State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of May 29 - 31, 2007

State of New York Court of Appeals

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To be argued Tuesday, May 29, 2007

No. 89 Matter of Eighth Judicial District Asbestos Litigation (Reynolds v Amchem Prodcuts, Inc.)

Donald Reynolds, who worked at the Ashland Oil refinery in Tonawanda for more than 35 years, was diagnosed with malignant mesothelioma, an incurable lung disease, in 2003. Reynolds and his wife filed this personal injury action against 20 defendants, including Garlock Sealing Technologies LLC and Niagara Insulations, Inc., alleging that his disease was the result of workplace exposure to asbestos. By the time the trial was held in 2004, the only remaining defendants were Garlock, which provided the refinery with asbestos-containing pump gaskets and packing, and Niagara, which provided asbestos-containing pipe insulation.

Shortly before the trial began, Reynolds and Niagara entered into a confidential "high-low agreement" in which Niagara agreed to pay Reynolds a minimum of $155,000 in return for Reynolds' agreement to accept a maximum of $185,000 from Niagara regardless of the outcome of the trial. The trial court was informed of the agreement, but neither the court, Reynolds, nor Niagara informed Garlock or the jury. The jury awarded $3.75 million to the plaintiffs, apportioning liability 60 percent to Garlock and 40 percent to Niagara. Supreme Court reduced the judgment to $2.7 million, but denied Garlock's motion to set aside the verdict and grant a new trial based on the court's failure to disclose the high-low agreement, which capped Niagara's liability at $185,000.

The Appellate Division, Fourth Department affirmed in a 3-1 decision. The majority said, "Absent evidence of collusion between Niagara and plaintiffs to the detriment of Garlock, the failure to disclose the high-low agreement does not mandate reversal.... Here, Niagara retained the incentive to minimize its own culpability and to magnify the culpability of Garlock and [Reynolds], and thus Garlock 'has failed to show how the [high-low] agreement realigned loyalties so as to prejudice [it]'...."

The dissenter argued the trial court failed to notify Garlock of ex parte communications regarding the agreement, as required by Code of Judicial Conduct Canon 3, and that Reynolds and Niagara "thus actually or potentially gained a 'procedural or tactical advantage' over Garlock." He said, "[I]t was unfair to Garlock and prejudicial to its substantive rights and interest to be compelled to participate in the trial without knowledge of the critical procedural and substantive fact" that a high-low agreement limited Niagara's liability to a specified range.

For appellant Garlock: Michael J. Hutter, Albany (518) 445-2360
For respondent Reynolds: John Ned Lipsitz, Buffalo (716) 849-0701

State of New York Court of Appeals

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To be argued Tuesday, May 29, 2007

No. 90 Matter of Polito v Walsh

Carmine Polito, Mario Fortunato and three co-defendants were arrested by federal agents in 2002 for the murder of Sabatino Lombardi, a Genovese crime family associate who was shot to death while playing cards at the San Guiseppe Social Club in Brooklyn in November 1994. Among other counts, they were charged with a violent crime in aid of racketeering (VCAR) under 18 USC § 1959, which provides, "Whoever,... for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished ... for murder, by death or life imprisonment ...."

After a jury trial in U.S. District Court for the Eastern District of New York, Polito and Fortunato were convicted and sentenced to life without parole. On appeal, the U.S. Court of Appeals for the Second Circuit reversed their VCAR convictions on the ground there was insufficient evidence to establish that they killed Lombardi "'for the purpose of ... maintaining or increasing position in an enterprise engaged in racketeering activity.'"

When Polito and Fortunato were subsequently indicted for second degree murder by a Kings County grand jury for the killing of Lombardi, they commenced this article 78 proceeding to prohibit the state prosecution based on New York's double jeopardy statute (CPL 40.20[1]), which provides, "A person may not be twice prosecuted for the same offense." They argued the state murder charge is a lesser-included offense of VCAR murder and, therefore, the two are "the same offense" under the statute.

The Appellate Division, Second Department dismissed the proceeding, saying, "It is uncontroverted that the facts of the VCAR offense and the murder offense are the same, i.e., both are based upon the shooting of Lombardi on November 30, 1994. However, the offenses are not the same in law since the federal statute includes essential elements not present in the state statute.... To establish a VCAR violation, it must be demonstrated, inter alia, that an enterprise exists, and that the violent crime was committed to maintain or increase the defendant's position in the enterprise (*see* 18 USC § 1959). These are not elements of murder in the second degree." The court also ruled the state murder charge is not a lesser-included offense of VCAR because it would be possible to commit a VCAR offense without at the same time committing second degree murder. "Murder is not the only crime which may serve as a basis for a VCAR violation since the statute lists other offenses, such as kidnapping, assault, or maiming, which may constitute the underlying criminal element of the statute...," it said.

Appellants argue it is irrelevant that crimes other than murder may serve as the basis for a VCAR violation because they were actually prosecuted for VCAR murder. "VCAR murder requires proof that the defendant committed murder under New York law and did so to maintain or increase his position in a criminal enterprise," Fortunato says. "New York state murder requires proof that the defendant committed murder under New York law. Because proof of one offense (VCAR murder) necessarily entails proof of the other (murder), the latter is a lesser-included of the former, and the two are the 'same offense' for purposes of ... CPL 40.20(1)." Appellants also contend that CPL 40.20(1) abrogates the dual sovereignty doctrine, which allows a successive state prosecution following a federal prosecution for the same or greater offense.

For appellant Fortunato: Paul Shechtman, Manhattan (212) 223-0200
For appellant Polito: Diarmuid White, Manhattan (212) 861-9850
For respondent Hynes: Brooklyn Assistant District Attorney Ann Bordley (718) 250-2464

State of New York Court of Appeals

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To be argued Tuesday, May 29, 2007

No. 91 Leder v Spiegel

When Abraham Warsaski died in 1993, his only surviving relatives were two nephews, Marshall and Michael Spiegel, who lived in Illinois. Under Warsaski's last will dated September 15, 1992 (as well as under three earlier wills executed in 1991, 1990 and 1986), he left his entire estate of approximately $800,000 to charity and specifically disinherited his nephews.

The Spiegels filed objections to the will in Manhattan Surrogate's Court in 1993, claiming that Warsaski lacked testamentary capacity. Their first attorney withdrew from the case, citing irrevocable differences with his clients, and the Spiegels ultimately retained Manhattan attorney Joanne Rowland to represent them at trial. After rejecting a $108,000 settlement offer, they proceeded to trial in 1997 and sought to introduce photocopies of alleged writings of Warsaski to establish his lack of competency. Surrogate's Court refused to admit the evidence, due to the Spiegels' failure to authenticate the papers, and dismissed their challenge to the will.

At the trial's conclusion, Rowland moved to be relieved as counsel and to be paid the $17,704.57 balance of her legal fees and disbursements. Marshall Spiegel counterclaimed for legal malpractice and breach of contract, contending that but for Rowland's erroneous advice, he and his brother would have accepted the $108,000 settlement offer. The court dismissed Spiegel's counterclaims and granted Rowland's application for fees.

The Appellate Division, First Department affirmed in a 3-2 decision, saying Spiegel's malpractice claim "is based upon nothing but bare allegations of fact and conclusory legal arguments." The majority said the claim "rests on the unsupported, conclusory assertion that he would have accepted the settlement offer but for [Rowland's] erroneous advice concerning his prospect of success at trial. There is no support for his claim in the voluminous record this matter has generated, nor is there anything in the record, such as an affidavit from his co-objectant brother Michael, to refute [Rowland's] claim that she actively encouraged the brothers to accept the settlement, but that [Marshall Spiegel] alone had refused over Michael's protestations." The court observed that the settlement negotiations continued "up to the morning of trial" and that Marshall said in a 1999 affirmation that "the settlement offer he now claims [Rowland] counseled him to refuse, remained open, but that he and his brother were refusing to accept it ... without verification of the value of the estate."

The dissenters argued that Spiegel properly stated a claim for malpractice. "The majority relies in part on [Rowland's] claim that she actively encouraged a settlement and that [Marshall] and his brother refused to accept it. These assertions, even assuming their truth, do not undercut [Marshall's] malpractice claim in the slightest.... That [Marshall] rejected the settlement offer for other reasons -- good, bad or otherwise -- hardly negates his contention that he would have accepted it but for [Rowland's] alleged malpractice. If the majority maintains that this contention is a 'conclusory legal argument,' the majority errs; it is an assertion of fact, what [Marshall] would have done. To the extent the majority relies on this contention being a 'bare' or 'unsupported' allegation, that would only underscore that the majority is improperly resolving the issue of credibility against [Marshall] on [Rowland's] motion to dismiss...."

For appellant Marshall Spiegel: Jeffrey A. Barr, Manhattan (212) 227-1834
For respondent Joanne Rowland: Leo Fox, Manhattan (212) 867-9595

State of New York Court of Appeals

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To be argued Wednesday, May 30, 2007

No. 92 Benesowitz v Metropolitan Life Insurance Company

Mitchell Benesowitz began working for the Honeywell Corporation in April 2002 and was immediately covered under Honeywell's long-term disability (LTD) plan, which is administered by the Metropolitan Life Insurance Company (MetLife). He had been treated for kidney disease during the three months prior to his hiring by Honeywell. In October 2002, Benesowitz decided he could no longer work and he applied for short-term disability benefits. MetLife paid the benefits for five months, but in April 2003 the insurer denied his application for long-term disability based on a provision of its policy that permanently excludes LTD coverage for a disability that is caused by a pre-existing condition and arises during the first 12 months of coverage.

Benesowitz ultimately filed this lawsuit in federal court to contest the denial, contending that MetLife's permanent exclusion of coverage for disabilities caused by pre-existing conditions violates New York Insurance Law § 3234(a)(2), which states, "No pre-existing condition provision shall exclude coverage for a period in excess of twelve months following the effective date of coverage for the covered person." U.S. District Court for the Eastern District of New York dismissed the claim, rejecting his argument that the statute permits an insurer only to withhold benefits during the first 12 months of coverage. The court agreed with MetLife that section 3234(a)(2) allows insurers to impose a permanent bar to coverage of disabilities that arise within that period.

The U.S. Court of Appeals for the Second Circuit, finding the statute "ambiguous," is asking the New York Court of Appeals to resolve the issue. "Nothing in the plain text indicates that 'twelve months' refers to a waiting period rather than to the time during which manifestation of a disability forecloses future recovery," the court said. "Both interpretations are reasonable."

New York State, in an amicus brief filed in support of the plaintiff, said the Superintendent of Insurance has consistently interpreted the statute to allow only a temporary waiting period, rather than a permanent bar to coverage, since the law was enacted in 1993.

The Second Circuit said the State "has represented to this court that the Superintendent set allowable rates for disability insurance policies based on his understanding that disability benefits for a pre-existing condition will only be precluded for a twelve-month period. Conversely, MetLife contends that it has relied for years on the Superintendent's approval of its plan provision, which is now said to conflict with the statute, and that a change in the interpretation accepted in the insurance industry will 'create havoc in the employee disability benefit plan arena.' Thus, the issue central to this appeal is of exceptional interest to both insureds and insurers in New York, as well as to the state itself, which is responsible for regulating the relationship between insurers and insureds."

For appellant Benesowitz: Eve-Lynn Gisonni, Woodbury (516) 921-7773
For amicus curiae State: Solicitor General Barbara D. Underwood (212) 416-6279
For respondents MetLife et al: Amy K. Posner, Long Island City (212) 578-8296

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To be argued Wednesday, May 30, 2007

No. 93 BP Air Conditioning Corp. v One Beacon Insurance Group

Henegan Construction Company, Inc., the general contractor for a construction project at One World Trade Center in 2000, hired BP Air Conditioning Corp. as the HVAC subcontractor. BP, in turn, subcontracted the steamfitting work to Alfa Piping Corp. in an agreement that required Alfa to obtain comprehensive general liability insurance naming BP as an additional insured. Alfa's policy was issued by One Beacon Insurance Group.

The insurance dispute in this appeal arose in December 2000, when Joseph Cosentino, an employee of another BP subcontractor, Karo Sheet Metal, Inc., slipped and fell on a patch of oil at the work site and filed a personal injury suit against Henegan (the Cosentino action). Henegan brought a third party action against BP and Alfa, and Cosentino later added them as direct defendants. When BP sought a defense from One Beacon, the insurer refused, contending that BP's additional insured coverage under Alfa's policy would not be triggered until it was determined in the Cosentino action that Alfa was responsible for the oil slick that caused Cosentino's fall. One Beacon relied on a portion of the additional insured endorsement in Alfa's policy, which provides that a contractor employing Alfa "is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured."

BP commenced this declaratory judgment action against One Beacon, contending it was entitled to a defense in the Cosentino action. Supreme Court ruled in favor of BP, declaring One Beacon was obligated to provide a defense.

The Appellate Division, First Department upheld Supreme Court's ruling on the insurer's duty to defend in a 3-2 decision, rejecting One Beacon's argument that "the liberal principles governing the activation of the duty to defend ... apply only to named insureds, not to parties covered pursuant to additional insured endorsements, such as BP." The majority relied on Pecker Iron Works of N.Y. v Traveler's Ins. Co. (99 NY2d 391 [2003]), concluding that, "in the absence of unambiguous contractual language to the contrary, an additional insured 'enjoy[s] the same protection as the named insured.'" It said, "As applied here, this principle can mean only that, for named insureds and additional insureds alike, the activation of the duty to defend depends on the allegations of the pleadings" and not on final adjudication of the underlying personal injury action. The majority modified Supreme Court's ruling by further declaring that One Beacon's coverage is primary, and BP's coverage under its own policy is excess.

The dissenters argued that One Beacon is not required to defend or indemnify BP "unless and until it is determined that its additional insured obligation is triggered. That determination can only be made if the factfinder in the underlying Cosentino action determines that Cosentino's accident resulted from Alfa's activities." They said, "No one challenges an insurer's broad duty to defend its named insured, whose status as an insured is not conditional. In the case of BP's coverage as an additional insured, however, BP must meet the condition precedent set forth in Beacon's additional insured endorsement before the endorsement, and hence, coverage, is triggered."

For appellant One Beacon: Jonathan Schapp, Buffalo (716) 626-2600
For respondent BP: Mitchell S. Cohen, Manhattan (212) 847-7900

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To be argued Wednesday, May 30, 2007

No. 94 People v Vincent Litto

In January, 2004, 19-year-old Vincent Litto was driving on Gerritsen Avenue in Brookyn with three passengers, all 13-year-old boys, when he allegedly inhaled (or "huffed") the spray from an aerosol can of "Dust-Off." About 45 seconds later, he veered across the center line and collided with an oncoming car, killing 17-year-old Kristian Roggio. Two passengers in Litto's car and two in the other vehicle were seriously injured. "Dust-Off," which is generally used to clean electronic equipment, contains a hydrocarbon propellant that has a depressive effect on the central nervous system, according to a toxicologist who testified before the grand jury.

Litto was indicted on 14 charges, including driving while intoxicated under Vehicle and Traffic Law § 1192(3) and second degree vehicular manslaughter under Penal Law § 125.12, which requires proof the defendant violated Vehicle and Traffic Law § 1192(3). Section 1192(3) provides, "No person shall operate a motor vehicle while in an intoxicated condition," but it does not define the term "intoxicated." Supreme Court granted Litto's motion to dismiss both charges, concluding that the meaning of "intoxicated" within the statutory scheme "is limited to a driver's impairment by the consumption of alcohol."

The Appellate Division, Second Department affirmed in a 3-1 decision, saying, "The history and structure of [the statute] demonstrate that the Legislature intended it to apply only to intoxication caused by alcohol." The majority traced the evolution of the state's drunk driving laws since 1910, citing amendments enacted in 1941 to allow evidence of blood alcohol content (BAC), in 1960 to prohibit driving while "impaired by the consumption of alcohol," in 1970 to create presumptions of impairment and intoxication based on BAC levels and, "significantly," the 1966 enactment of Vehicle and Traffic Law § 1192(4), which made it a misdemeanor to drive while "impaired by the use of a drug." "[C]ontrary to the view of our dissenting colleague," the court said, "the Legislature clearly expressed its intent that Vehicle and Traffic Law § 1192(4) was enacted to preclude operation of a motor vehicle while under the influence of drugs or narcotics. By implication, the Legislature recognized that Vehicle and Traffic Law § 1192(3) did not proscribe such conduct. For us to hold otherwise would render section 1192(4) superfluous, a result to be avoided in statutory construction...."

The dissenter said, "[A]lthough the case law discussing and applying the subdivision has frequently involved the consumption of alcohol, such a limitation is not compelled by the plain language of the statute, by the expressed intent of the Legislature in enacting or amending the same, or by controlling case law. Further, applying such a limitation would run contrary to the goal of the legislation to keep the roads safe from drivers who are incapable of employing the physical and mental abilities needed to operate a vehicle as a reasonable and prudent driver without regard to what substance gave rise to such an intoxicated condition."

For appellant: Brooklyn Assistant District Attorney Ann Bordley (718) 250-2464
For respondent Litto: Anthony M. Bramante, Brooklyn (718) 625-5525

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To be argued Thursday, May 31, 2007

No. 95 Rosario v Diagonal Realty, LLC

Sonia Rosario has lived in a rent-stabilized apartment on West 174th Street for 30 years, and for the past 19 years she has received a rent subsidy through the federal section 8 program for low-income tenants, which is administered by the New York City Housing Authority (NYCHA). Rosario's subsidy covers $410 of her $776 monthly rent. In February 2004, her landlord Diagonal Realty notified her and NYCHA that it was opting out of the section 8 program and would no longer accept the rent subsidy payments. A month later, Diagonal commenced a proceeding to evict her for nonpayment of rent.

Rosario and six other tenants who were receiving section 8 subsidies commenced this action against Diagonal and four other landlords that were seeking to opt out of the section 8 program. The tenants sought a declaration that the landlords were obligated to continue accepting their rent subsidies, contending the section 8 subsidies constituted a material term and condition of their leases and that under New York's rent stabilization laws they were entitled to renewal leases on the same terms. They also argued the four landlords (including Diagonal) that were receiving tax abatements under New York City's J-51 tax law were expressly prohibited by that statute from discriminating against section 8 recipients and, therefore, must accept the subsidies. The landlords relied on a 1996 amendment to the federal section 8 statute that eliminated the "endless lease rule," which had required landlords participating in the program to renew leases for section 8 tenants and prohibited them from terminating a section 8 tenancy except for good cause. Contending this amendment permits them to opt out of the section 8 program, they argued that any contrary provisions in the state's Rent Stabilization Code and the city's J-51 law are preempted by the federal statute.

Supreme Court, finding there was no express or implied preemption, granted summary judgment for the plaintiffs and declared the landlords could not opt out of the program and must continue accepting the subsidies. The court said the plain language of the J-51 law prohibits owners receiving the benefits of a J-51 tax abatement from discriminating against tenants who, among other things, qualify for section 8 subsidies. "As such," it said, "J-51 falls squarely within the section 8 regulation [24 CFR 982.53(d)] stating that nothing in the section 8 scheme is intended to preempt 'operation of state and local laws that prohibit discrimination against a section 8 voucher-holder because of status as a section 8 voucher-holder.'" Regarding the state's rent stabilization laws, the court said, "It cannot be said that the section 8 statute is so comprehensive as to create an inference that Congress intended to leave no room for state or local regulation in the area, and this court is not persuaded that the provisions of section 8 cannot be harmonized with those of the Rent Stabilization Law."

The Appellate Division, First Department affirmed.

Diagonal argues that a landlord's participation in section 8 is voluntary under federal law and that Congress clearly intended to permit landlords to opt out of the program. It also contends nothing in state or city law prohibits such opting out, saying the State Division of Housing and Community Renewal "has determined that a landlord's opting out of the Section 8 program is not a refusal to renew a lease on the same terms and conditions as the expiring lease and that Section 8 benefits are not part of the terms and conditions of a rent stabilized tenancy." Diagonal argues, "A landlord's refusal to participate in the Section 8 program going forward does not constitute discrimination in violation of the 'J-51' statute against a tenant who has Section 8 benefits where the landlord has not evicted the tenant or sought to evict the tenant for being a recipient of Section 8 benefits."

For appellant Diagonal: Richard T. Walsh, Williston Park (516) 535-1700
For respondent Rosario: Judith Goldiner, Manhattan (212) 577-3300

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To be argued Thursday, May 31, 2007

No. 96 Matter of Estate of Tomeck

The Saratoga County Department of Social Services (DSS), supported by the State Attorney General, is appealing lower court rulings that rejected its claim for $324,812.12 from the estate of Margaret Tomeck as reimbursement for Medicaid payments DSS made for the nursing home care of her husband, John Tomeck, from 1997 until his death in 2005. Margaret Tomeck, who lived in Saratoga Springs, died in 2002.

DSS initially denied Medicaid coverage to the husband in 1997, finding the couple had excess assets and income under the spousal impoverishment provisions of the federal Medicaid Act. DSS determined they had combined assets of $123,830.90, which exceeded the $74,820 "community spouse resource allowance" (CSRA) that Margaret could retain without making her husband ineligible for Medicaid. At a hearing before the State Department of Health, the Tomecks contended Margaret was entitled to an increase in her CSRA because her net monthly income of $1,072.24 fell below the "minimum monthly maintenance needs allowance" (MMMNA) of $1,976 that Medicaid eligibility rules allowed for the uninstitutionalized spouse in 1997. The Department of Health upheld the denial of benefits, holding that under its "income first" policy, $903.76 of the husband's monthly income (consisting primarily of Social Security benefits) was properly deemed to be available to Margaret, bringing her income up to the MMMNA level. Margaret then signed a spousal refusal, attesting that she needed to retain all of her income and assets to support herself and that she could not contribute to her husband's care, which had the effect of qualifying her husband for Medicaid in July 1997.

After Margaret's death, DSS filed its claim for reimbursement from her estate, contending that her refusal to contribute to her husband's care created an implied contract with her under Social Services Law § 366(3)(a) that allowed DSS to recover its Medicaid expenditures. The statute applies to "a responsible relative with sufficient income and resources to provide medical assistance" who refuses to provide necessary care to a Medicaid applicant. The Tomeck Estate argued there was no implied contract because Margaret did not have the means to pay for her husband's care. Surrogate's Court denied the DSS claim for reimbursement, holding that John Tomeck's Social Security benefits were improperly allocated to Margaret. The court denied the estate's request for attorney's fees.

The Appellate Division, Third Department affirmed. Relying on the Second Circuit's ruling in Robbins v DeBuono (218 F3d 197), the court held that DSS violated the anti-alienation provisions of the Social Security Act (42 USC § 407) by attributing John Tomeck's benefits to Margaret in order to raise her income level to the MMMNA before she signed the spousal refusal. "Thus, because [Margaret] did not have 'sufficient income and resources to provide medical assistance' to her husband at that point, no implied contract was created and her estate cannot now be held liable for the medical assistance furnished to her husband," it said.

DSS and the Attorney General argue, in part, that Robbins has been superceded by the U.S. Supreme Court's more restrictive reading of the anti-alienation provisions in Washington State Dept. of Social & Health Servs. v Guardianship Estate of Keffeler (537 US 371). They argue that attributing John Tomeck's benefits to Margaret as part of the Medicaid eligibility determination does not violate the statute because it "does not take control over the social security income in order to discharge an existing or anticipated liability."

For appellant-respondent Saratoga County DSS: Hugh G. Burke, Ballston Spa (518) 884-4770
For amicus curiae Attorney General: Assistant Solicitor General Victor Paladino (518) 473-4321
For respondent-appellant Tomeck: Louis W. Pierro, Albany (518) 459-2100

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To be argued Thursday, May 31, 2007

No. 97 Matter of Simone D. papers sealed

The acting director of the Creedmoor Psychiatric Center commenced this proceeding in 2005, seeking permission to administer electroconvulsive therapy (ECT) to Simone D. without her consent. The patient is a 57-year-old immigrant from the Dominican Republic who has a history of psychiatric illness, including severe depression, beginning in 1984. Simone has been an involuntary patient at Creedmoor since 1994 and has undergone, over her objection, at least 148 court-authorized ECTs, or shock treatments, since 1995. In its current petition, Creedmoor asserts that when ECT is discontinued, Simone "becomes severely depressed and regressed. She stops eating, drinking and becomes dehydrated and requires nasogastric tube feeding. She can also become agitated, aggressive ... assaultive and delusional." It also asserts that she is not competent to make an informed, reasoned decision about her treatment.

After a hearing, Supreme Court granted the petition to authorize a series of up to 30 ECTs over a period of six months. Simone appealed, contending the court improperly relied on its own knowledge about ECT and unfairly curtailed cross-examination of Dr. Ella Brodsky, a Creedmoor psychiatrist who was the facility's only witness, about the potential risks and benefits of ECT and alternative treatments.

The Appellate Division, Second Department affirmed in a 3-2 decision, saying Creedmoor "established by clear and convincing evidence that [Simone] lacked the capacity to make a reasoned decision with respect to the proposed treatment and that the proposed treatment was narrowly tailored to give substantive effect to her liberty interest" under Rivers v Katz (67 NY2d 485 [1986]). Rejecting claims that cross-examination was improperly curtailed, the majority said, "The nature and extent of cross-examination are matters within the trial court's sound discretion.... When the cross-examination is viewed as a whole and properly analyzed in context, it is clear that [Simone's] counsel was permitted extensive questioning on all relevant areas to be considered under Rivers v Katz (supra)." It also said, "There is no indication in the record that the court based its decision on its own knowledge or became an unsworn witness. To the contrary, the court's determination is amply supported by the medical evidence presented, including the evidence elicited by [Simone's] counsel during cross-examination." It concluded that the benefits of ECT "are crystal clear. As Dr. Brodsky recognized, although [Simone] may not achieve remission, the treatment has improved her quality of life. Namely, with the treatment, she will not remain in a fetal position, she will eat, interact, and not pose a danger to herself or others."

The dissenters said Simone's attorney "tried to cross-examine Dr. Brodsky on the extensive course of ECT administered to his client over the years without permanent improvement," but when he "tried to ask questions about the physical pain ECT causes, and also about grand mal seizure, the court interceded and proclaimed that it was familiar with the workings of ETC. When counsel sought to elicit information about hemorrhages and the rupture of the blood/brain barrier caused by ECT, the court sustained [Creedmoor's] objections. Likewise, the court thwarted counsel when he inquired about the dosage and duration of ECT, the Food and Drug Administration risk classification of ECT machines, and the identification of succinylcholine. These were but a few of the limitations the court placed on counsel as he attempted to show that Simone D. should not be forced yet again to undergo ETC." They said, "The court prevented Simone D. from making a record that could be reviewed on appeal and instead became a silent witness relying on its own knowledge of ETC. [Simone], therefore, was unable to demonstrate the side effects of ECT, the risks of this course of treatment, and the potential alternatives that may be available.... Put simply, there is no way to determine whether [Creedmoor] met its burden because much of the evidence was contained only in the court's mind."

For appellant Simone D.: Kim L. Darrow, Mineola (516) 746-4373
For respondent Creedmoor: Assistant Solicitor General Patrick J. Walsh (212) 416-6197