

COHENS V HESS: Court of Appeals holds that a vacated plea of guilty to a traffic violation may be used as evidence in a subsequent civil action.

By Michael G. Bersani

Imagine this scenario: You represent the plaintiff in an MVA. Defendant failed to stop at a stop sign and struck your client's car as she was passing through the intersection. At deposition defendant admits that he pleaded guilty to violating Vehicle and Traffic Law § 1110(a) (failure to obey a traffic-control device). At trial, however, defendant denies he failed to obey the stop sign. On cross-examination, you ask defendant whether he pleaded guilty to failing to obey a traffic-control device. Defendant's attorney objects and asks to be heard.

Out of the presence of the jury you learn, for the first time, that after the deposition, and without your knowledge, defendant had successfully moved in City Court to vacate the plea of guilty to Vehicle and Traffic Law § 1110(a), and instead accepted a plea of guilty to Vehicle and Traffic Law § 1201(a) (a non-moving violation consisting of parking on the paved portion of a highway). Defendant argues, based on *People v Spitaleri* (9 NY2d 168), that a vacated plea is a legal nullity, and therefore cannot be used as evidence. (In *Spitaleri* the Court had held that a criminal defendant's withdrawn guilty plea could not be used against him in a subsequent trial regarding the same charge.) Plaintiff argues that *Spitaleri* is controlling only in criminal cases. Plaintiff points to *Ando v Woodberry*, 8 NY2d 165), where the Court held that a plea of guilty to a traffic violation is admissible as evidence in a subsequent civil action.

The Court sustains the objection. The jury never hears of the defendant's plea and returns a verdict apportioning 60% of the liability to your client, and only 40% to defendant. This is the position in which the plaintiff's attorney found herself in *Cohens v Hess*.

Plaintiff's attorney obtained the City Court Coram Nobis motion papers and brought a post-trial motion for a new trial, asking the judge to reconsider his prior ruling. The City Court motion papers revealed that defendant did not move to vacate the plea until after depositions in the civil action and more than three years after the original plea was entered, at a time when the points on defendant's license had already expired. The City Court motion papers never mentioned that there was an ongoing civil action. In the post-trial motion papers, defendant's attorney admitted that the sole motive for vacating the plea was to shield defendant from introduction of the plea in the civil action. Nevertheless, the Court reaffirmed its prior ruling, again relying on *Spitaleri*.

After a 3 to 2 split in the Fourth Department (*Cohens v Hess*, 670 A.D.2d 287 [4th Dep't 1998]) affirming the trial Court's Decision, the case went up to the Court of Appeals where it was unanimously reversed (*Cohens v Hess*, 1998 N.Y. Slip Op. 10517, 1998 WL 824558). The Court held that, at least where there is no evidence that the initial plea was coerced, a vacated plea to a traffic violation is admissible in a subsequent civil action. The Court distinguished criminal cases such as *Spitaleri*, where the introduction of the vacated plea forces the defendant to take the stand to explain

why he had originally pleaded guilty. The Court reasoned that the same concern was not present in the civil context. Plaintiff was granted a new trial (*Cohens v Hess*, citing *Spitaleri*).

Plaintiffs' attorneys should applaud the outcome of *Cohens v Hess*. If the Court had ruled in favor of the defendant, insurance defense attorneys would have moved, in droves, to withdraw their clients' former pleas to traffic violations. Indeed, they would have been forced to do so, or risk being sued for malpractice. *Cohens v Hess* thwarts once and for all this "parade of horrors" for plaintiffs and their lawyers.