinney 1997).

13. *See Aliessa*, 96 N.Y.2d at 435; N.Y. SOC. SERV. LAW § 122(1)(c).

14. *See Aliessa*, 96 N.Y.2d at 436; N.Y. SOC. SERV. LAW § 122(1)(b)(ii).

15. *See Aliessa*, 96 N.Y.2d at 422.

16. *Id.*; *See also* 8 U.S.C. § 1101.

17. *See Aliessa*, 96 N.Y.2d at 422; 8 U.S.C. § 1254; 26 U.S.C. § 3304(a)(14)(A). These are aliens the INS is aware of, but has no plans to deport.

18. *See Aliessa*, 96 N.Y.2d at 422-23.

Article XVII, section 1 of the New York Constitution[19] and the Equal Protection clauses of the United States and New York Constitutions.[20]

Three days later, the appellate division decided *Alvarino v. Wing*,[21] which held that Social Services Law section 95 did not unconstitutionally deny resident aliens food assistance because the State enacted the statute in direct response to a Federal appropriations bill.[22] Therefore, the standard for equal protection purposes should be a rational basis standard rather than strict scrutiny.[23] The supreme court then granted reargument based on the holding of *Alvarino* and vacated its decision that section 122 violated the Equal Protection clauses of the United States and New York State Constitutions.[24] The court did not reverse their decision that section 122 violated Article XVII, section 1 of the New York State Constitution. The Appellate Division, First Department then reversed that decision in part and affirmed in part and held that section 122 did not violate the equal protection clauses, agreeing with the supreme court, and it also did not violate article XVII, section 1 of the New York State Constitution, disagreeing with the Supreme Court.[25]

The appellate division held that a mere rationality standard should apply based upon *Alvarino*.[26] The court followed the rule from *Alvarino* that state-made classifications made pursuant to federally mandated laws are entitled to the same rationality review, as would be a federally enacted law.[27] The plaintiffs then appealed to the court of appeals as of right.[28]

---

19. "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." *Aliessa*, 96 N.Y.2d at 427-28.

20. *See Aliessa*, 96 N.Y.2d at 423.

21. 690 N.Y.S.2d 262 (1st Dep't 1999).

22. *See* Pub. L. No. 105-118, 111 Stat 2386 (1997).

23. *Alvarino*, 690 N.Y.S.2d at 256; *accord*, Mathews v. Diaz, 426 U.S. 67 (1976); Washington v. Confederated Bands & Tribes of Yakima Nation, 439 U.S. 463 (1979).

24. *See Aliessa*, 96 N.Y.2d at 436.

25. *Id.*

26. 690 N.Y.S.2d 262 (1st Dep't 1999).

27. *See Mathews*, 426 U.S. at 81-83; *Washington*, 439 U.S. at 501 (holding that state action is subject to rationality review and not strict scrutiny when a state acts "in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians.")

28. *See Aliessa*, 96 N.Y.2d at 436; *see also* N.Y. C.P.L.R. 5601(b) (McKinney 2001).

III. Discussion

The court first addressed the issue of whether section 122 violated Article XVII, section 1 of the New York State Constitution.[29] Care for the needy in New York State is a "constitutional mandate."[30] The State argued that the law provides plaintiffs with full safety net protection and emergency medical treatment.[31] The plaintiffs argued that section 122 deprived them of ongoing medical care. Under the scheme they would have to wait until their conditions reached emergency proportions before they could receive treatment.[32] The United States Supreme Court has said that ongoing medical care is a "basic necessity of life."[33] Judge Rosenblatt listed two ailments as examples that require ongoing treatment – diabetes and asthma.[34] The court disposed of this issue and found in favor of the plaintiffs by holding that section 122 violated the "letter and spirit" of Article XVII, section 1 by imposing "overly burdensome" conditions for eligibility that had nothing to do with need.[35]

Judge Rosenblatt[36] then centered his analysis of the equal protection issue on *Graham v. Richardson*.[37] This case involved the manner in which the State of Arizona administered a federal disability program under federal law.[38] Arizona argued that because federal law impliedly authorized its fifteen year residency period it did not violate the 14th Amendment.[39] The United States Supreme Court held that the federal government does have the power to distinguish among aliens regarding rules for their admission and naturalization.[40] However,

---

29. *See Aliessa*, 96 N.Y.2d at 436.

30. *Id.* (citing Tucker v. Toia, 43 N.Y.2d 1, 7 (1977); Lovelace v. Gross, 80 N.Y.2d 419, 424 (1992); Jiggets v. Grinker, 75 N.Y.2d 411, 416 (1990)).

31. *See Aliessa*, 96 N.Y.2d at 428.

32. *Id.* at 429.

33. Memorial Hospital v. Maricopa County, 415 U.S. 250, 260-61 (1974) ("To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the damage of a substantial and irrevocable deterioration in his health.")

34. *See Aliessa*, 96 N.Y.2d at 429.

35. *Id.*

36. Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley and Graffeo concurred in the decision.

37. 403 U.S. 365 (1971) (holding that State classifications based on alienage are subject to strict scrutiny.).

38. *See id.* at 367.

39. *See id.* at 382.

40. *Id.*

"Congress does not have the power to authorize the individual states to violate the Equal Protection Clause."[41] As a threshold matter, aliens are "persons" for purposes of 14th Amendment protection.[42]

The plaintiffs argued that strict judicial scrutiny[43] should apply to section 122 because it creates a classification based upon alienage.[44] The state argued that since section 122 merely implemented federal immigration policy that a mere rationality standard[45] should apply.[46] The State did not even attempt to justify section 122 under a strict scrutiny standard and did not identify a "compelling State interest" that section 122 would promote.[47]

The United States Constitution gives Congress the right to "establish [a] uniform Rule of Naturalization."[48] In regards to immigration, the United States Supreme Court has explained that "over no [other] conceivable subject is the legislative power of Congress more complete."[49] Congressional power is so strong in this area that it has the power to exclude aliens,[50] and it also has the power to deport aliens.[51] Judge Rosenblatt pointed out in footnote 15 that the states were given no such power in the United States Constitution.[52] Immigration policy is an exclusively federal endeavor and the Congress is granted a wider

---

41. *See Aliessa,* 96 N.Y.2d at 434 (quoting *Graham,* 403 U.S. at 382).

42. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

43. *See Aliessa,* 96 N.Y.2d at 427 (under strict scrutiny a state statute will withstand an equal protection challenge only when the State shows that the law "furthers a compelling state interest by the least restrictive means practically available) (quoting Bernal v. Fainter, 467 U.S. 216, 227 (1984)).

44. *See Aliessa,* 96 N.Y.2d at 427.

45. For an exposition of rationality review, *see* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969) ("The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of [equal protection] only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.")

46. *See Aliessa,* 96 N.Y.2d at 431.

47. *Id.*

48. *See Aliessa,* 96 N.Y.2d at 432 (quoting U.S. CONST., art. I, § 8, cl. 4).

49. *See Aliessa,* 96 N.Y.2d at 432-33 (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

50. *See* Chan Ping v. United States, 130 U.S. 581 (1889).

51. *See* Bugajewitz v. Adams, 228 U.S. 585, 592 (1913).

52. *See Aliessa,* 96 N.Y.2d at 433 (citing Plyer v. Doe, 457 U.S. 202, 219 n.19. (1982)).

latitude in making distinctions between aliens and citizens than state legislatures.

The Constitution does not prevent Congress from making a distinction between aliens and citizens.[53] In *Mathews v. Diaz*,[54] aliens challenged a federal statute that denied Medicare to those aliens who had been in the United States for less than five years. The Supreme Court showed its true superiority over immigration policy when it stated that the "decision to share our bounty with our guests may take into account the character of the relationship between the alien and this country; Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence."[55] That case was distinguished from the instant case because it was a federal welfare program, whereas here it was a state program and thus the federal control over immigration policy is clear.

When federal welfare policies are administered jointly with the states, Congress may direct the states to implement immigration objectives as long as the "[f]ederal government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass."[56] The United States Supreme Court has cautioned the states regarding state regulation that discriminates against lawful immigrants as being "impermissible if it imposes additional burdens not contemplated by Congress."[57]

The State argued that based on the above law, section 122 did exactly what Title IV allowed it to do. The court of appeals disagreed with this analysis and followed *Graham v. Richardson*.[58] The United States Supreme Court in *Graham* stated explicitly that a "congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene [the] explicit constitutional requirement of uniformity."[59] Judge Rosenblatt was concerned with uniformity in state laws and under the State's argument there appeared the possibility of fifty different State laws regarding requirements for legally admitted aliens to receive Medicaid. This

53. *See Aliessa*, 96 N.Y.2d at 432.
54. 426 U.S. 67 (1976).
55. *See Aliessa*, 96 N.Y.2d at 433 (quoting *Mathews*, 426 U.S. at 80).
56. *See Aliessa*, 96 N.Y.2d at 435 (quoting *Plyer* at 219 n. 19).
57. *See Aliessa*, 96 N.Y.2d at 433 n.16 (quoting DeCanas v. Bica, 424 U.S. 351, 358 n.6 (1976)).
58. 403 U.S. 365 (1971).
59. *See Aliessa*, 96 N.Y.2d at 434 (quoting *Graham*, 403 U.S. at 382).

could, in theory, lead to a "race to the bottom," with each state passing more harsh laws denying aliens welfare benefits.

The Court then held that Title IV is constitutionally flawed because of its lack of uniformity in immigration policy, a uniformity that the United States Constitution requires.[60] It falls directly under *Graham* because it allows states to adopt divergent approaches on welfare policies in regards to immigration, an outcome that *Graham* disavowed.[61] Judge Rosenblatt attacked Title IV when he stated: "in the name of national immigration policy, it impermissibly authorizes each state to decide whether to disqualify many otherwise eligible aliens from State Medicaid."[62] Therefore, Title IV gives section 122 no special protection from strict scrutiny. Since the State showed no compelling interest for the policy, the court held that section 122 is unconstitutional because it is a distinction based on alienage, violating the equal protection clauses of both the United States Constitution and the New York State Constitution.[63] Although he stopped short of declaring Title IV of PRWORA unconstitutional, Judge Rosenblatt made clear that under *Graham* and the United States Constitution, Title IV was flawed because it did not reflect a uniform federal policy on immigration matters and actually encouraged non-uniform laws.

IV. CONCLUSION

In *Aliessa*, the New York Court of Appeals held that section 122 of the New York Social Services Law was unconstitutional on two grounds. First, it violated Article XVII, section 1 of the New York State Constitution because it imposed upon plaintiffs overly burdensome eligibility conditions for medical care that had nothing to do with need. Second, it violated the Equal Protection Clauses of both the New York and United States Constitutions by denying legal aliens Medicaid benefits solely on their status as aliens. Furthermore, the Court held that the proper standard of review was strict scrutiny because distinctions based

60. *See Aliessa*, 96 N.Y.2d at 435 ("Considering that Congress has conferred upon the States such broad discretionary power to grant or deny aliens State Medicaid, we are unable to conclude that title IV reflects a uniform national policy. If the rule were uniform, each State would carry out the same policy under the mandate of Congress — the only body with authority to set immigration policy."); *see also* U.S. CONST., art. I, § 8, cl. 4 ("[The Congress shall have the power] to establish a uniform Rule of Naturalization.").

61. *See Aliessa*, 96 N.Y.2d at 435; *Graham*, 403 U.S. at 382.

62. *See Aliessa*, 96 N.Y.2d at 436.

63. *Id.*

upon alienage were present. Because immigration policy is clearly a federal endeavor, and the United States Constitution and case precedents demand uniformity, section 122 must be analyzed under strict scrutiny. Section 122 could not pass muster under this test because there was no compelling state interest identified.

This case provides an excellent example of the federalism battle that is currently occurring in America. States rights advocates may argue that the states should have the right to determine what kind of benefits that they give to aliens within their borders. On the other hand, opponents of such laws see immigration policy as the exclusive domain of the federal government. It is an interesting battle that is also being waged in other areas of law and one that is far from being resolved.

Christopher DeCicco

PEOPLE V. ARNOLD[1]

(decided June 12, 2001)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that prospective jurors who disclose prior experiences or opinions that may prejudice their verdicts must be disqualified from serving as jurors, unless they unequivocally state that they can nevertheless render impartial verdicts.[2] Additionally, the court held that prospective jurors with "expert" backgrounds are not automatically disqualified to serve as jurors.[3] Jurors, however, cannot use their professional or technical expertise to introduce facts and conclusions into jury deliberations that were not developed at trial.[4]

II. BACKGROUND

The defendant in this case was indicted and tried on charges relating to the stabbing of his girlfriend.[5] A jury found the defendant guilty of criminal assault.[6]

The defendant appealed his conviction claiming that the trial court erred by refusing to grant his motion to exclude one of the prospective jurors for cause during voir dire.[7] The defendant argued that the prospective juror made statements that clearly indicated she could not decide the case fairly.[8]

The prospective juror minored in women's studies and researched the issue of battered women's syndrome while in college.[9] In response to a question posed by the prosecutor, the prospective juror stated that she had done a lot of research on domestic violence and battered women's syndrome. She added "I have a problem with that."[10] De-

1. 96 N.Y.2d 358 (2001).
2. *See id.* at 362-64.
3. *Id.* at 364-68.
4. *See id.*
5. *Id.* at 361.
6. *Id.*
7. *See* People v. Arnold, 708 N.Y.S.2d 762, 763 (4th Dep't 2000).
8. *See id.* at 764; *Arnold*, 96 N.Y.2d 358, 360 (2001).
9. *Arnold*, 96 N.Y.2d at 360.
10. *See id.*; *see also Arnold*, 708 N.Y.S.2d at 764.

fense counsel then asked the prospective juror if she might discuss what she knew about domestic violence with other jurors during deliberations and if that might make other jurors rely on her as an expert.[11] The prospective juror responded, "I think so," and counsel suggested that it might be better if she served as a juror on a different type of case.[12]

The prosecutor objected to defense counsel's motion to exclude the prospective juror for cause.[13] The prosecutor argued that the prospective juror never stated that she "wouldn't be able to listen to the law and would be unfair."[14] The prosecutor also mentioned that the juror could "be advised as to what she can or cannot do."[15] Ultimately, the trial court refused to exclude the juror for cause, and the defendant was forced to use a peremptory challenge.[16] The defendant exhausted his peremptory challenges before the jury selection process concluded.[17] Thus, if the trial court had excluded the prospective juror for cause, the defendant would have had one additional peremptory challenge with which to shape the jury.

In a 3-2 decision, the appellate division reversed the judgment of the trial court.[18] The majority held that "once the prospective juror expressed doubt regarding her ability to be impartial or indicated that she might be an unsworn expert witness in the jury room, it was incumbent upon the court to ascertain that her prior state of mind would not influence her verdict and that she would render an impartial verdict based upon the evidence."[19] The majority indicated that the court failed to determine if the prospective juror could be impartial despite her prior knowledge and experiences.[20] The majority dismissed the charges against the defendant without prejudice.[21]

Two judges dissented from the majority opinion because they believed that the prospective "juror did not evince a state of mind that would likely preclude her from rendering an impartial verdict based

---

11. *Arnold,* 96 N.Y.2d at 360.
12. *Id.*
13. *Id.* at 361.
14. *Id.*
15. *Id.*
16. *Id.*
17. *See Arnold,* 708 N.Y.S.2d 762, 763.
18. *See id.*
19. *Id.* at 764.
20. *Id.*
21. *Id.*

upon the evidence."[22] The dissenting opinion noted that all of the prospective jurors, including the prospective juror at issue, collectively indicated that they would follow the law and base their verdict on the evidence alone.[23]

The New York Court of Appeals granted the People's request for Leave to Appeal and affirmed the judgment of the appellate division.[24]

III. Discussion

The court of appeals began its analysis by repeating the old maxim that a defendant in a criminal trial has the right to be tried by an impartial jury.[25] The court, however, recognized that a defendant does not have the right to a "perfect" trial or a "perfect" jury.[26] The court explained that a prospective juror is not automatically disqualified from serving on a jury simply because he or she comes to court with life experience.[27] It would be unrealistic and undesirable to expect jurors to render verdicts without reference to their life experiences.[28] Unavoidably, all jurors come to court with the knowledge and experiences that they have acquired over the course of their lives.[29] Jurors must use these tools to assess the strength of evidence and legal arguments.[30]

Each juror, however, must be ready to decide a particular case without favoring one party over the other, and must be dedicated to deciding the case solely on the law and evidence introduced at trial.[31] The court stated that New York's Criminal Procedure Law provides "that a party may challenge a prospective juror for cause if the juror 'has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence.'"[32] The court cited *People v. Culhane* for the general principle that jurors must clearly express

22. *Id.*
23. *Arnold*, 708 N.Y.S.2d. at 764.
24. People v. Arnold, 95 N.Y.2d 888 (2000) (granting Leave to Appeal); *Arnold*, 96 N.Y.2d 358.
25. *Arnold*, 96 N.Y.2d 358.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 361-62 (citing N.Y. C.P.L. § 270.20 (1) (b) (Consol. 2001).

that any prior experiences or opinions that they bring to the jury room will not preclude them from rendering a fair verdict.[33]

The court then discussed how it applied this general principle in past cases. In *People v. Johnson*, the court held that the trial court improperly denied a defendant's challenge to disqualify a juror for cause after the juror stated he would favor police testimony.[34] Additionally, in *People v. Reyes* the court reversed the trial court's decision to deny a challenge to disqualify a juror for cause even though the juror stated that she could only try to be fair deciding a drug-related case impartially.[35]

The court noted that prospective jurors who themselves indicate that they might be biased in a particular case, must unequivocally indicate that they can decide the matter impartially if they are to serve on the jury.[36] If a prospective juror promises to decide a case fairly despite his or her prior experiences or opinions, a trial court may allow the prospective juror to serve if the court finds the promise credible.[37]

With these cases in mind, the court held that the appellate division correctly reversed the trial court's decision to deny the defendant's challenge for cause.[38] The court noted that the prospective juror's statements "revealed that, because of her [educational] background, the juror herself questioned whether she could be impartial in any domestic violence case . . . . Accordingly, the trial court should have granted the challenge for cause unless the juror unequivocally indicated that she could be fair despite her background."[39] Since the trial court did not elicit unequivocal assurances of impartiality from the prospective juror, the trial court should have granted the challenge for cause.[40] Agreeing with the appellate division, the court stated that it was not enough that the entire jury collectively stated that it would be impartial.[41] The trial court should have disqualified the prospective juror for cause unless she personally stated that she could decide the case impartially.[42]

---

33. *Id.* at 362 (citing People v. Culhane, 33 N.Y.2d 90, 106 (1973)).
34. *Id.* (citing People v. Johnson, 94 N.Y.2d 600, 611 (2000)).
35. *Id.* (citing People v. Reyes, 681 N.Y.S.2d 241 (1998)).
36. *Id.* (citing People v. Williams, 63 N.Y.2d 882, 884-85 (1984)).
37. *Arnold*, 96 N.Y.2d 358.
38. *Id.*
39. *Id.* at 358-59.
40. *Id.*
41. *Id.* at 362-63.
42. *Id.* at 363.

Next, the court addressed the defendant's contention that the trial court should have questioned the prospective juror further because she indicated that her study of domestic violence might make her an unsworn "expert" in the jury room.[43] Citing a United States Supreme Court opinion and several New York cases, the court noted that "the jury must reach its verdict solely on evidence received in open court, not from outside sources," and "courts have at times found it necessary to reverse convictions where jurors have been exposed to prejudicial, extra-record facts."[44]

The court remarked that it had overturned convictions in prior cases when jurors tainted the deliberative process by conducting unauthorized experiments and the jury treated the results of those experiments as evidence.[45] In *People v. Stanley* and *People v. Brown*, the court reversed convictions because jurors conducted unauthorized experiments or recreations to test the credibility of eyewitness testimony.[46] In *People v. Legister*, the court reversed a conviction where two jurors simulated the lighting conditions of the crime scene in a hotel room and then informed the rest of the jury of the results of their experiment.[47]

The court recently addressed the issue of "expert" jurors in *People v. Maragh*.[48] There, the court overturned a conviction because two nurses on the jury used their professional knowledge to calculate the victim's blood loss and reach conclusions about the cause of death.[49] The nurses presented their conclusions, which contradicted the conclusions of the experts who testified at the trial, to the rest of the jury.[50]

Although a court will not generally impeach a verdict by examining the details of a jury's deliberative process, the court "recognized that a narrow exception exists where there has been a showing of "improper influence" on the jury."[51] In *Maragh*, the court held that the

43. *Id.*

44. *Arnold*, 96 N.Y.2d at 363 (citing Shepard v. Maxwell, 384 U.S. 333, 351 (1966); People v. De Jesus, 42 N.Y.2d 519, 523 (1977); People v. Hommel, 41 N.Y.2d 427 (1977)).

45. *Id.*

46. *Id.* (citing People v. Stanley, 87 N.Y.2d 1000 (1996)); People v. Brown, 48 N.Y.2d 388 (1979)).

47. *Id.* (citing People v. Legister, 75 N.Y.2d 832 (1990)).

48. *Id.* at 364 (citing People v. Maragh, 94 N.Y.2d 269 (2000)).

49. *Id.*

50. *Id.*

51. *Id.* (quoting *Maragh*, 94 N.Y.2d at 573).

potential for a biased verdict exists when jurors use their professional expertise to form conclusions about the material issues involved in a case.[52] The "expert" juror's conclusions are not part of the trial record and, ultimately, might even contradict the evidence developed at trial.[53] The "expert" juror may also inform other jurors of his or her opinions or conclusions, tainting the entire deliberative process.[54] Jurors "are likely to defer to the gratuitous injection of expertise . . . over and above their own everyday experiences, judgment and the proofs adduced at trial."[55]

The court established a test in *Maragh* for determining when a juror with a professional expertise has improperly influenced the jury.[56] "Overall, a reversible error can materialize from (1) jurors conducting personalized specialized assessments not within the common ken of juror experience and knowledge (2) concerning a material issue in the case, and (3) communicating that expert opinion to the rest of the jury panel with the force of private, untested truth as though it were evidence."[57] Jurors may not "engage in experimentation, investigation and calculation that necessarily rely on facts outside the record and beyond the understanding of the average juror."[58] The court stated that this principle is violated when jurors use their expert knowledge to conduct scientific analyses and then communicate the results of those analyses to other jurors.[59] Such communication necessarily influences the jury to render a verdict based upon information beyond the evidence presented at trial.[60]

However, in the instant case the court held that the principles enunciated in *Maragh* were not violated and the trial court was not required to exclude the juror for cause based upon *Maragh*.[61] The record did not disclose that the prospective juror had any special expertise concerning an issue that was material to the case.[62] The court did not believe that the juror's knowledge of domestic violence issues

52. *Id.* (quoting *Maragh*, 94 N.Y.2d at 574).
53. *See id.*
54. *See id.* at 364-66.
55. *Arnold*, 96 N.Y.2d at 364 (quoting *Maragh*, 94 N.Y.2d at 574).
56. *Id.*
57. *Id.* (quoting *Maragh*, 94 N.Y.2d at 574).
58. *Id.* at 365.
59. *Id.*
60. *See id.* at 364-65.
61. *Arnold*, 96 N.Y.2d at 365.
62. *Id.* at 365.

was relevant to the trial.[63] Furthermore, the court declined to hold that merely studying a subject in college qualified the juror as an expert.[64] Finally, since the defendant used a peremptory challenge to excuse the juror, she was never in a position to communicate any "expert" information to the jury.[65]

On a final note, the court cautioned trial courts to address any concerns about prospective jurors early in the proceedings.[66] Trial courts must inform jurors that they are to decide cases impartially and solely on the evidence adduced at trial.[67] If a prospective juror indicates "a willingness to consider facts outside the record, the court should remind the juror what is and is not permissible."[68]

IV. Conclusion

In *People v. Arnold*, the New York Court of Appeals unanimously held that trial courts must grant challenges for cause during voir dire if prospective jurors indicate that they lack impartiality.[69] A juror who indicates that he or she may be biased in a particular matter should be excluded for cause, unless the prospective juror unequivocally states that he or she will decide the matter impartially and based upon the evidence alone.[70] Additionally, the court held that jurors should not automatically be excluded from a jury because they possess professional expertise or knowledge.[71] A juror, however, may not use professional knowledge or expertise to insert facts and conclusions that were not presented at trial into the jury's deliberative process.[72]

Christopher P. Massaro

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 365-66.
67. *Id.*
68. *Id.*
69. *Arnold*, 95 N.Y.2d 888.
70. *See id.*
71. *Id.*
72. *Id.*

NEW YORK STATE ASS'N OF CRIMINAL DEFENSE LAWYERS V. KAYE[1]

(decided June 14, 2001)

I. SYNOPSIS

In an opinion *per curiam*, the New York Court of Appeals held that Judiciary Law § 35-b grants the court not only the power to approve, but also the ultimate administrative rule-making power to promulgate schedules of fees for qualified counsel for defendants in capital cases.[2]

II. BACKGROUND

In 1995, the New York Legislature reinstated the death penalty.[3] Simultaneously, it enacted Judiciary Law § 35-b in order to offer indigent defendants subject to the death penalty representation by qualified counsel.[4] Judiciary Law § 35-b creates the Capital Defender Office, which is governed by a three-member board of directors: one appointed by the Chief Judge of the New York Court of Appeals, one member appointed by the temporary President of the Senate, and one member appointed by the Speaker of the Assembly.[5]

In order to ensure that qualified attorneys are available, Judiciary Law § 35-b also creates a four member screening panel in each Judicial Department: two appointed by the board of directors of the Capital Defender Office, and two appointed by the Presiding Justice in each Judicial Department.[6] Judiciary Law § 35-b requires that each screening panel establish and update a roster of attorneys qualified for appointment as lead counsel and associate counsel to represent indigent defendants in capital cases.[7] In addition, Judiciary Law § 35-b requires that each screening panel promulgate and periodically update, in consultation with the Administrative Board of the Courts, a schedule of

1. 96 N.Y.2d 512 (2001).
2. *Id.*
3. New York State Ass'n of Criminal Defense Lawyers v. Kaye, 703 N.Y.S.2d 349, 351 (Sup. Ct. Albany County 1999).
4. N.Y. JUD. LAW § 35-b(1)-(2) (McKinney 1983); New York State Ass'n of Criminal Defense Lawyers v. Kaye, 710 N.Y.S.2d 146, 147 (3d Dep't 2000).
5. *See* N.Y. JUD. LAW § 35-b(3); *Kaye*, 703 N.Y.S.2d at 351.
6. N.Y. JUD. LAW § 35-b(5)(a).
7. *Id.*

fees for qualified counsel for defendants in capital cases, which fee schedules are subject to the approval of the court of appeals. The Chief Judge of the New York Court of Appeals and the Presiding Justices of each of the four Judicial Departments comprise the Administrative Board of the Courts.[8]

In December 1995 and January 1996, screening panels initially submitted proposed fee schedules to the court of appeals.[9] In March 1996, after consideration of public comments relating to the proposed fee schedules, the court of appeals, acting as an administrator requested further data, documentation, analysis and consideration from the screening panels.[10] After receiving further input, the court of appeals concluded that counsel's fees should be established at uniform statewide rates. Lead counsel and associate counsel compensation would be capped at an hourly rate higher than $175 and $150. In-court and out-of-court work would receive the same rate of compensation. Compensation for certain legal and paralegal assistants would be approved at an hourly rate no more than $40 for legal assistants and $25 for paralegal assistants.[11]

Thereafter, the four screening panels revised, promulgated, and submitted identical fee schedules, and on November 21, 1996, the court of appeals issued Orders approving such fee schedules.[12] Pursuant to the approved fee schedules, the fees for in-court and out-of-court work would be the same.[13] Additionally, the hourly rates for lead counsel and associate counsel would not be higher than $175 and $150, respectively.[14] Furthermore, the hourly rates for legal assistants and paralegal assistants would not be higher than $40 and $25, respectively.[15]

On September 22, 1997, the court of appeals directed the screening panels to re-examine the fee schedules in view of the available empirical data at that time.[16] The screening panels, in consultation with the Administrative Board of the Courts, proceeded accordingly.[17] The

---

8. N.Y. JUD. LAW § 210(2) (McKinney 1983).
9. *Kaye*, 703 N.Y.S.2d at 352.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

Administrative Board of the Courts believed that fees should be uniform statewide; that the fees for in-court and out-of-court work should be the same; that different fees should be applied to pre-death-notice and post-death-notice work; and that the hourly rates for lead counsel should not be higher than $125 for post-notice work, and $100 for pre-notice work; and that the hourly rates for associate counsel should not be higher than $100 for post-notice work, and $75 for pre-notice work.[18]

Eventually, the screening panels of all but the First Department agreed to the revised fee schedules urged by the Administrative Board of the Courts.[19] The decisions of the screening panels of the Third and Fourth Departments were unanimous, while one member of the screening panel of the Second Department dissented.[20] The screening panel of the First Department, however, was evenly divided with two members favoring the old fee schedule and two members favoring the revised fee schedule urged by the Administrative Board of the Courts.[21]

After inviting and reviewing public comments and studying additional data, on December 16, 1998, the court of appeals issued an Order approving the revised fee schedules promulgated by the screening panels of the Second, Third and Fourth Departments.[22] The Order also approved the same revised fee schedule submitted only by two members of the screening panel of the First Department.[23]

In April 1999, petitioners, four attorneys certified to accept capital cases and the New York State Association of Criminal Defense Lawyers, on behalf of its members so certified, filed a petition under CPLR Article 78 to annul the December 16, 1998 Order,[24] contending that the court of appeals exceeded its administrative power when it revised the fee schedule for the First Department, and that the reduced fee schedules did not meet the standards of Judiciary Law §35-b for adequate compensation.[25] The Supreme Court, Albany County, dismissed the

---

18. *Id.*
19. *Id.* at 353.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. New York State Ass'n of Criminal Defense Lawyers v. Kaye, 710 N.Y.S.2d at 148 (3d Dep't 2000).
25. New York State Ass'n of Criminal Defense Lawyers v. Kaye, 96 N.Y.2d 512 (2001).

petition, holding that petitioners failed to meet the burden of establishing that the Order was irrational, arbitrary, or an abuse of discretion[26] even though petitioners had standing.[27] The Appellate Division, Third Department, affirmed, holding that petitioners lacked standing because petitioners' claimed injuries of reduced fees and increased caseload did not fall within the zone of interest of ensuring that qualified attorneys are available to represent defendants in capital cases,[28] and because petitioners' alleged harm was insufficient to entitled judicial intervention.[29]

Petitioners then filed a motion to disqualify Judges Kaye, Smith, Levine, Ciparick and Wesley of the court of appeals from participating in the decision of petitioners' motion for leave to appeal from the appellate division's decision.[30] The court of appeals dismissed the motion,[31] but granted the motion for leave to appeal.[32]

III. Discussion

The court of appeals did not address the issue of standing, as it assumed that petitioners had standing.[33] Instead, it affirmed the dismissal of the petition on three grounds.[34]

First, the court concluded that contrary to what the petitioners claimed, the wording "promulgate" used in Judiciary Law § 35-b(5)(a) ordinarily has many meanings, and in the present case, in view of the legislative intent, it merely means to make known or public the terms of a proposed fee schedule.[35] Thus, the court believed that Judiciary Law § 35-b(5) ascribes a role for the screening panels subordinate to that of the court in setting the fee schedules.[36]

In deliberations, the court noted that the legislature elected to incorporate a public comment period, preceding the exercise of final rule-making, in Judiciary Law § 35-b(5)(a), which is comparable to

26. *Kaye,* 703 N.Y.S.2d at 358-59.
27. *Id.* at 355.
28. *Kaye,* 710 N.Y.S.2d at 149.
29. *Id.*
30. New York State Ass'n of Criminal Defense Lawyers v. Kaye, 95 N.Y.2d 556, 559 (2000).
31. *Id.* at 562.
32. *Kaye,* 95 N.Y.2d 770 (2000).
33. *Kaye,* 96 N.Y.2d at 516.
34. *Id.* at 517-20.
35. *Id* at 517.
36. *Id.*

those required for an administrative agency under the State Administrative Procedure Act § 202(1)(2).[37] The court also took notice that the public comment period begins after the screening panels both publish the fee schedules and complete their work, but before the court acts pertaining to them.[38] The court believed that this sequence was significant and indicated that the legislature wanted the court to have the ultimate administrative rule-making power in setting the fee schedules.[39] The court reasoned that had the legislature wanted the screening panels to have the ultimate administrative rule-making power, it would have given the screening panels rather than the court the benefit of the outside input from the public comment period.[40]

Next, the court pointed out that petitioners' interpretation is contrary to the overall statutory scheme.[41] The court noted that the capital offense statute assigns to the court very broad administrative responsibilities including the most important administrative responsibility of fulfilling the State's constitutional responsibility to provide competent counsel to capital defendants and to provide a system of compensation for that representation.[42] The court reasoned that in order to properly carry out these broad administrative responsibilities, its authority should include not only the narrow readings of powers expressly conferred by the capital offense statute, but also the implied powers that are necessary for properly carrying out its responsibilities.[43] The court believed that the ultimate administrative rule-making power to promulgate schedules of fees is one of the necessary implied powers it should have. Otherwise, the court could not properly carry out even its most important administrative responsibility because the whole fee setting process would come to a halt if, for example, at the initial stage of the capital defense fee schedule process any screening panel could not make a majority determination.[44]

Finally, the court rejected petitioners' argument that the reduction in fees jeopardizes the legislature's intent to provide adequate qualified counsel to capital defendants and held that it was arbitrary

37. *Id.*
38. *Id* at 518.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 518-19.

and capricious.[45] The court pointed out that the 1996 capital counsel fees should be reduced only after it considered public comments, surveys, and responses from the screening panels and other empirical data and documents.[46]

More particularly, the court pointed out that one of the documents it reviewed was an April 1998 report prepared for the American Bar Association detailing fees for capital representation in each of the 38 states having the death penalty, which indicated that the reduced fees in New York State were still higher than the corresponding fees in at least 36 of the other 37 states.[47] Another document the court reviewed was a 1998 report prepared by a subcommittee of the United States Judicial Conference on fees for capital representation in federal death penalty cases.[48] The report stated that the maximum federal hourly rate of up to $125 was sufficient to attract competent defense counsel, and that the hourly rate for federal death penalty representation ranged from a high average of $115.82 in 1991 to a low of $79.92 in 1994, with the most recent reported average of $108.84 in 1997. Thus, the court pointed out that the approved reduced rates exceeded the average rate of compensation actually paid for in federal capital representation.[49] In addition, the court noted that unlike other jurisdictions, additional state funds were available to pay uncapped expenses for necessary export and investigative services.[50] In view of these findings, the court concluded that the reduced fees still exceeded the average rate of representation nationwide.[51] Therefore, the reduced fees were neither arbitrary nor capricious.[52] In addition, in view of these findings, the court concluded that the reduced fees would continue to attract adequate qualified counsel to represent capital defendants.[53]

IV. CONCLUSION

The New York Court of Appeals held that Judiciary Law § 35-b grants the court not only the power to approve, but also the ultimate

45. *Id* at 519.
46. *Id.*
47. *Id.*
48. *Id* at 520.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*

administrative rule-making power to promulgate schedules of fees for qualified counsel for capital defendants.[54]

Douglas D. Zhang

54. *Id.*

LEVIN V. YESHIVA UNIVERSITY[1]

(decided July 2, 2001)

I. SYNOPSIS

This case involved several students enrolled at Yeshiva University's Albert Einstein College of Medicine who were each denied on-campus housing with their lesbian partners.[2] With one dissenting opinion, the New York Court of Appeals held that several students enrolled at Yeshiva University's Albert Einstein College of Medicine, who were each denied on-campus housing with their lesbian partners, did not state a valid claim of marital status discrimination in violation of New York State and City Human Rights Laws.[3] However, the court held that the students did state a valid cause of action of "disparate impact discrimination based on sexual orientation as proscribed under the New York City Human Rights Law."[4]

II. BACKGROUND

Yeshiva University's Albert Einstein College of Medicine (hereinafter "AECOM"), which is located in the Bronx, provides numerous apartments, of various sizes, near its campus for the housing of its students.[5] These apartments are offered below market rates.[6] The school's housing policy restricts such apartments to medical students, their spouses, and any dependent children.[7] Even though vacancies are "filled from a waiting list on a first-come, first-served basis," in some circumstances, married couples are given priority to the apartments.[8]

---

1. 96 N.Y.2d 484 (2001).
2. *Id.* at 496.
3. *Id.* The New York State Human Rights Law is codified as Executive Law § 296. *Id.* at 489. Additionally, the New York City Human Rights Law is codified as New York City Administrative Code § 8-107. *Id.*
4. *Id.* at 496.
5. *Id.* at 489.
6. Levin v. Yeshiva Univ., 691 N.Y.S.2d 280 (Sup. Ct. N.Y. County 1999).
7. *Levin,* 96 N.Y.2d at 489.
8. *Id.* AECOM's housing policy makes distinctions based on the size of the apartment. *Id.* For studio apartments, married couples always receive priority. *Id.* "One-bedroom apartments must be shared by a minimum of two students or a married couple. Two-bedroom apartments must be shared by a minimum of three individuals, with married couples having one or more children receiving priority. *See id.*

In order to receive housing priority, however, married couples must provide "acceptable proof of marriage" to the university's housing office.[9]

Prior to attending her first year at AECOM, plaintiff Sara Levin requested housing for herself and her lesbian partner of five years.[10] AECOM, under its policy, requested that Ms. Levin provide them with "proof of marriage in order to live with a non-student."[11] Levin was unable to produce such proof and, as a result, lived with two other students in an on-campus three-bedroom apartment.[12] The following year Levin once more requested housing with her partner, but again her request was denied.[13] Ms. Levin and her partner ultimately moved into an off-campus apartment located in Brooklyn.[14]

In addition, AECOM denied a request from plaintiff Maggie Jones to live in student housing with her partner.[15] Consequently, during her first year, she lived with another AECOM student in a one-bedroom apartment.[16] Eventually, she too moved off campus in order to live with her partner.[17]

In 1998, Ms. Levin and Ms. Jones filed suit against AECOM.[18] The plaintiffs filed seven causes of action.[19] Claims one through five alleged that AECOM's housing policy violated the marital status sections of the New York State and New York City Human Rights Laws by allowing married spouses of AECOM students to live in on-campus housing while forbidding non-married partners of students from doing the same.[20] The plaintiffs' sixth cause of action claimed that the school's housing policy violated New York State Real Property Law § 235-f (the

---

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Levin*, 96 N.Y.2d at 489.

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.* A third named plaintiff, Gilda Wildfire, secretary and treasurer of a lesbian and gay student organization whose members included Levin, Jones, and other students adversely affected by the housing policy, also joined the suit. *Id.* at 489-490 n.1. All claims with respect to her were barred for lack of standing. *Id.* at 496.

19. *Levin*, 691 N.Y.S.2d at 281.

20. *Id.* For examples of the sections of the New York State and City Human Rights Laws that make it unlawful to discriminate on the basis of marital status, see Executive Law § 296(2-a), (4), (5)(a)(1) and the N.Y.C. ADMIN. CODE § 8-107(5).

"Roommate Law"), which, among other things, prohibits a landlord from restricting the "occupancy of residential premises to a tenant and the tenant's immediate family."[21] The plaintiffs' seventh and final cause of action alleged that, under the New York City Human Rights Law, the school's housing policy had a disparate impact against homosexuals.[22] The plaintiffs argued that because homosexuals, unlike heterosexuals, are unable to marry their partners, they are thus absolutely prevented from living in on-campus housing with their partners.[23]

AECOM did not answer the plaintiffs' allegation, but, instead, moved to dismiss the complaint.[24] The Supreme Court of New York granted AECOM's motion and dismissed the plaintiffs' complaint in its entirety.[25] The Appellate Division, First Department unanimously affirmed.[26]

As to the first five causes of action, the appellate division found that, because the plaintiffs were "unmarried women who were denied permission to live with their life partners," AECOM's housing policy did not discriminate against them on the basis of marital status as such.[27] The appellate division also upheld the dismissal of the sixth cause of action because the court found that the Roommate Law was not applicable.[28] According to the court, the Roommate Law placed restrictions only on a tenant's primary residence.[29] The court reasoned that because a full-time student's primary residence does not change by living in temporary student housing, the law did not apply.[30] As to the seventh claim, the appellate division held that the plaintiffs failed to establish that the housing policy had a disparate impact on homosexuals because it had the same effect on non-married, hetero-

21. *Levin*, 691 N.Y.S.2d at 281. "[This] statute further provides that any rental agreement must permit occupancy by the tenant, the immediate family of the tenant, one additional occupant and the dependent children of the occupant." *Id.*

22. *Id.*

23. *Id.* Specifically, the plaintiffs' seventh cause of action alleged a violation of N.Y.C. ADMIN. CODE § 8-107 (5) and (17). *Id.* at 281; *Levin*, 96 N.Y. 2d at 490.

24. *Levin*, 96 N.Y.2d. at 490. The motion to dismiss was filed pursuant to New York Civil Practice Law and Rules § 3211(a)(7). *Id.*

25. *Levin*, 691 N.Y.S.2d at 285.

26. Levin v. Yeshiva Univ., 709 N.Y.S.2d 392 (1st Dep't 2000).

27. *Id.* at 392.

28. *Id.* at 393.

29. *Id.*

30. *Id.*

sexual students as it had on non-married, homosexual students.[31] The plaintiffs appealed the dismissal of their claims, except for the sixth cause of action, to the court of appeals.[32]

III. Discussion

The court of appeals agreed with the lower courts that the claim of discrimination on the basis of marital status was properly dismissed.[33] However, the court also "modif[ied] the order of the appellate division and remit[ted] the case to the supreme court for further proceedings" because the plaintiffs "pleaded allegations sufficient to raise an issue of fact as to whether defendant's housing policy [had] a disparate impact on the basis of sexual orientation."[34]

A. *Marital Status Discrimination*

The court of appeals first examined the plaintiff's claim that AECOM's housing policy discriminated on the basis of marital status.[35] The court found that AECOM's housing policy did not discriminate on its face.[36] In reaching this conclusion, the court heavily relied upon two of its prior cases, *Manhattan Pizza Hut v. New York State Human Rights Appeal Bd.*[37] and *Hudson View Properties v. Weiss*.[38] The court stated that these two cases stood for the proposition that "for the purposes of applying [a] statutory proscription, a distinction must be made between the complainant's marital status as such, and the existence of the complainant's disqualifying relationship – or absence thereof – with another person."[39]

The court then analogized AECOM's housing policy to the lease at issue in *Hudson View*.[40] In *Hudson View*, the court upheld a lease provision that limited the occupancy of an apartment to the tenant and those in a legal, family relationship with the tenant.[41] The validity

31. *Id.*
32. *Levin*, 96 N.Y.2d at 490.
33. *Id.*
34. *Id.* at 490-91.
35. *Id.*
36. *Id.*
37. 434 N.Y.S.2d 961 (1980).
38. 463 N.Y.S.2d 428 (1983).
39. 754 N.Y.2d at 490.
40. *Id.*
41. *See Hudson View*, 463 N.Y.S.2d 428.

of the lease provision did not turn on the marital status of the tenant.[42] Likewise, the court found that "AECOM's housing policy is restricted to those in legally recognized, family relationships with a student."[43] As a result, according to the court, the applicability of the restriction in AECOM's housing policy did not depend on whether the student was married.[44] Therefore, by limiting on-campus housing to students, their spouses, and dependent children, the court held that the housing policy did not "facially discriminate on the basis of marital status."[45] Accordingly, the court concluded that the plaintiffs' first five causes of action, claiming discrimination on the basis of marital status as prohibited by the New York State and New York City Human Rights Laws, were properly dismissed by the courts below.[46]

B. Disparate Impact on Homosexuals

The court began the discussion of this issue with an overview of the applicable statutes.[47] The court first noted that § 8-107(5)(a)(1) of the New York City Administrative Code makes it unlawful for any public or private institution to refuse housing to any person because of, among other things, that person's sexual orientation.[48] Further, the court noted that § 8-107(17) creates a cause of action for "an unlawful discriminatory practice based upon disparate impact."[49] Thus, "a claim of discrimination based on sexual orientation can be stated where a facially neutral policy or practice has a disparate impact on a protected group."[50]

---

42. *See id.* In *Hudson View,* the tenant was living with a man with whom she had a loving relationship, i.e., a person who was not a member of her immediate family. *See id.* The fact that, by marriage, he could become a member of her immediate family and therefore legally live in the apartment was irrelevant to the question of whether the restrictive covenant was valid. *Id.* The court reasoned that the applicability of the restriction did not depend on her marital status as such because, "[w]ere the additional tenant a female unrelated to the tenant, the lease would be violated without reference to marriage." *Id.* Thus, the restriction did not discriminate on the basis of marital status. *Id.*

43. *Levin,* 96 N.Y.2d at 490-91.

44. *Id* at 491.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Levin,* 96 N.Y.2d at 491 (citing N.Y.C. ADMIN. CODE § 8-107(17)).

50. *Id.* (citing N.Y.C. ADMIN. CODE §8-107(17)(a)). In any such claim, if it shown that a defendant's policy or practice results in a disparate impact, the defendant, under § 8-107[17][a][2] of the New York City Administrative Code, may "plead and prove" as

According to the court, "[h]ow this impact is measured is obviously a critical determination."[51] For guidance in this regard, the court looked at the United States Supreme Court's decision in *Griggs v. Duke Power*.[52] In *Griggs*, African-American employees of the defendant utility company alleged that the company's hiring policy, which required all applicants for certain positions to have a high school diploma and/or pass a standardized test, violated Title VII of the Civil Rights Act of 1964.[53] The plaintiffs argued that, even though the policy was neutral on its face, statistically it disqualified African-Americans at a higher rate than it did white candidates.[54] The Court agreed with the plaintiffs and found that the policy excluded African-Americans more frequently than similarly situated white applicants.[55] According to the Supreme Court, a prima facie case of disparate impact is established when it is shown that a test, policy, or practice "select[s] applicants for hire or promotion in a racial pattern significantly different from that pool of applicants."[56]

The court of appeals found that the lower courts' disparate impact analysis rendered the standard articulated in *Griggs* and its progeny meaningless.[57] The appellate division held that AECOM's housing policy did not have a disparate impact on the plaintiffs on the basis of sexual orientation.[58] In analyzing any disparate impact, the intermediate court excluded married students from consideration for purposes of comparison between benefited and excluded classes.[59]

---

an affirmative defense that the policy or practice "bears a significant relationship to a significant business objective." *Id.* at 1103 n.3. However, if (1) the plaintiff produces "substantial evidence of an alternative policy or practice with less disparate impact" and (2) the "defendant fails to prove that the alternative policy or practice would not serve defendant's significant business objective as well as the complained of policy or practice" then the affirmative defense will be defeated. *Id.*

51. *Id.* at 492.

52. 401 U.S. 424 (1971).

53. *See id.* at 426.

54. *See id.*

55. *See id.* at 431.

56. *Id.* at 425. This language comes from the Supreme Court's interpretation of *Griggs* in a subsequent case, Albermarle Paper Co. *v.* Moody, 422 U.S. 402, 425 (1975).

57. *See Levin*, 96 N.Y.2d at 493.

58. *Levin*, 709 N.Y.S.2d at 393.

59. *Id.* (holding that the plaintiffs "failed to establish that defendants' policy had a disparate impact on homosexuals since it had the same impact on *non-married*, heterosexual medical students as it had on *non-married*, homosexual students.") (emphasis added).

The court of appeals found this methodology to be erroneous as a matter of law.[60] According to the court, because married students were eligible to live with non-students in on-campus housing, married students constituted a significant portion of beneficiaries under the school's housing policy.[61] In order to determine whether the housing policy had a disparate impact on the basis of sexual orientation, the court reasoned that "there must be a comparison that includes consideration of the full composition of the class actually benefited under the challenged policy."[62] Therefore, the disparate impact analysis in this case must include married persons.[63] Otherwise, "any realistic examination of the discriminatory effects of [the] policy" will be obscured.[64]

The court of appeals concluded that because the appellate division failed to include married students in its disparate impact methodology, the plaintiff's seventh cause of action was improperly dismissed.[65] As a result, the court ordered the claim "reinstated and remitted to the Supreme Court for further proceedings."[66]

VI. Conclusion

The court of appeals held that lesbian students at AECOM who were each denied university housing with their life partners did not state a valid cause of action of marital status discrimination under the

60. *Levin*, 96 N.Y.2d at 496.

61. *Id.* at 493-94.

62. *Id.* at 496.

63. *Id.*

64. *Id.* To illustrate this point, the court used the facts of *Griggs*, 401 U.S. 424. If the plaintiffs in *Griggs* were precluded from "analyzing the racial composition of those actually offered employment under the company's policy," then, the court noted," the only comparison would have been between those blacks and whites without high school diplomas or passing test scores." *See Levin*, 96 N.Y.2d at 493. Because all members of the compared classes would not be recipients of favorable treatment, no disparate impact would have been established. *See id.*

65. *See id.* at 496. The court stated that, by excluding married students from the equation, the Appellate Division must have accepted one of AECOM's two following arguments: (1) Because the distinction the housing policy makes based on marital relationships is a lawful one (citing *Hudson View*), married students are not similarly situated to other students and (2) the housing policy discriminates on its face on the basis of sexual orientation because marriage, under the law, is the union of a man and a woman and therefore married students are not similarly situated with the groups to be compared. *See id.* at 493-496. The court flatly rejected both arguments relying on its own interpretation of the law and United States Supreme Court precedent. *Id.*

66. *Id.* at 496.

New York State and City Human Rights Laws.[67] Nevertheless, the court additionally found that the plaintiffs did state a valid claim of disparate impact based on sexual orientation under the City Human Rights Law.[68]

Gregory G. Gomez

67. *Id.* at 491.
68. *Id.* at 496.

MASON V. U.E.S.S. LEASING CORP., ET AL.[1]

(decided July 2, 2001)

I. SYNOPSIS

In a memorandum decision, the New York Court of Appeals ruled on a question certified by the appellate division. The question certified to the court was whether the appellate division correctly held that a question of fact existed as 1) to whether the defendants negligently permitted plaintiff's attacker into her apartment building if the attacker was known to security personnel as a possible troublemaker and 2) to whether plaintiff's opening of her door without looking through the peephole was an intervening act which relieved defendants from liability.[2] The court of appeals held that the appellate division properly reversed the supreme court's order granting defendants' motions for summary judgement.[3] The court reasoned that landlords have a duty to take minimal precautions to protect tenants from foreseeable injury and that on a motion for summary judgement a plaintiff only needs to raise a triable issue of fact as to whether a defendant's conduct proximately caused plaintiff's injuries.[4]

II. BACKGROUND

Plaintiff, Yolanda Mason, resided in a Queens apartment building that is part of a larger complex called Lefrak City.[5] Defendant, U.E.S.S. Leasing Corporation and Builders and Realtors Corporation, Inc., owned the complex and defendant, Mid-City Security Service Inc., provided security for the complex.[6] On July 11, 1992, just after 7:00 a.m., plaintiff was phoned by her live-in boyfriend who told her that he would come up to the apartment in five minutes.[7] A few minutes later, the apartment doorbell rang and plaintiff opened the door thinking it was her boyfriend.[8] She did not first look through the peephole or ask

1. 96 N.Y.2d 875 (2001).
2. Mason v. U.E.S.S. Leasing Corp., 712 N.Y.S.2d 465 (1st Dep't 2000).
3. *Mason*, 96 N.Y.2d at 877.
4. *Id.* at 878.
5. *Id.* at 877.
6. *Id.*
7. *Id.*
8. *Id.*

who was at the door.[9] Third-party defendant Lawrence Toole was at plaintiff's door and forced his way inside.[10] Toole then dragged plaintiff to the bedroom where he beat, raped and sodomized her at knifepoint.[11]

In the first cause of action, plaintiff argued that defendants negligently allowed Toole to enter the building and gain access to her apartment.[12] In the second cause of action, plaintiff alleged that defendant Mid-City Security Service Inc. negligently performed its security contract.[13] Plaintiff's third cause of action maintained that defendants violated RPL § 235-b and breached the implied warranty of habitability by failing to properly staff the security desk or secure the complex.[14]

The supreme court granted the defendants' motions for summary judgment and dismissed the plaintiff's complaint.[15] The supreme court found that plaintiff's deposition testimony indicated that defendants had taken minimal security precautions and that plaintiff failed to show that defendants' negligence was a proximate cause of her injuries.[16]

A divided appellate division reversed the supreme court order, reasoning that a question of fact existed as to whether defendants negligently permitted plaintiff's attacker to enter the building.[17] A majority of the appellate division also held that a factual issue existed as to whether plaintiff's act of opening the door without first looking through the peephole was an independent intervening act.[18]

The appellate division majority stated that

> [i]n premises security cases . . . the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in the building can be established only if the assailant gained access to the premises through a negligently maintained entrance. Since even a fully secured entrance

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

> would not keep out another tenant, or someone allowed into the building by another tenant, plaintiff can recover only if the assailant was an intruder.[19]

The appellate division majority noted that the landlord had a security guard stationed in the common lobby and the Lefrak City complex had an intercom system and locked inner and outer doors.[20] Despite these security provisions, the appellate division majority held that a question of fact existed as to whether or not the defendants negligently allowed plaintiff's attacker into her building when it was widely known by security personnel and other residents that the attacker was a non-resident and local troublemaker.[21] The attacker's photograph was also in a photo book containing pictures of persons previously arrested in the apartment complex.[22]

The appellate division majority distinguished the facts of this case from several other peephole cases.[23] In the first case, *Elie v. Kraus,*[24] the plaintiff lived in a garden apartment complex in a series of two-story buildings with access provided through a ground-level door which led to two units.[25] "Locks on the buildings' outer doors had been previously removed in favor of new inner apartment doors with an extra deadbolt and peephole."[26] "The Court held that the individual tenant's apartment doors were the main line of defense against intruders and therefore plaintiff's act of buzzing open his door after dark without checking who it was or looking out the peephole was an intervening cause of the attack."[27] The court held that this intervening act severed the landlord's liability for the plaintiff's injuries.[28]

In the second case distinguished by the appellate division majority, *Benitez v. Paxton Realty Corp,*[29] the court held that there was no evidence as to the manner in which the plaintiff's attacker gained access to the building.[30] Therefore, plaintiff could not prove that defendant's negligence was the proximate cause of his injuries.[31] The court

19. *Mason,* 712 N.Y.S.2d at 466-67 (citing Burgos v. Aqueduct Realty Corp., 92 N.Y.2d 544, 550-551 (1998)).
20. *Id.* at 467.
21. *Id.*
22. *Id.*
23. *Id.*
24. 631 N.Y.S.2d 16 (1st Dep't 1995).
25. *Mason,* 712 N.Y.S.2d at 467.
26. *Id.*
27. *Id.*
28. *Id.*
29. 637 N.Y.S.2d 11 (1st Dep't 1996).
30. *Mason,* 712 N.Y.S.2d at 467.
31. *Id.*

relied on *Elie* and stated that plaintiff's acts of opening the door without asking and checking the peephole was an intervening cause that severed any liability of the landlord for failure to provide adequate security.[32] The appellate division majority noted that these two cases predated *Burgos v. Aqueduct Realty Corp.* [33] The appellate division majority also pointed out that while they may decide as a matter of law the issue of whether an intervening act severs the causal relationship between the landlord's negligence in providing security and the ability of plaintiff's attacker to gain access to her apartment, it is best to leave the issue for a jury given the facts of this case.[34]

In analyzing the legal cause of plaintiff's injuries, the appellate division majority stated that a number of factors might be relevant where acts of third persons intervene between the defendant's conduct and the plaintiff's injury.[35] The defendant's liability may turn upon whether the intervening act of a third person is a normal or foreseeable consequence of the situation created by the defendant's negligence.[36] If the intervening act is not foreseeable or is far removed from the defendant's conduct, a superceding act may indeed break the causal chain.[37] Issues concerning what is foreseeable are generally for the fact finder to resolve, although there are certain instances where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law.[38] Those cases typically involve independent intervening acts that operate upon, but do not flow from, the original negligence.[39]

The appellate division majority reasoned that plaintiff's opening of her apartment door, without looking through the peephole or asking who was at the door, was an independent intervening act which did not flow from defendants' alleged negligence in allowing a known troublemaker to enter the complex and gain access to plaintiff's apartment.[40] Therefore, the appellate division majority held that as a matter of law, defendants were not relieved of liability.[41] Comparing this case to the facts of *Burgos v. Aqueduct Realty Corp.*, the majority noted

32. *Id.*

33. 92 N.Y.2d 544, 550-551 (1998) (holding that in landlord liability cases plaintiff can only recover if the assailant was an intruder).

34. *Mason*, 712 N.Y.S.2d at 467.

35. *Id.* at 468 (citing Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 314-315 (1980)).

36. *Id.* (citing *Derdiarian*, 51 N.Y.2d at 314-15).

37. *Id.* (citing *Derdiarian*, 51 N.Y.2d at 314-15).

38. *Id.* (citing *Derdiarian*, 51 N.Y.2d at 314-15).

39. *Id.* (citing *Derdiarian*, 51 N.Y.2d at 314-15).

40. *Id.*

41. *Id.*

that the plaintiff could have just as easily opened her door without looking through the peephole if she were leaving for work or taking out the garbage.[42] However, issues relating to intervening acts, proximate cause and comparative negligence are best left to a jury to decide.[43] Therefore, the appellate division majority dismissed the supreme court's order granting defendants' motions for summary judgement, reinstated plaintiff's complaint and remanded for further proceedings.[44]

Judge Tom of the appellate division dissented from the majority opinion and recounted several facts not discussed by the majority.[45] The dissenting judge noted that the plaintiff's boyfriend had keys to the entrance of her building and to one of the two locks on her apartment door.[46] Also, plaintiff's attacker Lawrence Toole was well known in the complex because he grew up on the premises and his family currently resided there.[47] Toole's name was in a photo book identifying persons arrested on the premises, but at the time of the incident, Toole was not restricted from the complex.[48] Plaintiff's building "was equipped with an intercom and a door buzzer system, which were functioning on the day of the attack."[49] A security guard was stationed in the front lobby of the building and plaintiff's apartment door was equipped with two locks and a peephole.[50]

The dissenting judge noted that the lower court found that the landlord had taken the necessary minimal security precautions required by law. The judge stated that "landlords have a common law duty to take minimal precautions to protect tenants from foreseeable harm," including foreseeable criminal conduct by a third party.[51] The court found in similar circumstances that "furnishing a security guard in the lobby, and installing functioning locks and peepholes on doors, could constitute reasonable security measures."[52] The dissenting judge argued that a tenant must establish that the injury was proximately caused by the landlord's breach of its duty of care.[53] Further-

42. *Mason*, 712 N.Y.S.2d at 468.
43. *Id.*
44. *Id.*
45. *Id.* at 468-69.
46. *Id.* at 469.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* (citing Jacqueline S. v. City of New York, 81 N.Y.2d 288, 293-94 (1993)).
52. *Id.* (citing S.M.R.K., Inc. v. 25 W.43rd St. Co., 673 N.Y.S.2d 119 (1st Dep't 1998)).
53. *Id.* (citing *Burgos*, 92 N.Y.2d at 548).

more, a tenant also has a responsibility to act reasonably when giving entrance to a third party.[54]

In dissent, Judge Tom also asserted that the court has

> consistently held that a plaintiff's own conduct of responding to a knock or a ring by opening a locked apartment door that contains a peephole without first looking through the peephole to ascertain who is on the other side constitutes intervening and superceding causation that breaks the causal chain and severs the landlords liability.[55]

The causal chain may be severed even when a landlord's own security measures are not reasonable and even when the tenant's conduct is readily explainable.[56]

The dissenting judge also discredited the majority's conclusion that *Burgos v. Aqueduct Realty Corp.* requires the application of a new standard because it was decided after the two peephole cases, *Benitez* and *Elie*.[57] Judge Tom argued that *Burgos* addressed the different case of a landlord's duty to exclude intruders.[58] Judge Tom stated, "[I]n Burgos and pre-Burgos case law, intruders were characterized generally as non-residents who often, though not necessarily, were unknown."[59] In this case, the assailant did not logically fit that description because he had family residing in the complex which he presumably visited.[60] Despite *Burgos*, courts have still held that tenants have a duty to ascertain who is at the door.[61] The law is clear that if a tenant fails to look through the peephole and identify who is at the door, the landlord's liability is severed as a matter of law.[62]

III. Discussion

The court of appeals began its analysis by briefly recounting the facts of the case and the procedural history.[63] The court restated the issue as whether the appellate division correctly held that a question of fact existed as: (1) to whether the defendants negligently permitted

54. *Id.* (citing *S.M.R.K., Inc.*, 673 N.Y.S.2d 119).
55. *Id.* (citing *Benitez*, 637 N.Y.S.2d 11; *Elie*, 631 N.Y.S.2d 16).
56. *Id.* (citing *S.M.R.K, Inc.*, 673 N.Y.S.2d 119).
57. *Id.* at 470.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Mason*, 96 N.Y.2d at 877.

plaintiff's attacker to enter her apartment building, and; (2) to whether plaintiff's act of opening the door without first looking through the peephole was an independent intervening act.[64]

In analyzing the first issue, the court stated that "landlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person."[65] If a landlord is alerted to the possibility of criminal conduct by third persons based on past experience, the "landlord has a duty to minimize the foreseeable danger."[66] The extent that criminal activities by third parties in a housing complex are foreseeable "will depend on the location, nature and extent of previous criminal activities and their similarity, proximity or other relationship to the crime."[67]

The court held that on a motion for summary judgement, the plaintiff must only raise a triable issue of fact concerning whether the defendant's conduct proximately caused plaintiff's injuries.[68] The court stated that in this case, questions of fact still existed as to whether the defendants negligently failed to exclude plaintiff's attacker from the building complex.[69] Plaintiff's assailant, Lawrence Toole, had been involved in numerous criminal acts in the complex, including robbery, attempted rape and assault.[70] Toole had also been arrested on the premises and defendants kept an arrest photo of him.[71] The court held that it could not conclude that Toole's involvement in criminal activity within the complex was not a foreseeable possibility.[72] The court argued that more discovery was needed to determine how foreseeable a risk Toole was and what security measures defendants used to deal with him.[73]

In response to the second issue, the court's response was very brief. The court also agreed with the appellate division majority that the plaintiff's acts of opening her apartment door without first looking through the peephole or asking who was there were not independent

---

64. *Id.*
65. *Id.* at 878 (citing *Jacqueline S.*, 81 N.Y.2d at 293-94; *Burgos*, 92 N.Y.2d at 548).
66. *Id.*
67. *Id.* (citing *Jacqueline S.*, 81 N.Y.2d at 295).
68. *Id.*
69. *Id.* at 878.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*

intervening acts that excused defendants of culpability.[74] Therefore, the court answered the certified question from the appellate division in the affirmative.

IV. Conclusion

In *Mason*, The New York Court of Appeals held that a question of fact existed as: (1) to whether defendants negligently permitted plaintiff's attacker into her building, and; (2) to whether plaintiff's act of opening her door without looking through the peephole or asking who was at the door was an intervening act which relieved defendants from liability.[75] The court confirmed that these issues could not be resolved as a matter of law and therefore answered the certified question from the appellate division in the affirmative.[76]

Erin L. Roberts

74. *Id.*
75. *Id* at 877.
76. *Id* at 878.

PEOPLE V. DEPALLO[1]

(decided July 2, 2001)

I. SYNOPSIS

In a decision by Justice Wesley, the New York Court of Appeals unanimously affirmed an order of the Appellate Division, Second Department, which held that a defendant's right to testify at trial did not include a right to commit perjury, that the Sixth Amendment right to the assistance of counsel did not compel counsel to assist or participate in the presentation of perjured testimony, and that defendant was not deprived of his right to be present at a material stage of trial.[2]

II. BACKGROUND

Defendant and his accomplices performed a calculated attack upon a 71-year-old man.[3] Before bludgeoning him to death with a shovel, they ransacked his home and stabbed him repeatedly with a knife and scissors.[4] Evidence tying defendant to the scene included his blood and fingerprints both on the victim's clothing and at the victim's home.[5] Defendant made several incriminating statements upon his arrest that placed him at the scene. During pre-trial proceedings, he admitted to forcing one of his accomplices to participate in the crime under threat of death.[6]

Prior to defendant's trial, his defense counsel advised him that he was not required to take the stand, but if he did decide to testify, he must do so truthfully.[7] Defendant confirmed counsel's statements to the court and insisted on testifying.[8] Over numerous objections by defense counsel, defendant testified that he was home the entire evening of the crime, and that his contrary statements to the police were induced by promises that he could return home.[9]

1. 96 N.Y.2d 437 (2001).
2. People v. DePallo, 714 N.Y.S.2d 755 (App. Div. 2d Dep't 2000).
3. People v. DePallo, 96 N.Y.2d 437 (2001).
4. *Id.* at 439.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *DePallo*, 96 N.Y.2d at 439.

Later, after both sides had rested, defense counsel addressed the court in chambers ex parte and explained that while preparing for trial, defendant indicated that he was going to deny his participation in the crime while on the stand.[10] This was contrary to past conversations that counsel had with defendant, so counsel warned defendant that he could not participate in any kind of perjury and that defendant should not perjure himself.[11] Defense counsel did not refer to Defendant's trial testimony during summations.[12]

The trial court noted that counsel had complied with the procedures for such circumstances as outlined in *People v. Salquerro*.[13] Defendant was convicted of two counts of second-degree murder, two counts of first-degree robbery, two counts of first-degree burglary, and one count of second-degree robbery.[14]

Defendant appealed his convictions on two grounds: (1) that he was deprived of the effective assistance of counsel when his attorney informed the court that defendant intended to perjure himself on the stand, and (2) that he was deprived of his right to be present at material stages of trial when his attorney conveyed this information during court conferences at which the defendant was not present.[15] The Appellate Division, Second Department, affirmed the judgment of the trial court, and this court granted leave to appeal.[16]

III. Discussion

The court began by explaining that the first issue presented by this case is far from novel.[17] In fact, defense attorneys have dealt with the ethical dilemmas of client perjury since the late 19th Century when the disqualification of criminal defendants to testify in their own defense was abolished by statute in federal and most state courts.[18] The appropriate role of counsel when caught in this situation is hard to define with any degree of precision because of the competing considerations involved.[19] A lawyer with a potentially perjurious client must

10. *Id.* at 439-40.
11. *Id.* at 440.
12. *Id.*
13. *Id.*; *see also* People v. Salquerro, 433 N.Y.S.2d 711 (Sup. Ct. N.Y. County 1980).
14. *DePallo,* 96 N.Y.2d at 440.
15. *DePallo,* 714 N.Y.S.2d at 756.
16. *Id.* at 755.
17. *DePallo,* 96 N.Y.2d at 440.
18. *Id.*
19. *Id.*

balance the "duties of zealous advocacy, confidentiality and loyalty to the client on one hand, and a responsibility to the courts and our truth-seeking system of justice on the other."[20]

However, in spite of these competing considerations, two points are very clear: (1) a defendant's right to testify at trial does not include a right to commit perjury, and (2) the Sixth Amendment right to the assistance of counsel does not compel defense counsel to assist or participate in the presentation of perjured testimony.[21]

The United States Supreme Court has stated that when faced with this dilemma,

> "counsel must first attempt to persuade the client not to pursue the unlawful course of conduct. If unsuccessful, withdrawal from representation may be an appropriate response, but when confronted with the problem during trial, as here, an attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response."[22]

This approach has been codified under New York's Code of Professional Responsibility, in section DR 7-102.[23] The court found that defense counsel acted consistent with these responsibilities when he first attempted to dissuade defendant from testifying falsely.[24] Since Defendant insisted on taking the stand and proceeded to perjure himself, counsel properly notified the court.[25]

Defendant's contention that his counsel should have withdrawn himself from the case was also rejected.[26] The court failed to see how substitution of counsel would have resolved the problem and noted that it could have actually facilitated Defendant's fraud.[27] The rest of counsel's representation was more than competent, and because there was no breach of any recognized professional duty, it follows that Defendant was not deprived of his right to assistance of counsel.[28]

Next, the court dealt with the second issue raised by Defendant: that his right to be present during a material stage of trial was violated

---

20. *Id.*
21. *Id.* at 441.
22. *DePallo,* 96 N.Y.2d at 441.
23. *Id.*; *see also* 22 N.Y.C.R.R. § 1200.33.
24. *DePallo,* 96 N.Y.2d at 441.
25. *Id.*
26. *Id.* at 442.
27. *Id.*
28. *Id.*

by his absence from the ex parte communication between the court and his attorney.[29] A defendant's constitutional and statutory right to be present at all material stages of trial when he may have something valuable to contribute or when presence would have a substantial effect on his ability to defend himself does not extend to matters of law or procedure that have no potential for meaningful input from a defendant.[30]

The court explained that the ex parte communications at issue here are precisely one of those situations in which Defendant's presence was not mandated and had no bearing on his ability to defend against the charges or on the outcome of the jury trial.[31] The purpose of the ex parte meeting was simply to memorialize counsel's ethical dilemma for appellate review or any possible inquiry into his professional ethical obligations.[32] The meeting was merely procedural and defendant had no right to be present.[33]

IV. Conclusion

In *DePallo*, the New York Court of Appeals held that the Sixth Amendment right to the assistance of counsel does not compel counsel to assist or participate in the presentation of perjured testimony.[34] Therefore, defense counsel does not violate that right by informing the court of a defendant's perjury during trial.[35] In addition, the court also held that when the subject matter of ex parte communications between the court and defendant's counsel involves matters of law or procedure with no potential for meaningful input from a defendant, defendant has no right to be present.[36]

Amy St. Jude Wichowski

---

29. *Id.*
30. *Id.* at 443.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 441.
35. *DePallo,* 96 N.Y.2d 442.
36. *Id.* at 443.

PEOPLE V. EDWARDS[1]

(decided July 5, 2001)

I. SYNOPSIS

With one justice dissenting, the New York Court of Appeals held that a voluntary, intelligently made plea of guilty to an indictment for first-degree murder entered under the then applicable law did not automatically become invalid after a judicial decision holding the particular section of the statute under which the plea was made unconstitutional.[2] The court did not reach the issue of defendant's waiver of the right to appeal on assertions of constitutional infirmities.[3] Additionally, the court dismissed defendant's appeal upon the ground that he was not adversely affected by the appellate division order within the meaning of New York Criminal Procedure Law § 450.90.[4]

II. BACKGROUND

Defendant Daniel Edwards was arrested on May 20, 1997, and subsequently indicted for murder in the first degree and several lesser crimes, for the shooting death of Frank Arroyo.[5] Defendant's brother and his brother's girlfriend were indicted for the same crimes.[6] The District Attorney pursuant to CPL § 250.40, filed a notice of intent to seek the death penalty for all three defendants in January 1998, subsequently withdrawing the notice as to defendant's brother.[7] Defendant pleaded not guilty and trial was set to commence on November 9, 1998 in county court of Schoharie County, New York.[8]

In October, 1998, defendant and the District Attorney entered into plea negotiations.[9] The plea agreement entered into and approved by the county court provided that defendant would plead guilty to murder in the first degree in full satisfaction of the indictment and

1. 96 N.Y.2d 445 (2001).
2. *Id.* at 454.
3. *Id.* at 456.
4. *Id.*; *see* N.Y. CRIM. PROC. LAW § 450.90 (Consol. 2001).
5. *People v. Edwards*, 712 N.Y.S.2d 71 (3d Dep't 2000).
6. *People v. Edwards*, 690 N.Y.S.2d 404 (1999).
7. *Id.*
8. *Id.*
9. *Id.*

cooperate with the prosecution, in return for which the District Attorney would agree to the plea and withdraw the notice of intent to seek the death penalty. The proposed sentence was to be 25 years to life, or alternatively, if defendant failed to cooperate, a maximum sentence of life without parole, if it was found to be appropriate by the court.[10] Additionally, defendant waived his right to appeal except in regard to the suppression of his statement made to police. This statement, admitting his guilt, was made while being interviewed by the police, but prior to his arrest.[11] Defendant then proffered his plea to the county court and made a complete allocution, at which point the prosecutor withdrew her notice of intent to seek the death penalty.[12] The court subsequently accepted the guilty plea and allowed it to be entered.[13]

At the time of defendant's guilty plea, New York's Criminal Procedure Law Sections 220.10(5)(e) and 220.30(3)(b)(vii) both provided that a defendant, against whom a notice of intent to seek the death penalty was pending, could only enter a plea of guilty to the crime of first-degree murder with the consent of the people and the permission of the court, and only when the sentence that was agreed upon was life imprisonment without parole or a term of years.[14] The result was that the death sentence could only be imposed if the accused pled not guilty and exercised his Sixth Amendment right to a jury trial.[15] After entry of defendant's guilty plea, but prior to his sentencing, the New York Court of Appeals decided *Hynes v. Tomei*,[16] following Supreme Court precedent, declaring the two above-noted sections of the New York Penal Law facially unconstitutional and excising them.[17] The court also construed the remaining portions of the two statutes to prohibit entry of a guilty plea to first-degree murder while a notice of intent to seek the death penalty was pending.[18]

In February, 1999, defendant moved the county court to withdraw his plea of guilty to murder in the first degree, arguing that the court of appeals' decision in *Hynes v. Tomei*[19] declaring the plea provisions of

10. *Edwards*, 712 N.Y.S.2d at 74.
11. *Id.*
12. *Edwards*, 690 N.Y.S.2d at 405.
13. *Id.*
14. *Edwards*, 96 N.Y.2d at 449.
15. *Id.*
16. 92 N.Y.2d 613, *cert. denied* 527 U.S. 1015 (1999).
17. *Edwards*, 96 N.Y.2d at 449.
18. *Id.*
19. 92 N.Y.2d 613.

C.P.L. §§ 220.10(5)(e) and 220.30(3)(b)(vii) unconstitutional, rendered his plea invalid.[20] After reviewing the plea agreement and transcripts of the pre-plea conferences and the allocution, the court found that defendant's plea was entered knowingly, voluntarily and intelligently.[21] The trial court further held that the court of appeals had explicitly stated, in its *Hynes* decision, that its holding would not prevent guilty pleas to first-degree murder when no notice of intent to seek the death penalty was pending.[22] In the instant case, the court reasoned that because the notice of intent to seek the death penalty had been withdrawn prior to entry of the guilty plea, it was constitutionally valid.[23] The trial court had interpreted the court of appeals' mandate as referring to the time of entry of the plea as opposed to the time of the admission and allocution in open court.[24] Consequently, because the only issue that defendant raised regarding his plea was its invalidity following the *Hynes* decision, the court denied defendant's motion.[25]

Subsequently, defendant appealed to the Appellate Division, Third Department, where the People argued that defendant's waiver of his right to appeal precluded appellate review.[26] Defendant simultaneously appealed the denial of his motion to suppress his statement of guilt.[27] The appellate court found that defendant's waiver could not have been knowingly made because the constitutional infirmity in the penal law only came to light afterwards, and further that the right to appeal the validity of a plea based upon a statute that suffered such a constitutional infirmity was of a class of rights that could not be waived.[28] The court went on to decide the issue of the validity of defendant's guilty plea, finding it invalid.[29] The court vacated defendant's plea and sentence, restored the indictment to the pre-plea stage, and reinstated the notice of intent to seek the death penalty.[30]

20. *Edwards*, 690 N.Y.S.2d at 405.
21. *Id.*
22. *Id* at 406.
23. *Id.*
24. *Id.*
25. *Id.* at 405.
26. *Edwards*, 712 N.Y.S.2d at 74.
27. *Id.*
28. *Id.* at 75.
29. *Id.* at 75-76.
30. *Id.* at 77.

The court also affirmed the lower court's denial of defendant's motion to suppress his statement.[31]

Leave was granted to both the People and defendant to appeal the appellate division's order.[32]

III. Discussion

The Court of Appeals framed the issue to be decided on appeal as whether ". . .as a matter of Federal constitutional law, defendant's plea of guilty to first degree murder was invalid as having impermissibly burdened his Fifth and Sixth Amendment Rights."[33] The court analogized its decisions in *Hynes v. Tomei* and the instant action to the Supreme Court's decisions in *United States v. Jackson*[34] and *Brady v. United States*[35] to analyze the issues and reach its conclusion.

In *United States v. Jackson*, the Court held that the death penalty provision of the Federal Kidnapping Act, "impermissibly burdened capital defendant's Fifth Amendment Rights against self incrimination and Sixth Amendment Rights to trial by jury. . .".[36] The *Jackson* Court construed the Federal Kidnapping Acts death penalty provision to create a two-tiered penalty structure by limiting the imposition of the death penalty to defendants who insisted on a jury trial.[37] Therefore, a defendant who pled guilty to the applicable crime could not be subjected to the death penalty.[38] The Court found that while Congress could mitigate the severity of capital punishment, it could not impose the death penalty in ". . .a manner that needlessly penalizes the assertion of a constitutional right."[39] The Court further found that the statute needlessly encouraged guilty pleas and tended to discourage defendants from claiming innocence and demanding trial by jury.[40] However, the court stressed that this holding did not imply that every defendant who entered a guilty plea under the Act did so involuntarily.[41] Additionally, the Court ruled that, since the death penalty provi-

31. *Id.*
32. *Edwards*, 96 N.Y.2d at 445.
33. *Id.* at 451.
34. 390 U.S. 570 (1968).
35. 397 U.S. 742 (1970).
36. *Edwards*, 96 N.Y.2d at 449.
37. United States v. Jackson, 390 U.S. 570 (1968).
38. *Id.*
39. *Id.* at 583.
40. *Id.*
41. *Id.*

sion had been added to the Act subsequently, excising that provision would leave the statute a cohesive whole while removing the constitutional infirmity.[42]

Similarly, thirty years later, the New York Court of Appeals, in *Hynes v. Tomei*,[43] found that the plea provisions of New York Criminal Procedure Law sections 220.10 and 220.30 imposed a two-tiered penalty structure on defendants indicted for first-degree murder.[44] The court felt compelled by the Supreme Court's *Jackson* ruling to hold that these plea provisions likewise impermissibly burdened defendant's constitutional rights.[45] To clarify its position, the court distinguished plea bargaining from these plea provisions which needlessly encouraged guilty pleas, and which the *Jackson* Court prohibited.[46] After examining legislative purpose and the remaining statute's cohesiveness, should the capital pleading provisions be excised, the court found the plea provisions to be severable, and struck them.[47] The Court further construed the resulting statute to provide that a defendant could not plead guilty to first-degree murder while a notice of intent to seek the death penalty was pending.[48] However, it is important to note that the Supreme Court in its *Jackson* decision was construing the actual death penalty provision of the Federal Kidnapping Act, while the New York Court, in its *Hynes* decision, was construing certain plea provisions of the Criminal Procedure Law.[49]

The other one-half of the New York Court of Appeals' analogy was to a case that came before the Supreme Court one year after that Court had invalidated the death penalty provision of the Federal Kidnapping Act.[50] Defendant Brady was indicted under the Federal Kidnapping Act, the death penalty provisions of which had been found unconstitutional in *U.S. v. Jackson*.[51] Unlike the instant defendant who had moved to withdraw his guilty plea to first-degree murder on the ground that it was invalid under *Hynes v. Tomei*,[52] defendant Brady

42. *Id.* at 585-86.
43. 92 N.Y.2d 613.
44. *Id.* at 620.
45. *Id.* at 623.
46. *Id.*
47. *Id.* at 636.
48. *Id.*
49. *See id.* at 622.
50. Brady v. United States, 397 U.S. 742 (1970).
51. *Id.*
52. 92 N.Y.2d 613 (1999).

sought review claiming that his plea of guilty was not voluntarily given because the then valid death penalty provisions of the Federal Kidnapping Act operated to coerce his plea.[53]

The *Brady* Court extensively discussed the requirements *Jackson* imposed upon review of guilty pleas under the Federal Act, finding that decision ". . .neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts, and since reiterated that guilty pleas are valid if both 'voluntary' and 'intelligent.'"[54] The voluntariness of a guilty plea, as was mandated by precedent, must be determined by consideration of all relevant facts and circumstances surrounding it, only one of which was the possibility of a death sentence after a guilty verdict.[55] The record, in Brady's case, was replete with circumstances indicating that his decision to plead guilty was competently weighed against the strength of the government's case against him and the probability of damaging testimony by his codefendant.[56] Brady's plea was voluntary under this standard and the Supreme Court affirmed the denial of his request for relief by the United States Court of Appeals for the Tenth Circuit.[57]

The instant defendant, however, sought relief based upon the rule of constitutional adjudication that states with newly declared constitutional rules should be applied to criminal cases pending on direct review.[58] This Supreme Court precedent enunciated the view that the Court was bound by judicial integrity to apply the current best understanding of governing constitutional principles to all similar cases pending on direct review, and overruled prior precedent.[59] The court of appeals, in the instant matter, however, likened the circumstances surrounding defendant Edward's guilty plea under constitutionally infirm provisions subsequently excised from a statute to defendant Brady's plea of guilty under subsequently declared constitutionally infirm provisions of the Federal Kidnapping Act.[60]

The court found, as the Supreme Court had in *Brady*, that their prior decision holding the statutory provisions constitutionally defec-

53. *Brady*, 397 U.S. at 744.
54. *Id.* at 747.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Edwards*, 96 N.Y.2d at 445.
59. Griffith v. Kentucky, 479 U.S. 314 (1987)
60. *Edwards*, 96 N.Y.2d at 454.

tive under which defendant Edwards had previously pled guilty, did not fashion a new standard for judging the validity of guilty pleas.[61] Closely paralleling the Supreme Court's analysis in *Brady*, the New York court ruled that defendant Edward's guilty plea was not automatically invalidated because its subsequent decision in *Hynes* may have shown "...that the plea rested on a faulty premise."[62] Maintaining that the instant case was procedurally and analytically identical to the *Brady* case, the New York court held that defendant Edward's guilty plea, standing alone, did not violate his Fifth or Sixth Amendment rights.[63] Accordingly, the Appellate Division's Order on the People's Appeal was reversed because it was based solely on the premise that defendant's Fifth and Sixth Amendment rights were violated. Defendant's guilty plea was reinstated, and the case was remanded to the appellate division for a factual review of the record.[64] Additionally, the court dismissed defendant's appeal holding that he was not adversely affected by the appellate division order, which is a requisite for review under CPL § 450.90(1).[65]

The New York judges relied on the Supreme Court's many decisions vacating death sentences imposed before its *Jackson* decision, while leaving undisturbed guilty pleas under the excised provisions of the Federal Kidnapping Act, to support its reasoning and ultimate conclusion.[66] However, the Supreme Court's *Jackson* decision invalidated the death penalty provisions of the Federal Kidnapping Act; whereas the New York *Hynes* decision invalidated certain plea provisions of New York Criminal Procedure Law. Nevertheless, the New York court focused on the coerciveness of the excised provisions and their effect on the voluntariness of defendant's guilty plea.[67]

Consequently, the New York Court did not even touch upon the issue of the retroactive application of a new constitutional rule to defendant Edward's direct appeal, except in reply to a rather strong dissent by Judge Smith.[68] In a contrite response to the dissent, the court again invoked Supreme Court precedent, arguing that a voluntary, knowing and intelligently made guilty plea subsequently waived a de-

61. *Id.* at 452.
62. *Id.*
63. *Id.* at 454.
64. *Id.* at 456.
65. *Id.*
66. *Id.* at 453-54.
67. *Id.*
68. *Id.* at 454-55.

fendant's Fifth and Sixth Amendment rights, and that defendant may not thereafter raise claims of prior deprivation of those constitutional rights.[69]

Judge Smith's dissent objected to the instant decision because acceptance of defendant Edward's guilty plea was violative of both statutory and fundamental constitutional principles.[70] He concluded that the guilty plea was invalid after the court's *Hynes* decision, based upon both New York State and Supreme Court precedent enunciating the principle that defendant was entitled to the benefits of the new constitutional rule while his case was on direct appeal.[71] Additionally, the dissent found the majority's reliance on the *Brady* case to reach its decision unfounded because of the difference in the provisions of the two statutes that had been declared unconstitutional.[72] Judge Smith disagreed with the adjudication of the issue of voluntariness of the plea rather than the issue of whether a plea is valid when the statutory provisions under which it was made are declared unconstitutional.[73]

IV. Conclusion

In *Edwards*, the New York Court of Appeals held that subsequent adjudication declaring certain plea provisions of New York Criminal Procedure Law unconstitutional did not alter the standard for judging the voluntariness of guilty pleas, nor did it automatically invalidate a plea of guilty in a capital murder case that had been entered prior to such adjudication of unconstitutionality.

Gail Goldfarb

69. *Id.* at 455.
70. *Id.* at 456.
71. *Id.* at 458-59.
72. *Id.* at 459.
73. *Id.* at 460.

SHELDON SILVER V. GEORGE E. PATAKI[1]

(decided July 10, 2001)

I. SYNOPSIS

In a 6-1 majority decision, the New York Court of Appeals held that the Speaker of the New York State Assembly has the capacity and standing as a Member of the Assembly to seek judicial redress where a legislative vote was allegedly unconstitutionally nullified.[2] The lone dissent disagreed stating that only a sufficient voting bloc or the entire legislature itself may make a valid vote nullification claim.[3]

II. BACKGROUND

In January 1998, Governor George Pataki submitted the 1998-1999 executive budget along with various proposed budget bills to the New York State Legislature. The Legislature rejected many of the Governor's proposals and enacted its own budget bills that removed, reduced and added provisions to his proposals. When the revised bills were submitted to the Governor, he exercised his line item veto power, including fifty-five line item vetoes in the non-appropriation bills.[4] Sheldon Silver, the Speaker of the New York State Assembly, brought an action in the Supreme Court of New York seeking a declaratory judgment. Silver alleged that Governor Pataki violated Article IV § 7 of the New York State Constitution by using the line item veto in the non-appropriation bills.[5] Silver asserted that the Governor could only utilize his line item veto power in appropriations bills, but had to accept or reject non-appropriations bills in their entirety. The Governor filed a motion to dismiss claiming that Silver lacked the capacity and standing to bring such an action and in the alternative to transfer venue from New York County to Albany County. Silver cross-motioned for summary judgement.

---

1. 96 N.Y.2d 532 (2001).
2. *See id.* at 538.
3. *See id.* at 547.
4. A non-appropriation bill contains specific instructions on how to allocate funds within an appropriation bill. They generally include sources, schedules and sub-allocations for funding.
5. *See* Silver v. Pataki, 684 N.Y.S.2d 858 (Sup. Ct. N.Y. County 1999).

After a detailed discussion of modern cases regarding standing in the context of challenges to legislative actions, the court noted a "loosening of the standing restrictions, particularly in situations where a failure to permit standing could be an insurmountable wall against any judicial review of a challenged act."[6] The court's main concern was that if a legislator is denied standing to sue in order to uphold acts of the legislature against an unconstitutional use of the veto power, the legality of the vetoes could avoid judicial scrutiny entirely.[7] Ultimately, the court denied Pataki's motions and held that Silver was an appropriate party with both the capacity and standing to bring a suit claiming unconstitutional use of the Governor's veto power.[8] In addition, the court held the plaintiff's cross motion in abeyance.[9]

Governor Pataki appealed the supreme court's decision. The Appellate Division, First Department, reversed and entered a judgement for the Governor dismissing the complaint.[10] The appellate division noted that the Speaker of the Assembly had no authority to institute the litigation on behalf of the legislature and lacked the capacity to bring this action.[11] The legislature could have authorized the litigation, thus granting Silver the capacity to sue on behalf of the institution, but it did not.[12] The court said, however, that even if Silver did have inherent authority to bring the action on behalf of the legislature, he did not have the standing to bring this suit.[13] According to the court, "the Speaker has made no allegation of any personal harm nor any remediable interference with the performance of his duties."[14] There was only a potential institutional injury in this case that did not confer standing to the Speaker.[15]

The policy underpinning the court's decision was that if a legislator was granted a cause of action under these facts, it would "needlessly propel the judiciary into future political conflicts."[16] In addition, if an individual legislator could sue the Governor, then there would be no

6. *Id.* at 862.
7. *Id.* at 863.
8. *Id.*
9. *Id.* at 864.
10. *See* Silver v. Pataki, 711 N.Y.S.2d 402 (1st Dep't 2000).
11. *Id.* at 409.
12. *Id.* at 408.
13. *Id.* at 409.
14. *See id.*
15. *Id.*
16. *See id.* at 403.

"principled reason to decline to adjudicate disputes between legislators of the same house or between legislators of each house."[17] A judicial option to sue here would stifle the ability of the legislature to enact laws while its members were involved in litigation against one another.[18]

Justice Williams' dissent was based on a finding that legal capacity to sue in this case need not be expressly granted, but may be implied as a matter of law.[19] He relied on various New York Court of Appeals and United States Supreme Court decisions reflecting a more "liberal view toward standing" to determine that the appellee Silver had capacity and standing to bring this suit.[20] Given these cases, the dissent found the requirement that all legislators whose votes were nullified be parties to an action in order to have standing to be preposterous.[21]

Plaintiff Silver appealed based on the dissent's reasoning. The New York Court of Appeals affirmed the portion of the Appellate Division's decision which held that Silver had no representative authority as Speaker to engage in litigation on behalf of the entire legislature.[22] The court, however, modified the lower court's decision denying the motion to dismiss in so far as it was brought by the plaintiff as an individual member of the legislature.[23] It ruled that Silver, as a member of the state assembly, lacked the authority under the New York Constitution to sue on behalf of the assembly without a resolution expressing its will that he do so, but that he did have the capacity and standing to sue individually in this case.

III. Discussion

The court framed the limited threshold issue on appeal as whether "Mr. Silver, as a Member or Speaker of the Assembly, has capacity and standing to bring this action?"[24] With regard to capacity, the court noted that it can be "expressly conferred or inferred as a neces-

---

17. *Id.* at 408.
18. *See id.*
19. *Id.* at 410.
20. *See id.* To demonstrate his point, Justice Williams relied on Boryszewski v. Brydges, 37 N.Y.2d 361 (1975), Morganthau v. Cooke, 56 N.Y.2d 24 (1982), Sulivan v. Siebert, 417 N.Y.S.2d 129 (1979), Winner v. Cuomo, 580 N.Y.S.2d 103 (1992), and Coleman v. Miller, 307 U.S. 433 (1939).
21. *See id.* at 410-11.
22. *See* Silver v. Pataki, 96 N.Y.2d 532 (2001).
23. *See id.*
24. *See id.* at 536.

sary implication from powers and responsibilities. . .within the zone of interest to be protected."[25] Since Silver has a responsibility to consider and vote on legislation, that responsibility "necessarily includes continuing concern for protecting the integrity of one's votes and implies the power to challenge in court the effectiveness of a vote that has allegedly been unconstitutionally nullified."[26] If this were not so, a legislator's vote, and therefore the will of the people he or she represents, would be meaningless in cases where the vote was nullified without express constitutional power to do so. Since a legislator would clearly have capacity to sue if he or she was precluded from voting on legislation before the assembly, he or she should have capacity to sue after the legislation passed where their vote was allegedly nullified.[27] With this reasoning, the court concluded that Silver has capacity to sue as a member of the Assembly.

The court went on to say, however, that Silver does not have the inherent capacity to bring litigation on behalf of the legislature.[28] The New York Constitution does not grant the Speaker representative authority and the Assembly did not pass a resolution committing the Speaker to engage in litigation as its representative.[29] Thus, the court found this portion of the appellate division's analysis correct and upheld this narrow part of their decision.

The issue of Silver's standing was addressed next. The Court stated the test as, "a plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest."[30] In the context of "legislator standing" cases fall into three general categories: lost political battles, nullification of votes and usurpation of power.[31] A suit based on a lost political battle will never confer standing. Vote nullification as alleged here, however, may do so when brought by the appropriate party under credible facts. In order for Silver to have standing to bring suit here, he must show that he as an individual suffered an injury in fact such that he "has an actual legal stake in the matter being adjudicated."[32] As noted, the court found that Silver the individual suffered an injury in fact when his vote was

25. *Id.* at 537.
26. *Id.*
27. *See id.*
28. *Id.* at 538.
29. *Id.*
30. *See id.* at 539.
31. *Id.*
32. *Id.*

nullified by the Governor's line item veto.[33] On the other hand, his claim that the Assembly as a whole suffered an injury is an allegation of "political harm. . . that fails to rise to the level of a cognizable injury in fact."[34] Silver is conferred standing to sue only as an individual, but not on behalf of the legislature.

The court relied mainly on the United States Supreme Court case *Coleman v. Miller*[35] for its reasoning. In that case, twenty members of the Kansas State Senate challenged the ratification of an amendment to the US Constitution where the vote was a 20-20 deadlock broken by the Lieutenant Governor's vote.[36] The Supreme Court determined that the legislators there had a direct interest in maintaining their vote and had suffered an injury in fact such that their standing to sue was recognized.[37] *Coleman* was distinguished by two other cases mentioned throughout the supreme court and appellate division decisions, *Matter of Posner v. Rockefeller* (heavily relied upon by the appellate division) and *Raines v. Byrd*.[38] In both of those cases, legislators lost their political battles in the legislature when legislation was validly enacted over their opposition.[39] There was no vote nullification, and no direct harm suffered by the legislators. "Thus, each lacked the standing to sue" in those cases.[40]

The court went on to expressly reject the requirement that a "controlling bloc" of legislators are necessary parties in order to confer standing in a vote nullification suit. Following *Coleman* where the fact that all Senators that cast votes were plaintiffs was not critical, the court said, "plaintiff's [Silver] injury in the nullification of his personal vote continues to exist whether or not other legislators who have suffered the same injury decide to join in the suit."[41] The court also rejected the idea that potential vote nullification was not established in this case because Silver had a remedy within the political process including a legislative override of the Governor's veto and a suit by others ag-

---

33. *Id.* at 540.
34. *Id.*
35. 307 U.S. 433 (1939).
36. *See id.*
37. *See id.*
38. Posner v. Rockefeller, 26 N.Y.2d 970 (1970); Raines v. Byrd, 521 U.S. 811 (1997).
39. *See id.*
40. *See Silver*, 96 N.Y.2d at 540.
41. *See id.* at 541.

grieved by the contested vetoes.[42] Following another federal case, *Campbell v. Clinton*,[43] the court said "the existence of other possible political [or judicial] remedies does not negate the injury in fact or defeat standing."[44] It was noted that if this were not the case, unconstitutional conduct might otherwise be insulated from judicial review.[45]

Finally, the court addressed the appellate division's concern that if Silver was granted standing to sue, it would open the "floodgates" to litigation over legislative disputes crippling the lawmaking branch and dragging the judiciary into political battles.[46] According to the court, this decision announces "nothing new" it simply confirms, "what was assumed before: in limited circumstances, legislators do have standing and capacity to sue when conduct unlawfully interferes with or usurps their duties as legislators."[47]

Judge Graffeo's dissent focused on the fact that Silver's complaint alleged no personal injury to him as an individual and emphasized the institutional harm rather than individual injury caused to him as a legislator.[48] He saw this as "clearly an institutional claim" where Silver had no explicit authority to sue and no inherent or implied authority to bring a suit as the majority determined.[49] He found no legal basis for capacity to sue in this case without "collective authorization" from the legislature.[50] In addition, he advocated the "voting bloc" requirement in order to grant standing in a suit to redress vote nullification.[51] The dissent construed *Posner*, *Coleman*, and *Raines* completely opposite to the majority and would have held that the plaintiff lacked capacity and standing to bring suit in this case as a Member of the Assembly.[52]

This decision does not greatly expand the law beyond where it was prior to this case. It simply clarifies it. Now there is precedent for an individual legislator to have the capacity and standing to bring a suit for vote nullification in New York. Its most significant impact may likely

42. *See id.*
43. 52 F. Supp. 2d 34 (D.C. Cir. 1999).
44. *Silver*, 96 N.Y.2d at 541.
45. *See Silver*, 96 N.Y.2d at 541.
46. *See* Silver, 711 N.Y.S.2d at 403.
47. *Silver*, 96 N.Y.2d at 542.
48. *See id.* at 543.
49. *Id.* at 544.
50. *Id.*
51. *See id.* at 547.
52. *Id.*

be in limiting the New York Governor's use of the line item veto in similar instances.

IV. CONCLUSION

The New York Court of Appeals held that in the context of unconstitutional vote nullification or usurpation of power, an individual legislator has the capacity and standing to bring suit for judicial redress.[53] Additionally, the court held that the Speaker of the Assembly is not constitutionally authorized to bring a suit on behalf of the institution. He or she must be explicitly authorized by the legislature to do so.[54]

Jeffrey Dodes

53. *See id.* at 538.
54. *Id.*

PEOPLE V. VERNACE[1]

(decided July 10, 2001)

I. SYNOPSIS

The New York Court of Appeals affirmed the Appellate Division's order that the State established good cause for its significant delay in prosecuting defendant, Robert Vernace.[2] The court found that the District Attorney made a good faith determination to delay prosecution for sufficient reasons and therefore the defendant was not deprived of due process even if there was some prejudice to him.[3] Furthermore, the court found that the appellate division's inference of witness fear had ample support in the record, placing the good cause issue beyond further review.[4]

II. BACKGROUND

This case involves a 1981 double murder at the Shamrock Bar in Queens, New York.[5] The two bar owners were shot at point blank range on April 11, 1981 after defendant's cohort allegedly became enraged over a spilled drink.[6] Three individuals linked to organized crime were thought to be suspects: defendant, Robert Vernace (aka "Pepe"), Frank Riccardi (aka "Frankie the Geech"), and Ronald Barlin (aka "Ronnie the Jew").[7] The Shamrock bartender had identified all three assailants by their nicknames[8] as all three had been patrons at another Queens neighborhood bar where the bartender had worked.[9] The bartender identified Riccardi from a high school yearbook photograph and Barlin from a mug shot taken on a prior arrest.[10] The FBI furnished two important leads regarding the defendant Vernace. This included information that showed Vernace frequented a certain social

1. 96 N.Y. 2d 886 (2001).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.* at 888.
6. *See id.*
7. *See id.* at 887.
8. *See id.* at 888.
9. *See id.*
10. *See id.*

club known as an organized crime hangout, and that he lived at a specified location with a named girlfriend[11] led to the bartender's identification of him from surveillance photographs of the comings and goings of the social club.[12]

The photographs were then shown to Vernace's girlfriend on September 30, 1981, who confirmed that it was the defendant and that he was actually her husband.[13] She claimed no knowledge of the defendant's whereabouts and refused any further cooperation.[14]

In addition to the bartender, Linda Gotti was the only other person present at the Shamrock during the shootings that was able to identify all three assailants from photographs shown to her by the police.[15] Furthermore, virtually all of the 20 to 25 people allegedly in the bar at the time of the murders, denied seeing the crime.[16]

The Homicide Bureau of the Queens county District Attorney's Office stated in a memorandum dated March 25, 1982 that it wished to present "the case of People v. Barlin, Riccardi and Vernace" for Grand Jury consideration of two counts of murder in the second degree.[17] However, for reasons not known at the time of the "Singer" hearing, the District Attorney never pressed charges against Vernace.[18] Consequently, the Grand Jury, voted to indict only Riccardi and Barlin for the Shamrock homicides.[19]

Shortly after the murders, the main witness for the prosecution either fled the jurisdiction or hid from the police.[20]

Consequently, the case against Barlin was dismissed on motion of the District Attorney in May 1983 because Linda Gotti was unable to identify him at the Wade hearing. The other defendant, Riccardi, was not located and still remains at large.[21] Following the 1982 indictment, there was a total absence of any action by the prosecutor or any other law enforcement authorities for fourteen years toward establishing defendant Vernace's criminal responsibility for the Shamrock

---

11. *See id.*
12. *See id.*
13. *See* People v. Vernace, 96 N.Y. 2d 886, 888 (2001).
14. *See id.*
15. *See id.*
16. *See id.* at 887.
17. *See id.* at 889.
18. *See id.* at 889.
19. *See id.*
20. *See id.* at 887.
21. *See id.*

murders.[22] Defendant Vernace was indicted on November 19, 1998, seventeen years after the incidents occurred.[23] Defendant objected that he was subjected to an unreasonable delay and the Supreme Court, Queens County granted the defendant's motion to dismiss the indictment because the preindictment delay violated his right to a speedy trial.[24]

III. Discussion

In a six to one decision, the court of appeals found in favor of upholding the appellate division's determination that the People established good cause for the delay in prosecuting the defendant as it is a mixed question of law and fact for which there is sufficient support in the record.[25] The court stated that in New York, "'we have never drawn a fine distinction between due process and speedy trial standards' when dealing with delays in prosecution."[26] When determining if a defendant's rights have been abridged the factors utilized are the same whether the right asserted is a speedy trial right or the due process right to prompt prosecution.[27]

The court determined that the factors involved are not only the extent of the delay but also the reasons for the delay, the nature of the underlying charge, whether there has been an extended period of pretrial incarceration, and whether there is any indication that the defense has been impaired by reason of the delay.[28] In applying the factors to the defendant's particular case, the Court agreed that the delay had in fact been extensive but balanced the other factors in favor of the prosecution.[29]

The nature of the underlying charge is two counts of murder in the second degree.[30] In addition the vicious manner of shooting the two men at point blank range in a crowded bar added to the seriousness.[31] Furthermore, the record shows that there was virtually no pre-

22. *See id.* at 889.
23. New York v. Vernace, Lexis 2002 N.Y. Misc. 122, *2.
24. New York v. Vernace, 711 N.Y.S.2d 492 (2000).
25. *See Vernace*, 95 N.Y.2d at 887.
26. *See id.* (quoting People v. Singer, 44 N.Y.2d 241 (1978)).
27. *See id.* (citing People v. Staley, 41 N.Y.2d 789 (1977)).
28. *See id.* (citing People v. Taranovich, 37 N.Y.2d 442 (1975)).
29. *See id.* at 888.
30. *See id.*
31. *See id.*

trial incarceration[32] and the court found that the defense had not been impaired.[33] Moreover, the court identified that the defendant had enjoyed significant freedom with no public suspicion attendant upon an untried accusation of crime, and the record does not demonstrate undue prejudice to the defense.[34] The court even went so far as to say that the delay in this instance has made the case against the defendant more difficult for the prosecution to prove beyond a reasonable doubt.[35]

Justice Levine, the sole dissenter voted to reverse the appellate division's holding and found that there was a total absence of any justification for the pre-accusatory prosecutorial delay and believes that the majority opinion undermines the principles of due process and fundamental fairness.[36]

Justice Levine noted in his dissent that New York case law was well settled with respect to the effect of inordinate pre-accusatory prosecutorial delay.[37] In contrast to the holding of the Supreme Court of the United States under the Due Process Clause of the 14th Amendment,[38] "an unjustified, protracted pre-indictment delay in prosecution, even one far shorter than 14 years, has been held as a deprivation of a defendant's State constitutional right to due process, without requiring a showing of actual prejudice."[39]

Furthermore, the dissent discussed that "where there has been a prolonged delay, we impose a burden on the prosecution to establish good cause"[40] The dissent describes in the opinion some conflicting facts that cast doubt on to the "good cause" established by the prosecution.

The prosecution's main justifications for the delay was the allegations that the defendant was in hiding to avoid arrest and that the Shamrock bartender was unable to identify the defendant in May of

32. *See id.*

33. *See id.*

34. *See id.*

35. *See Vernace*, 96 N.Y. 2d at 888.

36. *See id.* at 891.

37. *See id.* at 889.

38. *See id.* (citing United States v. Lovasco, 431 U.S. 783 (1977), *cert. denied*, 434 U.S. 881).

39. *See id.*; *see also* People v. Lesiuk, 81 N.Y.2d 485 (1993); People v. Fuller, 57 N.Y.2d 152 (1982); People v, Singer, 44 N.Y.2d 241 at 253-54 (1978); People v. Staley, 41 N.Y.2d 789 (1977); *see also* N.Y. CONST. art. I, § 6).

40. *See id.* at 889 (citing *Lesiuk*, 81 N.Y.2d at 490).

1983, the time of Barlin's case, because he had fled or was in hiding.[41] However the dissent discusses that the lower court rejected these contentions based on sufficient evidence presented at the Singer hearing.[42] The dissent also points to the District Attorney's actions in misplacing both a gun fired at the homicides and the complete original file folder on the case.[43]

Conversely, the majority through the weighing of multiple factors discussed above affirmed the order that prosecution of the defendant 14 years later was not a deprivation of the defendant's State constitutional right to due process. The Court held that the evidence of witnesses' fear and reluctance to testify supported the appellate division's finding and was justification for not moving forward promptly with the prosecution.[44]

IV. Conclusion

The New York Court of Appeals affirmed the appellate division's order that the State had met their burden is establishing good cause for its significant delay in prosecuting the defendant.[45] Because the prosecution made a good faith determination to delay prosecution for sufficient reasons, defendant was not deprived of due process even if there was some prejudice to him.[46] The court affirmed that in New York the courts do not draw a fine distinction between due process and speedy trial standards when dealing with delays in prosecution.[47]

Courtney E. McGuinn

41. *See id.* at 890.
42. *See id.*
43. *See id.* at 890-91.
44. *See id.* at 890.
45. *See id.* at 887.
46. *See id.*
47. *See id.*

PEOPLE V. ENRIQUE ROJAS[1]

(decided October 25, 2001)

I. SYNOPSIS

In a 6-1 majority decision, the New York Court of Appeals held that the prosecution could introduce evidence of a prior alleged crime to refute the defendant's contention made during his opening statement and cross-examination of a prosecution witness.[2]

II. BACKGROUND

While in custody in the Onondaga Justice Center jail the defendant, Enrique Rojas, allegedly attempted to assault another inmate.[3] The jail personnel put the defendant in segregated custody because they felt the defendant was dangerous.[4] As a part of the jail's policy, the defendant was required to wear paper clothing instead of fabric clothing.[5] After the defendant refused to change his clothes, several guards entered his cell to supervise his exchange of clothing.[6] During this process, the defendant punched one of the guards in the face, dislocating his jaw.[7] The grand jury indicted the defendant for both assaults. The County Court granted the defendant's motion to sever the charges and only the assault on the guard is at issue in this case.[8]

In the pre-trial proceeding the defense moved to preclude the prosecution from introducing proof of defendant's alleged attempted assault on the inmate because such proof constituted inadmissible propensity evidence.[9] The prosecution argued that some explanation of the defendant's status was necessary to avoid giving the jurors the impression the defendant was mistreated.[10] The court ruled that the prosecution could not discuss the defendant's alleged assault on the

1. 97 N.Y.2d 32 (2001).
2. *Id.* at 32, 41.
3. *Id.* at 32.
4. *Id.*
5. *Id.* at 34.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 35.

inmate.[11] The prosecution could, however, explain to the jurors that the defendant's status was changing and that status required a change of clothing.[12]

At trial, the defense's opening statement concentrated on the hardships of segregated detention and stated that the defendant had done nothing wrong and was bewildered by having to wear paper clothing.[13] On cross-examination the defense elicited testimony from Deputy Keith Betsey, a corrections officer, who addressed the hardships of segregated detention, such as not being able to have pens, pencils, or sheets.[14] Sergeant Walter Rys testified that the defendant was "a problem" and was involved in an altercation with another inmate where the defendant stabbed the inmate with a pencil.[15] The defendant objected to this testimony, but the court overruled his objection because the defense had "opened the door" in its opening statement and cross-examination of Deputy Betsey.[16] The court instructed the jury that this evidence was important to explain why the defendant was in segregated custody, but it should not be used as evidence of his guilt as to these specific charges.[17] The defendant moved for a mistrial arguing under *People v. Molineux*[18] that the prosecution's witnesses had improperly mentioned the defendant's prior attempted assault on the inmate.[19] The court denied the defendant's motion for a mistrial because the defense counsel misled the jurors by portraying the defendant as a victim of unjust treatment.[20]

The jury convicted the defendant of two counts of assault in the second degree for striking the guard. The Appellate Division, Fourth Department, unanimously affirmed the conviction on the grounds that the defendant opened the door to the testimony by portraying the defendant as the victim of abusive guards and seeking an acquittal on the grounds of fairness.[21] The defendant appealed and the issue decided

---

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 36.
18. 168 N.Y. 264 (1901).
19. *Rojas*, 97 N.Y.2d at 36.
20. *Id.*
21. *See People v. Rojas*, 717 N.Y.S.2d 448, 449 (4th Dept. 2000).

by the court of appeals was whether the challenged evidence was admissible under a *Molineux* exception.[22]

III. Discussion

The court began its analysis by addressing the defendant's contention that "evidence of the prior attempted assault does not fall within any of the *Molineux* exceptions."[23] The court explained that the defendant initially benefited from a "favorable ruling barring introduction of the prior alleged stabbing, and then sought to use that ruling as a sword, to his advantage, by mischaracterizing the purpose of his solitary confinement."[24] The court also explained the *Molineux* exceptions are an illustrative list and are not exhaustive.[25]

The court acknowledged that the evidence arguably became admissible under Molineux when introduced to justify defendant's confinement and the guards' actions.[26] The evidence was used to refute the defendant's contention that he was the victim of unjustified restraint by the guards. The court stated that evidence of prior crimes could be introduced "to refute defendants' contentions at trial."[27]

On this issue, the court concluded that because the defendant abused the initial favorable *Molineux* ruling, it was unnecessary for the court to create another *Molineux* exception in this case.[28] The court noted that evidence of a prior crime is not only admissible if it "passes through the Molineux prism,"[29] but that the prosecution is authorized to introduce evidence of a prior crime if the defendant denies it or if the defendant offers evidence of good character.[30]

Next, the court addressed the defendant's opening statement. The defense's opening statement strongly suggested that "the jury should acquit defendant because, having done nothing wrong, he was

---

22. *See Rojas*, 97 N.Y.2d at 36.

23. *Id.* The *Molineux* exceptions allow evidence of other crimes to prove the specific crime charged when it "tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial." *Molineux*, 168 N.Y. at 293.

24. *Rojas*, 97 N.Y.2d at 36.

25. *Id.* at 37.

26. *Id.* at 38.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

abused and mistreated, culminating in a scuffle with guards who surrounded him in his cell."[31] The defense also used its cross-examination "to further the impression that the guards were not performing a lawful duty in supervising his exchange of clothing."[32] The court stated that the defense "converted the shield of the preclusion order into a sword by arguing the People should not be allowed to supply that justification."[33] If the prosecution did not refute the defendant's misleading assertions, the jury could have acquitted the defendant "based on the erroneous belief that he was unjustly confined and mistreated."[34]

Lastly, the court addressed the dissent's arguments. The dissent argued that defendant was seeking to show that he lacked intent to injure the officer and, therefore, did not open the door to the challenged testimony.[35] The court noted that the record indicated, "neither the defendant's opening statement nor cross-examination of Deputy Betsey even touched on defendant's lack of intent to injure the jail guard."[36] Additionally, the defendant need not have acted intentionally to injure the police officer to be guilty of assault in the second degree. The defendant must only act intentionally to prevent a police officer from performing a lawful duty.[37]

The dissent's second argument was that the defendant was only charged with attempted assault on the inmate and had not been convicted of that charge.[38] The court stated that the distinction between the charge and the conviction was irrelevant because the alleged attempted assault gave the prison authorities a valid basis to confine the defendant to segregated custody.[39]

Finally, the court distinguished People v. Betts[40] and People v. Bennett.[41] Those cases dealt with the defendant's Fifth Amendment rights and held that the prosecution "may not cross-examine defen-

---

31. *Id.* at 39.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 40.
38. *Id.*
39. *Id.*
40. People v. Betts, 70 N.Y.2d 289 (1987).
41. People v. Bennett, 79 N.Y.2d 464 (1992).

dants about pending crimes to impeach their credibility."[42] The case at hand does not involve the defendant's Fifth Amendment rights. The prosecution "adduced the challenged evidence by examining their own witness, and therefore did not invite defendant to incriminate himself."[43]

IV. Conclusion

The New York Court of Appeals held that because the defendant opened the door to the evidence of a prior alleged crime based on the combination of his opening statement and cross-examination of a prosecution witness, the evidence was properly admitted.[44]

Princess M. Tate

42. *Rojas,* 97 N.Y.2d at 40.
43. *Id.*
44. *See id.* at 32.

MARTINEZ V. CITY OF SCHENECTADY[1]

(decided November 19, 2001)

I. SYNOPSIS

In a unanimous decision,[2] the New York Court of Appeals held that plaintiffs asserting a constitutional tort claim must establish grounds that entitle them to a damages remedy *and* must prove that their constitutional rights have been violated.[3]

In addition, the court held that where a felony conviction is reversed because the evidence that was the basis for the conviction was obtained by use of a faulty search warrant, there is no favorable termination necessary for purposes of malicious prosecution.[4]

Finally, the court held that "the existence of probable cause serves as legal justification for an arrest and is an affirmative defense to the claim" of false imprisonment.[5]

II. BACKGROUND

On September 21, 1987, a confidential informant advised investigators from the Schenectady Police Department that the informant could obtain drugs from the home of Melody Martinez.[6] Arrangements were made for an uncontrolled drug buy, where the confidential informant purchased seven grams of cocaine, which were turned over to the police.[7] On September 22, 1987, the confidential informant placed an arranged telephone call to Ms. Martinez, which was recorded by the police.[8] During the telephone call the informant and Ms. Martinez discussed a drug purchase.[9] A search warrant for Ms. Martinez' residence was issued on the basis of information provided by

1. 97 N.Y.2d 78 (2001).
2. Opinion by Chief Judge Kaye. Judges Smith, Ciparick, Wesley and Rosenblatt concur. Judges Levine and Graffeo took no part.
3. *Martinez*, 97 N.Y.2d at 83.
4. *See id.* at 84.
5. *Id.* at 85.
6. *See* People v. Martinez, 572 N.Y.S.2d 946 (3d Dep't 1991).
7. *Id.* at 947.
8. *Id.* at 948.
9. *Id.*

the confidential informant.[10] The home of Melody Martinez was searched by police officers; during the search cocaine was discovered.[11] Ms. Martinez was indicted for criminal possession of a controlled substance.[12] Ms. Martinez was convicted and sentenced to 15 years to life in prison.[13]

During the trial Ms. Martinez made a motion to suppress certain evidence obtained during the police search of her residence.[14] Ms. Martinez claimed that the "search warrant application was insufficient to establish probable cause."[15] Ms. Martinez' motion was denied.[16]

On appeal the Appellate Division, Third Department, upheld the denial of Ms. Martinez' suppression motion.[17] The court found that the "affidavits supplied by the confidential informant provided probable cause for the issuance of the search warrant.[18]

The court of appeals reversed the conviction decision, concluding that the submitted affidavits did not sufficiently establish the reliability of the informant.[19] After four years of incarceration, Ms. Martinez' conviction was reversed and she was released from prison in December of 1992.[20]

After her release, Ms. Martinez brought an action in federal court against both the police officers involved in the investigation and the City of Schenectady.[21] Ms. Martinez alleged a cause of action under 42 U.S. § 1983 and state law claims for false imprisonment and malicious prosecution.[22]

The Second Circuit Court of Appeals dismissed Ms. Martinez' claim under 42 USC § 1983, after which she brought an action in state court alleging false imprisonment, malicious prosecution; and a state

10. *Id.*
11. *Id.*
12. *See* Martinez v. Schenectady, 714 N.Y.S.2d 572(3d Dep't 2000).
13. *See id.*
14. *See Martinez*, 572 N.Y.S.2d at 948.
15. *Id.*
16. *See Martinez*, 714 N.Y.S.2d at 573.
17. *Id.*
18. *See Martinez*, 572 N.Y.S.2d at 946.
19. *See* People v. Martinez, 80 N.Y.2d 549 (1992).
20. *See Martinez*, 714 N.Y.S.2d at 573.
21. *Id.*
22. *See id.*

constitutional tort cause of action for violations of the Equal Protection and Search and Seizure Clauses of the New York Constitution.[23]

Ms. Martinez based her tort action upon the Court of Appeals' decision in *Brown v. State of New York*,[24] recognizing a private right of action to recover damages against the state for violations of the State Constitution.[25] In *Brown*, every non-white male in the city of Oneonta was stopped and questioned by police during their search for a black man suspected of assault.[26] In *Brown* none of the claimants were prosecuted.[27]

The police officers and the City of Schenectady each made a motion for summary judgment, which the New York Supreme Court granted.[28] Ms. Martinez appealed and the appellate division affirmed, noting that the existence of probable cause is a relevant factor to both malicious prosecution and false imprisonment, and rendered both claims meritless.[29]

The appellate division then distinguished Ms. Martinez' case from *Brown*, noting that Ms. Martinez was charged with a crime as a result of the search of her residence, her suppression motion was ultimately granted and her conviction reversed.[30] Therefore, the court found Ms. Martinez had received an adequate remedy for the violation of her liberty interest.[31]

III. Discussion

The court began its discussion by addressing Ms. Martinez' tort claim based on alleged violations of the State Constitution.[32] The court found that the "narrow remedy established in *Brown*[33] was not applicable to Ms. Martinez' facts.[34]

---

23. Martinez v. Schenectady, 115 F.3d 111, 114 (citing NY Const. art. I, § 11 and § 12).
24. 89 N.Y.2d 172 (1996).
25. *See Martinez*, 97 N.Y.2d at 83.
26. *See Brown*, 89 N.Y.2d at 176.
27. *Id.*
28. *See Martinez*, 714 N.Y.S.2d at 572.
29. *Id.* at 573.
30. *Id.*
31. *Id.*
32. *Martinez*, 97 N.Y.2d at 81.
33. *Brown*, 89 N.Y.2d at 192.
34. *Martinez*, 97 N.Y.2d at 83.

The court stated that the remedy authorized by *Brown* recognized two interests.[35] First, the "private interests that citizens harmed by constitutional violations have an avenue of redress," and second the "public interest that future violations be deterred."[36] The court noted that in *Brown*, "neither declaratory nor injunctive relief were available to the plaintiffs. . . it was damages or nothing."[37]

The court reiterated the principle that the "tort remedy is not boundless."[38] "Claimants must establish grounds that entitle them to a damages remedy, in addition to proving that their constitutional rights have been violated."[39] In analyzing this issue the court determined that "recognition of a constitutional tort claim," in Ms. Martinez' case was "neither necessary to effectuate the purposes of the state constitutional protections she invoked, nor appropriate to ensure full realization of her rights."[40]

In reaching this determination the court concluded that "the cost to society of exclusion of evidence and the consequent reversal of Ms. Martinez' conviction. . . will serve the public interest of promoting greater care in seeking search warrants."[41] The court felt that the "deterrence objective" of *Brown* was satisfied by the exclusion of incriminating evidence.[42]

The court then addressed whether Ms. Martinez had "demonstrated how money damages were appropriate in ensuring full realization of her asserted constitutional rights."[43] The court determined that Ms. Martinez had failed to do so based upon her inability "to distinguish her case from that of any criminal defendant who has been granted suppression of evidence, or reversal of a conviction, based on technical error at the trial level."[44] The court added that Ms. Martinez had received a "substantial benefit from the dismissal of her indictment and release from prison," and had failed to show any facts warranting a damages remedy.[45]

---

35. *Id.* at 83.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Martinez*, 97 N.Y.2d at 84.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*

Therefore, while Ms. Martinez' liberty interests were violated through an unconstitutional search and seizure, the court nonetheless affirmed the motions for summary judgment because Ms. Martinez failed to demonstrate that she was entitled to a pecuniary remedy.

The court equates the constitutional violation with a technical error at trial and thus diminishes the sanctity of the rights afforded to the people of New York, both criminal defendants and not, by their state constitution.

The court then addressed Ms. Martinez' malicious prosecution and false imprisonment claims.[46] To prove malicious prosecution, Ms. Martinez would have to establish that "a criminal proceeding was commenced, that it was terminated in favor of the accused, lack of probable cause and that the proceeding was brought out of actual malice."[47] The court's discussion of malicious prosecution focused on the "favorable termination" factor.

The court stated that the cause of action must fail because the criminal proceeding was not terminated in Ms. Martinez' favor.[48] The court held that "a criminal defendant has not established favorable termination when the outcome of the criminal proceeding is inconsistent with the innocence of the accused."[49] The court relied heavily on the fact that Ms. Martinez' conviction was not reversed based upon a lack of guilt but because of a faulty search warrant.[50] In fact, the court added that Ms. Martinez' guilt was proven "beyond a reasonable doubt."[51]

Finally, the court briefly addressed Ms. Martinez' false imprisonment claim. The court highlighted the elements needed to establish false imprisonment: defendant must intend to confine, plaintiff must be conscious of the confinement and must not have consented to the confinement, and that the confinement must not have otherwise have been privileged.[52]

The court stated that "probable cause serves as a legal justification for the arrest and an affirmative defense to the claim."[53] The court found that the facts of Melody Martinez' case provided an "ample

46. *Martinez*, 97 N.Y.2d at 85.
47. *Id.*, (*citing* Broughton v. State of New York, 37 N.Y.2d 452, 457, (1975)).
48. *Id.*
49. *Id.* at 86.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 87 (citing Broughton v. State of New York, 37 N.Y.2d at 458).

showing for probable cause," and therefore it affirmed the motion for summary judgment.[54]

IV. Conclusion

The New York Court of Appeals held that plaintiffs asserting a constitutional tort claim must establish grounds that entitle them to a damages remedy *and* prove that their constitutional rights have been violated.[55]

In addition, the court held that where a felony conviction is reversed because the evidence that was the basis for the conviction was obtained by use of a faulty search warrant, there is no favorable termination for purposes of malicious prosecution.[56]

Finally, the court also held that "the existence of probable cause serves as legal justification for an arrest and an affirmative defense to the claim" of false imprisonment.[57]

Stacey Mesler

54. *See id.* at 87.
55. *Id.* at 83.
56. *See id.* at 84.
57. *Id.* at 87.

IN RE ESTATES OF COVERT[1]

(decided November 20, 2001)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that when the will of a murder victim bequeaths property to the family of the wrongdoer, the family members are viewed as "innocent distributees," and are not automatically disinherited because of their relationship to the offender.[2]

II. BACKGROUND

Edward and Kathleen Covert executed a joint will on December 14, 1995. This will provided that, upon the death of the first spouse, the surviving spouse would inherit all of the property. Further, upon the death of the surviving spouse, the couple's residuary estate would be bequeathed in three equal shares: one-third to each set of parents, and one-third to be divided among all siblings.[3] Edward also had two life insurance policies and a retirement plan.[4] He listed Kathleen as the primary beneficiary, with his parents as the contingent beneficiaries.[5] On April 3, 1998, Edward shot and killed his wife, and then proceeded to kill himself.[6] The will was admitted to probate on May 21, 1998.[7] Kathleen's sister, Kelly Hawley, was designated the executrix by the will.[8] She petitioned the surrogate's court to assist in the estate distribution.[9] Edward was survived by his parents and three siblings ("The Coverts").[10] Kathleen was survived by her parents and two siblings ("The Millards").[11]

---

1. *In re* Estates of Covert, 97 N.Y.2d 68 (2001).
2. *See id.*
3. Some of the jointly owned property, including a time share and jewelry, was bequeathed to Kathleen's sister, Kelly Hawley. *See id.* at 73.
4. *Id.* at 73.
5. *Id.*
6. *See id.* at 72.
7. *Id.*
8. *Id.* at 73.
9. *See id.*
10. *See id.*
11. *Id.*

The Covert's argued in their answer to Hawley's petition that the will should be construed under a "strict compliance" approach, so that the express terms of the will would be adhered to.[12] They wanted the estates to be divided into the three equal shares designated by Kathleen and Edward.[13] Conversely, the Millards argued in their answer that the will should not be executed simply as written, and that the Coverts should be precluded from taking under the will since Edward intentionally caused the death of Kathleen.[14] The Covert's moved for summary judgment to dismiss the Millards' answer, and requested that the court compel distribution based on the express terms of the will.[15]

The surrogate's court granted summary judgment to the Millards based on the precedent established in *Riggs v. Palmer*.[16] This case set forth the doctrine that a wrongdoer, such as a killer, should not be able to benefit from the death of the victim.[17] The surrogate's court precluded the Coverts from taking any property under Kathleen's estate based on *Riggs*. However, Edward's individual property (including his life insurance policies and pension plan) would be distributed according to the provisions of his will and designation of contingent beneficiaries.[18]

On appeal, the Appellate Division, Third Department, disagreed with the order of the surrogate's court and modified it.[19] The appellate division held that the Coverts were not disqualified from taking their share of Kathleen's estate, and treated Edward as if he had predeceased Kathleen.[20] Since all of Edward's property would then go to Kathleen's estate, and be distributed according to the terms of the will, the court ruled that the joint property of Kathleen and Edward Covert should pass through Kathleen's estate and be divided in equal thirds.[21] Thus, under the terms of the will, the Coverts are entitled to their

---

12. *Id.* at 73.

13. "Strict Compliance" refers to a court construing a testator's will by the actual written words. *See id.* (citing *In re* Bailey, 91 N.Y.2d 520, 525 (1998) and Williams v. Jones, 166 N.Y. 522 (1901)).

14. *Id.*

15. *See id.*

16. Riggs v. Palmer, 115 N.Y. 506 (1889). The Court found that a grandson who murdered the testator was enjoined from receiving any of the property left to him in his grandfather's will.

17. *Id.* at 513.

18. *In re Estates of Covert*, 97 N.Y.2d at 73.

19. *In re Estates of Covert*, 717 N.Y.S.2d 392 (3rd Dep't 2000).

20. *Id.* at 395.

21. *Id.* at 394.

share.[22] In addition, the court also found that since Edward was the actual owner of his life insurance policies and retirement fund, he had the ability to distribute it as he wished, and the proceeds should go to his contingent beneficiaries.[23]

The Millard's appealed this ruling, and the New York Court of Appeals affirmed the decision of the appellate division on different grounds. The court noted that Edward's survivors, the Coverts, are mere innocent parties, and thus the *Riggs* standard does not apply.[24] The court also affirmed the decision of the appellate division that the proceeds of the insurance and retirement plans should go to the beneficiaries designated by Edward since that property does not belong to the victim.[25]

III. Discussion

The court began its analysis with a discussion of will construction and testamentary distribution. "This Court has long recognized that testamentary instruments are strictly construed so as to give full effect to the testator's clear intent."[26] However, despite this deference accorded the testator, there is also a conflicting principle that prevents a wrongdoer from benefiting from a crime.[27] In *Riggs v. Palmer*, the New York State Court of Appeals barred the grandson from taking a gift from his grandfather's estate since he would be profiting from his crime. The grandson was deprived of an interest in the estate because he murdered his grandfather.[28] However, the court did permit the estate to pass to the grandson's mother and sisters, since they were also beneficiaries of the deceased.[29] In the present case, the court had to determine whether this doctrine should apply in the situation of Kathleen Covert, in which her will specifically made a bequest to the relatives of her murderer.

First, the court refused to adopt the rationale of the appellate division to treat Edward as if he had predeceased Kathleen, finding that the *Riggs* doctrine unequivocally precludes Edward from taking any be-

22. *See id.*
23. *See id.*
24. *In re Estates of Covert*, 97 N.Y.2d at 74-75.
25. *Id.* at 76-77.
26. *Id.* at 74.
27. *See id.* (citing Riggs v. Palmer, 115 N.Y. 506 (1889)).
28. Riggs v. Palmer, 115 N.Y. 506 (1889).
29. *See id.* at 515.

quest made by Kathleen to him. This property automatically passes into the residuary.[30]

Next, the court addressed the Millard's argument that the *Riggs* doctrine voids the gift to the Coverts and that since the residuary is invalid, the estate should pass under intestacy.[31] The court emphasized that *Riggs* is inapplicable unless the Coverts are not innocent distributees.[32] Further, the fact that Kathleen actually made a will gives rise to a presumption against intestacy.[33] The court concluded that Kathleen's will and residuary is valid, and that no part of the estate should pass by intestacy.[34]

To illustrate this point more clearly, the court divided the property at issue into three categories. The first category included the property owned individually by Kathleen and Edward.[35] The court ruled that this property automatically passes by the will of the deceased, regardless of *Riggs*.[36] Thus, the individually owned property should be distributed in equal thirds among Edward's parents, Kathleen's parents and their siblings.[37]

With regard to the property owned jointly by Kathleen and Edward, the court considered the effect of the vesting on Edward's property rights.[38] In analyzing this issue, the court looked to Civil Rights Law § 79-b, which states "[a] conviction of a person for any crime, does not work as a forfeiture of any property, real or personal, or any right or interest therein."[39] However, as applied to this case, the court found that Edward cannot profit from killing Kathleen.[40] Thus, he is not entitled to take the property under the typical survivorship rights that he would have if Kathleen died naturally. The court ruled that the joint property should be divided evenly between the two, but that Edward is not entitled to Kathleen's share.[41] It passes directly to Kathleen's estate.[42]

---

30. *In re Estates of Covert*, 97 N.Y.2d at 75.
31. *Id.*
32. *See id.* at 74-75.
33. *See id.* at 75.
34. *Id.*
35. *Id.*
36. *See id.*
37. *See id.*
38. *Id.* at 75.
39. *Id.* at 76 (citing N.Y. CIVIL RIGHTS LAW § 79-b (Consol. 2001)).
40. *See id.*
41. *Id.*
42. *See id.*

The final category of property addressed by the court was the proceeds of the life insurance policies and pension plans.[43] Comparing these to contracts, the court posited that since the terms are clear and unambiguous, and since the primary beneficiary (Kathleen) is deceased, the proceeds should go to the contingent beneficiaries designated by Edward - his parents.[44] The court did not accept the argument that its ruling in *Petrie v. Chase Manhattan Bank*[45] precludes this outcome.[46] *Petrie* involved a disposition to an alternative beneficiary of the victim's trust chosen by the wrongdoer.[47] The court ruled that the disqualification of the offender extended to his nominee for trust beneficiary as well.[48] Here, the court distinguished Kathleen's estate because the insurance policies and pension plan were the actual property of Edward (not the victim). Thus, his contingent beneficiaries are entitled to take their share as innocent distributees.[49]

IV. CONCLUSION

The New York State Court of Appeals held that Edward Covert was not entitled to receive any property from his wife based on *Riggs v. Palmer*. However, the property he would have received would pass directly into the residue, and be distributed according to the terms of the joint will of Kathleen and Edward Covert. According to *Riggs*, the relatives of Edward are not prohibited from taking their share of the estate because it was the intent of Kathleen that they be the residual beneficiaries. The rights of the Coverts are not diluted because of their relationship to Edward. The couple's joint property passed to their respective estates, and the life insurance and pension proceeds passed to the contingent beneficiaries of Edward.

Nicole M. Fantigrossi

43. *See id.*
44. *Id.*
45. 352 N.Y.S.2d 194 (Ct. App. 1973).
46. *In re Estates of Covert*, 97 N.Y.2d at 76.
47. *See id.*
48. *Id.*
49. *See id.* at 77.

LEADER V. MARONEY, PONZINI & SPENCER[1]

(decided November 20, 2001)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that a showing of reasonable diligence in attempting to effectuate service is not a threshold factor that must always be established to grant a motion pursuant to C.P.L.R. 306-b for an extension of time to serve a summons and complaint.[2] The court noted that, while C.P.L.R. 306-b gives the courts two separate standards under which to consider an application for an extension of time to effectuate service "upon good cause shown" or "in the interest of justice,"[3] only the "good cause" standard requires a showing of reasonable diligence.[4] Thus, the Court of Appeals clarified that under the "interest of justice standard," reasonable diligence is not required to satisfy C.P.L.R. 306-b.

II. BACKGROUND

Three issue-related proceedings – based on Article 3, Section 6(b) of the New York Civil Practice Law and Rules – were merged by the court of appeals for *Leader v. Maroney, Ponzini & Spencer*.[5] In the first case, plaintiff Susan Leader sued defendant law firm, Maroney, Ponzini & Spencer ("Maroney"), for legal malpractice in the handling of her divorce.[6] Leader *pro se* filed a summons with notice approximately two months before the expiration of the statute of limitations and before retaining counsel.[7] However, Leader never served the defendant with a summons with notice.[8] Her newly-retained counsel was told that Leader had filed a summons with notice and that the defendant had

1. 97 N.Y.2d 95 (2001).
2. *See id.* at 103.
3. *See* N.Y. C.P.L.R 306-b (McKinney 2001).
4. *See Leader*, 96 N.Y.2d at 104-05.
5. Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95 (2001); *see also* N.Y. C.P.L.R. 306-b (McKinney 2001). The three cases are Leader v. Maroney, Ponzini & Spencer, 718 N.Y.S.2d 374 (2d Dep't 2000); Scarbaggio v. Olympia & York Estates Co., 718 N.Y.S.2d 392 (2d Dep't 2000); and Hafkin v. North Shore Univ. Hospital, 718 N.Y.S.2d 379 (2d Dep't 2000).
6. *Leader*, 97 N.Y.2d at 100; *see also Leader*, 718 N.Y.S.2d at 375-76.
7. *Leader*, 97 N.Y.2d at 101; *see also Leader*, 718 N.Y.S.2d at 376.
8. *Id.*

not been served.[9] However, the attorney erroneously followed the former version of C.P.L.R. 306-b and allowed the 120-day period for service to expire.[10] He commenced a second action by filing a new summons and complaint after the statute of limitations had expired.[11] Subsequently, Maroney was promptly served.[12] Maroney moved to dismiss the second action based upon the expiration of the statute of limitations.[13] Leader moved for an extension of time to serve in the first action.[14]

The Supreme Court, Westchester County, granted Maroney's motion to dismiss the second action based upon the expiration of the statute of limitations.[15] The court also granted Leader's motion for an extension of time to effect service of the summons with notice in the first action.[16] Maroney appealed. The Appellate Division, Second Department, affirmed, noting that "the Supreme Court properly exercised its discretion in granting the plaintiff's motion for an extension of time to effect service in the first action."[17]

In the second issue-related proceeding, plaintiff Kathryn Scarabaggio, sued defendant property owner Olympia & York Estates Co. for personal injuries sustained as the result of a slip and fall on defendant's property.[18] Although Scarabaggio properly filed a summons and complaint, Olympia was never served.[19] Here, the "[p]laintiff's process server attempted to serve Olympia at its last-known business address, but was unable to do so because Olympia had relocated."[20] However, [t]he process server did not inform plaintiff's counsel of the failure.[21] Scarabaggio discovered the failure weeks after the 120-day period had expired.[22] As a result of this, Scarabaggio promptly moved for an extension of time to serve.[23]

9. *Id.*
10. *See id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *See Leader*, 97 N.Y.2d at 101-02; *see also Leader*, 718 N.Y.S.2d at 376.
15. *See Leader*, 97 N.Y.2d at 101; *see also Leader*, 718 N.Y.S.2d at 376.
16. *Id.*
17. *Leader*, 718 N.Y.S.2d at 378.
18. *See Leader*, 97 N.Y.2d at 102.
19. *See id.*
20. *Id.*
21. *Id.*
22. *See id.* at 102.
23. *See id.*

The Supreme Court, Richmond County, granted plaintiff's motion for both "good cause" and "the interest of justice."[24] Olympia appealed. The Appellate Division, Second Department, affirmed noting that the supreme court "providently exercised its discretion in granting the plaintiff's motion pursuant to C.P.L.R. 306-b . . .in the interest of justice."[25]

In the third issue-related proceeding, plaintiff Rhoda Hafkin sued Defendant hospital, North Shore University Hospital ("NSUH"), for medical malpractice.[26] Hafkin commenced the action in January, 1998.[27] Hafkin filed a summons and complaint one day before the expiration of the statute of limitations.[28] NSUH was never served in the action.[29] Similar to *Leader*, plaintiff commenced a second action by filing a summons and complaint in September of 1998 after the expiration of both the limitations period and the statutory 120-day period.[30] After this second filing, Hafkin properly served the NSUH.[31] Defendant moved for a dismissal of the second action on statute of limitations grounds.[32] In February 1999, plaintiff cross-moved for an extension of time to serve the summons and complaint in the first action.[33]

The Supreme Court, Nassau County, "granted the defendant's motion to dismiss the second action and denied as academic plaintiff's cross-motion" for an extension of time to serve in the first action.[34] NSUH appealed. The Appellate Division, Second Department, affirmed, noting that the second action "was neither timely commenced nor timely served" and, "[t]hus, it was properly dismissed as time-barred."[35] With regard to the first action, the appellate division noted that the "plaintiffs proffered no explanation or excuse for their initial failure to have served the defendant within the 120-day period . . ." and

24. *See Leader*, 97 N.Y.2d at 102; *see also* Scarabaggio v. Olympia & York Estates Co., 718 N.Y.S.2d 392, 392-93 (2d Dep't 2000).

25. *Id.*

26. *Leader*, 97 N.Y.2d at 103; *see also Hafkin v. North Shore Univ. Hospital*, 718 N.Y.S.2d 379, 380 (2d Dep't 2000).

27. *Leader*, 97 N.Y.2d at 103.

28. *Id.*

29. *See id.*

30. *See Leader*, 97 N.Y.2d at 102; *see also Hafkin*, 718 N.Y.S.2d at 380-81.

31. *See Leader*, 97 N.Y.2d at 103; *see also Hafkin*, 718 N.Y.S.2d at 381.

32. *See id.*

33. *Id.*

34. *Id.*

35. *Hafkin*, 718 N.Y.S.2d at 381.

"[f]urther, they did not proffer any explanation or excuse for the delay of almost eight months between the expiration of the 120-day period and the date of their cross requesting an extension of time."[36]

III. Discussion

As mentioned above, all three combined proceedings are based on C.P.L.R. 306-b. The New York Court of Appeals noted that the cases required it "to determine the standards by which a court may exercise its discretion to extend a plaintiff's time to effectuate service pursuant to C.P.L.R. 306-b."[37]

The court began its discussion by addressing the history of C.P.L.R. 306-b.[38] The statute's original enactment in 1992 transformed New York from a "commencement-by-service" jurisdiction to a "commencement-by-filing" jurisdiction.[39] Under the original version of C.P.L.R. 306-b, the filing plaintiff was given a 120-day period within which to serve the defendant.[40] If proof of service was not filed within 120 days, "the action was automatically 'deemed dismissed' without prejudice." However, the plaintiff was given a second 120-day period to commence a new action and effectuate service.[41]

Criticism of both peremptory dismissal and the requirement of filing proof of service led to the Legislature's enactment of the modern version of C.P.L.R. 306-b in 1997.[42] The modern version eliminated the requirement of filing proof of service.[43] Further, if service is not effected within the 120-day period, the action is no longer "deemed dismissed."[44] Instead, "the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."[45] Any deci-

36. *Id.*

37. *Leader*, 97 N.Y.2d at 100.

38. *See id.* For a more complete articulation of the history of C.P.L.R. 306-b. *See Leader*, 718 N.Y.S.2d 374 (2d Dep't 2000), and authority cited therein.

39. *Leader*, 97 N.Y.2d at 100.

40. *See id.*

41. *Id.* N.B.: Plaintiff received this second period even if the Statute of Limitations had expired.

42. *Id.*

43. *See Leader*, 718 N.Y.S.2d at 376.

44. *See Leader*, 97 N.Y.2d at 101.

45. *Id.*; *see also* N.Y. C.P.L.R. 306-b (McKinney 2001).

sion to extend the time for service is a matter within the court's discretion.[46]

The court of appeals first applied principles of statutory construction and interpretation and then looked to the legislative history of C.P.L.R. 306-b. The court determined that C.P.L.R. 306-b provides the courts with "two separate standards by which to measure an application for an extension of time to serve."[47] From a standpoint of statutory interpretation, the court of appeals noted that meaning and effect should be given to every word of a statute.[48] Following this guideline, the court of appeals noted that the Legislature's use of the disjunctive "or" indicated that there are two separate and distinct criteria.[49]

The court of appeals augmented this analysis with an examination of the legislative history of C.P.L.R. 306-b. This history is "unequivocal that the inspiration for the new C.P.L.R. 306-b provision was its Federal counterpart."[50] The purpose of the revision was "to offer New York courts the 'same type of flexibility' enjoyed by the Federal Courts under Rule 4(m) of the Federal Rules of Civil Procedure."[51] The Federal rule provides two alternative grounds for an extension of time to serve.[52] The first ground is good cause and the second ground is an "unspecified discretionary basis for extension 'even if there is no good cause shown.'"[53]

In recognizing two distinct standards, the Court rejected defendants' arguments that, "although the statute provides that an extension may be granted for 'good cause' or in the 'interest of justice', under either standard a plaintiff must show reasonable diligence in attempting to effect service as a prerequisite to a court's exercising its discretion to grant an extension."[54] The court of appeals agreed with the plaintiffs' assertion that the defendants' interpretation "would render

---

46. *See Leader*, 97 N.Y.2d at 101.

47. *Id.* at 104.

48. *See id.* at 104-05; *see also* Cohen v. Lord, Day & Lord, 75 N.Y.2d 95, 100 (1989) (holding that "words are not to be rejected as superfluous where it is practicable to give each a distinct and separate meaning").

49. *See Leader*, 97 N.Y.2d at 104.

50. *Id.* at 105.

51. *Id.* (internal citations omitted).

52. *Id.*

53. *Id.* (internal citations omitted).

54. *Id.* at 103-04.

the interest of justice [standard] meaningless and would, in effect, merge the two standards into one."[55]

Since the "good cause" standard was not at issue in the three combined proceedings, the court of appeals then addressed the factors that are to be considered when applying the interest of justice standard. The court of appeals noted that any such analysis is highly fact specific and requires a balancing of the interests of the litigating parties.[56] While the plaintiff "need not establish reasonably diligent efforts at service," the court may consider diligence, or the lack thereof, as a factor.[57] Other factors identified by the Court to be considered are the expiration of the statute of limitations, the merits of the cause of action, the length of the delay in service, the promptness of the request for an extension, and the possibility of prejudice to the defendant.[58]

Finally, the court of appeals applied these factors to the cases *sub judice*. The court affirmed the judgment in *Leader*, noting that the appellate division properly applied the interest of justice standard.[59] The *Leader* plaintiff made no attempt to serve during the first 120-day period because counsel erroneously followed the old version of the C.P.L.R. and, hence, was unable to show good cause.[60] Nevertheless, plaintiff qualified for an extension on the separate "interest of justice" ground because the case had merit, the defendant was unable to show prejudice, and the statute of limitations had expired.[61] Further, the court implied that an extension could be given merely for an attorney's error.

The court of appeals affirmed the judgment in *Scarabaggio*, noting again that the appellate division properly considered the relevant factors for a determination of the interest of justice.[62] The court noted that the plaintiff promptly moved for an extension after learning of the

55. *Id.* at 104. Note that this is true because the good cause standard has been interpreted as requiring reasonable diligence. For a discussion, *see Leader*, 718 N.Y.S.2d 374, 376-77. *See also*, Alexander, *Practice Commentaries*, C.P.L.R. 306-b at 483 (Consol. 2000 & Supp. 2000).

56. *See Leader*, 97 N.Y.2d at 105.

57. *Id.* at 106.

58. *Id.*

59. *Id.* at 106.

60. *Id.*

61. *Id.*

62. *See id.*

failure of the process server.[63] Also noteworthy to the court, was that the defendant failed to show prejudice.[64]

Similarly, the court affirmed the judgment in *Hafkin,* noting that while the trial court denied the extension, it properly applied the interest of justice standard.[65] Hafkin failed to offer any explanation for either the failure to serve or the delay in making the motion for an extension.[66] The *Hafkin* plaintiff simply argued that, like the *Leader* plaintiff, *Hafkin* properly followed the old provision.[67] The court, however, distinguished the two, noting that "unlike in *Leader,* plaintiffs did not assert that they were unaware of section 306-b's amendment."[68] The court also inferred prejudice to the defendant, who had no notice of plaintiff's claims for nearly three years after the accrual of the claim.[69]

IV. Conclusion

In *Leader v. Maroney, Ponzini & Spencer,* the New York Court of Appeals held that the interest of justice standard for granting an extension of the time to effectuate service does not require, as a dispositive factor, a showing of reasonable diligence. Rather, C.P.L.R. 306-b contemplates promoting the furtherance of justice through a careful analysis of case-specific facts and a balancing of the competing interests of the parties. Factors such as diligence (or lack thereof), the expiration of the statute of limitations, the promptness of the request for an extension of time, the possibility of prejudice to the defendant, and the meritorious nature of the cause of action were provided in the court's non-exhaustive list of factors to be considered in deciding a motion on this ground. Therefore, *Leader v. Maroney, Ponzini & Spencer* clarifies C.P.L.R. 306-b.

Robert F. Jordan

---

63. *See id.*
64. *See id.*
65. *See id.* at 107.
66. *See id.*
67. *See id.*
68. *See id.* at 107-08.
69. *See id.* at 107.

BLOOMFIELD V. BLOOMFIELD[1]

(decided November 27, 2001)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that a prenuptial agreement executed over 30 years ago is not void, and does not constitute a waiver of maintenance, but must be reviewed by the trial court to determine whether it is unconscionable.[2] In addition, the court held that the validity of support waivers in marital agreements should be governed by the newly enacted version of the General Obligations Law § 5-311, and not the repealed version.[3]

II. BACKGROUND

On May 30, 1969, plaintiff-husband, now a 62-year-old practicing attorney, and defendant-wife, now a 55-year-old self-employed antiques dealer, were married.[4] In January 1995, the parties separated.[5] Prior to their marriage, the plaintiff requested that the defendant sign a prenuptial agreement that he had drafted.[6] In this agreement, the defendant waived her spousal property and elective rights.[7] Specifically, the agreement stated that the defendant agreed to,

Waive and renounce any and all rights that, and to which, [she] would otherwise be entitled to because of such marriage, whether present or future rights, to any and all property which [plaintiff] has now, or which he may acquire in the future, whether the same be real, personal, [or] mixed property, or any kind or nature and wherever situated.[8]

When the agreement was executed, the plaintiff was a 30-year-old practicing attorney, and the defendant was a 24-year-old who had completed one year of college.[9] Plaintiff claims that the parties were at his

1. 97 N.Y.2d 188 (2001).
2. *Id.* at 191.
3. *Id.* at 192.
4. *Id.* at 191.
5. *Id.*
6. *Id.*
7. *Id.* at 191.
8. *Id.* at 192.
9. *Id.*

father's office when the agreement was signed, while the defendant claims that they were alone in her apartment when she signed the agreement.[10] The parties do not dispute that the defendant was not represented by counsel in the negotiating, drafting, or signing of the document, nor that she signed the document.[11] In 1995, the plaintiff initiated the divorce proceedings and the defendant answered and counterclaimed demanding equitable distribution.[12] Two years into discovery, the plaintiff raised the existence of the prenuptial agreement as a defense to the defendant's claim for equitable distribution.[13]

The Supreme Court, Bronx County, held that the prenuptial agreement was unenforceable.[14] The husband appealed and on grant of reargument, the Appellate Division, First Department affirmed the supreme court's holding that, at the time the agreement was signed, it was void under the law in effect, since it violated the 1969 version of the General Obligations Law § 5-311 and it did not comply with the execution formalities under the current Domestic Relations Law § 236(B)(3).[15] The Appellate Division, First Department, found that the prenuptial agreement contained broad waiver language which constituted an impermissible waiver of support.[16] In addition, the appellate division further held that even if the agreement was not void on its face, the parties' marriage would toll the Statute of Limitations, thereby allowing the defendant to challenge the validity of the agreement on other grounds.[17]

III. DISCUSSION

The court began its analysis by stating that the defendant is not time-barred from challenging the validity of the prenuptial agreement, since the agreement arises from, and directly relates to the plaintiff's claim that the agreement precludes equitable distribution of his assets.[18] In making this determination, the court relied on the well established principle that claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. Bloomfield v. Bloomfield, 723 N.Y.S.2d 143, 144 (App. Div. 1st Dep't 2001).
15. *Bloomfield*, 97 N.Y.2d at 192.
16. *Id.*
17. *Id.*
18. *Id.* at 192-193

Statute of Limitations, even though an independent action by the defendant might have been time-barred at the time the action was commenced.[19]

The court relied on the holding of *Sunshine v. Sunshine*[20] for the principle that duly executed prenuptial agreements are accorded the same presumption of legality as any other contract.[21] The court also noted that there is a "strong public policy favoring individuals ordering and deciding their own interests through contractual agreements."[22] Additionally, the court followed the holding in *Roldolitz v. Neptune Paper Prods. Inc.,*[23] and concluded that it will assume that a deliberately prepared and executed agreement reflects the intention of the parties.[24] Furthermore, the court held that while it is concerned with the parties' intent, it generally will consider their intent to the extent it is evidenced by their writing.[25] When evidence is lacking that both parties intended to violate the law, and both a lawful and unlawful construction of a written agreement are possible, preference will be given to the construction that does not violate the law.[26]

The court applied the above mentioned settled principles and held that the plain language of the prenuptial agreement indicates that the defendant waived only her right to distribution of the property either then owned or later acquired.[27] In addition, the court noted that the agreement neither expressly or implicitly refers to a release of the plaintiff's support obligations to the defendant, since a waiver of rights to present and future interests in the plaintiff's property, without more, does not constitute a waiver of the right to receive support.[28] Furthermore, the court held that the lower courts incorrectly con-

19. *Id.* at 193; *see also* McKinney's CPLR 203(d); 118 East 60th Owners, Inc. v. Bonner Props., Inc., 677 F.2d 200, 200, 202-204 (S.D.N.Y. 1982); Rebeil Consulting Corp. v. Belle Levine, 617 N.Y.S.2d 830, 831 (App. Div. 2d Dep't 1994); Maders v. Lawrence, 49 Hun 360; *see generally*, 1 Weinstein-Korn-Miller, N.Y. Civ Prac ¶ 203.25, at 2-140 to 2-142.

20. 381 N.Y.S.2d 260 (App. Div. 1st Dep't 1976).

21. *Bloomfield*, 97 N.Y.2d at 193 (citing *Sunshine*, 381 N.Y.S.2d at 261-62, *aff'd*, 40 N.Y.2d 875 (1976)).

22. *Id.* (quoting In re Estate of Greiff, 92 N.Y.2d 341, 344 (1998)).

23. 22 N.Y.2d 383 (1968).

24. *Bloomfield*, 97 N.Y.2d at 193.

25. *Id.* (citing *Rodolitz*, 22 N.Y.2d at 387).

26. *Id.* at 193 (citing Galuth Realty Corp. v. Greenfield, 478 N.Y.S.2d 51 (App. Div. 1984); Great Northern Ry. Co. v. Delmar Co., 283 U.S. 686, 691 (1931)).

27. *Id.* at 193.

28. *Id.*

strued the provision to be a waiver of the right to receive support, which consequently would have invalidated the agreement under the 1969 version of the General Obligations Law § 5-311.[29] The court stated that this construction "belies the intent of the parties, who never contested plaintiff's duty to provide support until the courts below voided the agreement by grafting into the property waiver an additional waiver of support."[30] In making its determination, the court also considered the fact that in 1969, under New York law, wives had no legal interest in their husbands' property, and held that the agreement simply waived any present interest she may have had to the plaintiff's property when the agreement was executed and also any future property rights she might acquire through subsequent changes in the law.[31]

The court then stated that even if the appellate division correctly concluded that the defendant's waiver encompassed her right to receive support, the validity of support waivers in marital agreements is governed by the newly enacted version of the General Obligations Law § 5-311, rather than the old version of the law that was repealed by the New York State Legislature.[32] The court asserted that it would have applied the version of the General Obligations Law § 5-311 that was in effect at the time the plaintiff attempted to enforce the agreement.[33] In making this determination the court relied on the general principle that the validity of a contract depends upon the law that existed at the time the contract was made and does not appertain to variations of the law that are made due to changes in public policy.[34] Additionally, the court noted that noncompliance with the execution formalities contained in Domestic Relations Law § 236(B)(3) will not invalidate the prenuptial agreement, since the agreement was made prior to the effective date of that subdivision.[35]

In conclusion, the court stated that the supreme court did not address the issue of unconscionability, and although the appellate division concluded that "it also appears that the agreement could be held unconscionable" and was "manifestly unfair," these considerations

29. *Id.*
30. *Id.*
31. *Id.* at 194.
32. *Id.*
33. *Id.*
34. *Id.* (citing Goldfarb v. Goldfarb, 450 N.Y.S.2d, 214-215 (App. Div. 2d Dep't 1982)).
35. *Id.*

were not necessary to its ruling.[36] Therefore, the court held that the defendant is permitted to contest the conscionability of the prenuptial agreement before the trial court.[37]

IV. Conclusion

In *Bloomfield*, the New York Court of Appeals held that a prenuptial agreement executed over 30 years ago, in which the defendant agreed to,

> Waive and renounce all rights that, and to which, [she] would otherwise be entitled to because of such marriage, whether present or future rights, to any and all property which [plaintiff] has now, or which he may acquire in the future, whether the same be real, personal, [or] mixed property, or of any kind or nature and wherever situated,[38]

is not void and does not constitute a waiver of maintenance.[39] Rather, the court determined that it must be reviewed by the trial court as to whether it is unconscionable.[40] In addition, the court held that the validity of support waivers in marital agreements should be governed by the newly enacted version of the General Obligations Law § 5-311, and not the repealed version.[41]

Monique D'Errico

36. *Id.*
37. *Id.*
38. *Id.* at 191-92.
39. *Id.* at 192.
40. *Id.*
41. *Id.* at 194.

LIGHTMAN V. FLAUM[1]

(decided November 27, 2001)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that the "clergy-penitent privilege" does not create a fiduciary duty of confidentiality upon members of the clergy which can subject them to civil liability for the disclosure of confidential communications.[2] The court stressed constitutional implications, the intent of the Legislature in enacting CPLR 4505, and the lack of clergy licensing in its opinion upholding the decision of the appellate division.[3]

II. BACKGROUND

Chani Lightman, an Orthodox Jewish woman, initiated a divorce proceeding against her husband and sought an order granting her temporary custody of the couples' four children.[4] In the proceeding, her husband Hylton Lightman submitted affirmations from two rabbis to show that his wife was endangering the Orthodox Jewish upbringing of the children.[5] Tzvi Flaum, a rabbi in the Lightmans' synagogue, stated that the plaintiff told him she had stopped engaging in religious purification laws and was seeing a man socially.[6] Rabbi David Weinberger, an acquaintance of the Lightmans, said the plaintiff told him that she stopped her religious bathing to avoid sexual relations with her husband.[7]

The plaintiff later initiated a suit against the rabbis, claiming an action for breach of fiduciary duty in violation of the CPLR 4505 "clergy-penitent privilege."[8] She also claimed a cause of action for intentional infliction of emotional distress and defamation.[9] The defen-

1. Lightman v. Flaum, 97 N.Y.2d 128 (2001).
2. *Id.*
3. *Id.*
4. *Id.* at 131.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

dant rabbis motioned to dismiss the case.[10] The supreme court converted the motion into one for summary judgment and requested further evidence from the parties.[11]

Tzvi Flaum submitted two additional affirmations in which he claimed that Hylton Lightman revealed marital problems to him several years earlier, and that afterwards, he had a confrontation with the plaintiff and her mother during which the plaintiff admitted her deviations from Jewish religious practices.[12] Flaum argued that because the plaintiff never asked for spiritual guidance, the confessions were not confidential under Jewish law. He further claimed that Jewish law required him to relay the information to the plaintiff's husband to prevent him from engaging in sexual relations with his wife. Furthermore, Weinberger gave a doctrinal explanation for revealing the plaintiff's admissions. In one of his affidavits, he indicated that during their conversations a friend accompanied her, and because of this he believed that the conversations were not confidential. The plaintiff contradicted this testimony, characterizing her interactions with the defendants as "spiritual counseling" and disagreeing with their interpretation of religious law.[13] The supreme court granted partial summary judgment, dismissing the claim of defamation but allowing the causes of action for intentional infliction of emotional distress and breach of fiduciary duty.[14]

The appellate division, in a decision with two dissentions, dismissed the emotional distress and the fiduciary duty causes of action.[15] In doing so, the appellate division held that CPLR 4505 did create a fiduciary duty of confidentiality but that the plaintiff failed to demonstrate that she had not waived the privilege.[16] The two dissentions would have sustained the cause of action for a breach of fiduciary duty and left the issue of whether the plaintiff had waived the clergy-penitent privilege to the jury.[17]

The plaintiff appealed the judgment of the appellate division on the issue of the fiduciary duty of confidentiality.[18] The defendants,

10. Lightman v. Flaum, 717 N.Y.S.2d 617 (2d Dep't 2000).
11. *Id.*
12. *Lightman*, 97 N.Y.2d at 132.
13. *Id.* at 132.
14. *Id.* at 132-33.
15. *Id.* at 133.
16. *Id.*
17. *Id.*
18. *Id.* at 132.

supported by amici curiae submitted by the National Jewish Commission on Law and Public Affairs, maintained that requiring a fiduciary duty of confidentiality against the standards of religious law would be an unconstitutional interpretation of CPLR 4505.[19]

The lengthy concurrence of Judge Miller, partially dissenting from the rest of the appellate court, indicated some of the unusual procedural background of the case. After the supreme court converted the motion for dismissal and asked for affidavits, the parties set a schedule for submission of the evidence.[20] The parties stipulated that the submissions would be simultaneous with no right of reply. After the defendants submitted their affidavits, they objected to the plaintiff's submission a week later as untimely.[21]

The parties then set a new schedule extending the deadline for submissions and both sides made additional affirmations.[22] The initial supreme court decision, however, considered only the first affidavit submitted by the defendants, and was recalled by a stipulation of the parties. The supreme court then issued a ruling which Judge Miller argued intended to sustain the plaintiff's cause of action for breach of a fiduciary duty, pending the defendants' proof of their defenses. Judge Miller's concurrence pointed out that some of the defendants' critical arguments came in their final submissions, and the plaintiff was thus precluded from responding to them. It then noted the impropriety in shifting the burden of proof of a particular material fact to the plaintiff when the plaintiff had no opportunity to respond.[23]

Judge Miller disputed the majority's suggestion that there were no factual issues necessary to decide the case. He argued that the lack of a right of reply, the disagreement between affidavits on when and how often the plaintiff may have waived or preserved her privilege, and the necessary factual issues involved in determining whether a waiver had been made militated against a finding for summary judgment.[24]

The partial dissension also argued against finding that constitutional issues prevented the court from interfering in the case. It noted that New York courts had previously stepped into disputes involving

---

19. *Id.*
20. *Lightman*, 717 N.Y.S.2d at 619.
21. *Id.*
22. *Id* at 620-21.
23. *Id.*
24. *Id.* at 620-22.

religious matters.[25] It also argued that the free exercise of religion is made up of the freedom to believe and the freedom to act, and that the freedom to act had previously been regulated permissibly by the courts.[26]

III. DISCUSSION

The New York Court of Appeals first gave an explanation of the origins and development of the law regarding confidential information and privilege against disclosure in court. The common law protects certain confidential information from disclosure during a trial.[27] Statutes delineate specific categories of confidential information that are protected under the rules of evidence.[28] CPLR article 45 is a codification of the common law restricting the admissibility of information gained in specific contexts, such as between attorney and client (CPLR 4503) or psychologist and patient (CPLR 4507).[29] Quoting previous case law, the court stated that the intent of these statutes is to protect special relationships, which are created "in an atmosphere of transcendent trust and confidence."[30]

The court noted that the clergy-penitent privilege was not available under common law and arose only with statutes.[31] Under the original legislation, the privilege applied when the rules of the specific religion of the clergy member prohibited him or her from disclosing the substance of confidential communications, but not when the religious law allowed clergy to divulge confidences.[32] This applied specifically in the case of Roman Catholic Penance, a ritual in which acts not in accordance with the religion are confessed to a member of the clergy who is bound by religious doctrine to refrain from divulging these confidences.[33]

25. See id. at 626 (citing Employment Div. v. Smith, 494 U.S. 872 (1990); First Presbyt. Church v. United Presbyt. Church, 62 N.Y.2d 110 (1984), cert. denied).

26. *See Lightman*, 717 N.Y.S.2d at 626 (citing Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940)).

27. *See* McCORMICK ON EVIDENCE § 78, at 323-24 (5th ed. 1999).

28. *See e.g.*, N.Y. CODE PROF. RESP. DR 4-101(A), (B).

29. *See* N.Y. C.P.L.R. § 4503, § 4507 (Consol. 2001).

30. *See Lightman*, 97 N.Y.2d at 133 (citing Aufrichtig v Lowell, 85 N.Y.2d 540 (1988)).

31. *See id.*(citing Matter of Keenan v Gigante, 47 N.Y.2d 160, 166 (1979), *cert. denied*, 444 U.S. 887).

32. *See* Former CIVIL PRACTICE ACT § 351.

33. *Lightman*, 97 N.Y.2d at 133.

The New York Legislature eventually enacted CPLR 4505, providing that unless "the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed [to] disclose a confession or confidence made to him in his professional character as spiritual advisor."[34] This expanded the understanding of the privilege beyond Roman Catholicism to other religions. The court noted, however, that the statute's protection applies only to information given "in confidence and for the purpose of obtaining spiritual guidance," and not to all information given to a member of the clergy.[35]

The court distinguished confidential information received under the rules governing secular professionals from privileged information under the CPLR. The narrowly drawn provisions under the CPLR, the court stated, reflect that those rules are not the sources of fiduciary duty but "merely reflections of the public policy of this State to proscribe the introduction into evidence of certain confidential information" in the absence of a waiver.[36] The court pointed out that professional responsibility codes frequently impose greater restrictions on disclosure than statutes. The Code of Professional Responsibility, for example, protects not only confidential communications covered under the attorney-client privilege, but also secrets defined as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[37]

The court also asserted that professionals and clergy specified in CPLR article 45 are substantially different in terms of the extent of state regulation of their practices. Specifically, professionals such as physicians, psychologists, and social workers derive their authority to practice from the state and are subject to educational and licensing requirements, while clergy may engage in religious activities without State permission and are not necessarily subject to educational requirements.[38] This difference explains why, absent CPLR 4505, the plaintiff has no independent statutory basis for stating a claim.

---

34. *See* N.Y. C.P.L.R. § 4505 (Consol. 2001).

35. *Lightman*, 97 N.Y.2d at 134 (citing People v Carmona, 82 N.Y.2d 603, 609 (1993)).

36. *Id.* at 135.

37. *Cf.* N.Y. C.P.L.R. § 4505 (Consol. 2001), CODE OF PROF. RESP. DR 4-101[A],[B].

38. *Id.* at 136.

The court heeded the contentions of the defendants and the amici that the imposition of liability, regardless of religious principles that motivate disclosure, would violate the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution.[39] The opinion stated the "prospect of conducting a trial to determine whether a cleric's disclosure is in accord with religious tenets has troubling constitutional implications."[40] The court noted that in different contexts, civil courts had previously been forbidden from determining religious disputes because of the danger of violating the First Amendment by establishing one religion as correct and interfering with the practice of other factions.[41] Placing the fact-finders in the position to decide whether religious law has been violated or to allow parties to introduce evidence or offer experts to dispute an interpretation or application of religious requirements would be impermissible.[42]

The court closed its opinion by reiterating that CPLR 4505 is intended by the legislature to be a rule of evidence, not a statute giving a private right of action.[43] Thus, the court determined that resolving the factual issues of the case was unnecessary since there was no basis for a claim.

IV. Conclusion

The New York Court of Appeals held that CPLR 4505, commonly referred to as the "clergy-penitent privilege," does not give rise to a private cause of action for breach of a fiduciary duty against clergy who disclose confidences. The court found that the lack of a comprehensive statutory scheme indicated that the legislature intended CPLR 4505 only as a rule governing the admissibility of evidence, and that constitutional concerns prevent it from legally requiring clergy to maintain confidences.

Samuel C. Gardner

39. *Id.* at 136.
40. *Id.*
41. *Lightman,* 97 N.Y.2d at 137 (citing First Presbyt. Church of Schenectady v United Presbyt. Church in the United States of Am., 62 N.Y.2d 110, 116 (1984)).
42. *Lightman,* 97 N.Y.2d at 133.
43. *Id.* at 137-38.

DELUCA V. DELUCA[1]

(decided November 27, 2001)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that a non-pension supplemental benefit received by a New York City police officer is "marital property" subject to equitable distribution in a divorce settlement, notwithstanding that the officer did not become eligible to receive the benefit until after the divorce action commenced and the benefit did not accrue incrementally during the officer's years of service and the marriage.[2]

II. BACKGROUND

Plaintiff husband and defendant wife were married in 1966 and in 1967 plaintiff joined the New York City Police Department(NYPD).[3] In 1984 plaintiff was promoted to detective.[4] During the marriage the defendant was a housewife and cared for the two children born to her and the plaintiff.[5] In July 1996, the plaintiff commenced a divorce action and in February 1998 he retired from the NYPD.[6] Upon his retirement the plaintiff was entitled to three types of benefits: (1) a pension from the New York City Police Officer's Pension Fund which had accrued during the plaintiff's nearly 30 years of service and amounted to $46,737 per year; (2) an annuity fund which was maintained by the Detective's Endowment Association and was valued at approximately $33,000; and (3) a Police Superior Officer's Variable Supplement Fund (PSVO) valued at approximately $110,000 and awarded to those achieving the rank of detective at the time of retirement.[7]

The PSVO was created by the New York State Legislature and consisted of monies paid from the contingent reserve fund of the NYPD

1. DeLuca v. DeLuca, 97 N.Y.2d 139 (2001).
2. *See id.* at 141.
3. DeLuca v. DeLuca, 718 N.Y.S. 2d 364, 365 (2d Dep't 2000).
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.* (citing N.Y. COMP. CODES R. & REGS. tit. 13, § 232(a)(16), 278 (4) (2002)).

pension fund.[8] The purpose of the PSVO was to be a supplement, for those police officers who qualified, to the officers pension fund benefits.[9]

The Supreme Court of Queens County determined that all three benefits were marital property and therefore the defendant was entitled to an equitable distribution of 50% of these benefits.[10] The plaintiff appealed the portion of the supreme court's decision regarding the PSVO benefit.[11]

The appellate division reversed the supreme court on the PSVO benefit, holding that it was not marital property and thus not subject to equitable distribution.[12] The appellate court based its decision on the fact that the legislation that created the PSVO explicitly declared that it "shall not be, and shall not be construed to constitute, a pension or retirement system or fund," and therefore did not qualify as a marital asset.[13] In support of this reasoning, the appellate division cited the court of appeals in *Matter of Maye (Bluestein)*[14] where the court held that firefighters' variable supplements funds may not be construed as a pension.[15]

Defendant wife appealed the judgment of the appellate division regarding the PSVO benefit to the court of appeals.[16] The court of appeals reversed stating that for purposes of marital actions, such as divorce proceedings, where a determination must be made of what constitutes marital assets, the Domestic Relations Law provisions, not the Administrative Code, should apply, and under Domestic Relations Law the PSVO qualified as a marital asset subject to equitable distribution.[17]

III. Discussion

In ruling that the PSVO was not a marital asset the appellate division looked at whether the benefits from the PSVO could be character-

8. *See id.* at 365 (citing N.Y. Comp. Codes R. & Regs. tit. 13, §279 (2002)).
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.* at 367 (citing N.Y. Comp. Codes R. & Regs. tit. 13, § 279 (2002).).
14. 40 N.Y.2d 113, 115-116 (1976).
15. *DeLuca*, 718 N.Y.S.2d at 367.
16. *See DeLuca*, 97 N.Y. 2d 139.
17. *See id.* at 143-44.

ized as pension benefits.[18] This was an important question because, as the appellate division stated, "in the context of marital property, pensions have been described as contract rights of value, received in lieu of higher compensation which would otherwise have enhanced either marital assets or the marital standard of living."[19] The appellate division added that pension fund benefits have been ruled by the New York Court of Appeals to be marital property because a pension fund is a type of deferred compensation which, to the extent it accrues during the marriage, is considered a marital asset and subject to equitable distribution.[20] The PSVO by contrast was not the type of benefit which accrued over time or was received in lieu of higher compensation which would have enhanced the marital assets or standard of living, but was one which became available only upon the occurrence of certain conditions; that is, the officer must have been in service as a member of the pension fund and retire after 20 or more years of service.[21] If both conditions were not met, the officer would receive nothing, regardless of the number of years of service the officer had accumulated.[22] The appellate division pointed to the explicit language of the legislation which created the PSVO, which stated that it was not to be considered another pension benefit, and thus not possess the accrual characteristics of such.[23] Instead it was to be a supplement to pension benefits provided the officer met the stated conditions.[24] Since the plaintiff here was not eligible to receive the benefit until after he retired, the benefit did not accrue during his years of service and marriage, and he did not retire until after commencement of the divorce action, the appellate division reasoned, the benefit was not a marital asset.[25]

Central to the court of appeals reversal of the appellate division was its decision that the Domestic Relations Law rather then the Administrative Code should be applied in determining whether the PSVO was a marital asset.[26] According to the Domestic Relations Law of New York, marital property is defined as "all property acquired by either or

---

18. *See DeLuca,* 718 N.Y.S.2d at 366.
19. *See id.*
20. *See id.* (citing Olivio v. Olivio, 82 N.Y.2d 202, 207 (1993)).
21. *See id.* at 366.
22. *See id.*
23. *See id* at 367.
24. *See id.*
25. *See id.*
26. *See DeLuca,* 97 N.Y. 2d at 143.

both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held."[27] The court of appeals had earlier ruled that the wording "all property acquired during a marriage" as mentioned in the Domestic Relations Law showed the intent of the law to provide each spouse with a fair share of that valuables that each helped to create and expected to enjoy at a future date.[28]

The problem that the court of appeals had to confront with the PSVO benefit was that, unlike a pension, it does not accrue over time. Thus, it would appear that the timing of the officer's retirement in relation to the commencement of a divorce action would be the determinative factor in whether such benefit was a marital asset subject to equitable distribution.

The court resolved this problem by stating that in light of the broad interpretation given to marital property, concepts such as "vesting" and "maturity" are not determinative.[29] Further, the court had earlier ruled that compensation received after dissolution of the marriage for services rendered during the marriage is marital property.[30] But the court had also ruled that certain other types of compensation that are not in the category of being deferred during the marriage and paid after it was ended are not marital property.[31] Compensation that is defined as a type being created after a divorce rather than being deferred during the marriage is not marital property and thus not subject to equitable distribution.[32]

The court referred to its decision in *Olivio v. Olivio* where a Social Security bridge payment, given to an employee as an early retirement incentive and designed to provide support to the employee until he reached the age of social security eligibility, was not a marital asset.[33] The court held this was the proper treatment of the benefit because neither the employee nor his ex-wife had any right to the payment during the time they were married as it was not based on past services rendered by the husband.[34] Had the employee retired one day before

27. *See id.* at 143-44 (citing N.Y. DOM. REL. LAW § 236(B) (Consol. 2001)).
28. *See id.* (citing DeJesus v. DeJesus, 90 N.Y.2d 643 (1997)).
29. *See id.* at 144.
30. *Olivio*, 82 N.Y.2d at 208.
31. *See id.*
32. *See id.*
33. *See id.*
34. *See id.*

the bridge payment benefit had become effective, the court added, he would not have been entitled to that payment.[35]

Therefore, the question to be resolved by the court in *DeLuca* was whether the PSVO benefit was one that was intended to be compensation for past services rendered during the marriage or was instead another form of compensation, such as an incentive to continue employment, which is separate property post-divorce.[36]

In holding that the PSVO benefit was for past services rendered the court looked at the fact that to be eligible for the benefit an officer had to have been a member of the pension system.[37] Moreover, the court stated, the money in the PSVO originated with the general pension fund and is subordinate to the pension fund in that it may not impair the rights of any pension fund members.[38] Therefore, the court concluded, the purpose of the PSVO benefit was to provide a supplement to the benefits of certain long-term uniformed employees.[39] The court pointed to its decision in *Gagliardo v. Dinkins*[40] where it ruled that variable supplements funds, such as the PSVO in *DeLuca*, are "additional future compensation for services actually rendered by police officers".[41] The result of the court's holding was that the defendant was entitled to an equitable portion of the PSVO benefit to the extent of the plaintiff's past service that occurred during the marriage.[42]

The court's decision here has established a clearer procedure for determining whether benefits are marital assets or whether they are separate property in the context of a divorce. Concepts such as "vesting" and "maturity" will no longer be considered obstacles to determining whether benefits similar to the PSVO benefit are marital property.[43] Instead the focus will be on whether the benefit can be said to be for past services rendered, thus making it more likely that at least a portion of such benefit will be considered marital property subject to equitable distribution, regardless of the form the benefit may take and the time it is received.

---

35. *See id.*
36. *See DeLuca*, 97 N.Y. 2d at 145.
37. *See id.* (citing N.Y. COMP. CODES R. & REGS. tit. 13, § 281[a][2] (2002)).
38. *See id.* (citing N.Y. COMP. CODES R. & REGS. tit. 13, § 232 (2002)).
39. *See id.* at 146.
40. 89 N.Y.2d 62 (1996).
41. *See id.* at 74.
42. *See DeLuca*, 97 N.Y.2d at 146.
43. *See id.*

IV. CONCLUSION

In *DeLuca*, the New York Court of Appeals held that the PSVO benefit was compensation for past services rendered, and to the extent that such services were rendered during the marriage, the defendant was entitled to an equitable share of the PSVO benefit.[44]

Paul A. Kemnitzer

44. *See id.*

BENJAMIN ALSTON ET. AL. V. STATE OF NEW YORK[1]

(decided December 13, 2001)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that the state preserved its sovereign immunity under the New York Court of Claims Act § 8 for alleged violations of the Fair Labor Standards Act of 1938 ("FLSA").[2] The court of appeals found that the claimants failed to comply with the statute of limitations established by the New York Court of Claims Act § 10(4), which allots a six month time frame for claimants to file their claims against the State.[3]

II. BACKGROUND

In 1991, the named claimant Benjamin Alston, a parole officer, along with 102 similarly situated parole officers, filed an action against the State in federal court for alleged violations of the FLSA.[4] The United States District Court for the Northern District of New York dismissed the claim in 1997 based upon the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*.[5] The Supreme Court, in *Seminole*, held that Congress did not have the authority under Article I of the U.S. Constitution to invalidate the State's Eleventh Amendment sovereign immunity from lawsuits brought or prosecuted in federal court.[6] After Alston's appeal to the United States Court of Appeals for the Second Circuit, both parties agreed to voluntarily dismiss the case after the court of appeals ruled against the claimants in a similar case.[7] In 1998, claimants filed the same cause of action in the court of claims as raised in federal court.[8] In response, the State filed a motion to dismiss for lack of subject matter jurisdiction. The motion to dismiss was granted by the court of claims because the claimants failed to file within the six month statute of limitations required by the Court of

1. 97 N.Y.2d 159 (2001).
2. *Id.* at 162.
3. *Id.*
4. *Id.* at 160.
5. *Id.* at 161.
6. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (1996).
7. *Alston*, 97 N.Y.2d at 161.
8. *Id.*

Claims Act § 10(4) and were not timely in seeking relief under Court of Claims Act § 10(6).[9]

Claimants appealed to the appellate division which then affirmed the court of claims based on the Supreme Court's holding in *Alden v. Maine.*[10] In that case, the Supreme Court found that a state's sovereign immunity can not be overridden by Article I powers delegated to the Congress by the United States Constitution.[11] The appellate division decided that even though New York waived its sovereign immunity, subject to the six-month statute of limitations established by the court of claims act, the limitation cannot be overridden by the two or three year statute of limitation established for legislation enacted under Article I powers.[12] The court of appeals granted leave to appeal and affirmed the decision by the appellate division on December 13, 2001.[13]

III. Discussion

The court of appeals began its analysis with a discussion of the state's retention of sovereign immunity.[14] According to the Eleventh Amendment, the states are immune from prosecution in their own courts and can only be sued upon consent for liabilities that a state chooses to assume.[15]

In addressing the application of sovereign immunity, the court of appeals relied heavily on its decision in *Yonkers Constr. Co. v. Port Auth. Trans-Hudson Corp.*[16] and the Supreme Court's decision in *Alden v. Maine.*[17] In *Yonkers Constr. Co.*, the court of appeals "explicitly recognized that a waiver of sovereign immunity can be conditioned upon compliance with a particular time requirement."[18] Furthermore, the Supreme Court in *Alden* stated, "[i]n light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity

9. *Id.*
10. *Id.*; Alden v. Maine, 527 U.S. 706, 730 (1999).
11. *Alden*, 527 U.S. at 730.
12. *Alston*, 97 N.Y.2d at 161.
13. *Id.*
14. *Id* at 162.
15. U.S. Const. amend. XI.
16. 93 N.Y.2d 375 (1999).
17. *Alden*, 527 U.S. at 706.
18. *Yonkers Constr. Co.*, 93 N.Y.2d at 379.

beyond the congressional power to abrogate by Article I legislation."[19] In *Alden,* the Supreme Court dismissed plaintiff's state court FLSA action because Maine had not waived its sovereign immunity in regard to FLSA actions.[20]

The court of appeals continued its analysis by addressing claimant's alleged distinction of their case from *Alden v. Maine.* Claimants argued that unlike Maine, New York waived its sovereign immunity to include FLSA actions against the state.[21] Claimants further asserted that, because of the alleged distinction, their case should have been governed by the Supreme Court decision *Felder v. Casey*[22] as applied by the Third Department in *Ahern v. State of New York.*[23]

In *Felder,* the United States Supreme Court reversed the Supreme Court of Wisconsin and held that the state's notice of claim statute was not applicable to claims brought under 42 U.S.C. § 1983 against the City of Milwaukee because:

> In enacting § 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court.[24]

The court of appeals disagreed with the claimant's reliance on *Felder* and *Ahern* and distinguished the claimant's case from *Felder* in two respects.[25] First, the Supreme Court in *Felder* did not discuss the issue of New York State's sovereign immunity; and second, that municipal

19. *Alden,* 527 U.S. at 754.
20. *Id.*
21. *Alston,* 97 N.Y.2d at 161.
22. 487 U.S. 131 (1988).
23. *Alston,* 97 N.Y.2d at 161-62.
24. *Felder,* 487 U.S. at 153.
25. *Alston,* 97 N.Y.2d at 162.

corporations which included the city defendant, are not entitled to the benefits of sovereign immunity.[26]

The court of appeals also disagreed with claimant's reliance on *Ahern*.[27] Noting its decision in *Alden v. Maine*, the court of appeals overruled the appellate division's interpretation of *Felder* in *Ahern*, which indicated that FLSA claims brought against the state are governed by the Federal Statute of Limitations applicable to such claims and that the State was not entitled to sovereign immunity based on the claimant's failure to satisfy the six-month limitations period specified in the Court of Claims Act § 10(4).[28]

The court of appeals continued its analysis with a discussion of another more substantial distinction between the claimant's case and *Felder*.[29] The claims in *Felder* were brought under 42 U.S.C. § 1983, which was enacted under § 5 of the 14th Amendment.[30] The claimant's case in *Alston* was brought under the FLSA, which was enacted under Congress' Article I authority.[31] The Supreme Court in *Alden v. Maine* stated that even when the Congress has complete lawmaking authority over a particular area, like legislation enacted under the authority of Article I of the United States Constitution, the Eleventh Amendment prevents the authorization of suits by private parties against non-consenting states.[32] In contrast, the Supreme Court also held in *Alden v. Maine* "that in adopting the Fourteenth Amendment, the people required the states to surrender a portion of the sovereignty that had been preserved to them by the Constitution, so that Congress may authorize private suits against non-consenting states pursuant to its § 5 enforcement power."[33]

The court of appeal's analysis indicates that legislation enacted with respect to Article 5 of the 14th Amendment, like 42 U.S.C. § 1983, is not abrogated by the state's sovereign immunity if Congress has authorized private suits against the state under that statute.[34] Whereas with regard to the FLSA, state employees cannot sue a state employer for unpaid overtime, since Congress did not have power to abrogate states' Eleventh Amendment immunity when it enacted legislation under the Interstate Commerce Clause, and FLSA's overtime provisions cannot be regarded as serving the Fourteenth Amendment pur-

26. *Id.*
27. *Id.*; Ahern v. State of New York, 676 N.Y.S.2d 232 (1998).
28. *Alston*, 97 N.Y.2d at 162.
29. *Id.*
30. *Felder*, 487 U.S. at 138.
31. *Alston*, 97 N.Y.2d at 162.
32. *See* Alston, 97 N.Y.2d at 162 (citing *Alden*, 527 U.S. at 756).
33. *See id.* (citing *Alden*, 527 U.S. at 756).
34. *See id.* (citing *Alden*, 527 U.S. at 756).

pose.[35] In light of its analysis, the court of appeals concluded that because the FLSA was enacted under Article I the state's sovereign immunity can not be invalidated.[36]

The court of appeals continued its analysis of the state's waiver of its sovereign immunity according to New York Court of Claims Act § 8.[37] The Court of Claims Act states:

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.[38]

The court of appeals then explained that the Court of Claims Act clearly establishes that the state's waiver of its sovereign immunity was not absolute.[39] It also discussed that the waiver was conditional on compliance with the applicable statute of limitations explicitly set forth in Court of Claims Act § 10(4)4, which stated "[a] claim for breach of contract, express or implied, and any other claim not otherwise provided for by this section, over which jurisdiction has been conferred upon the court of claims, shall be filed and served upon the attorney general within six months after the accrual of such claim. . . ."[40] The Court of Appeals reasoned that a conditional waiver of sovereign immunity is consistent with the legislative history.[41] It also concluded that even though New York has a conditional waiver of sovereign immunity, it is not enough to distinguish itself from *Alden v. Maine* as nothing in that case indicated that a waiver of sovereign immunity must be "absolute, unconditional and applicable in all situations."[42] Therefore, due to the fact that claimants failed to file their claim within the six month statute of limitations established by the Court of Claims Act, the state was entitled to have the claim dismissed based on its sovereign immunity.[43]

---

35. Moad v. Arkansas State Police, 111 F.3d 585, 587 (1997).
36. *Alston*, 97 N.Y.2d at 162.
37. *Id.*
38. N.Y. CT. CL. ACT § 8.
39. *Alston*, 97 N.Y.2d at 163.
40. N.Y. CT. CL. ACT §10[4].
41. *See* N.Y. CT. CL. ACT, Statement in Support, Bill Jacket, L 1939, ch 860, at 27.
42. *Alston*, 97 N.Y.2d at 164.
43. *Id.*

IV. CONCLUSION

The New York Court of Appeals decided unanimously to uphold the appellate division's decision in *Alston v. State.*[44] The court of appeals decided that when the State of New York waives its sovereign immunity subject to the statute of limitations set forth by the New York Court of Claims Act § 10(4), it cannot be nullified by Congress' Article I powers.[45] Furthermore, the court of appeal's decision in *Alston* overruled its decision in *Ahern v. State of New York* in light of the Supreme Court's more recent decision in *Alden v. Maine.*[46]

Andrea J. Sessa

44. *Id.*
45. *Id.* at 162.
46. *Id.*

PEOPLE V. ROBINSON[1]

(decided December 18, 2001)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that a police officer, who has probable cause to believe a driver has committed a traffic violation, does not violate Article I, § 12 of the New York State Constitution by stopping the vehicle, even though the officer's primary motivation was to conduct another investigation.[2] The court of appeals adopted the rule of law announced by the United States Supreme Court in *Whren v. United States*.[3]

II. BACKGROUND

Three cases based on Article I, § 12 of the New York State Constitution were merged by the court of appeals for this decision. In each of the three cases a police officer observed the defendant engaging in suspicious conduct in the automobile, but stopped the car only after a traffic violation was committed. The officers then arrested the defendants for the more serious offense, which was unrelated to the traffic violation.

In the first case, *People v. Robinson,* two police officers were on night patrol in the Bronx.[4] Their main assignment was to ensure that no robberies of taxicabs occurred that night.[5] They observed a taxicab run through a red light and pulled it over.[6] When they approached the car they saw the defendant in the backseat wearing a bulletproof vest.[7] They ordered the defendant out of the taxicab, and noticed a gun on the floor of the car where the defendant had been sitting.[8] They arrested the defendant and charged him with criminal possession of a weapon and unlawfully wearing a bulletproof vest.[9] The

1. 2001 N.Y. LEXIS 3790 (N.Y. Ct. of App. Dec. 18, 2001)
2. *Id.* at *2.
3. 517 U.S. 806 (1996).
4. *Id.* at *2.
5. *Robinson*, 2001 N.Y. LEXIS 3790, at *2.
6. *Id.*
7. *Id.* at 3.
8. *Id.*
9. *Id.*

"[d]efendant moved to suppress the vest and the gun, arguing that the officers used the traffic infraction as a pretext to search the occupant of the taxicab."[10] The court denied the defendant's motion to suppress the evidence and he was convicted of both charges.[11] He was sentenced to 8 years to life on the weapons charge and 1 1/2 to 3 years for unlawfully wearing a bulletproof vest.[12]

The appellate division affirmed the district court decision and applied the reasoning of the United States Supreme Court in *Whren*.[13] The court of appeals affirmed the decision of the appellate division.

In the second case, *People v. Reynolds*, a police officer observed a male prostitute get into the defendant's truck.[14] The officer ran a check on the license plate and learned that the registration had been expired for two months.[15] He then stopped the vehicle, but did not charge either occupant with prostitution.[16] However, he noticed that the "driver's eyes were bloodshot, his speech was slurred and there was a strong odor of alcohol in the car."[17] He arrested the defendant for driving while intoxicated. "At the police station, tests indicated that the defendant's blood alcohol level was .20 percent, double the legal limit of .10 percent (*see*, Vehicle & Traffic Law § 1192-(2))."[18] The defendant was charged with driving while intoxicated and operating an unregistered vehicle.[19] However, the Rochester City Court granted the defendant's motion to suppress the evidence and dismissed all of the charges. The county court affirmed, "holding that the traffic violation was merely a pretext and the officer's primary motivation was to investigate prostitution."[20] The court of appeals reversed this decision.

In the third case, *People v. Glenn*, two plainclothes police officers observed a taxicab make a right turn without signaling.[21] One officer also noticed a passenger in the backseat lean forward. The officers pulled the car over in order to determine if the taxicab driver was be-

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at *4.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at *4-5.
21. *Id.* at *5.

ing robbed.[22] An officer found cocaine on the backseat and additional drugs on the defendant. The "[d]efendant was charged with criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree."[23] The defendant made a motion to suppress the evidence. The motion was denied and he was convicted and sentenced to 4 1/2 to 9 years in prison.[24] The appellate division relied on the reasoning in *Whren* and unanimously affirmed his conviction, and the court of appeals affirmed the appellate division's decision.[25]

III. Discussion

As mentioned above, the New York Court of Appeals adopted the rule of law announced in *Whren* by the United States Supreme Court. In *Whren*, the Supreme Court held that "where a police office has probable cause to detain a person temporarily for a traffic violation, that seizure does not violate the Fourth Amendment to the United States Constitution, even though the underlying reason for the stop might have been to investigate some other matter."[26]

The court began its discussion by comparing the language of the Fourth Amendment with the language in Article I, § 12 of the New York State Constitution. Noting that the language of the two provisions is identical, the court determined that they "generally confer similar rights,"[27] however, the court has never "hesitated to expand the rights of the New York citizens beyond those required by the Federal Constitution where a longstanding New York interest was involved."[28]

In determining whether there was a longstanding New York interest involved, so as to expand the rights of the defendants, the court looked to previous decisions. The court concluded that the defendants' rights should not be expanded and dismissed the dissent's suggestion that the primary motivation test should be applied.[29] The primary motivation test focuses on the officer's subjective intent.[30] However, the majority states that the court has always upheld police

---

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at *5-6.
26. *Id.* at *6.
27. *Id.* at *9.
28. *Id.* at *10.
29. *Id.* at *9.
30. *Id.* at *11.

conduct where the reason for the traffic stop is valid, without considering the officers' subjective intent. Thus, the court concludes that the "primary motivation test is not, and should not be, part of [the New York] State constitutional jurisprudence."[31] The validity of the traffic stop will be upheld, as long as it is based on an objective standard. The objective standard present in this case is the Vehicle and Traffic Law.[32]

The court explained that in previous decisions, the defendant's rights have not been extended beyond the Federal Constitution in any cases where a police officer had "probable cause to conclude that a law or regulation [had] been violated."[33] If the court were to regulate the ability of a police officer to stop a vehicle when he or she has probable cause, the regulation "may lead to the harm of innocent citizens."[34] They cite *People v. Reynolds* as an example, where by stopping the vehicle, the officers arrested someone who was driving under the influence of alcohol.

In response to the argument that the "officers will use their authority to stop persons on a selective and arbitrary basis,"[35] the court refers to the *Whren* decision. In the *Whren* case, the Supreme Court noted that the answer to this type of claim or action falls within the Equal Protection Clause of the Constitution.[36] The court also cites to the *Brown v. State of New York*[37] case where "this court recognized that in New York State, a plaintiff has a cause of action for a violation of the Equal Protection Clause and the Search and Seizure Clause of the State Constitution."[38] Thus, the citizens rights are protected because the court's decision addresses the initial police action; "[t]he scope, duration and intensity of the seizure, as well as any search made by the police subsequent to that stop, remain subject to the strictures of Article I, § 12 and judicial review."[39]

Next, the court responds to several of the arguments made by the dissenters. First, they acknowledge that the dissenters correctly maintain that the exercise of police power under both the Fourth Amendment and the New York State Constitution must be reasonable, and

31. *Id.*
32. *Id.* at *13.
33. *Id.*
34. *Id.*
35. *Id.* at *14.
36. *Id.*
37. 89 N.Y.2d 172 (1996).
38. *See Robinson*, 2001 N.Y. LEXIS 3790, at *15.
39. *Id.* at *16-17.

not arbitrary.[40] However, the majority determines that the dissenters incorrectly bifurcate the concepts of arbitrariness and probable cause. Citing *Florida v. Wells*[41] as an example, the majority states that "[o]nly in the absence of established probable cause has the United States Supreme Court and this Court examined the arbitrariness of police conduct so as to require that police activities be governed by objective standards that restrict officers in looking for incriminating evidence."[42] Therefore, if an officer has probable cause, the issue of whether or not the stop was arbitrary is not relevant.

The court contrasts this type of search with an inventory search, "where arbitrariness is necessarily part of the reasonableness equation."[43] In these cases, even though "the seizure of the vehicle is justified, the subsequent inventory search, lacking probable cause, cannot be arbitrary and must be performed according to uniform procedures."[44] Therefore, in inventory search cases, the courts will analyze probable cause and arbitrariness separately.[45]

To support this proposition, the court cites *Delaware v. Prouse*.[46] In this case, the United States Supreme Court "invalidated random police stops conducted for vehicle license and registration checks because there was no probable cause justification."[47] However, the "*Prouse* Court expressly distinguished a random stop from one based on circumstances where, as here, probable cause exists 'to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations.' "[48]

The dissent believes, that "in the context of traffic code violations . . . the existence of probable cause that the infraction was committed is manifestly insufficient to control arbitrary police conduct . . . because motor vehicle travel is so much a part of our lives and minutely regulated, total compliance with the law is impossible."[49] However, the majority rejects this assertion, stating that just because many New Yorkers disobey the Vehicle and Traffic Law, does not mean that the

40. *Id.* at *17-18.
41. 495 U.S. 1 (1990).
42. *See Robinson*, 2001 N.Y. LEXIS 3790, at *18.
43. *Id.* at *19.
44. *Id.*
45. *Id.*
46. 440 U.S. 649 (1979).
47. *See Robinson*, 2001 N.Y. LEXIS 3790, at *20.
48. *Id.* at *20-21.
49. *Id.* at *22.

officers should not be allowed to enforce it. The Vehicle and Traffic Law provides an objective basis for the stop, therefore, making it impossible that the stop could be considered arbitrary. According to the majority, if a citizen breaks any one of the many Vehicle and Traffic laws or regulations, the violation is enough of an objective reason for the officer to stop the automobile.

Next, the dissenters argue that many officers use racial profiling as a means of determining which vehicles to stop and search. Therefore, they suggest that search and seizure cases should be based on a "reasonable police officer" standard.[50] The "reasonable police officer" standard asks "would a reasonable police officer with traffic responsibilities [make] the stop?"[51] However, the majority of the court concludes that it is impossible to separate the reason for the stop from the legality of the stop itself.[52] They conclude that if the dissents test is imposed, "[a] police officer could arbitrarily stop someone for speeding and the stop would be valid, but a gun seen in plain view in the car during the stop would be suppressed and unlawfully seized."[53]

Additionally, the court points out that not one State has adopted the "reasonable police officer test."[54] In fact, they cite to two cases that expressly rejected the test. The first is, *United States v. Scopo*,[55] where the Second Circuit held that "the fact that an officer may be engaged in an arrest which would not usually be effected in the course of the officer's normal duties does not negate the validity of the arrest."[56] The second case is, *United States v. Botero-Ospina*,[57] where the Tenth Circuit, which had been applying the "reasonable police officer" standard, reversed itself and adopted the same rule of law announced in *Whren*, before *Whren* was decided. The Tenth Circuit found the "reasonable police officer" standard unworkable stating that it created "inconsistent and sporadic" results.[58]

The court concludes the opinion by stating that it will not invoke a test (the "reasonable police officer" standard) that will allow selective

50. *Id.* at *24.
51. *Id.*
52. *Id.*
53. *Id.* at *25.
54. *Id.*
55. 19 F.3d 777, 782 (1994).
56. *See Robinson*, 2001 N.Y. LEXIS 3790, at *26.
57. 71 F.3d 783, 786-87 (1995).
58. *See Robinson*, 2001 N.Y. LEXIS 3790, at *26.

enforcement of traffic laws.[59] Several factors lead the court to this conclusion. First, a unanimous majority of the United States Supreme Court rejected this test in *Whren*.[60] Second, the court agrees that there is truth in the dissenters argument that police officers use their discretion daily and that New York citizens violate the Vehicle and Traffic Law often. However, these two factors together do not make the traffic stops arbitrary in nature.[61] Therefore, by adopting the rule of law in *Whren*, the court "confirm[s] a standard that constrains police conduct — probable cause under the Vehicle and Traffic Law and its related regulations that govern the safe use of our highways."[62]

IV. Conclusion

In *People v. Robinson*, the New York Court of Appeals held that the reasoning in *Whren* adopted by the United States Supreme Court, should be adopted as a matter of New York State Law as well. The rationale behind the holding in *Whren* is that "when a police officer has probable cause to detain a person temporarily for a traffic violation, that seizure does not violate the Fourth Amendment to the United States Constitution even though the underlying reason for the stop might have been to investigate some other matter."[63] The New York Court of Appeals extended this reasoning to hold that "where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate Article I, § 12 of the New York State Constitution."[64] Additionally, "[i]n making that determination of probable cause, neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant."[65] Therefore, it affirmed the decisions in *People v. Robinson* and *People v. Glenn* and, it reversed the decision in *People v. Reynolds*.

Cynthia Mitchell

59. *Id.* at *27.
60. *Id.*
61. *Id.*
62. *Id.* at *28.
63. *Id.* at *6.
64. *Id.* at *9.
65. *Id.*