

Oral Argument before the Appellate Division, Third Department

November 13, 2018, 1 p.m.

**Appellate Panel: Associate Justice William McCarthy, as Presiding Justice
& Associate Justices Robert Mulvey, Christine Clark, Phillip Rumsey
(Associate Justice Michael Lynch taking no part)**

Transcribed, from the VIDEO, by Appellant Elena Sassower

<http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/appeal/11-13-18-oral-argument.htm>

Announcer:

All rise. Ladies and gentlemen, the justices of the court. Hear ye, hear ye, hear ye. All persons having business before this Appellate Division of the Supreme Court, held in and for the Third Judicial Department of the State of New York, let them draw near, give their attention, and they shall be heard. First case is case number 527081, *Center for Judicial Accountability versus Cuomo*. Please be seated.

Presiding Justice McCarthy:

Good afternoon, everybody. Welcome to the Appellate Division, Third Department. If any appellant would like to reserve any time for rebuttal, please state so at the outset of your argument. Keep in mind during your argument that our Third Department is transmitting the arguments live, or streamed, so people can watch, and the public can watch, and lawyers can watch. And so, if there are sensitive matters that are being addressed during the course of your argument, be cognizant of that. Ms. Sassower.

Appellant Sassower:

My name is Elena Sassower. I am the unrepresented plaintiff-petitioner, plaintiff-appellant.

Presiding Justice McCarthy:

Would you like, I'm sorry to interrupt you, would you like any rebuttal time?

Appellant Sassower:

I would indeed. Five minutes.

The threshold issues on this appeal concern the integrity of the judicial process below. A judge who failed to make disclosure of her financial interest in the litigation, of her relationships with parties to the litigation, who concealed the issue – and who demonstrated her interest and bias born of interest and relationships by decisions that obliterated any semblance of the rule of law.

Complicit in that was the attorney general, from whose office she came out. She was, for 30 years, a part of the attorney general's office, and she used her judicial office to countenance the corruption of the judicial process by the attorney general in a citizen-taxpayer action, this citizen-taxpayer action, to which the attorney general had no legitimate defense and where, because he had no legitimate defense, his duty was not to defend, but to represent the plaintiffs. And his representation and intervention on behalf of the plaintiffs, who have brought this suit on behalf of the People of the State of New York and the public interest, was yet another issue that she ignored.

It appears that this Court, likewise, is not prepared to address the threshold issues relating to itself. Each of the justices here have a huge financial interest. You are each disqualified. You not only are disqualified, but pursuant to Judiciary Law 14, you have no jurisdiction to sit. I have brought that issue to your attention and you have ignored it. And you, as well as your fellow justices of this Court, have rendered three decisions that completely ignored the serious and substantial financial interests that each of you have by reason of the fact that this citizen-taxpayer action challenges your commission-based judicial pay raises that have given you a salary of \$75,000 a year beyond what you are entitled. A determination for the plaintiffs, the appellants here, will knock down that salary of yours by \$75,000 and subject you to a claw-back of probably about \$300,000 per judge. That was also the issue below. And you have failed to make any disclosure on that issue, disqualification with respect to that issue, and it appears that not only are you refusing to address your disqualification, mandatory disqualification, voiding any decision you might render, but you, like the court below, are countenancing litigation fraud by the attorney general.

The brief before you is uncontested, *as a matter of law*. The attorney general has not denied or disputed any aspect of the presentation, showing that the plaintiffs have an entitlement to summary judgment on each of the ten causes of action, challenging the constitutionality and lawfulness of the state budget, three men-in-a-room, behind-closed-doors budget deal-making, the behind-closed-doors legislative conferences that substitute for legislative committee action. What is at issue in this lawsuit is the constitutionality of the budget, what has been going on, what has propelled this, quote, "culture of corruption", and it appears that this court not only will it not address its own direct financial interest, but it is countenancing here what Judge Hartman countenanced below, which is the litigation fraud of the attorney general.

I will reserve the balance of my time as rebuttal.

Presiding Justice McCarthy:

Thank you.

Assistant Solicitor General Brodie:

May it please the Court, Frederick Brodie for respondents.

I want to focus initially on the substantive issue raised by this case. The legislature's delegation of authority to the commission was permissible. The delegation contained reasonable safeguards and standards. First, the legislature gave the commission direction. It said to examine the prevailing adequacy of state judges' compensation and determine whether any of such pay levels warranted adjustment or warranted increase. Second, the legislature gave the commission standards. The commission was directed to take into account all appropriate factors, including six specific factors, like the overall economic climate and rates of inflation. Third, the legislation contained structural safeguards. It required the commission to make recommendations to the governor, legislature, and chief judge. Those recommendations would have the force of law only if the legislature did not modify or abrogate them by statute within three months. The legislature thus retained its law-making power. It provided for a recommendation to come back to it from the commission and the legislators could reject or modify that recommendation. So the argument in plaintiff's brief and in her petition that there was an excessive delegation is not correct.

I would note that similar commissions have been held constitutional. We cited two cases regarding the Commission on Health Care Facilities and the commission at issue here, this commission, was upheld by Nassau County Supreme Court. And that decision is in the record, reproduced at page 428. It's quite a short order, so we didn't cite it in our brief, but that does mean that two separate commissions have been upheld as constitutional, which refutes plaintiff's argument in her reply brief, at pages 31 to 32, that I improperly used the plural form, commissions.

Also the enabling law was budgetary in nature. Plaintiff argues that it shouldn't have been included in an appropriations bill. But when applying Article VII, Section 6 of the Constitution, the test is whether a provision in an appropriation bill is essentially non-budgetary. A budgetary measure is one designed to allocate the state's resources. Here, the commission was charged to determine what additional state resources should be allocated to paying judges. In fact, the budget bill's title stated that the commission would provide periodic salary increases. And salary increases have already been appropriated based on the actions of the first commission. So you have an ongoing series of salary increases and this legislation that created the commission was intended to provide for more. It didn't address the power of judges, it didn't address any particular judicial decision. It didn't address court procedure. It addressed money.

Associate Justice Rumsey:

Initially the judge did not dismiss the sixth cause of action.

Assistant Solicitor General Brodie:

That's correct. So there was subsequently summary judgment on that. And on summary judgment we demonstrated that the sixth cause of action, we demonstrated that all the i's were dotted and the t's were crossed in the legislative process. So the legislation that established the commission was correctly passed and correctly implemented.

Let me now, having made the substantive point that I wanted to make, the substantive points that we wanted to make in the argument, let me address the points that plaintiff made regarding disqualification. Justice Hartman properly denied plaintiffs' motion for disqualification. Judiciary Law Section 14 lists various grounds for disqualifying judges. One of those is interest, but the rule of necessity overrode interest in this case. Under *Maron against Silver*, which is the Court of Appeals case that held the freeze on judicial salaries to be unconstitutional, under that case, if there is no other body that can decide a matter, then the judge has to take it on herself to do it. And that's what Justice Hartman did.

The other ground advanced by plaintiff is actual bias. But there is no evidence of actual bias. Plaintiff says Justice Hartman was biased because she ruled against them and those rulings were wrong. But, well, for one thing, we think, the respondents think, that those rulings were right. And, secondly, this Court has held that bias will not be inferred, will not be inferred, from adverse decisions. That's the *Knight* case, cited in our brief, at page 59. When a litigant alleges subjective bias, without evidence, the presiding judge is the sole arbiter, the sole arbiter of recusal. That's the *Moreno* case, cited on page 2 of our opposition memorandum in reargument. The decision not to recuse is a matter of conscience for the judge. Here, Justice Hartman was satisfied that she could serve impartially and once she was satisfied that she could serve impartially, she had an obligation not to recuse herself and therefore she acted wholly correctly.

And I would like to finally address the multiple allegations of fraud that have cast a pall over this litigation. Plaintiff complains essentially about instances where the attorney general disagreed with her legal position, but did not repeat the exact words of her arguments. That's not fraud. It's the adversary system. The way the system works, as your Honors know, plaintiff makes her best arguments, we make our best arguments, the respondents, and then, after reviewing both sides' arguments and the relevant parts of the record, the court makes a decision. Nothing is concealed because the court has the full record and it has both sides' briefs.

Here on full review of both sides' submissions should lead to affirmance for the reasons stated in respondents' brief. And I will rest on that brief for the remainder of the arguments.

Presiding Justice McCarthy:

Thank you.

Appellant Sassower:

This is appalling.

What took place below, as chronicled by the brief, supported by the three-volume record, is a complete obliteration of any semblance of a judicial process. All standards went out the window, for dismissal motions, for summary judgment motions. The judge, on the issue of interest, the judge purported she had no interest. She didn't invoke the rule of necessity,

even in her final decision that passingly referred to it. She had an interest that is proscribed by Judiciary Law 14 – just as you have interests, identical interests, financial interests that are proscribed by Judiciary Law 14 that divest you of jurisdiction to sit. And I made a motion, which you denied an hour ago, giving no reasons and allowing this proceeding, this appellate argument, in which Mr. Brodie repeated the outright lies and frauds already demonstrated in my papers to you, in the reply brief, in the motions. You have denied three motions, three fact-specific, record-based, law-supported motions, addressed to your disqualification for interest and for relationships, calling upon you to make disclosure, calling upon you to address whether or not, in fact, under Judiciary Law 14, you may even invoke the rule of necessity so as to sit here. And you have allowed the most flagrant fraud, fraud, with respect to everything.

Ten causes of action are presented by this citizen-taxpayer action and all ten causes of action were thrown in decisions that cannot be defended. They obliterated all standards. I am here to answer any questions you may have about any of those causes of action.

With respect to the sixth cause of action, which is the only cause of action he, Mr. Brodie, discussed, it has five parts. And each of the parts has multiple facets. And any aspect would require you to void the statute creating the commission on judicial, legislative, executive compensation, and the predecessor commission statute. But there are two additional causes of action, besides, and there are, of course, seven other causes of action, all of which demonstrate that there was no defense by the state to the complete violation of constitutional provisions, statutory provisions, legislative rule provisions relating to the judiciary budget, in which you have an interest, the legislative budget, the executive budget. All of this unconstitutionality is what is propelling our culture of corruption and your duty, your duty is to uphold the Constitution, uphold the rule of law – beginning with the threshold issues which you have tried to avoid as to whether or not you have a disqualifying interest that divests you of jurisdiction, rendering anything you do void. If you have any question as to your duty to make disclosure, to make disclosure of your interests and relationships, impacting on your fairness and impartiality – and no bench conversant with the briefs could allow the drivel of Mr. Brodie here repeating what has already been exposed as deceptions.

Thank you.

Presiding Justice McCarthy:

Thank you. Thank you, both.