SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

DUKE L. FUNDERBURKE, Plaintiff, - against - NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, DANIEL E. WALL in his official capacity as PRESIDENT OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, ROBERT W. DUBOIS in his official capacity as DIRECTOR OF THE EMPLOYEE BENEFITS DIVISION OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, UNIONDALE UNION FREE SCHOOL DISTRICT, WILLIAM K. LLOYD, in his official capacity as SUPERINTENDENT OF THE UNIONDALE UNION FREE SCHOOL DISTRICT, LAWRENCE D. BLAKE, in his official capacity as ASSISTANT SUPERINTENDENT FOR BUSINESS AFFAIRS FOR THE UNIONDALE UNION FREE SCHOOL DISTRICT, MYRTLE E. DICKSON, in her official capacity as DIRECTOR OF PERSONNEL FOR THE UNIONDALE UNION FREE SCHOOL DISTRICT, Defendants.	Index No. 05/006186 IAS Part 3 J.S.C. Edward W. McCarty, III **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that Plaintiff Duke L. Funderburke, pursuant to CPLR § 5701, hereby appeals to the Appellate Division of the Supreme Court for the Second Judicial Department from the decision and order of the Supreme Court, Nassau County (Edward W. McCarty, III, J.), entered on July 12, 2006, which order granted Defendants' Motions for Summary Judgment and denied Plaintiff's Motion for Summary Judgment, and this appeal is taken from each and every part of that order as well as from the whole order.

Dated: New York, New York
August 2, 2006

KRAMER LEVIN NAFTALIS & FRANKEL LLP

By: _____
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Attorneys for Plaintiff Duke L. Funderburke

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Attorneys for Defendants New York State Department of Civil Service, Daniel E. Wall, in his official capacity as President of the New York State Department of Civil Service, and Robert W. DuBois, in his official capacity as Director of the Employee Benefits Division of the New York State Department of Civil Service

Scott B. Fisher, Esq.
Jaspan Schlesinger Hoffman LLP
300 Garden City Plaza
Garden City, New York 11530

Attorneys for Defendants Uniondale Union Free School District, William K. Lloyd, in his official capacity as Superintendent of the Uniondale Union Free School District, Lawrence D. Blake, in his official capacity as Assistant Superintendent for Business Affairs for the Uniondale Union Free School District, and Myrtle E. Dickson, in her official capacity as Director of Personnel for the Uniondale Union Free School District

CLERK OF NASSAU COUNTY
240 Old Country Road
Mineola, NY 11501

Supreme Court of the State of New York
Appellate Division : Second Judicial Department

Form A - Request for Appellate Division Intervention - Civil

See § 670.3 of the rules of this court for directions on the use of this form (22 NYCRR 670.3).

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

DUKE L. FUNDERBURKE,

Plaintiff,

- against -

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, DANIEL E. WALL in his official capacity as PRESIDENT OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, ROBERT W. DUBOIS in his official capacity as DIRECTOR OF THE EMPLOYEE BENEFITS DIVISION OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, UNIONDALE UNION FREE SCHOOL DISTRICT, WILLIAM K. LLOYD, in his official capacity as SUPERINTENDENT OF THE UNIONDALE UNION FREE SCHOOL DISTRICT, LAWRENCE D. BLAKE, in his official capacity as ASSISTANT SUPERINTENDENT FOR BUSINESS AFFAIRS FOR THE UNIONDALE UNION FREE SCHOOL DISTRICT, MYRTLE E. DICKSON, in her official capacity as DIRECTOR OF PERSONNEL FOR THE UNIONDALE UNION FREE SCHOOL DISTRICT,

Defendants.

For Court of Original Instance

August 3, 2006

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☒ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ CPLR article 78 Proceeding
- ☐ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ☒ Appeal
- ☐ Original Proceeding
- ☐ Transferred Proceeding
- ☐ CPLR 5704 Review

Nature of Suit: Check up to five of the following categories which best reflect the nature of the case.

A. Administrative Review

- ☐ 1 Freedom of Information Law
- ☐ 2 Human Rights
- ☐ 3 Licenses
- ☐ 4 Public Employment
- ☐ 5 Social Services
- ☐ 6 Other

B. Business & Other Relationships

- ☐ 1 Partnership/Joint Venture
- ☐ 2 Business
- ☐ 3 Religious
- ☐ 4 Not-for-Profit
- ☐ 5 Other

C. Contracts

- ☐ 1 Brokerage
- ☐ 2 Commercial Paper
- ☐ 3 Construction
- ☒ 4 Employment
- ☐ 5 Insurance
- ☐ 6 Real Property
- ☐ 7 Sales
- ☐ 8 Secured
- ☐ 9 Other

D. Domestic Relations

- ☐ 1 Adoption
- ☐ 2 Attorney's Fees
- ☐ 3 Children - Support
- ☐ 4 Children - Custody/Visitation
- ☐ 5 Children - Terminate Parental Rights
- ☐ 6 Children - Abuse/Neglect
- ☐ 7 Children - JD/PINS
- ☐ 8 Equitable Distribution
- ☐ 9 Exclusive Occupancy of Residence
- ☐ 10 Expert's Fees
- ☐ 11 Maintenance/Alimony
- ☐ 12 Marital Status
- ☐ 13 Paternity
- ☐ 14 Spousal Support
- ☐ 15 Other

E. Miscellaneous

- ☐ 1 Constructive Trust
- ☐ 2 Debtor & Creditor
- ☐ 3 Declaratory Judgment
- ☐ 4 Election Law
- ☐ 5 Notice of Claim
- ☒ 6 Other
  - common law interstate marital recognition
  - Equal Protection, Art. I, § 11, NY State Constitution

F. Prisoners

- ☐ 1 Discipline
- ☐ 2 Jail Time Calculation
- ☐ 3 Parole
- ☐ 4 Other

G. Real Property

- ☐ 1 Condemnation
- ☐ 2 Determine Title
- ☐ 3 Easements
- ☐ 4 Environmental
- ☐ 5 Liens
- ☐ 6 Mortgages
- ☐ 7 Partition
- ☐ 8 Rent
- ☐ 9 Taxation
- ☐ 10 Zoning
- ☐ 11 Other

H. Statutory

- ☐ 1 City of Mount Vernon Charter §§ 120, 127-f, or 129
- ☐ 2 Eminent Domain Procedure Law § 207
- ☐ 3 General Municipal Law § 712
- ☐ 4 Labor Law § 220
- ☐ 5 Public Service Law §§ 128 or 170
- ☒ 6 Other CSL § 164

I. Torts

- ☐ 1 Assault, Battery, False Imprisonment
- ☐ 2 Conversion
- ☐ 3 Defamation
- ☐ 4 Fraud
- ☐ 5 Intentional Infliction of Emotional Distress
- ☐ 6 Interference with Contract
- ☐ 7 Malicious Prosecution/ Abuse of Process
- ☐ 8 Malpractice
- ☐ 9 Negligence
- ☐ 10 Nuisance
- ☐ 11 Products Liability
- ☐ 12 Strict Liability
- ☐ 13 Trespass and/or Waste
- ☐ 14 Other

J. Wills & Estates

- ☐ 1 Accounting
- ☐ 2 Discovery
- ☐ 3 Probate/Administration
- ☐ 4 Trusts
- ☐ 5 Other

V2.0.060293

Appeal

Paper Appealed From (check one only):

☐ Amended Decree	☐ Determination	☒ Order	☐ Resettled Order
☐ Amended Judgment	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: Nassau
Dated: 7/11/06	Entered: 7/12/06
Judge (name in full): Edward W. McCarty,III	Index No.: 05/006186
Stage: ☐ Interlocutory ☒ Final ☐ Post-Final	Trial: ☐ Yes ☒ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal Information

Are any unperfected appeals pending in this case? ☐ Yes ☒ No. If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? ☐ Yes ☐ No. Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:	County:
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order

Court:	County:
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of the proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Appeal from Order of the Supreme Court granting Defendants' Motions for Summary Judgment and denying Plaintiff's Motion for Summary Judgment.

Amount: If an appeal is from a money judgment, specify the amount awarded.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review.

- Whether Defendants' refusal to provide health insurance and dental insurance to Plaintiff's spouse violates the NY Civil Service Law.
- Whether New York's marriage recognition rule requires Defendants to recognize Plaintiff's marriage to his spouse for purposes of according spousal benefits.

Issues Continued:

- Whether Defendants' refusal to provide health insurance and dental insurance to Plaintiff's spouse breaches Defendant Uniondale Free School District's collective bargaining agreement with the Uniondale Teachers' Association.
- Whether Defendants' refusal to provide health insurance and dental insurance to Plaintiff's spouse violates Plaintiff's right to equal protection, pursuant to Article I, Section 11 of the New York Constitution.

Use Form B for Additional Appeal Information

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1	Duke L. Funderburke	Plaintiff	Appellant
2	NY State Dept. of Civil Svce.	Defendant	Respondent
3	Daniel W. Wall	Defendant	Respondent
4	Robert W. DuBois	Defendant	Respondent
5	Uniondale Union Free School District	Defendant	Respondent
6	William K. Lloyd	Defendant	Respondent
7	Lawrence D. Blake	Defendant	Respondent
8	Myrtle E. Dickson	Defendant	Respondent
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Attorney Information

Instructions: Fill in the names of the attorneys or firms of attorneys for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided.

In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Alphonso B. David, Esq., Lambda Legal Defense & Education Fund, Inc.

Address: 120 Wall Street, Suite 1500

City: New York State: NY Zip:10005 Telephone No.: (212) 809-8585

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 1

Attorney/Firm Name: Susan L. Sommer, Esq., Lambda Legal Defense & Education Fund, Inc.

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City: New York State: NY Zip: 10005 Telephone No.:(212) 809-8585

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 1

Attorney/Firm Name: Jeffrey S. Trachtman, Esq., Kramer Levin Naftalis & Frankel LLP

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City: New York State: NY Zip: 10036 Telephone No.: (212) 715-9100

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 1

Attorney/Firm Name: Norman C. Simon, Esq., Kramer Levin Naftalis & Frankel LLP

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Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 1

Attorney/Firm Name: Kenneth A. Caruso, Esq., Bracewell & Giuliani LLP

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Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 2,3,4

Attorney/Firm Name: Scott B. Fisher, Esq., Jaspan Schlesinger Hoffman LLP

Address: 300 Garden City Plaza

City: Garden City State: NY Zip: 11530 Telephone No.: (516) 746-8000

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 5,6,7,8

Use Form C for Additional Party and/or Attorney Information

The use of this form is explained in § 670.3 of the rules of the Appellate Division, Second Department (22 NYCRR 670.3). If this form is to be filed for an appeal, place the required papers in the following order: (1) the Request for Appellate Division Intervention (Form A), this document, (2) any required Additional Appeal Information Forms (Form B), (3) any required Additional Party and Attorney Information Forms (Form C), (4) the notice of appeal or order granting leave to appeal, (5) a copy of the paper or papers from which the appeal or appeals covered in the notice of appeal or order granting leave to appeal is or are taken, and (6) a copy of the decision or decisions of the court of original instance, if any.

ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. EDWARD W. MC CARTY, III

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

DUKE L. FUNDERBURKE,

Plaintiff(s)

INDEX No.6186/05

-against-

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, DANIEL E. WALL in his official capacity as PRESIDENT OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, ROBERT W. DUBOIS in his official capacity as DIRECTOR OF THE EMPLOYEE BENEFITS DIVISION OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, UNIONDALE UNION FREE SCHOOL DISTRICT, WILLIAM K. LLOYD, in his official capacity as SUPERINTENDENT OF THE UNIONDALE UNION FREE SCHOOL DISTRICT, LAWRENCE D. BLAKE, in his official capacity as ASSISTANT SUPERINTENDENT FOR BUSINESS AFFAIRS FOR THE UNIONDALE UNION FREE SCHOOL DISTRICT, MYRTLE E. DICKSON, in her official capacity as DIRECTOR OF PERSONNEL FOR THE UNIONDALE UNION FREE SCHOOL DISTRICT,

MOTION DATE:5/4/06
MOTION SEQ.#002-003-004

Defendant(s)

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Cross-Motion	XX
Answering Affidavit	
Replying Affidavits	X

Motion (#002) by defendants New York State Department of Civil Service, Daniel Wall and Robert Dubois (hereinafter, "DCS defendants") for an order pursuant to CPLR 3212 granting summary judgment in favor of the DCS defendants; cross motion (#003) by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in favor of plaintiff against all defendants, and cross motion (#004) by defendants Uniondale Union Free School District, William Lloyd, Lawrence Blake, and Myrtle Dickson (hereinafter, the "District defendants") for an order pursuant to CPLR 3212 granting summary judgment in favor of the District defendants, are decided as set forth herein.

Plaintiff was employed for many years as a teacher by defendant Uniondale Union Free School District, until his retirement in 1988. As a retiree, plaintiff receives health insurance benefits from the District and is enrolled in the Empire Plan and the District Dental Plan and Supplemental Health Plan.

Plaintiff and his same-sex partner, Bradley Davis, have lived together since 1963. In February 1995, plaintiff requested domestic partner health care coverage from the District for his partner. The District refused and plaintiff commenced an action against the District alleging that the District's denial of health insurance benefits to his domestic partner was discriminatory. The District's motion to dismiss plaintiff's complaint was granted in *Funderburke v Uniondale Union Free School Dist. No. 15,* 172 Misc.2d 963, aff'd 251 AD2d 622.

On October 27, 2004, plaintiff and his partner, Mr. Davis, were married in Canada and returned to their residence in New York. By letter dated October 29, 2004, plaintiff requested spousal medical and dental insurance coverage from the District for Mr. Davis. The District advised plaintiff that the Empire Plan does not recognize same-sex marriages for the purpose of spousal coverage. The District's counsel further advised plaintiff that the District was not required by law to provide health insurance coverage to same-sex spouses or domestic partners, and the District elected not to provide coverage to such individuals.

Plaintiff commenced this action alleging: (1) violation of the New York Civil Service Law and Regulations; (2) denial of the right to equal protection under the New York State Constitution and (3) breach of contract. In response to the District defendants' motion to dismiss for failure to add necessary parties, plaintiff amended the complaint to add the DCS defendants. The motion to dismiss was then denied as academic.

The DCS defendants and the District defendants now seek summary judgment in their favor, while plaintiff seeks summary judgment in his favor.

The issue in this case is whether a same-sex marriage performed in Canada triggers entitlement to spousal health insurance coverage in New York. In deciding this case, this Court is constrained to follow the recent holding of the Court of Appeals in *Hernandez v Robles*, ___NY3d___, 2006 WL 1835429. While the Court of Appeals in that case did not directly address the issue of whether New York should recognize same-sex marriages performed in foreign jurisdictions, the Court's ruling is instructive on the definition of

marriage. The Court of Appeals held that there are rational grounds for limiting the definition of marriage to opposite sex couples and that any expansion of the traditional definition of marriage should come from the New York State Legislature.

Plaintiff urges that the marriage recognition rule should apply and that New York must therefore recognize his Canadian marriage. However, plaintiff's union is not a "marriage" as same has now been defined by the Court of Appeals. Under current New York law, plaintiff and his partner are not considered spouses and therefore spousal insurance benefits are unavailable to them.

All of the defendants' motions for summary judgment are therefore granted and plaintiff's cross motion for summary judgment is hereby denied.

Date 7-11-06

E W McCarty III
J.S.C.