

## 'A Wild Ride' To The High Court

*Kin draws Bridgeport lawyer into high-profile privilege case*

By THOMAS B. SCHEFFEY

J. Craig Smith is an associate at a Bridgeport personal injury firm. But this fall, his work took him to Washington, D.C. As luminaries of the legal world walked by, he sat at the counsel table in the U.S. Supreme Court.

And he had a cousin from Georgia to thank for it all.

—When my father called me from Georgia [in 2006] about Norman being fired, I didn't know if I could do anything for him," said Smith. —But my Dad said, "Remember who you are, and where you're from — we stick by our own." I knew I had to do right by Norman... When I got that phone call, it was the beginning of a truly wild ride."

It all started in a carpet mill. Norman Carpenter, a modest, self-described "mountain man" rooted to the hill country of northwest Georgia, supervised a shift of about 100 carpet factory workers. One day in 2006, he wrote an e-mail to his human resources department mentioning that one of his workers said she was undocumented.

In subsequent e-mails to Mohawk Industries' HR department, Carpenter said he had used an interpreter to check with the rest of his immigrant crew, and that 90 percent of them were also undocumented.



Law Tribune File Photo

**Attorney J. Craig Smith said he received threats from big national law firms who wanted him to turn over his cousin's case to them.**



Contributed Photo

**Yale law professor Judith Resnik directed attorney Smith's brief-writing efforts and argued the attorney-client privilege case before the Supreme Court.**

That e-mail exchange halted abruptly, and Carpenter was directed to the company's inhouse legal department. He quickly found himself atop a litigation issue as explosive as a powder keg.

Unknown to him, his employer had been embroiled for more than two years in a class action charging the company with federal Racketeer Influenced and Corrupt Organizations Act violations. The allegations were that Mohawk was engaged in an illegal conspiracy to use undocumented workers to drive down labor costs.

At the offices of Mohawk's law department, Carpenter was ordered to confer with the company's lead RICO defense lawyer. Behind closed doors, Carpenter alleges, he was pressured to retract his statements about undocumented workers. He refused to, and was fired.

So Carpenter turned to a lawyer he trusted. That would be his first cousin, J. Craig Smith, who grew up nearby in Georgia and, at the time, was a fourth-year associate of Bridgeport's Koskoff, Koskoff & Bieder. Smith, in turn contacted a two-man Atlanta employment law firm. The trio of lawyers then proceeded with a federal suit against Mohawk for wrongful termination and witness tampering in early 2007.

Mohawk, in its defense, contended that it was Carpenter who was the lawbreaker, and that he had, without company knowledge, hired illegal workers.

Despite Mohawk's hostility, Carpenter was reluctant to testify against his former employer in the RICO case. But in Carpenter's own case, he sought discovery material from Mohawk of anything justifying his firing. That would include Carpenter's talks with the RICO defense lawyer. Mohawk strenuously opposed disclosing that information, claiming attorney-client privilege.

A federal trial judge disagreed, ruling that Mohawk should disclose the material leading to Carpenter's firing. The judge found that Mohawk had already waived attorney-client privilege on this topic during the RICO litigation.

Mohawk appealed to the U.S. Court of Appeals for the Eleventh Circuit, which decided that it lacked jurisdiction to provide an interlocutory ruling on the privilege question. The Eleventh Circuit said Mohawk would have to wait until the end of Carpenter's wrongful discharge case, and then file its appeal.

Mohawk's lawyers felt this was one issue it had to fight. If a trial court erroneously makes a ruling that attorney-client privilege does not apply, they argued, the "eat is out of the bag" and the privileged information will affect the case. Even if an appellate court reverses the decision, they contended, serious harm from disclosure of privileged information has already been done.

### **'Downright Nasty'**

Thus, in 2008, Mohawk sought certiorari from the U.S. Supreme Court, on the issue of the mid-trial appeal of an issue of attorney-client privilege. Circuits were divided on this issue. In January 2009, Smith was shocked to learn that Mohawk beat the long odds of any bid for certiorari. Cousin Norman's case was headed for the highest court in the land.

Immediately, Smith's phone began to ring with calls from high-powered Supreme Court specialists, with offices in New York, Washington, Chicago and Atlanta. There are only about 12 firms around the country that regularly handle Supreme Court cases, and if one of them wasn't involved, Smith was warned, he wouldn't stand much of a chance.

Smith was admitted to argue before the U.S. Supreme Court, and was legally entitled to argue his cousin's case. But the high-pressure callers gave him a lot to worry about. —"You could ruin this for everybody, and mess up the law into the future," he was told. —"I've heard a lot of threats in my time as a lawyer. But this was something new for me."

—"Some of those calls were downright nasty," agreed Koskoff senior partner Michael Koskoff.

Smith turned to his Koskoff colleagues for advice and solace. —"I was upset, honestly. I wanted to do the best thing for Norman, and I didn't want to mess up the law. [My

colleagues] helped manage me as I sort of pulled my hair out on their couches in the evenings.”

In the end, the Koskoff firm didn’t pick any of those out-of-state appellate advocates. Indeed, for the “lead vocalist” to argue the case, the Koskoff firm turned to nationally renowned Yale Law School professor Judith Resnik, who teaches procedure, federalism and feminism. She’s a noted lecturer and author, and has had her share of U.S. Supreme Court experience.

For help with the often-complex Supreme Court procedure, Carpenter’s team got help from Public Citizen Litigation Group in Washington, D.C., which was founded by Ralph Nader.

### **Worthy Opponents**

The first amicus curiae briefs filed sided with Mohawk. The American Bar Association’s litigation section and the U.S. Chamber of Commerce extolled the sanctity of the attorney-client privilege, and contended that federal trial judges make erroneous rulings in too many cases. And Mohawk, in its cert petition, contended that secrecy of attorney-client confidences is the sine qua non of the relationship, which would be “irreparably destroyed absent immediate appeal” of a trial judge’s ruling that privilege did not apply.

But then came the friends of the court for Norman Carpenter’s side. A long list of former Circuit Court judges and distinguished law professors revealed an almost untold story. For years, the circuit courts around the country have been facing mounting caseloads and shrinking budgets. The judges have become administrators of a layer of staff attorneys and law clerks in order to oversee a tsunami of immigration appeals. To cope, judges have had to stop granting oral arguments in many cases, and writing fewer detailed opinions. To allow another wave of interlocutory appeals, the amici briefs concluded, would further overwhelm the court system.

In the meantime, Smith was working on briefs of his own. “Judith [Resnick] took me under her wing,” Smith said. “Judith is a rigorous taskmaster – she worked me. She helped me [avoid] the pitfalls.

On Oct. 5, Smith sat at the counsel table at the U.S. Supreme Court with Resnik, who was greeted like a celebrity by a who’s-who of federal judges, prosecutors and law professors who were supporting their case. Additionally, about 10 of Norman Carpenter’s family members traveled from the hill country around Dalton to observe the historic moment.

It was the first day on the bench for new Justice Sandra Sotomayor, who at one point asked the pivotal question. What harm would come to litigants, she asked, if they simply had to wait until the case’s conclusion to appeal a contested attorney-client privilege ruling? Couldn’t those possible trial errors wait until the end of the case, like virtually all other issues taken up on appeal?

In her first written opinion on the high court, Sotomayor wrote for a unanimous court, finding in Carpenter's favor on Dec. 8 that the attorney-privilege question could be handled in a post-trial appeal. —Appellate courts," she wrote, —can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence."

## **Rebel Yell**

The decision obviously did not please Mohawk or the ABA. But it left the Connecticut participants beaming. Resnik, in an interview, said —the decision enables district judges and litigants to deal with litigation, and not run up and down to the courts of appeal. It's a very vital part of a functioning litigation system."

Michael Koskoff was glad the dire warnings that Smith might —mess up the law for everybody" proved wrong. For plaintiffs' lawyers battling corporations, new rounds of mid-trial appeals would present a hardship for individuals and their counsel, Koskoff said.

As for Smith, he said last Friday: —Norman called me this morning and just let out a 'yee-haa' — a real rebel yell. He's just so happy with the result, and looking forward to getting together for Christmas. I'm really glad that by helping my cousin, we were also able to help claimants all over the country."

The past few years have been exciting for Smith. —I've never worked harder in my life," he said. —And even having grown up in the hills, there were more ups and downs than I could have imagined." •