State of New York Court of Appeals

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To be argued Tuesday, February 18, 2014

No. 45 Isabella v Koubek

Roberta Oldenborg was driving home from a business meeting in November 2007 when she collided near Coxsackie with a car driven by Doris Hallock. Oldenborg's co-worker, Matthew Isabella, was a passenger in her car and was injured in the accident. Because the injury occurred in the course of his employment, Isabella was barred by Workers' Compensation Law § 29(6) from suing Oldenborg, and he was eventually awarded workers' compensation benefits.

In 2009, Isabella brought this federal action against Hallock and her husband, Peter Hallock, who owned the car she had been driving. Isabella claimed Doris Hallock's negligent driving was the proximate cause of his injuries. The Hallocks then filed a third-party complaint against Oldenborg's husband, Michael Koubek, who owned the car she had been driving. The Hallocks claimed that Oldenborg's negligent driving was the proximate cause of Isabella's injuries and that Koubek was liable under New York's Vehicle and Traffic Law § 388, which provides that a vehicle owner is liable for injuries resulting from the negligent permissive use of the vehicle. Koubek moved for summary judgment dismissing the Hallocks' third-party complaint, arguing that his wife's statutory immunity under Workers' Compensation Law § 29(6) protected him from liability.

U.S. District Court for the Northern District of New York denied Koubek's motion. Relying on a New York Supreme Court decision, the District Court found that Koubek could be vicariously liable for his wife's negligence under Vehicle and Traffic Law § 388 despite her statutory immunity. The District Court said, "The purpose of [Workers' Compensation Law § 29(6)] will not be frustrated by allowing this suit to proceed since the [Hallocks and Koubek] are unrelated by employment." Prior to trial, the parties agreed to a settlement in which Isabella would receive $800,000 and the jury would apportion liability between Koubek and the Hallocks. They also agreed that if District Court's motion decision is reversed on appeal and the Hallocks' claim against Koubek dismissed, the Hallocks would pay the entire settlement. The jury found Koubek 90 percent liable and the Hallocks 10 percent liable for the accident. Koubek appealed.

The U.S. Court of Appeals for the Second Circuit is asking the New York Court of Appeals to resolve the "apparent conflict" between the two statutes, "both of which arguably apply in this case." In a certified question, it asks, "Whether a defendant may pursue a third-party contribution claim under New York Vehicle and Traffic Law § 388 against the owner of a vehicle, where the vehicle driver's negligence was a substantial factor in causing the plaintiff's injuries, but the driver is protected from suit by the exclusive remedy provisions of New York Workers' Compensation Law § 29(6).

For appellant Koubek: Arthur J. Siegel, Albany (518) 533-3000
For respondent Hallocks: Glenn A. Kaminska, Albertson (516) 294-5433

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To be argued Tuesday, February 18, 2014

No. 46 People v Tyrone Sweat

Tyrone Sweat and his brother, Michael, were charged with possession of stolen property in Buffalo in 2011. Sweat was granted transactional immunity after testifying against Michael before the grand jury. When the prosecutor called him as a witness at his brother's trial in 2012, Sweat refused to testify. County Court explained that, since he had immunity, he had no Fifth Amendment right to remain silent, but he still refused. The prosecutor asked that Sweat "be cited for civil contempt and confined until he agrees to testify or until the end of the proceeding, and also we'll charge him with criminal contempt for refusing to be sworn and testify." The court found him in contempt, placed him in custody, and appointed counsel to represent him. After conferring with counsel, Sweat again refused to testify and refused to explain why. The court returned him to custody, saying, "I find you're in contempt in my immediate view and presence for engaging in conduct which has obstructed and threatened to obstruct these proceedings and impair ... my authority to preside over these proceedings and, therefore, I will issue a mandated commitment." Sweat was brought to court the next day and still refused to testify. His lawyer said he was "morally opposed to testifying against his brother." Sweat was held until the end of the two-day trial, when his brother was acquitted and the court ordered Sweat released.

Three weeks later, Sweat was arrested on two misdemeanor counts of criminal contempt. Buffalo City Court dismissed the charges, finding further prosecution was barred by double jeopardy.

Erie County Court affirmed. It said prosecution for criminal contempt would be barred by double jeopardy only if the prior contempt proceedings were criminal, rather than civil, in nature, and it found "the proceedings amounted to a hybrid combination of both criminal and civil characteristics." It held, "[A]lthough the court never formally pronounced sentence upon [Sweat], it clearly confined him pursuant to a Mandate of Commitment (Judiciary Law 752) upon a finding that his conduct obstructed the proceedings and impaired the court's authority to preside (Judiciary Law 750[1] ...). By the court's own language, then, the proceedings were perforce criminal in nature and under these circumstances, this court is compelled to conclude that the defendant's release at the conclusion of the trial was tantamount to a sentence of time served."

The District Attorney's Office argues that prosecution on the criminal contempt charges is not barred because the prior contempt proceedings were intended "to compel defendant's testimony rather than to punish him" and, therefore, "the contempt proceeding was not 'criminal' for double jeopardy purposes. The lack of an unconditional sentence (or any sentence for that matter) or a fine, combined with the court's returning defendant to court on three occasions and the release of defendant immediately when the opportunity to testify had passed, indicates that the purpose was remedial or coercive rather than punitive."

For appellant: Erie County Assistant District Attorney Nicholas T. Texido (716) 858-2424
For respondent Sweat: John R. Nuchereno, Buffalo (716) 875-2503

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To be argued Tuesday, February 18, 2014

No. 47 Palladino v CNY Centro, Inc.

Until his termination in 2008, Eugene Palladino was employed as a bus driver by CNY Centro, Inc., and was represented by the Amalgamated Transit Union, Local 580, an unincorporated association. Centro disciplined him in 2007 after he informed the dispatcher that he had been called out of town and could not make it back in time for his regular shift. Centro concluded that he gave false reasons for his inability to report for work and suspended him for five days. The Union filed a grievance on his behalf and sought arbitration, but Palladino refused to provide information it sought in investigating the matter. Months later, citing "significant" concerns about the merits of his grievance and his failure to cooperate, the Executive Board of Local 580 voted unanimously to withdraw the grievance. Centro sought to terminate Palladino in 2008, based in part on his late departure at the start of his shift and "unnecessary delay" on a bus run. The charges again included "misrepresentation," based on a videotape from his bus that contradicted his explanation for the delay. The Union negotiated a settlement that would avoid termination and instead impose a 12-day suspension, but Palladino did not return the union's call urging him to accept the deal and did not attend his termination hearing. Centro discharged him. Palladino filed a grievance, but the Union's Executive Board voted unanimously against submitting it to arbitration.

Palladino brought these consolidated actions against Local 580 and Centro to challenge both disciplinary actions. His suit included claims for breach of the duty of fair representation against the Union and claims for breach of contract against both defendants. The Union and Centro moved for summary judgment dismissing all claims against them.

Supreme Court dismissed all claims against the Union except for breach of the duty of fair representation. "Contrary to ... the Union's ... contentions that the General Association Law, Section 13, bars Mr. Palladino's action, I find that Palladino's claim alleging breach of duty of fair representation does not rise to the level of an intentional tort requiring proof that the individual members of the Union ratified the alleged negligence complained of."

The Appellate Division, Fourth Department reversed and dismissed the remaining claims. It relied on Martin v Curran (303 NY 276 [1951]), which held that, in a tort action against an unincorporated association, the plaintiff must allege and prove that every member of the association approved or ratified the wrongful conduct. The court agreed with Local 580 "that the Union is a voluntary unincorporated association and that plaintiff has failed even to plead that the Union's conduct was authorized or ratified by the entire membership of the association" and, therefore, the claim "that the Union breached its duty of fair representation is 'fatally defective.'"

Palladino argues the Appellate Division erred in applying the Martin rule to an action against a labor organization for breach of the duty of fair representation "rather than the exception to unanimous ratification carved out by this Court in Madden v Atkins (4 NY2d 283 [1958]) where elected union officials are delegated with authority to act on behalf of the union membership."

For appellant Palladino: Robert Louis Riley, Syracuse (315) 254-4233
For respondents Local 580 et al: Kenneth L. Wagner, Syracuse (315) 422-7111
For respondent Centro: Craig M. Atlas, East Syracuse (315) 437-7600

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To be argued Tuesday, February 18, 2014

No. 48 People v Enrique Rivera

Enrique Rivera was charged with second-degree murder for the fatal stabbing of Edgar Ojeda during a brawl at El Borinquen Bar in Brooklyn in February 2005. The fatal injury was a five inch deep stab wound in Ojeda's chest; he also suffered shallower non-fatal wounds to his upper back and shoulder. When Rivera was arrested the next day, he told the police that he got into a minor confrontation and "right away the crowd rose. Then I felt punches and grabbing. So I take out a knife, used it in self defense, swinging it at the crowd not knowing that I really hurt anyone." At his first trial, the judge submitted first and second-degree manslaughter to the jury as lesser-included offenses. The jury deadlocked and the court declared a mistrial.

At the retrial, Supreme Court submitted first-degree (intentional) manslaughter as a lesser-included offense, but denied Rivera's request to submit second-degree (reckless) manslaughter to the jury, saying there was no evidence to support the charge. "The medical examiner testified in this case that these were stab wounds that could not have been inflicted by someone just swinging a knife around. They had to have been stabbed -- stabbing wounds caused by intentional infliction. So there is no basis to submit a reckless count on the evidence in this case." The jury acquitted Rivera of murder and convicted him of first-degree manslaughter. He was sentenced to 25 years in prison.

The Appellate Division, Second Department affirmed. "Viewing the evidence in the light most favorable to the defendant..., we find that there was no reasonable view of the evidence that would support a finding that the defendant acted recklessly when he stabbed the victim...," it said. "Accordingly, the Supreme Court properly denied the defendant's request to charge manslaughter in the second degree."

Rivera argues the trial court violated his due process right to a fair trial by refusing to submit reckless manslaughter to the jury. "Here, a defense eye-witness testified that Edgar Ojeda was killed during a sudden barroom brawl among people who had been drinking, during which appellant was surrounded by several angry men and numerous people threw punches," he says. "This evidence of a chaotic fight involving multiple people, as well as evidence of appellant's intoxication, provided a reasonable basis for the jury to conclude that appellant's *mens rea* was reckless rather than intentional." He says the nature of the victim's wounds "did not make this the rare case in which the injuries were so extreme that they conclusively established an intent to cause death or serious physical injury."

For appellant Rivera: Leila Hull, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Solomon Neubort (718) 250-2514

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To be argued Tuesday, February 18, 2014

No. 49 Albunio v City of New York

Attorney Mary D. Dorman represented two former officers of the New York Police Department, Captain Lori Albunio and Lieutenant Thomas Connors, in a civil rights action under the New York City Human Rights Law seeking damages for retaliation and constructive discharge from the NYPD. In retainer agreements, each plaintiff agreed to pay Dorman $2,500 upon executing the agreement, $5,000 if the case went to trial, and 33⅓ percent "of the sum recovered, whether recovered by suit, settlement or otherwise." After trial, a jury awarded $479,473 to Albunio and $507,198 to Connors. Dorman applied for counsel fees under NYC Administrative Code § 8-502(f) and was awarded $279,756 in fees and $17,070.04 for her trial work. When the City appealed, Dorman and her clients signed separate retainer agreements providing that, if successful, Dorman would be entitled to any statutory counsel fees for appellate work "in their entirety." After the judgment was affirmed by the Appellate Division and this Court, Dorman applied for statutory fees under section 8-502(f) and was ultimately awarded $267,732.50 in appellate fees and $3,053.43 in disbursements.

When a dispute arose between Dorman and her clients over calculation of the contingency fee, Dorman sought an order interpreting and enforcing the retainer agreements. She argued that her one-third contingency fee should be based on the total amount of the jury verdict plus the statutory fees awarded for her trial work. Her clients argued the contingency fee should be based solely on the jury award and then offset by the statutory counsel fees awarded for the trial. They also argued Dorman's contingency fee should be offset by the $7,500 in retainer fees they each had paid, as well as by any statutory fees awarded for appellate work.

Supreme Court ruled for Dorman on the primary issue, holding she was entitled to one third of the statutory fee award for trial work and one third of the jury verdict. It ruled her clients were entitled to an offset for their $7,500 in retainer fees, but not for statutory appellate fees.

The Appellate Division, First Department affirmed, saying, "The broad terms of the contingency fee agreement providing for a fee of 33⅓ percent of 'the sum recovered, whether recovered by suit, settlement or otherwise,' unambiguously require that the award of attorneys' fees [for trial work] be included in 'the sum recovered'.... Nor does this State follow the rule found in certain federal statutes that contingency counsel must take the larger of the contingency fee or the statutory fee...."

Albunio and Connors argue that statutory counsel fees should ordinarily be credited against an attorney's contingency fee. They say statutory fees may be added to the jury verdict for the purpose of determining the contingency fee only "if the clients specifically agree to such an arrangement. But when the retainer agreement simply specifies that the lawyer should receive a certain percentage of the 'sum recovered,' a client would not understand that the 'sum recovered' included statutory fees which are not mentioned anywhere in the retainer agreement." They also argue the appellate fee award must be subtracted from Dorman's contingency fee based on federal precedents.

For appellants Albunio and Connors: Leon Friedman, Manhattan (212) 737-0400
For respondent Dorman: Paul O'Dwyer, Manhattan (646) 230-7444