

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 Thursday, May 7, 2015

No. 93 Branch v County of Sullivan

Sharen Branch filed this wrongful death action against Sullivan County on behalf of the estate of her son, Robert Bastian, who was a 17-year-old student at Sullivan County Community College (SCCC) when he suffered a fatal heart attack in his dormitory in November 2007. Branch alleged the County was negligent in failing to have a defibrillator -- and an employee trained in its use -- available for medical emergencies at the dormitory. The County moved for summary judgment dismissing the suit, arguing that it did not owe a duty of care to Bastian because it did not own, operate, maintain or control the dormitory where he lived or SCCC. Branch responded that SCCC is a "department" of the County, which is the sponsor of the college pursuant to Education Law § 6302, and therefore the County had a legal duty to ensure that SCCC made a defibrillator available.

Supreme Court granted the County's motion to dismiss. "As the sponsor of the college, the County is only responsible for the College's fiscal operation...," it said. "The College's operations ... are governed by its own Board of Trustees" and "Education Law § 6306(5) assigns responsibility for the maintenance of buildings and facilities to the Board of Trustees.... The statutory scheme designating its Board of Trustees as the sole party responsible for the operation of the College's facilities shields Sullivan County, the local sponsor, from liability that might otherwise attach...."

The Appellate Division, Third Department affirmed, rejecting Branch's argument that SCCC is an alter ego of the County and should be treated as a County department for liability purposes. "Although defendant has a role in the fiscal oversight of SCCC as its local sponsor..., it is the board of trustees ... that is responsible for its day-to-day management...," the court said. "Here, defendant established that, beyond its role as sponsor and contributor of a portion of SCCC's operating budget, it does not have input into the board's allocation of resources and has no role in the day-to-day operation and management of the school. Moreover, defendant established that it did not own the building where decedent suffered his fatal heart attack. Accordingly, in the absence of 'ownership, occupancy, control or special use of the property' by defendant, it did not owe decedent a duty...."

Branch argues that SCCC "is an instrumentality of the County" and, "as SCCC's alter ego," the County is liable for negligence at the school. "[T]he statutory scheme governing the establishment and administration of community colleges in New York, which does not expressly define the juridical identity of a community college or explicitly vest such institution with the right to sue or be sued, supports the conclusion that SCCC is an instrumentality (or arm) of the County and has no independent juridical existence and, thus, the County is the real party in interest against whom suit may properly be brought."

For appellant Branch: Michael H. Sussman, Goshen (845) 294-3991

For respondent County: Bryan R. Kaplan, Monticello (845) 701-1312

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No. 94 People v Steven Lashway

(papers sealed)

Steven Lashway was convicted of three counts of second-degree rape in 1990 and was sentenced to 10½ to 21 years in prison. Prior to his release in 2004, he was designated a risk level III sex offender under the Sex Offender Registration Act (SORA), based in part on his having a prior felony sex crime conviction. He was later found to have a mental abnormality under Mental Hygiene Law article 10 and confined to a psychiatric facility, where he violated parole by assaulting a staff member and was returned to prison.

In 2010, Lashway applied for a reduction of his SORA risk classification to level II under Correction Law § 168-o. Clinton County Court obtained an updated recommendation from the Board of Examiners of Sex Offenders, then denied the application without a hearing. The Appellate Division reversed and remitted the matter for a hearing. County Court obtained another updated recommendation from the Board in 2012, and it approved Lashway's request for copies of all documents the Board listed in its 2010 and 2012 updates. The Board produced five of the seven listed documents within a week, six days before the hearing, but said it could take several weeks to retrieve the other two documents from a storage facility. At the hearing, Lashway sought an adjournment until the remaining documents were produced. The court denied his request and, after the hearing, denied his application for a reduced risk level.

The Appellate Division, Third Department affirmed in a 3-1 decision, saying Lashway's arguments for a reduced risk level were not persuasive. It also ruled County Court did not err in denying him an adjournment, noting the Board's recommendations said only that it "reviewed" the undisclosed documents, not that it relied on them. "More significantly, County Court was not bound by the Board's recommendation...." While Lashway was entitled to discovery of the documents, it said "all discovery is subject to certain limitations and the court has 'considerable discretion to supervise the discovery process'...." It rejected the dissenter's argument that denial of the adjournment deprived Lashway of due process. "Due process is 'a flexible concept' ... and a defendant's due process rights in [a reclassification] context are similar, but not identical to, the rights of a defendant in an initial risk assessment.... Here..., defendant was neither denied the ability to offer relevant materials in support of his application nor prevented from defending himself against any evidence or documentation relied upon by County Court in deciding [it]."

The dissenter said denial of the adjournment deprived Lashway of due process and a fair hearing. While the lower court was not bound by the Board's recommendation, "in practice, the Board's recommendation is often among the most influential factors considered by a sentencing court in making its classification determination.... I believe that principles of due process require that [a defendant] be afforded access -- through prehearing discovery -- to all material considered on or influencing his reclassification petition...." Although "the court itself did not possess or rely upon the withheld materials, ... the court did expressly rely on the Board's recommendation, which did consider the materials." "While it may be debatable whether the denial of this material" affected the outcome, he said, "I cannot agree that the error was harmless or overlook the deleterious precedential value of an affirmance in this case."

For appellant Lashway: Marcy I. Flores, Warrensburg (518) 623-4845

For respondent: Clinton County Asst. District Attorney Nicholas J. Evanovich (518) 565-4770

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No. 95 Universal American Corp. v National Union Fire Insurance Company of Pittsburgh, PA

Universal American Corp. provides health insurance and services to people covered by Medicare and Medicaid. Its products include Medicare Advantage plans, a federally-regulated alternative to Medicare in which medical providers submit claims for services in the same way they do for traditional insurance policies. Many of Universal's claims are submitted and "auto-adjudicated" through its computer system, generating payment without manual review. In July 2008, Universal American purchased a Computer Systems Fraud Rider from National Union Fire Insurance Company of Pittsburgh, PA, which provides coverage for: "Loss resulting directly from a fraudulent (1) entry of Electronic Data or Computer Program into, or (2) change of Electronic Data or Computer Program within the Insured's proprietary Computer System ... provided that the entry or change causes (a) Property to be transferred, paid or delivered, (b) an account of the Insured, or of its customer, to be added, deleted, debited or credited, or (c) an unauthorized account or a fictitious account to be debited or credited."

Universal says it suffered \$18 million in losses in December 2008 on fraudulent claims against its Medicare Advantage plans, most of which were submitted and processed through its computer system. The perpetrators, doctors and clinics in three southern states, enrolled new members by paying kickbacks to some patients for use of their personal information and by stealing that information from other patients. The fraudulent providers were not enrolled in Universal's plans, but were able to submit claims after obtaining a National Provider Identifier from the federal Centers for Medicare and Medicaid Services. When National Union denied its claim for \$7.8 million, after deductible, Universal brought this action for breach of contract and declaratory judgment.

Supreme Court granted National Union's motion for summary judgment and dismissed the complaint. It said the key clause in the rider, providing coverage for "fraudulent entry" of data into Universal's computer system, is not ambiguous and limits coverage to "an unauthorized entry into the system ... by an unauthorized user, such as a hacker," not the submission of fraudulent claims by "an authorized user."

The Appellate Division, First Department agreed, saying the "unambiguous plain meaning" of the computer fraud rider, covering loss from a fraudulent 'entry of electronic data' or 'change of electronic data' within the insured's proprietary computer system, was intended to apply to wrongful acts in manipulation of the computer system, i.e., by hackers, and did not provide coverage for fraudulent content consisting of claims by bona fide doctors ... authorized to use the system for reimbursement for health care services that were not provided."

Universal argues the key clause is ambiguous, and must be resolved in favor of the insured, because "fraudulent entry of electronic data" could apply equally to entry of fraudulent data as to fraudulent entry into the computer system. "[W]hether a submitting party has (or lacks) 'credentials' to enter an invoice in Universal American's computer system ... has no bearing on whether the submission is 'fraudulent.' Whether any particular 'entry of data' was 'fraudulent' depends on the truth or falsity of the submission, and therefore necessarily on its content." It says the lower courts' interpretation of the policy "resulted in negating any coverage at all."

For appellant Universal American: Richard H. Dolan, Manhattan (212) 344-5400
For respondent National Union: Barbara A. Lukeman, Manhattan (212) 940-3010

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No. 96 Shipley v City of New York (reargument)

On January 10, 2005, one day after 17-year-old Jesse Shipley was killed in an automobile accident in Staten Island, an autopsy was performed, with the consent of his father, by Dr. Stephen de Roux of the Medical Examiner's Office. Dr. de Roux removed organ tissue samples and the brain, which was preserved for later neuropathologic examination. Jesse's body was released the same day, but his parents were not told that his brain had been retained. They held a funeral and buried him on January 13. About two months later, students from Jesse's high school saw his brain in a jar, labeled with his name, during a field trip to the Staten Island office of the medical examiner. The field trip was cut short and Jesse's sister, a student at the school, soon learned of the situation and informed the parents, Andre and Korisha Shipley, who had thought Jesse's brain was buried with his body. Neuropathologists conducted their examination of the brain a few days later. In October 2005, the brain was returned to the Shipleys, who held a second funeral service and burial. Dr. de Roux later testified that the two-month interval between the autopsy and the examination of Jesse's brain was not uncommon because "I wait months, until I have six brains," before summoning a neuropathologist from Manhattan to examine them.

The Shipleys brought this action for emotional distress against the City and Medical Examiner's Office based, in part, on alleged violation of their common-law right of sepulcher, which gives the next of kin the right to possession of a decedent's body for preservation and burial. Supreme Court denied the City's motion to dismiss the claim, finding there were unresolved questions regarding whether the defendants' failure to inform the Shipleys that their son's brain was not returned with his body interfered with their right of sepulcher.

The Appellate Division, Second Department affirmed that portion of the order. While the Medical Examiner's Office had authority to perform the autopsy and retain the brain for further testing, it said, the office "also has the mandated obligation" under the right of sepulcher and Public Health Law § 4215(1) "to turn over the decedent's remains to the next of kin for preservation and proper burial once the legitimate purposes for the retention of those remains have been fulfilled," a duty that "is clearly for the benefit of, and is owed directly to, the next of kin. Furthermore, it may be satisfied in the present context by the simple act of notifying the next of kin that, while the body is available for burial, one or more organs have been removed for further examination.... This requirement, hardly onerous in nature, strikes an appropriate balance between the fulfillment of the legitimate scientific and investigative duties of the Medical Examiner's Office and the recognition of the long-established rights of next of kin to receive and provide final repose to the remains of their loved ones." After trial, a jury awarded the Shipleys \$1 million in damages. The Second Department reduced the award to \$600,000.

The City argues that neither the right of sepulcher nor Public Health Law § 4215(1) apply to "those parts of a body that have appropriately been removed during the course of an authorized autopsy. It follows that neither requires the New York City Medical Examiner to turn over such parts to the decedent's next of kin once the legitimate purposes for the retention of the parts have been fulfilled." It says the office satisfied its obligations when it returned Jesse's body to the Shipleys after the autopsy but, even if the office had a duty to return all organs, the Appellate Division had "no basis in statute or common law" for "imposing an additional, newly found duty" to notify the next of kin when any organs are removed for further examination. In any event, the City argues it cannot be held liable because the Shipleys did not demonstrate the existence of a special relationship.

For appellant City: Assistant Corporation Counsel Ronald E. Sternberg (212) 356-0840
For respondent Shipleys: Marvin Ben-Aron, Staten Island (718) 442-9000