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THE NEW YORK COURT OF APPEALS
1998 CASE COMPILATION

Smith Barney Shearson Inc. v. Sacharow[1]
(decided December 4, 1997)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that the six-year eligibility provision of the National Association of Securities Dealers Code creates the substantive feature that may affect the right to arbitrate.[2] In addition, the court held that the arbitrability of a dispute is itself a proper subject for arbitration, and that New York's choice of law provisions in customer agreements do not trump core arbitration provisions.[3]

II. BACKGROUND

Two issue-related proceedings—based on Section 15 of the National Association of Securities Dealers (NASD) Code of Arbitration—were merged by the Court of Appeals for this decision.[4] In the first case, the Sacharow brothers, as executors of their father's estate, filed a statement of claim with the National Association of Securities Dealers (NASD) in 1994, seeking arbitration concerning investments made by Edward Greenhill, a Smith Barney broker. The plaintiffs contended that their father's medical condition, prior to his death, prevented him from monitoring his investments and that Greenhill consummated "risky and speculative investments, resulting in a substantial depletion of their father's investment account."[5] The customer agreement between the deceased and Smith Barney contained the following clauses: "(1) [a]ny controversy . . .

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1. 689 N.E.2d 884 (N.Y. 1997).
2. *See id.* at 884.
3. *See id.*
4. *See* NASD Code of Arbitration Procedure § 15 (1984).
5. *Sacharow*, 689 N.E.2d at 885.

shall be settled by arbitration' in accordance with the rules of the NASD Code; and (2) the agreement 'shall be governed by the laws of the State of New York without giving effect to [its] choice of law or conflict of laws provisions."[6] Both Greenhill and Smith Barney moved to block the arbitration arguing that the transactions in question were "executed six years prior to the filing of the statement of claim."[7] In addition, Greenhill and Smith Barney claimed that "eligibility for arbitration is an arbitrability question, whose determination is reserved solely to the courts."[8]

The stay initially was granted by the Supreme Court, New York County, but the plaintiffs' claims were later reconsidered by the court.[9] Upon reconsideration, the Supreme Court denied Smith Barney's application and ordered the parties to proceed with the arbitration.[10] The Appellate Division, First Department, affirmed noting that Section 15 of the NASD's Code of Arbitration Procedure contains claim limitations on the power of the arbitrator to entertain such claims, and that Section 15 is an eligibility requirement, and not a statute of limitations.[11] Regardless of whether the arbitration agreement contains a New York choice of law provision, an issue raised pursuant to Section 15 should be determined by the courts, "since eligibility is a question of substantive arbitrability."[12] The appellate court then concluded that the agreement in question "clearly and unambiguously indicate[d] that the parties agreed to arbitrate all disputes, including eligibility."[13]

In the second action, Vivian Hause, an elderly woman, invested in a highly speculative limited partnership based on Smith Barney's advice given to her in 1986 and 1987. After suffering substantial losses, Hause

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6. *Id.*

7. *Id.*

8. *Id.*

9. *See* Smith Barney Shearson, Inc. v. Sacharow, 656 N.Y.S.2d 203, 204 (1st Dep't 1997).

10. *See Sacharow*, 689 N.E.2d at 885.

11. *See Sacharow*, 656 N.Y.S.2d at 204.

12. *Id.*

13. *Id.* at 205.

filed a claim and an arbitration demand with the NASD.[14] The customer agreement between Hause and Smith Barney contained the same provisions as those found in the Sacharow agreement.[15] The Supreme Court, New York County, granted Smith Barney's motion to block the arbitration.[16] The Appellate Division, First Department, reversed, noting that while the eligibility provision found in Section 15 of the NASD Code constituted a question of arbitrability that should be decided by a court, here, the "clear and unmistakable evidence [is] that the parties intended that [arbitrability] would be decided by the arbitrator."[17] In addition, the Appellate Division held that the agreement overrode any "implication that could be drawn from a simple New York choice of law clause that the parties intended that the courts would decide Section 15 eligibility."[18] Based on this reasoning, the appellate court ruled that the issue should be kept out of the courts.

III. DISCUSSION

As mentioned above, the two proceedings are based on Section 15 of the NASD Code of Arbitration. The court noted that the applicable provisions of Section 15 of the NASD Code of Arbitration raise two questions: "arbitrability of the ineligibility time bar" and "the appropriate forum for the determination of that threshold issue[.]"[19]

The court began its discussion by addressing "whether the eligibility feature of Section 15 of the NASD Code [was] a condition precedent to arbitration, and, thus whether it constitute[d] a question of arbitrability."[20] The court held that Section 15 of the NASD Code, which provides that "[n]o dispute, claim, or controversy shall be eligible for submission

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14. *See Sacharow*, 689 N.E.2d at 886.
15. *See id.*
16. *See id.*
17. Smith Barney, Inc. v. Hause, 655 N.Y.S.2d 489, 491 (1st Dep't 1997).
18. *Id.* at 492.
19. *Sacharow*, 689 N.E.2d at 885.
20. *Id.* at 886.

to arbitration under this Code where six (6) years shall have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy[,]"[21] is not a "'mere' proceduralism" or statute of limitations, but rather a "substantive eligibility requirement."[22] The section "creates a substantive feature that may affect the right and obligation to arbitrate"[23] as it "limits the subject of, entitlement to and range of arbitrable matters."[24]

The court acknowledged the principle that the "question of arbitrability is an issue generally for judicial determination[.]"[25] However, it also noted that there is an exception to this rule;[26] this exception exists when the parties to the agreement "clearly and unmistakabl[y]" committed to arbitrating the issue of arbitrability.[27] The court then had to determine whether the parties in the present proceedings had "clearly and unmistakabl[y]" committed to arbitrate arbitrability as part of their alternative dispute resolution.[28]

In analyzing this issue, the court relied heavily on the decision of the United States Court of Appeals for the Second Circuit in *PaineWebber Inc. v. Bybyk*.[29] In that case, the court considered a provision in an arbitration agreement that provided that "any and all controversies ... shall be determined by arbitration" and held that such a clause clearly "evince[d] the parties' intent to submit issues of arbitrability to the arbitrators."[30] The court in *PaineWebber* further held that the "any and all" language encompassed disputes involving the scope and timeliness of

21. NASD Code of Arbitration Procedure § 15.

22. *Sacharow*, 689 N.E.2d at 887.

23. *Id.*

24. *Id.* at 886.

25. *Id.* at 887.

26. *See id.*

27. *Id.*

28. *Id.*

29. *See id.* (relying on the exception noted in *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996)).

30. *PaineWebber Inc.*, 81 F.3d at 1199.

claims.[31] Like the Second Circuit, the New York Court of Appeals in *Sacharow* also emphasized that the drafters of the arbitration agreements were primarily investment houses who could "adequately protect their interests with specificity of inclusion and exclusion."[32]

Next, the court in *Sacharow* looked at the language of Section 35 of the NASD Code, which provides that "[t]he arbitrators shall be empowered to interpret and determine the applicability of all provisions under [the NASD] Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s)."[33] The court concluded that this provision "commits all issues, including issues of arbitrability and timeliness, to the arbitrators[.]"[34]

The court then addressed the potential clash between an arbitration clause and a New York choice of law clause.[35] The court held that the "parties' contractual choice of New York law should not trump the core arbitration provision."[36] In making this determination, and distinguishing prior rulings that were based both on statutory and contractual issues,[37] the court emphasized that the issues in the instant case concerned only a *contractual* time limitation under the NASD.[38] The court relied on the U.S. Supreme Court's reasoning in *Mastrobuono v. Shearson Lehman Hutton*.[39] In that case, a customer agreement included a New York choice

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31. *See id.*

32. *Sacharow*, 689 N.E.2d at 887-88.

33. NASD Code of Arbitration Procedure § 35 (1992).

34. *Sacharow*, 689 N.E.2d at 888 (citing *FSC SEC Corp. v. Freel*, 14 F.3d 1310, 1312-13 (8th Cir. 1994) and *PaineWebber Inc.*, 81 F.3d at 1202).

35. *See id.*

36. *Id.*

37. The court explained that while the decision in *Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193 (1995), correctly held that New York statutory law requires that time limitations questions are for the courts, it is distinguishable as the issues in this appeal relate to *contractual* limitations questions agreed upon by the parties. *See Sacharow*, 689 N.E.2d at 889.

38. *See Sacharow*, 689 N.E.2d at 888-89.

39. 514 U.S. 52 (1995); *see Sacharow*, 689 N.E.2d at 889 (addressing the need to rely upon *Mastrobuono*).

of law provision and an arbitration clause that required that "any controversy" must be arbitrated according to the NASD's rules.[40] The arbitrator awarded punitive damages to the investor, and the brokerage house challenged the award on the ground that New York law prohibited arbitrators from awarding punitive damages.[41] Despite the New York law precluding the power of awarding punitive damages, the Supreme Court held that the arbitrator's decision was proper.[42] In reaching its decision, the Supreme Court held that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other."[43]

Based on this reasoning, the *Sacharow* court concluded that "[a] boilerplate choice of law clause [did] not necessarily signify the parties' acceptance of limitations imposed by New York law with respect to the contractually conferred power on an arbitrator to determine all issues, including arbitrability."[44] The court also held that the "choice of law provision . . . [did] not diminish the parties' intention to arbitrate 'any and all controversies.'"[45] The court further stated that "a choice of law clause incorporates substantive New York principles" without restricting "the scope of authority of the arbitrators."[46]

In conclusion, the court noted that "[t]his decision fortifies and advances the long and strong public policy favoring arbitration" which New York "favors and encourages as a means of conserving the time and resources of the courts and the contracting parties."[47] In addition, the court added that "[p]arties should be free to opt for [arbitration],"[48] and that "it would be ironic and anomalous to permit parties from the securi-

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40. *Mastrobuono*, 514 U.S. at 58-59.

41. *See id.* at 55.

42. *See id.*

43. *Id.* at 64.

44. *Sacharow*, 689 N.E.2d at 888.

45. *Id.* at 889.

46. *Id.*

47. *Id.*

48. *Id.* at 890.

ties industry, who generally derive benefits from the arbitration method they impose on their thousands of consumers, to elude the comprehensive language of their own industry-drafted arbitration agreements."[49]

IV. CONCLUSION

In *Sacharow*, the New York Court of Appeals held that the six-year eligibility provision of the National Association of Securities Dealers Code creates the substantive feature that, in certain instances, affects the right to arbitrate. In addition, the court held that New York choice of law provisions in customer agreements do not trump core arbitration provisions, nor do they diminish the intention of the parties to arbitrate "any and all controversies," including the question of arbitrability itself.

49. *Id.*

New York Botanical Garden v. Board of Standards and Appeals of New York[1]
(decided April 2, 1998)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that the Board of Standards and Appeals ("BSA") of the City of New York was entitled to deference in making decisions, and that its decisions will be upheld so long as they are reasonable, rational, and consistent with the governing statute.[2]

II. BACKGROUND

Since 1947, Fordham University has operated a broadcasting station as part of its educational program at its Rose Hill campus.[3] In 1993, Fordham applied to the New York City Department of Buildings ("DOB") for a permit to build a new broadcasting facility and attendant tower as an "accessory use" on its Rose Hill Campus.[4] The permit was issued by the DOB, and Fordham began construction.[5] The petitioner, the New York Botanical Garden, a neighboring landowner located near the eastern end of the campus, objected to the issuance of the permit, and the DOB commissioner issued an order to stop work until the issue could be resolved.[6] The commissioner later reissued the permit, informing Fordham that the DOB had determined that the radio station and tower did constitute an "accessory use" as that term is defined in Zoning Resolution section 12-10.[7] An administrative appeal and two public hearings followed, and the BSA affirmed the commissioner's determination and

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1. 694 N.E.2d 424 (N.Y. 1998).
2. *See id.* at 426.
3. *See id.* at 425.
4. *Id.* The broadcasting facility and tower were described as accessory uses to the principal use of the property, which was as an educational institution. *See id.*
5. *See id.*
6. *See id.*
7. *Id.* at 425-26.

rejected the petitioner's contention that the tower could be smaller or relocated to another site.[8] The BSA expressly ruled on the issue of whether the radio station and proposed tower are "incidental to" and "customarily found" in connection with a university's primary use; the BSA concluded that they were.[9]

The Botanical Garden then filed a petition under Article 78 of the CPLR, to repeal the BSA's ruling that the radio station and the tower constituted an accessory use of Fordham's property.[10] The supreme court dismissed the Botanical Garden's petition, holding that the BSA's determination was both rational and supported by substantial evidence.[11] The court rejected the petitioner's claim that the BSA's determination was arbitrary and capricious, stating that the petitioner was improperly relying on an aesthetic argument.[12] The court also found it significant that the construction of a new tower was a practical necessity in order for the station to comply with FCC regulations.[13] Additionally, the court noted that it would be abusing its judicial power to annul the BSA's determination because the BSA, comprised of expert members trained to consider all relevant factors with regard to zoning, real estate, and safety issues at the local level, determined that Fordham's application for a proposed tower constituted an accessory use.[14] Finally, the supreme court considered the timing of the Botanical Garden's petition, and questioned why it was not filed until the tower was half-constructed.[15] The petitioner appealed the decision.[16]

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8. *See id.* at 426.

9. *Id.*

10. *See id.*

11. *See* New York Botanical Garden v. Board of Standards and Appeals of New York, N.Y.L.J., June 19, 1996, at 25 (Sup. Ct. N.Y. County).

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See* New York Botanical Garden v. Board of Standards and Appeals, 656 N.Y.S.2d 242 (1st Dep't 1997).

The Supreme Court, Appellate Division unanimously affirmed the decision, holding that the BSA's decision was supported by substantial evidence that it is not uncommon for colleges and universities to own and operate radio stations and that the BSA's decision was rationally based on a statute that specifically lists radio towers as an accessory use.[17] The petitioner again appealed, and the New York Court of Appeals affirmed the appellate division's decision, noting that the BSA is comprised of many experts familiar with land use, planning and its interpretation of the Zoning Resolution.[18] As such, the BSA is entitled to deference so long as its interpretation of a resolution is neither "irrational, unreasonable nor inconsistent with the governing statute . . . ."[19]

III. DISCUSSION

The court began its analysis by reviewing Zoning Resolution section 12-10, and determined that there is a three-pronged test for determining whether a use qualifies as an accessory use.[20] First, the accessory use must be conducted on the same zoning lot as the principal use.[21] Second, it must be "clearly incidental to, and customarily found in connection with[,]" the principal use.[22] Third, there must be "unity of ownership, either legal or beneficial, between the principal and accessory uses."[23] The Botanical Garden took issue with the second prong of the three-part test and the BSA's determination that the tower was both incidental to, and customarily found in connection with, the principal use of the land as a university campus.[24] The Botanical Garden further argued that the "customarily found" inquiry presents an issue for legal, and not factual,

17. *See id.* at 242.

18. *See* New York Botanical Garden v. Board of Standards and Appeals, 694 N.E.2d at 426 .

19. *Id.*

20. *See id.* at 427.

21. *See id.*

22. *Id.*

23. *Id.*

24. *See id.*

interpretation.[25] Thus, the petitioner argued, the court should determine the "customarily found" question—it should not be left to the BSA.[26]

The court rejected the Botanical Garden's argument, and determined that whether the proposed tower and station uses are "clearly incidental to and customarily found in connection with" the principal use is a question of fact for the BSA to decide.[27] The court further noted that pursuant to section 659(b) of the New York City Charter, the BSA includes a city planner, an engineer, and an architect, and "[t]hese professionals unanimously determined that the radio station and the proposed tower are incidental to, and customarily found in connection with, [Fordham University]."[28]

The court then addressed the Botanical Garden's argument that the "customarily found" element of the definition of accessory use is a legal question.[29] The Botanical Garden relied on the court of appeal's decision in *Teachers Ins. & Annuity Ass'n v. City of New York*.[30] In that case, the court determined that whether a restaurant was of "special historical or aesthetic interest" under the Administrative Code of the City of New York was a question of fact better left to the expertise of the Landmarks Preservation Commission.[31] The question of whether the restaurant would only be given landmark status if it was "customarily open or accessible to the public," however, was a legal determination that would be made by the court.[32]

The court distinguished the *New York Botanical Garden* case from the *Teachers* case, stating that there is no dispute that radio stations and their attendant towers are incidental to the principal uses of college and university campuses in New York and in other states around the coun-

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. 623 N.E.2d 526 (N.Y. 1993).
31. *Id.* at 528.
32. *Id.* at 528-29.

try.[33] The court explained that the factual issue before the BSA was whether "a station of this particular size and power, with a 480-foot tower, [is] customarily found on a college campus or is there something inherently different in [Fordham's] radio station and tower that would justify treating it differently."[34] The court also noted that Botanical Garden initially objected to the size of Fordham's radio operations, arguing that it was highly unusual for a university to operate a station that is affiliated with National Public Radio and that broadcasts at a signal strength of 50,000 watts.[35]

To rebut these assertions, Fordham produced evidence that over 180 college or university radio stations are affiliated with National Public Radio, and over half of these operated at a signal strength of 50,000 watts.[36] Fordham also introduced evidence that building this tower was a necessity in order to comply with current FCC regulations and licensing requirements.[37] Based on the above evidence, the court found that the Botanical Garden's argument ignored the fact that the Zoning Resolution classification of accessory uses is based upon functional, rather than structural, specifics.[38] According to the court, there was more than adequate evidence for the BSA to conclude that the proposed radio station and tower use is customarily found in connection with a college or university.[39]

The court also addressed the concern that if it enacted a new restriction on accessory uses that was not found in the Zoning Resolution, it would be encroaching on the BSA's determination of the appropriate size and scope of towers based upon an individual assessment of need.[40] This determination must be made by the BSA, and courts may intervene only

33. *See New York Botanical Garden*, 694 N.E.2d at 427.

34. *Id.*

35. *See id.* at 428.

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.* at 428-29.

if the BSA's determination is arbitrary or capricious.[41]

Finally, the court addressed the Botanical Garden's argument that the BSA ignored its obligation to consider the environmental impact of the tower on an adjoining property before designating it as an accessory use.[42] More specifically, the Botanical Garden stressed the negative impact of such a tower on the unique nature of the Botanical Garden's buildings and grounds.[43] Although the court did not dismiss these legitimate concerns, it concluded that the environmental issues are not the legal issues presented in this case; instead, the court was asked to determine only whether the BSA's decision in permitting the accessory use on Fordham's property was arbitrary or capricious.[44]

IV. CONCLUSION

The New York Court of Appeals held that the BSA's ruling was entitled to deference, and that a 480-foot radio antenna tower built on the Fordham University campus was a permitted "accessory use" under the New York City Zoning Resolution.[45] The court found that substantial evidence supported the BSA's ruling, which the court found neither arbitrary nor capricious.[46]

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41. *See id.* at 429.
42. *See id.*
43. *See id.*
44. *See id.*
45. *Id.* at 427-28.
46. *See id.* at 428.

Diamond Asphalt, Corp. v. Sander[1]
(decided July 9, 1998)

I. SYNOPSIS

Recently, the New York Court of Appeals declared that New York City's current bid selection procedure violated General Municipal Law § 103(1),[2] which provides that contracts for "public work" must be awarded to the "lowest responsible bidder" unless otherwise provided by an act of legislature or a local law adopted prior to September 1, 1953.[3] Under the stricken procedure, a contract was awarded to the bidder whose combined bid for both the utility interference work and the street construction work portions of a project was the lowest bid, regardless of whether the bid for the street construction portion of the contract on its own was the lowest bid of its kind.[4]

II. BACKGROUND

In 1992, New York City entered into a joint bidding agreement with Con Edison, New York Telephone and Empire City Subway,[5] which covered City construction projects "mutually agreed upon" between the City and the utility companies.[6] Under the agreement, the City would "solicit bid specifications for all aspects of the work involved in a public project, including utility interference work"[7] — that work necessary to protect utility facilities during street repair projects.[8] The City agreed to award contracts to the bidder whose aggregate bid for both the utility interference work and the City's reconstruction work was the lowest re-

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1. 700 N.E.2d 1203 (N.Y. 1998).

2. *See id.* at 1215; *see also* N.Y. GEN. MUN. LAW § 103 (McKinney 1996).

3. *Diamond Asphalt*, 700 N.E.2d at 1208.

4. *See id.* at 1205 (describing the nature of the joint bidding agreement between the City of New York and Con Edison, New York Telephone and Empire City Subway).

5. *See id.*

6. *Id.*

7. *Id.*

8. *See id.* at 1204.

ceived.[9] However, under the agreement, the lowest combined bidder was often not the lowest bidder for the City's share of the work.[10]

In the transaction at issue in the present case, Diamond Asphalt Corporation submitted the lowest bid for the City's portion of the work, but its aggregate bid, which included the utility work, was not the lowest bid received by the City.[11] After the City awarded the contracts at issue to the lowest aggregate bidder, the City Chief Procurement Officer issued a letter to Diamond advising the company that the City had invoked its "bypass authority" under New York City Charter § 313(b)(2).[12] Bypass authority allows the Mayor, who delegated this authority to the City Chief Procurement Officer, to award a contract to a bidder other than the lowest responsible bidder when it is determined to be in the "best interest of the City."[13]

Diamond initiated legal proceedings pursuant to CPLR article 78, challenging the City's selection methods, and sought a preliminary injunction to prevent certification of the contracts.[14] The City, along with several intervenor-respondent utility companies, moved to dismiss the petition.[15]

The Supreme Court denied the preliminary injunction and granted the respondent's motion to dismiss holding that utility interference work was not "public work" under General Municipal Law § 103(1).[16] In determining the lowest responsible bidder, the court found that the City could not consider the amount bid for the utility interference work.[17] The court also determined that the Mayor's "bypass" authority under Charter

9. *See id.* at 1205.

10. *See id.*

11. *See id.*

12. *Id.* at 1206; *see also* N.Y. CITY CHARTER ch. 13 § 313(b)(2) (1989).

13. N.Y. CITY CHARTER ch. 13 § 313(b)(2)(1989); *see also Diamond Asphalt,* 700 N.E.2d at 1207.

14. *See Diamond Asphalt,* 700 N.E.2d at 1206.

15. *See Diamond Asphalt,* 700 N.E.2d at 1206-07.

16. *Id.* at 1207; *see also* N.Y. GEN. MUN. LAW § 103(1).

17. *See Diamond Asphalt,* 700 N.E.2d at 1207.

§ 313(b)(2) allows the City to award contracts to bidders other than the lowest responsible bidder.[18]

The Appellate Division affirmed the trial court's decision stating that the Mayor lawfully invoked his Charter § 313(b)(2) bypass authority.[19] The court found that the Mayor's exercise of the bypass authority did not violate General Municipal Law § 103(1) because such "authority was established prior to September 1, 1953 and was merely revised and restated upon its transfer to the Mayor when the Board of Estimate was abolished."[20] Further, the Appellate Division reversed the trial court and held that the utility interference work did constitute public work under General Municipal Law § 103(1).[21]

III. DISCUSSION

The Court of Appeals began its analysis by resolving two "threshold matters."[22] First, the court acknowledged that the injunctive proceeding was moot since "the work under the contracts at issue [was] completely or substantially done. . . ."[23] The court therefore converted the matter into a declaratory judgment action because the issues presented constituted a clear legal challenge to the validity of the bidding regimen being used by the City.[24]

Second, the court addressed Diamond's contention that the Appellate Division should not have considered whether utility interference work is public work and therefore properly included in determining the lowest

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18. *Id.*; *see also* N.Y. CITY CHARTER ch. 13 § 313(b)(2)(1989).

19. *See* Diamond Asphalt Corp. v. Sander, 656 N.Y.S.2d 248, 249 (1st Dep't 1997); *see also Diamond Asphalt*, 700 N.E.2d at 1207.

20. *Diamond Asphalt*, 656 N.Y.S.2d at 249; *see also* Diamond Asphalt, 700 N.E.2d at 1207 (quoting the Appellate Division decision).

21. *See Diamond Asphalt*, 656 N.Y.S.2d at 249; *see also Diamond Asphalt*, 700 N.E.2d at 1207.

22. *Diamond Asphalt*, 700 N.E.2d at 1207.

23. *Id.*

24. *See id.*

responsible bidder.[25] Diamond asserted that the City raised this argument for the first time on appeal "in response to the trial court's analysis."[26] The court determined that the argument was preserved under what it termed "unusual circumstances" since it was ruled on by both lower courts and the parties were "aware of its potential significance."[27]

Next, the court considered whether private utility interference work constitutes "public work" under General Municipal Law § 103(1), when, as under the joint agreement, municipalities determine the "lowest responsible bidder" through a combined assessment of bids for utility interference work and street construction work.[28]

Since neither General Municipal Law § 103(1) nor its legislative history define the term "public work,"[29] the court instead looked to prior cases where courts evaluated whether a contract constituted "public work."[30]

Under the case law, the court found that in determining whether a particular contract involves public work it is necessary to look at the "total character of the arrangement."[31] In applying this test, "the [c]ourt has stressed the importance of ensuring that the underlying purposes of the competitive bidding statutes are not violated --i.e., that there is no potential for fraud and that the Legislature's objectives are complied with."[32]

The court considered the rationale used in the contracts cases and concluded that the utility work at issue did not constitute public work under General Municipal Law § 103.[33] Although the Court felt that the

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25. *See id.*

26. *Id.*

27. *Id.* at 1208.

28. *Id.* at 1204.

29. *Id.* at 1208.

30. *Id.*

31. Citiwide News v. New York City Transit Auth., 467 N.E.2d 241 (N.Y. 1984); *see also Diamond Asphalt*, 700 N.E.2d at 1209.

32. *Diamond Asphalt*, 700 N.E.2d at 1213.

33. *See id.* at 1210.

"core" of the transactions involved public work,[34] the Court did not believe that the joint bidding agreement and side addendum[35] transformed the private utility interference work into public work. The court noted that side agreements (also called "commitment letters" or "side-bar letters") were not part of the formal joint bidding agreement and that the utility companies were given the "opportunity to review the accepted bid and the differential in the constituent parts of the bid before signing onto the side-bar letter."[36] Therefore, the court believed that the agreement in the instant case was contradictory to the public bidding process[37] and "open[ed] the door to fraud."[38]

The court next addressed whether New York City Charter § 313(b)(2), as adopted in 1989, is valid under General Municipal Law § 103(1).[39] The court addressed the argument that bypass power was contained in the previous charter, and thus Charter § 313(b) is a "mere revision, simplification, consolidation, codification or restatement of a pre-September 1, 1953 special law or local law" which should be considered a local law adopted prior to September 1, 1953.[40]

First, the court noted that the Legislature did not classify Charter § 313 as a "mere revision, simplification, consolidation, codification or restatement" of the previous Charter.[41] The court did not believe that

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34. *Id.*

35. *See id.* Under the joint bidding agreement at issue, the City would pay the accepted contractor for the entire project including the utility interference work. The utility companies would then be obligated to reimburse the City for their portion of the work. Under the "side addendums" at issue, the utility companies, after the contract was awarded, would agree that the cost for their portion of the work would be adjusted to include the difference between the accepted contractor's bid for the City's portion of the work and the lowest bid received for the City's portion of the work. *See Diamond Asphalt*, 700 N.E.2d at 1205-06.

36. *Id.* at 1212.

37. *See id.* at 1214.

38. *Id.* at 1212 (citing Matter of Signacon Controls v. Mulroy, 298 N.E.2d 670 (N.Y. 1973)).

39. *See id.* at 1214.

40. *Id.* at 1214-15 (quoting 1981 Opns. St. Comp. No. 81-109, at 111).

41. *Id.* at 1215 (quoting 1981 Opns. St. Comp. No. 81-109, at 111).

Charter § 313 should be classified as such since the bypass power, which was held originally by the now-defunct Board of Estimate, was transferred in the 1989 amendment to the Mayor.[42] The court stated that to effectuate such a power reallocation and override the plain language of the General Municipal Law, the legislature would need to clearly declare its intention to continue and transfer the bypass authority to the Mayor.[43]

Further, the court stated that even if Charter § 313 could be classified as a mere revision or recodification of the old charter provision, neither the Legislature or the Court of Appeals has determined "that such enactments fit within the General Municipal Law exception."[44] Again, the Court believed that clearer guidance from the legislature would be necessary to make such a determination.[45]

IV. DISSENT

Chief Judge Kaye filed a dissenting opinion in which Judge Wesley concurred, concluding that the "total character" of the joint bidding "arrangement" was of a "public work" nature since the overriding goal was to reconstruct the City streets.[46] Judge Kaye characterized the utility interference work, which accounted for less than ten percent of the total cost of the street construction projects, as "incidental."[47] Finding this determination dispositive, the Chief Judge did not reach the bypass authority issue.[48]

V. CONCLUSION

Municipalities may no longer include the amount bid for private util-

42. *See id.*
43. *See id.*
44. *Id.*
45. *See id.*
46. *Id.* at 1218. (Kaye, C.J., dissenting).
47. *Id.* (Kaye, C.J., dissenting).
48. *See id.* at 1215 (Kaye, C.J., dissenting).

ity interference work in determining the lowest responsible bidder for street reconstruction contracts. Further, the Mayor may no longer invoke bypass authority under Charter § 313 (b)(2) to award contracts to bidders other than the lowest responsible bidder in order to effectuate agreements similar to New York City's joint bidding agreement.

People v. Hidalgo[1]
(decided June 4, 1998)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals resolved a conflict among the departments of the Supreme Court, Appellate Division by holding that a defendant's plea waiver agreement of her right to appeal included the right to challenge her sentence as harsh and excessive.[2]

II. BACKGROUND

On February 24, 1996, Ms. Sarita Hidalgo, defendant, was involved in a street fight where one of her associates assaulted a woman by slashing her in the face.[3] The Erie County Grand Jury indicted Ms. Hidalgo of assault in the first degree[4] on June 27, 1996.[5] Ms. Hidalgo pleaded guilty to attempted assault in the first degree[6] in accordance with a negotiated plea agreement on October 2, 1996.[7] Judge Michael L. D'Amico of the Erie County Court reviewed the agreement and informed Ms. Hidalgo that the court could sentence her to prison for up to seven years, probation for up to five years, and/or impose a fine of up to $5,000.[8] Ms. Hidalgo "confirmed that she understood the court's options, and that no 'promises or commitments' had been made concerning her sentence."[9] She then waived her right to appeal with no limitations, stating that she understood that she could not return to any court to set aside the negoti-

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1. 698 N.E.2d 46 (N.Y. 1998).
2. *See id.* at 46.
3. *See id.*
4. *See* N.Y. PENAL LAW § 120.10 (McKinney 1996).
5. *See Hidalgo*, 698 N.E.2d at 46.
6. *See* N.Y. PENAL LAW § 110.05 (McKinney 1996).
7. *See Hidalgo*, 698 N.E.2d at 46.
8. *See id.* at 48.
9. *Id.*

ated plea agreement.[10] On November 22, 1996, Judge D'Amico sentenced Ms. Hidalgo to one to three years imprisonment.[11]

Ms. Hidalgo appealed to the Supreme Court, Appellate Division, Fourth Department, arguing that her sentence was harsh and excessive.[12] The appellate division unanimously affirmed her conviction without opinion.[13] The New York Court of Appeals granted leave to appeal.[14] The court of appeals affirmed the lower courts, holding that Ms. Hidalgo's waiver of appeal encompassed the right to appeal her sentence, even though she did not know her sentence at the time of the waiver.[15]

III. DISCUSSION

Ms. Hidalgo argued that her waiver of appellate review did not include the right to appeal her sentence because she did not expressly waive that right and she did not know her sentence at the time of her waiver.[16] Judge Wesley, writing for the court, found this argument flawed and began the analysis by examining the process and effect of a New York plea bargain.[17]

In *People v. Seaberg*,[18] the New York Court of Appeals stated that plea bargains are a "necessary part of the criminal justice system."[19] A plea bargain helps "conserve prosecutorial and judicial resources, provide prompt resolution of criminal proceedings, and permit swift and certain punishment of law violators."[20] When a defendant enters a plea

10. *See id.*
11. *See id.* at 47.
12. *See* People v. Hidalgo, 664 N.Y.S.2d 903 (4th Dep't 1997).
13. *See id.*
14. *See* People v. Hidalgo, 698 N.E.2d at 47.
15. *See id.* at 48.
16. *See id.* at 47.
17. *See id.*
18. 541 N.E.2d 1022 (N.Y. 1989).
19. *Hidalgo*, 698 N.E.2d at 47 (citing *Seaberg*, 541 N.E.2d at 1024).
20. *Id.* (citing *Seaberg*, 541 N.E.2d at 1024).

pursuant to a plea bargain, the defendant waives the right to appeal the conviction and sentence.[21]

When a plea is entered, the trial court must determine whether the plea is made voluntarily, knowingly, and intelligently by assessing "a number of relevant factors, including the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused."[22] "The role of the appellate courts is to review the [trial court's] record to ensure that the defendant's waiver reflects a knowing, intelligent and voluntary choice."[23] As long as the plea waiver is "on the record and is voluntary, knowing and intelligent,"[24] the waiver is enforceable and includes "all appealable issues of the case, including those relating to the sentence . . . ."[25]

The four departments of the appellate division have disagreed, however, on the scope of the waiver as it relates to a defendant who did not receive a specific sentence promise as part of the plea agreement.[26] In *People v. Chandler*,[27] the fourth department held that even when a defendant enters into a plea agreement without a specific sentence promise, the appeal waiver includes all issues related to the sentence.[28] In *People v. Leach*[29] and *People v. Maye,*[30] on the other hand, the second and third departments, respectively, held that the waiver does not include the right to review a sentence "if [the] defendant is unaware of the sentence at the time of the appeal waiver."[31]

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21. *See id.* (citing *Seaberg*, 541 N.E.2d at 1025).

22. *Id.* at 47-48 (citing *Seaberg*, 541 N.E.2d at 1026; People v. Callahan, 604 N.E.2d 108, 112 (N.Y. 1992)).

23. *Id.* at 48.

24. *Id.* at 47.

25. *Id.*

26. *See id.* at 47.

27. 626 N.Y.S.2d 893 (4th Dep't 1995).

28. *See id.* at 894.

29. 611 N.Y.S.2d 17 (2d Dep't 1994).

30. 532 N.Y.S.2d 609 (3d Dep't 1988).

31. *Hidalgo*, 698 N.E.2d at 47.

Ms. Hidalgo argued that her waiver was neither knowing nor intelligent because she did not know her sentence at the time of the plea and she did not expressly waive her right to appeal the sentence.[32] After review of the trial court record, the court of appeals found that Ms. Hidalgo was advised of the sentencing options. She stated that she understood the court's options, and she "expressly waived her right to appeal without limitation."[33] The court of appeals concluded that Ms. Hidalgo "knowingly and intelligently waived her right to appeal from any and all aspects of her case, including the sentence."[34] The court conceded that Ms. Hidalgo did not expressly waive the right to challenge her sentence; however, it also noted that trial courts are not required to "engage in any particular litany during an allocution in order to obtain a valid guilty plea in which defendant waives a plethora of rights."[35]

The court of appeals affirmed the holding in another decision delivered on the same day. *People v. Lococo*,[36] a consolidation of two separate cases for the purposes of appeal, involved defendants who challenged the severity of their sentences after entering into a plea agreement.[37] The defendants claimed that since they did not know the specific sentence at the time of the waiver, they did not waive the right to appeal the sentence in their plea agreements.[38] The court stated that the defendants were informed of the maximum sentence the trial court could impose as a result

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32. *See id.* at 48.

33. *Id.*

34. *Id.*

35. *Id.* (quoting People v. Moissett, 564 N.E.2d 653, 654 (N.Y. 1990)).

36. 699 N.E.2d 416 (N.Y. 1998).

37. *See id.* at 417. In *Lococo*, defendants Ellen and Michael Lococo were convicted in the Justice Court, Town of Cheektowaga, of endangering the welfare of a child. *See id.* at 416. They each entered a plea of guilty, waived the right to appeal, and were sentenced. *See id.* at 417. In *Lococo*'s companion case, *People v. Stanley*, defendant Jeffrey Stanley was convicted in the same Cheektowaga court of criminal trespass, criminal mischief, and petit larceny. *See id.* at 416. He also entered a plea of guilty, waived the right to appeal, and was sentenced. *See id.* at 417.

38. *See id.* at 417.

of the conviction.[39] Thus, the court, in an unanimous memorandum, cited *Hidalgo* and held that "[e]ach defendant voluntarily, knowingly and intelligently waived the right to appeal from any and all aspects of their case, including the severity of the sentence."[40]

IV. CONCLUSION

The *Hidalgo* court held that a defendant's plea agreement waiver of appellate review encompasses the right to review the sentence as harsh and excessive when the defendant is aware of the maximum sentence the trial court may impose.[41] The question of how the defendant is made aware of the trial court's sentencing options and the accuracy of that information arose in *People v. Garcia*.[42] In a memorandum decision, the court held that when a defendant allegedly receives inaccurate information from his attorney about the possible sentence under the plea agreement, this misinformation must be considered when determining whether the plea was voluntary, knowing and intelligent.[43] Yet, the court noted, misinformation is not dispositive of the determination.[44] In *Garcia*, the court considered the length of the defendant's sentence and determined that the plea was voluntary, knowing and intelligent.[45]

In October, the Appellate Division, Third Department, considered the question of whether a defendant who is unaware of the sentencing options available can challenge his sentence as harsh and excessive after *Hidalgo*. In *People v Shea*,[46] defendant James Shea pleaded guilty to grand larceny in the second degree and was sentenced to three and a third

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39. *See id.*
40. *Id.*
41. *See Hidalgo*, 698 N.E.2d at 48.
42. 700 N.E.2d 311 (N.Y. 1998).
43. *See id.* at 311.
44. *See id.*
45. *See id.*
46. 679 N.Y.S.2d 428 (3d Dep't 1998).

to ten years imprisonment.[47] Mr. Shea executed a written waiver of his right to appeal, which stated he waived this right "willingly, knowingly and intelligently."[48] He was neither "specifically questioned" as to whether he understood the terms, nor advised of the maximum sentence under his plea agreement.[49] Mr. Shea appealed the sentence as harsh and excessive.[50]

The Appellate Division, Third Department, distinguished Mr. Garcia's case from *Hidalgo*. The third department stated that in *Hidalgo*, "the trial court had explained to the defendant the range of sentencing options available, including the maximum period of incarceration, at the time of the plea."[51] Thus, because the trial court did not advise Mr. Shea "of the maximum sentence that he could face when he waived his right to appeal," his waiver under the plea "did not encompass the right to challenge his sentence."[52] After reviewing Mr. Garcia's sentence, the third department found the sentence appropriate and affirmed the trial court's decision.[53]

The defendant's knowledge of the sentencing options available to the trial court may be an important element to the holding in *Hidalgo*. Under *Hidalgo* and *Garcia*, if the defendant is unaware of the sentencing options available, the appellate court will take this factor under considera-

47. *See id.* at 429.

48. *Id.*

49. *See id* at 429-30.

50. *See id.*

51. *Id.* at 430.

52. *Id.*

53. *See id.*

tion in reviewing whether the plea was knowing, voluntary, and intelligent.

Kass v. Kass[1]
(decided May 7, 1998)

I. SYNOPSIS

In a matter of first impression, the New York Court of Appeals unanimously held that agreements between gamete donors, or progenitors, concerning disposition of their pre-zygotes should generally be enforced in a dispute between them.[2] The court also held that the informed consents signed by the parties manifested their mutual intention that the pre-zygotes be donated to an in vitro fertilization ("IVF") program for research.[3]

II. BACKGROUND

Appellant Maureen Kass and her husband, respondent Steve Kass, participated in an IVF[4] program after unsuccessful efforts to conceive a child.[5] During the final IVF procedure, five pre-zygotes were cryopreserved for future use.[6] The parties signed four consent forms supplied by the hospital.[7] Later, when the couple decided to dissolve their marriage, they each signed an "uncontested divorce" agreement prepared by the appellant.[8] This agreement included a clause stating that the five pre-zygotes "should be disposed of [in] the manner outlined in our consent

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1. 696 N.E.2d 174 (N.Y. 1998).
2. *See id.* at 180.
3. *See id.* at 181.
4. Generally, the IVF process starts by stimulating a woman's ovaries. This stimulation produces eggs which are removed and placed in a glass dish. The pre-zygotes are formed when sperm cells are added to the dish, thus fertilizing the eggs. The pre-zygotes are either transferred to the woman's uterus or cryopreserved for future use. *See id.* at 175.
5. *See id* at 181.
6. *See id.* Cryopreservation reduces physical and medical costs because delay may enhance chances of pregnancy and eggs need not be recovered every time implantation is attempted. *See id.*
7. *See id.* at 176.
8. *Id.* at 177.

form and that neither Maureen Kass[,] Steve Kass or anyone else will lay claim to custody of these pre-zygotes."[9]

Appellant then brought this matrimonial suit seeking sole custody of the pre-zygotes.[10] The supreme court granted custody to appellant[11] and the appellate division reversed.[12] A two-justice plurality held that the parties intended to donate their pre-zygotes for research in the event that they failed to reach a mutual decision regarding disposition.[13] The court of appeals agreed with the plurality and affirmed.[14]

III. DISCUSSION

The court of appeals began its analysis with a summary of the law on the disposition of frozen embryos.[15] The court stated that New York has not yet adopted a statute dealing with this issue and that only one case nationwide has set out guidelines to resolve disputes between a divorcing couple regarding the disposition of stored embryos.[16] In *Davis v. Davis*,[17] the Supreme Court of Tennessee held that when a prior written agreement between the parties does not exist, courts must balance the parties' competing interests.[18]

Because statutory and case law is minimal, the New York Court of Appeals turned to commentary for suggestions on the disposition of dis-

9. *Id.*

10. *See id.*

11. *See id.*

12. *See id.*; Kass v. Kass, 663 N.Y.S.2d 581, 590 (2d Dep't 1997).

13. *See Kass*, 663 N.Y.S.2d at 587-88.

14. *See Kass*, 696 N.E.2d at 178.

15. *See id.*

16. *See id.* at 178.

17. 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, Stowe v. Davis, 507 U.S. 911 (1993). Unlike *Davis*, in *Kass* it was not necessary for the court to decide whether it should balance the parties' interests because both parties signed informed consent agreements and an uncontested divorce document. *See Kass*, 663 N.Y.S.2d at 586.

18. *See Davis*, 842 S.W.2d at 604.

putes involving pre-zygotes.[19] The court outlined four approaches on this issue.[20] The first approach suggested that control should be vested in one of the gamete donors.[21] The second approach implied a contract to procreate based on the parties' involvement in an IVF program.[22] The third approach considered the gamete donors to have a "bundle of rights" relating to the pre-zygotes; the gamete donors could then exercise these rights through "joint disposition agreements."[23] The final approached suggested that an embryo should not be destroyed, implanted or used in research if a person with decision-making authority objects.[24] Following this brief description of the various approaches to disposing of stored pre-zygotes, the court turned to the appeal before it.[25]

Before addressing the central issue of the case, however, the court disposed of the issue of whether pre-zygotes are entitled to "special respect."[26] It was not necessary to address the issue of "special respect" in this case, reasoned the court, because the parties' agreement answered the question of who has dispositional authority over the pre-zygotes.[27] The informed consents provided by the IVF program were signed by the parties before cryopreservation, and manifested their intent regarding disposition of the pre-zygotes.[28]

The central issue was "whether the consents clearly express[ed] the parties' intent regarding disposition of the pre-zygotes in the present cir-

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19. *See Kass*, 696 N.E.2d at 179.

20. *See id.*

21. *See id.*

22. *See id.*

23. *Id.*

24. *See id.* (citing NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY, 317-20 (1998)).

25. *See Kass*, 696 N.E.2d at 179.

26. *Id.* The court also concluded that a woman's right of privacy is not implicated with respect to the disposition of pre-zygotes, nor are pre-zygotes considered "persons" under the Constitution. *Id.*

27. *Id.*

28. *See id.* at 180.

cumstances."[29] "Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them."[30] The respondent argued that the consents clearly indicated that the pre-zygotes should be transferred to the IVF program for research.[31] The appellant, on the other hand, argued that the consents were too ambiguous on this issue.[32]

Specifically, the appellant claimed there were two ambiguities in the consents.[33] According to the appellant, the first ambiguity was in "INFORMED CONSENT NO. 2."[34] The sentence states: "In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction."[35] The appellant interpreted this sentence to mean: "In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined by a court of competent jurisdiction."[36] The second ambiguity argued by appellant was that the "ADDENDUM NO. 2-1," the "STATEMENT OF DISPOSITION," was limited to situations involving "death or other unforeseen circumstances."[37]

To resolve the issue of ambiguity, the court looked to the language of these consents. First, it noted that the consents included words such as "we," "us," and "our," indicating that the disposition of the pre-zygotes

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29. *Id.*
30. *Id.*
31. *See id.*
32. *See id.*
33. *See id.* at 181.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 182. ADDENDUM NO. 2-1 stated: "In the event that we [. . .] are unable to make a decision regarding disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF Program to examin[e] [them] for biological studies and dispos[e] of [them] for approved research investigation as determined by the IVF Program." *Id.* at 181.

must be a joint decision.[38] Second, the court agreed with the appellate division's resolution of the ambiguities.[39] If the informed consents were read as suggested by the appellant, the courts would have control over the disposition of the pre-zygotes.[40] This interpretation would conflict with the parties' intent as expressed in the informed consents.[41] Finally, the "uncontested divorce" agreement, even though inoperative, supported the parties' intent to dispose of the pre-zygotes only by joint agreement.[42] Therefore, the court held that "the parties unequivocally manifest[ed] their mutual intention that in the present circumstances the pre-zygotes be donated for research to the IVF program."[43]

IV. CONCLUSION

The New York Court of Appeals resolved the issue of how pre-zygotes should be disposed when the gamete donors sign informed consents agreeing to their disposition.[44] The court held that these agreements

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38. *Id.*

39. *See id.* at 181-82.

40. *See id.* at 182.

41. *See id.*

42. *Id.* at 181-82. The court explained that extrinsic evidence cannot produce ambiguity in agreements; however, the appellate division plurality properly used the "uncontested divorce agreement" to settle any ambiguity. *See id.*

43. *Id.* at 181.

44. *See id.* at 180.

should generally be enforced when there is a dispute between the parties.[45] In the case at bar, the informed consents unambiguously manifested the parties' "mutual intention that in the present circumstances the pre-zygotes be donated for research to the IVF program."[46]

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45. *See id.*

46. *Id.* at 181.

Manning v. Brown[1]
(decided November 20, 1997)

I. SYNOPSIS

The New York Court of Appeals held that a passenger's knowing participation in the unauthorized use of a stolen vehicle precluded her from maintaining her action to recover for injuries sustained as a result of that conduct.[2]

II. BACKGROUND

On April 21, 1993, plaintiff, Christina Manning, defendant, Karla Amidon, and a third girl were riding in a truck driven by a fourth friend when Amidon noticed a parked car belonging to Ralph and Julie Brown.[3] Amidon requested that the truck be stopped so that she could search the Browns' car for loose change.[4] While searching, Amidon found the keys to the car under some papers.[5] Amidon started the car, inviting Manning and the third friend to join her.[6] After driving around for a while, Manning switched places with Amidon and began driving the Browns' car.[7] Later, Manning and Amidon again switched places so that Amidon was driving.[8] Manning then suggested that the radio station be adjusted.[9] While Amidon adjusted the station, the car swerved and collided with a pole.[10] Manning later commenced this negligence action against Amidon and the Browns.[11]

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1. 689 N.E.2d 1382 (N.Y. 1997).
2. *See id.* at 1383.
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*

Deposition testimony indicated that Amidon did not have permission to drive the Browns' car.[12] Mr. Brown testified that he believed he had left the extra set of keys at home in his kitchen.[13] The Browns moved for summary judgment based on the lack of permission to use their vehicle.[14] Amidon also "moved for summary judgment based upon plaintiff's participation in a serious crime."[15] Manning filed a cross-motion for further discovery.[16] The Supreme Court, Essex County, granted the defendants' motions for summary judgment and denied the remaining requests for relief.[17] The Appellate Division, Third Department, affirmed.[18]

III. DISCUSSION

The Court of Appeals began its analysis by restating the rule set forth in *Barker v. Kallash*:[19] Where a plaintiff has engaged in a serious violation of the law and seeks recovery for injuries that are the direct result of such conduct, recovery will be denied as a matter of public policy.[20] The court in *Manning* acknowledged that in *Barker*, conduct regulated by statute was distinguished from conduct "entirely prohibited by law."[21] The court explained that violating a statute that governs the manner in which activities are conducted constitutes negligence, and thus the principles of comparative negligence are applicable. Therefore, a complaint will not be dismissed simply because the plaintiff has engaged in prohibited conduct.[22] However, where a plaintiff's injuries are "a direct result

12. *See id.*
13. *See id.*
14. *See id.*
15. *Id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. 468 N.E.2d 39 (N.Y. 1984).
20. *See id.* at 41.
21. *Manning*, 689 N.E.2d at 1384.
22. *See id.*

of a serious violation of the law involving hazardous activities which were not justified under the circumstances[,]" the plaintiff is precluded from maintaining an action to recover for injuries sustained.[23]

After determining that Manning's injuries were the direct result of her illegal activity, the court had to determine whether the conduct was "such a serious violation of the law that she should be precluded, as a matter of public policy, from recovery."[24] The court noted that joyriding is usually accompanied by reckless or excessively fast driving, which poses a danger not only to the participants but also to the public.[25] Therefore, joyriding is a sufficiently serious violation of law so that, as a matter of public policy, Manning was precluded from recovery for injuries sustained while engaged in that conduct.[26]

The court next determined that the Browns were entitled to summary judgment. The court determined that they did not violate Vehicle and Traffic Law § 1210(a), which provides that a person or driver of a vehicle shall not leave the vehicle unattended without "stopping the engine, locking the ignition, removing the key from the vehicle . . . provided, however, the provision for removing the key from the vehicle shall not require the removal of keys hidden from sight about the vehicle for convenience or emergency."[27] As Amidon testified that she had found the keys underneath some papers and Mr. Brown testified that he believed the keys to be at home in his kitchen, plaintiff was unable to create a factual dispute regarding concealment of the keys.[28] The Browns were therefore entitled to summary judgment, and the court affirmed the order of the Appellate Division.[29]

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23. *Barker*, 468 N.E.2d at 42.
24. *Manning*, 689 N.E.2d at 1384.
25. *See id.* at 1384-85.
26. *See id.* at 1385.
27. N.Y. VEH. & TRAF. LAW § 1210(a) (McKinney 1996).
28. *See Manning*, 689 N.E.2d at 1385.
29. *See id.*

IV. CONCLUSION

The New York Court of Appeals has determined that unauthorized use of a motor vehicle constitutes a sufficiently serious violation of the law so as to preclude, as a matter of public policy, an action to recover for injuries sustained as a direct result of that violation.

Johnson v. Pataki[1]
Martinez v. Pataki
(decided December 4, 1997)

I. SYNOPSIS

In a 4-3 decision written by Chief Justice Judith Kaye, the New York Court of Appeals narrowly upheld the Governor's executive order which superseded and replaced a local District Attorney with the State Attorney General in a potential death penalty prosecution.[2] The Court of Appeals also held that the matter was not rendered moot by the facts that one defendant committed suicide and that the state dropped the charges against the other two defendants after they were prosecuted in federal court.[3]

II. BACKGROUND

Since 1973, the New York Legislature tried to revive the death penalty in the State of New York.[4] From 1973 to 1984, the New York Court of Appeals struck down several capital punishment statutes due to constitutional defects.[5] From 1978 to 1994, Democratic Governors Hugh Carey and Mario Cuomo vetoed all capital punishment bills that the Legislature passed.[6] In 1995, the New York Legislature re-enacted the death penalty as part of a set of criminal sentencing statutes.[7] Republican Governor George Pataki signed the bill into law as he had promised during his election campaign.[8] However, in order to withstand constitutional chal-

1. 691 N.E.2d 1002 (N.Y. 1997).

2. *See infra* notes 62-86 and accompanying text.

3. *See infra* notes 43-61 and accompanying text.

4. *See* 691 N.E.2d at 1015 n.4 (Smith, J., dissenting) (giving a brief history of capital punishment in New York).

5. *See id.*

6. *See id.*

7. *See* N.Y. PENAL LAW § 60.06 (McKinney 1998).

8. *See* James Dao, *Death Penalty in New York Reinstated After 18 Years, Pataki Sees Justice Served*, N.Y. TIMES, March 8, 1995, at A1.

lenges,[9] the Legislature did not make the death penalty an automatic sentence; it is an option which the prosecution must select in a first degree murder case.[10] The other option the provision allows is life sentence without parole.[11]

On the day the legislature passed the law, Robert Johnson, the publicly-elected Bronx District Attorney, issued a statement expressing his views on the legislation.[12] District Attorney Johnson stated that he had concerns about the death penalty and that, while he will exercise his discretion to aggressively pursue life without parole in every appropriate case, it was his "present intention not to utilize the death penalty provisions of the statute."[13] Governor Pataki interpreted this as a "blanket policy" on the part of District Attorney Johnson and was concerned that Mr. Johnson was substituting his will over the will of the Legislature and that the statute would be challenged as being carried out disproportionately throughout the state.[14]

The Governor's and the Bronx D.A.'s discord was immediately tested in a prosecution prior to the one at issue here. In December 1995, four months after the law became effective, a multiple homicide occurred in the Bronx.[15] A suspect was accused and indicted. The day after the indictment, Governor Pataki asked Mr. Johnson if he would seek the death penalty in these murders.[16] The Governor further asked that, if Mr. Johnson was not seeking the death penalty, was that decision based on the specific facts of the case or a "policy decision not to seek the death penalty in any case in Bronx County."[17] Mr. Johnson responded that he

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9. *See* 691 N.E. 2d at 1015 (Smith, J., dissenting) (noting that "the Legislature tread[ed] carefully"). *Id.*

10. *See* N.Y. PENAL LAW § 60.06.

11. *See id.*

12. *See* Adam Nossiter, *In New York City a Mixed Response from Prosecutors*, N.Y. TIMES, March 8, 1995, at B5.

13. *Id.*

14. N.Y. COMP. CODES R. & REGS. tit. 9, § 5.27 (1996).

15. *See id.* (noting the prosecution of Michael Vernon).

16. *See id.*

17. *Id.*

had reviewed the facts and intended to "exercis[e] [his] statutory discretion" and seek life without parole.[18] However, Mr. Johnson did not address the question whether or not he had a "blanket policy" with regard to capital prosecution in the Bronx.[19] Nonetheless, the Governor accepted the Bronx D.A.'s decision "with grave reservations."[20]

Four months later, the conflict between the Governor and the Bronx D.A. culminated. On March 14, 1996, New York City Police Officer Kevin Gillespie was killed in the line of duty in the Bronx.[21] Angel Diaz was apprehended and later indicted for first degree murder in connection with Officer Gillespie's killing.[22] On March 19, 1996, Governor Pataki again asked Mr. Johnson if he would pursue the death penalty.[23] The Governor felt that this case cried out for such a sentence because the defendant had three prior felony convictions and was engaged in a robbery spree when he allegedly killed Officer Gillespie.[24] The Governor repeated his inquiry that if Mr. Johnson would not seek the death penalty was it because of a policy not to pursue any death penalty case in Bronx County.[25] The Bronx D.A. responded that he had not taken a position against the death penalty, but rather that he had numerous concerns about the use of the option.[26] Furthermore, the D.A. stated that his comments "left the door ajar, however slight, to exercise this option in the Bronx."[27] The D.A. did not state whether he would seek the death penalty in the Gillespie murder, but noted that the statute allowed him to make that de-

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18. Johnson v. Pataki, 691 N.E.2d 1002, 1011 (1997) (Smith, J., dissenting) (giving a detailed history of the correspondence between Governor Pataki and Bronx D.A. Johnson).

19. N.Y. COMP. CODES R. & REGS. tit. 9, § 5.27 (1996).

20. 691 N.E.2d at 1011 (Smith, J., dissenting).

21. *See* 655 N.Y.S.2d 463, 465 (1st Dep't 1997).

22. *See id.*

23. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 5.27.

24. *See* 691 N.E.2d at 1011 (Smith, J., dissenting) (giving a detailed history of the correspondence between Governor Pataki and Bronx D.A. Johnson).

25. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 5.27.

26. *See* 691 N.E.2d at 1011-12 (Smith, J., dissenting).

27. *Id.*

termination within 120 days.[28] The Governor found the Bronx D.A.'s answer unacceptable.[29]

The day after receiving Mr. Johnson's response, Governor Pataki issued Executive Order No. 27.[30] The Order directed the Attorney General, Dennis Vacco, to replace and supersede District Attorney Johnson in the investigation and prosecution of the Gillespie matter.[31] In his Order, the Governor stated that he was concerned that, in failing to consider the death penalty option on a case by case basis, the Bronx D.A. was substituting his personal policy as opposed to the will of the Legislature.[32] The Governor further stated that the Bronx D.A.'s "blanket policy" would cause the death penalty to be carried out disproportionately in New York State and the Court of Appeals may invalidate it for this reason.[33] Thus, the Governor felt it necessary to exercise his constitutional duty to "take care" that the laws are properly carried out.[34] Subsequently, Mr. Vacco notified the court and the defendant, Mr. Diaz, that the People would seek the death penalty against Mr. Diaz.[35]

District Attorney Johnson and several Bronx voters and taxpayers filed separate suits to invalidate the supersession order.[36] The Supreme Court dismissed the petitions and found that the Governor's Order was valid.[37] Mr. Johnson and the Bronx voters appealed the decision. The Appellate Division affirmed.[38] The Appellate Court found Executive Or-

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28. *See id.* at 1012.

29. N.Y. COMP. CODES R. & REGS. tit. 9, § 5.27.

30. *See* 691 N.E.2d at 1012 (Smith, J. dissenting).

31. *See id.*

32. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 5.27.

33. *See id.*

34. *Id.* (referring to a governor's duty under art. IV § 3 of New York's Constitution).

35. *See* 691 N.E.2d at 1004.

36. *See id.*

37. The dismissal order was a one page unpublished document by Howard Silver, J., Supreme Court, Bronx County, dated July 18, 1996. *See* Johnson v. Pataki, 655 N.Y.S.2d 463, 467 (1st Dep't. 1997).

38. *See* 655 N.Y.S.2d 463.

der No. 27 valid and furthermore found that the Governor had ample basis for the Order.[39] Mr. Johnson and the Bronx County voters appealed again.

In the meantime, Mr. Diaz committed suicide in his jail cell before his trial for Officer Gillespie's murder.[40] Furthermore, his accomplices, Jesus Mendez and Ricardo Morales, were indicted in federal court on federal charges.[41] As a result, the state charges against them were dropped.[42]

III. DISCUSSION

A. *Mootness*

Before proceeding with an analysis of the Governor's superseder order, the Court of Appeals first had to address the threshold issue of mootness. The Attorney General argued that Mr. Diaz's suicide and the dismissal of state charges against Messrs. Mendez and Morales had rendered the case moot.[43] Despite these facts, the Court held that the case was not moot.[44]

The mootness doctrine holds that where the rights of the parties are not directly affected by the determination of the appeal or where the court's adjudication will have no legal impact on the parties, the case is moot.[45] The doctrine "forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions . . . ."[46] Therefore, an appeal pre-

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39. *See id.* at 466 (stating that the Governor's intervention was "fully justified").

40. *See* 691 N.E.2d at 1004.

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.* ("We first reject the Attorney-General's contention that this appeal has been mooted by the death of Diaz, the conviction of Mendez and Morales on Federal charges, and the dismissal of the State indictments against these two defendants.").

45. *See* Matter of Hearst Corp. v. Clyne, 409 N.E.2d 876, 877-878 (N.Y. 1980).

46. *Id.* at 877.

sents a live controversy where the rights of the parties will be directly affected by the court's determination.[47]

The Court held that the case was not moot for two reasons. First, the Court reasoned that "live controversies" still existed in the matter of expenses of the Diaz prosecution.[48] The Governor's Executive Order stated that, pursuant to Executive Law § 63(2), Bronx County had to reimburse the Attorney General for expenses incurred during the prosecution.[49] However, if the superseder order was held invalid, the Attorney General's Office could not properly claim any reimbursement.[50] Thus, the Court reasoned that the matter must be settled so as to figure out if Bronx County owed the Attorney General's Office any costs.[51]

Second, the Court found that the Executive Order was not limited to the prosecution at issue.[52] The Court reasoned that the Bronx D.A. "may find it necessary to initiate additional proceedings . . . if the Executive Order was invalidated."[53] Hence, if a similar case arose in the future, the Bronx D.A. would need to know whether the Governor can supersede again.[54] Therefore, the matter must be settled so as to provide guidance on each party's role in similar future situations.[55]

In his dissenting opinion, Judge Smith provides a valid counterargument against the Court's reasoning. For Judge Smith, the case was "clearly moot" because there were no "live question[s]" presented.[56]

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47. *See* 691 N.E.2d at 1004 (citing *Matter of Hearst Corp.*).

48. *Id.*

49. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 5.27 (citing Executive Law § 63(2)).

50. *See* 691 N.E.2d at 1004 ("[T]he validity of the charges depends on the validity of the order . . . .").

51. *See id.* ("[T]he appeal continues to have immediate consequence for the parties."). *Id.*

52. *See id.*

53. *Id.*

54. *See id.; see also id.* at 1012-13 (Smith, J., dissenting) (interpreting the Court's ruling).

55. *See id.* at 1010.

56. *Id.* at 1012-13.

Judge Smith notes that the Attorney General's Office had not asked for any reimbursement from Bronx County.[57] Furthermore, the issue of costs reimbursement was not "independently significant" to except the mootness doctrine.[58] Judge Smith also noted that the issue before the Court was the validity of the Governor's superseder order which dealt with Officer Gillespie's murder and the prosecution of Messrs. Diaz, Morales, and Mendez.[59] Therefore, Judge Smith reasoned that the Court's argument about whether the Bronx D.A. may face a similar situation again was "speculative."[60] Hence, this speculation did not except the mootness doctrine which "forbids courts" to engage in "hypothetical . . . or otherwise abstract questions."[61]

B. *Superseder*

After quickly dispensing with the mootness issue, the Court addressed the primary issue: whether Governor Pataki's Executive Order No. 27, which superseded the Bronx D.A. in the Gillespie murder prosecution, was valid. Since the Governor's authority to supersede is not a novel issue in New York,[62] the Court first reviewed the law regarding the Governor's superseder authority. After analyzing Executive Order No. 27 "on its face," the Court held that the Order was valid.[63] Based on the rule of law, the Court could have stopped there. However, just as the lower courts analyzed the Governor's reasons for issuing the Order, the Court of Appeals felt compelled to also review the Governor's reasons.[64]

The law regarding the Governor's superseder power states that

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57. *See id.* at 1013 (Smith, J., dissenting) (noting further that there was no indication that the Attorney General would ever request reimbursement from the Bronx).

58. *Id.*

59. *See id.*

60. *Id.*

61. Matter of Hearst Corp. v. Clyne, 409 N.E.2d 876, 877 (N.Y. 1980).

62. *See* 691 N.E.2d at 1005 (citing several cases regarding a governor's supersession of a district attorney).

63. *See id.* at 1005-06.

64. *Id.* at 1004, 1007.

"when the Governor acts by Executive Order pursuant to a valid grant of discretionary authority, his actions are largely beyond judicial review."[65] In such cases, a court is limited to determining whether New York's Constitution or New York's Legislature has empowered the Governor to act.[66] A court cannot review the manner in which the Governor chooses to act, and the Governor is not required to explain the choices made.[67] However, in *Mulroy v. Carey*,[68] the Court of Appeals "reserved the possibility that in some undefined circumstance" New York's courts could invalidate a Governor's order.[69]

In the instant case, the Court found that article IV, § 3[70] of the New York Constitution and Executive Law § 63(2)[71] both provided the Governor with authority to supersede a District Attorney in a matter.[72] Article IV, § 3 imposes on the Governor the duty to "take care that the laws are faithfully executed."[73] Executive Law § 63(2) orders the Attorney General "[w]henever required by the governor" to "conduc[t] ... criminal actions or proceedings ... which the district attorney would otherwise be authorized or required to exercise or perform ...."[74]

Based on article IV, § 3 and Executive Law § 63(2), the Court of Appeals held Governor Pataki's Executive Order No. 27 valid.[75] The Court reasoned that "on its face" the Order "reflect[ed] the authority granted [to] the Governor."[76] Since a court cannot review the manner in

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65. *Id.* at 1004.
66. *See id.* at 1005.
67. *See id.*
68. 373 N.E.2d 369 (N.Y. 1977).
69. 691 N.E.2d at 1005 (citing *Mulroy*).
70. N.Y. CONST. art IV, § 3 (McKinney 1987).
71. N.Y. EXEC. LAW § 63(2) (McKinney 1993).
72. *See* 691 N.E.2d at 1005-06.
73. N.Y. CONST. art IV, § 3.
74. N.Y. EXEC. LAW § 63(2) (McKinney 1993).
75. *See* 691 N.E.2d at 1005-06.
76. *Id.*

which the Governor chose to act,[77] the Court could have stopped there. Indeed, the Court implicitly kept open the question "reserved" in *Mulroy* noting that it need not review the Governor's reasons here and explicitly noted that it was not setting any standard for review of the Governor's actions.[78]

However, even while acknowledging that the Governor "is not obliged to state reasons for superseder," the Court continued its analysis.[79] The Court found that even if the Governor's action was subject to judicial review, Executive Order No. 27 was still valid.[80] The Court reasoned that the Order was supported by the Governor's reasons that there was a threat to faithful execution of the death penalty law.[81] The Governor stated that he was concerned that the Bronx D.A. was substituting his personal policy for the will of the Legislature by not considering the death penalty option on a case by case basis.[82] The Governor further stated that the Bronx D.A.'s refusal to pursue the death penalty in any cases would cause the death penalty to be carried out disproportionately throughout the State thus risking invalidation from the Court.[83] The Court found that Mr. Johnson "never unequivocally disavowed" that he had a blanket policy against the death penalty.[84] As such, the Governor's superseder did not lack a "rational basis."[85] Thus, the Court affirmed and agreed with the trial court and the Appellate Division that Executive Order No. 27 was valid and had ample basis for support.[86]

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77. *See id.* at 1005.

78. *Id.* at 1003, 1005-06, 1007 ("We need not define whether a standard of review, if one is applicable at all, should be reasonableness, necessity or some other standard.")

79. *Id.* at 1007.

80. *See id.* at 1003.

81. *See id.* at 1007.

82. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 5.27.

83. *See id.*

84. 691 N.E.2d at 1008.

85. *Id.*

86. *See id.* at 1007.

C. *Appellants' Additional Arguments*

In addressing the appellants' additional arguments, the Court also clarified some issues of law. District Attorney Johnson and the Bronx voters argued that since the Bronx D.A. is an elected official and a constitutional officer, he has exclusive authority to prosecute crimes in the Bronx.[87] The Court countered that, although the New York Constitution provides for the offices of Governor, Attorney General, and District Attorney, it does not delineate responsibilities among them.[88] The Court noted that the delineation of duties has historically been left to the Legislature.[89] In turn, the Legislature has "recognized" the authority of the Attorney General to prosecute cases at the local level when directed by the Governor.[90] Hence, the Bronx D.A. does not have exclusive authority to prosecute crimes in Bronx County.

District Attorney Johnson also argued that the Legislature granted "unfettered discretion" to the local district attorneys to determine whether or not to seek the death penalty.[91] Therefore, the Governor cannot supersede and make that determination.[92] Judge Titone agreed with this argument in his dissent.[93] However, the Court noted that while the Legislature enacted a provision in the sentencing statutes whereby a district attorney can request the Attorney General to assist in a death penalty prosecution,[94] the Legislature left the Governor's supersession power intact in the same section.[95] Thus, the Court reasoned that the Legislature did not intend for the district attorneys' discretion to negate the Gover-

87. *See id.* at 1006.

88. *See id.; see also* N.Y. CONST. art IV, § 3 (McKinney 1987).

89. *See* 691 N.E.2d at 1006.

90. *Id.* (citing Executive Law § 63).

91. *Id.* at 1007.

92. *See id.* at 1007 (noting the argument that the Governor was substituting his policy choice for the District Attorney's).

93. *See id.* at 1008-10 (Titone, J., dissenting).

94. *See* N.Y. EXEC. LAW § 63-d (McKinney 1993).

95. *See* 691 N.E.2d at 1007.

nor's supersession power.[96]

District Attorney Johnson further argued that newly enacted Executive Law § 63-d[97] allowed the Attorney General to "assist" the D.A. only when "requested by the District Attorney."[98] Mr. Johnson argued that this provision in the new sentencing statutes implicitly repealed Executive Law § 63(2) superseder in first degree murder prosecutions.[99] The Court countered that the two statutes are complimentary; they merely provide two different ways for the Attorney General to exercise prosecutorial authority in the State.[100] Furthermore, the Court stated that "[n]othing in or about that [new] section evinces a legislative intention to limit a Governor's supersession authority."[101] Hence, the newly enacted Executive Law § 63-d did not repeal Executive Law § 63(2) in first degree murder cases.

IV. CONCLUSION

In *Johnson v. Pataki*,[102] the Court of Appeals reaffirmed the rule that when the Governor acts by executive order, judicial review is limited to determining whether the State Constitution or the Legislature has given the Governor the authority to act.[103] In the case of supersession of a District Attorney, the Governor has been granted discretionary authority to supersede by Article IV § 3 of the Constitution and Executive Law § 63(2).[104] However, the Court still "reserved" the possibility that in some

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96. *See id.* ("[T]he Legislature also left unchanged the long-standing authority vested in the Governor to supersede a District Attorney in a particular matter.").

97. N.Y. EXEC. LAW § 63-d (McKinney 1993).

98. 691 N.E.2d at 1006.

99. *See id.*

100. *See id.*

101. *Id.*

102. 691 N.E.2d 1002 (N.Y. 1997).

103. *See supra* notes 62-86 and accompanying text.

104. *See supra* notes 62-86 and accompanying text.

undefined circumstances a court could invalidate an executive order.[105]

The Court of Appeals also arguably broadened the mootness doctrine. Parties could now argue that a case is not moot because the issue of parties' cost reimbursement has not been decided.[106] Parties may also argue that a case is not moot because a similar situation may arise again between them.[107]

105. *See supra* notes 62-86 and accompanying text.

106. *See supra* notes 43-61 and accompanying text.

107. *See supra* notes 43-61 and accompanying text.

Raquet v. Braun[1]
(decided June 5, 1997)

I. SYNOPSIS

In a unanimous decision,[2] the New York State Court of Appeals held that where a statutory cause of action by injured firefighters was authorized only against those persons who were in control of the premises where the fire occurred at the time of the accident, a third party action for indemnification by the defendants lies, even though the injured firefighters would not have a direct cause of action against the third party defendant.[3]

II. BACKGROUND

One firefighter, Mitchell Spoth, was killed, and another, Frank Raquet, was injured,[4] when a canopy roof and a portion of masonry wall on a building addition collapsed outward during the course of a fire.[5] Mitchell Spoth's representative and Frank Raquet sued the building owner, the building's tenants, and the contractors who had designed and built the addition.[6] The plaintiffs' alleged that the contractors violated several sections of the New York State Building Construction Code in constructing the addition, and that such violations which would render the building permit null and void.[7] Further, plaintiffs alleged that the masonry contractor failed to leave openings in the wall to allow for its proper connection to the roof.[8] In accord with General Municipal Law § 205-a(3), the claims against the contractors were dismissed,[9] while the

1. 681 N.E.2d 404 (N.Y. 1997).
2. Judge Wesley took no part in this decision. *See id.* at 409.
3. *See id.* at 407.
4. *See id.* at 406.
5. *See id.*
6. *See id.*
7. *See id.*
8. *See Raquet*, 681 N.E.2d at 409.
9. *See id.* at 406.

claims against the owner and the tenants were allowed to proceed.[10] The building's owner and tenants then sought indemnification from the contractors.[11] The Supreme Court, Erie County, denied the motions for indemnification[12] and the Appellate Division, Fourth Department, affirmed.[13] The Court of Appeals reversed and remitted the case to the Supreme Court.[14]

III. DISCUSSION

The court, with Judge Titone writing for the majority, began its analysis by examining the firefighter's right of action.[15] General Municipal Law § 205-a creates a right of action for firefighters where the negligence of any person in failing to comply with the requirements of any statute, ordinance or rule, directly causes the firefighter's injury or death.[16] This section was enacted to ameliorate the harsh effects of the "firefighter's rule,"[17] which bars firefighters from recovering in common law negligence for injuries sustained in the line of duty.[18]

Despite the statutory language referring to the negligence of "any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments . . .",[19] the Court of Ap-

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10. *See id.*

11. *See id.*

12. *See id.*

13. Raquet v. Braun, 607 N.Y.S.2d 799 (4th Dep't 1994).

14. *See Raquet*, 681 N.E.2d at 409.

15. *See id.* at 406.

16. *See* N.Y. GEN. MUN. LAW § 205-a (McKinney 1997).

17. David L. Strauss, Comment, *Where There's Smoke, There's the Firefighter's Rule: Containing the Conflagration After One Hundred Years*, 1992 WIS. L. REV. 2031, 2034 (outlining the history, development and implementation of the firefighter's rule).

18. *See* Zangh v. Niagara Frontier Transp. Commn., 649 N.E.2d 1167, 1171 (N.Y. 1995).

19. N.Y. GEN. MUN. LAW § 205-a.

peals in *Kenavan v. City of New York*[20] held that General Municipal Law § 205-a liability could be asserted only against property owners or others having control of the premises where the firefighting takes place.[21] In applying this principle to the facts in *Raquet*,[22] the Court of Appeals stated that while clearly the owner of the premises may be held directly liable under General Municipal Law § 205-a,[23] the contractors could be held liable only if they were in control of the premises at the time of the injury.[24] Noting that the contractors had completed their work on the building twelve years prior to the date of the fire, the court dismissed the firefighters' direct causes of action against the contractors.[25] Following this dismissal, the owner and tenants filed their claim for indemnification against the contractors.[26]

Before considering the indemnification issue, the Court of Appeals was careful to note that its prior decision in this case was not a dismissal on the merits of the claims against the contractors.[27] The disposition was limited to a holding that the firefighters could not recover against the contractors;[28] the indemnification issue had not been raised at that time.[29]

In its decision, the court focused on the principle that a defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party.[30] The court found the basis for that principle in *Oceanic Steam Nav. Co. v. Compania Transatlantic Espanola*:[31] "[E]very one is responsible for the consequences of his own

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20. 517 N.E.2d 872 (N.Y. 1987).
21. *See id.* at 875.
22. *See Raquet*, 681 N.E.2d at 404.
23. *See Zanghi*, 649 N.E.2d at 1175.
24. *See id.*
25. *See id.* at 1176.
26. *See Raquet*, 681 N.E.2d at 406.
27. *See id.*
28. *See id.*
29. *See id.*
30. *See id.* at 407.
31. 31 N.E. 987 (N.Y. 1892).

negligence, and, if another person has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him."[32] When considering apportionment, it is critical that the breach of duty by the contributing party must have had a part in causing the injury for which contribution is sought.[33] Ordinarily, the party from whom contribution is sought will have breached a duty owed directly to the injured party,[34] but in more unusual cases the right to apportionment may arise from the duty owed by the contributing party to the party seeking contribution.[35] In such cases, indemnity is appropriate because of a separate duty owed the to the indemnitee by the indemnitor.[36]

The court stated that the purpose of General Municipal Law § 205-a was to overcome the firefighters rule and allow firefighters to recover in tort for their injuries.[37] The court found nothing written into the statute which would prevent a party who is forced to answer in damages from shifting the economic burden to those whose negligent acts actually caused the harm.[38]

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32. *Id.* at 989.

33. *See* Nassau Roofing & Sheet Metal Co. v. Facilities Improvement Corp., 523 N.E.2d 803, 805 (N.Y. 1988).

34. *See id.*

35. *See* Guzman v. Haven Plaza Housing Dev. Fund Co., 509 N.E.2d 51, 54, 55 n.5 (N.Y. 1987).

36. *See* Mas v. Two Bridges Assocs., 554 N.E.2d 1257, 1263 (N.Y. 1990).

37. *See Raquet*, 681 N.E.2d at 408.

38. *See id.*

IV. CONCLUSION

A person who is held liable to an injured firefighter under General Municipal Law § 205-a(3), because they are in possession or control of the premises where the injury occurs, may have a cause of action against third parties responsible for violations of building codes or other laws if such violations contributed to the injury. The mere fact that the injured firefighters could not directly sue such persons will not serve to bar indemnifications.

Sayeh R., and Another, Children Alleged to Be Neglected v. Monroe County Department of Social Services, Appellant, Patricia Ann P., Respondent[1]
(decided December 22, 1997)

I. SYNOPSIS

In an effort to protect infants from harm, the New York Court of Appeals held, in a 4-3 decision, that, in a child protective proceeding brought under Article 10 of the Family Court Act ("the Act"), the New York Family Court had subject matter jurisdiction and properly asserted its personal jurisdiction over a Florida mother. The court allowed the Department of Social Services (DSS) to bring an action that could potentially effectuate a change in custody. The court found no legal conflicts with respect to custody determinations or federal law, since child protective proceedings brought under the Act are expressly excluded from custody determinations under both the federal Parental Kidnapping Prevention Act(PKPA)[2] and the state Uniform Child Custody Jurisdiction Act (UCCJA)[3] rendering both inapplicable.[4]

II. BACKGROUND

Ahmad R. and Patricia P. married in Florida in 1980 and had three children (two girls and one boy) during their marriage. They divorced in 1986, and Patricia was designated "the primary custodial parent."[5] The children remained with Patricia, and Ahmad moved to Rochester, New York. In 1988, Raymond Wike, "a former boyfriend or acquaintance" of Patricia's, waited for Patricia to fall asleep and then removed the two girls from their bedroom, after which he attacked, raped, and repeatedly stabbed them.[6] The younger girl was killed; the older girl, Sayeh, sur-

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1. 693 N.E.2d 724 (N.Y. 1997).
2. 28 U.S.C. § 1738A (1998).
3. N.Y. DOM. REL. LAW Ch. 14, Art. 5-A, § 75 (McKinney 1988).
4. *See Sayeh R.*, 693 N.E.2d at 727.
5. *Id.* at 726.
6. *Id.*

vived by pretending she was dead.[7] As a result of the incident, the following year the Florida court changed the custody order to make Ahmad the primary custodial parent, reserving liberal visitation rights to Patricia during the summer and Christmas holidays.[8]

For the following eight years, the two surviving children lived with Ahmad as New York domiciliaries.[9] During the first three years, 1990 to 1993, the children visited Patricia during summers and Christmas holidays.[10] Over the years, the children had adjusted well in New York, with the "love, guidance, and emotional support" of Ahmad, their stepmother, and the children born of Ahmad's second marriage.[11] Unfortunately, there were "corroborated allegations" that during the children's visits with her, Patricia had abused them both verbally and physically, and subsequently, the children said that they no longer wanted to visit her.[12] Through their guardian ad litem, the children filed a New York petition to prevent their removal from New York, and sought elimination of Patricia's visitation rights.[13] Subsequently, Patricia went to Ahmad's house in Rochester with a New York police officer to enforce her visitation rights over the Christmas holiday. She was refused visitation and told that the children did not want to see her.[14]

Patricia then attempted to enforce her visitation rights in contempt proceedings against Ahmad in the Florida court system, and in 1997, after several contempt orders had been issued against Ahmad for his refusal to comply with Patricia's visitation rights, the Florida court changed the custody order and again granted primary custody back to

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7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.* at 731 n.1 (Smith, J., dissenting).

11. *Id.* at 726.

12. *Id.*

13. *See id.* at 732 n.2 (Smith, J., dissenting). The petition was dismissed for lack of jurisdiction. *See id.* (citing *Matter of* Mott v. Patricia Ann R., 691 N.E.2d 623 (N.Y. 1997)).

14. *See id.* at 726.

Patricia.[15] In New York, Ahmad attempted to modify the Florida court order, without success.[16]

DSS commenced the present action in New York Family Court, stressing that "as a result of the prior trauma, the children have weakened psychological functioning and...serious psychological and emotional pathologies, which would be further severely aggravated by [Patricia's] efforts to obtain temporary and permanent custody."[17] Nonetheless, the Family Court granted Patricia's motion to dismiss, holding that the court lacked personal jurisdiction over Patricia, and that even if Patricia's attempt to recover custody was harmful to the children, that was not sufficient to constitute neglect as to bring the case within the scope of Family Court jurisdiction.[18] The court also concluded that the UCCJA was inapplicable, and that the federal PKPA precluded modification of the Florida court's order granting custody to Patricia.[19]

The Appellate Division, Fourth Department, affirmed, based solely on the issue of personal jurisdiction, since basing a finding of neglect in New York as the result of attempted enforcement of a valid Florida visitation or custody order would create interstate custody conflicts, which "would encourage conversion of private custody disputes into child protective proceedings."[20]

The Court of Appeals reversed, concluding, in sum, that "New York State has a compelling interest in assuring the safety and well-being of its domiciliaries."[21]

III. DISCUSSION

The court began its analysis by distinguishing a custody dispute that

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15. *See id.*
16. *See id*; *see also Mott*, 691 N.E.2d at 623.
17. *Sayeh R.*, 693 N.E.2d at 726.
18. *See In the Matter of* S.R., 657 N.Y.S.2d 884, 887 (Fam. Ct. 1997).
19. *See id.* at 887, 889.
20. *Matter of* Sayeh R., 659 N.Y.S.2d 590, 591 (4th Dep't 1997).
21. *Sayeh R.*, 693 N.E.2d at 727.

implicates the PKPA and UCCJA, which would result in Florida's retention of jurisdiction, from a child protective proceeding based on neglect, which implicates the Family Court Act and brings the action within the subject matter jurisdiction—and Patricia within the personal jurisdiction—of the Family Court.[22] The court noted that there had been no attempt to modify the Florida court's custody determination, even though, on its face, the result seemed to circumvent the PKPA and the New York UCCJA. Rather, the court explained, DSS acted pursuant to its statutory command to investigate alleged "abuse and mistreatment," and while Patricia had a right to enforce valid Florida court orders, such enforcement would be without regard to the children's "special vulnerabilities," and thus could give rise to a finding of neglect on Patricia's part for failing to provide the "minimum degree of care" given her children's special needs after the horrors they had experienced years earlier while in Patricia's care.[23]

The court was also persuaded by the testimony of an independent child psychologist presented by DSS, and not prompted by either parent, who found that both children suffered clinical disorders and predicted further diminution of their mental health, ranging from major depression to massive personality disorganization, if Patricia supplanted Ahmad as the custodial parent.[24] Thus, while Patricia had a legal right to enforce visitation, the court found her lack of sensitivity to these "exceptional circumstances and special vulnerabilities"—and her insistence on an immediate change in custody rather than a gradual, preparatory, super-

22. *See id.* at 727 ("[B]ecause the parties involved and the relief sought in this child protective proceeding are quite distinct from those of a custody dispute, this child protective proceeding is not a 'custody determination' within the meaning of the PKPA or New York's UCCJA. We further note New York UCCJA's express exclusion of child protective proceedings from its definition of 'custody proceedings'") (citations omitted).

23. *Id.* at 728 (citing Family Court Act § 1012(h): "'Impairment of emotional health' and 'impairment of mental or emotional condition' includes a state of substantially diminished psychological or intellectual functioning" as the result of Patricia's failure "to exercise a minimum degree of care toward the child[ren]").

24. *See id.* (citing the expert's testimony: "nothing [could] be more terrifying and traumatic for Sayeh tha[n] to return her to the place where her sister was raped and murdered and where she was raped, physically assaulted and left for dead").

vised restoration of visitation—was sufficient to fall below the requisite minimum degree of care.[25]

Finally, the court expressed its awareness of the potential for child protective proceedings to be used as a device to overturn a valid custody decision of another state, but gave assurances that "New York courts and child protective agencies will be vigilant against any such abuse . . . in the future."[26] The court then disposed of the personal jurisdiction issue and granted jurisdiction to New York, which subsequently brought Patricia within the grasp of New York's long-arm statute.

The court based its findings on Family Court Act § 1036(c), since the children are domiciled within New York, and factually it was "sufficiently supported" that the alleged abuse or neglect occurred within New York.[27] The court also noted that Patricia's prior invocation of the "aid and protection" of New York courts via cross-moving and an attorney's affidavit in 1996, as well as the aid of a local New York police officer to enforce visitation, were sufficient to avail her of the benefits of the New York courts and law enforcement.[28] As a result, she fell within New York's long-arm jurisdiction.[29] Consequently, the court reversed and remitted the case to the Family Court.[30]

IV. THE DISSENTS

Judge Smith's dissent stressed the majority's disregard for comity and public policy, its incorrect application of long-arm jurisdiction, and placed further emphasis on the resulting vitiation of current law and the potential for anyone in an action involving children to invoke protective proceedings as a platform for a child custody determination based on

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25. *Id.* at 729. The court noted its lack of approbation of the father's interference with visitation. *See id.* at n.2.

26. *Id.* at 730.

27. *Id.*

28. *Id.*

29. *See id.*

30. *See id.* at 730-31.

neglect.[31]

Judge Smith argued that Patricia was left with no alternative, other than entirely to relinquish her rights, and thus urgently sought immediate enforcement of her rights in contempt proceedings against Ahmad as a matter of necessity. His dissent also contended that Ahmad prevented the enforcement of Patricia's court-ordered parental right to visitation, and noted the legal discrepancy created by Patricia's patently valid enforcement of the order and Ahmad's extralegal lack of compliance with the order, which naturally precipitated her actions.[32] Moreover, Patricia's impetus for turning aggressively to the courts for enforcement of the Florida order was due to Ahmad's recalcitrance, evidenced by Sayeh's discontinued counseling in 1992, and Ahmad's refusal to allow Patricia's visits with the children in New York despite court orders and his prior agreement to do so.[33] Thus, Judge Smith argued, Patricia's actions did not constitute neglect sufficient to bring her within scope of New York's personal jurisdiction and, as a result, Florida ought to continue its exercise of original jurisdiction based on "principles of comity and public policy" and that which is "in the best interests of the children."[34]

Additionally, Judge Smith argued, Patricia's defensive litigation efforts in New York were not sufficient to confer long-arm jurisdiction or to establish minimum contacts to confer personal jurisdiction.[35] Alternatively, he opined, the neglect was caused by the Florida court's order requiring the children's relocation to Florida rather than any of Patricia's actions.[36] Judge Smith noted that the Florida court did, in fact, order gradual, short, supervised visits, and that Patricia's aggressive defensive litigation posture flowed from Ahmad's lack of compliance with those orders and was, in reality, the "antithesis of 'neglect,'"[37] and also that

31. *See id.* at 731-37 (Smith, J., dissenting).

32. *See id.* at 731 (Smith, J., dissenting).

33. *See id.* at 731-32 (Smith, J., dissenting).

34. *Id.* at 731 (Smith, J., dissenting).

35. *See id.* at 734 (Smith, J., dissenting).

36. *See id.* (Smith, J., dissenting).

37. *Id.* (Smith, J., dissenting).

Patricia's visits to New York represented her willingness to comply with those orders.[38]

Finally, the dissent argued that the majority's holding must, by its own terms, modify the Florida court's custody ruling, which runs afoul of Congress' intent that the PKPA extend the Full Faith and Credit Clause of the Constitution[39] to interstate custody determinations in order to prevent "[p]itting the courts of two jurisdictions against each other."[40] In the instant case, the Florida court sought to enforce its own orders, and Ahmad ignored those orders with impunity.[41] Judge Smith also noted the importance of maintaining parent-child relationships, and stressed that children's preferences should be considered with caution, especially where the relationship between the parents is acrimonious.[42]

Judge Bellacosa wrote a separate dissent to stress the comity and public policy issues and the paucity of "a legally cognizable basis" to mandate reversal of the Appellate Division.[43] He placed particular emphasis on the implications of this case beyond the fact that Ahmad has managed "to juxtapose the judicial processes of two States against one another, while [gaining] the strategic upper hand in the continuing litigation activity[.]"[44] He posited that a new standard of neglect has been established based "on a novel concept of 'special vulnerabilities'"[45] and suggests that New York has not borne its "huge threshold burden" to allow the alteration of the Florida court's determination,[46] in turn "significantly impair[ing] the comity covenant among the States that ought to be the hallmark of custody determinations."[47]

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38. *See id.* at 735 (Smith, J., dissenting).
39. U.S. CONST. art. IV, § 1.
40. *Sayeh R.*, 693 N.E.2d at 736.
41. *See id.* (Smith, J., dissenting).
42. *See id.* at 736 n. 7 (Smith, J., dissenting).
43. *Id.* at 737 (Bellacosa, J., dissenting).
44. *Id.* at 739 (Bellacosa, J., dissenting).
45. *Id.* at 738 (Bellacosa, J., dissenting).
46. *Id.* at 739 (Bellacosa, J., dissenting).
47. *Id.* at 740.

V. CONCLUSION

The implications of the court's holding are far-reaching. Although ostensibly the majority's holding delineates New York's duty and willingness to protect its own infant residents, child protective proceedings in New York, under Article 10 of the Family Court Act, may now "allow New York to exercise jurisdiction affecting parental custody/visitation rights even though New York does not qualify as the child's home state."[48] Consequently, these holdings on subject matter and personal jurisdiction, although presently the result of extraordinary facts, may in the future be "applied to situations never contemplated when the Court of Appeals made its determination."[49]

48. *Matter of S.M.R.*, 220 N.Y.L.J. 33 (Dec. 14, 1998).

49. Myrna Felder, *Court Renders Four Major Decisions*, 220 N.Y.L.J. S5 (Oct. 5 1998).

Szczerbiak v. Pilat[1]
(decided October 23, 1997)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals held that a police officer who struck a bicyclist, while responding to a report of a group of males fighting, was entitled to immunity under Vehicle and Traffic Law § 1104, even though the officer had not activated his siren or emergency lights at the time of the collision.[2]

II. BACKGROUND

On December 7, 1992, plaintiffs' decedent, 16 year old Eric Szczerbiak, was riding a bicycle in the Town of Cheektowaga in Erie County.[3] He attempted to cross Dick Road from a mid-block parking lot driveway, rather than from an intersection.[4] Officer Pilat was responding to a report of five males fighting in a cemetery a few miles from the accident scene.[5] Officer Pilat entered Dick Road in the rightmost lane, approximately eight hundred feet from the accident scene, and accelerated past drivers in the passing lane,[6] without engaging his siren or emergency lights.[7] Testimony placed the speed of the vehicle at between thirty-nine and fifty-five miles per hour at the time of impact.[8] Officer Pilat testified that he struck Eric Szczerbiak "while glancing down from the road momentarily to turn on his emergency lights and headlights."[9] The family brought suit for wrongful death and the Supreme Court, Erie County,

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1. 686 N.E.2d 1346 (N.Y. 1997).
2. *See id.* at 1347-49.
3. *See id.* at 1348.
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.* (describing the officer's actions as designed to prevent an accident from traffic moving into the right lane from the passing lane).
8. *See id.*
9. *Id.*

dismissed the complaint.[10] The Appellate Division, Fourth Department, affirmed.[11] The Appellate Division, in a memorandum opinion, added that "a momentary lapse of judgement" is not enough to attach liability to the defendant under the "reckless disregard" test.[12]

III. DISCUSSION

The issue that the New York State Court of Appeals considered is whether the "defendant's conduct in driving the automobile rose to the level of 'reckless disregard' for the safety of others required by [New York State] Vehicle and Traffic Law § 1104(e) to impose liability upon drivers of emergency vehicles."[13] Judge Ciparick, writing for the court, began the analysis by discussing the emergency vehicle privilege.[14] New York State Vehicle and Traffic Law § 1104 provides a qualified privilege for drivers of emergency vehicles to disregard the ordinary rules and regulations that bind other motorists.[15] The qualification is stated in § 1104(e): the driver of an emergency vehicle is not relieved of a "duty to drive with due regard for the safety of all persons",[16] nor is the driver protected from the "consequences of his reckless disregard for the safety of others."[17]

The Court of Appeals interpreted the reckless disregard standard in the companion decisions of *Saarinen v. Kerr*[18] and *Campbell v. City of Elmira.*[19] In *Saarinen,* a police officer observed a van running a stop sign

10. *See id.*

11. *See* Szczerbiak v. Pilat, 645 N.Y.S.2d 256, 257 (4th Dep't 1996).

12. *Szczerbiak,* 686 N.E.2d at 1348; *Szczerbiak v. Pilat,* 645 N.Y.S.2d at 257 (quoting Saarinen v. Kerr, 644 N.E.2d 988 (1994)).

13. *Szcerbiak,* 686 N.E.2d at 1347.

14. *See id.* at 1349.

15. *See* N.Y. VEH. & TRAF. LAW § 1104(a), (b) (McKinney 1997).

16. *Id.* § 1104(e).

17. *Id.*

18. 644 N.E.2d 988 (N.Y. 1994).

19. 644 N.E.2d 993 (N.Y. 1994).

while being operated in a reckless manner.[20] The officer followed the van into a parking lot and activated his emergency lights.[21] Rather than stop, the van pulled away.[22] The officer pursued the van and turned on his siren.[23] The van pulled out onto a public road, ran a steady red light,[24] then collided with a vehicle driven by the plaintiff.[25]

Plaintiff brought suit against the officer's employer, the Village of Massena, contending that the village should be vicariously liable for the officer's lack of due care in pursuing the van.[26]

In a case of first impression,[27] the Court of Appeals held that a police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others.[28] In contrast to an ordinary negligence claim, which requires merely showing a lack of due care under the circumstances,[29] the standard of reckless disregard demands more than this. It requires evidence that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow,"[30] and has done so with conscious indifference to the outcome.[31]

The court reached this conclusion by examining the legislative intent behind Vehicle and Traffic Law § 1104. The court reasoned that had the

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20. *See Saarinen*, 644 N.E.2d at 989.

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.* at 991 (stating that this case presents a "question of statutory interpretation [faced] for the first time").

28. *See id.*

29. *See id.*

30. *Id.* (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON TORTS § 34 at 213 (5th ed.n 1984)).

31. *See Saarinen*, 644 N.E.2d at 991.

legislature intended that the less demanding standard of due care be applicable to the drivers of emergency vehicles, the statutory language mentioning a "duty to drive with due regard for the safety of all persons"[32] would have sufficed. The legislature went beyond that formulation, drafting a provision specifically dealing with the consequences of reckless disregard.[33] The court took this as an indication that the legislature intended a more exacting standard than the traditional due care formula.[34]

The Court of Appeals considered the same issue of reckless disregard in *Campbell v. City of Elmira,*[35] which was decided the same day as *Saarinen*. The emergency vehicle in *Campbell* was a fire truck. The truck was responding to a general alarm[36] when it proceeded through an intersection against a red traffic light.[37] The truck was traveling at a speed of ten to fifteen miles per hour as it proceeded through the intersection.[38] The plaintiff, Campbell, entered the intersection on a motorcycle with the green traffic light in his favor,[39] and struck the fire truck's rear wheel.[40]

At trial, conflicting testimony was offered as to whether the driver of the fire truck ever looked in the direction from which the plaintiff was approaching the intersection,[41] whether the truck was accelerating or decelerating while in the intersection,[42] whether the truck's siren or air horn was heard,[43] and whether the fire truck's driver even knew what color the

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32. *Id.*
33. *See id.* at 992.
34. *See id.*
35. *See Campbell*, 644 N.E.2d at 993.
36. *See id.*
37. *See id.*
38. *See id.*
39. *See id.*
40. *See id.*
41. *See id.* at 995.
42. *See id.*
43. *See id.*

traffic light was when he entered the intersection.[44] The jury returned a verdict for the plaintiff,[45] and the Appellate Division affirmed,[46] finding the verdict rationally supported by the evidence.[47]

On review, the Court of Appeals reasoned that the reckless disregard standard requires the presence of the customary features of recklessness, such as a general intent in connection with the alleged wrongdoer's actions, and disregard of a known or obvious risk so great as to make it highly probable that harm would follow.[48] The court agreed that parties might be found to have acted in violation of the statutory formulation if they consciously—with general intent, not necessarily with intent to cause particular injury—disregarded known serious risks of harm.[49] The court upheld the jury's verdict that the fire truck's driver had "intentionally violated the statutory mandate when he recklessly flaunted the risks of proceeding in an emergency setting into an intersection against a red light, indifferently and in disregard of any modicum of statutorily required attentiveness."[50]

The court distinguished this decision from the decision in *Saarinen*.[51] It contrasted the "cautiously progressive series of actions taken by the police officer in *Saarinen*"[52] with the fire truck driver's "more flagrant, nuanced and complex, conscious violation of Vehicle and Traffic Law §1104(e)."[53]

Judge Titone filed a dissenting opinion in *Campbell*, which was

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44. *See id.*
45. *See id.*
46. *See id.* (citing Campbell v. City of Elmira, 604 N.Y.S.2d 609 (3rd Dep't 1993)).
47. *See Campbell*, 644 N.E.2d at 995.
48. *See id.* at 996.
49. *See id.*
50. *Id.*
51. *See id.* at 997 (contrasting the *Campbell* case with the *Saarinen* case).
52. *Id.* (emphasis added).
53. *Id.*

joined by Judge Simons and Judge Levine.[54] Judge Titone argued that Vehicle and Traffic Law § 1104(a)(2), which permits an emergency vehicle to pass a steady red signal after slowing down as may be necessary for safe operation,[55] combined with § 1144(a), which requires other motorists to yield the right of way to an approaching emergency vehicle,[56] jointly operated to give the fire truck a preemptive right of way, regardless of whether it faced a signal to stop.[57] He pointed out that under the court's decision in *Saarinen*, slight or momentary departures from traffic safety rules are not the type of actions to which liability for recklessness can be attached.[58] He concluded that, regardless of any momentary lapses in judgment,[59] the truck driver may have exhibited, his use of warning devices, coupled with his slow rate of speed,[60] are not evidence of reckless disregard on the driver's part, but "at most a pure accident."[61]

In the present case, even if Officer Pilat was "negligent in glancing down, this 'momentary judgment lapse' does not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach."[62]

IV. CONCLUSION

Vehicle and Traffic Law § 1104 gives operators of authorized emergency vehicles a qualified privilege to disregard the ordinary rules of prudent and responsible driving.[63] The operator's conduct will be evaluated not against the usual negligence standard of due care, but rather

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54. *See id.* at 998 (Titone, J., dissenting).
55. *See* N.Y. VEH. & TRAF. LAW § 1104 (a) (2).
56. *See id.* § 1144 (a).
57. *See Campbell*, 644 N.E.2d at 998 (Titone, J., dissenting).
58. *See id.* at 999.
59. *See id.* at 1000.
60. *See id.*
61. *Id.*
62. *Szczerbiak*, 686 N.E.2d at 1349.
63. *See id.*

against a standard of reckless disregard for the safety of others.[64] A momentary judgment lapse does not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach.[65]

64. *See id.*

65. *See id.*