# State of New York
# Court of Appeals

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To be argued Thursday, November 21, 2024

**No. 122 People v Edward Mero**

Edward Mero was charged in 2017 with two counts of second-degree murder for unrelated crimes. The first charge stemmed from the death of Mero's roommate, Megan Cunningham, whose charred body was found after a fire at their Albany apartment in January 2013. The second was based on the death of Shelby Countermine, who was found in a shallow grave in the Town of Coeymans in May 2015.

County Court denied Mero's motion to sever the charges related to each victim for separate trials, finding that the charges were joinable because they were based on the same statutes and Mero failed to show good cause for severance. Evidence at trial established that Mero had been the last person to see both victims alive; and two inmates from the Albany County jail, where Mero was held awaiting trial, testified that he admitted killing Countermine and one of them said he also admitted killing Cunningham. Mero was convicted on all counts and sentenced to consecutive terms of 25 years to life.

After the trial, Mero filed a CPL 440.10 motion to vacate his conviction on the ground that his defense counsel had a conflict of interest due to her undisclosed business relationship with an Albany assistant district attorney (ADA) who served as co-counsel in prosecuting Mero. From 2014 to 2018, including the period of Mero's trial in 2017, his defense counsel paid the ADA $20,500 for drafting four appellate briefs in criminal cases outside of Albany County. The relationship was first disclosed by the ADA six months after Mero's trial ended. Supreme Court denied the motion to vacate, finding that "the potential conflict arising out of the business did not operate on the conduct of the defense" of Mero and "no confidences were disclosed."

The Appellate Division, Third Department affirmed in a 3-2 decision, ruling County Court did not err in denying the motion to sever the charges. Mero's "contention that the joinder of these counts caused him undue prejudice is purely speculative, as the record on appeal shows that the evidence relating to each victim was 'separately presented, uncomplicated and easily distinguishable'.... Additionally, County Court properly instructed the jury to separately consider the evidence applicable to each of the charged crimes ... and to avoid considering evidence of guilt on one count as propensity evidence of guilt on other charged counts.... Defendant fails to point to any place in the record where the People used any proof for impermissible propensity reasons, and we discern no such use." It said Supreme Court did not err in denying Mero's motion to vacate his conviction because he failed to establish that the "potential conflict of interest affected, or operated on, or bore a substantial relation to the conduct of the defense."

The dissenters said County Court abused its discretion in denying severance and the case should be reversed and remitted for separate trials. They said "it is much more likely that the jury would focus on the abhorrent common nature of the crimes than to focus on the fundamental differences of proof" and "there is great likelihood that the cumulative weight of the proof ... depicted [Mero] as having a propensity to commit [murder], and thus improperly swayed the jury to convict ... on this basis alone." They concurred that the potential attorney conflict did not require reversal because Mero "failed to produce anything other than speculation that this conflict affected his defense. Our lasting concern is whether, absent extremely unusual circumstances, such a showing can ever be established."

For appellant Mero: Matthew C. Hug, Albany (518) 283-3288
For respondent: Albany County Assistant District Attorney Emily Schultz (518) 487-5460

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To be argued Thursday, November 21, 2024

**No. 123 People v Cleveland Lawson, a/k/a Emanuel Marks**

NYPD officers stopped Cleveland Lawson's Toyota in March 2017, after they saw him make two U-turns on Lenox Avenue in Manhattan. When Lawson failed a breathalyzer test, they charged him with driving while intoxicated. Lawson moved to suppress his breath test results on the ground that they were the result of an unlawful traffic stop, arguing the prosecution failed to establish that the U-turns were illegal. Criminal Court granted the motion to suppress, finding the prosecutor failed to prove that portion of Lenox Avenue was in a "business district," in which U-turns are prohibited. The court denied the prosecutor's oral motion to reopen the hearing, saying, "You had your chance to meet your burden. The same statutes have been on the books forever. And this defendant has been in jail for nearly a year and a half...."

In a subsequent written motion to reargue the suppression motion, the prosecution asserted for the first time that the U-turns were illegal under section 4-07 of New York City's traffic rules, which prohibit U-turns on "divided highways." Criminal Court granted the motion to reargue, rejecting Lawson's argument that "the People cannot use a motion for re-argument to present the court with new arguments as to why the vehicular stop was lawful." The court then denied Lawson's motion to suppress, saying, "Because u-turns are prohibited on a divided highway, the u-turns that defendant made were illegal and the traffic stop was, therefore, valid." Lawson pled guilty to DWI and was sentenced to 40 days in jail.

The Appellate Term, First Department affirmed, saying "the court had 'inherent power to recall and vacate its initial suppression ruling, in which suppression had been granted'.... '[W]here there is a clearly erroneous dismissal..., It is unreasonable to foreclose a court from reconsidering its previous determination, and there is no indication that the Legislature intended to preclude the Judge from reinstating [a] ... dismissed count upon reargument'...."

Lawson argues that, "because the prosecution was provided with a full and fair opportunity to litigate the dispositive issues at the suppression hearing, the suppression court's denial of suppression, two and a half months after granting suppression, based on an entirely new legal theory not previously litigated, was not authorized as an exercise of a suppression court's 'inherent authority.'.... If sanctioned, the suppression court's actions would create an unworkable rule allowing the prosecution an unlimited number of opportunities to satisfy their burden, unbounded by time or cause."

For appellant Lawson: Iván Pantoja, Manhattan (347) 927-2012
For respondent: Manhattan Assistant District Attorney Jared Wolkowitz (212) 335-9000

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To be argued Thursday, November 21, 2024

**No. 124 Hobish v AXA Equitable Life Insurance Company**

In 2007, the AXA Equitable Life Insurance Company issued to the Hobish Irrevocable Trust a $2 million insurance policy on the life of Toby Hobish, who was then 82 years old. Her three adult children are the sole beneficiaries of the Trust. The cost of insurance (COI) rate, a major factor in determining premiums, was not guaranteed in the policy and AXA was entitled to increase it, but the policy provided, in part, "Changes in policy cost factors ... will be on a basis that is equitable to all policyholders of a given class...." In 2015, AXA announced a significant increase in its COI rates, which included an increase of 43.5 to 72.5 percent for policies that were issued for insureds who, like Hobish, were over 80 years old. In 2016, the Trust notified AXA it was surrendering its policy, under protest, "due to [AXA's] recent, unlawful, and inequitable increase in premiums." In return, AXA paid the Trust the surrender value of $400,000. Hobish and the Trust brought this action against AXA in 2017, asserting claims for breach of contract and violation of General Business Law (GBL) § 349. They alleged that AXA, which marketed the policy as a safe investment for the elderly, had singled out elderly insureds for exorbitant cost increases to induce them to surrender their policies. Hobish died in 2019.

Supreme Court denied the plaintiffs' motion for summary judgment on liability for their claim that AXA breached the policy provision requiring that policy cost increases be "equitable to all policyholders of a given class." It said the term "given class" was ambiguous and its meaning could not be resolved as a matter of law. The court denied AXA's motion for summary judgment dismissing the suit, but granted summary judgment to dismiss certain claims.

The Appellate Division, First Department affirmed, saying the term "a given class" is ambiguous and "the court was not required to resolve the ambiguity against [AXA], as the extrinsic evidence presented in this case was not conclusory." AXA's motion to dismiss the GBL § 349(h) claim was properly denied because "issues of fact exist as to whether there was consumer impact in this case." The court said the Trust's claim for nearly $1.6 million in compensatory and consequential damages was properly dismissed. "This amount allegedly represented the value of the death benefit, offset by the surrender payment made to plaintiffs" and other charges. Since the plaintiffs surrendered the policy, "the policy was no longer in effect and plaintiffs were no longer entitled to the $2 million death benefit." It said the Trust's claim for $12 million in punitive damages under GBL § 349(h) was properly dismissed because the statute caps awards at $1,000. "The statute only provides for these 'limited punitive damages'...."

The Trust argues, among other things, that the lower courts erred in ruling "the Trust waived any claim for breach-of-contract damages based on AXA's destruction of value in Mrs. Hobish's life insurance policy because the Trust surrendered the policy. This ruling is contrary to controlling precedent that a defendant's breach gives a plaintiff the right to terminate the contract and sue for damages based on the value of the contract – especially when defendant's breach was designed to force the plaintiff to terminate the contract." It argues the term "given class" is not ambiguous and the Trust is entitled to summary judgment on AXA's liability for breach of contract "because it is undisputed that AXA's substantial rate increase on the elderly Mrs. Hobish – with no rate increase for younger insured persons – was not equitable for persons in her 'given class' of 'Standard Non-Tobacco User' – as required by that contract."

For appellant Hobish: Gary J. Malone, Manhattan (212) 350-2700
For respondent AXA: Larry H. Krantz, Manhattan (212) 661-0009

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To be argued Thursday, November 21, 2024

**No. 125 Calabrese v City of Albany**

Henry Calabrese lost control of his motorcycle and fell on Lark Street in Albany when he struck a depression in the road in July 2019. He filed this personal injury action against the city. Albany moved to dismiss the suit on the ground that it had not received prior written notice of the defective road condition, as required by the Albany City Code.

The city received complaints about a large pothole in the vicinity of the accident scene through its online reporting system, SeeClickFix (SCF), which is monitored and maintained by its Department of General Services (DGS). There were four complaints in the fall of 2018 and a complaint of a "very large pothole" in May 2019. Calabrese also alleged that the city negligently created the defect in the street, an exception to the prior written notice requirement, when it performed an extensive excavation for an emergency water line repair in April 2019. He presented the expert opinion of a licensed engineer, who said in an affidavit that Albany improperly backfilled the excavation, causing the pavement to sink in a "precipitous process."

Supreme Court denied Albany's motion to dismiss, rejecting its argument that reports submitted through the SCF system do not qualify as prior written notice because they were not "actually given to the Commissioner of General Services," as required by the City Code. It also rejected the city's claim that it was entitled to immunity for its emergency excavation for the water line repair; and it said there are questions of fact about whether the city's repair work created Lark Street's defective condition, including the "weight and credibility" to be given to the plaintiff's expert.

The Appellate Division, Third Department affirmed, saying "the fact that defendant promoted the SCF program and the DGS Commissioner approved an internal departmental protocol for processing and responding to SCF complaints satisfies the "actually given to the Commissioner of General Services" requirement" of the City Code. While the SCG complaint form states that use of the system "does not constitute a ... valid prior written notice," it said, "Enforcement of that qualifier ... would allow defendant to encourage the public to utilize SCF to address real safety concerns, while at the same time deflating the legal impact of such a notice. Defendant cannot have it both ways." The court said, "In view of the temporal proximity of complaints that the excavation [in Lark Street] was sinking, and [the expert's] opinion that this was a 'precipitous process,' we find that plaintiff has raised a question of fact as to whether the excavation falls within the affirmative negligence exception...." Rejecting the city's claim of immunity for its emergency excavation work, it said "a municipality has a proprietary duty to keep its roadways in a reasonably safe condition ... for which immunity does not apply."

Albany argues the prior written notice requirement was not satisfied because notice of the Lark Street defect "was not sent to or received by its statutory designee;" because the "written notice requirement is not satisfied by electronic notice;" and because the requirement is not satisfied by "a communication sent to an employee of a statutory designee." It says the affirmative negligence exception to the notice rule does not apply because "the depression was not affirmatively created," but instead "appeared gradually due to natural forces." And it contends "the emergency excavation was a discretionary act taken in furtherance of a governmental purpose and is therefore clothed with governmental immunity."

For appellant Albany: Robert Magee, Albany (518) 434-5050
For respondent Calabrese: Peter P. Balouskas, Albany (518) 556-3428