

***State of New York
Court of Appeals***

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

NOVEMBER 2003 CALENDAR

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Tuesday, November 18, 2003

No. 149 Losurdo v Asbestos Free, Inc.

No. 150 Rodriguez v Burn-Brite Metals Co., Inc.

These appeals require the Court to interpret Workers' Compensation Law § 114-a, which was enacted in 1996 to prevent fraudulent claims. The statute provides, in part:

"If for the purpose of obtaining compensation pursuant to section fifteen of this chapter, or for the purpose of influencing any determination regarding any such payment, a claimant knowingly makes a false statement or representation as to a material fact, such person shall be disqualified from receiving any compensation directly attributable to such false statement or representation." The statute also authorizes a penalty up to the full amount of past payments "directly attributable to the false statement or representation."

In Case No. 149, James A. Losurdo fell from a ladder while working for Asbestos Free, Inc. in 1994, injuring his left knee. After medical examinations and a hearing at which he denied any prior knee injuries, he was awarded benefits for lost wages and medical treatment. Three years later, the employer's workers' compensation carrier discovered he had suffered a left knee sprain in a football game in 1989 and sought treatment for the knee again in 1991.

A Workers' Compensation Law Judge found no intent to defraud, but the Workers' Compensation Board disqualified Losurdo from receiving future wage replacement benefits and ordered repayment of past benefits. Although it agreed the prior injury did not affect the severity of his work-related knee injury, the Board ruled his misrepresentations about "the prior medical history of his injury site" concerned a "material fact" and, therefore, violated the statute. The Appellate Division, Third Department affirmed the decision.

Losurdo argues the statute's reference to false statements "as to a material fact" means statements made by claimants to obtain benefits to which they would not otherwise be entitled. Since his prior knee injury did not affect the degree of his disability or the amount of his benefits, he contends he did not violate section 114-a.

Case No. 150 arose in 1998 when Francisco Rodriguez, a 32-year-old welder at Burn-Brite Metals, injured his shoulder at work and was awarded workers' compensation benefits for lost wages and medical costs. The State Insurance Fund (the employers' workers compensation carrier) subsequently learned Rodriguez was operating a restaurant -- work inconsistent with his claimed disability.

The Workers' Compensation Board disqualified Rodriguez from receiving wage benefits, but ruled that section 114-a does not authorize the termination of medical benefits. It said the language of the statute expressly applies to WCL § 15, which pertains only to wage replacement benefits, not medical benefits. The Third Department upheld the determination.

The State Insurance Fund and Burn-Brite argue that "when the Workers' Compensation Law fraud fighting statutes are read as a whole and to effectuate the legislative intent, the Workers' Compensation Board can terminate medical benefits when a claimant commits fraud."

No. 149 For appellant Losurdo: Howard D. Olinsky, Oswego (315) 343-9112

For respondent Asbestos Free: John I. Hvozda, North Syracuse (315) 461-4277

No. 150 For appellant Insurance Fund & Burn-Brite: Susan B. Marris, Liverpool (315) 453-6530

For respondent Board: Assistant Attorney General Howard B. Friedland (212) 416-8688

For respondent Rodriguez: Thomas M. Robertson, Syracuse (315) 426-1149

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To be argued Tuesday, November 18, 2003

No. 128 Salino v Cimino

Suffolk County and County Attorney Robert Cimino are appealing a judgment requiring them to provide a legal defense to Suffolk County Police Officer Gary Salino in a federal civil rights action.

The underlying federal suit stems from a dispute between Salino and his neighbor, Corey Kay, over the year-round rental of two summer cottages on Kay's property in Mt. Sinai. Salino obtained copies of documents filed in conjunction with Kay's applications for certificates of compliance and occupancy for the cottages and gave them to the district attorney, contending they were fraudulent. A criminal investigation resulted in the arrest of Kay and Joan VanMiddeltem, the broker who handled Kay's purchase of the property, on charges of offering a false instrument for filing. After VanMiddeltem was acquitted and the charges against Kay were dismissed, they filed separate federal court actions against Salino personally and in his capacity as a police officer, claiming they had been deprived of their constitutional and civil rights.

Salino sought legal representation from the County under Suffolk County Code § 35-3(A), which requires the County to defend employees in civil suits "arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting, or in good faith purporting to act, within the scope of his public employment or duties" The last clause of the statute provides that the determination of whether an employee was acting within the scope of his duties "shall be made in the first instance by the County Attorney."

Cimino denied his request and Supreme Court upheld the determination, saying there was "a sufficient factual basis for the determination that the acts allegedly committed by [Salino] were not committed while he was acting in furtherance of his public employment"

The Appellate Division, Second Department unanimously reversed and ordered the County to defend Salino in the Kay action, ruling its refusal had been arbitrary and capricious. "Some of the acts asserted in the complaint in the underlying federal civil rights action were alleged by [Kay] to have been performed by [Salino] in his capacity as an employee of the County of Suffolk. Therefore, applying the clear and unambiguous meaning of the language contained in the legislation, the County ... is obligated to afford a defense to" Salino, it said.

The County argues, in part, that the ruling overlooks the last clause of the statute, which "impresses the County Attorney with the duty and authority to conduct an investigation for the purpose of making an independent determination 'in the first instance' whether or not an employee was acting within the scope of employment...." It also contends the decision conflicts with the Second Department's own prior rulings and those of the First and Third Departments.

For appellant Cimino and County: Assistant County Attorney Theodore D. Sklar (631) 853-4049
For respondent Salino: Stephen L. O'Brien, Nesconset (631) 265-6660

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To be argued Tuesday, November 18, 2003

No. 148 N.Y.A.A.D., Inc. v State of New York

Among other provisions of the Airbag Safety and Anti-Theft Act, passed by the State Legislature in 1996, is one allowing vehicle owners to replace a deployed or stolen airbag with either a new unit or a salvaged airbag installed by a registered vehicle dismantler. However, effective in March 1998, the statute provided that salvaged airbags could be installed only if they were certified according to "standards established by a nationally recognized testing, engineering and research body" approved by the state commissioner of motor vehicles. Because there was no certifying body in place, the Legislature extended this deadline to March 1999. There have been no further extensions, although there is still no nationally recognized testing body and no airbag certification standards approved by the commissioner.

In December 1999, the commissioner of motor vehicles notified repair shops and vehicle dismantlers that only new airbags would be allowed beginning in March 2000. He explained that, because the statute permitted only "certified salvage airbags" and no certification procedure was in place, the "only acceptable replacement bag at this time is a new one."

N.Y.A.A.D., Inc., which is better known as the Automotive Recyclers' Association of New York, and several individual vehicle dismantlers then brought this action to invalidate the statute, arguing the commissioner's failure to promulgate regulations for the certification of salvaged airbags had rendered the law a nullity. They relied on the statute's enacting clause, which states: "This act shall take effect immediately, provided ... the commissioner of motor vehicles shall promulgate such rules and regulations as are necessary to implement the provisions of this act on or before January 1, 1997."

Supreme Court, finding that the Legislature intended the statute "to allow New York consumers access to salvaged airbags," agreed with the plaintiffs that the commissioner's adoption of certification standards for salvaged airbags "was a condition precedent to the validity of the Act" and that his failure to do so was fatal to it.

The Appellate Division, Third Department reversed and dismissed the suit, agreeing with the State that the Legislature did not intend to allow the installation of salvaged airbags that were not certified as safe. It said Supreme Court erred in interpreting the reference to promulgation of "rule and regulations" in the effective date clause to include the approval of certification standards for salvaged airbags, which was contained in another section of the statute. "Since the requirement inferred by Supreme Court was not 'expressed clearly and unequivocally,' we conclude that the Act's effective date clause should not be read to make such regulations a condition precedent, thereby eviscerating the statute's intent," it said.

The plaintiffs argue the commissioner's failure to adopt certification standards rendered the statute invalid and that he usurped legislative authority by prohibiting the sale of salvaged airbags until a certification process is approved.

For appellant N.Y.A.A.D.: George J. Szary, Albany (518) 462-5300

For respondent State: Assistant Solicitor General Julie S. Mereson (518) 474-3654

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To be argued Wednesday, November 19, 2003

No. 151 Fullan v 142 East 27th Street Associates

Sean Fullan and Peggy Bates, tenants of a rent-stabilized apartment at 142 East 27th Street in Manhattan, filed a Fair Market Rent Appeal (FMRA) with the State Division of Housing and Community Renewal in 1991, claiming their initial rent exceeded the apartment's fair market rental value. The building was owned by Dobro Corporation at that time. In 1993, the Division's rent administrator ordered Dobro to pay the tenants a \$37,480 overcharge award and Dobro filed a petition for administrative review. In 1995, while its petition was still pending, Dobro sold the building to 142 East 27th Street Associates. The Division denied Dobro's petition in January 1997. One month later, 142 East 27th Street Associates sold the building to its current owner, 27 Realty LLC.

In December 1998, Fullan and Bates brought this action to collect the overcharge award from 27 Realty and its managing agent, Heller Realty, among others. The Appellate Division, First Department granted summary judgment to the tenants, holding 27 Realty and Heller Realty liable for paying the FMRA award with interest and attorneys fees, a total of more than \$95,000.

The Appellate Division said a "current successor landlord is generally liable for overcharges collected by a predecessor landlord after April 1, 1984. We see no reason to except from this rule, particularly where, as here, due diligence by plaintiffs' present landlord, 27 Realty, in connection with its purchase of the subject premises would have apprised it of the FMRA award and would have enabled it to take steps to avoid the necessity for this enforcement action or, at the very least, to avoid the financial consequences of successor liability."

27 Realty and Heller Realty argue the Appellate Division "misapplied the successor liability provisions of the [Rent Stabilization] Code as they apply to rent overcharge cases, rather than the very different successor liability provisions of the Code as they apply to fair market rent appeals. Section 2526.1(f) provides that a current owner is liable for all penalties based on overcharges collected since April 1, 1984, including overcharges collected by any prior owner, but section 2526.1(g) exempts FMRA proceedings from that provision. Regarding FMRA cases, section 2522.3 simply says the award "shall direct the affected owner to make the refund" and, "to the extent the present owner is liable for all or any part of the refund," allows a present owner to credit the refund against future rents. The defendants argue that, because they had no opportunity to participate in the FMRA proceeding, they cannot be held liable for the award.

For appellant 27 Realty LLC and Heller Realty: Howard Grun, Manhattan (212) 687-1700

For respondents Fullan and Bates: Mitchell Merlis, Manhattan (212) 986-6140

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To be argued Wednesday, November 19, 2003

No. 152 Hammer v The American Kennel Club

Jon H. Hammer, a Manhattan lawyer who owns a pure-bred Brittany spaniel with an undocked tail nearly ten inches long, is asking the Court to reinstate his suit to prohibit The American Kennel Club (AKC) and The American Brittany Club from enforcing a breed standard for judging Brittany's that provides, "any tail substantially more than four inches shall be severely penalized." Among other claims, he contends the docked-tail standard violates Agriculture and Markets Law § 353 and constitutes illegal discrimination. Lower courts dismissed his complaint.

Section 353 states, "A person who ... tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, ... or causes, procures or permits any animal to be ... unjustifiably injured, maimed, mutilated or killed, ... or who wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor"

In a 3-2 decision, the Appellate Division, First Department ruled Hammer had no standing as a private individual to seek civil enforcement of the animal cruelty law, which it said is a criminal statute. "As such, its enforcement should be entrusted to the agencies of law enforcement, the police and district attorneys' offices," it said. The majority also ruled Hammer failed to establish his discrimination claim, saying he has no "legally protected right" to compete without penalty in dog shows. "While plaintiff employs the term discrimination in describing defendants' standards for judging Brittany spaniels, 'discriminating' against dogs with tails longer than four inches is no more illegal than 'discriminating' against dogs taller than 20½ inches or smaller than 17½ inches is height, another standard adopted for purposes of competitions. Dog tail length, like dog height, is not a consideration protected by state or federal anti-discrimination law," the court said.

The dissenters said his suit should be reinstated, arguing that Hammer was not trying to privately enforce section 353, but rather "seeks a declaration that the AKC's standard for judging the Brittany spaniel deprives him of a benefit of membership on the basis of his unwillingness to violate a state law and he seeks to enjoin defendants from enforcing that standard against him by penalizing his dog in competitions on the basis of the length of her tail." As to whether tail docking violates the statute, they said the answer depends on whether the procedure is justifiable. "Defendants assert that docking a Brittany spaniel's tail protects the dog against tail injuries during field trials and hunts ...," the dissenters said. "Assuming arguendo that the protection of hunting dogs against tail injuries justifies docking the tails of hunting dogs, it is not a justification for docking the tails of non-hunting dogs, such as plaintiff's, for purposes of AKC competitions."

The Airedale Terrier Club of America and ten other dog breed clubs filed an amicus curiae brief in support of the defendants.

For appellant Hammer: Joseph P. Foley, Irvington (914) 591-6776

For respondent American Brittany Club: Debra I. Resnick, Manhattan (212) 753-7500

For respondent American Kennel Club: Dale C. Christensen Jr., Manhattan (212) 574-1200

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To be argued Wednesday, November 19, 2003

No. 153 Blake v Neighborhood Housing Services of New York City, Inc.

Rupert Blake, the owner of a small contracting company, was injured in March 1995 while repairing a second-floor window of a two-family house on Schieffelin Avenue in the Bronx. Blake was standing on the upper portion of an extension ladder at a height of about 17 feet when it suddenly retracted, carrying him down until his ankle was caught and crushed between rungs of the extension and the main frame about three feet from the ground.

Blake sued Neighborhood Housing Services of New York City (NHS) as agent of the owner under Labor Law § 240(1), which imposes absolute liability on building owners who fail to provide ladders and other devices "so constructed, placed and operated as to give proper protection" to workers against elevation-related risks. The ladder belonged to Blake. NHS contended the sole cause of the accident was Blake's failure to engage the safety catches that prevent the ladder's extension from retracting. The trial court denied Blake's motion for a directed verdict on liability against NHS and ultimately dismissed his suit after the jury found the ladder was "so constructed, operated as to give proper protection to plaintiff."

The Appellate Division, First Department affirmed the order, saying, "Plaintiff testified that he did not know what caused the ladder to retract, and that the ladder had previously been steady and free from defect. Under these circumstances, a factual issue was posed as to whether plaintiff's injury was caused by some inadequacy of the ladder or was solely attributable to the manner in which plaintiff used the ladder (see Weininger v Hagedorn & Co., 91 NY2d 958, 960...). The jury was entitled to resolve this issue as it did and we perceive no ground upon which its verdict would be susceptible to disturbance."

Blake argues that a worker's alleged negligence in using a safety device is not a valid defense against a Labor Law § 240(1) claim. He says, "The collapse of the ladder is a *prima facie* violation of Labor Law § 240(1) and the proximate cause of the accident and the injuries sustained by plaintiff There were no issues of fact for submission to the jury and the jury should not have been asked to make a determination on what was purely a question of law and a *prima facie* violation of the Labor Law."

The Defense Association of New York filed an amicus curiae brief in support of NHS.

For appellant Blake: Gail S. Kelner, Manhattan (212) 425-0700

For respondent NHS: Carol R. Finocchio, Manhattan (212) 686-0800

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To be argued Thursday, November 20, 2003

No. 155 People v James Johnson

James Johnson was indicted on charges of first and second degree criminal possession of a weapon after a New York City police officer found a loaded handgun in the glove compartment of his rental car in October 1999. Johnson contends the search was illegal and asks the Court of Appeals to suppress the evidence.

Plainclothes Officer Anderson Walcott said he saw Johnson speeding and driving recklessly on the Upper West Side of Manhattan and followed him for seven or eight minutes before pulling him over. As he approached the car, Walcott said he saw Johnson reach over to the glove box, open it and then close it. Johnson handed his driver's license to Walcott through the window, but said he did not have the rental agreement for the car. Walcott asked what was in the glove compartment and suggested the rental agreement might be there, but Johnson said it was not. When a computer check revealed that Johnson's license was suspended, Walcott removed him from the car and arrested him. The officer then opened the glove compartment and found a nine millimeter handgun. On the way to the precinct, Johnson told the officer he was a bodyguard and kept the gun for protection.

When Johnson moved to suppress the evidence, the prosecution argued the gun was legally seized during an inventory search of the vehicle. Police may search impounded vehicles without a warrant to protect the occupants' property, to guard against claims of lost, stolen or damaged property and to protect the arresting officers from danger, but such inventory searches must be conducted pursuant to standard procedures reasonably designed to meet these objectives and to limit the discretion of individual officers. An inventory search may not be used to investigate criminal activity.

Supreme Court suppressed the gun and Johnson's statement because "the People have failed to come forward with any evidence of the police procedures for inventory searches, failed to establish the reasonableness of the procedures and failed to sustain their burden of coming forward with proof that the officer carried out an inventory search in accordance with any such reasonable police procedures" The judge also found "the officer's claimed inventory search ... is, I regret to say, less than a believable claim and it appears to be merely a pretext to cover for what was the officer's desire in the first place, to see what the defendant was up to and to somehow get into the interior of his car to see if the defendant was in possession of contraband or the weapon."

The Appellate Division, First Department unanimously reversed the order. "The Supreme Court erred in granting defendant's suppression motion inasmuch as defendant's vehicle was properly stopped by the police after speeding and driving recklessly and the subject gun was properly recovered from the vehicle's glove compartment as part of a valid preliminary and limited inventory search at the scene...", it said. "Since defendant was driving with a suspended out-of-state driver's license and could not produce registration papers for the vehicle, defendant was properly arrested, the vehicle impounded and its contents preliminarily inventoried at the scene"

For appellant Johnson: Judith Stern, Manhattan (212) 440-4310

For respondent: Manhattan Assistant District Attorney Donald J. Siewert (212) 335-9000

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To be argued Thursday, November 20, 2003

No. 156 People v Robert Johnson

On the evening of February 5, 2000, two New York City police officers came upon Robert Johnson struggling with another homeless man, Val Grey, near the subway station at Allen and East Houston Streets in Manhattan. Johnson was holding an ice pick in his right hand and Grey was pressing that hand against a wall. Grey was bleeding from his left eye and shouted to the officers, "He stabbed me." The officers arrested Johnson at the scene.

Grey made additional statements to one of the officers at a nearby laundromat, on the ambulance ride to the hospital and then, most extensively, after he received initial medical treatment at the hospital about an hour after the incident. Grey said he was walking down the subway stairs when a garbage can rolled down behind him. He said he went back up and confronted Johnson, who stabbed him twice in the eye with the ice pick. Grey was hospitalized for more than three months for injuries to his eye, skull and brain. He left the hospital on his own in May 2000 and police were unable to locate him to testify at Johnson's trial.

In Grey's absence, Supreme Court allowed the prosecution to introduce into evidence the statements he made to police on the evening of the attack under the excited utterance exception to the hearsay rule. Johnson was convicted of first degree assault and sentenced to 20 years in prison. In his appeal, Johnson contends Grey's hearsay statements were admitted at trial in violation of his right to due process and to confront the witnesses against him.

The Appellate Division, First Department affirmed his conviction, saying, "The victim's statements to the police shortly after he had been stabbed in the eye twice by the defendant, and his further statements made in the hospital emergency room an hour later, in response to police questioning, were properly admitted as excited utterances. The evidence clearly established that all of the victim's statements were made while he was still under the influence of the stress caused by his serious injuries."

Johnson argues Grey's statement at the hospital did not qualify as an excited utterance because it "was made after the excitement of the incident had passed. The statement was made one hour and twenty minutes after the incident. The complainant had been treated at the hospital and was 'more relaxed.' He was calm, alert and able to follow complex commands. The statement was not exclamatory; it was a paragraph-long narrative made in response to police questioning." Since there were no other witnesses to the stabbing, he argues the remaining evidence was insufficient to support a conviction.

For appellant Johnson: Laura Lieberman Cohen, Manhattan (212) 440-4310

For respondent: Manhattan Assistant District Attorney Walter J. Storey (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, November 20, 2003

No. 157 People v Davon Taylor

On December 17, 1993, Juzan Bracey was shot three times in the head during an apparent dispute over drug turf in a video store on Eastchester Road in the Bronx. The store owner said Davon Taylor and Andre Lewis were present and that he saw Lewis moving toward Bracey with a gun in his hand just before the shots were fired. Lewis was arrested a month later and was convicted of the murder in June 1997. Police considered Taylor to be a witness, not a suspect, until his cousin Melanie McDermott was arrested for assault and robbery in December 1996 and told police she had witnessed the shooting and implicated Taylor.

At Taylor's trial, McDermott testified that Lewis and Taylor had previously discussed killing Bracey and that Lewis shot Bracey on Taylor's command. The primary defense witness, Taylor's former girlfriend Danette Hamilton, testified that she was with McDermott at Taylor's home at the time of the shooting and that McDermott could not have witnessed the crime. Taylor was convicted of second degree murder and sentenced to 25 years to life in March 2000.

On appeal, the defense argued Taylor's conviction should be overturned due to prosecutorial misconduct and ineffective assistance of defense counsel. Among other things, he contended he was prejudiced by the prosecutor's "unsubstantiated allegations," repeated during cross-examination and summation, that Hamilton had been bribed to present perjured testimony supporting the defense. He argued that his defense attorney's failure to properly object to the prosecutor's conduct and to preserve an appellate claim of insufficient evidence denied him effective assistance of counsel.

The Appellate Division, First Department affirmed the conviction, saying the defense attorney "made objections where appropriate, and generally obtained suitable curative relief from the court. Defendant was not prejudiced by his attorney's not objecting to testimony that was clearly admissible." It also said the prosecutor's "excesses in cross-examination of defendant's witnesses do not rise to the level requiring reversal."

Taylor argues, "The confluence of extraordinary prosecutorial misconduct with [defense] counsel's persistent failure to object, seek curative instructions or move for a mistrial, in the context of an exceptionally weak case, constituted ineffective assistance of counsel."

For appellant Taylor: Susan J. Walsh, Manhattan (212) 267-2600

For respondent: Bronx Assistant District Attorney Lynetta M. St. Clair (718) 590-2121

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To be argued Thursday, November 20, 2003

No. 158 People v Larry Andrew

Larry Andrew was found guilty of assaulting Melvin Hubbert in March 1999 in the Brooklyn rooming house where they both lived. Hubbert had been engaged in a long-running dispute with the owner over heat, water and power and Andrew, as building superintendent, had cut off water and electricity at the landlord's direction.

Hubbert testified that Andrew attacked him without provocation and cut him repeatedly as he walked down a common stairway with a flashlight. Andrew testified Hubbert attacked him without provocation, knocking him down with the flashlight, and that he defended himself by striking back with an object he found on the hallway floor. Andrew sought to impeach the credibility of Hubbert, who had testified that he consumed only a single beer that day, by introducing a note made by the surgeon who treated Hubbert's wounds that Hubbert had been unable to sign a surgical consent form because he was too drunk.

The trial judge refused to admit the note into evidence under the business records exception to the hearsay rule because it was based on information given to the surgeon by another physician, making it double hearsay, because it was not supported by a blood alcohol analysis conducted at the hospital, and because it was not related to Hubbert's treatment or diagnosis.

Andrew was sentenced to six years in prison for first degree assault. The Appellate Division, Second Department affirmed his conviction.

Andrew argues that hospital entries indicating a patient was intoxicated clearly relate to diagnosis and treatment and should be admissible as business records. Intoxication affects a patient's tolerance of anesthesia and his ability to describe symptoms to physicians, according to the defense brief, and it affects a patient's competence to consent to treatment.

For appellant Andrew: DeNice Powell, Manhattan (212) 693-0085

For respondent: Queens Assistant District Attorney Thomas S. Berkman (718) 286-6668