The Court of Appeals' Year in Review, COVID-19 Edition

By Rob Rosborough

2020 has been a year unlike any other. With the spread of COVID-19 growing in New York exponentially in March, Chief Judge Janet DiFiore and the entire court system decided to take unprecedented action to limit in-court proceedings to only those essential for the administration of justice. The Court of Appeals was no exception. And yet, through it all, the Court diligently continued its work, deciding novel issues of statewide importance and ensuring that the wheels of justice continued to turn. Here's a quick look back at this extraordinary year at the Court of Appeals.

COVID-19 BRINGS SOCIAL DISTANCING TO THE COURT OF APPEALS

Although the Court at first decided to proceed with the oral arguments scheduled for its March session in person, with an option for argument by videoconference, only the first day of argument ended up going forward. It was a remarkable sight to see the Court observing social distancing by moving Chief Judge DiFiore, Judge Rivera, and Judge Stein from their normal positions on the bench to the advocates' tables in front of the bench, while Judges Fahey, Garcia, Wilson, and Feinman spread out along the bench behind them. As they say, a picture is worth a thousand words:

Behind the advocates was an eerily empty courtroom that echoed with each argument. As the pandemic continued, the Court decided to take a small number of its April/May Session arguments on submission, and then in June, held virtual arguments for the first time in the Court's history. Even now, when arguments are back to being heard in person, only the judges and the advocates are allowed in the courtroom, everyone is wearing masks, the argument podium has been removed, and counsel are arguing the most important cases in the state seated at tables like it's a roundtable discussion on the finer points of New York law. These are remarkable times.

THE COURT OF APPEALS' BUSINESS CONTINUES NEVERTHELESS, BUT AT A REDUCED VOLUME

Even with the pandemic whirling around us, the Court of Appeals continued its regular practice of deciding cases about 30 days after they were argued, and handed down a number of noteworthy decisions this year. The total number of appeals that the Court has decided, however, has decreased considerably. For example, between 2017 and 2019, the Court decided an average of 128 appeals per year (approximately 99 in the normal course on full briefing and oral argument, and 29 on the sua sponte merits track on letter briefing only). This year, in contrast, through the end of October, the Court has decided

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Judges of the Court of Appeals heard cases in June while social distancing. They now wear masks at all times. Photo courtesy of the New York Unified Court System.

45 appeals in the normal course and 16 appeals on the sua sponte merits track. If that pace continues, the Court will end up deciding only about 76 appeals this year, which is well below its average for the last three years.

Although much of the decline can be chalked up to dealing with the COVID-19 pandemic, the reduction in the total volume of appeals that the Court of Appeals decides is consistent with a troubling trend that can be observed over the last number of years. Between 2010 and 2016, the Court decided an average of 234 appeals per year, about 190 of which were in the normal course with oral argument. But in 2017, that number began to dip significantly. That year, only 142 appeals were decided, 110 of which were following full briefing and oral argument. In 2018, it was 136 appeals (104 in the normal course), and in 2019, it was down to 108 appeals (only 83 in the normal course).

The significant reduction in the Court's caseload means that it is not only much harder to get a case to the Court of Appeals (the Court granted only 2.1% of its civil motions for leave to appeal in 2019, and has granted leave in only 20 civil cases this year so far), but also to give women and other historically underrepresented groups opportunities to argue in our state's highest court. In 2019, for example, the Court of Appeals heard 168 total oral arguments, only 50 of which were given by women. Although the 30% rate is larger than the rate seen at the United States Supreme Court, for example, the rate masks a significant divide between arguments in criminal cases and those in civil cases. Women argued in 44% of criminal cases in 2019 (31 criminal arguments out of 71 total), but only 20% of civil cases (19 civil arguments out of 97 total). The 168 total available argument spots in 2019 were down from the 372 total available arguments in 2016 and the 420 total available arguments in 2012.

In 2020, the Court of Appeals heard only 115 oral arguments (42 in criminal cases, 73 in civil cases), well off the pace of last year because the pandemic forced the Court to cancel all but one argument day in March, April, and May. Again, there is a marked divide in the rate of arguments by women in civil and criminal cases. Although women have argued 50% of the criminal cases this year (21 out of the 42 available arguments), they have only argued 25% of the civil cases (18 out of 73 arguments). It's time for the Court to tackle this issue head on. Besides granting leave to appeal in more cases to provide more total opportunities for argument in the state's most important cases, the Court should, at the very least, amend its rules to expressly encourage arguments by women and other underrepresented advocates in our state's highest court.

Now, on to this year's most notable Court of Appeals decisions:

- *In re Vega (Postmates Inc. – Commissioner of Labor)*, 35 N.Y.3d 131 (Mar. 26, 2020): In a decision that could significantly drive up costs for businesses in the gig economy, the Court held that couriers for Postmates – a delivery business that uses a website and smartphone app to coordinate deliveries from restaurants and stores to people across the country – are employees, not independent contractors, requiring Postmates to make unemployment insurance contributions for them. The Court held that Postmates exercised more than incidental control over the couriers' work by "dictating to which customers they can deliver, where to deliver the requested items, effectively limiting the time frame for delivery and controlling all aspects of pricing and pay-

ment," even though the couriers could choose their own work schedules and delivery routes. Although this decision was made in the context of unemployment insurance, its rationale for holding gig economy couriers to be employees could also have significant impacts in wage and hour cases based on the misclassification, and could establish that the couriers should be entitled to a number of other employment rights that are typically afforded to employees, but denied to independent contractors.

- *Bill Birds, Inc. v. Stein Law Firm, P.C.*, 35 N.Y.3d 173 (Mar. 31, 2020): What lawyer hasn't worried that a client may one day sue over legal advice that was given during the course of a representation? If you have, this Court of Appeals decision is worth reading. Narrowing the possible avenues for such a suit against lawyers and law firms, the Court held that claims brought under Judiciary Law § 487(1), which provides that an attorney "who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" is guilty of a misdemeanor and may be liable to the injured party for treble damages in a civil action, does not "extend to negligent acts or conduct that constitutes only legal malpractice," and does not cover pre-suit advice. Thus, the Court affirmed the dismissal of a section 487(1) claim against a law firm that had alleged the plaintiffs were "induced to file meritless lawsuit based on misleading legal advice."
- *Regina Metropolitan Co., LLC v. New York State Div. of Hous. & Community Renewal,* 35 N.Y.3d 332 (Apr. 2, 2020): In a case that was poised to have a huge impact on rent-stabilized housing in New York City and on landlords in particular, the Court of Appeals held that the proper method for calculating the recoverable rent overcharges for apartments that were improperly removed from rent stabilization during receipt of J-51 benefits was to start with the rent charged four years before the case was filed, add any legal increases that applied during the statute of limitations period, and then compute the difference between the legal rent and the rent that was actually charged. Resolving a previously unsettled question, the Court held that the rental history that occurred before the four-year lookback period could not be considered. Notably, however, the impact that this decision could have had was largely muted when, while these appeals were pending, the legislature amended the Rent Stabilization Law to change the rent overcharge calculation. Although the tenants asked the Court to apply the new amendments retroactively to their cases, the Court declined to do so because it would have imposed a huge unexpected liability on the apartment owners that was not contemplated under the pre-amendment RSL, and would not have comported with due process.
- *Colon v. Martin*, 35 N.Y.3d 75 (May 7, 2020): When a claimant looks to sue a municipality in tort, they must first serve the municipality with a notice of claim. Under General Municipal Law § 50-h, the municipality has the right to depose the claimant before an action is commenced. Resolving a matter of first impression, the Court of Appeals held that when there is more than one claimant named in a notice of claim, the municipality has the right to depose each separately outside the presence of the other. The statute's reference to permitting the claimant to have "*such examination* in the presence of his or her own personal physician and such relative or other person as he or she may elect" refers only to the physical examination contemplated by the statute, not to the oral deposition. Thus, failure of the claimants to accede to the municipality's request to conduct separate section 50-h depositions warranted dismissal of the action.
- *National Fuel Gas Supply Co. v. Schueckler*, 35 N.Y.3d 297 (June 25, 2020): Given New York's bountiful oil and natural gas reserves, development of interstate transmission lines has consistently been proposed across the state. In the course of those projects, development companies generally must establish, under Eminent Domain Procedure Law § 204(B), that the projects have a public benefit before the companies may exercise eminent domain powers to take the easements necessary to build the pipeline. In *NFG*, the Court of Appeals was asked whether a company that has been issued a Federal Energy Regulatory Commission certificate of public convenience and necessity for a project, based upon a review similar to that required under EDPL 204(B), could continue to exercise eminent domain powers even if the New York State Department of Environmental Conservation had denied a required water quality certification for the project. The Court held that it could. The DEC's denial of the water quality certification did not impair the validity of the FERC certificate of public convenience and necessity, the Court held, because the FERC certificate only conditioned construction of the project on receipt of the water quality certificate; it did not condition the exercise of eminent domain powers.
- *People v. Hinshaw*, __ N.Y.3d __, 2020 N.Y. Slip Op. 04816 (Sept. 1, 2020): The Court of Appeals' precedent, especially when it concerns the constitutional rights of criminal defendants, regularly shows that the state constitution con-

tinues to play a significant role in protecting the rights of New Yorkers. This time, the Court clarified that, under the state constitution, New York requires probable cause of a traffic infraction for law enforcement to conduct a traffic stop of a car, or reasonable suspicion that a crime has been committed. As the Court noted, this upholds New York's tradition of providing more protection for New Yorkers under the state constitution than is otherwise provided under the federal constitution, which permits traffic stops based only upon reasonable suspicion.

- *Hewitt v. Palmer Veterinary Clinic, PC*, __ N.Y.3d __, 2020 N.Y. Slip Op. 05975 (Oct. 22, 2020): As everyone remembers from law school, pet owners get one free bite before they can be held strictly liable for injuries that their pets cause. The one free bite rule is essentially a notice requirement; once a pet owner knows that a pet has vicious propensities because the pet has bitten or injured someone before, the owner may be held liable without regard to their negligence for any subsequent injury that the pet causes. The one free bite prior notice rule, however, doesn't apply to veterinary clinics, the Court of Appeals held in *Hewitt*. Veterinary clinics are already on notice of the dangers that may exist in their waiting rooms when a pet that is ill, distressed, or has just been treated is brought into that space. Indeed, the Court held, because the clinics have "specialized knowledge relating to animal behavior and the treatment of animals who may be ill, injured, in pain, or otherwise distressed" and "are uniquely well-equipped to anticipate and guard against the risk of aggressive animal behavior that may occur in their practices – an environment over which they have substantial control, and which potentially may be designed to mitigate this risk," no prior notice of an animal's vicious propensities is required before the clinic may be held liable for injuries caused by a pet in the clinic's waiting room.

THE COURT OF APPEALS EXPANDS DIGITAL FILINGS AND AMENDS SERVICE REQUIREMENTS

Whether due to the COVID limitations on in-person filings, or the Court simply decided it was time to expand electronic filings, the Court amended its rules, effective May 27, 2020, to require, for the first time, parties to file digital copies of all civil motions, opposing papers to those motions, and jurisdictional inquiry responses. Before this amendment, the Court's rules had limited digital filings to the briefs and records filed on appeals. Unlike filing on the NYSCEF system, however, the digital filing does not actually constitute service or filing of the motion. That is still governed by the CPLR and when the paper copy of the motion papers hits the counter in the Clerk's Office and is stamped received. But the new rule amendments provide that the parties have seven days after the return date of the motion to upload their digital copies of the motion papers.

What is most notable about this rule change is that the Court is significantly reducing the amount of printed paper copies of the motion papers that have to be filed in the Clerk's Office (from six copies to one), and eliminating entirely the requirement to file paper copies of the Appellate Division briefs and record that must normally accompany civil motions for leave to appeal. Another change to note: under the Court's rules, counsel used to have to serve the other side with two copies of a motion for leave to appeal, and the affidavit of service needed to note specifically that two copies were served. No longer. Now, only one copy of the motion needs to be served.

LOOKING TO 2021 AT THE COURT OF APPEALS

Throughout 2020, the Court of Appeals has adapted to the difficult times, shifted its procedures to ensure the safety of its staff and the parties that appear before it, and set a great example for how to remain productive during an unprecedented pandemic. Looking to next year, the Court will decide another slate of novel issues – including whether the state constitutional ban on gambling precludes the legislature from authorizing daily fantasy sports without a constitutional amendment and whether the Forever Wild clause of the New York Constitution precludes the state from cutting the trees necessary to create community connector snowmobile trails throughout the Adirondacks – but the Court will be doing so with a new associate judge on the bench.

On November 2, 2020, Associate Judge Leslie Stein announced that she will be retiring from the Court of Appeals bench effective June 4, 2021. That was very surprising news. Judge Stein, who joined the Court in 2015, was not slated to reach mandatory retirement until 2026. Her decision to retire now opens two seats on the bench in 2021; Associate Judge Eugene Fahey will be forced into mandatory retirement on December 31, 2021. With Judge Stein's upcoming retirement, the Court will lose a distinguished jurist who often found herself as the deciding vote in split cases, and Governor Andrew Cuomo will have yet another chance to appoint a new judge to our state's highest bench (this will be his ninth appointment to the seven-member bench). With all of this change ahead, 2021 is sure to be another exciting year at the Court of Appeals.