POST-VERDICT JUROR ISSUES, LABOR LAW § 2401(1), ATTORNEYS' FEES

ROY L. REARDON AND MARY ELIZABETH MCGARRY
SIMPSON THACHER & BARTLETT LLP

APRIL 2003

Two of the recent Court of Appeals decisions we discuss this month arise out of criminal convictions and problems with jurors discovered post-verdict, in one of which the Court held the fact that a venire person lied during selection to avoid being stricken from the panel did not automatically entitle the defendant to a new trial. Another involves whether work performed on a building scheduled for demolition constituted alteration or demolition for purposes of Labor Law § 240(1). In the last opinion we address, the Court decided a case involving attorneys' fees, but did not resolve an issue of keen interest to public interest lawyers.

Jury Issues

Two recent cases involved criminal defendants seeking new trials due to issues regarding members of the respective juries that convicted them. Only one succeeded in his appeal.

The defendant in *People v. Rodriguez* was charged with selling a controlled substance. After Rodriguez's conviction was entered, misconduct on the part of one of the jurors was discovered.

The juror, Cohen, was acquainted with an Assistant District Attorney. They had been high school friends but lost touch with each other for 10 years. Yet a few weeks before the trial, Cohen contacted the ADA and the two had lunch together (the various opinions in the case do not discuss whether the contact occurred before or after Cohen had received notice he was being called to jury service). During voir dire in *Rodriguez*, Cohen deliberately concealed his friendship with the ADA when questioned about any relationships with persons in law enforcement. Shortly after the trial, Cohen called the ADA in order to arrange dinner among the two and their wives, and mentioned his actions. The ADA informed the prosecutor, who informed the court, which held an evidentiary hearing.

The trial court concluded that Cohen had engaged in misconduct. It found, however, that the relationship between Cohen and the ADA was "remote." It also credited Cohen's testimony that he was motivated only by his desire to sit on a short trial such as Rodriguez's and thereby avoid a long trial, and that he was not influenced in deliberations by his relationship with the ADA. The court found no prejudice to the defendant and denied his

motion for a new trial pursuant to CPL 330.30(2), which applies when juror misconduct during the trial is discovered after a verdict has been rendered but before sentencing. In those circumstances, retrial is required only if the conduct "may have affected a substantial right."

Defendant's position on appeal was that Cohen's lying during voir dire deprived defendant of his "substantial right" under the State constitution to participate in jury selection. If Cohen had revealed the relationship, the argument went, defendant would have questioned him further and, perhaps, stricken him from the panel.

The Court (Judge Albert M. Rosenblatt) unanimously affirmed the denial of a new trial stating, "we have never held that a juror's concealment of any information during voir dire is by itself cause for automatic reversal." Instead, motions pursuant to CPL 330.30(2) are to be decided upon the specific facts, the nature of the juror misconduct and the likelihood of prejudice. Here, the Court held, the trial court's finding that the juror's misconduct was "harmless" was supported by evidence, and thus would not be overturned.

In *People v. Sanchez,* the decision to grant a new trial merited only a memorandum opinion. Sanchez was charged with several counts of drug possession and sale. During deliberations, one of the jurors confided to a court officer that she did not understand "what was going on," the judge or the lawyers. This apparently was attributable to her lack of facility with English as a second language.

While the trial judge and lawyers were discussing the problem, the jurors reached a verdict. The court then conducted a brief interview of the juror, including a single question directed to her command of English, and declared her "not grossly unqualified," the standard under CPL 270.35, which applies to juror misconduct or inability to serve is discovered after the jury has been sworn but before it reaches a verdict. The Court of Appeals held that this questioning did not constitute the "probing and tactful inquiry" required when it appears that a juror may be grossly unqualified.

Labor Law § 240(1)

In *Panek v. County of Albany*, the Court was again called upon to examine the reach of Labor Law § 240(1) in a case in which the plaintiff claimed his injury occurred during the course of the demolition or alteration of a building.

The plaintiff was an engineer technician employed by the FAA at Albany Airport. He was injured while removing two air handlers from a control tower that was scheduled for demolition in the near future. They were to be installed in the new control tower that was already in operation. In the course of his work, plaintiff fell from a ladder owned by the FAA and was injured.

Plaintiff later sued Albany Airport Authority, which leased the towers to the FAA, and the County of Albany for which the Authority operated the airport, for negligence

and violations of various provisions of the Labor Law. After discovery was complete, plaintiff moved for partial summary judgment on his § 240(1) claim on the basis that the work he was doing when injured was incidental to the upcoming demolition of the old tower, or, alternatively, constituted an alteration of that tower. Defendants cross-moved to dismiss all claims, arguing that the work was neither part of the separately contracted-for demolition of the tower nor an alteration.

The Supreme Court, Albany County granted plaintiff's motion and denied defendants' cross-motion, finding that plaintiff had been engaged in alteration activity, but rejecting the theory that he had been engaged in demolition activity. The Appellate Division, Third Department reversed, granted defendants' cross-motion and dismissed the complaint, concluding that plaintiff was not involved in either activity. In somewhat of a "Catch-22," the Appellate Division decided that plaintiff had not been engaged in demolition, but the tower's scheduled demolition precluded a finding that plaintiff was engaged in alteration.

The Court of Appeals disagreed with respect to the alteration issue and in an opinion by Judge Victoria A. Graffeo, for a unanimous Court, reinstated the orders of the Supreme Court.

At the core of the opinion is the view that § 240(1) imposes strict liability on owners, contractors and their agents, and should be construed liberally to fulfill its purpose of protecting workers. Accordingly, while plaintiff had not been engaged in demolition, as both courts below had found, he was performing work "in the nature of an alteration," as contemplated by the statute. Relying upon its prior decisions in *Joblon v. Sobow*, 91 N.Y.2d 457 (1998) and *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958 (1998), the Court concluded plaintiff had been engaged in work involving a significant change to the building and therefore an alteration, and the fact that the building was scheduled for demolition did not change the nature of that work.

Attorneys' Fees

This Court of Appeals generally does not reach out to resolve significant issues. This is illustrated by its decision in *Wittlinger v. Wing,* a case that had been closely watched for one of two holdings of the Appellate Division, First Department below, that of broad application. The Court of Appeals instead affirmed the order being appealed on the basis of the narrower, case-specific holding.

Wittlinger involved application of the Equal Access to Justice Act, CPLR Art. 86, which provides that in a suit against the State the court "shall award [attorneys' fees] to the prevailing party . . . unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust." The Appellate Division had affirmed the denial of attorneys' fees to the petitioner in an Article 78 proceeding on the grounds that petitioner was not a "prevailing party" and the State's position was "substantially justified." The Court of Appeals affirmed the result, ruling that the First Department had not abused its discretion in

finding the State had been "substantially justified" in its position, but never reached whether the alternative holding was also correct.

To give a condensed description of the factual background, petitioner had commenced an Article 78 proceeding against New York to receive public assistance payments that had been wrongfully cut-off. The State and petitioner stipulated to an administrative hearing at which the State attempted to justify the termination of petitioner's benefits. The hearing resulted in a decision that the benefits were improperly terminated and petitioner was entitled to $15,000 in back benefits, at which point the State agreed to pay petitioner. Due to bureaucratic bungling, no payment was received for four months, and payment of the entire sum was not completed for an additional two months.

Prior to the balance due having been paid, the State moved to dismiss the Article 78 proceeding on the basis that no court order directing compliance with the administrative decision was necessary. The final payment was thereafter received and the Supreme Court, New York County both granted the State's motion to dismiss the petition as moot and denied petitioner's application for attorneys' fees. Petitioner appealed the latter ruling, relying upon the "catalyst" theory pursuant to which a party who achieves his litigation objective because the suit brought about a voluntary change in the defendant's conduct has "prevailed."

The First Department declared the "catalyst" theory "no longer viable," citing *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources.* There, the U.S. Supreme Court in interpreting a federal statute held that, "where there is no judicially sanctioned change in the legal relationship of the parties," for example a judgment or court-ordered consent decree, there could be no "prevailing party." 532 U.S. 598, 605 (2001). This holding of the First Department was of great concern to public interest law supporters. It attracted several amici who argued that such a narrow reading of "prevailing party" would discourage lawyers from agreeing to take on meritorious suits against the State for fear the State, on the verge of losing, could avoid paying their fees by agreeing to the relief sought.

The Court of Appeals "neither endorse[d] nor repudiate[d]" the First Department's declaration of the catalyst theory's death. Instead, the unanimous decision written by Judge Albert M. Rosenblatt stated, "we need not reach the . . . issue" because the State was not without substantial justification in taking its ultimately unsuccessful position at the administrative hearing.