2011-02821

To be argued by:
JULIE M. SHERIDAN

Time requested: 10 minutes

Supreme Court, Nassau County – Index No. 10-13518

Supreme Court of the State of New York
Appellate Division – Second Department

EMILY PINES, DAVID DEMAREST, JEFFREY D. LEBOWITZ, STEPHEN FERRADINO, RALPH A. BONIELLO, III AND JOSEPH C. CALABRESE,

Plaintiffs-Respondents,

-against-

THE STATE OF NEW YORK,

Defendant-Appellant,

BRIEF FOR APPELLANT

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Dated: November 15, 2011

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forth in the Judiciary's 2009-10 budget proposal but was deleted by the Legislature before the budget was enacted.

The judgment of the court below should be reversed. Chapter 51, § 3, does not authorize the disbursement of $51 million to the judiciary to increase judicial salaries because it does not satisfy the constitutional requirement that judicial compensation be "established by law." N.Y. Const., art. VI, § 25(a). As the Court of Appeals explained in *Matter of Maron v. Silver*, 14 N.Y.3d 230, 250 (2010), "a mere provision calling for a lump-sum payment of [$51] million without repeal or revision of the Judiciary Law article 7-B judicial salary schedules is further evidence that additional legislation was required before the funds could be disbursed." Thus, Supreme Court erred in holding that chapter 51, § 3, by itself increased judicial salaries.

The legislative history of Chapter 51, § 3, further supports this conclusion. After considering the Judiciary's proposed budget, the Legislature excised provisions specifying the increased salaries to be received by the judges. In addition, in debates at the time of the adoption of Chapter 51, the chairs of the Assembly Ways and Means Committee and the Senate Judiciary Committee, and the ranking member of the Senate

Finance Committee, all made crystal clear that section 3 did not enact a judicial pay raise. And events subsequent to the passage of the 2009 budget, including the *Maron* decision itself, the adoption of legislation creating the Special Commission on Judicial Compensation in late 2010, and the proceedings of the Commission, have further demonstrated that none of the relevant actors -- not the Court of Appeals, not the Legislature, not the Governor, and not the Judiciary -- viewed chapter 51 as having enacted a judicial pay raise in 2009. These parties all correctly believed that, notwithstanding the 2009 appropriation language, "[t]he last time the Legislature adjusted judicial compensation was in 1998." *Maron*, 14 N.Y.3d at 244. Consequently, Supreme Court mistakenly concluded that chapter 51, § 3, "established by law" (N.Y. Const., art. VI, § 25[a]) an increase in judicial salaries, and the court's judgment ordering the State to pay such salary increases to judges pursuant to a formula that the Legislature never adopted cannot stand.

QUESTION PRESENTED

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Floor debates immediately before the enactment of the budget bill make clear that the deletion of the schedule of specific salary adjustments was no accident and that legislators in both the Senate and Assembly intended and understood that the $51 million appropriation would not be disbursed unless additional legislation in the form of another chapter law in 2009 was enacted adjusting judicial salaries. In the Senate, the following exchange took place between Senator Sampson, the Chair of the Judiciary Committee, and Senator DeFrancisco, the ranking member of the Senate Finance Committee:

> Senator DeFrancisco: Senator Sampson, in the Governor's proposed budget there was a pot of money designated for judicial salaries. And the understanding was out of the judiciary budget that was submitted by the judiciary and submitted by the Governor, that out of that money there was enough money available for a salary increase for the judiciary. I understand that the language authorizing such an increase is not in the final budget; is that correct?
>
> Senator Sampson: That's correct.
>
> * * *
>
> Senator DeFrancisco: In order for the judiciary to receive a salary increase from this budget, is it correct that there would have to be a separate bill

> authorizing such an increase separate and apart from this budget?
>
> Senator Sampson: That's correct, Senator. . . .
>
> Senator DeFrancisco: One last question, I'm sorry, just to be clear.
>
> * * *
>
> Senator DeFrancisco: Stated another way, the only mechanism for a judicial salary increase would be through a separate piece of legislation. And just because the same money is in the budget, that would not authorize, for example, the head of the Office of Court Administration or the Chief Judge of the Court of Appeals to simply grant an increase.
>
> Senator Sampson: Through you, Mr. President, you are correct, Senator DeFrancisco.

(R254-257).

Similarly, the Assembly debate also made it clear that the appropriation was intended to provide authority for the payment of a judicial salary increase only if one was subsequently enacted, and that the lack of reference to the need for a subsequent chapter of the 2009 laws did not affect this meaning:

> Mr. Farrell [Chair of the Assembly Ways and Means Committee]: As required by New York State's Constitution, judicial salaries are and have always been set by law, Article VII(B) of the

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> Judiciary Law. A reappropriation of potentially available monies cannot and does not change that law and what it certainly does not authorize is any salary increases. The notion that the Office of Court Administration has been somehow authorized or empowered to ignore both the New York State Constitution and Article VII(B) of the Judiciary Law *by some words stricken from an appropriation is 100 percent incorrect. Simply stated, some redundant words were removed*, but these words could be replaced if that was deemed necessary to eliminate any contrived confusion in a chapter amendment. No New York State court in any case, and there have been several, has ever determined that judicial salaries could be adjusted without amendments to Article VII(B) of the Judiciary Law

(R244) (emphasis added).

The Legislature did not enact legislation during the 2009-10 fiscal year to alter the judicial salary schedules contained in article 7-B of the Judiciary Law or take any other action to increase judicial salaries. Therefore, the salary schedules in article 7-B as amended in 1998 remained in effect.

D. Chapter 567 of the Laws of 2010 - The Special Commission on Judicial Compensation

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judicial compensation be "established by law" was met by Chapter 51, § 3, as enacted, and that the appropriation was self-executing (R16).

In its decision, the court acknowledged that Chapter 51, § 3, lacked the itemization necessary to implement judicial pay raises, but concluded that the formula of specific annual salaries and percentage increases contained in the Judiciary's proposed budget bill could be used to "cure" this omission even though the Legislature had deleted that formula before it enacted the budget bill (R13). The court also concluded that the Legislature's failure to include the "pursuant to a subsequent chapter of law" language, which had been present in prior appropriations, "constituted overwhelming and irrefutable evidence that such additional legislation is not required to effect the salary increases" (R14). The court found the Assembly and Senate floor debates "unpersuasive" in this respect since they simply represented "debate about the issue" among "less than a handful of legislators" (R15).

Accordingly, in a judgment entered March 16, 2011, the court ordered the State to allocate and pay the $51 million appropriation:

> in accordance with the direction of the Office of Court Administration for the immediate distribution of such funds to all the judges and

legislation was required before the funds could be disbursed." 14 N.Y.3d at 250. But the Court did not indicate that the presence of the "pursuant to" phrase was essential to its holding or that the absence of the phrase from an appropriation would lead to a different result. On the contrary, the Court relied on the constitutional requirement that judicial compensation be "established by law," and held that the "lump-sum" nature of the appropriation was "further evidence" that additional legislation was required. 14 N.Y.3d at 249-250. The 2009 appropriation here, too, is merely a "lump-sum" and the absence of the "pursuant to" phrase in the appropriation is therefore irrelevant.

The court below erroneously viewed the absence of the "pursuant to" language in Chapter 51, § 3, as "overwhelming and irrefutable evidence" (R14) that the Legislature no longer intended to require enactment of additional legislation to effectuate judicial salary adjustments. The Assembly floor debate that preceded enactment of Chapter 51, § 3, establishes precisely the opposite. Assembly member Farrell, the Chair of the Assembly Ways and Means Committee, specifically stated that the fact that the "pursuant to" phrase was not included in the 2009 appropriation language did not convert the appropriation into a pay raise:

> [t]he notion that the Office of Court Administration has been somehow authorized or empowered to ignore both the New York State Constitution and Article VII(B) of the Judiciary Law by some words stricken from an appropriation is 100 percent incorrect. Simply stated, some redundant words were removed, but these words could be replaced if that was deemed necessary to eliminate any contrived confusion in a chapter amendment

(R244). No legislator voiced any disagreement with this statement. This history indicates that the Legislature deleted the "pursuant to" phrase because it was redundant and unnecessary in light of the constitutional requirement that judicial compensation be "established by law" and the longstanding historical practice of adjusting judicial compensation by enacting legislation separate from the budget.

The court below acknowledged that the Legislature had always "established" judicial compensation "by law" in accordance with the Compensation Clause by enacting legislation that contains a judicial salary schedule. But the court concluded that this historic practice was "not determinative," citing *Pataki v. New York State Assembly*, 4 N.Y.3d 75 (2004) (rejecting argument that it was unconstitutional for the governor to include school aid distribution language in an appropriation bill when this topic had historically been addressed in non-appropriation bills) (R14). In

VII(B) of the Judiciary Law. A reappropriation of potentially available monies cannot and does not change that law and what it certainly does not authorize is any salary increases" (R244).

The court below mistakenly discounted the value of these statements, reasoning that they simply represented "debate about the issue" (R15). That is an inaccurate characterization. First, as noted above, these exchanges represent the considered judgments of relevant committee chairs and members regarding the meaning of Chapter 51, § 3. *See St. Paul*, 247 U.S. at 318. In addition, not one legislator spoke in opposition to the statements made by Senator DeFrancisco, Senator Sampson, or Assembly member Farrell. There is therefore no basis for concluding that any controversy existed concerning whether Chapter 51, § 3, was self-executing. The debates clearly establish that the Legislature intended that it not be self-executing.

In sum, there is ample and unequivocal support in the language of the appropriation, legislative history and floor debate to establish that the Legislature did not intend Chapter 51, § 3, to be a judicial salary increase, and Supreme Court erred in concluding to the contrary.

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