Appellate Division Review

Navigating Uncharted Legal Waters

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Ten years ago, in October 2004, the New York Law Journal launched the Appellate Division Review on its maiden voyage.

Since that time, New York's intermediate appellate courts have weathered sea changes in legal doctrine. Their leadership has changed as well: since 2004, in each department, a new presiding justice has taken the helm.

One thing that has remained constant, however, is the care taken by the justices to reach the correct destination when navigating uncharted legal waters, while at the same time riding the wave of increased caseloads.

The third quarter of 2014 is no exception. For our 40th tour of the four departments, we present appellate explorations of subjects ranging from murder to parking violations, and from heroin to foie gras.

First Department

Corporations. Corporate lawyers are familiar with the New York statute entitling shareholders to review certain corporate books and records.[1] Less well-known is a shareholder's common-law right to corporate information. That common-law right is more expansive than the statute, according to the First Department's unanimous decision in Retirement Plan for General Employees of the *City of North Miami Beach v. The McGraw-Hill Companies*.[2]

The petitioner, a shareholder in McGraw-Hill, alleged that Standard & Poor's Financial Services LLC (S&P), which McGraw-Hill owned, "undertook a strategy of fraudulently issuing positive ratings on complex financial products" that encouraged investment in toxic securities and helped trigger the 2008 financial crisis. The shareholder made a written demand on McGraw-Hill to inspect books and records relating to the board of directors' oversight and management of S&P. McGraw-Hill declined to produce documents that were not required by the statute.

Ruling for the shareholders in an unsigned opinion, the First Department explained that a shareholder's statutory right to inspect corporate books and records "supplemented, but did not replace, the common-law right." In fact, "the common-law right of inspection is broader than the statutory right."

So long as a shareholder acts "in good faith and for a proper purpose," the First Department held, common-law inspection rights may be enforced. The court made

clear that investigating allegations of mismanagement to "aid legitimate litigation" constitutes a "proper purpose" for the shareholder's request under both the statute and common law.

Parking Violations. Have a parking ticket that you wish would disappear? Justice Dianne T. Renwick may have granted your wish in *Nestle Waters N. Am. Inc. v. City of New York*.[3] Justice Renwick's decision for a unanimous panel requires dismissal of parking tickets that inaccurately describe the type of license plate on the vehicle.

Nestle Waters North America, Inc. operates fleets of trucks. Many Nestle trucks bear New Jersey license plates labeled "Apportioned." These plates were issued under the International Registration Plan (IRP), through which states divide highway use taxes paid by a particular truck. New York City's Parking Violations Bureau (PVB) issued numerous parking tickets to Nestle. Rather than identifying the license plate type as "Apportioned," the PVB used the term "IRP"—a shorthand used in New York (but not by other states) to describe this type of plate.

Using "IRP" was administratively convenient because the PVB's automatic coding machines contain a shortcut key for that term, the PVB stressed.

Justice Renwick was unmoved. She pointed out that the governing statute "sets forth five mandatory identification elements which may not be omitted from a parking summons." A misdescription of any of those elements "constitutes a jurisdictional defect mandating dismissal." One of those elements is "plate type." "[T]he statute simply does not allow" the PVB to adopt a different code to describe the plates on Nestle's trucks, the First Department concluded, invalidating the 38 summonses in that case and probably many more.

Defamation. A "snake pit filled with bribery and back-room political deals"—that's how a New York Daily News columnist described the Brooklyn court system in a piece that prompted one judge to sue for defamation. Snake pits aside, *Martin v. Daily News*[4] raised an interesting legal question: Were the allegedly defamatory statements republished when the Daily News accidentally left the column off the paper's website and then restored it three years later?

As Justice David B. Saxe explained for a unanimous panel, the "single publication rule" makes a defamatory statement in one issue of a newspaper or magazine "one publication which gives rise to one cause of action." That remains true on the Internet, where "continuous access to an article posted via hyperlinks to a website is not a republication."

The Daily News did not provide continuous access to the "snake pit" column, however. Instead, it was inadvertently deleted from the website, and was restored only after inside counsel advised that the article's omission might be misinterpreted as an admission of liability or destruction of evidence.

When restored to the Internet, the column—still substantially in its original form—reached a new audience through links to social media and networking sites. Nonetheless, Justice Saxe concluded that reinstalling the column did not republish it. "Had the columns remained on the Daily News website as was intended," he wrote, "their presence there three years later would not have justified any additional action."

Second Department

Estates. Crime doesn't pay—even when the victim's sole heir dies and the perpetrator stands to receive the heir's entire estate. That's the lesson of *Matter of Edwards*,[5] a unanimous decision of the Second Department authored by Justice L. Priscilla Hall.

In 2008, Brandon Palladino strangled his mother-in-law. The decedent's will left her entire estate to her only child—Brandon's wife, Deanna. Shortly after the murder, Deanna died of an accidental drug overdose. She died intestate, leaving one distributee—Brandon.

While a murderer cannot inherit directly from his victim, the New York courts have not previously considered whether indirect inheritance is permitted. The slate is not blank, though. "[D]eeply rooted in this State's common law," Justice Hall observed, is the principle that "a wrongdoer may not profit from his or her wrongdoing."

"If this Court were to allow Brandon to inherit the assets of the decedent's estate through Deanna's estate, it would be rewarding Brandon's criminal behavior," Justice Hall wrote. The Second Department would not permit Deanna's "intervening estate" to "allow Brandon to profit from his unlawful killing."

Criminal Appeals. Only on rare occasions do appellate judges issue an opinion that reads like a lengthy continuing legal education lecture, instructing the bar step-by-step on the correct way to proceed.

People v. Brown,[6] a unanimous decision authored by Justice Peter B. Skelos, is one such lecture. The defendant Jamarr Brown pleaded guilty to attempted murder and executed a written waiver of his appellate rights. In the plea proceedings, the Supreme Court did not examine Brown on his decision to waive. Rather, the judge asked defense counsel whether he had "discussed with your client the waiver of appeal," to which defense counsel responded, "I will do that."

That was inadequate. "All too frequently," Justice Skelos explained, "the combination of a terse oral colloquy or overreliance on a written waiver, together with the trial court's failure to thoroughly explore on the record the defendant's particular circumstances, compels the Appellate Division to find that an appeal waiver was invalid."

To be enforceable, a criminal defendant's waiver of appellate rights must be "knowing, intelligent and voluntary." That standard requires trial judges to "engage in a comprehensive colloquy, which clearly places on the record the defendant's understanding of the nature of the right to appeal and the consequences of waiving it."

Third Department

Standing. A consumer who "occasionally eats foie gras at parties" lacks standing to compel the Commissioner of Agriculture and Markets to ban foie gras derived from force-fed birds, the Third Department ruled in *Animal Legal Defense Fund v. Aubertine*.[7]

Most foie gras is produced by force-feeding ducks and geese to enlarge their livers. Daniel Strahlie contended that foie gras was consequently an "adulterated food product" and sought an order banning it. He worried that his periodic indulgence at social events increased the chances of developing "secondary amyloidosis," a condition that an expert opined is a "possible risk" for foie gras-loving individuals with certain medical conditions.

The Third Department was unimpressed. In a unanimous decision authored by Justice John A. Lahtinen, the court found that Strahlie lacked the "injury in fact" necessary to establish standing. Strahlie had cited "no situation of any person ever suffering secondary amyloidosis that was linked to foie gras," and did not even contend that he had an underlying medical condition that would predispose him to contracting it. An "occasional exposure to a product that has not yet been connected by any actual case to the purported risk of harm" is too speculative to support standing.

Seizures. State troopers stopped a speeding motorist shortly after midnight. During the traffic stop, they discovered there was an active warrant for the driver's arrest. An arrest was made. During an inventory search of the car, they found a clear plastic bag containing 41 grams of heroin. Was the heroin admissible? "No," the Third Department ruled in *People v. Leonard*,[8] a 3-1 decision authored by Justice Christine M. Clark, and the reason may have been bad lawyering.

After arresting a driver, the police may impound his car and conduct an inventory search pursuant to "reasonable police regulations relating to inventory procedures administered in good faith." At the suppression hearing, however, the People made only a perfunctory showing. The prosecutor "failed to ask any substantive questions of their witnesses so as to otherwise establish (1) that the State Police had a standardized procedure, (2) that such procedure was reasonable, and (3) that it was followed here." Because the People failed to meet their burden, Justice Clark wrote, the heroin should have been suppressed.

Fourth Department

Sealing. As part of 2009's Drug Law Reform Act, the Legislature allowed defendants in drug cases to have their criminal records sealed if they have completed a judicial diversion or drug treatment program and also served the sentence for their offense.[9] Ruling on an appellate issue of first impression, the Fourth Department held in *People v. M.E.*[10] that even defendants convicted prior to the statute's enactment may take advantage of conditional sealing.

The defendant had pleaded guilty to drug charges in 1996. She served her sentence without incident, successfully completed an inpatient drug treatment program, and became a nurse.

"By all accounts," Justice Gerald J. Whalen observed in a unanimous opinion, "defendant has turned her life around since becoming drug-free."

In 2013, the defendant moved to seal her criminal records. County Court denied the motion, reasoning that the statute did not apply to convictions entered before its 2009 effective date.

In a decision that helps protect the privacy of persons with drug convictions, the Fourth Department clarified that the statute applies to all eligible convictions, whenever obtained.

The sealing law "simply creates a mechanism for restricting future access to existing records." When those records were originally created is "immaterial."

Workers' Compensation. The give-and-take in the Workers' Compensation "bargain" is well-known: Employers pay for mandatory insurance for workplace injuries, and in return receive immunity from the injured employee's claims for negligence against her employer or co-employees.

But, what happens when the plaintiff is injured by a co-employee driving a company car and the employer has a supplementary uninsured/underinsured motorist (SUM) policy? The New York courts have never addressed that question—until *Hauber-Malota v. Philadelphia Insurance Companies*,[11] a unanimous opinion authored by Justice Edward D. Carni.

Because the driver who caused the accident was the injured plaintiff's co-employee, the Fourth Department ruled, the plaintiff's exclusive remedy was Workers' Compensation. A SUM policy requires the insurer to pay uninsured motorist benefits in the amount that the injured person "shall be entitled to recover as damages from an owner or operator of an uninsured motor vehicle."[12] Here, the SUM endorsement required payment of all amounts that the insured was "legally entitled to recover."

Since the plaintiff and the negligent driver were both employed by the same company, the plaintiff was not legally entitled to recover from the driver. Without a legal entitlement to damages, the plaintiff could not receive SUM benefits.

Endnotes

1 BCL §624.

2 2014 N.Y. Slip Op. 06154 (1st Dept. Sept. 11, 2014).

3 2014 N.Y. Slip Op. 05609 (1st Dept. July 31, 2014).

4 2014 N.Y. Slip Op. 05369 (1st Dept. July 17, 2014).

5 2014 N.Y. Slip Op. 05873 (2d Dept. Aug. 20, 2014).

6 2014 N.Y. Slip Op. 06101 (2d Dept. Sept. 10, 2014).

7 2014 N.Y. Slip Op. 05395 (3d Dept. July 17, 2014).

8 2014 N.Y. Slip Op. 05468 (3d Dept. July 24, 2014).

9 CPL 160.58(1).

10 2014 N.Y. Slip Op. 05748 (4th Dept. Aug. 8, 2014).

11 2014 N.Y. Slip Op. 05705 (4th Dept. Aug. 8, 2014).

12 Ins. L. §3420(f)(1).