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 Wednesday, October 15, 2014

No. 189 People v Dwight D. DeLee

In 2009, an Onondaga County Grand Jury indicted defendant Dwight DeLee for murder in the second degree as a hate crime, murder in the second degree, and criminal possession of a weapon in the third degree. According to the People's witnesses a trial, DeLee approached and shot the victim -- an individual who identified as a transgendered woman -- with a rifle from close range.

At trial, County Court submitted several lesser included offenses to the jury, including manslaughter in the first degree as a hate crime and manslaughter in the second degrees as a hate crime as lesser included offenses of murder in the second degree as a hate crime, and manslaughter in the first and second degrees as lesser included offenses of murder in the second degree. The jury found defendant guilty of manslaughter in the first degree as a hate crime and criminal possession of a weapon in the third degree, but acquitted him of the remaining charges, including manslaughter in the first degree.

County Court denied DeLee's motion to set aside the verdict with respect to manslaughter in the first degree, which DeLee contended was inconsistent with the jury's not guilty verdict on the charge of manslaughter in the first degree. On DeLee's appeal, the Appellate Division, Fourth Department, modified the judgment of conviction by reversing the part convicting him of manslaughter in the first degree as a hate crime and dismissing count one of the indictment, and otherwise affirmed. The Appellate Division said that "all of the elements of manslaughter in the first degree are elements of manslaughter in the first degree as a hate crime," and determined that County Court "properly instructed the jury that the only difference between the two crimes in this case is that manslaughter in the first degree as a hate crime has an added element requiring the People to prove that defendant intentionally selected the victim due to his sexual orientation." The Appellate Division concluded that, "[b]y acquitting defendant of manslaughter in the first degree, the jury necessarily found that the People failed to prove beyond a reasonable doubt at least one element of manslaughter in the first degree."

The People ask the Court of Appeals to reinstate DeLee's conviction for manslaughter in the first degree as a hate crime, arguing that County Court instructed the jury to consider the hate-crime and non-hate crime manslaughter charges separately, and as a result the jury could have "reasonably concluded" that its finding of guilt as to the hate crime "negated a finding that it was a non-hate crime." The People contend that the jury's verdict, "when viewed in light of the trial court's instructions to the jury, was not repugnant to the jury's verdict of not guilty of manslaughter in the first degree as a non-hate crime."

For appellant: Onondaga County Chief Asst. District Attorney James P. Maxwell (315) 435-2470
For respondent DeLee: Philip Rothschild, Syracuse (315) 218-0179

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To be argued Wednesday, October 15, 2014

No. 185 Matter of New York City Asbestos Litigation
Andrucki v Aluminum Co. of America

After George Andrucki was diagnosed with malignant mesothelioma, he and his wife Mary filed a notice of claim against the Port Authority of New York and New Jersey on October 4, 2010, alleging that his disease was caused in part by his exposure to asbestos when he worked on the construction of the World Trade Center in 1971 and 1972. They commenced a personal injury action against the Port Authority and 16 other defendants and on November 12, 2010, they served the complaint on the Port Authority. Service of the complaint was premature under McKinney's Unconsolidated Laws of New York § 7107, which requires service of a notice of claim at least 60 days before suit is commenced against the Authority. George Andrucki died two weeks later. In January 2011, his wife filed a supplemental summons and amended complaint which added the Port Authority as a defendant and asserted a claim for wrongful death against all of the defendants, but she did not serve a second notice of claim on the Port Authority. The Port Authority moved to dismiss all claims against it, arguing that Mary Andrucki failed to obtain subject matter jurisdiction over it because she did not file a second notice of claim for wrongful death. The Port Authority did not appear at the trial, which proceeded while its motion was pending.

Supreme Court denied the motion to dismiss and held the Port Authority to be in default. "Determinative of this motion is that plaintiffs have complied with all of the requirements of [Uncons Laws] §§ 7107 and 7108. Indisputably, Mr. and Mrs. Andrucki served the Port Authority with a valid notice of claim on October 4, 2010. More than 60 days later..., plaintiffs herein explicitly added the Port Authority to this action via supplemental summons and amended complaint." It said Andrucki had "no obligation to file a new action against the Port Authority.... [Section] 7107 does not require it, nor would same promote the statute's purpose. Indeed, the legislature's intent to condition the waiver of sovereign immunity solely on compliance with specific temporal restrictions and the filing of a notice of claim is very clear." The court ultimately awarded Andrucki $2.5 million in damages.

The Appellate Division, First Department reversed and dismissed the complaint for lack of subject matter jurisdiction. It said, "The initial notice of claim specifically stated that it was for personal injury arising from the asbestos exposure and not for the decedent's death, which had yet to occur." Although New Jersey courts "have held 'substantial compliance' with the notice requirements to be sufficient for instituting an action against the Port Authority," and New York courts have held that under General Municipal Law § 50-e "notice of injury placed a municipality on notice of a plaintiff's subsequent death from that same injury," it said section 7107 "contains no substantial compliance provision" and must be strictly construed. "Under these circumstances, plaintiffs should have served on the Port Authority a new notice of claim concerning the wrongful death and survivorship actions."

For appellant Andrucki: Alani Golanski, Manhattan (212) 558-5500
For respondent Port Authority: Christian H. Gannon, Manhattan (212) 651-7500

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To be argued Wednesday, October 15, 2014

No. 186 Paterno v Laser Spine Institute

Frank Paterno, a Westchester County resident, is asking the Court to reinstate his medical malpractice action against the Laser Spine Institute (LSI), a surgical facility in Florida, and five Florida physicians who were involved in his treatment there in 2008. Paterno, who suffered from back pain, learned of LSI from an Internet ad it posted on America Online and he communicated with the facility through numerous telephone calls, emails and fax transmissions. LSI sent him insurance and registration forms, which he filled out and returned, and a letter with surgical recommendations. He sent his MRI films to the Florida facility, and an LSI physician contacted his own physician in New York by phone to discuss his proposed surgery. At LSI's request, Paterno had blood tests conducted by his New York physician and forwarded the results to LSI. He underwent two surgical procedures at LSI in June 2008. After his return, when he complained of constant pain, LSI physicians provided prescriptions for him to fill at New York pharmacies. In August 2008, LSI flew him back to Florida for "revision" surgery. He remained in pain and continued to communicate with LSI until December 2008. He later had surgery in New York to correct his condition, performed by physicians who were not affiliated with LSI.

LSI moved to dismiss Paterno's suit for lack of personal jurisdiction. He responded that he obtained long-arm jurisdiction over them pursuant to CPLR 302(a)(1), which provides that "a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent: 1. transacts any business within the state...." Even when not physically present, an entity transacts business in New York when it purposefully avails itself of the benefits and privileges of conducting business in the state. Supreme Court granted the motion to dismiss.

The Appellate Division, Second Department affirmed on a 3-2 vote, finding the "totality of the circumstances" did not provide a basis for imposing long-arm jurisdiction. "... LSI's email messages ... and telephone conversations with the plaintiff while he was in New York do not constitute 'business' activity and are not sufficiently 'purposeful' for jurisdictional purposes.... Although the case at bar involves a number of telephone calls and email messages..., it cannot be concluded that LSI 'projected [itself] ... into New York in such a manner [as to] purposefully avail [itself] of the benefits and protections of [New York] law [].... [T]he advent of the Internet does not alter the still-valid premise that the mere solicitation of business in this state does not amount to the transaction of business herein."

The dissenters said "the number, nature, and timing" of LSI's contacts with New York, including communicating with Paterno and his New York physicians, providing prescriptions, ordering blood work and MRIs, and using its website to solicit business, were sufficient to confer long-arm jurisdiction. The contacts "demonstrate the 'purposeful creation of a continuing relationship' with the plaintiff.... Particularly in light of evolving business practices resulting from technological advances, the manner in which businesses employing such technologies are increasingly reaching outside of their traditional jurisdictions to acquire new business, and the degree to which these changes have an impact upon consumers, there were sufficient minimum contacts present to warrant the exercise of jurisdiction pursuant to CPLR 302(a)(1)."

For appellant Paterno: Timothy G. Griffin, Bronxville (914) 771-5252
For respondents: Joshua R. Cohen, Manhattan (212) 742-8700

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To be argued Wednesday, October 15, 2014

No. 187 Nesmith v Allstate Insurance Company

In November 1991, Allstate Insurance Company issued a liability policy to Tony Wilson covering his apartment building in Rochester. The policy, with a limit of $500,000 per occurrence, was for one year and Wilson renewed it for two additional one-year periods. In 1993, two children of Felicia Young were exposed to lead paint while living in the building. The family moved out of the apartment and Wilson attempted to remediate the lead paint condition himself. In 1994, Jannie Nesmith and two children moved into the same apartment and were exposed to lead paint. Wilson was cited for health violations in December 1994, when lead hazards were found in some of the same locations as well as other areas of the apartment. Young and Nesmith brought separate personal injury actions against Wilson seeking damages for injuries the children sustained as a result of their exposure to lead. Wilson settled the Young lawsuit in 2005 for $350,000, which was paid by Allstate.

Allstate then took the position that its liability for all lead-related injuries in the apartment was limited to $500,000, leaving only $150,000 of coverage after the first settlement, because the lead exposure of both families was one occurrence under the terms of the policy. It relied on the policy's noncumulation clause, which states, "Regardless of the number of ... injured persons, claims, claimants or policies involved, our total liability under the Family Liability Protection coverage for damages resulting from one accidental loss will not exceed the limit [of $500,000]. All bodily injury ... resulting from one accidental loss or from continuous or repeated exposure to the same general conditions is considered the result of one accidental loss." Nesmith argued the full policy limit of $500,000 was available because the two families were unrelated and were injured during different policy periods and different tenancies, at different times, due to exposure to different lead hazards. Nesmith entered into a settlement in which she reserved her right to file this declaratory judgment action against Allstate for a determination of the amount of coverage available. She agreed to accept $150,000 if Allstate prevailed, and the insurer agreed to pay her $500,000 if the full policy limit was found to be available.

Supreme Court ruled in favor of Nesmith. "Plaintiff is correct in maintaining that there were two different families involved in the lawsuits..., that the lead paint condition responsible for lead poisoning in the [Young] matter had been remediated, that the chipping paint was in a different location in the Nesmith case, and that those children lived at [the apartment] during a different time frame.... Given the facts in this matter, the court cannot conclude that the infants in the two different cases were exposed to the same conditions that caused their injury."

The Appellate Division, Fourth Department reversed, saying the fact the plaintiffs were injured during different policy periods did not require Allstate to pay more than its single policy limit. It also ruled the Young and Nesmith claims stem from a single accidental loss. "[T]he evidence establishes that the lead paint that injured the second set of children is the same lead paint that was present in the apartment when the first set of children lived there.... Inasmuch as the claims arise from exposure to the same condition, and the claims are spatially identical and temporally close enough that there were no intervening changes in the injury-causing conditions, they must be viewed as a single occurrence within the meaning of the policy."

For appellant Nesmith: Mark G. Richter, Whitesboro (315) 736-6787
For respondent Allstate Insurance Co.: Barry I. Levy, Uniondale (516) 357-3000

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To be argued Wednesday, October 15, 2014

No. 188 Frezzell v City of New York

In 2006, plaintiff Kent Frezzell, an officer with the New York City Police Department, was involved in an automobile accident with another NYPD officer, Steve Tompos. Both officers were on-duty and driving separate marked police vehicles. Both officers responded to the radio call of a third officer who was on foot chasing a man with a gun. Frezzell turned onto a one-way street in the direction of traffic, while Tompos turned onto the same street against the legal flow of traffic. The two vehicles collided virtually head on.

Frezzell sued Tompos and the City of New York, alleging in a General Municipal Law § 205-e claim that the reckless acts of Tompos caused injuries to Frezzell. The defendants moved for summary judgment dismissing the section 205-e claim, arguing that that claim was subject to the recklessness standard of Vehicle and Traffic Law § 1104, and Tompos had not acted recklessly.

Supreme Court, New York County, granted the motion for summary judgment and dismissed the complaint, concluding that, "at best," Frezzel had "alleged mere negligence, which under the Vehicle and Traffic Law is not sufficient in this case." The Appellate Division, First Department, affirmed, stating that "defendants' proof established that ... Tompos ... did not act in 'reckless disregard for the safety of others' while operating his vehicle in the wrong direction on a one-way street."

Frezzell contends that "material questions of fact precluded the grant of summary judgment as a matter of law." According to Frezzell, questions of fact exist regarding whether Tompos disregarded traffic signals, proceeded despite impediments to his vision, or entered a police pursuit without authorization and without informing other officers of his presence. Frezzell argues that any one of these questions of fact "may jeopardize the privileged operation that Vehicle and Traffic Law § 1104 provides," and summary judgment was therefore inappropriate.

For appellant Frezzell: Jay L.T. Breakstone, Port Washington (516) 466-6500
For respondents NYC and Tompos: Asst. Corporation Counsel Victoria Scalzo (212) 356-0856