

## NEW YORK COURT OF APPEALS ROUNDUP

### FAIR ELECTIONS, TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS, AND CRIMINAL PROCEDURE

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The tension experienced in our national elections this week between the need for strict adherence to procedures designed to ensure fair elections and the desire to avoid disenfranchising voters whose votes are called into question for reasons unrelated to fraud, was also present in the Court of Appeal's divided (5-2) decision in *Matter of Gross v. Albany County Board of Elections*, in which the Court invalidated improper yet non-fraudulent absentee ballots under the Election Law. A subsequent federal court injunction has nullified the effect of *Gross* on constitutional grounds. This month we discuss these decisions, as well as the Court's answers to certified questions in two cases, one involving tortious interference with prospective economic relations, *Carvel Corp. v. Noonan*, and the other interpreting General Business Law § 349, *Blue Cross and Blue Shield of New Jersey Inc. v. Philip Morris USA Inc. ("BCBS")*,<sup>1</sup> and its decision concerning depraved indifference murder and preserving an insufficiency of evidence argument for review, *People v. Kenneth H. Payne*.

#### Absentee Ballots

Due to a federal court challenge to redistricting in Albany County, certain districts were unable to conduct elections for the County Legislature in November 2003. Elections for those districts were rescheduled for the spring of 2004 after a revised redistricting plan was approved. The Albany County Board of Elections, apparently misinterpreting a federal court order, mailed an absentee ballot for the general election to anyone who had requested one the previous fall. The Board thus failed to apply the Election Law requirement that a voter apply for an absentee ballot and certify to certain facts qualifying him or her for absentee voting in that particular election. There were no allegations of fraud on the part of the Board or any absentee voter.

The state court proceedings arose from petitions filed by candidates from two districts with very close races and considered whether, under the Election Law, the absentee ballots could be canvassed despite the Board's error. The Court answered in the negative in an

unsigned *per curiam* opinion that did not address any constitutional issue. The Court held that the comprehensive statutory scheme governing absentee balloting and aimed at maintaining the integrity of elections must be applied strictly. While not every deviation from the letter of the statute is fatal, the Court explained, here “the Board’s error simply cannot be characterized as technical, ministerial or inconsequential.” The majority expressed sympathy with the plight of the voters, but reluctantly concluded that “an exception predicated on voter innocence would swallow the rule, effectively relieving election officials of their obligation to adhere to the law.”

The dissent by Judge Albert M. Rosenblatt (Judge Robert S. Smith joining), argued that the mistake was ministerial. Moreover, even if the mistake were more than ministerial, it was honest. The dissenters believed that the balance of interests tipped in favor of “letting the voter’s vote count” because strict adherence to the rules in these circumstances would not further the Election Law’s objectives.

Shortly after the Court of Appeals handed down its decision, two candidates and several of the absentee voters filed an action in the Northern District of New York under 42 U.S.C. § 1983, alleging violation of their rights under Fourteenth Amendment. Last week the District Court held that the candidates’ claims were barred by *res judicata*, but granted the voters’ request for a preliminary injunction barring the Board from certifying winners of the elections without tallying the contested ballots. *Hoblock v. Albany County Board of Elections* (Judge Lawrence E. Kahn). The federal court, like the dissent in *Gross*, considered the defect in procedure to be a “technicality.” It found that it would be fundamentally unfair to the absentee voters to disqualify their ballots. The District Court concluded that plaintiffs should not to have show intentional constitutional violations to establish their § 1983 cause of action, and that they therefore were likely to succeed on the merits of their claim.

### **Prospective Economic Relations**

It is not unusual for lawyers to be asked by clients whether they can “sue” for what is felt to be unlawful or unfair action by a third party that hurts the clients’ business. Such was the case in *Carvel Corp. v. Noonan*, which reached the Court of Appeals by way of certified questions from the United States Court of Appeals for the Second Circuit. The principal question certified was whether, under the evidence, Carvel had tortiously interfered with the prospective economic relations of its franchisees by distributing its product through supermarkets that compete with the franchisees.<sup>2</sup> The Court answered “No,” in an opinion by Judge Robert S. Smith, with a concurring opinion by Judge Victoria A. Graffeo. Chief Judge Judith S. Kaye took no part.

In separate federal District Court trials, all three franchisees had verdicts returned in their favor for compensatory and punitive damages based upon breach of the implied covenant of good faith and fair dealing and tortious interference with plaintiffs’

existing or prospective business relations.<sup>3</sup>

Anyone who believed there was a clear and simplistic answer to the certified question need only look to the opinions of Judges Smith and Graffeo, and the comprehensive discussion of the issue in the opinion certifying the question by Judge Richard C. Wesley of Second Circuit (formerly a Judge of the Court of Appeals), to see that is not the case.

All opinions in the case included a discussion of the Courts' prior decisions in *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183 (1980), and *NBT Bancorp Inc. v. Fleet/Norstar Fin. Group, Inc.*, 87 N.Y.2d 614 (1996). In *NBT*, the Court held that where there was an existing contract with which the defendant interfered causing its breach, recovery for tortious interference may be had even if the defendant was engaged in lawful conduct. Where the claim is only interference with prospective contract rights, however, a plaintiff is required to show "more culpable" conduct by the defendant in order to recover.

The opinion by Judge Smith concluded that because Carvel had not committed a crime or independent tort, the franchisees could not recover unless Carvel's conduct came within an exception to the general rule that criminal or tortious conduct is required. An exception exists for conduct "aimed solely at harming the [plaintiff]," but was inapplicable here; it was not disputed that Carvel had a motive of self-interest – to reverse its decline in business.

The Court specifically left "for another day" the issue of whether an additional exception exists for conduct that is "culpable" yet falls short of criminal or tortious. It found that because Carvel had not employed "wrongful means," its conduct would not fall within such an exception should the Court ever adopt one. The Court rejected the franchisees' argument that Carvel had employed wrongful means in the form of economic pressure because conduct constituting tortious interference must be directed at a party with whom the plaintiff seeks to have a relationship (the franchisee's customers), rather than the plaintiff itself, and no such pressure was used.

Finally, the Court concluded that Carvel's distribution of its products to supermarkets was not itself "wrongful," and that, to the extent Carvel engaged in activities inconsistent with the nature of the franchise relationship, contract law and not tort law should be the basis of the franchisees' claims.

The concurring opinion by Judge Graffeo, while agreeing that the proof was insufficient to support a claim for tortious interference against Carvel, considered the standard for recovery applied by Judge Smith too restrictive, and argued that the "improper conduct" standard found in Restatement (Second) of Torts, § 766B should be used in an interference case.

### **Direct Injury Required for § 349**

In *BCBS*, the Court in an opinion by Justice Carmen Beauchamp Ciparick unanimously ruled that only those directly harmed by conduct violative of the State's consumer protection statute may bring an action under Gen. Bus. L. § 349.

Plaintiff insurer brought an action in federal court against tobacco companies to recover sums expended for the treatment of its subscribers' smoking-related diseases. The jury ruled in favor of the tobacco company appellants on plaintiff's federal RICO and common law claims, but for plaintiff on the § 349 claim.

On appeal, the United States Court of Appeals for the Second Circuit asked the Court of Appeals to resolve a matter of statutory interpretation. Section 349 provides a private right of action to those injured "by reason of" a violation of the statute. The Second Circuit saw the issue of whether plaintiff had been injured "by reason of" appellants' conduct toward its subscribers as one of proximate cause, and asked the Court of Appeals to resolve whether plaintiff's injury was too remote to support the claim.<sup>4</sup>

The Court of Appeals viewed the issue as one of standing rather than causation. Its opinion discussed the common law rule that insurer claims to recover the cost of treating insureds were derivative and thus could be asserted only through subrogation. The Court declined to presume an intent to depart from this rule "in the absence of a clear indication of such intent from the Legislature," although, as the Court recognized, § 349 is a remedial statute and therefore should be construed broadly. "We hold simply that what is required is that the party actually injured be the one to bring suit."

### **Criminal Procedure**

As it did last term in *People v. Gonzalez*, 1 N.Y.3d 464 (2004), in *People v. Payne* the Court set free a defendant whom the jury had acquitted of a higher charge but convicted of depraved indifference murder because the facts of the case indicated the killing was intentional and therefore did not come within the definition of depraved indifference. Judge Albert M. Rosenblatt's decision for the 5-2 majority warned prosecutors that "depraved indifference murder may not be properly charged in the overwhelming majority of homicides."

The decision is more notable, however, for its resolution of the preservation issue over which the Court divided. At the close of the prosecution's case, the defendant made a motion under CPL 290.10 to dismiss for insufficient evidence. The trial court reserved decision, a procedure utilized by courts to preserve the People's right to appeal dismissal of charges and seek reinstatement of a conviction without running afoul of the double jeopardy clause. Defendant then testified and tried to establish that he had not acted intentionally. At the close of the case the defendant neither asked the court to rule on the reserved motion nor made a motion to dismiss based upon all of the evidence.

The majority concluded that the issue of whether the evidence supported the verdict had been adequately preserved for review. Unlike a defendant who puts on a defense after a CPL 290.10 motion has been denied and, according to precedent, thereby waives his right to have the sufficiency of the People's evidence alone considered, *see People v. Hines*, 97 N.Y.2d 56 (2001), defendant Payne had proceeded with a defense after the court deferred ruling. Extending *Hines* to this situation would "bar an appeal even though the trial court, aware that the motion was pending, had a full opportunity to review the issue in question."

Judge Robert M. Smith wrote a concurring opinion that expressed reservation about Judge Rosenblatt's argument for distinguishing *Hines*, and admitted that his concurrence was influenced by his doubt as to the wisdom of that precedent.

The dissent was authored by Judge Susan Phillips Read and joined in by Judge Victoria A. Graffeo. This opinion argued that defendant's decision to put on his own case after the court failed to grant his insufficiency motion (by reserving decision) put him in no different position than one who proceeds with a defense after such a motion has been denied. According to the dissent, the defendant waived his right to have the trial court or any appellate court consider his argument that the People's case-in-chief produced insufficient evidence to support the depraved indifference murder charge.

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Endnotes:

- <sup>1</sup> Simpson Thacher & Bartlett LLP, of which the authors of this column are members, represented a defendant in the trial of the *BCBS* action. That was not a party to the appeal.
- <sup>2</sup> The second question certified was whether punitive damages were recoverable by the franchisees. Because the first certified question was answered "No," the Court never had to reach this question.
- <sup>3</sup> Carvel had sued over 50 of its franchisees in the federal District Court in Connecticut seeking a declaratory judgment that its distribution practices did not violate its franchise agreements. The franchisees (which we refer to herein as plaintiffs) filed counterclaims. Shortly before trial, Carvel moved to dismiss its own complaint, without prejudice. The District Court granted the dismissal motion and ordered separate trials for three franchisees.
- <sup>4</sup> A second question was also certified, but it was not necessary for the Court of Appeals to reach the issue due to its answer to the first question.