NEW YORK COURT OF APPEALS ROUNDUP:

NON-WAIVER OF RIGHT OF COMPEL ARBITRATION, NEGLIGENT SPOLIATION OF EVIDENCE, AND THE DEATH PENALTY (AGAIN)

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November 6, 2007

In an action by a lawyer against her former firm, *Stark v. Molod Spitz DeSantis & Stark PC*, the Court of Appeals addressed whether "forays" into the courthouse during the parties' disputes waived a contractual right to compel arbitration. In an action against a nonparty that had been served with a preservation order, *Ortega v. City of New York*, the Court declined to recognize an independent tort for negligent spoliation of evidence. And in the last remaining capital appeal, *People v. Taylor*, the Court vacated the defendant's death sentence. We discuss these recent decisions below.

Arbitration of Lawyers' Disputes

It would be difficult to conceive of a case that so thoroughly justifies New York's "long and strong public policy favoring arbitration" than *Stark v. Molod Spitz DeSantis & Stark, P.C.* Indeed, it should be used as Exhibit A in support of any effort to make arbitration compulsory in intramural disputes involving lawyers.

Ms. Stark became an equity partner in the defendant law firm in 1996. She withdrew from the partnership in 2000, and became a contract partner under an employment agreement that contained a broad arbitration clause. Either party could terminate the agreement on 60 days' written notice. On April 10, 2003, the firm gave Ms. Stark notice of termination, and thus began a vigorous and ugly dispute rivaling the most bitter of divorce actions. Ms. Stark fired the first salvo by commencing a special proceeding seeking myriad forms of relief, ranging from securing her rights in case files to recovering the personal property left in her office from which she had been locked out. The firm opposed the application, and while it cited the employment agreement's arbitration clause, it did not move to compel. This initial dispute was resolved quickly by a so-ordered stipulation and the battle, as distinguished from the "war," was over.

In October 2003, Ms. Stark started a new action against the firm and its

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shareholders. Defendants moved to dismiss and to compel arbitration. Ms. Stark cross-moved to stay arbitration. All this was for naught when the motion court found the action to be a nullity because it bore the same index number as the earlier special proceeding.

In April 2004, Ms. Stark started a new action, purchased a new index number, and alleged a broad array of causes of action from breach of contract to gender discrimination and harassment in violation of New York City's Human Rights Law. Among other relief, she sought $10 million in punitive damages. The firm filed motions before two courts with jurisdiction over settled actions in which it was counsel for a party, seeking to have those courts resolve the allocation of fees from those actions between Ms. Stark and the firm. Ms. Stark responded by order to show cause to prevent the firm from seeking to have fee allocations in individual lawsuits decided by the trial judges to whom those lawsuits were assigned. The firm then moved to dismiss her new action, or to stay it and compel arbitration. Ms. Stark cross-moved to stay arbitration.

The motion judge dismissed most of Ms. Stark's claims on various grounds, and ordered to arbitration her one surviving claim for discrimination. The Appellate Division, First Department, reversed. It reinstated several causes of action, concluded that the firm had waived its right to arbitrate by its numerous actions in the courthouse, and because of its decision on waiver found it unnecessary to resolve whether discrimination claims brought under the Human Rights Law are arbitrable. Justice Eugene L. Nardelli issued a partial dissent, agreeing with the motion court that the firm had not waived its right to compel arbitration, and the Court of Appeals thereafter granted leave to appeal solely that issue.

In an opinion by Judge Susan Phillips Read for a unanimous Court, the Court reversed. In a nutshell, the Court concluded the firm's "forays" into the courthouse did not represent acceptance of court resolution of the matter, that there was no waiver of the contractual right to arbitrate, and that the state's policy favoring arbitration should carry the day. The lessons to be learned from the case are, first, that not all actions taken in the courthouse will serve to waive a party's right to arbitrate a dispute, and, second, that the state's policy favoring arbitration is alive and well.

No Spoliation Tort

In *Ortega v. City of New York,* a unanimous Court, in an opinion by Judge Victoria A. Graffeo, joined the majority of jurisdictions to have considered the issue and decided against recognizing a claim of spoliation of evidence as an independent tort. The Court's conclusion was based largely upon the fact that the elements of causation and damages would be virtually impossible to prove without engaging in speculation and conjecture, resulting in unreliable determinations.

Ms. Ortega purchased a 1987 Ford minivan from a private owner. She then brought the vehicle for a state inspection and a tune-up. The following day, while she and coplaintiff Mr. Peralta were driving in the vehicle, they smelled fumes. When they pulled the vehicle to the side of the road, it burst into flames, causing both individuals to suffer severe

burns.

A towing contractor removed the vehicle from the scene to its storage facility. Mr. Peralta's lawyer tried to inspect the vehicle, but was denied access by the contractor because Mr. Peralta was not the owner. On Nov. 7, 2003, the contractor took the vehicle to the New York City Police Department's automobile pound.

In the meantime, Mr. Peralta started a special proceeding against the towing contractor and the police department, and on Nov. 18 obtained an order giving him 60 days to inspect the minivan, during which time the vehicle could not be altered or destroyed. The order was served on the police department, which promptly sent a copy of it to the pound. Unfortunately, the order was either not received or not acted upon. The vehicle was sold at auction on Dec. 10, 2003, and crushed for scrap metal on Dec. 30.

In July 2004, Ms. Ortega and Mr. Peralta sued the city for the personal injuries they sustained as a result of the vehicle fire. One of their theories of liability was that the city had breached its duty to preserve the vehicle, therefore committing the tort of negligent spoliation of evidence.

Plaintiffs made a motion for summary judgment supported by the affidavit of an accident reconstructionist, who said that the destruction of the vehicle made it impossible to determine the cause of the fire or to identify the responsible parties. In opposition, the city asserted that the spoliation claim was inherently speculative because inspection of the vehicle might not have revealed the cause of the fire. The city also presented an affidavit from its own reconstruction expert, who stated that the plaintiffs could have pursued other methods of investigation to establish their claims against the true tortfeasors, such as the vehicle manufacturer, prior owner, or service station that performed the inspection and tune-up.

The motion court, in a thoughtful opinion by Justice Martin M. Solomon, acknowledged that the tort of spoliation was problematic due to its speculative nature. It nonetheless concluded that Mr. Peralta had stated a cause of action, but denied his summary judgment motion due to the existence of factual issues. It dismissed Ms. Ortega's claim because she had not obtained a preservation order and the city therefore owed her no duty. The Appellate Division, Second Department, reversed.

Independent Spoliation Tort

Certain states have recognized an independent spoliation tort. Some of these require a showing of malice, while others put the claim in the category of negligence and require a showing of proximate cause and damages. Plaintiffs here would fail to satisfy the elements of the tort in either of these types of jurisdictions, the Court observed, because there was no suggestion of malice, and the spoliation was not the cause of the personal injuries for which plaintiffs sought damages.

A few states that have recognized the tort have not required either malice or

proximate cause or damages, reasoning, in essence, that "for every wrong there should be a remedy." New York jurisprudence does seek to provide a remedy to those who have been wronged, but the Court concluded that such principle should be the beginning rather than the end of its analysis; both judicial and social policy concerns come into play in determining whether to recognize new tort causes of action.

The Court provided various rationales for denying the existence of a third-party spoliation claim. These included that the tort would create significant potential liability for municipalities. Its basic conclusion, however, was that because both causation and damages would present insuperable problems of proof, a spoliation claim could be based only on speculation and conjecture, which New York should not permit.

The Court acknowledged that there will be instances in which third parties with a duty to preserve evidence (like the city here) breach that duty. Refusing to recognize a cause of action for such a breach does not leave parties without recourse, however. They can pursue civil contempt, as plaintiffs originally did in *Ortega*, although that claim was dismissed because it had not been filed in the court that issued the preservation order. The Court of Appeals did recognize, however, that contempt would not provide an avenue for recovery of all of the damages plaintiffs had sought, for example for their pain and suffering stemming from the fire.

Death Penalty

"Stare decisis et non quieta movere" - "to stand by things decided, and not to disturb settled points" - carried the day in the last outstanding capital appeal, *People v. Taylor,* the well-publicized "Wendy's" murder case that arose from the horrific armed robbery of a fast food restaurant during which seven employees were forced into a walk-in refrigerator and shot, five of them fatally.

In *People v. LaValle*, 3 NY3d 88 (2004), a divided Court of Appeals found New York's death penalty statute unconstitutional. Two of the four judges who supported that result have since left the Court. Three current members of the Court are of the view that *LaValle* was decided correctly, and voted to vacate the sentence of death in *Taylor.* Three others, all of whom believe that *LaValle* was decided incorrectly, dissented in *Taylor* on the ground that *LaValle* had determined the statute unconstitutional only as applied in that case, and that even under the reasoning of *LaValle,* the statute had been constitutionally applied in *Taylor.* The seventh member of the Court, Judge Robert S. Smith, who had authored the dissent in *LaValle* and continues to believe that case was decided incorrectly, nonetheless voted to vacate the death sentence in *Taylor*. His concurring opinion stated that, pursuant to the doctrine of stare decisis, *LaValle* should not be disturbed.

Deadlock Jury Instruction

The appeals in both cases centered on the mandatory deadlock jury instruction of the death penalty statute enacted by New York in 1995. That instruction required a trial court to tell the jury that it should consider whether to sentence the defendant to death or to life

imprisonment without possibility of parole, but that its decision would have to be unanimous, and that if the jurors could not agree on a sentence, the court would impose a sentence of at minimum 20-to-25 years in prison and at maximum life.

The jury in *LaValle* was given that instruction, and sentenced the defendant to death. The Court of Appeals vacated the sentence, finding that the deadlock instruction was coercive, and therefore violated the Due Process Clause of the state Constitution. The Court also held that the deadlock provision could not be severed from the statute because due process requires that a jury be informed of the consequences of its failure to agree on a sentence. The Court further determined that it could not rewrite the instruction to render it constitutional; instead, rather the Legislature would have to craft new language. The opinion concluded, "under the present statute, the death penalty may not be imposed."

Taylor presented a unique situation. The defendant was convicted and sentenced to death before *LaValle* was decided, but the trial judge attempted to ameliorate the coercive nature of the deadlock provision. Although the judge gave the instruction as required by the statute, he also informed the jury that he was empowered to, and in this case "would almost certainly," sentence the defendant to 25 years on each count to run consecutively so that Mr. Taylor would not become eligible for parole until he had served 175 years in prison.

To four judges of the Court of Appeals (the dissenters and Judge Smith), said this additional instruction rendered the deadlock instruction constitutional as applied. The three-judge plurality of Chief Judge Judith S. Kaye, Judge Carmen Beauchamp Ciparick (both of whom were in the majority in *LaValle*), and Judge Theodore T. Jones (who was not yet on the Court when *LaValle* was decided), in an opinion by Judge Ciparick, did not decide that issue, although it observed that the trial judge in *Taylor* had effectively provided the jury with his view of the mitigating evidence introduced during the sentencing phase of the trial.

To the plurality and Judge Smith, however, whether the mandatory deadlock instruction had been, or theoretically could be constitutionally applied, was not the controlling issue. Instead, they viewed *LaValle* as having ruled the provision unconstitutional on its face. Judge Ciparick stated that, in the prior decision "[w]e deemed it necessary, regardless of a showing of actual prejudice, 'to strike down the deadlock instruction . . . because it creates the substantial risk of coercing jurors . . . ,'" quoting *LaValle*, 3 NY2d at 128, and that the Court would be "rewrite[ing] history [to] recategorize our holding as dictum."

Stare Decisis

The Court emphasized the importance of the principle of stare decisis, which allows the judiciary to function and also promotes its legitimacy. In the words of the plurality, stare decisis "is deeply rooted in the precept that we are bound by the rule of law, not the personalities that interpret the law." The concern that little had changed in the three years since *LaValle* was decided, other than the composition of the Court, seems to have undergirded Judge Smith's opinion, as well.

Both the plurality and the concurring opinions pointed to the fact that nothing in *LaValle* prohibits the Legislature from adopting a new deadlock instruction. The dissenting opinion, however, suggested that it was doubtful any such attempt would pass muster with the Court: "Fair-minded citizens might well be forgiven for wondering whether the Court of Appeals is simply unwilling ever to uphold a death sentence, no matter how the law is written (or may be rewritten) . . . ." Judge Susan Phillips Read authored the dissenting opinion, joined by Judge Victoria A. Graffeo who, like Judge Read, had dissented in *LaValle*, and Judge Eugene F. Pigott Jr., who joined the Court only recently.

The dissent stated that it accepted the holdings of *LaValle* as "binding precedent for reasons of stare decisis," but argued for narrow application of the doctrine to the holdings of cases only, and interpreted *LaValle* as holding the deadlock provision unconstitutional as applied. The statue did not prohibit trial courts from supplementing the mandatory instruction, as was done in *Taylor,* and thus the constitutional defect could be cured by removing any possible fear of jurors that a deadlock would result in release of the defendant back into the community, Judge Read argued.

Of course, this solution would be effective only when the sentence available for the trial court to impose would permit the jury to be assured there was no possibility the defendant would someday be paroled. The plurality and concurring judges considered such a "fix" to be unworkable, and pointed out that it would reduce the instances in which capital punishment was available, restricting the statute in a manner the Legislature did not intend.

The result of *Taylor* is to make clear, if any doubt remained on the matter after *LaValle,* that if capital punishment is to be restored in New York, the Legislature will have to make that occur.