Commonwealth of Massachusetts

THE APPEALS COURT

BOSTON UNIVERSITY SCHOOL OF LAW
Boston, MA

Tuesday, March 5, 2024

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THE APPEALS COURT

The sitting of the Massachusetts Appeals Court scheduled for Tuesday, March 5, 2024, shall be held at 9:30 A.M. at Boston University School of Law on Commonwealth Avenue in Boston.

Presiding Justices for this session are as follows:

Mark V. Green, Chief Justice

Vickie L. Henry, Associate Justice

Joseph M. Ditkoff, Associate Justice

The Appeals Court is conducting this sitting at Boston University School of Law as part of a continuing effort to broaden public awareness, understanding, and accessibility of the Massachusetts court system. The Justices will continue to hear oral arguments in cases on appeal at the John Adams Courthouse in Boston during the month.

MEET THE PANEL

CHIEF JUSTICE MARK V. GREEN

Chief Justice Mark V. Green was born in Moline, Illinois, on September 1, 1956. He received his A.B. degree, with distinction in all subjects, from Cornell University in 1978, and his J.D. degree, *cum laude*, from Harvard Law School in 1982. Chief Justice Green practiced transactional real estate law as an associate with the firms of Herrick & Smith and Goulston & Storrs until 1990, when he accepted a position with Shawmut Bank as Vice President and Senior Counsel for Real Estate. From 1994 to 1995, Chief Justice Green was General Counsel of The Mortgage Acquisition Corporation. He joined the legal department of BayBank, N.A. in 1995, where he remained through its merger with the Bank of Boston in 1996.

In May 1997, Chief Justice Green was appointed by Governor William F. Weld as an Associate Justice of the Massachusetts Land Court, where he served until his appointment by Governor Jane M. Swift to the Appeals Court on November 1, 2001. On December 6, 2017, he was appointed Chief Justice of the Appeals Court by Governor Charles D. Baker.

While at the Land Court, Chief Justice Green chaired a committee that promulgated the Land Court's Guidelines for Registered Land. In 2003, at the request of the Supreme Judicial Court, Chief Justice Green chaired the Study Committee on Trial Transcripts. From 2012 until his appointment as Chief Justice, he chaired the combined appellate courts' IT Steering Committee where, among other initiatives, he led the courts' implementation of electronic filing.

Chief Justice Green has been a panelist on numerous continuing legal education programs sponsored by Massachusetts Continuing Legal Education and the Boston Bar Association, among others. He also has been a guest lecturer for courses at the Harvard Business School and the Massachusetts Institute of Technology Center for Real Estate Studies. From 2007 until his appointment as Chief Justice, he served as a member of the Board of Editors of the Boston Bar Journal. In 2005 and 2009, Chief Justice Green participated in rule of law exchange programs in Russia and, in 2011, he was a member of a rule of law exchange program in the People's Republic of China, focused on the American jury trial system.

He is married, with two children.

ASSOCIATE JUSTICE VICKIE L. HENRY

Born in Ohio and raised in Michigan, Justice Vickie L. Henry graduated, *cum laude*, from Wellesley College in 1988 with a bachelor's degree in Economics. She graduated *summa cum laude* from Boston University School of Law in 1993, where she was the projects editor of the American Journal of Law & Medicine and won the American Jurisprudence Award for the course in Corporations.

Upon graduation, Justice Henry served as a law clerk to Vermont Supreme Court Justice Denise Johnson. In 1994, she became an associate in the firm of Crosby, Heafey, Roche & May PC in Oakland, California. Moving back to Boston in 1996, she became an associate and, subsequently, a partner in the firm of Foley Hoag LLP, where she focused on intellectual property disputes, commercial litigation, and product liability. In this practice, she represented corporate and individual clients from a diverse range of businesses and industries, including pharmaceuticals, medical devices, telecommunications, and food processing equipment. Early in her career with Foley Hoag, Justice Henry completed a four-month rotation in the Norfolk County District Attorney's Office, prosecuting jury and bench trials. She culminated her career at Foley Hoag as the co-deputy coordinator of the Litigation Department.

From 2011 until her appointment to the Appeals Court, Justice Henry was a Senior Staff Attorney and Youth Initiative Director of Gay & Lesbian Advocates & Defenders. As the leader of the Youth Initiative, she was involved in public policy advocacy, education, and strategic litigation efforts in New England and on a national level. Justice Henry also worked on GLAD's teams to successfully challenge the constitutionality of section 3 of the federal Defense of Marriage Act and to win a landmark ruling at the United States Supreme Court that same-sex couples throughout the United States are guaranteed equal access to marriage and to all the rights, benefits, and responsibilities associated with marriage.

Appointed to the Appeals Court by Governor Charles D. Baker, Justice Henry joined the court on December 22, 2015.

ASSOCIATE JUSTICE JOSEPH M. DITKOFF

Born in Bronxville, New York in 1971, Associate Justice Joseph M. Ditkoff graduated *cum laude* from Yale College in 1993 with a B.A. in History, where he was chairman of the Tory Party debating society and an award-winning debater. He graduated *magna cum laude* from Harvard Law School in 1996, where he was managing editor of the Harvard Journal of Law and Public Policy.

Upon graduation, Justice Ditkoff clerked for the Honorable Jerry E. Smith of the United States Court of Appeals for the Fifth Circuit. He then proceeded to the Office of Independent Counsel Kenneth W. Starr, where he served as Litigation Chairman and Associate Independent Counsel. During his employment there, Justice Ditkoff co-authored five federal appellate briefs, two U.S. Supreme Court certiorari oppositions, and over thirty grand jury filings while undertaking significant supervisory responsibilities.

In 1999, he began his long tenure at the Suffolk County District Attorney's Office, where he was promoted from an Assistant District Attorney to Deputy Legal Counsel to the District Attorney. Justice Ditkoff authored over 140 briefs in the Supreme Judicial Court and the Appeals Court and argued 85 cases before the two courts. His responsibilities also included prosecuting complex trials in a second chair role, advising the District Attorney, formulating office policies, giving ethics advice, defending the office in civil suits, conducting training, and drafting legislation. In 2014, he joined the Administrative Office of the District Court as General Counsel of the District Court, where he advised the Chief Justice, Justices, and Clerks on legal developments, ethical concerns, and legislation. He drafted standardized jury instructions, procedures, rules, forms, and guidelines for civil and criminal cases, including the Uniform Trial Court Rules for Civil Commitment Proceedings for Alcohol and Substance Use Disorders.

Justice Ditkoff has been a significant contributor in a number of legal and community activities. He continues to serve on the Supreme Judicial Court Standing Advisory Committee on the Rules of Criminal Procedure, is an editor on the Massachusetts Law Review, and assists the bar as an instructor for Massachusetts Continuing Education Programs. Civically, he served over a decade as an elected representative to his town meeting, headed his neighborhood association, and was a vice president of his synagogue.

Appointed by Governor Charles D. Baker, Justice Ditkoff joined the court on April 27, 2017.

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THE APPEALS COURT

The Appeals Court was established in 1972 to serve as the Commonwealth's intermediate appellate court. It is a court of general jurisdiction that hears criminal, civil, and administrative matters. All appeals from the Trial Court (except for cases of murder in the first degree) are initially entered in the Appeals Court. Similarly, the court receives all appeals from the Appellate Tax Board, the Industrial Accident Reviewing Board, and the Employment Relations Board.

Although the Appeals Court is responsible for deciding all such appeals, every year a small number are taken by the Supreme Judicial Court for direct appellate review.

After a case is decided by the Appeals Court, the parties may request further appellate review by the Supreme Judicial Court, but such relief is granted in very few cases. Thus, the Appeals Court is the court of last resort for the overwhelming majority of Massachusetts litigants seeking appellate relief.

By statute, the Appeals Court has a chief justice and 24 associate justices. The justices of the court sit in panels of three (3) with the composition of judicial panels changing each month.

In addition to its panel jurisdiction, the Appeals Court also runs a continuous single justice session, with a separate docket. The single justice may review interlocutory orders and orders for injunctive relief issued in certain Trial Court departments, as well as requests for review of summary process appeal bonds, certain attorney's fee awards, motions for stays of civil proceedings or criminal sentences pending appeal, and motions to review impoundment orders.

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THE APPEALS COURT

CONTACT INFORMATION

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Commonwealth of Massachusetts

THE APPEALS COURT

Chief Justice
Mark V. Green

Justices
Ariane D. Vuono
William J. Meade
Peter J. Rubin
Gabrielle R. Wolohojian
James R. Milkey
Amy L. Blake
Gregory I. Massing
Eric Neyman
Vickie L. Henry
Kenneth V. Desmond, Jr.
Peter W. Sacks
Sookyoung Shin
Joseph M. Ditkoff
Sabita Singh
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Marguerite T. Grant
Maureen E. Walsh
Rachel E. Hershfang
Robert A. Brennan
Andrew M. D'Angelo
Christopher P. Hodgens
Paul Hart Smyth
Robert E. Toone

Court Administrator
Gina L. DeRossi, Esq.

Commonwealth of Massachusetts

THE APPEALS COURT

March 5, 2024
DOCKET

NOTICE: The following summaries of the cases being argued are drawn from the papers filed with the Appeals Court by the parties. The summaries are intended to serve as background information for those who are attending the arguments. They neither describe all the facts and issues raised by the parties, nor reflect the thoughts or views of the justices.

Commonwealth vs. Cappello.
No. 23-P-722

On May 27, 2017, officers responded to a call about a domestic disturbance between the defendant and the victim, her sister. When officers arrived on the scene, they found the victim sitting on the ground with a black eye and red marks above her eyebrow. Witnesses reported that the defendant and the victim fought inside the defendant's car. The defendant screamed at the victim and dragged her out of the car by her hair. The altercation continued outside the vehicle. When the defendant heard approaching sirens, she got in her car and drove away.

Approximately an hour later, an officer observed the defendant driving near the scene and activated his emergency lights. The defendant got out of her car and walked unsteadily toward the officer's cruiser. When the officer exited his cruiser, he could immediately smell an odor of alcohol from the defendant. The officer arrested her for the previously reported assault and battery and placed her in his cruiser. In thick and slurred speech, the defendant argued that she was the victim in the earlier incident. At the station, the defendant agreed to perform field sobriety tests and attempted the one-legged stand, but only counted "1-one thousand, 2" before beginning to fall and placing her foot back on the ground. The defendant also took a breathalyzer test that showed a blood alcohol content of 0.09 percent.

The defendant admitted to sufficient facts for assault and battery and operating under the influence of intoxicating liquor (OUI) and received a

continuance without a finding of guilty. One year later, the defendant completed her probation, and the charges were dismissed. The defendant subsequently moved to vacate her admission to sufficient facts on the OUI charge. A judge in the District Court denied her motion.

On appeal, the defendant contends that the judge erred in denying her motion because had she known of the misconduct of the Office of Alcohol Testing (OAT) as it related to breathalyzer tests, she would not have tendered her plea on the OUI charge. She asserts that (1) evidence of OAT's misconduct would have detracted from the factual basis of her plea, (2) such evidence would have substantially influenced her counsel's recommendation whether to accept the plea offer, and (3) the value of such evidence outweighed the benefits of entering into the plea agreement. The Commonwealth counters that the judge was well within her discretion to deny the defendant's motion, as the defendant's supporting affidavits failed to raise a substantial issue worthy of consideration by the court. In addition, the Commonwealth argues that there was strong evidence of the defendant's impairment from intoxication, and the defendant received a clear benefit from her admission.

Commonwealth vs. Durham.
No. 23-P-11

In August 2014, the defendant pleaded guilty to four counts of breaking and entering in the daytime with intent to commit a felony, one count of larceny over $250, and one count of receiving stolen property with a value more than $250. He was sentenced to concurrent suspended sentences of 18 months and was ordered to pay $21,479 in restitution. From 2016 through 2019, the defendant's probation was extended three times because of his failure to pay restitution.

In October 2019, the defendant, through his appointed counsel, filed a Motion to Remit Restitution Order and Terminate Probation in the District Court pursuant to Commonwealth v. Henry, 475 Mass. 117 (2016) (Henry motion). In support of the motion, the defendant filed an affidavit averring that he was unable to pay the balance of the restitution owed because he was making $500 a week as a cook, had four children to support, and was over $5,500 in arrears in child support. The motion was denied, and the defendant's probation was extended for three years. In 2022, the defendant again filed a Henry motion. By that time, he had paid $10,675 in restitution. A judge denied the motion, and the defendant now appeals.

In Henry, the Supreme Judicial Court established that a defendant's probation could not be extended where the defendant was unable to pay restitution. In considering whether a defendant is able to pay, a judge should consider whether restitution would cause a defendant "a substantial financial hardship" by depriving them or their dependents of basic human needs. Here, the defendant argues that where he established that he was indigent, received Supplemental Nutrition Assistance Program (SNAP) benefits and other government assistance, and was in arrears on child support, the judge abused his discretion in denying the defendant's Henry motion. The Commonwealth argues that the judge did not abuse his discretion because the defendant did not meet his burden of proof. The defendant's affidavit, without substantial detail and supporting financial statements, was insufficient proof that he was unable to pay restitution.

Commonwealth vs. Sanchez.
No. 23-P-101

On April 23, 2018, the defendant left a house party with three people, including Ronald Brown, to fight Carlos Fonseca over a "derogatory comment" about the defendant's "group" that Fonseca had posted on social media. After the defendant and Fonseca engaged in a fist fight at a 7-Eleven, the defendant announced that the two of them were "good," but Fonseca's friend, Christian Escotto, warned the defendant that his "boys" would be showing up with an AR-15 rifle. The defendant returned to the car, and he and his friends circled the block. Brown pulled out a handgun, which the defendant had used about a week earlier then sold to Brown, and Brown announced that he was going to "pop" Escotto. The defendant initially objected, but then tied his hood around his face and got out of the car with Brown. Brown fired six times, hitting both of Escotto's legs. The defendant and his friends left the scene and returned to the house party, where they described to partygoers what they had done.

Subsequently, the defendant and Brown noticed two partygoers in their midst who were not affiliated with the defendant's group, Alejandro Vargas and Adrian Kimborowicz. When Vargas and Kimborowicz left the party, Brown decided that he and the defendant would rob them in the parking lot. They followed Vargas and Kimborowicz, but Vargas noticed Brown reaching for what appeared to be a gun and fled toward the woods. Brown threatened to shoot him, but Vargas got away. A short while later, Vargas returned to the parking lot and saw the defendant and Brown robbing Kimborowicz. The defendant and Brown demanded Vargas's possessions, Brown pistol whipped Vargas and Kimborowicz in the head, and the defendant again demanded their possessions. The defendant

and Brown took money, car keys, and a pair of shoes; Vargas and Kimborowicz fled on foot. The defendant used the stolen car keys to enter one of the vehicles, which his friend drove away from the scene. The next morning, a police officer spotted the defendant driving that vehicle, and after a chase, he was arrested.

After a jury trial in the Superior Court, the defendant was convicted of two counts of armed robbery, two counts of armed carjacking, larceny of a motor vehicle, and assault and battery with a firearm. He was acquitted of carrying a firearm without a license and assault and battery.

On appeal, the defendant argues that it was reversible error to admit evidence of his prior, uncharged bad act, namely that he fired the gun about a week prior to these incidents. The Commonwealth responds that the evidence was probative because it showed that the defendant knew that the firearm worked, and some of the charges were based on a joint venture theory.

Roque Pena vs. Arrowood Indemnity Company & others.
No. 23-P-699

This is an appeal from a decision of a reviewing board (board) of the Department of Industrial Accidents (DIA), denying Arrowood Indemnity Company (Arrowood) reimbursement from the Workers' Compensation Trust Fund (trust fund).

The trust fund is funded by "assessments." Insurers collect assessments from the employers they insure and pay those assessments into the trust fund. The trust fund is required by law to reimburse insurers for a portion of workers' compensation payments made to previously injured workers who suffer a subsequent work-related injury (i.e., a "second injury").

In 2005, Arrowood stopped writing new workers' compensation policies in Massachusetts but continued administering existing policies, entering so-called "run-off" status. It has not collected assessments from employers or paid assessments into the trust fund since 2008.

In 2013, the trust fund denied Arrowood's second injury reimbursement requests. Arrowood sought review by the DIA and, after an evidentiary hearing, an administrative judge denied its claim. The administrative judge found that participation in the trust fund, through the payment of assessments, is a prerequisite to receiving reimbursement.

Arrowood appealed to the board, which affirmed the administrative judge's decision. In its decision, the board noted that the Appeals Court had affirmed a similar ruling in Home Ins. Co. v. Workers' Compensation Trust Fund, 88 Mass. App. Ct. 189 (2015). In Home, the court held that an insurer no longer paying assessments into the trust fund could not receive the cost-of-living adjustment reimbursement to which it would otherwise be entitled.

On appeal, Arrowood asks this court to overturn Home, arguing that its interpretation of the law is contrary to legislative intent. Arrowood contends that, in Home, the court assumed that when an insurer enters run-off status, the trust fund is deprived of revenue. Arrowood argues that this assumption is incorrect, and the court should reverse the board's decision.

The trust fund counters that this case is governed by Home, where the court previously rejected these same arguments, and the board's decision should be affirmed on the basis of stare decisis.

Deborah Mucher Barr vs. Peter Swenson & others.
No. 23-P-491

This case involves a family-owned, closely held corporation, John E. Swenson Co., Inc., which operates a hotel in Chatham. Barr (plaintiff) is a shareholder and one of three corporate directors. Peter and David Swenson (defendants) are the other two directors and Barr's uncles. Barr brought this action in the Superior Court, individually and derivatively, asserting claims for breach of fiduciary duties and seeking access to the company's books. A judge entered summary judgment for the Swensons on all counts. Barr now appeals, raising arguments only with respect to her claims for breach of fiduciary duties.

Barr alleges that the Swensons engaged in a self-interested sale of stock and failed to exercise the company's right to restrict transfers, thereby depriving her of the benefits of that sale. In October 2018, Barr had a conversation with Peter Swenson wherein she offered to purchase additional shares of company stock at $100,000 per share. In April 2019, Peter's wife and David's three children sold four shares among themselves at $85,000 per share without informing Barr. At no point did Peter or David assert the company's right to restrict the transfers and repurchase the shares in order to sell them to Barr at her offer of $100,000. In so doing, she argues that they lost the company $60,000.

On appeal, Barr challenges the judge's conclusion that Barr needed (and did not have) any expert testimony on damages. Barr argues that it was improper to

consider damages at the summary judgment stage and, further, that a jury could have calculated damages based on lay testimony. Alternatively, Barr contends that a plaintiff bringing a claim for breach of fiduciary duty is entitled to nominal damages.

The Swensons counter that Barr failed to meaningfully argue below her claims for $60,000 in actual or nominal damages, and such claims are accordingly waived. Moreover, the Swensons argue that they did not breach their fiduciary duties because (1) they were acting in their personal capacities when helping to negotiate the stock sales, (2) the board routinely waived the restriction on stock transfers, and (3) Barr had no right to buy any shares.

Mittas Early Learning, LLC vs. MDC Properties-Westford Rd, LLC & another.
No. 23-P-471

In 2013, a daycare franchiser entered into a lease with a developer for a property in Tyngsboro, Massachusetts. The lease required the developer to build a daycare center and obtain a certificate of occupancy within 180 days of receiving a building permit. The developer missed the deadline by almost two years.

In 2016, the franchiser and the developer signed an amendment to the lease (first amendment), which set a new deadline for a temporary certificate of occupancy and increased the rent. The first amendment would be "null and void" if the deadline was not met. The town building inspector authorized the franchiser to move into the building by the deadline, but the certificate of occupancy issued 35 days late.

Once the building was occupiable, the developer assigned its rights and obligations to the defendant landlord, MDC Properties-Westford Rd, LLC, and the franchiser assigned its rights and obligations to the plaintiff tenant, Mittas Early Learning Center, LLC. Pursuant to the lease, the tenant provided the landlord with written notice of unfinished work, including HVAC problems, for the landlord to complete. The lease entitled the tenant to actual damages plus $500 per day for work uncompleted after thirty days. In 2017, the parties executed a second amendment to the lease, requiring that the landlord repair and maintain the HVAC system and ratifying the first amendment to the lease. The HVAC system remained broken through February 2020.

The tenant sued the landlord. After a bench trial in the Superior Court, the judge found that the landlord had breached the second amendment by not repairing

the HVAC system within a reasonable period of time, and the tenant was entitled to actual damages of $25,000, but not $500 per day, because the $500 per day was an unenforceable penalty. The judge found that the failure to finish the construction and obtain a certificate of occupancy was not a breach of contract because the tenant failed to provide written notice of the failure to the landlord. The tenant and landlord both appealed.

The tenant now argues that it was not required to provide written notice that the landlord breached the lease where the landlord failed to timely provide a certificate of occupancy as required by the lease, or timely provide a temporary certificate of occupancy under the first amendment. The landlord counters that (1) the tenant was required to provide notice, (2) the tenant cannot argue that the first amendment is not enforceable because the judge found it enforceable at the tenant's request, (3) the first amendment is enforceable because the tenant ratified it by signing the second amendment, and (4) the franchiser forgave the construction delays that occurred prior to June 2016 by signing the first amendment.

The tenant also argues that the $500 per day due for uncompleted work is an enforceable liquidated damages clause. The landlord counters that it is an unenforceable penalty.

Finally, the landlord argues that the damages of $25,000 were speculative and should be reversed. The tenant replies that $20,000 is for time employees spent supervising contractors, and $5,000 is for excessive utility costs.