

AUGUST 2, 2018 ORAL ARGUMENT
ON THE TRO SOUGHT BY PLAINTIFF-APPELLANTS' ORDER TO SHOW CAUSE

Transcribed by plaintiff-appellant Elena Sassower from the video:
<http://www.judgewidth.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/appeal/8-2-18-oral-argument.htm>

Justice Devine: Counsellor, do you intend to put in any additional papers?

Brodie: You mean, when you say put this on, our Honor, are you saying there is going to be a preliminary injunction?

Justice Devine: No, I'm saying is returnable,

Brodie: Returnable.

Justice Devine: Tuesday, August 7th.

Brodie: And is there going to be a TRO in place during that time?

Justice Devine: That's what we're going to argue here today.

Brodie: Well, depending on what's argued today, the answer is, I don't know.

Justice Devine: Okay.

Brodie: At the moment, I'm content with what we've submitted.

Justice Devine: I'm going to sign the order to show cause. I'm going to ask you to admit service today, we'll get you a copy of it as soon as this proceeding is over. So where it says, Let service of the order to show cause be made on or before the 2nd day of August. And, counsel, I'll ask you to – provided you do get the copy, after this proceeding – admit service at that time.

Brodie: Alright, and I think that, thinking about it, I would like the chance to respond, as may be necessary.

Justice Devine: I'll give you 'til 5 o'clock tomorrow. So, I'm going to put, answering papers, if any, are to be – do you have facsimile service? Or e-mail?

Sassower: E-mail.

Justice Devine: Have you been corresponding by e-mail?

Sassower: Absolutely.

Justice Devine: Okay, I'm going to allow the attorney general to make service upon you by 5 p.m. tomorrow by e-mail.

Sassower: Absolutely.

Justice Devine: Counsel you have the e-mail address, you're okay with that?

Brodie: Yes.

Justice Devine: Okay. So, service by e-mail.

Brodie: I'm sorry, your Honor, one question with respect to that, is the letter that I submitted on, I think the 24th of July, that's considered part of the record?

Justice Devine: That's correct.

Brodie: I don't have to resubmit that.

Justice Devine: That's correct.

Brodie: Thank you.

Sassower: By way of clarification, that was submitted on the 23rd and resubmitted on the 26th.

Justice Devine: Okay. That letter, what's the date? That letter is part of the record. I have it here. It is dated July 26th. Correct, counsellor? It starts off with "I represent the defendants-respondents in the above appeal. Yesterday I received plaintiffs-appellants' proposed order to show cause and supporting papers".

Brodie: Yes. There's two letters. That's the coverletter where I transmitted the hard copy of the first letter – and the first letter is dated July 23rd.

Justice Devine: Okay. They are both part of the record.

Brodie: Thank you, your Honor.

Judge Devine: Alright, so, answering papers, if any, are to be served, *via* e-mail, on August 3rd before 5 p.m. Okay, so that's it. So, your motion is returnable Tuesday August 7th, you have to have the papers in by tomorrow, August 3rd, before 5

p.m. And the only thing, and I'm going to sign the order to show cause, putting it on, the only thing left is for you (gesturing to Sassower) to convince me, and you (gesturing to Brodie) to try to convince me not to, grant a restraining order between now and Tuesday. And I'd like to have you limit it between now and Tuesday and you have two minutes.

Sassower: Before my time begins to run, before my time begins to run, may I just clarify what your Honor has just set up as far as the scheduling.

Justice Devine: Yep.

Sassower: His papers are due to be served upon me tomorrow at the end of the day by e-mail. Do I have a right of reply?

Justice Devine: Well you have the original papers and you have not, the reason I didn't address that is that you didn't ask for an opportunity to reply and now you have served a reply today.

Sassower: I have, indeed.

Justice Devine: So

Sassower: But, that was a reply

Justice Devine: Pardon me?

Sassower: That was a reply to submissions that he had already made. He is no longer saying that he is going to be resting on those

Justice Devine: Let's do this,

Sassower: – on the July 23rd and July 26th letters.

Justice Devine: Let's do this. I will give you 'til Monday, at 5 o'clock

Sassower: Thank you.

Justice Devine: to reply, if you choose. So, reply papers – and just to be clear (Sassower's cell phone goes off) – that's alright, that's alright – just to be clear, if counsel doesn't serve any answering papers you have no right of reply.

Sassower: Thank you for clarifying.

Justice Devine: Reply papers, if any, are due and should be served – you’re going to get a copy of this anyway –

Sassower: Thank you.

Justice Devine: must be served, on or before 5 p.m., Monday is the 6th, I think. Monday, the 6th. Okay, so here’s the outline. Papers tomorrow (gesturing to Brodie), papers Monday (gesturing to Sassower), returnable Tuesday.

Sassower: One further question with respect to that. Are appearances, are we to appear in court?

Justice Devine: No.

Sassower: So it is deemed submitted. There is no further argument

Justice Devine: That’s correct

Sassower: on the motion. And how about a hearing?

Justice Devine: We don’t have hearings, as such. We just look at the record from below, so there’s no hearing.

Sassower: Okay, well, the statutes speak of hearing, but,

Justice Devine: We’re not, we’re not –

Sassower: Okay, let’s go beyond that. Thank you, very much, your Honor, there are threshold issues in this important–

Justice Devine: Are you starting?

Sassower: Yes, yes. Thank you.

Justice Devine: Okay. So, I’m going to strictly limit to 10 minutes on both sides. So, go ahead.

Sassower: There are threshold issues on this appeal and on this motion that replicate what were the threshold issues below and are threshold in the questions presented on the appeal, and that is, disclosure, judicial disqualification/disclosure, as well as the question as to who is representing the interest of the state and the entitlement of the attorney general to be here presenting.

Justice Devine: Right, right.

Sassower: That this attorney general – that this assistant solicitor general, Mr. Brodie – should say that well he, or that the office, is content with what we have submitted is inexcusable because I identified, last week, in e-mail communications, that the letter interposed that requested that the order to show cause not be signed...

Justice Devine: [unintelligible] And I don't, but I have a reason – and I'm going to let you start over. Let's assume for today's purposes and I want to make clear what I've done and I should have done that sooner. I put this on for Tuesday. We're going to hear it Tuesday. There is no pay period until Wednesday. So the really, really narrow issue here is why should I issue a restraining order today until Tuesday when no pay checks will issue until Wednesday. So, what I'd like you to do is focus on that issue because it may very well be – and I put it on quickly because I think it is important – but it may very well be that you don't need this relief –

Sassower: Thank you.

Justice Devine: – by Wednesday.

Sassower: Thank you, and I would agree, that the reason, and I say this in the reply paper that I submitted to the Court, that the reason that the citizen-taxpayer action statute does not require an undertaking is because it is expected that even with the granting of the TRO, a hearing on the preliminary injunction will be immediately thereafter held so that the issue will be resolved. Mr. Brodie, in his papers, argued that an undertaking is required. Alright.

The reason why the appellants are entitled to a temporary restraining order is because they have met the standard for the granting of a temporary restraining order and for the granting of a preliminary injunction. That is, we have established before the Court that we have an entitlement to summary judgment on the three causes of action of the verified complaint that are addressed to the issue of the constitutionality, the lawfulness, of the statute that created the Commission on Legislative, Judicial and Executive Compensation, as well as the cause of action which is addressed not to the statute, which is chapter 60, Part E, of the Laws of 2015, but the violations of the statute – even were it to be constitutional, even were it to be constitutional, as written, as applied, and by its enactment – the Commission violated the statute, assuming it is constitutional, violated it in a succession of respects, possibly any one of those respects would entitle the appellants to the voiding of its report that recommended the pay raises, but those violations include violations of the conditions precedent for making a pay raise

recommendation, that is, the explicit factors, the express factors that the Commission was required to examine and evaluate as a condition precedent for its pay raise recommendations. You look at the statute, you look at the Commission report, and you see that they have not addressed those statutory factors.

So we have established through those three causes of action an entitlement to summary judgment that is laid out in the appeal brief, and the attorney general's office has had that appeal brief, in draft, since June 14th and they were aware of its sum and substance even before it was embodied in a brief. So, we have a summary judgment entitlement.

Now, there are three prongs, of course, for a preliminary injunction and for a TRO.

The first is likelihood of success on the merits and we have an entitlement to summary judgment as to each of those three causes of action and each of those three causes of action have multiple parts and facets and any one of them, actually, would probably be sufficient – depending on which part, most of them would, actually, be sufficient to void, either the statute, to require the holding of its unconstitutionality, or the failure to comply with the statute by the Commission.

The second prong, as your Honor, I'm sure, is aware, is irreparable injury, immediate and irreparable injury. Well, we have a vast amount of money that is being paid out. Your Honor is familiar with the pay periods, I'm not. And you've said, well, from now, until next Tuesday –

Justice Devine: [unintelligible]

Sassower: – Right, right. But needless to say, with each pay period, okay, the pay reflects those increases, which, it's, it's, with each pay period, it's plainly hundreds of thousands of dollars. The question is, could they be recovered. And the monetary loss is, is, qualifies, where it's not recoverable. It cannot be fully recompensed. Unless the attorney general is willing to stipulate that there can be a claw-back, there will be a claw-back, alright, that that money can be returned to the public fisc, we've established the second prong.

The third is the equities. And there are no balance of equities favoring the respondents. The respondents and the affected parties, who are the judges and the district attorneys, have, at their highest echelons, been fully aware of all the evidence, the mountain of evidence, the facts, the law, that requires the voiding of these salary increases.

So, that, in sum and substance, is why appellants are here before you on what is a historic case. It is a case where – the judicial pay raises which, of course, your Honor has an interest in and cares very much about, but as your Honor is aware, your duty is to rise above. The only basis – rule of necessity does not permit an actually biased judge to sit. It permits a judge who is interested, but who is able to rise above his interests, because every other judge is also interested. But that special judge who can say, yes, I have a vested interest, but, nonetheless, I do my duty because that is my job.

This case – the judicial pay raises, as important as it is for your Honor – is only a component of a monumental citizen-taxpayer action challenging the constitutionality of the whole of the budget, the judiciary budget, the legislative budget, the executive budget, three men in a room, behind closed doors budget deal-making, the behind-closed-doors party conferences that substitute for committee action in the Legislature. This is a monumental case that enables the Court to demonstrate the importance of judicial independence, that it follows the Constitution, it follows the law, and it protects the public and returns our state to constitutional governance which we don't have, have not had, and the gushing –

Justice Devine: You have two minutes.

Sassower: – volume of money that comes out of the slush-fund budget is what propels the, quote, culture of corruption in this state.

Lastly, this Court has before it a presentation in my reply papers, because, in every respect, Mr. Brodie misrepresented, misrepresented. And the most fundamental issue here is, as I said, whether or not he is properly, the attorney general is properly, before the Court. He has not identified the legal basis upon which he appears. The only basis, Executive Law 63.1, is the interest of the state and if there is no legitimate defense – and there is no defense on this appeal to what was done below as to each of the causes of action – the attorney general's duty is not to corrupt the judicial process by litigation fraud, which is what he did below, in collusion with the judge who came out of the attorney general's office. The duty of the attorney general and of this Court is to require that the attorney general disgorge who made the determination, if any determination was made, as to the interest of the state. Likewi –

Justice Devine: Your time is up.

Sassower: Thank you. Thank you.

Justice Devine: Counsel.

Brodie: May it please the Court, a procedural point is dispositive here. The underlying lawsuit did not challenge the current budget. The complaint was filed in September 2016. The current budget didn't exist back then. The complaint addressed the year 2016 to 2017. In Supreme Court, in March 2017, plaintiff moved for leave to supplement the complaint, which is effectively leave to amend it, to include a claim based upon 2017 to 2018. Leave was denied. So that means that all that was at issue below was 2016 to 2017. Now the authority to spend funds appropriated for 2016 to 17 has lapsed. So a TRO and preliminary injunction would, therefore, have no effect.

In her reply papers, plaintiff claims that this case challenges every budget year in perpetuity. But it cannot. Any claim based on future budgets would be unripe. You can't challenge a budget before it's been conceived. Such a claim would be speculative. For instance, in the next budget year, the judges may not get a pay raise. The only issue regarding 2017 to 18 and the current budget year, therefore, is whether supreme court properly denied leave to amend. Now, that's a discretionary determination.

Justice Devine: Well, let's break for one minute. The Constitution prohibits reducing judges' salaries, so we'll still have that raise next year.

Brodie: Um –

Justice Devine: It's not that we may not get it. It's there.

Brodie: If the raise has been decided on, yes, but, you know, in some year in the future you know, they may say no raise is coming. In other words, we don't know what's going to happen, whether it's a 10 percent raise, a 1 percent raise, a 20 percent raise, a zero percent raise, we don't know what factors are going to be considered, we don't know what will happen in future budget. That's the point. So even if this Court on appeal were to rule that leave to amend should have been granted, the remedy would be remittal to supreme court, with directions to allow amendment, and respondents would then have the opportunity to answer the allegations concerning the current year. We have not had that opportunity yet. It would be unfairly prejudicial to defendants if the Court were to consider, if this Court, on appeal, were to consider new allegations without us having had the chance to answer and defend below.

Now I don't think that appellant has made the showing necessary to support a TRO and I'll go through those three factors quickly.

First, appellant hasn't showed immediate and irreparable injury, as required under the State Finance Law. Appellant noticed this appeal on January 10th. Six months later she perfects the appeal and suddenly wants a TRO. Now she could have come in, without having perfected the appeal, with TRO papers back in January, but she didn't. She waited 6 months, perfected the appeal, and now she wants a TRO. Her delay undermines any claim of urgency.

Indeed, after this Court scheduled a TRO hearing at appellant's request for July 24, appellant unilaterally insisted on delaying it, even though the Court was prepared and I was prepared to proceed. That shows this TRO was a tactical device and not a response to a real emergency.

Second, the balance of equities favors the respondents. Judges and district attorneys throughout the state have planned their lives in reliance on salaries that were funded by the budget. That money is not a gift. They're doing work in exchange for it. It would cause immediate harm to those people if the Court slashed their salaries the way appellant requests. On the other side of the scale, the challenged payments would be improper only if appellant wins this appeal and then goes back on remand, because, remember, some of these went out on motions to dismiss, others went out on summary judgment, goes back on remand and wins on the merit. The chances of that happening, at best, are speculative. Now, also, there would be administrative havoc, if your Honor were to sign the TRO today. I understand that there is no paycheck coming to your Honor until Wednesday, I don't know about the district attorneys. I don't know when those checks are going out to the counties to pay the district attorneys. I don't know about all the other judges, whether they are on the same table, timetable, or perhaps a different timetable. And prudently, complying with the Court's direction, if the Court says there is a TRO, prudently, we would have to arrange to stop, to stop the pay increases going forward because we assume that there may well be a preliminary injunction and that would really throw a wrench into the works. And, I cannot stand here and represent to the Court that we would be able to do this in four days. I don't know how long it would take us to rejigger the whole compensation system.

Third, appellant is unlikely to succeed on the merits. The decisions below show that the 2016 to 17 budget is constitutional. I'll provide a few examples. Itemization. Appellant's claim that the budget is not sufficiently itemized is not justiciable. Itemization is purely for the convenience of the Legislature. Case on that, *Saxton against Carey*, 44 NY2d at 550 to 551. Three men in a room. Budget negotiations are legal. Nothing prohibits the governor and the leaders of the Assembly and the Senate from getting together and agreeing on the basic outline of the budget. Indeed, that's what

they're supposed to do. Your Honor, we don't want a situation where people don't agree and the budget runs out and then the state government comes to a halt. That is what everyone is trying to avoid. The legislation creating a compensation commission contained reasonable standards, it provided for a legislative veto so if the Commission does something the Legislature doesn't like, the Legislature can pass a law and the Commission's recommendation no longer has effect.

And, of course, judicial pay can be increased. The Constitution doesn't forbid increases in judicial salaries, only decreases.

I want to address the allegations of fraud, briefly, that are overhanging this litigation because they should not pass by unaddressed. Appellant complains about instances where the courts or counsel disagreed with her legal position, but did not directly address every single one of her arguments. That's not fraud.

First, for fraud by concealment there must be a duty to disclose. I have no duty to repeat all of my opponent's arguments. My duty is to represent my client zealously within the bounds of the law by making our arguments, not our opponent's.

Second, failure to address an argument isn't fraud. It's a strategic choice. The argument might be unimportant, in light of other points, or it might be refuted elsewhere, or perhaps it's immaterial, duplicative, or just plain meritless. In any event, I have no desire to defraud the Court. That's why, in footnote 1, on the first page of my letter, I urge the Court – this is the July 23rd letter – I urge the Court, read appellant's papers. Nothing is concealed, I'm telling the Court, read her papers. That way the Court will have a full picture of all the arguments being made.

Now with respect to violations of the statute by the Commission – which is a point that I didn't address in my letter –

Justice Devine: You have two minutes.

Brodie: – Thank you, your Honor. Appellant says they didn't consider all the factors they are supposed to consider. I would submit that this is like a parole case. And, you know, when a parole commission considers whether or not to parole a prisoner, there is a list of like 11 factors that they have to consider, but this Court has been clear and the other courts of this state agree with it, that you don't need to mention each factor that you are considering. You only need to talk about the main ones that impel your decision. And I would submit that the same thing is true of the pay recommendation. And, in any

event, again, there is a legislative veto.

And finally, appellant is not entitled to have the attorney general take over this proceeding and represent her. Executive 63.1 gives the attorney general discretion to join in a lawsuit if, in her opinion, the interest of the state so warrant. Here, the attorney general's office has from the beginning represented the respondents. We obtained a judgment in respondents' favor below. Appellant sued the governor, the assembly, the senate, the chief judge, the comptroller, and the attorney general, virtually the entire state government, all three branches. After she sued every branch of state government and lost on dispositive motions in supreme court, appellant cannot reasonably believe the attorney general will switch sides and represent her on appeal. We will not do it. We will continue to represent our clients and defend the constitutionality of the laws of this state. Thank you.

Justice Devine: Thank you.

Sassower: Do I have the opportunity to rebut [unintelligible]

Justice Devine: No, ma'am, but you have an opportunity to put in reply papers in by Monday.

Sassower: Thank you. And that is contingent on his making a submission. If he doesn't make a submission I have no entitlement to –

Justice Devine: That's correct.

Sassower: – correct his misrepresentations here before the Court.

Justice Devine: I'll give you 2 minutes.

Sassower: Thank you. Virtually everything that Mr. Brodie said is rebutted by the reply papers that I worked hard to submit so that I could help this Court understand that the attorney general misrepresents throughout. He began his argument before this Court making the claim that the pay raises are not part of the current budget, or upcoming budget. And your Honor recognized, but the pay raises that have taken effect since April 1st, 2012 are cumulative, they keep on going, they are embedded. It makes no difference whether or not there will be subsequent increases, and, by the way, there is a automatic increase scheduled for this coming April 1st 2019. But that's irrelevant for the moment because the issue is that those salary increases that are the product of commission reports that are statutorily-violative, fraudulent, unconstitutional and so-demonstrated are embedded in the budget. He misrepresented that in his papers and he repeated that before the Court.

For him to purport that anything that the court did below was proper, was appropriate, is a deceit. He has all the particulars laid out in the record, in the brief, and, as I said, he should be required, we rest on the brief as demonstrating our entitlement to summary judgment on all those causes of action, so his duty –

Justice Devine: Okay. Time's up.

Sassower: – his duty is to submit an opposition brief that rebuts.

Justice Devine: Okay. We know the schedule. I've signed the order to show cause. In my judgment there is no harm that would occur between now and Tuesday, so, without prejudice, I am striking the clause that would grant temporary relief. And, initialing the change, all those changes that I have made on the record, and on the video, the order to show cause is granted, and we're adjourned.

Thank you both very much. And can we get copies for the parties?

Sassower: Is service accepted? Now?

Justice Devine: As soon as he gets it. He's agreed, on the record.

Sassower: So that he's not requiring that I serve him?

Justice Devine: Service is done.