

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

SHIPLEY,

Respondent, (Reargument)

-against-

No. 96

CITY OF NEW YORK,

Appellant.

20 Eagle Street
Albany, New York 12207
May 07, 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
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

RONALD E. STERNBERG, ESQ.
CORPORATION COUNSEL OF THE CITY OF NEW YORK
Attorneys for Appellant
100 Church Street
New York, NY 10007

MARVIN BEN-ARON, ESQ.
AMEDURI GALANTE D'AGOSTINO & FRISCIA
Attorneys for Respondent
471 Bement Avenue
Staten Island, NY 10310

Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Counsel, you want any
2 rebuttal time?

3 MR. STERNBERG: Three minutes, Your Honor,
4 please.

5 CHIEF JUDGE LIPPMAN: How much?

6 MR. STERNBERG: Three minutes, please.

7 CHIEF JUDGE LIPPMAN: Three minutes, go
8 ahead.

9 MR. STERNBERG: May it please the court.
10 Good afternoon, my name is Ronald Sternberg. I'm
11 from the Office of the New York City Corporation
12 Counsel on behalf of the defendants/appellants.
13 Unlike the last time we were before this court, the
14 court now has before it the amicus brief for the
15 National Association of Medical Examiners. That
16 brief is - - - is - - - is - - - adds substantially
17 to - - - to our understanding of the issues that are
18 presented in this case. The brief informs - - -

19 JUDGE RIVERA: Well, one thing it shows,
20 and it's clear anyway from the last argument in your
21 briefs, is that there certainly are medical examiners
22 that do exactly what - - - what the - - - the AD had
23 ordered. So I wanted to ask when do you make a
24 decision and how do you make a decision to inform
25 someone about the removal of the organs and the

1 opportunity- - - to - - - to get the organs, because
2 you do do it for apparently religious purposes or
3 otherwise. How do you make that decision? How do
4 you know to either inform that person or even ask
5 that person?

6 MR. STERNBERG: If a person comes under the
7 religious exemptions, they make it known to us.

8 JUDGE RIVERA: I'm sorry. How would they -
9 - - that's what I'm asking. How - - - how would you
10 know that?

11 MR. STERNBERG: The - - - there - - - there
12 are discussions. Quite honestly, I'm not sure of the
13 exact procedure. There is no exact procedure. The
14 people - - - this is all informal. The - - - these
15 are not formalized procedures. The medical examiner
16 talks to the people. The people talk to the medical
17 examiner, and that includes - - -

18 JUDGE FAHEY: But - - - but a point of
19 fact, there is no statutory requirement for
20 notification, and - - - and so once - - - in disposal
21 of remains post burial. So - - - so we're really
22 coming back to then the - - - the right of sepulcher
23 and whether or not the - - - the - - - the right
24 would exist in that context.

25 MR. STERNBERG: That's - - - that's

1 precisely. The - - - the - - - the - - - the - - -
2 the Appellate Division founded the obligations it
3 imposed - - - imposed on us, both statutory and
4 common law. It found an obligation in - - - in this
5 4215 of the public health law. It found an
6 obligation in the common law right of sepulcher. Our
7 argument, of course, is that neither of those,
8 neither the statute nor the common law imposes an
9 obligation upon - - -

10 JUDGE RIVERA: So that forecloses you from
11 having these conversations?

12 MR. STERNBERG: Does it foreclose us?

13 JUDGE RIVERA: Yes.

14 MR. STERNBERG: Absolutely not.

15 JUDGE RIVERA: Well, since it doesn't and
16 you seem to have them, now let's get back to my
17 question, how is it that you decide who to have these
18 conversations with and - - - and who gets, let's call
19 it a benefit for the moment, the benefit of being
20 able to reunite, if you will, their loved ones'
21 organs for purposes of burial?

22 MR. STERNBERG: The medical examiner works
23 in the public interest. It - - - the medical
24 examiner provides all the information that next of
25 kin asks for and desire. The medical examiner

1 returns or - - - or turns over organs that are
2 requested. These are all in the - - -

3 CHIEF JUDGE LIPPMAN: Counsel, how much - -
4 - how much of a burden does this - - - why is it such
5 a - - - a major, major burden to just in the normal
6 course tell people if there - - - if there are, you
7 know, parts of the body being withheld?

8 MR. STERNBERG: There are two responses to
9 that. And as I said last time the - - - the - - -
10 the - - - the act of telling somebody is - - - is, as
11 the Appellate Division said, a simple act. But - - -
12 but it's more than just telling people, because the
13 ramifications, it has ramifications for the next of
14 kin, which are critical. There's ram - - -

15 CHIEF JUDGE LIPPMAN: Isn't that the point
16 that it has ramifications?

17 MR. STERNBERG: And - - - and - - - and as
18 - - - as the medical examiner has determined in its
19 post - - - post-Shipley operation of the Appellate
20 Division order, as I informed the court, eighty
21 percent of the next of kin have declined our - - -
22 our - - - our - - -

23 JUDGE PIGOTT: Offer.

24 MR. STERNBERG: Have declined the return of
25 the organs.

1 JUDGE RIVERA: So then it's not going to
2 result in a significant burden. If they - - - if the
3 major - - - the overwhelming majority - - -

4 MR. STERNBERG: Well - - -

5 JUDGE RIVERA: - - - do not have an
6 interest in this.

7 MR. STERNBERG: But - - - but - - -

8 JUDGE RIVERA: But for those twenty percent
9 - - -

10 MR. STERNBERG: And - - -

11 JUDGE RIVERA: - - - who may not fallen
12 within your religious exemptions, shouldn't - - -

13 MR. STERNBERG: And in fact of tho - - -

14 JUDGE RIVERA: - - - they be fairly
15 treated?

16 MR. STERNBERG: In fact, of those twenty
17 percent, ten percent don't even come back to return,
18 and of those twenty percent, a significant majority
19 says, gee, I wish you hadn't told me, because now you
20 give me a real dilemma and I'm sort of guilted into
21 saying yes, I want the - - -

22 JUDGE STEIN: Coun - - - counselor - - -

23 MR. STERNBERG: - - - want the organs.

24 JUDGE STEIN: - - - the - - - the - - - the
25 statute is the statute, and - - - and - - - and we

1 have to interpret that to determine whether it does
2 or does not define - - - how it defines remains and
3 so on and so forth. But under the common law right,
4 have - - - have we decidedly said whether - - - in
5 any cases up until now, this court said whether
6 remains include organs, for example, that are removed
7 during - - - during the - - - the process of autopsy?

8 MR. STERNBERG: I have a long footnote in
9 my brief, Your Honor, where I cite quite a number of
10 cases, quite honestly I don't recall if one of them
11 was from this court, where remains of the body is
12 used in the context which I submit is appropriate.
13 That is, what remains after everything happens. I'd
14 have to go back to the footnote and see if it was
15 from this court, but I will say that - - -

16 CHIEF JUDGE LIPPMAN: Pretty important
17 whether it's from this court, isn't it?

18 MR. STERNBERG: It would be, and - - - and
19 I - - - and I'll find out on reply which cases I
20 cited. But the fact is that - - - that over - - -
21 over time and over - - - over the course of the
22 country, courts have seemed to say that remains of
23 the body means what's - - - in our context what's on
24 the table after the autopsy is completed. To - - -
25 to - - - to interpret the statute otherwise would,

1 first of all, be in conflict with - - - with the - -
2 - with the public health law in general because the
3 public health law defines these organs that we're
4 talking about as medical waste. By defining it as
5 medical waste, two things, one, the Appellate
6 Division - - -

7 JUDGE RIVERA: So it leaves it to the ME?

8 MR. STERNBERG: I'm sorry?

9 JUDGE RIVERA: I mean some of it's
10 statutory, but it leaves it to the ME to define some
11 of what's medical waste? So I guess the question is
12 what - - - what otherwise - - - again, because you do
13 do this for some people. So I - - - I - - - I asked
14 you before does the - - - does the statute foreclose
15 you from making that choice and you said no, but if
16 the statute says it's medical waste then how can you
17 return it?

18 MR. STERNBERG: Well, as I - - - we return
19 it because, number one, it doesn't go to the next of
20 kin. If - - - if - - - if - - - as does the body,
21 the organs are returned to a funeral home and the
22 funeral home disposes of the - - - of the organs
23 appropriately as medical waste. And that - - -
24 that's crit - - - what - - - what the definition of
25 medical waste makes - - -

1 JUDGE RIVERA: Does that mean that - - -
2 that you're saying they - - - they would not be able
3 to - - - if - - - if the next of kin wanted the
4 organs to be buried, the - - - the funeral parlor
5 could not do that for them because it's medical
6 waste. You turn over - - - you're saying you turn
7 over medical waste to funeral parlors to dispose of
8 it.

9 MR. STERNBERG: And - - - and burial is
10 certainly one of those ways that it can be disposed.
11 Funeral homes are equipped to do it. So - - - but it
12 - - -

13 JUDGE RIVERA: Is that how you handle the -
14 - - the - - - the category that you say falls within
15 the religious exemption? You turn it over to the
16 funeral home to then - - -

17 MR. STERNBERG: Well - - -

18 JUDGE RIVERA: - - - follow the religious
19 requirements of the family?

20 MR. STERNBERG: Pre - - - precisely. The -
21 - - the - - - the - - - careful attention is paid
22 during the course of the autopsy, should an autopsy
23 be performed. We - - - in some cases autopsies - - -
24 you know, we would defer. We can always say we do
25 need to do an autopsy, but we would defer if it's a

1 religious exemption, if possible. But special - - -

2 JUDGE STEIN: So if eighty - - - if eighty
3 percent of the people say, yes, we - - - we want the
4 organs back and - - - and - - - and we want you to -
5 - - because I think - - - as I understand one of your
6 concerns is then you're responsible for - - - for
7 safekeeping the - - - the rest of the body for - - -
8 it could be for a lengthy period of time. But what
9 if, instead of twenty percent of the people, eighty
10 percent of the people said, you know, we want this
11 organ back. Would that - - - would that be a
12 problem?

13 MR. STERNBERG: The law would remain the
14 same. We would - - - we would say that the law does
15 not require us to do it, but it would create
16 tremendous problems. It would create problems for
17 the medical examiner in instituting - - - in - - - in
18 preserving bodies. Somebody may say keep my - - -
19 keep the body until the organ is ready. In this
20 particular case of this brain, a brain cannot be
21 examined until it's fixed. It's fixed in formalin.
22 It takes at least two weeks. So now - - - and - - -
23 and the - - - and the medical examiner does 5,500
24 autopsies a year, so now we have bodies stacking up.

25 JUDGE FAHEY: But - - - but isn't - - -

1 isn't really your most reasonable argument,
2 particularly given the sad confluence of events here
3 where - - - where the - - - the way the - - - the - -
4 - the child's brain was found and then afterwards the
5 way the family found it? It seems to me that this
6 series of events were particularly sad and - - - and
7 difficult for any family to have to deal with. And -
8 - - but - - - so - - - so I don't think you have a
9 very good argument there. I think your real argument
10 is, is that it's not authorized by statute, and if
11 the legislature wants to do this then they could go
12 ahead and do that. And - - -

13 MR. STERNBERG: I was certainly going to
14 come to that, Your Honor, because - - -

15 JUDGE READ: There are - - - there are
16 states where that's been done, right? There are
17 states that have had - - - adopted requirements one
18 way or another in terms of notification?

19 MR. STERNBERG: I - - - I - - -

20 JUDGE FAHEY: Mich - - - Michigan being - -
21 - to follow up with Judge Read - - -

22 JUDGE READ: Yeah.

23 JUDGE FAHEY: - - - was one - - - one.

24 MR. STERNBERG: Michigan, I - - - I have it
25 in my brief where - - - where they indicate organs

1 have to be returned and they specify what organs have
2 to be returned. There also is cited in the - - - in
3 the amicus brief, there are states which, as - - - as
4 New York does, classify these as medical waste and
5 said they are to be disposed of without notification
6 and without regard to - - - to consent of the
7 parties.

8 JUDGE PIGOTT: I worry the - - -

9 JUDGE READ: What happened - - - what
10 happened here? You - - - you returned - - - you
11 returned the - - - the brain, right? It - - - or
12 what did happen here? What all was - - - I guess
13 what was returned, because that wasn't the only thing
14 that was - - - that was retained.

15 MR. STERNBERG: Correct.

16 JUDGE READ: As I understood.

17 MR. STERNBERG: Every - - - the - - - the -
18 - - the Shipleys requested everything and everything
19 was returned, and there was - - -

20 JUDGE READ: Okay. And everything included
21 more than the brain, it included the sections that
22 were put in the - - - what - - - what the ME called
23 the histology jar?

24 MR. STERNBERG: Yes. That was - - - that
25 was all returned. Now the - - - the - - -

1 JUDGE RIVERA: You returned that after they
2 knew that you were holding them?

3 MR. STERNBERG: After this - - -

4 JUDGE RIVERA: After they - - - after they
5 knew - - -

6 MR. STERNBERG: After the unfortunate
7 incident.

8 JUDGE RIVERA: - - - and they made the
9 request.

10 MR. STERNBERG: That's a confluence events
11 here, I'll agree, Your Honor, are - - -

12 JUDGE RIVERA: So but for that you would
13 not have returned?

14 JUDGE READ: Well, that was the lawsuit,
15 right?

16 JUDGE RIVERA: Of course, right?

17 JUDGE READ: The lawsuit was filed at that
18 point.

19 MR. STERNBERG: Sometime thereafter but - -
20 -

21 JUDGE RIVERA: But it's pre - - - but it's
22 predating any determination in the lawsuit.

23 MR. STERNBERG: We would not have returned.

24 JUDGE RIVERA: No, I understand.

25 MR. STERNBERG: We - - - we - - - we

1 returned the organs because we were requested to
2 return the organs. And as a result of that request,
3 as we do in - - - in most if not all cases, we do
4 return. There may be cases where - - -

5 CHIEF JUDGE LIPPMAN: Judge - - - Judge
6 Pigott has a question. Judge Pigott.

7 JUDGE PIGOTT: Well, I - - - I was going to
8 say I get the impression that we may not know enough
9 to make a decision here. This is a very complicated
10 field. The amicus brief was - - - you know, was very
11 helpful in pointing all of that out, but, you know,
12 waste and what goes here and the fact that - - - that
13 in order to do a studious examination of brains you
14 need a number of them and that's over time. And I -
15 - - I would assume - - - you know, I - - - there's no
16 malice here. It's just that - - - that we're talking
17 maybe best practices or something.

18 MR. STERNBERG: I think we - - - we - - -
19 the medical exam - - - the longstanding practice in
20 the medical examiner - - - medical examiner in the
21 City of New York serves the interest of the public.
22 It serves the interest of the next of kin.

23 CHIEF JUDGE LIPPMAN: Why isn't it a better
24 practice - - - given the long history of this common
25 law right, why isn't there better practice that - - -

1 for those people who feel strongly about this that
2 they be given the opportunity to know? Why - - - why
3 - - - I - - - I still don't - - - that's - - - that's
4 my hang up.

5 MR. STERNBERG: I underst - - -

6 CHIEF JUDGE LIPPMAN: I - - - I don't get
7 the giant big deal, and I understand that with
8 government entities things can get burdensome, but
9 particularly if you say that your experience thus far
10 is that not many people really, you know, do have
11 that - - - that great serious concern. Why isn't it
12 just - - - when you talk about better practice from a
13 policy perspective, this is so traumatic, and that's
14 why this right goes back for so many years that - - -
15 that people, it's a - - - it's a - - - almost a
16 sacred right to get back the remains of your dear - -
17 - dear ones. Why isn't it from a policy perspective
18 just a better practice? I - - - I - - - I understand
19 your argument.

20 MR. STERNBERG: The sho - - - the sho - - -
21 the sho - - -

22 CHIEF JUDGE LIPPMAN: We've been doing it a
23 certain way. I get that.

24 MR. STERNBERG: No. But the short answer
25 is that - - - that Your Honor is correct that this -

1 - - this - - - this right goes back a long, long
2 ways. It has never, never been held to incorporate
3 what the Appellate Division says it incorporates.

4 CHIEF JUDGE LIPPMAN: I don't - - -

5 MR. STERNBERG: This - - - this is
6 something new.

7 CHIEF JUDGE LIPPMAN: I don't think - - -

8 MR. STERNBERG: In fact, the only court - -
9 - the only court who has directly addressed the same
10 issue that this court is addressing is the Ohio
11 Court, and they just - - -

12 CHIEF JUDGE LIPPMAN: Yes. But, counselor,
13 what I'm saying to you is that's why we're here.
14 We're going to say what it is, and - - - and Ohio may
15 have its viewpoint, whatever. I was asking from a
16 policy perspective, but why don't you mull on that
17 one. Let's hear from your adversary, and you'll have
18 your rebuttal time.

19 MR. STERNBERG: Thank you, Judge.

20 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

21 MR. BEN-ARON: Good afternoon. May it
22 please the court, my name is Marvin Ben-Aron and I
23 represent the Shipleys. The first thing I'd like to
24 address is the issue of the public policy, whether
25 it's a burd - - -

1 CHIEF JUDGE LIPPMAN: Go ahead.

2 MR. BEN-ARON: - - - whether it's a burden
3 to the City to have to provide notification, also in
4 - - - in actuality to return organs.

5 JUDGE STEIN: But would you also address
6 their argument that in fact it - - - it - - - it may
7 be more troublesome for more of the next of kin for
8 them to do what they're being asked to do?

9 MR. BEN-ARON: The truth is there's no
10 admissible evidence before the court that indicates
11 that there has been a burden. Will there be people
12 who don't want to know? Possibly. Does that mean
13 that we should still deny - - -

14 JUDGE STEIN: Well, there's no evidence
15 that it won't be a burden either. I mean, because
16 we're talking public policy here. We're not talking
17 about - - -

18 MR. BEN-ARON: But in this particu - - -

19 JUDGE STEIN: - - - legal evidence.

20 MR. BEN-ARON: But in this particular case
21 we're talking about this four-and-a-half years since
22 the City, to - - - to its credit, since the Appellate
23 Division decision, has altered its policy and has
24 started notifying next of kin.

25 JUDGE PIGOTT: Have the other sixty-one

1 counties in the state?

2 MR. BEN-ARON: Excuse me?

3 JUDGE PIGOTT: Have - - - have the other
4 sixty - - -

5 MR. BEN-ARON: I - - - I believe that the
6 other counties have as well. I know that Rensselaer
7 County has. After our prior argument on January 5th
8 there were some newspaper articles and I also saw a
9 law journal article that said that the majority of
10 the counties are doing the exact same thing.

11 JUDGE PIGOTT: You have a - - - you have a
12 very, very sensitive case. I mean, the - - - this
13 case started, and I think you pled it, in terms of
14 outrage. I mean that - - - you know, that this - - -
15 this brain was in a jar that students saw and they
16 communicated it to the daughter - - - or to the
17 sister. If none of that had been - - - had - - - had
18 happened, this case wouldn't have existed, because
19 they would never would have known.

20 MR. BEN-ARON: If none of that had
21 happened, we wouldn't have known, which means that
22 they would have continued, in our opinion, to violate
23 the law.

24 JUDGE PIGOTT: Well, all right, all right.
25 But what my - - - my point is this. That - - - that

1 for, as your opponent points out, for years and years
2 and years and years, the - - - the - - - the MEs
3 across the state have done what they believe to be in
4 the best interest of - - - of both the public and - -
5 - the - - - the - - - the relatives of the deceased.
6 And - - - and you've got - - - you've got cases where
7 there are no relatives. You've got victims of crime,
8 you've got multi-death accidents and things like
9 that. And in the midst of all this somebody's got to
10 sit down and type a letter to somebody saying, by the
11 way, you know, your - - - your loved one lost a leg
12 in the accident. We can't find it. What would you
13 like us to do?

14 MR. BEN-ARON: The truth is the only - - -
15 Dr. de Roux testified at the trial, and he was
16 actually asked by the trial attorney, Mr. Galante, if
17 the Medical Examiner's Office has been inconvenienced
18 by the new procedure. At that point it was slightly
19 over a year that they'd started the new procedure.
20 Initially he said he didn't want to answer the
21 question. After some coaxing, he said I don't know.
22 All I know is it requires a little bit more
23 paperwork. It requires us to write down who we spoke
24 to, when, and if they want the organ back.

25 JUDGE PIGOTT: If - - - if - - -

1 JUDGE READ: But you - - - we're talking
2 about - - -

3 MR. BEN-ARON: I don't think that's a
4 burden.

5 JUDGE READ: Well, putting - - - you're - -
6 - but you're suing for damages for negligence, that
7 the medical examiner did something wrong, and what -
8 - - what - - - what - - - how did anything the
9 medical examiner do here, what was wrong? What law
10 did he violate? I mean, wasn't he acting within his
11 discretion? You're not saying he was acting in bad
12 faith or anything like that.

13 MR. BEN-ARON: I do not believe that the
14 medical examiner abused his discretion.

15 JUDGE READ: So what duty - - -

16 MR. BEN-ARON: And - - -

17 JUDGE READ: What duty did he owe to you
18 did he breach that allows you to collect damages from
19 the City?

20 MR. BEN-ARON: The duty that he owed was to
21 ultimately return the remains of the body.

22 JUDGE PIGOTT: Which he did.

23 MR. BEN-ARON: Which - - - which he would
24 not have done but for the fact that we discovered
25 that he had retained the organ.

1 JUDGE PIGOTT: But is - - - but is that - -
2 - so what are the - - - what's the million dollars
3 for, because you - - - you've got the - - - you've
4 got the brain back, and it - - - and it was properly
5 buried?

6 MR. BEN-ARON: Ultimately, the brain was
7 returned and it was properly buried.

8 JUDGE PIGOTT: So what's the consequential
9 - - -

10 MR. BEN-ARON: Well, actually now it's
11 600,000. It's not a million dollars. It was
12 reduced.

13 JUDGE READ: So there's some kind of
14 emotional damages now, is that what you're talking
15 about? And - - -

16 MR. BEN-ARON: Yes. And - - - and as - - -

17 JUDGE PIGOTT: Well, wouldn't - - -

18 MR. BEN-ARON: - - - as the Appellate
19 Division held - - -

20 JUDGE RIVERA: Funeral costs.

21 MR. BEN-ARON: - - - and also as the lower
22 court held, the right - - - the right of - - -

23 JUDGE READ: All right. How did the
24 medical - - - how did the medical examiner know he
25 had this duty to inform you that he was - - - and

1 there - - - by the way, it wasn't just the brain that
2 he held back, right? There were - - -

3 MR. BEN-ARON: That is correct.

4 JUDGE READ: - - - other tissue samples.
5 You're saying he should have told you that too?

6 MR. BEN-ARON: I believe that he should
7 tell the family everything that he's holding back.

8 JUDGE PIGOTT: In a list or just generally?

9 MR. BEN-ARON: And that there's an
10 obligation to return the organs.

11 JUDGE PIGOTT: In a list or just generally?

12 JUDGE RIVERA: I - - - but - - - sorry.

13 MR. BEN-ARON: I would say generally. As -
14 - - as the Appellate Division found, I think that
15 it's a generous balance to the City to say that the
16 right of sepulcher is satisfied by merely informing
17 that you're retaining certain organs and you can
18 request them back.

19 JUDGE STEIN: If we find that the statute
20 doesn't require that - - - that the remains, you
21 know, are - - - are medical waste rather than remain
22 - - - or, you know, part of the duty to return the
23 body, then how do you show that there is a private
24 duty, a private right of action?

25 MR. BEN-ARON: The public health law

1 actually states that it's a public right of action.
2 In the - - - in the legislative notes to the public
3 health law it says specifically that even though the
4 law is derived from the penal code, that they're
5 putting it into the public health law because it goes
6 to a specific right that's given to the next of kin.

7 JUDGE READ: So this duty to inform is
8 found in the public health law?

9 MR. BEN-ARON: I'm not saying a duty to
10 inform; a duty to return.

11 JUDGE READ: A duty to return, okay.

12 JUDGE RIVERA: So - - - so in reality, what
13 - - - what you're looking for is that anything that
14 under the law they are not entitled to keep. That is
15 to say, of course the medical examiner has
16 discretion, the AD recognized this, to identify what
17 is medical waste, what cannot be returned that would
18 otherwise violate the statutes. But what doesn't
19 fall into those categories is covered by the right of
20 sepulcher and is otherwise not foreclosed by the
21 statute, that that's what they have to let you know
22 that you can have. If - - - of course, if your
23 clients don't want it, that's their business.

24 MR. BEN-ARON: Right. Under the right of
25 sepulcher, the common law right of sepulcher, I was

1 entitled to the entire body. That was what I was
2 entitled to.

3 JUDGE READ: Um-hum.

4 JUDGE FAHEY: I thought you really were
5 entitled to - - - and this - - - this is - - - I
6 thought you're really entitled to on the right of
7 sepulcher is the right to burial - - -

8 MR. BEN-ARON: Correct.

9 JUDGE FAHEY: - - - of the - - - let me
10 finish just the thought. The right of the remains on
11 - - - on - - - and - - - and burial of the remains
12 and that's the right. And that's why this is unusual
13 as a tort, as we all know, because there are no
14 pecuniary damages yet that are quantified, and you
15 can get - - - and you can get money damages because
16 of purely emotional damages because you've been
17 denied the closure of right to burial.

18 So - - - but your clients had that. They
19 already had that right. What - - - what you're
20 saying is you were - - - you were related - - - were
21 - - - were entitled to a complete remains or some
22 partially complete remains. And I'm wondering if
23 this case hadn't - - - if the - - - if the Second - -
24 - if the First Department hadn't talked about
25 notification, if there would really be a legal issue,

1 because then it would just be the amount of damages
2 as related to the emotional costs of - - - of not
3 being able bury.

4 MR. BEN-ARON: I don't fully understand the
5 question.

6 JUDGE FAHEY: Well, let - - - let me ask
7 you this. Do you agree that - - - that that's what
8 sepulcher is, it's really a right to burial?

9 MR. BEN-ARON: I believe that sepulcher is
10 a right to return of the body, the entire body, for
11 burial.

12 JUDGE FAHEY: Okay.

13 MR. BEN-ARON: There are many religious
14 groups that believe that the body must be buried
15 essentially intact.

16 JUDGE ABDUS-SALAAM: Does - - - does that
17 conflict with any right of the ME to dispose of
18 medical waste which might include any number of
19 things, including organs and tissue and whatever
20 else?

21 MR. BEN-ARON: I don't think so, but I
22 would also say that the statute that authorizes the
23 ME to perform the - - - an autopsy, and there's no
24 question that they have an absolute right, in this
25 particular case they had the discretion to perform an

1 autopsy, I would say is in derogation of the common
2 law, which says that I'm entitled to return of the
3 body for immediate burial. That being said, the
4 statute has to be strictly construed. The statute
5 does not say that the medical examiner has the right
6 to destroy organs. Additionally, pursuant to city
7 regulation, it says specif - - -

8 JUDGE PIGOTT: Yeah. But what does a ME
9 do? I - - - I - - - I honestly don't know. Do they
10 destroy organs? I mean, do they keep tissue because
11 there may be a disease or something that needs to be
12 examined, and by doing that are they then violating
13 your common law right to bury the - - - the person
14 because there's - - - there's tissue missing?

15 MR. BEN-ARON: I don't believe - - - and
16 actually, I thought that the amicus brief supported
17 my position with regard to this. I don't believe
18 that the retention of the organ is per se a violation
19 in this particular case. As Judge Mastro found and -
20 - - and - - - and wrote in the decision for the
21 Appellate Division, the medical examiner has broad
22 discretion to retain the organs until such time as
23 his reasonable need for the organs are satisfied.

24 JUDGE READ: Well, now, I think he - - - I
25 think the medical examiner said that he kept back the

1 samples generally for three years.

2 MR. BEN-ARON: That would be the
3 histological things.

4 JUDGE READ: The histological slide jar.
5 Yeah.

6 MR. BEN-ARON: There's no quest - - -
7 there's no question about that.

8 JUDGE READ: So he could continue to do
9 that, and then he would return them?

10 MR. BEN-ARON: I would argue yes if - - -
11 if he deemed that it was necessary to retain those
12 portions, he absolutely has the right to do so.

13 JUDGE PIGOTT: If he had said - - -

14 JUDGE RIVERA: And he would have inf - - -
15 and he would have inf - - -

16 MR. BEN-ARON: But I believe - - -

17 JUDGE RIVERA: And he would have informed
18 your client - - - or the arg - - - your argument,
19 excuse me, is that he should have informed your
20 client and those like your client so that your client
21 could decide what to do about that. Your client
22 could very well feel that I'm not going to come back
23 three years later. We'll bury him, we'll just
24 cremate it, whatever we're going to do. Others may
25 decide maybe I'll wait. Others may decide whatever

1 they want to decide. But the point is that the ME,
2 as I understand, both that amicus and their position
3 is they do already inform some people. And if - - -

4 MR. BEN-ARON: Right.

5 JUDGE RIVERA: And the order here is they
6 got to inf - - - inform everyone so that people can
7 make these choices within the right of sepulcher that
8 exists.

9 MR. BEN-ARON: I agree with you 100
10 percent. That's exactly what my argument is.

11 JUDGE RIVERA: And - - - and at the same
12 time, if indeed the ME would have decided in this
13 case, any other case, I'm not returning the brain
14 because it's medical waste, it's contaminated,
15 whatever, you have no rights, because that falls
16 within the statute of what the ME can do.

17 MR. BEN-ARON: Well, the issue of medical
18 waste is interesting because even as they set forth
19 in the amicus, the - - - defining the organs as
20 medical waste does not give the medical examiner the
21 right to destroy them.

22 JUDGE ABDUS-SALAAM: Counsel, was this
23 argument about the public health law and medical
24 waste, was that advanced in the Appellate Division?

25 MR. BEN-ARON: I don't believe that it was,

1 but it's not my argument. It's their argument. But
2 in response to the argument, I would say the City
3 regulations specifically say that only the next of
4 kin have the right to determine how their - - - their
5 next of kin's remains will be disposed of. The fact
6 that another statute defines these organs as medical
7 waste does not necessarily say that the medical
8 examiner has the right to destroy. Because as the
9 amicus properly points out - - -

10 JUDGE ABDUS-SALAAM: That - - - I - - - I
11 agree with you. The City - - -

12 MR. BEN-ARON: - - - giving to the medical
13 - - -

14 JUDGE ABDUS-SALAAM: - - - nobody advanced
15 it.

16 MR. BEN-ARON: I'm - - -

17 JUDGE ABDUS-SALAAM: Nobody advanced it in
18 the Appellate Division.

19 MR. BEN-ARON: Correct.

20 JUDGE ABDUS-SALAAM: The Appellate Division
21 came up with that. The Appellate Division came up
22 with that argument.

23 MR. BEN-ARON: No, actually, I - - -

24 JUDGE ABDUS-SALAAM: In the Dixon case.

25 MR. BEN-ARON: Actually, I think that the

1 Appellate came up with it after the Appellate
2 Division decision, I think. But that medical waste
3 argument, just to finish it - - - I'm sorry. I - - -
4 I do think that it is important. Among the ways to
5 dispose of medical waste is burial and cremation. So
6 to return those organs to a funeral home so that the
7 family can have another burial or have a cremation
8 fully comports with the statute that says we're
9 properly disposing of these organs as medical waste.

10 JUDGE STEIN: But - - - but the statute
11 gives the ME the discretion to decide which way to -
12 - - to do it.

13 MR. BEN-ARON: No, it doesn't.

14 JUDGE STEIN: No?

15 MR. BEN-ARON: Nowhere in the statute does
16 it say that. The statute authorizes the autopsy. It
17 does not say anything at all about what you do with
18 the organs after the autopsy is completed.

19 JUDGE RIVERA: But the organ may be an - -
20 - well, not - - - not if you're talking about a - - -
21 a - - - a health emergency or something like that.
22 You're talking about something that's contaminated,
23 the ME there - - -

24 MR. BEN-ARON: Clearly, if something's
25 contaminated - - -

1 JUDGE RIVERA: If it's under the statute or
2 otherwise. You're saying apart from what may have
3 already been legislatively designated - - -

4 MR. BEN-ARON: Correct.

5 JUDGE RIVERA: - - - as material that would
6 never be returned to the public or a funeral parlor.

7 MR. BEN-ARON: Correct.

8 CHIEF JUDGE LIPPMAN: Anything else,
9 counsel?

10 MR. BEN-ARON: I don't think so, Your
11 Honor.

12 CHIEF JUDGE LIPPMAN: Okay. Thank you,
13 counsel.

14 MR. BEN-ARON: Thank you.

15 CHIEF JUDGE LIPPMAN: Counsel, com - - -
16 coming back to the policy argument, has the world
17 come to an end with the change of practice that
18 you've undertaken in response to this - - - this
19 earlier decision?

20 MR. STERNBERG: We're all here, Your Honor.
21 So - - - so - - -

22 JUDGE RIVERA: So far so good.

23 CHIEF JUDGE LIPPMAN: But that - - - but I
24 mean it in - - - in re - - -

25 MR. STERNBERG: That's not to say that it's

1 - - -

2 CHIEF JUDGE LIPPMAN: - - - in relation to
3 the burden aspect, to the - - - the - - - the policy
4 argument that it - - - it's bothersome to have to do
5 it. It hasn't been such a great burden, has it?

6 MR. STERNBERG: Well, no, I - - - I - - -
7 Your Honor, I would disagree, Your Honor. I think
8 that - - - and I think the amicus brief outlines that
9 very, very well. That - - -

10 CHIEF JUDGE LIPPMAN: Are MEs protesting in
11 the streets around the state that - - - that this is
12 such a burden and we can't do our job?

13 MR. STERNBERG: Not to my knowledge, Your
14 Honor. But then again, you know, that - - - that's
15 really not - - - not the issue here.

16 CHIEF JUDGE LIPPMAN: Well, you've got - -
17 - there's an - - -

18 MR. STERNBERG: And I - - - I would suggest
19 - - - I would - - -

20 CHIEF JUDGE LIPPMAN: There's an ancient
21 right that it's - - - that is at issue here. So,
22 again, from my perspective, I'm just saying I think
23 we can argue endlessly about the statutory framework
24 and what it is, but - - - but isn't it just better?
25 Why wouldn't you tell people about this?

1 MR. STERNBERG: Well - - -

2 JUDGE RIVERA: Or why don't you tell
3 everyone because you already do tell some people?

4 MR. STERNBERG: Your Honor used the word
5 that we inform. In - - - in fact, that - - - that
6 implies to me that - - - that you're suggesting that
7 we take an - - - we do something affirmatively to
8 some people, not to other people. We don't. We - -
9 - we react to what people are telling us and - - -

10 JUDGE READ: So if somebody comes to you
11 and says I have a religious - - - a religious
12 objection to an autopsy or I have a religious reason
13 to want to have - - -

14 MR. STERNBERG: And then it's discussed and
15 as it's - - - as it's discussed with - - -

16 JUDGE RIVERA: That's - - - that's - - -
17 those - - - there are existing protocols about that
18 now?

19 MR. STERNBERG: Again, I don't think it - -
20 - there's nothing written. There's nothing formal.
21 But we - - -

22 JUDGE RIVERA: So it's left to the
23 individual of - - - of - - - well, Dr. Forensic,
24 whoever's doing the autops - - - whoever has this
25 conversation, it's left to that individual to decide

1 how to proceed.

2 MR. STERNBERG: But - - -

3 JUDGE RIVERA: And maybe they do exactly
4 what you're about to say or were trying to say or
5 they may themselves initiate the conversation. Is
6 that possible?

7 MR. STERNBERG: It - - - do - - - do they
8 initiate the conversation? No. My bel - - - my - -
9 - my understanding is that - - - that they react to
10 the conversation that is brought to them. Of course,
11 with respect to the religious objections, there are
12 statutory guidelines.

13 JUDGE RIVERA: Yeah.

14 MR. STERNBERG: And there are statutory
15 requirements with respect to honoring religious
16 requests. We - - -

17 JUDGE RIVERA: I understand. But you're
18 saying that's if someone makes the request.

19 MR. STERNBERG: Some - - - someone comes -
20 - -

21 JUDGE RIVERA: Absent that, no one
22 inquires.

23 MR. STERNBERG: Someone inquires, someone
24 comes to us. We - - - we - - - we - - - we're not
25 treating people differently, in other words. We - -

1 - we treat people the same and we react to what
2 they're telling us and we act according to the way we
3 understand the law.

4 JUDGE RIVERA: But if - - - if someone came
5 to you but didn't have a religious reason for it,
6 they just say I - - - I just can't live with the
7 thought that my son's body will not be buried with
8 his brain, that - - -

9 MR. STERNBERG: Absolutely.

10 JUDGE RIVERA: - - - that would be separate
11 and apart from the religious exemptions that you
12 already add - - - address?

13 MR. STERNBERG: That's what happened here,
14 Your Honor.

15 JUDGE RIVERA: No, no, I understand. But
16 that's my question to you. That's - - - that's my
17 question to you. You say people come and inquire, so
18 your - - - your - - - your practice, your position is
19 that if someone inquires, only if they substantiate
20 it with a religious reason for why they want to do
21 this - - -

22 MR. STERNBERG: No.

23 JUDGE RIVERA: - - - you will not honor the
24 request?

25 MR. STERNBERG: No, no. Not at all, Your

1 Honor. I mean the Ship - - -

2 JUDGE STEIN: So if the Shipleys had come
3 to you and said, okay, we understand you have to do
4 this - - - this autopsy, but it's really important to
5 us that - - - that we bury our son in - - - in his
6 entirety - - -

7 MR. STERNBERG: And we - - - and - - -

8 JUDGE STEIN: - - - what - - - what would
9 you have done then?

10 MR. STERNBERG: We - - - we would work out
11 with the Shipleys how to best honor their request. I
12 - - -

13 JUDGE RIVERA: Well, isn't it then, if that
14 is so, whether you want to call it the better
15 practice or fairness or what the right of sepulcher
16 requires or what the - - - the public health law does
17 not permit you otherwise not to do, isn't it then
18 appropriate, because some people may not be as well
19 informed to know that they could inquire, to simply
20 let them know you can inquire? You don't want to,
21 you don't have to. Isn't that what the AD is simply
22 asking you to do?

23 MR. STERNBERG: Well - - -

24 JUDGE RIVERA: Or ordering you to do?

25 MR. STERNBERG: In fact, Your Honor, our

1 position is that even assuming that we can read into
2 the statute and the common law some obligation to
3 return - - -

4 JUDGE RIVERA: Um-hum.

5 MR. STERNBERG: - - - organs, we don't have
6 an obligation to inform. We - - - we do separate - -
7 - it's the obligation to - - - and it's then - - - I
8 could be here all night, Your Honor, and - - - and I
9 wish I could. The only reason - - -

10 CHIEF JUDGE LIPPMAN: Finish - - - finish
11 your thought, counsel, and you won't be here all
12 night.

13 JUDGE READ: I have one - - - I have one
14 question.

15 JUDGE FAHEY: We agree with that.

16 JUDGE READ: I have one question.

17 MR. STERNBERG: The only reason damages
18 were awarded in this case was because of the medical
19 examiner's failure to inform. They were not awarded
20 damages for - - - they got all the organs back. They
21 did not get damage - - - the only reason they got
22 damages was because the medical examiner - - -

23 CHIEF JUDGE LIPPMAN: Okay, Judge Read. Go
24 ahead.

25 JUDGE READ: What's ever happened to - - -

1 to the Dixon case? Whatever happened there?

2 MR. STERNBERG: I - - - I'm sorry, Your
3 Honor. I can't answer.

4 JUDGE READ: Can't answer? Oh, can't - - -

5 MR. STERNBERG: I - - - I - - - I just
6 don't know what happened.

7 JUDGE READ: Okay, all right.

8 CHIEF JUDGE LIPPMAN: Oh, and, counselor,
9 both of you, you are free for the evening.

10 MR. BEN-ARON: Thank you, Your Honor.

11 CHIEF JUDGE LIPPMAN: Thank you.

12 Appreciate it.

13 (Court is adjourned)

14

15

16

17

18

19

20

21

22

23

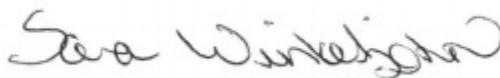
24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Shipley v. City of New York, No. 96 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: May 12, 2015