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COURT OF APPEALS

STATE OF NEW YORK

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SHIPLEY,

Respondent,

-against-

No. 2

CITY OF NEW YORK,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 5, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 2, Shipley v. City of  
2 New York.

3 Counsel, would you like any rebuttal time?

4 MR. STERNBERG: Two minutes, Your Honor,  
5 please.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure, go  
7 ahead.

8 MR. STERNBERG: Your Honors, Ronald  
9 Sternberg from the Office of the New York City  
10 Corporation Counsel on behalf of the defendants-  
11 appellants.

12 Your Honors, the Appellate Division in this  
13 case made two correct findings and two incorrect  
14 findings. It properly found that the medical  
15 examiner is entitled to governmental function  
16 immunity for its - - - his discretionary acts in - -  
17 -

18 CHIEF JUDGE LIPPMAN: What about - - - what  
19 about the whole issue of - - - of - - - which I think  
20 is at the heart of what we're dealing with - - -  
21 notice to the family? Why - - - why isn't it an  
22 interference for the right of sepulcher if you keep -  
23 - - in this case, a very serious part of the body is  
24 being held and examined, and you don't tell the  
25 family? And then, as in this case, you wind up

1           having a lot of angst and two different burials, and  
2           all kinds of implication.

3                         Why - - - why - - - why is that - - -  
4           that's not - - - is that a discretionary act as to -  
5           - - as to the - - - to keep the brain and put it in a  
6           jar and - - - and even - - - even if it is  
7           discretion, you have no obligation to tell the family  
8           that - - - that - - - and - - - and the right, as I  
9           understand it, goes to the next of kin, right? So if  
10          that's - - - if that's where the right goes, how - -  
11          - how do you justify the lack of notice? And why  
12          isn't that an appropriate grounds for what was held  
13          here?

14                        MR. STERNBERG: A number of answers, Your  
15          Honor. Our - - - our whole argument is that nothing  
16          requires us to do that, neither the statute nor the  
17          common law right of sepulcher.

18                        CHIEF JUDGE LIPPMAN: But this is a - - -  
19          an ancient right, right?

20                        MR. STERNBERG: And it's never been held to  
21          require what the Appellate Division required. That  
22          is, this is - - - it's never been held to require a  
23          medical examiner - - -

24                        CHIEF JUDGE LIPPMAN: Why shouldn't it  
25          require that from a policy perspective? Why wouldn't

1           you notify the family?

2                   MR. STERNBERG: Well, in fact, Your Honor,  
3           it has never been the policy of the New York City  
4           Medical Examiner. And from what I understand,  
5           medical examiners and coroners throughout the country  
6           do provide this notification.

7                   CHIEF JUDGE LIPPMAN: Why shouldn't it be  
8           the - - - the policy, the law, that in regard to this  
9           ancient right, you have to notify the family?

10                  MR. STERNBERG: There are no - - -

11                  CHIEF JUDGE LIPPMAN: And we can get into  
12           technical arguments about what's part of the body,  
13           what's not part of the body, all of this kind of  
14           thing. But why isn't this very basic?

15                  MR. STERNBERG: There - - - there are - - -  
16           there are two reasons, one going to the interest of  
17           the medical examiner, and two going to the interest  
18           of - - - of the next of kin. In fact, while - - -  
19           while the Appellate Division denominated these  
20           obligations as simple and hardly onerous, in fact,  
21           they're nothing of the sort. They're neither simple,  
22           nor hardly onerous. It's creates incredible  
23           hardships - - -

24                  CHIEF JUDGE LIPPMAN: It would be difficult  
25           to say that - - - that yes, we have the body, but

1 we're examining the brain - - -

2 MR. STERNBERG: It's not - - -

3 CHIEF JUDGE LIPPMAN: - - - we're going to  
4 give - - -

5 MR. STERNBERG: It's not difficult to say  
6 that, Your Honor, but the implications of saying that  
7 have - - -

8 JUDGE READ: So you're - - - so you're  
9 talking about practical effects if we rule against  
10 you?

11 MR. STERNBERG: That's number one,  
12 practical - - -

13 JUDGE READ: All right, that's - - - well,  
14 I want to know what are they? What are the practical  
15 effects?

16 MR. STERNBERG: The practical effects are  
17 the - - - the medical examiner in the City of New  
18 York does over 5,000 autopsies a year. If every  
19 single next of kin had to be told what the Appellate  
20 Division said they had to be told, that requires the  
21 medical examiner to set up an incredible apparatus,  
22 making provision for saving and - - - and maintaining  
23 these organs, and - - - and - - - until the family  
24 decides what it wants to do.

25 And in fact, our - - - our post-Shipley

1           experience in this regard - - - because obviously  
2           we've been complying - - - in fact, in the second  
3           ramification of this is many families, if not most  
4           families, do not want this information. That may be  
5           counterintuitive - - -

6                         JUDGE RIVERA: Okay, can I just clarify the  
7           first point you made about the - - - the impact - - -  
8           the practical impact on the city and the ME. I - - -  
9           I think you were saying that this will then turn on  
10          what the families want done and how long they want  
11          the organs held or did I misunderstand you - - -

12                        MR. STERNBERG: Well, it - - -

13                        JUDGE RIVERA: - - - because it seems to me  
14          it's the ME who's got the organs, and you're just  
15          informing when the body's returned, the body's not  
16          whole; there are things that we are keeping for the  
17          moment. But it's whether or not you release them or  
18          don't release them, when you release those organs,  
19          they then have a choice of whether or not they're  
20          going to do another burial or they're fine with the  
21          original burial.

22                        MR. STERNBERG: Well, the whole - - - the  
23          whole obligation to - - - to inform the family stems  
24          initially from the Appellate Division's determination  
25          that we have the obligation to return. If we didn't

1 have the obligation to return, there would be no  
2 obligation to - - -

3 JUDGE RIVERA: But - - - well, if you have  
4 no lawful reason to keep or otherwise dispose of it  
5 as medical waste, they then have a right to bury this  
6 body, and the body would include the organs. I know  
7 you have an argument about it doesn't include the  
8 organs. For one moment, you know, just - - - just go  
9 with me on this. Let's assume it does include the  
10 organs. Why - - - why would they not have a right to  
11 have these organs returned to them once you're done  
12 with them or you have no use for them?

13 MR. STERNBERG: Well, the question's  
14 implied in the answer, Your Honor. If - - - if we  
15 have an obligation to return them - - -

16 JUDGE RIVERA: Yeah.

17 MR. STERNBERG: - - - then - - - although  
18 we do argue that even assuming an obligation to  
19 return, the additional obligation to tell is not  
20 implied in that. The Appellate Division implied - -  
21 -

22 JUDGE RIVERA: Well, it - - - it seems  
23 essential, does it not? I mean, if - - - if you're  
24 returning a body to me, don't I need to know for  
25 purposes of the burial - - - and for many people,

1 it's not merely trying to comply with whatever legal  
2 requirement there might be - - - this proper lawful  
3 disposition of - - - of the body, but there are  
4 religious belief systems behind the burial process  
5 and the end of the life.

6 MR. STERNBERG: That - - - that is true,  
7 Your Honor. And if any next of kin wants the organs  
8 or - - - or any organs that had been retained back,  
9 and they ask for them, they get them back.

10 JUDGE READ: Well, what about - - -

11 MR. STERNBERG: We're not - - - we're not -  
12 - -

13 JUDGE READ: What about the consent? You  
14 have to get consent for an autopsy, correct?

15 MR. STERNBERG: In some circumstan - - - if  
16 - - - if we're not - - - if - - - the law can provide  
17 the - - - the - - - the duty to do the autopsy and -  
18 - - and in this case, we had both the law and the  
19 consent.

20 JUDGE READ: You had the consent. So when  
21 you have the consent, can this - - - can this  
22 difficulty - - - the practical difficulty that you  
23 point out be handled by the wording of the consent?  
24 In other words, that the - - - that the - - - when I  
25 give my consent and I understand that during the

1 course of the autopsy, some organs may be removed,  
2 and I agree I don't want them back, or I do want them  
3 back. Can it be handled in that way?

4 MR. STERNBERG: Well, it - - - it can and  
5 in fact, that - - - that's what we've been doing  
6 post-Shipley, but the fact is that it's - - - that is  
7 not an obligation that it is imposed by statute or  
8 common laws, which is our argument. And - - -

9 JUDGE PIGOTT: If I understand the - - -  
10 part of your argument, maybe a substantial part of  
11 it, the only testimony we've got in this whole case  
12 from anybody with a medical degree is Dr. de Roux, am  
13 I right?

14 MR. STERNBERG: That's correct, Your Honor.

15 JUDGE PIGOTT: And he said, this is how we  
16 do it. And I suspect that most of us have no idea  
17 what goes on in front of an ME in - - - in an ME  
18 autopsy in terms of - - - of where - - - what happens  
19 to the body and how it happens, and what organs - - -  
20 I know they're all - - - you know, from television,  
21 you know, some of them are weighed and some of them  
22 aren't, and - - - and there's tests on - - - on  
23 fluids and everything else. And what is considered  
24 medical waste and what isn't and what goes back and  
25 what isn't - - - as macabre as all of that is, the



1 your white light is on, your distinction about the  
2 body from the remains of the body. I take it your  
3 argument really to turn on whether or not we read  
4 Article 42 to mean that "body" means solely the  
5 vessel and not anything that's contains inside the  
6 cadaver.

7 MR. STERNBERG: That's our - - - that's our  
8 statutory argument. The - - - the - - -

9 JUDGE RIVERA: Okay, so but given that  
10 that's your argument, could you please help me  
11 understand your reading then of 4215, both 1 and 2.  
12 It seems to suggest to me that it's implicit in this  
13 that the body includes the organs. I mean, at least  
14 in 2, it's talking about "or may retain parts of such  
15 body". There, "parts of the body" would mean organs,  
16 would it not? So it means it's a subset of the body.

17 MR. STERNBERG: There - - - there are - - -  
18 there are at least three reasons why 4 - - - in  
19 support of our argument that "remains of the body"  
20 does not mean what the Appellate Division said it  
21 does. "Remains of the body" is not cited though - -  
22 - there's a footnote in my brief - - - numerous cases  
23 throughout the county, old and new, which - - - which  
24 say, by implication, "remains of the body" means what  
25 remains after something happens. In other words,

1 "remains of the body" is that which is on the table,  
2 and in fact, which was returned to - - - to the  
3 Shipleys.

4 When the legislature wanted to include  
5 tissues, organs within the same article, it said it.  
6 It said the body or tissue or organs. And third and  
7 perhaps most critically, in fact, to - - - to include  
8 these removed organs during the course of an  
9 authorized autopsy within the term "remains of the  
10 body" would be contrary to the legislative scheme,  
11 which, in fact, does define these as medical waste.  
12 If you define something as medical waste, that means  
13 the medical examiner has to make a determination that  
14 in any particular - - - in each particular instance,  
15 how to treat the medical waste - - -

16 JUDGE RIVERA: So - - - so - - -

17 MR. STERNBERG: - - - so if we have to  
18 return them, that removes that discretion entirely -  
19 - -

20 JUDGE RIVERA: But you're not arguing here  
21 this was medical waste. You're arguing here the ME  
22 sought to treat the brain as medical waste, correct?  
23 That's not this case.

24 MR. STERNBERG: No, that's not this case.  
25 In fact, the brain was - - -

1 JUDGE RIVERA: Okay, may I just ask you  
2 that, because your red light - - -

3 MR. STERNBERG: - - - the brain was  
4 returned in this case.

5 JUDGE RIVERA: Okay, you're red light is  
6 on; let me just ask you. So what does in - - - in  
7 4215(2), "parts of such body for scientific purposes"  
8 refer to?

9 MR. STERNBERG: If the - - -

10 JUDGE RIVERA: If you're saying remains is  
11 sort of whatever's left after you're done removing  
12 the organs, what does parts of the body - - -

13 MR. STERNBERG: Parts of the body is  
14 different from remains of the body. Remains of the  
15 body is a term of art. Remains of the body - - -

16 JUDGE RIVERA: Right.

17 MR. STERNBERG: - - - as it's used through  
18 the case law and used in this statute, remains of the  
19 body means this is what - - -

20 JUDGE RIVERA: The vessel. The vessel.

21 MR. STERNBERG: - - - this is what remains  
22 of the body after - - - after an authorized autopsy.

23 JUDGE RIVERA: Right, but what's parts of  
24 such body? What does that refer to in 4215(2)?

25 MR. STERNBERG: I'm sorry, Your Honor. Can

1           you use the type exactly - - -

2                   JUDGE RIVERA:  It has - - - it refers to  
3 body, remains of such body, and then it says retain  
4 parts of such body for scientific purposes.

5                   MR. STERNBERG:  It's using two different  
6 terms.  It's using remains of the body; it's using  
7 parts of the body.  Parts of the body would be parts  
8 of the body, not remains of the body.

9                   CHIEF JUDGE LIPPMAN:  Okay, okay, counsel.

10                  JUDGE READ:  I have one question.

11                  CHIEF JUDGE LIPPMAN:  I'm sorry, Judge  
12 Read.  Go ahead, sure.

13                  JUDGE READ:  You - - - you men - - - you  
14 mentioned that in this case the brain was returned.

15                  MR. STERNBERG:  The brain was returned.

16                  JUDGE READ:  Was that because of the field  
17 trip and that - - - I mean, what would have happened  
18 if there hadn't been the field trip and the disputes  
19 that arose?  Would it have been returned?

20                  MR. STERNBERG:  The - - - the brain was  
21 returned because the - - - the Shipleys asked for the  
22 brain.

23                  JUDGE READ:  It wouldn't have been but for  
24 the fact that they asked, then?

25                  MR. STERNBERG:  That's correct, and that we

1 feel isn't - - -

2 CHIEF JUDGE LIPPMAN: So in the normal  
3 course, they wouldn't know and they wouldn't get it?

4 MR. STERNBERG: In the - - - in the normal  
5 cou - - - it depends what the normal course is. If  
6 they asked for it, and if they have a discussion with  
7 the - - - the medical examiner does not withhold  
8 information - - -

9 CHIEF JUDGE LIPPMAN: No, no, no, but - - -

10 JUDGE READ: Well, I guess is the point is  
11 - - -

12 CHIEF JUDGE LIPPMAN: Yeah.

13 JUDGE READ: - - - how would they know to  
14 ask for it?

15 MR. STERNBERG: Public information. They -  
16 - -

17 JUDGE READ: So you're talking - - -

18 MR. STERNBERG: - - - they know what an  
19 autopsy is. They know what an autopsy entails.

20 JUDGE READ: So what would have happened if  
21 they hadn't asked for it?

22 MR. STERNBERG: If - - - if a - - - if a -  
23 - -

24 JUDGE READ: Would it have been disposed of  
25 as medical waste at that point?

1 MR. STERNBERG: It would be - - - it would  
2 - - - at the proper time, when all necessary use of  
3 it has been made, it would be disposed as of medical  
4 waste.

5 JUDGE READ: Okay.

6 CHIEF JUDGE LIPPMAN: You don't find that a  
7 little bit jarring that you get your son back and the  
8 brain is in a jar and that you don't know and that  
9 you never know and it's thrown away?

10 MR. STERNBERG: Well, Your Honor, I go back  
11 to - - - that's a gut, visceral reaction, but I go -  
12 - - but I - - -

13 CHIEF JUDGE LIPPMAN: Yes, I'm asking you -  
14 - - I'm asking you from - - -

15 MR. STERNBERG: - - - and what I personally  
16 wou - - -

17 CHIEF JUDGE LIPPMAN: I'm asking you from a  
18 gut, visceral reaction.

19 MR. STERNBERG: Well, our experience with  
20 gut, visceral reactions has been - - - and if I may  
21 use a - - - a percentage - - - eighty-prove - - -  
22 eighty-two percent of the people subsequent to  
23 Shipley have not wanted the - - - the parts of the  
24 body back and - - - and a percentage of those, even  
25 people who we tell, because we're required to tell

1 now, and they - - - they feel an obligation, okay,  
2 you told me, I'd better get the brain back. Even  
3 those people later tell us, um, wish you hadn't told  
4 us, because it - - - be - - - it's an individual  
5 thing - - -

6 CHIEF JUDGE LIPPMAN: Okay.

7 MR. STERNBERG: - - - and that's part of  
8 what this policy - - -

9 CHIEF JUDGE LIPPMAN: Okay.

10 JUDGE READ: How much of a burden is that?  
11 Or explain to me again why - - -

12 CHIEF JUDGE LIPPMAN: Yeah.

13 JUDGE READ: - - - the telling is a burden  
14 or how much of a burden it is?

15 MR. STERNBERG: It's not the telling. It's  
16 - - - it's simple to tell, Your Honor. It's the  
17 repercussions of the telling. We're only telling  
18 them because that gives them the option of making the  
19 decision. I want the body now. I want you to hold  
20 the body until it's "intact".

21 CHIEF JUDGE LIPPMAN: Isn't that good - - -  
22 isn't that - - -

23 MR. STERNBERG: - - - I want you to dispose  
24 of the brain. That creates a - - -

25 CHIEF JUDGE LIPPMAN: Isn't that good?

1           Isn't that a good thing that you tell them?

2                   MR. STERNBERG: Not to some families, and  
3 not to a majority of the families, has been our  
4 experience.

5                   JUDGE READ: Well, a good - - - whether  
6 it's a good thing or a bad thing, I guess I'm trying  
7 to focus on what's the burden on the City from doing  
8 that. I mean, why - - - why is that such a burden on  
9 them?

10                   MR. STERNBERG: Well, 5,000 autopsies, if -  
11 - - if we - - - if we have to keep a large percentage  
12 of those bodies until such time as the family - - -  
13 don't forget this brain has to sit in formalin. It  
14 has to be fixed. That takes time. And that - - -  
15 and that's a requirement. You can't - - - you can't  
16 dissect a gelatinous brain. You have to fix the  
17 brain. So meanwhile we're holding bodies until such  
18 time as - - - as all the organs are ready to be  
19 returned.

20                   JUDGE READ: So it's just a question of the  
21 numbers. 5,000 a year.

22                   MR. STERNBERG: 5,000, that's a - - -

23                   JUDGE RIVERA: Well, you seem to say a  
24 super majority don't want - - - they don't want to  
25 delay the burial, and they - - - they don't want to

1 deal with this issue about the organs.

2 MR. STERNBERG: They don't even want to be  
3 told, Your Honor.

4 JUDGE RIVERA: They don't even want to be  
5 told - - -

6 MR. STERNBERG: They don't want to have to  
7 - - -

8 JUDGE RIVERA: So it seems it's not as  
9 burdensome as you suggest.

10 MR. STERNBERG: Well, you - - - you talked  
11 about the - - - the idea that this is a difficult  
12 time for families. And it - - - and it is. And so  
13 at this difficult time, they are content. They say I  
14 wish you had just given me the body, let me bury it,  
15 and go along my way. I don't want to know in three  
16 weeks, in four weeks, in five weeks. I don't want  
17 this second funeral.

18 Don't forget a second funeral which is now  
19 - - - you know, the Shipleys said we had to go  
20 through a second funeral, that - - - that's inherent  
21 in the process. If - - - you're not going to get the  
22 brain back when you get the body back. You're not  
23 going to get the brain back for weeks until we're  
24 done with it - - -

25 CHIEF JUDGE LIPPMAN: Okay, okay, coun - -

1 - I'm sorry. Judge Abdus-Salaam.

2 JUDGE ABDUS-SALAAM: No, I just - - - you  
3 mentioned earlier about putting some information in  
4 the consent, and if - - - if families have to sign  
5 the consent, then that information is there, and, you  
6 know, usually they're not going to read it, right?  
7 So wouldn't that be the best time to just sort of  
8 stick it in there?

9 MR. STERNBERG: Well, again, Your Honor,  
10 the - - - the process. The - - - the - - - the  
11 immediate saying, you know, here's your body; it's  
12 ready for burial, but - - - that's the easy part.  
13 It's the ramifications of - - - of what comes after  
14 that, that - - - that create problems, both for us  
15 and for the families.

16 CHIEF JUDGE LIPPMAN: Okay, counsel, thank  
17 you, counsel.

18 MR. STERNBERG: Thank you, Your Honors.

19 CHIEF JUDGE LIPPMAN: Counselor?

20 MR. BEN-ARON: May it please the court - -  
21 - excuse me. May it please the court, my name is  
22 Marvin Ben-Aron, and I represent the plaintiff-  
23 respondents.

24 In this particular case, I have a little  
25 bit of issue with the argument that was just made

1 with regard to the fact that they're talking about  
2 eighty percent of families don't want to know and  
3 such. To the City's credit, for four years now, they  
4 have been notifying people - - -

5 JUDGE PIGOTT: In your bill of particulars,  
6 you said "The negligence was in permitting the  
7 viewing, displaying of the - - - of the brain, and  
8 failing to obtain the consent of the plaintiffs".  
9 And now they did obtain the consent of the  
10 plaintiffs. And the viewing is no longer part of  
11 this case. And - - -

12 MR. BEN-ARON: That - - -

13 JUDGE PIGOTT: And if the only person to  
14 testify as to anything having to do with medicine in  
15 this thing and the way - - - and the way medical  
16 examiners operate and the way these things are  
17 handled, is the defense doctor, who says what they  
18 did was right, where's your cause of action?

19 MR. BEN-ARON: The defense doctor's - - -  
20 the defense's doctor does not address the issue of  
21 the plaintiff's right of sepulcher.

22 JUDGE PIGOTT: You didn't plead it.

23 MR. BEN-ARON: I would say just as the  
24 Appellate Division found that we sufficiently by  
25 stating that they held on to the body and that they

1 retained the body beyond their - - - its need.

2 JUDGE PIGOTT: Ri - - - well, and what - -  
3 - and what they said is, we did exactly what we  
4 always do. And it - - - and it was curious, because  
5 when you - - - when you are having these organs and  
6 you're going to - - - as they're mandated to do - - -  
7 to look at them, whether it's an auto accident, a  
8 gunshot, a - - - a terrible tragedy like 9/11, or  
9 whatever has to be done, they have to do it, and - -  
10 - and Dr. de Roux says this is what we do, this is  
11 how we do it, and this is the way this one was  
12 handled.

13 There was no doctor, no ME, no one with any  
14 medical experience whatsoever to say that what they  
15 did was wrong. So where's the cause of action?

16 MR. BEN-ARON: Well, the situation that you  
17 have here, this is a situation where it's essentially  
18 ignorance of the law. This is - - -

19 JUDGE PIGOTT: No, let's back that up,  
20 because they wouldn't even have known, similar to  
21 what Judge Abdus-Salaam was suggesting, that there  
22 was anything wrong, if the - - - if the students, who  
23 were on a field trip, hadn't seen the - - - the jar.

24 MR. BEN-ARON: I agree with you. The prob  
25 - - -

1 JUDGE PIGOTT: So nothing would have been  
2 wrong.

3 MR. BEN-ARON: No, the - - - it still would  
4 have been wrong. The fact of the matter is, just  
5 because the medical examiner has followed a policy -  
6 - - for arguments' sake, for hundreds of years - - -

7 JUDGE PIGOTT: Right.

8 MR. BEN-ARON: - - - does not mean that it  
9 does not violate the law.

10 JUDGE PIGOTT: No one says it - - -

11 MR. BEN-ARON: Nobody has ever checked  
12 before.

13 JUDGE PIGOTT: Excuse me. No one in this  
14 lawsuit says it's wrong. You didn't put in an ME.  
15 You didn't put in a doctor. You didn't put in  
16 anyone, other than the - - - than, I think, the  
17 mother and the father, who testified as to how  
18 grievous this was, and I - - - and no one's going to  
19 argue contrary to that, but where's the - - - where's  
20 the ME that's - - - that's on the other side of the  
21 table saying, what this medical examiner did is flat-  
22 out wrong. This is the absolute wrong way to do any  
23 of this.

24 MR. BEN-ARON: Well, the issue is none of  
25 that came out at trial simply because the Appellate

1 Division had already determined that there was  
2 already a violation of a right of sepulcher.

3 JUDGE PIGOTT: Where did you - - - where's  
4 - - - where's the burden of proof on that issue and  
5 how did you sustain it?

6 MR. BEN-ARON: The burden of proof on that  
7 issue, it was done essentially by virtue of a  
8 directed verdict.

9 JUDGE PIGOTT: By what?

10 MR. BEN-ARON: It - - - it - - - by trial  
11 it was done by virtue of a directed verdict.

12 JUDGE PIGOTT: I know, but where's - - -  
13 where's the proof that led to that? That's - - - I  
14 mean, where - - - where did anyone get to say, now I  
15 see the proof that says what this medical examiner  
16 did was wrong.

17 JUDGE READ: For example, was there any  
18 kind of evidence about what's done generally by  
19 medical examiners in other cities?

20 MR. BEN-ARON: The only evidence with  
21 regard to what medical examiners did in other cities  
22 was from the Sherk (phonetic) case, which was the  
23 Ohio case, which the Appellate Division did  
24 distinguish - - - it was - - -

25 JUDGE READ: What testimony here? There

1 was no testimony here?

2 MR. BEN-ARON: In this particular case,  
3 there was no testimo - - -

4 CHIEF JUDGE LIPPMAN: Counselor, you're  
5 relying on their admission. Isn't that what you're  
6 relying on?

7 MR. BEN-ARON: That is correct.

8 CHIEF JUDGE LIPPMAN: That they - - - that  
9 they didn't - - -

10 MR. BEN-ARON: At the time of trial, they  
11 admitted - - -

12 CHIEF JUDGE LIPPMAN: - - - they didn't  
13 notify - - -

14 MR. BEN-ARON: - - - that they did not  
15 notify - - -

16 CHIEF JUDGE LIPPMAN: - - - the family.  
17 That's - - - what you're relying on is their own  
18 admission is - - - is what your case rests upon,  
19 right?

20 MR. BEN-ARON: Correct, and that - - -

21 CHIEF JUDGE LIPPMAN: That's the basis for  
22 the directed verdict, right?

23 MR. BEN-ARON: Correct. And that was what  
24 the directed verdict was based upon. Ultimately, the  
25 situation here was that there was a finding that the

1 process, you know - - - what Dr. de Roux testified  
2 to, notwithstanding that he's the only medical expert  
3 who's test - - - who was testifying, there was a  
4 finding that what he did violated the common law  
5 right of sepulcher.

6 JUDGE PIGOTT: The finding of fact on that  
7 and what - - - what I think about is, let's assume  
8 you have a baby or a three-year-old child, or almost  
9 any heart-rending death you can think of, and you're  
10 saying to the medical examiner, now, what you got to  
11 do is get clinical here, and you got to go and tell  
12 these parents or these siblings or whoever, things  
13 they don't want to hear, because in Shipley we said  
14 without any medical basis whatsoever that this is  
15 macabre and it - - - and it really upsets people, and  
16 so from now on, you've got to handle it the way we  
17 say and not the way they've been doing it, which is,  
18 just do their job, do it well, and medical waste is  
19 medical waste. What they have to take is what they  
20 have to take, and the - - - and the body is buried.

21 MR. BEN-ARON: Even Dr. de Roux testified  
22 that he was aware of the fact that there were  
23 religious implications to retaining organs, and in  
24 fact, as to performing autopsies - - -

25 CHIEF JUDGE LIPPMAN: Well, his testimony

1 on that - - - and not to interrupt you, but had to do  
2 not with the Roman Catholic Church, which these  
3 people belonged to - - -

4 MR. BEN-ARON: That is correct.

5 JUDGE PIGOTT: - - - but with other sects,  
6 because there's nothing in the Roman Catholic  
7 theology that says that you have to by - - - bury the  
8 entire body.

9 MR. BEN-ARON: Well, that's not exactly the  
10 testimony that was given by Mrs. Shipley at the time  
11 of the trial - - -

12 JUDGE PIGOTT: Well, she didn't testify as  
13 to the theology. She testified - - -

14 MR. BEN-ARON: But she testified that - - -

15 JUDGE PIGOTT: - - - against it.

16 MR. BEN-ARON: - - - her priest had told  
17 her that the body is not properly buried in  
18 consecrated ground - - -

19 JUDGE PIGOTT: That wouldn't have been - -  
20 -

21 MR. BEN-ARON: - - - by virtue of the fact  
22 - - -

23 JUDGE PIGOTT: - - - that wouldn't have  
24 been hearsay, would it?

25 MR. BEN-ARON: The objection was not made,

1 so it's preserved. But the issue comes down to  
2 regardless of whether the City has been performing  
3 autopsies in the same fashion for years, if it's  
4 wrong, it's wrong.

5 JUDGE PIGOTT: If a nation's been doing it  
6 that way?

7 MR. BEN-ARON: I would say that it still if  
8 - - -

9 JUDGE PIGOTT: If he's doing it wrong, it's  
10 wrong. And there's no one that says what the nation  
11 is doing, which is presumably what Dr. de Roux is  
12 doing, is wrong.

13 MR. BEN-ARON: Well, in this particular  
14 case - - -

15 JUDGE PIGOTT: It's un - - - it's  
16 upsetting.

17 MR. BEN-ARON: - - - it was because nobody  
18 could know. You know - - -

19 JUDGE PIGOTT: It's upsetting in this case  
20 because they found out.

21 MR. BEN-ARON: Right.

22 JUDGE PIGOTT: If that class - - - if that  
23 class hadn't gone there, you wouldn't have a lawsuit,  
24 right?

25 MR. BEN-ARON: I would agree with you.

1 CHIEF JUDGE LIPPMAN: Counsel, is it the  
2 unique - - -

3 MR. BEN-ARON: I wouldn't know.

4 CHIEF JUDGE LIPPMAN: - - - nature, what  
5 Judge Pigott is talking about - - - is it the unique  
6 nature of this case that the class winds up seeing  
7 that body part in a jar that raises uniquely this  
8 right of - - - of sepulcher that has not been raised  
9 before, because it's so unusual that it would happen  
10 in this - - - in this way.

11 MR. BEN-ARON: I wouldn't - - -

12 CHIEF JUDGE LIPPMAN: Is that what this  
13 case is all about? That - - - that it never arose  
14 and I - - - and Judge Pigott certainly makes the  
15 point that none of us knew, none of us cared. That's  
16 what MEs do, and that's what apparently was done in  
17 this case, and - - - and what they did - - - clearly  
18 this case does not spin on whether what they did  
19 comported with whatever best practice was.

20 Your - - - as I understand your argument -  
21 - - you're arguing solely on the basis of the  
22 admission in this case that they didn't notify the  
23 family, where in this unique set of circumstances,  
24 the family sees or people who know the family see the  
25 body part in a jar and say, hey, look what - - - what

1 we saw that your son has - - - and then you raise  
2 this ancient right, and then you have the admission.

3 So the question is, is this so unique or  
4 now by - - - if we uphold what you're asking us to,  
5 do we create - - - which I gather is a part - - - a  
6 great part of this discussion. Judge Read mentioned  
7 it before. What are the practical implications of  
8 all of this, now that this unique situation has  
9 arrived - - - arisen and everyone is aware of it?  
10 Does it matter that now in each case the ME is going  
11 to have to say, hey, but this body part or that body  
12 part, we've held.

13 MR. BEN-ARON: Okay.

14 CHIEF JUDGE LIPPMAN: You follow what I'm  
15 saying?

16 MR. BEN-ARON: I do follow what you're  
17 saying.

18 CHIEF JUDGE LIPPMAN: I - - - I get it that  
19 the legal issue uniquely comes up because of the  
20 unique set of circumstances, so now we're grappling  
21 with it. Does it matter for practical implications?  
22 And do you think they are dispositive that it's too  
23 burdensome for them to do?

24 MR. BEN-ARON: Okay, in this particular  
25 case, Judge Mastro, in the Appellate Division

1 decision, did specifically say under these specific  
2 circumstances, we find - - - and I do think that it  
3 was a relatively narrow circumstance.

4 JUDGE PIGOTT: What was narrow about it?

5 MR. BEN-ARON: What I think was narrow  
6 about it was simply - - - in the beginning, because  
7 ultimately they also said that they were creating,  
8 essentially, a standard, subsequent - - - but  
9 initially it's - - - it's this narrow area where you  
10 happen to discover - - -

11 JUDGE PIGOTT: The negligence - - -

12 MR. BEN-ARON: - - - something that - - -

13 JUDGE PIGOTT: Right, the negligence - - -

14 MR. BEN-ARON: - - - in my opinion, the  
15 City has concealed for years.

16 JUDGE PIGOTT: The negligence was the field  
17 trip.

18 MR. BEN-ARON: That was actually an  
19 argument that was made in the Appellate Division that  
20 was not accepted.

21 JUDGE PIGOTT: That's what you - - - that's  
22 what your summons and complaint says. And - - -

23 MR. BEN-ARON: Correct.

24 JUDGE PIGOTT: - - - and to my knowledge,  
25 it wasn't amended, and as I wrote - - - read, your

1 bill of particulars is all around the fact that - - -  
2 that this negligence was in displaying the - - - the  
3 - - - the - - - body parts in the jars, which the ME  
4 said, you know, that's what we do. And the fact that  
5 this class came through and saw it is what sparked  
6 this entire thing.

7 MR. BEN-ARON: No, and ultimately the  
8 Appellate Division dismissed that portion of the  
9 claim - - -

10 JUDGE PIGOTT: Right.

11 MR. BEN-ARON: - - - that it was an issue  
12 of display.

13 JUDGE PIGOTT: Which is your complaint.

14 MR. BEN-ARON: But that's not the sole  
15 issue of the complaint. The so - - - the complaint  
16 also sets forth wrongful retention.

17 JUDGE PIGOTT: Retention, yes.

18 MR. BEN-ARON: Correct. And in this  
19 particular case - - -

20 CHIEF JUDGE LIPPMAN: With lack of notice,  
21 is that what you're saying?

22 MR. BEN-ARON: Well, I would say that lack  
23 - - -

24 CHIEF JUDGE LIPPMAN: Retention with lack  
25 of notice?

1 MR. BEN-ARON: Well, I would argue that  
2 lack of notice is - - - is implied - - -

3 CHIEF JUDGE LIPPMAN: By wrongful  
4 retention.

5 MR. BEN-ARON: - - - by the wrongful  
6 retention, simply because a layperson is not expected  
7 to know that a body is being returned to them without  
8 the organs.

9 CHIEF JUDGE LIPPMAN: But if they had the  
10 right - - -

11 MR. BEN-ARON: No layperson is going and  
12 studying what an autopsy is.

13 CHIEF JUDGE LIPPMAN: If they have the  
14 right to do - - - if they have the right to do the  
15 autopsy and they have the right to retain the brain -  
16 - -

17 MR. BEN-ARON: See, I would argue that - -  
18 - they definitely had a right to do the autopsy. The  
19 statute provides - - -

20 CHIEF JUDGE LIPPMAN: Is it your argument -  
21 - -

22 MR. BEN-ARON: - - - but because this was  
23 an accident - - -

24 CHIEF JUDGE LIPPMAN: - - - is it your  
25 argument that they didn't tell them that they

1 retained the brain, not that they retained the brain,  
2 or is it?

3 MR. BEN-ARON: Well, it's both. Because in  
4 this particular situation, ultimately the situation  
5 is that the City is retaining the brain without  
6 notifying people that they have, and it - - - it's  
7 sort of - - -

8 JUDGE ABDUS-SALAAM: Well, if they're  
9 allowed - - - but counsel - - -

10 MR. BEN-ARON: - - - it's an included - - -

11 JUDGE ABDUS-SALAAM: - - - counsel, if  
12 they're allowed - - -

13 MR. BEN-ARON: - - - offense - - -

14 JUDGE ABDUS-SALAAM: - - - to retain organs  
15 or remains or whatever - - - and doesn't it really  
16 depend on what the definition of "remains of the  
17 body" is? And if it does, and - - - and the ME is  
18 entitled to retain those remains at the ME's  
19 discretion, then where's the obligation to notify?

20 MR. BEN-ARON: Well, under the New York  
21 City regulations, the ME does not have the right to  
22 dispose. Only the next of kin has the right to  
23 dispose of the remains.

24 JUDGE PIGOTT: You mean the body.

25 JUDGE ABDUS-SALAAM: You're talking - - -

1           yeah - - -

2                   MR. BEN-ARON: No, I'm talking remains.

3                   JUDGE PIGOTT: Well, you're not talking  
4 about organs.

5                   MR. BEN-ARON: I'm talking about every  
6 facet of the body.

7                   JUDGE PIGOTT: Well, I think you're wrong  
8 about that.

9                   JUDGE RIVERA: Yes, you're saying that body  
10 and remains includes organ, and he's saying it  
11 doesn't.

12                   MR. BEN-ARON: Correct.

13                   JUDGE RIVERA: And your basis for saying it  
14 includes organs is?

15                   MR. BEN-ARON: My basis for saying it  
16 includes organs is actually the only New York case  
17 that - - - that I found that discussed it was the  
18 Scheuer case where they said a family was going - - -  
19 going into an apartment to retrieve and in that part  
20 - - - it was part of the scalp; it was skin tissue -  
21 - -

22                   JUDGE ABDUS-SALAAM: That's very different  
23 than this case, isn't it?

24                   MR. BEN-ARON: No, there was - - - in the -  
25 - - in that that case, those were defined as remains,

1           notwithstanding that the body had been removed  
2           already.

3                       JUDGE PIGOTT:   But we're having this  
4           argument - - -

5                       MR. BEN-ARON:   So they went in specifically  
6           to pick up these additional parts of the body,  
7           because they had the right to the ultimate  
8           disposition of those remains.

9                       CHIEF JUDGE LIPPMAN:   Okay, counselor,  
10          thanks.

11                      MR. BEN-ARON:   Thank you.

12                      MR. STERNBERG:   A couple of quick things,  
13          Your Honors.  I think it's important to recognize in  
14          this case that the Appellate Division, throughout  
15          most, if not all of the case, unauthorized  
16          withholding, mutilation and display are not part of  
17          this case.  The only part of this case are the new  
18          obligations which the Appellate Division imposed - -  
19          -

20                      CHIEF JUDGE LIPPMAN:   But he's - - - what -  
21          - - what more does he need than your admission that -  
22          - - that you didn't notify the family?

23                      MR. STERNBERG:   Well, what we admit - - -

24                      CHIEF JUDGE LIPPMAN:   That's what they're  
25          relying on.  And - - - and - - - and in con - - - in

1 the context of this, again, ancient right that's  
2 saying that - - - that by not notifying and returning  
3 and holding it that it violated that right.

4 MR. STERNBERG: Well - - -

5 CHIEF JUDGE LIPPMAN: That's the context,  
6 putting aside all of the ways that one could read the  
7 statute with remains of the body, in terms of waste.  
8 Why not in terms of this right and that you don't  
9 notify them about it, and you're keeping it, why  
10 isn't it a violation of that right?

11 MR. STERNBERG: Well, I - - - I'd rather  
12 not - - -

13 CHIEF JUDGE LIPPMAN: Are you saying it  
14 doesn't exist anymore?

15 MR. STERNBERG: Not at all, Your Honor.

16 CHIEF JUDGE LIPPMAN: So when does it kick  
17 in, in this circumstance, or a similar kind of  
18 circumstance? When - - - when would they violate  
19 that right?

20 MR. STERNBERG: But - - -

21 CHIEF JUDGE LIPPMAN: If - - - if the ME  
22 had done what, would he have violated the right?

23 MR. STERNBERG: That's hard to say. But -  
24 - - but first of all - - -

25 CHIEF JUDGE LIPPMAN: No, no, but - - -

1                   MR. STERNBERG: - - - it's important - - -  
2                   the - - - the right of sepulcher exists well beyond  
3                   the - - - the - - - the ME. The right of sepulcher  
4                   exists against private hospitals, against private  
5                   funerals, against anybody who would desecrate a body.  
6                   So - - -

7                   CHIEF JUDGE LIPPMAN: What if he took the  
8                   brain and he threw it away. He didn't - - - he  
9                   didn't - - -

10                  MR. STERNBERG: Well - - -

11                  CHIEF JUDGE LIPPMAN: - - - test it for any  
12                  reason. The ME took it and he threw it away. Would  
13                  it violate the right of the next of kin to get the  
14                  body back?

15                  MR. STERNBERG: I'd - - - I'd - - - I'd  
16                  have to know many more facts, but in fact, the - - -  
17                  the brain which is removed from a body is defined as  
18                  a medical waste. So if the judgment that he just  
19                  made - - -

20                  JUDGE PIGOTT: So the he could take it? So  
21                  the ME could take the body, take the brain out,  
22                  dispose of it, and - - - and give them the body.  
23                  They don't know.

24                  MR. STERNBERG: But - - - but- - -

25                  CHIEF JUDGE LIPPMAN: They don't care. No,

1 but I'm asking a question.

2 MR. STERNBERG: That's not - - - that's not  
3 what the ME does, Your Honor.

4 CHIEF JUDGE LIPPMAN: But I'm asking you  
5 hypothetically.

6 MR. STERNBERG: Hypothetically?

7 CHIEF JUDGE LIPPMAN: Yeah.

8 MR. STERNBERG: He has no ob - - -

9 CHIEF JUDGE LIPPMAN: Does it violate the  
10 right?

11 MR. STERNBERG: The ME has no obligation to  
12 return the - - - the brain that is removed, and has  
13 no obligation to inform that - - - that the brain has  
14 been retained.

15 JUDGE PIGOTT: And there's no testimony to  
16 the contrary. That's what de Roux said. That's what  
17 your argument was, and no one testified to the  
18 opposite that some MEs in some places - - -

19 MR. STERNBERG: And - - - and what - - -  
20 what I would respectively like to bring to the  
21 attention of the court, that the National Association  
22 of Medical Examiners has made a motion for leave to -  
23 - - to file an amicus brief in this case. They filed  
24 amicus briefs throughout the country in - - - in  
25 similar cases, including the Albrecht case in Ohio,

1 which - - - which I would obviously - - - obviously  
2 commend to your attention.

3 But through various missteps, that motion  
4 is not returnable until a week from today.

5 CHIEF JUDGE LIPPMAN: Are you - - - are - -  
6 - are you talking about this as - - - is a property  
7 right, like some of these other cases that have dealt  
8 with it, or you're talking about it as - - - as a  
9 right to the return of the body. In New York, that's  
10 what we have - - - is there this kind of right?

11 MR. STERNBERG: It's not - - - it's not - -  
12 - there's no property - - - I mean, this court has  
13 said over and over, there's no property right to - -  
14 -

15 JUDGE RIVERA: The - - -

16 MR. STERNBERG: - - - to a body.

17 JUDGE RIVERA: The whole - - - the whole  
18 case is turning here on whether or not we define body  
19 as including the organs?

20 MR. STERNBERG: The - - - the statutory - -  
21 - the statutory, because it's - - -

22 JUDGE RIVERA: The right of sepulcher.

23 MR. STERNBERG: - - - because the Appellate  
24 Division - - - no, no, the Appellate Division relied  
25 on two things. It relied on the Statute 4215 and

1 independently relied on the common law right of  
2 sepulcher. Our - - - we attempt to - - - to convince  
3 the court that reliance on the statute was incorrect,  
4 because the statute doesn't say what the court says  
5 it says. It doesn't - - - the statute by its terms  
6 does not refer to the brain.

7 CHIEF JUDGE LIPPMAN: And - - - and why is  
8 it incorrect on the common law right?

9 MR. STERNBERG: I'm sorry, Your Honor?

10 CHIEF JUDGE LIPPMAN: Why, on the common  
11 law right, hasn't that been that violated?

12 MR. STERNBERG: The common law - - - the  
13 common law has never been held to apply to organs  
14 retained by a medical examiner during the - - -  
15 properly retained by a medical examiner during the  
16 course of an authorized autopsy. It just never has  
17 been. Also we would - - - again, it would conflict  
18 with the statutory scheme in New York, which  
19 classifies these - - - these organs as medical waste.

20 JUDGE RIVERA: So all the organs in an  
21 autopsy are medical waste? They are all disposed of  
22 as medical waste?

23 MR. STERNBERG: All are classified as  
24 medical waste, and what we - - - what the - - - what  
25 the medical examiner wishes to do in this case is to

1 maintain the - - - his discretion to dispose of  
2 medical waste as appropriate in - - -

3 CHIEF JUDGE LIPPMAN: What if he just has  
4 the shell of the body left and disposes of everything  
5 else?

6 MR. STERNBERG: Well - - -

7 CHIEF JUDGE LIPPMAN: Did he violate the  
8 right?

9 MR. STERNBERG: No, he didn't, but that  
10 never happens. What happens - - -

11 CHIEF JUDGE LIPPMAN: Yeah, yeah, but he  
12 wouldn't. Why not?

13 MR. STERNBERG: Because he's not obligated  
14 to return any organs - - -

15 CHIEF JUDGE LIPPMAN: But to tell them that  
16 there's nothing inside other than the shell?

17 MR. STERNBERG: Or to tell them.

18 CHIEF JUDGE LIPPMAN: Okay.

19 JUDGE RIVERA: Okay, I'm sorry; can I just  
20 follow up about this question about the medical  
21 waste. But if - - - you say the ME wants the  
22 discretion to identify the organs as medical waste.  
23 Classify them as medical waste.

24 MR. STERNBERG: And he's also - - - he's  
25 also under no obligation.

1                   JUDGE RIVERA: Excuse me. Okay, I just  
2 want to clarify this. Classify them as medical  
3 waste. If - - - if the ME upon completion of the  
4 autopsy, determines that the brain could be returned,  
5 are you saying that then the ME has the discretion to  
6 declassify them as medical waste? I'm a little  
7 confused as to how this would work.

8                   MR. STERNBERG: How the medical - - - how  
9 the - - - how the ME treats medical waste is also  
10 subject to statute. That doesn't mean he doesn't  
11 return them. Medical waste can be properly disposed  
12 of by a funeral home. So if a party - - - as I just  
13 said, if a party requests the return of any or all  
14 organs, that happens. And that happens, regardless  
15 of the fact that they're - - - that they're  
16 classified as medical waste, but the funeral home is  
17 licensed to - - - whatever happens, the funeral home  
18 can deal with medical waste.

19                   These - - - these organs - - -

20                   JUDGE RIVERA: So if - - - so if - - -

21                   MR. STERNBERG: - - - we don't hand them to  
22 the next of kin. The next of kin doesn't tactilely  
23 (sic) have them.

24                   JUDGE RIVERA: Well, of course. Of course.

25                   MR. STERNBERG: The funeral home has them.

1 JUDGE RIVERA: Of course.

2 MR. STERNBERG: So the funeral home could  
3 then - - -

4 JUDGE RIVERA: Excuse me; any family could  
5 request them.

6 MR. STERNBERG: Any - - -

7 JUDGE RIVERA: And as long as the ME has  
8 determined - - - it's not, I guess, there's some  
9 public health issue related here, right - - - that  
10 they shouldn't be disposed of by someone other than  
11 the family, vis-a-vis the funeral parlor through a  
12 burial, you can return the organs.

13 MR. STERNBERG: Yes. And - - - and - - -

14 JUDGE RIVERA: And that's what the MEs do,  
15 correct?

16 MR. STERNBERG: And we do. And we do upon  
17 request.

18 JUDGE RIVERA: Okay, so being notified - -  
19 - so - - - okay, so that - - - I'm really now  
20 confused about your argument. So if that is the  
21 case, and - - - and all that's going on is that the  
22 Appellate Division says, okay, so just inform the  
23 family that they can request them.

24 MR. STERNBERG: Well, yes, and - - - and I  
25 can - - - I can see where Your Honor is having a

1           problem, because it seems like a sim - - - the  
2           Appellate Division said, here is a simple solution.  
3           Simply tell the family that here's the body, but we  
4           have retained X, Y and Z. Simple. And the Appellate  
5           Division said it's simple. But it's not simple, and  
6           we've certainly found that out - - -

7                         JUDGE RIVERA: No, I understand your  
8           argument that it's - - - that the Appellate Division  
9           is incorrect that it's not onerous. That you believe  
10          that it is onerous, or it has these ripple effects  
11          that are quite dramatic. The implications are quite  
12          dramatic. I understand that, but it sounds to me  
13          like you just said if a family requests the organs,  
14          and the ME doesn't identify this as the type of  
15          medical waste that cannot be returned to the funeral  
16          parlor so that the family can dispose of them, that  
17          you would return them.

18                        MR. STERNBERG: Absolutely, but - - - but -  
19          - - but - - -

20                        JUDGE RIVERA: So it strikes me that even  
21          though you think it's onerous, you seem to be  
22          admitting that there is a right to these organs.

23                        MR. STERNBERG: No. The fact that we  
24          comply with the family's request does not - - - it  
25          doesn't imply that the right - - - family has an

1 absolutely right to them. The - - - the discretion  
2 there lies with the medical examiner, we - - -

3 JUDGE RIVERA: But they have a right to  
4 request them is what you're suggesting, yes? You're  
5 - - - will you concede that? They have a right to  
6 request?

7 MR. STERNBERG: Absolutely.

8 JUDGE RIVERA: You may not honor that  
9 request - - -

10 MR. STERNBERG: Absolutely.

11 JUDGE RIVERA: - - - but they have a right  
12 to request.

13 MR. STERNBERG: Absolutely.

14 JUDGE RIVERA: So I guess then the next  
15 question is, if you don't know you have a right to  
16 request, isn't it - - - is it implicit in that right  
17 that they should be informed that they have a right  
18 to request?

19 MR. STERNBERG: Now we get into defining  
20 rights.

21 CHIEF JUDGE LIPPMAN: Why can't you do what  
22 Judge - - -

23 MR. STERNBERG: They - - - they don't have  
24 - - - they don't have - - - to use that word - - -  
25 they don't have the right to have someone tell them,

1 here's what we have done.

2 CHIEF JUDGE LIPPMAN: Counsel, why - - -  
3 why couldn't do what Judge Abdus-Salaam said? Just  
4 put it - - - put it in the - - - in the - - - in the  
5 form, you know - - -

6 MR. STERNBERG: Well, first of - - - first  
7 - - -

8 CHIEF JUDGE LIPPMAN: - - - and sign it,  
9 and then if they want to ask you, they'll ask you.

10 MR. STERNBERG: First of all, most - - -  
11 most - - -

12 JUDGE RIVERA: So some are not done by  
13 consent.

14 MR. STERNBERG: Most autopsies are not done  
15 by consent.

16 JUDGE RIVERA: They're not done by consent.

17 MR. STERNBERG: Most autopsies are done  
18 according to law. Even assuming there was no consent  
19 in this case, the autopsy would have been absolutely  
20 proper, because the - - - Jesse unfortunately died in  
21 a - - - in a car accident. So the aut - - - the - -  
22 - they had an absolute right to do the autopsy.

23 Those forms never come into effect. It's all - - -  
24 ninety - - - whatever percent it is, it's all oral -  
25 - -

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CHIEF JUDGE LIPPMAN: Okay, counsel. Thank

- - -

MR. STERNBERG: - - - between the medical  
examiner and the family.

CHIEF JUDGE LIPPMAN: - - - thank you,  
counsel. Thank you both.

MR. STERNBERG: And - - - and please take  
cognizance of the proposed amicus brief. Thank you,  
Your Honors.

CHIEF JUDGE LIPPMAN: Thank you. Thank both of  
you. Appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Shipley v. City of New York, No. 2, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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