

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.

To be argued Tuesday, September 11, 2012 (2:30 p.m.)

No. 170 Matter of Galasso

(papers sealed)

This attorney disciplinary proceeding against Garden City lawyer Peter J. Galasso (Galasso) stems from thefts of client funds by his brother, Anthony Galasso (Anthony), a non-lawyer who was office manager and bookkeeper for his law firm, Galasso & Langione (now Galasso, Langione, Catterson & LoFromento). Anthony stole more than \$5 million in client funds from the firm's escrow and IOLA accounts from June 2004 to January 2007, some \$4.5 million of it from escrow funds of a matrimonial client. Anthony forged bank documents to obtain access to the firm's accounts and hid his thefts with fabricated bank statements he submitted to Galasso. To conceal other thefts, Anthony transferred funds from the matrimonial client's escrow account to other firm accounts, which were later used to pay salary and Galasso's share of the purchase of an office condominium. When Anthony confessed his thefts to the firm in January 2007, Galasso secured the funds remaining in the escrow accounts, notified victimized clients, and reported the thefts to the Nassau County Police Department. Anthony pleaded guilty to grand larceny and other charges and was sentenced to 2½ to 7½ years.

The Grievance Committee for the Ninth Judicial District brought ten charges of professional misconduct against Galasso. A special referee sustained all ten, including eight charges that he breached his fiduciary duty by failing to safeguard client funds, provide a proper accounting, and promptly pay escrow funds to clients, and that he failed to supervise a non-lawyer employee. The referee also sustained charges that he was unjustly enriched by use of stolen client funds and failed to timely comply with the Committee's demands for information.

The Appellate Division, Second Department confirmed the referee's report and suspended Galasso for two years, saying he "failed to properly supervise" his brother's work as bookkeeper and "failed to properly review, audit, and reconcile" his law firm's bank accounts. It said, "In the exercise of reasonable management and supervisory authority, [Galasso] would have been aware of the unlawful and improper transfers and disbursements of the Baron funds so that remedial action could have been taken to avoid or mitigate the misappropriations of same." In imposing the suspension, it acknowledged his efforts to improve his business practices, his cooperation with the criminal prosecution of his brother, and his pro bono lawsuits to recover his clients' money. "However, we find that [Galasso] failed to maintain appropriate vigilance over his firm's bank accounts, resulting in actual and substantial harm to clients..." it said.

Galasso contends the evidence does not support the charges, arguing that he exercised appropriate oversight over the firm's accounts, did not cede his fiduciary duties to Anthony, and he "should not be held vicariously liable for the criminal conduct of a rogue employee" whose "practiced duplicity and deft document fabrication fooled everyone." He says he was not accused of intentional or reckless misconduct, but "only allegedly negligent behavior, that can be properly challenged in a civil action but which should have no place in a Disciplinary proceeding. Whether Appellant's objectionable conduct here adversely reflects on his fitness to practice law is highly dubious; how it justified his suspension is incomprehensible." He argues the order unfairly makes lawyers "insurers of their escrow accounts" and strictly liable for client losses.

For appellant Galasso: Jeffrey L. Catterson, Garden City (516) 222-6500

For respondent Grievance Committee: Matthew Lee-Renert, White Plains (914) 824-5070

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To be argued Tuesday, September 11, 2012 (2:30 p.m.)

No. 171 Matter of Bronx Committee for Toxic Free Schools v New York City School Construction Authority

The Bronx Committee for Toxic Free Schools and several individuals brought this article 78 proceeding to challenge the environmental review conducted by the New York City School Construction Authority (SCA) for its Mott Haven School Campus project, which is partially located on a contaminated industrial site in the Bronx. SCA identified hazardous organic compounds and metals at the site, enrolled the most heavily contaminated portion in the State Department of Environmental Conservation's Brownfield Cleanup Program, and devised remedial measures that included removing contaminated soil and placing a barrier of clean soil over the surface. SCA issued its final environmental impact statement (EIS) in October 2006. The EIS did not include consideration of a long-term site maintenance and monitoring plan, which SCA said it would prepare as part of the brownfield cleanup process.

Supreme Court ruled for the Committee for Toxic Free Schools, in part, by ordering SCA to prepare a supplemental EIS detailing its plan for long-term maintenance and monitoring of remediation measures for contaminated soil and groundwater. It said the final EIS was incomplete without the plan and SCA did not take the "hard look" at long-term environmental concerns required by the State Environmental Quality Review Act (SEQRA).

The Appellate Division, First Department affirmed, ruling that "the long-term monitoring measures, developed and implemented in their entirety after the final EIS was issued in October 2006, constituted 'changes proposed for the project'" and triggered the need for a supplemental EIS under SEQRA. "By failing to make any mention of the need for long-term monitoring in the initial EIS, SCA frustrated the purpose of SEQRA, which is to subject agency actions with environmental impact to public scrutiny..." it said. "Indeed, there is no record evidence that SCA took the requisite 'hard look' at the issue of long-term maintenance and monitoring of remediation measures until 2008, when it issued its final site management plan...." It said SCA's participation in the Brownfield Cleanup Program "did not exempt the project's environmental impacts from SEQRA scrutiny, and under SEQRA it was impermissible for SCA to omit a known remediation issue from the EIS with the idea of taking up that issue at a later date...."

SCA argues that its long-term monitoring plan "did not constitute a change in the construction project that was the subject of SEQRA review. Rather, the Final EIS explained the SCA's participation in the [brownfield program], and disclosed the remedial steps to mitigate the potential adverse impact on soil and groundwater conditions. The Site Management Plan was prepared after the remediation, in accordance with the [brownfield] regulations. It described the long-term monitoring of environmental controls but did not contain any new remedial measures or controls. In addition, the Plan fulfilled SEQRA's purpose of public involvement, because it was finalized after extensive public comment."

For appellant SCA: Assistant Corporation Counsel Janet L. Zaleon (212) 788-1020

For respondent Committee: Gregory Silbert, Manhattan (212) 310-8067

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To be argued Tuesday, September 11, 2012 (2:30 p.m.)

No. 172 Matter of State of New York v Shannon S.

(papers sealed)

The State brought this proceeding for civil management of Shannon S. under Mental Hygiene Law article 10 in 2009, when he completed his prison sentence for third-degree rape and criminal sexual act involving his 16-year-old girlfriend. They began dating in August 2002, when he was 29, and their relationship was discovered after she became pregnant at the end of the year. His lengthy criminal record included two other sex crimes involving underage girls. At age 24, he pleaded guilty to sexual misconduct after having intercourse with a 15-year-old girlfriend who was intoxicated on beer and marijuana. At age 26, he was charged with forcibly raping and sodomizing his sister's 13-year-old babysitter and pleaded guilty to second-degree rape. An Office of Mental Health psychologist, Dr. Jacob Hadden, interviewed him prior to his 2009 release and diagnosed him as having "paraphilia not otherwise specified" (paraphilia NOS), as described in the Diagnostic and Statistical Manual (DSM), as well as antisocial personality disorder and alcohol abuse. Dr. Hadden concluded that Shannon S. "demonstrated a deviant sexual interest in adolescents below the age of consent" and posed a high risk of recidivism.

At trial, Dr. Hadden and another State expert, Dr. Stuart Kirschner, presented their diagnosis of paraphilia NOS and said Shannon S. suffers from a mental abnormality as defined in Mental Hygiene Law § 10.3(i). They conceded that paraphilia does not explicitly include statutory rape and the DSM does not contain a category for paraphilic arousal involving coercion or nonconsent, but they said paraphilia NOS is a catch-all category for unspecified conditions that could include attraction to "children or other nonconsenting persons." Dr. Kirschner said Shannon S. was not a pedophile, but "more of a hebephile" because he was attracted to early pubescent females. The defense expert, Dr. Charles Ewing, described Shannon S. as a "career petty criminal" likely to commit nonsexual crimes, but said he did not have a mental disorder and was not predisposed to commit sexual offenses. He said hebephilia is not a paraphilia because, while statutory rape is illegal, an attraction to teenage girls is not statistically abnormal since "most males are sexually attracted to fully formed pubescent women."

Supreme Court found that Shannon S. suffered from a mental abnormality under section 10.3(i) and, after a dispositional hearing, held there was clear and convincing evidence that he was a dangerous sex offender requiring confinement at a secure treatment facility.

The Appellate Division, Fourth Department affirmed. It said the testimony of the State's psychologists that Shannon S. suffered from paraphilia NOS, was predisposed to committing sex offenses, and had serious difficulty controlling such conduct provided legally sufficient evidence to support the determination. It said Dr. Ewing's testimony "merely raised a credibility issue."

Shannon S. argues there is legally insufficient evidence that he suffers from a mental abnormality "without proof of a diagnosis from the Diagnostic and Statistical Manual." He says, "When the drafters of the DSM meant to exclude statutory rape from the list of paraphilias that a psychologist could diagnose..., this Court should not allow [the State's] experts, who purport to rely on the DSM, to circumvent the DSM ... by labeling the diagnosis as 'not otherwise specified.'" He also argues that civil confinement may not be ordered without a finding that no less restrictive alternative would suffice.

For appellant Shannon S.: Mark C. Davison, Canandaigua (585) 394-5222

For respondent State: Assistant Solicitor General Kathleen M. Treasure (518) 473-7712

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No. 173 Dean v Tower Insurance Company of New York

In March 2005, Douglas and Jona Dean obtained a homeowner's insurance policy from Tower Insurance Company of New York to cover a house they intended to buy on Mountain Road in Irvington. In their application, they said the house was their primary dwelling. The policy stated that it covered physical loss to the "residence premises," which it defined as "[t]he one family dwelling, other structures, and grounds ... where you reside." After closing on the house, the Deans discovered that its support beams had been heavily damaged by termites, requiring that much of the house be gutted and rebuilt. Without informing Tower, they continued to live in their old home and worked on the repairs themselves with the help of family and friends. In March 2006, the policy was renewed for a second year. The Deans were still living in their old home and working on the new one in May 2006, when the Mountain Road house was destroyed by a fire of unknown origin. Tower disclaimed coverage on the grounds that, because the Deans never moved into the house, it was not a "residence premises" as defined in the policy, and that they misrepresented in their application for the policy that they occupied the house as their primary dwelling. The Deans brought this action to compel coverage of the fire loss.

Supreme Court granted Tower's motion for summary judgment dismissing the complaint, holding that the house was not a "residence premises" under the policy. "Giving the words 'where you reside' their 'plain and ordinary meaning,' the policy covered a dwelling where the Deans lived for a permanent or extended period of time..." it said. "Here, plaintiffs do not allege that they ever lived at the Mountain Road house. At best, plaintiffs have established ownership of the house and presence in it to perform certain renovations, and a stated intent of living there." It said, "[T]here is insufficient evidence of plaintiffs' physical presence and permanency to demonstrate that they resided in the premises at any time prior to the date of loss."

The Appellate Division, First Department modified by denying Tower's motion and reinstating the complaint. "Because the 'residence premises' insurance policy fails to define what qualifies as 'resides' for the purposes of attaching coverage, the policy is ambiguous in the circumstances of this case, where the [Deans] purchased the policy in advance of closing but were then unable to fulfill their intention of establishing residency at the subject premises due to their discovery and remediation of termite damage that required major renovations," it said. "... the ambiguity in the policy must be construed against defendant under the facts of this case, and precludes the grant of summary judgment in its favor..." It also said there is an "issue of fact as to whether plaintiffs misrepresented their intention to reside" in the house.

For appellant Tower: Max W. Gershweir, Manhattan (212) 655-4000

For respondent Deans: Robert D. Meade, White Plains (914) 949-2700

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To be argued Tuesday, September 11, 2012 (2:30 p.m.)

No. 174 People v Calvin Harris

(papers sealed)

Calvin Harris is serving 25 years to life in prison for the murder of his wife, Michele, who was last seen on September 11, 2001. Neither her body nor any murder weapon was ever found. Harris and Michele were involved in an acrimonious divorce action at the time, but were both still living with their four young children at their home in Spencer, Tioga County. On the night she disappeared, Michele finished her shift as a waitress at about 9 p.m., had a drink with two co-workers, then visited her boyfriend at his apartment. She left the apartment to go home at about 11 p.m., but Harris said she never arrived. Police found recent bloodstains spattered in the kitchen and on the garage floor of the house. DNA analysis determined the blood was Michele's. Prosecutors also presented evidence of prior threats by Harris, including testimony of a hairdresser who, two months before the disappearance, overheard a cell phone conversation in which Harris told his wife: "Drop the divorce proceedings. I will fucking kill you, Michele. Do you hear me? I will fucking kill you. I can make you disappear...."

Based wholly on such circumstantial evidence, Harris was convicted of second-degree murder at his first trial in 2007, but hours after the verdict a new witness, Kevin Tubbs, came forward to say he had seen a woman resembling Michele and a younger man, who was not Harris, standing in front of her house at about 5:30 a.m. on September 12, 2001. County Court set aside the guilty verdict and ordered a new trial. Another man, John Steele, then informed the court in a letter that he and a companion had witnessed "a scene very similar to the account given by Mr. Tubbs" on the early morning of September 12. Steele died before Harris's second trial in 2009 and the court excluded from evidence Steele's letter and affidavit as hearsay. Harris was again convicted of second-degree murder.

The Appellate Division, Third Department affirmed in a 3-1 decision, holding there was legally sufficient evidence. "[T]he People presented evidence of defendant's motive, expressed intent to kill the victim and make her disappear, opportunity to do so on the night that the victim vanished, and evidence of his consciousness of guilt. This proof, in addition to the hundreds of still-red stains caused by the spattering of the victim's blood, provided sufficient circumstantial evidence for the jury to infer that, after the victim's return home, defendant incapacitated her in the kitchen and repeatedly struck her ... with an object that was placed on the throw rug, and that he then took her to the garage where she bled an additional amount that was largely wiped away while the blood was still moist."

The dissenter said "the blood spatter testimony was too inconclusive from which to infer ... that Michele was in the house on the night of September 11, 2001, much less violently and fatally attacked there. The threats, which were made months and years prior to [her] disappearance, are insufficient to support the People's suggested inference that defendant created a plan to kill [her] and then waited months to carry it out.... Finally, defendant's actions after [her] disappearance were neither inherently suspect nor give rise to any logical inferences of defendant's consciousness of guilt." He said the trial court made a series of errors warranting reversal, including its refusal to strike a juror who admitted a preexisting opinion on the issue of guilt and its exclusion of John Steele's affidavit. "[I]t seems that ... defendant was presumed guilty by the police, the District Attorney, and [Michele's] family and friends and that, at trial, the burden of proof was shifted to defendant to prove his innocence," he said.

For appellant Harris: William T. Easton, Rochester (585) 423-8290

For respondent: Tioga County District Attorney Gerald A. Keene (607) 687-8650