State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Wednesday, February 10, 2016

No. 27 Government Employees Insurance Co. v Avanguard Medical Group, PLLC

This appeal stems from a dispute over no-fault insurance benefits between Government Employees Insurance Co. and affiliated companies (collectively, GEICO) and Avanguard Medical Group, PLLC, a professional corporation owned by Dr. Mark Gladstein, who performs office-based surgery at Avanguard's offices in Brooklyn. Gladstein billed GEICO for surgeries he performed for accident victims the company insured, and Avanguard billed GEICO separately for facility fees to cover the cost of technicians, nurses, equipment and supplies it provided for the surgeries. GEICO paid for Gladstein's own medical services, but refused to pay about $1.3 million in facility fees charged by Avanguard. GEICO brought this action for a judgment declaring it was not obligated to pay facility fees to Avanguard, and it moved for a preliminary injunction and stay of lawsuits and arbitrations commenced by Avanguard.

GEICO argued the No-Fault Law requires it to pay facility fees only for services performed at hospitals and ambulatory surgery centers licensed under Public Health Law article 28, not for office-based surgery performed at offices such as Avanguard's, which are licensed under Public Health Law § 230-d. The Department of Financial Services (DFS) has adopted fee schedules establishing the allowable facility fees for hospitals and ambulatory surgery centers licensed under article 28, but not for office-based surgery providers licensed under section 230-d. Insurance Law § 5102(a)(1) requires automobile insurers to cover "basic economic loss" up to $50,000, including "[a]ll necessary expenses incurred for ... medical ... services," subject to the limitations of Insurance Law § 5108, which prohibits providers from charging insurers more than the amounts set in the fee schedules. Avanguard argued it was entitled to facility fees under a "catch-all" provision adopted by DFS, 11 NYCRR 68.5, which addresses reimbursable medical services that are "not set forth in the fee schedules." The regulation states that, "if [DFS] has not adopted or established a fee schedule applicable to the provider, then the permissible charge for such service shall be the prevailing fee in the geographic location of the provider...."

Supreme Court rejected GEICO's claims. While the fee schedules establish facility fees only for entities licensed under article 28, it said, "they do not provide that only article 28 facilities are entitled to bill for facility fees ... or that an [office-based surgery] entity ... is precluded from recovering facility fees." Therefore, it said, "the facility rate issue effectively defaulted to the [catch-all] provisions of § 68.5(b) -- under which fees would then be payable based on prevailing rates" in Avanguard's geographic area.

The Appellate Division, Second Department reversed, saying, "There is ... no provision for recovery of a facility fee for the performance of an 'office-based surgery' performed in a practice and setting accredited under [section] 230-d," which "imposes a substantially more modest level of oversight and regulation than article 28." The absence of a facility fee schedule for office-based surgery "supports GEICO's argument that a facility fee is not a necessary expense" for such services. It said the catch-all provision in section 68.5 does not apply because "there is indeed a fee schedule for facility fees" charged by article 28 facilities, though it "is not applicable to Avanguard. Thus, a prerequisite to application of the default provision is absent."

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For respondents GEICO: Barry I. Levy, Uniondale (516) 357-3000

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To be argued Wednesday, February 10, 2016

No. 28 Matter of Aoki v Aoki

Rocky Aoki, founder of the Benihana restaurant chain, created the Benihana Protective Trust (BPT) in 1998 to hold his stock and other assets of the business. The trust agreement gave him the power to appoint beneficiaries of the BPT through his will. He selected as trustees two of his six children, Kevin and Kana Aoki, and his attorney Darwin C. Dornbush. After Rocky married his third wife, Keiko Ono Aoki, in July 2002, Kevin and Kana sought advice from Dornbush about how to protect their interest in the trust from claims by Keiko. Dornbush's partner Norman Shaw, a trusts and estates specialist, drafted a partial release of Rocky's power of appointment that restricted distribution of BPT assets to only his children and grandchildren. In September 2002, Rocky signed the one-page release, which states, "I hereby irrevocably partially release [my] power of appointment so that, from now on, I shall have only ... a testamentary power to appoint any of the principal and accumulated net income remaining at my death to ... any one or more of my descendants." In December 2002, Rocky signed another partial release prohibiting him from making bequests from the BPT to any "non-resident alien."

In August 2003, Rocky executed a codicil to his will, drafted by his wife's attorney Joseph Manson, exercising his power of appointment to give 25 percent of the BPT assets and the income from the remaining 75 percent to Keiko. Manson asked Dornbush for an opinion letter addressing the validity of the codicil. In September 2003, Shaw told Manson that the bequests to Keiko were invalid because they were barred by the partial releases, which were irrevocable. Two weeks later, Rocky said in an affidavit that he did not understand the releases were irrevocable and he did not intend to limit his ability to bequeath BPT assets as he chose, but he never took any steps to challenge the validity of the releases. He removed Dornbush as a trustee in 2004. Rocky executed a new will in 2007, making the same dispositions to Keiko as in the codicil; but he added that if, "contrary to my desires, the [partial releases] are found to be valid," the trust assets should be divided equally between sons Devon and Steven Aoki. Rocky died in 2008. The BPT trustees brought this action against Devon, Steven and Keiko to determine validity of the releases. Keiko sought a declaration they were invalid "as they are the product of fraud." Devon and Steven moved for summary judgment declaring the releases valid.

Surrogate's Court denied the summary judgment motion, finding that Dornbush and Shaw were Rocky's fiduciaries, due to their attorney-client relationship, and that Keiko raised a triable question of whether the attorneys informed him the releases were irrevocable. After a bench trial, the court invalidated the releases, finding Devon and Steven failed to prove the attorneys did not induce Rocky to sign them by failing to explain the releases were irrevocable.

The Appellate Division, First Department reversed and declared the releases valid, relying on Cowee v Cornell (75 NY 91 [1878]). For the doctrine of constructive fraud to apply, it said, "the fiduciary must be a party to or have an interest in the subject transaction," but "neither Dornbush nor Shaw were parties to the releases and thus could not benefit from them. The Surrogate therefore erroneously shifted the burden of proof to Devon and Steven to prove that the releases were not procured by fraud." It said there was no evidence the attorneys misled Rocky about the nature of the releases, Rocky testified in prior litigation "that Shaw did explain the effect of these waivers" and, "[m]ost significantly," Rocky made no attempt to challenge their validity, "thereby calling into question his later allegations that the waivers did not represent his wishes."

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For respondents Devon and Steven Aoki: David C. Rose, Manhattan (212) 421-4100

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To be argued Wednesday, February 10, 2016

No. 29 People v Sean John *(papers sealed)*

Police officers responded to a report of a man with a gun at a Brooklyn address in January 2010 and met a couple in front of the building, a three-story brownstone. The man told them Sean John, who lived in the building, had just confronted him with a handgun, pointing it at his chest, and the woman said John had assaulted her several hours earlier. The officers entered the building, frisked John, and searched his apartment without a warrant, but found no gun. They arrested John for assault, handcuffed him, and placed him in their patrol car. One of the officers then spoke with a ground-floor tenant, who said she had seen John "go down into the basement with something in his hand." She directed the officer to the basement door and he went into the basement to search, finding a blue box labeled Smith and Wesson on the floor. The box was latched, but was not locked. The officer opened the box and found a handgun and ammunition, which belonged to John.

Supreme Court denied John's motion to suppress the gun, ruling that he had no reasonable expectation of privacy in the basement of the apartment building. The court also found the officer had consent for the basement search from the ground-floor tenant, when she told the officer John had carried something to the basement. "[T]he only fair, logical and reasonable inference that you can get from that is that [the tenant] certainly gave [the officer] permission to go search the basement." John was convicted of second-degree weapon possession and menacing and was sentenced to 4½ years in prison.

The Appellate Division, Second Department affirmed. A three-justice majority found the search and seizure were justified under the plain view doctrine. The officer "was lawfully present in the apartment building" and found the gun "in a gun box located in a common storage area accessible to anyone in the building. The box was not locked" and "was clearly marked 'Smith and Wesson.' Under these circumstances, the distinctive label on the outside of the box 'proclaim[ed] its contents' and ... made it immediately apparent to the officer that the box contained a firearm..., thus authorizing the officer to seize the box without a warrant," they said, citing People v Velasquez (110 AD3d 835). "Furthermore, since the gun box, 'by its very nature, could not support any reasonable expectation of privacy because its content could be inferred from its outward appearance'..., the officer lawfully opened the box, and discovered the handgun and ammunition inside."

A fourth justice concurred in result, "but only on constraint of this court's precedent in People v Velasquez...." She said, "While I recognize the several exceptions to the warrant requirement..., I fear that the exceptions ... have swallowed the rule. In my view, the police should have obtained a warrant prior to seizing and opening the gun box in the common area of the subject building.... There was no emergency or exigent circumstances to justify the search and seizure of the gun box without first obtaining a warrant. The defendant was already under arrest at the time the gun box was searched, and no clear threat to public safety was present."

John argues a warrant was required to search the contents of the "closed container" in the basement. He also argues that the admission of DNA evidence at his trial, without the testimony of those who performed the testing, violated his constitutional right to confront the witnesses against him.

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For respondent: Brooklyn Assistant District Attorney Sholom J. Twersky (718) 250-2537

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To be argued Wednesday, February 10, 2016

No. 46 Matter of NYC C.L.A.S.H., Inc. v New York State Office of Parks, Recreation and Historic Preservation

In February 2013, the State Office of Parks, Recreation and Historic Preservation adopted a regulation, 9 NYCRR 386.1, which establishes outdoor no-smoking areas in parks, historic sites and recreational facilities under its jurisdiction and, for the seven state parks in New York City, prohibits virtually all outdoor smoking. The Office said the rule was necessary to allow "patrons to enjoy the outdoors, breathe fresh air, walk, swim, exercise and experience State Parks' amenities and programs without being exposed to secondhand tobacco smoke and tobacco litter." New York City Citizens Lobbying Against Smoker Harassment (CLASH), a non-profit organization formed to advance and protect smokers' rights, filed this proceeding two months later to strike down the regulation, arguing the Office of Parks violated the separation of powers doctrine by usurping the authority of the Legislature.

Supreme Court held the regulation was adopted in violation of the separation of powers doctrine and declared it invalid, enjoined Parks officials from enforcing it, and ordered them to remove any "No Smoking" signs they installed in connection with it. Applying the factors outlined in Boreali v Axelrod (71 NY2d 1), it said the Office of Parks adopted the smoking restrictions, an area "fraught with 'difficult social problems,'" in "the absence of a legislatively established outdoor tobacco use policy.... Nor does the broad language of the Parks, Recreation and Historic Preservation Law empower respondents to promulgate rules regulating conduct bearing any tenuous relationship to park patrons' health or welfare.... Accordingly, the court finds that respondents extended their reach beyond interstitial rulemaking and into the realm of legislating." The Legislature had tried, and failed, to act on the issue, it said. "Between the 2001-2002 and 2013-2014 sessions, both the Senate and Assembly have attempted, albeit unsuccessfully, to target smoking in public parks.... [T]his is a strong indication that the Legislature is uncertain of how to address the issue." Finally, it said, "special expertise or technical competence is no longer required to understand that secondhand tobacco smoke is deleterious to the health of nonsmokers...."

The Appellate Division, Third Department reversed, ruling the Office of Parks did not intrude on legislative powers under Boreali. "First, we find no indication that [Parks] improperly balanced economic and social concerns against its stated goal in order to act on its own ideas of sound public policy...," it said. "Rather, all aspects of the regulation are grounded in [Parks'] stated purpose -- to allow all patrons to enjoy the fresh air and natural beauty of its outdoor facilities.... Next, we do not find that [Parks] 'wrote on a clean slate, creating its own comprehensive set of rules'.... The Legislature has instructed [Parks] to '[o]perate and maintain' its sites while '[p]rovid[ing] for the health, safety and welfare of the public using [those sites]' (PRHPL 3.09 [2], [5])." Parks officials did not improperly intrude "upon an area that is a matter of legislative debate," despite the Legislature's failed attempts to restrict outdoor smoking, it said. "We are not persuaded that these failed bills are enough to warrant the conclusion that [Parks] has exceeded its authority.... Finally, we find that there was sufficient agency expertise required to enact this rule such that it did not intrude upon legislative authority."

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