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 30, 2013

No. 11 Applewhite v Accuhealth, Inc.

Tiffany Applewhite was 12 years old in February 1998, when she suffered anaphylactic shock after receiving an intravenous steroid medication from a private nurse in the Applewhites' Bronx apartment. While the nurse began cardiopulmonary resuscitation, Tiffany's mother called 911 and said her daughter was having difficulty breathing. A basic life support (BLS) ambulance was dispatched because no advanced life support (ALS) ambulance was available at the time. Tiffany was in cardiac arrest and was not breathing when it arrived. Her mother said she asked the ambulance EMTs to immediately take Tiffany to a nearby hospital, about four minutes away, but they advised her to wait for an ALS ambulance while they continued CPR. The ALS ambulance arrived about 20 minutes later and its paramedics administered oxygen and epinephrine, then took Tiffany to the hospital. She survived, but suffered severe brain damage. Her mother brought this action on her behalf against New York City, among other parties, claiming the BLS ambulance EMTs were negligent in failing to bring oxygen to the apartment and in waiting for the ALS ambulance to transport the girl.

Supreme Court granted the City's motion to dismiss the suit, ruling Applewhite failed to prove the City owed a special duty of care. That would require her to show, among other things, that the City assumed an affirmative duty to act on her behalf and that she justifiably relied on its assurances to her detriment. The court said there was no proof of "detrimental reliance" because Tiffany's mother had no other options for providing oxygen or transporting her and, thus, "there is no showing that Plaintiff was deprived of assistance that reasonably could have been expected from another source because of the government's conduct...."

The Appellate Division, First Department reversed and reinstated the suit, holding that justifiable reliance was established. It said the mother wanted to go to the hospital immediately, but the EMTs allegedly assured her it was best to wait for the ALS ambulance to arrive with paramedics and proper equipment, without telling her it would take another 20 minutes. It said, "The mother justifiably relied on the [EMTs], who had taken control of the emergency situation, and who elected to await the arrival of the ALS ambulance." It said any questions regarding the mother's credibility and the issue of proximate cause, including the degree to which Tiffany's brain damage could have been avoided or mitigated, could not be resolved on the existing record.

The City argues that Applewhite "failed to state a claim, as she did not allege that the City assumed or breached a special duty." Even if she did allege a special duty, it says, she failed to establish the justifiable reliance element because the EMTs' response to her request for immediate transport to the hospital -- that they should wait for the ALS ambulance -- "did not constitute an assurance or guarantee of her daughter's safety." It also argues that Applewhite cannot prove that any reliance by her on the EMTs' statements was detrimental because "no alternative transport could possibly have been utilized within the limited time frame for successful resuscitation and, in any event, [] no viable alternative means of transport existed, given Tiffany's need for uninterrupted CPR."

For appellant City: Assistant Corporation Counsel Drake A. Colley (212) 788-1613
For respondent Applewhite: Matthew Gaier, Manhattan (212) 267-4177

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 30, 2013

No. 132 Island Park, LLC v State of New York

Island Park, LLC, the owner of a 400-acre commercial nursery in Rensselaer County, is seeking compensation for loss of access to its easement over CSX railroad tracks that bisect its land. The tracks are part of the heavily-traveled Hudson Line between Rensselaer and New York City. Island Park had used the easement, a private at-grade rail crossing known as Abele's Crossing, to move farm machinery from its property on one side of the tracks to the other. In February 2005, the State Department of Transportation (DOT) obtained an order to close Abele's Crossing under Railroad Law § 97(3), which authorizes the commissioner to "require alterations" in a private rail crossing "[i]n order to ensure public safety," in this case to prevent collisions between passenger trains and farm equipment. After DOT ordered barricades installed to close the crossing in November 2009, Island Park said it had to move its machinery nearly five miles over public roads to reach the isolated portion of its property. The company brought this action for compensation for a de facto taking of its easement and consequential damages, asserting the State should have acquired the easement and paid just compensation through its eminent domain power under Railroad Law § 97(5).

The Court of Claims granted the State's motion for summary judgment dismissing the claim, saying DOT's "closure of Abele's Crossing was an exercise of the police power, and accordingly, any damages allegedly suffered by claimant are not compensable." It said subsection 97(5) "does not expressly mandate appropriation of, and compensation for, all interests in property that may be affected by a determination under [subsection] 97(3)."

The Appellate Division, Third Department affirmed. It said the State must pay compensation when it "appropriates unto itself private property and puts it to public use," but when it "regulates the use of private property in a reasonable manner to protect the health and safety of the public ... the property owner is not entitled to compensation..., unless the regulation 'permanently so restricts the use of property that it cannot be used for any reasonable purpose' and effectively destroys its economic value." In closing Abele's Crossing, it said the State "did not appropriate claimant's easement for public use but, rather, ordered it closed because ... the crossing presented a significant danger to the public." The court found "no evidence that ... the closing of the crossing 'impose[s] so onerous a burden' such that it has deprived claimant of 'the reasonable income' it derives from the fields."

Island Park argues the closure of its crossing was a de facto and regulatory taking of its property interest in the easement, since the company is denied all use of it, and the State's refusal to pay compensation violates the state and federal constitutions and Railroad Law § 97. "The State's reliance on police power does not provide immunity for takings," it says. "By failing to compensate Island Park for the economic costs associated with the closure, the State impermissibly allocated the entire cost of improving rail corridors to a private individual, with no attempt to apportion the cost to the primary beneficiary: society at large."

For appellant Island Park: J. Michael Naughton, Albany (518) 438-9907
For respondent State: Assistant Solicitor General William E. Storrs (518) 474-5464

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 30, 2013

No. 133 People v Derek Chisholm *(papers sealed)*

In January 2006, a New York police officer applied to Criminal Court Judge Alex J. Zigman for a warrant to search a house in Queens. The officer and a confidential informant, who had reported buying cocaine there from a man named Derek three times in the prior month and who said he had seen firearms and other drugs in the house, appeared before the judge, who found reasonable cause and issued the warrant. When it was executed, the officers found Derek Chisholm in a bedroom with a pistol, sawed-off shotgun, marijuana and a supply of ziplock bags.

Before trial, Chisholm moved to controvert the search warrant and suppress the evidence, asserting it was not based on probable cause. He also sought a Darden hearing to determine the informant's existence and reliability. Supreme Court denied the motion after reviewing the search warrant and affidavit for the warrant. The defense moved to reargue the motion to controvert the warrant and the request for a Darden hearing. Supreme Court granted reargument, but adhered to its original decision. Chisholm was convicted at a bench trial of multiple weapon possession and drug-related offenses and was sentenced to 12 years in prison.

On appeal to the Appellate Division, Second Department, Chisholm filed a pro se motion requesting a transcript of the informant's appearance before Judge Zigman, who died in 2009. Chisholm said the record failed to show whether the informant "was examined under oath" or his testimony "recorded or summarized on the record" as required by CPL 690.40(1). The court granted the motion in February 2011 and ordered the court reporter to file a copy of the transcript under seal. In August 2011, the court reporter certified that she could not locate the transcript after a "diligent search."

The Appellate Division affirmed the conviction in November 2011, saying, "The Supreme Court providently exercised its discretion in denying the defendant's application for a Darden hearing..., in light of the fact that the confidential informant appeared before the issuing magistrate and gave sworn testimony concerning the events in question...."

The prosecution says that in November 2012, after reviewing the brief Chisholm filed in this Court, it asked the court reporter to conduct another search for the transcript of the informant's January 2006 appearance before Judge Zigman. The reporter located and transcribed the minutes by January 2013 and, pursuant to the Appellate Division's order, filed it under seal in Queens Supreme Court. The prosecution says this shows that Judge Zigman "fully complied with the requirements of CPL 690.40(1), because the transcript of the informant's testimony before the magistrate does, in fact, exist...."

Chisholm argues, "As a policy matter, this Court should not reward the People for waiting more than six years to produce minutes in response to an issue that appellant raised before three different courts. To allow the People to now rely on a transcript that they unjustifiably did not provide below would only encourage abuse and future delays."

For appellant Chisholm: Allegra Glashausser, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Donna Aldea (718) 286-5927

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 30, 2013

No. 134 Manuel de la Cruz v Caddell Dry Dock & Repair Co., Inc.

This breach of contract action arose from renovation and repair work that Caddell Dry Dock & Repair Co. performed on maritime vessels owned by New York City, including fire boats, garbage barges and ferries, under contracts with several City departments from 1996 to 2006. The contracts required Caddell to pay the prevailing rate of wages and supplemental benefits for work performed on "public works" projects pursuant to Labor Law § 220(3), and they incorporated schedules setting forth specific rates based on workers' job titles.

In September 2002, Manuel de la Cruz and two other Caddell employees brought this class action on behalf of 750 workers against Caddell and its sureties, alleging the plaintiffs performed repair and maintenance work for Caddell under "public works" contracts and that Caddell paid them less than the prevailing wages in violation of section 220(3). Supreme Court granted Caddell's motion for summary judgment dismissing the suit on the ground that repair and reconstruction of vessels is not a "public work."

The Appellate Division, First Department affirmed, holding that repair of city-owned vessels is not "public work" because boats and barges are not fixed structures and, thus, the contractual provision for payment of prevailing wages does not apply. Labor Law § 220(3) "does not define 'public work,' but ... precedent mandates that the prevailing wage law is limited to those workers employed in the construction, repair and maintenance work of fixed structures, and does not apply to workers who are servicing a commodity owned by the City," it said, citing Brukhman v Giuliani (94 NY2d 387). Rejecting the plaintiffs' "proposition that purpose and function alone determine whether a project is a public work," the court said, "[I]t is construction or construction-like activity on a fixed structure, rather than a finding of public purpose, that is the essential component of any determination as to a project being a 'public work.'"

The plaintiffs argue that their labor on the City's fleet is "the type of work contemplated under Labor Law § 220" and that the Appellate Division misinterpreted Brukhman as limiting "public work" to work performed on fixed structures. They say the focus of Brukhman was defining the type of work that constitutes "public work," not the type of structure on which the work is performed. They argue that "Federal authority has consistently held that repair of Federal vessels constitutes 'public work' subject to the prevailing wage requirements of the Davis-Bacon Act, 40 USC § 3142, the Federal analog to New York's Labor Law § 220.... It cannot be argued that, as a matter of public policy, the interests protected by New York Labor Law § 220 are any narrower than those protected by the Davis-Bacon Act.... Indeed, the wage protections to workers embodied in Labor Law § 220 are even more expansive, as [it] 'is an attempt by the State to hold its territorial subdivisions to a standard of social justice in their dealings with laborers, workmen and mechanics.'"

For appellants de la Cruz et al: James Emmet Murphy, Manhattan (212) 943-9080
For respondents Caddell et al: Richard V. Singleton II, Manhattan (212) 885-5000

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 30, 2013

No. 135 People v Christopher Brinson *(papers sealed)*
No. 136 People v Lawrence Blankymsee *(papers sealed)*

In 2000, Christopher Brinson was sentenced to a determinate prison term of 10 years for a second-degree robbery conviction along with indeterminate terms for related offenses, to be served consecutively, resulting in an aggregate sentence of 13 years under the merger/aggregation provisions of Penal Law § 70.30. In 2004, Lawrence Blankymsee was sentenced to two determinate prison terms of 5 years for possession of loaded firearms and longer, indeterminate terms for drug possession convictions, all to run concurrently, resulting in an aggregate sentence of 8 to 16 years under Penal Law § 70.30. At sentencing in both cases, the trial court failed to pronounce the mandatory term of post-release supervision (PRS) for the determinate sentences.

Brinson and Blankymsee were still incarcerated in 2010, when they were scheduled for resentencing to correct the error. They objected to imposition of PRS, arguing that they had an expectation of finality in their sentences because they had already served more prison time than was imposed in their determinate terms and, thus, they had completed their determinate sentences. Supreme Court rejected their arguments and imposed 5 years of PRS on both defendants.

The Appellate Division, Second Department affirmed, ruling the resentencings did not violate double jeopardy because the defendants were still serving a "single, combined sentence" of determinate and indeterminate terms when PRS was imposed. In Brinson, it said he was "charged with knowledge" that his multiple sentences would be aggregated into a single sentence under Penal Law § 70.30 and he had "no reason to expect that discrete prison sentences nonetheless survive such that, as he serves the aggregated sentence, he is sequentially completing his punishment for each particular conviction. Thus, the defendant, who was still serving what the statute regards as a single, combined sentence at the time of the resentencing, did not have an expectation of finality in the portion of the sentence attributable to" his determinate term for robbery.

The defendants argue the imposition of PRS violated double jeopardy protections because each had an expectation of finality in his determinate sentence. Brinson says, "Since the sentencing court had ordered that the indeterminate terms be served consecutively to, i.e. after, the determinate term, and appellant had finished serving that term, he had established an expectation of finality in that sentence such that it could not be altered to add a term of PRS." Penal Law §§ 70.30 and 70.40, which determine how prison officials "must calculate service of concurrent and consecutive sentences in order to establish release and expiration dates, do not purport to create a single aggregate sentence from the multiple ones that were imposed by the sentencing judge. Nor could they, consistent with constitutional due process principles, effectuate such a change ... because even a mandatory statutory provision cannot override the sentences actually imposed by the sentencing judge."

For appellants Brinson and Blankymsee: Paul Skip Laisure, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Anastasia Spanakos (718) 286-5810