State of New York Court of Appeals

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

To be argued Thursday, March 24, 2016 (arguments begin at noon)

No. 55 Friends of Thayer Lake LLC v Brown

Friends of Thayer Lake LLC, the Brandreth Park Association and individual plaintiffs are the owners of a large tract of Adirondack land in the Town of Long Lake, Hamilton County. The land has been in the hands of the Brandreth family since an ancestor bought it from the State in 1851. It is bordered on the north by the Whitney Wilderness Area, acquired by the State in 1998, which contains a network of lakes, ponds and streams called the Lila Traverse that allows canoeists to travel between Little Tupper Lake on the Wilderness Area's eastern side and Lake Lila on the western side. A two-mile stretch of shallow ponds and streams known as the Mud Pond Waterway crosses the plaintiffs' property, although an 0.8-mile carry trail on state land permits canoeists to bypass the waterway.

Phil Brown, editor of the Adirondack Explorer, tested the public's right of access to the Mud Pond Waterway by canoeing through it in May 2009. He used a trail to portage around 500 feet of rapids. The owners responded by posting more "no trespassing" signs, roping off the waterway at both ends, and installing surveillance cameras. They also brought this action against Brown, seeking damages for trespass and a declaration that the waterway is not navigable-in-fact under New York common law. The State intervened as a defendant and, with Brown, sought a declaration that the waterway is navigable-in-fact and, thus, open for public travel by boat. Supreme Court granted summary judgment to Brown and the State, declaring the waterway navigable-in-fact and the owners' efforts to deter access a public nuisance.

The Appellate Division, Third Department affirmed in a 3-2 decision, ruling the waterway is subject to a public right of navigation under Adirondack League Club v Sierra Club (92 NY2d 591) based on "'the capacity of the river for transport, whether for trade or travel,'" even though its past use "has been almost exclusively private and recreational rather than commercial.... [T]he test examines a waterway's capacity for use and not merely its actual use." It said, "[N]either the portage around the relatively short Mud Pond rapids nor the presence ... of other incidental obstacles such as beaver dams and fallen trees renders the Waterway nonnavigable.... [T]he presence of such occasional obstructions in a navigable-in-fact waterway gives rise to a public right to circumvent them by 'mak[ing] use, when absolutely necessary, of ... the right to portage on riparian lands'...." It said "no showing of necessity for public use of the Waterway is required.... The standard is practical utility, not necessity...."

The dissenters argued that "recreational use alone is insufficient to establish that a body of water" is navigable-in-fact. "[W]e cannot agree that the feasibility of using the Waterway for recreation and the fact that the public is capable of reaching it through a series of lakes, ponds, streams and portages render it a practical means of transportation so as to be navigable-in-fact. To conclude that they do would, in our view, unnecessarily expand our navigability-in-fact doctrine and destabilize settled expectations of private property ownership by opening up remote, unpopulated, privately owned bodies of water as long as the public has some way, however arduous and recently acquired, of gaining access to them."

For appellants Friends of Thayer Lake et al: Dennis J. Phillips, Glens Falls (518) 792-1174
For respondent Brown: John W. Caffry, Glens Falls (518) 792-1582
For respondents State and DEC: Assistant Solicitor General Brian D. Ginsberg (518) 776-2040

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To be argued Thursday, March 24, 2016 (arguments begin at noon)

No. 56 Sherman v New York State Thruway Authority

In February 2011, State Trooper Rodney Sherman slipped and fell on an icy sidewalk at the Troop T barracks in Newburgh, striking his head. He brought this personal injury action against the New York State Thruway Authority, the owner of the property, claiming it was negligent in failing to remove the ice or sand the sidewalk. At his examination before trial, he said there was an ice storm the night before his accident, which had become a "wintry mix" of snow, ice, sleet and rain when he drove to the barracks for his 7 a.m. shift. By about 8:15 a.m., when he fell, he said the weather was warmer with a light rain. Authority truck drivers recorded weather conditions in their log books as "lt. rain, snow &ice" at 11 p.m. the night before, and as "lt. rain" at 7 a.m. on the morning of the accident.

The Thruway Authority moved for summary judgment dismissing the claim on the ground, among others, that it was not liable because there was a storm in progress when Sherman fell. It submitted deposition testimony from Sherman and its employees, along with a certified weather report showing there had been continuous rain from 10:45 p.m. the night before to 3:45 p.m. on the day of the accident, with temperatures ranging from 34 to 36 degrees. It argued, "As there was still precipitation at the time of [the] accident, the storm in progress doctrine applies and the case should be dismissed as the 'storm' had not stopped and [the Authority] did not have a reasonable time to remedy any situation." Sherman responded that "there are no cases which hold that mere rain, rather than freezing rain, constitutes a storm in progress."

The Court of Claims denied the motion, saying "there are multiple issues of fact that must be resolved before the court can conclude, as a matter of law, that there was a storm in progress when claimant fell...."

The Appellate Division, Second Department reversed and dismissed the claim, saying the Authority "established that there was a storm in progress at the time of the accident. The deposition testimony of [Sherman], which was supported by certified climatological data, demonstrated that precipitation was falling when the claimant allegedly slipped and fell on ice..., and for a substantial period of time prior to the accident. Inasmuch as the weather condition in question was in progress when the claimant's accident occurred, the [Authority] demonstrated its prima facie entitlement to judgment as a matter of law dismissing the claim...."

Sherman argues the Appellate Division has split over how to apply the storm in progress doctrine when precipitation continues, but not as snow or ice. "Courts in the First, Third and Fourth Departments ... have applied a reasoned approach to this problem and consider the storm in progress to have ended, and the property owner's duty to ameliorate the slippery condition to begin, when the falling precipitation is not causing an appreciable accumulation of snow and ice." He says this rule should be adopted and his claim reinstated.

For appellant Sherman: Norman M. Block, Hawthorne (914) 769-3100
For respondent Thruway Authority: Andrew Zajac, Jericho (516) 822-8900

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To be argued Thursday, March 24, 2016 (arguments begin at noon)

No. 57 Plotch v Citibank, N.A.

In 2000, the owner of a Staten Island condominium unit took out a $54,000 line-of-credit loan from Citibank secured by a mortgage on his apartment. In 2001, he obtained an additional loan of $38,000 from Citibank secured by a second mortgage on his unit. On the same day, the borrower and Citibank executed a consolidation agreement combining the two mortgages "into a single mortgage lien" in the amount of $92,000. More than seven years later, after the borrower failed to pay common charges owed to the condo's board of managers, the board filed a lien against his apartment in 2009, then brought an action to foreclose and auction the unit. Citibank, named as a defendant in the action, did not answer. Supreme Court granted judgment to the board and ordered that the unit be sold at auction subject to "[t]he first Mortgage of record."

Adam Plotch purchased the unit at auction for $15,100 in 2010, then commenced this action against Citibank seeking a declaration that the $38,000 second mortgage was subordinate to the condo board's common charges lien under Real Property Law § 339-z and, thus, was extinguished by the foreclosure. Citibank answered that the 2001 consolidation agreement combining the mortgages was the first mortgage of record and had priority over the condo board's lien pursuant to the statute. Real Property Law § 339-z provides, "The board of managers [of a condominium] ... shall have a lien on each unit for the unpaid common charges thereof ... prior to all other liens except only ... all sums unpaid on a first mortgage of record.... Upon the sale or conveyance of a unit, such unpaid common charges shall be paid out of the sale proceeds." Supreme Court granted Citibank's cross motion for summary judgment, declaring the consolidated mortgages constitute the first mortgage of record.

The Appellate Division, Second Department affirmed. "Since Real Property Law § 339-z is in derogation of the common-law principle of 'first in time, first in right,' the statutory right to priority must be narrowly construed...," it said. "Moreover, Citibank's second mortgage comes within the ambit of the statutory priority accorded to all sums unpaid on a first mortgage of record over a lien for unpaid common charges.... Thus, the common charges lien does not have priority over the consolidation agreement."

Plotch argues the ruling conflicts with the language and intent of section 339-z to ensure access by condo boards to the equity in their units, which enables them to enforce their liens and collect unpaid common charges "that are so crucial to the financial viability of condominium associations." Noting that the condo board was not a party to the consolidation agreement and did not agree to give up its statutory priority, he says the ruling permits mortgage holders to "unilaterally elevate the priority" of a second mortgage by consolidating it with a first mortgage. He argues consolidated mortgages should retain their separate character and priority.

For appellant Plotch: Bruce H. Lederman, Manhattan (212) 564-9800
For respondent Citibank: Paul A. Levine, Albany (518) 433-8800

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To be argued Thursday, March 24, 2016 (arguments begin at noon)

No. 58 People v Wayne Henderson *(papers sealed)*

Wayne Henderson was 15 years old in January 2010, when he and his girlfriend were accused of repeatedly stabbing a 12-year-old friend in Queens, allegedly in retaliation for the victim informing his mother that Henderson and his girlfriend used marijuana. At trial, Henderson's attorneys contended the victim pulled a knife on Henderson first and his girlfriend inflicted the stab wounds, and they raised a defense of diminished capacity caused by mental illness, alcohol and drugs. In support, they called as an expert witness a physician who specialized in forensic and child psychiatry. He noted that Henderson had been placed at a residential center for psychiatric treatment of adolescents in 2008, although he was not placed on psychotropic medication until his arrest in this case. The expert diagnosed Henderson as suffering from schizophreniform disorder exacerbated by marijuana use. He described Henderson's conduct as "bizarre" and cited the random nature of the stab wounds as evidence of his lack of intent. On cross-examination, the expert conceded that he never reviewed photographs of the wounds or the victim's medical records, saying he instead relied on defense counsel's description, and said he was not told of the possible motive for the attack. He conceded this information could have changed his opinion. In summation, defense counsel said she did not show photographs of the stab wounds to the expert because he was not hired "as a medical doctor" to diagnose the victim's injuries. Henderson was convicted of second-degree attempted murder and two counts of first-degree assault and was sentenced to 6⅔ to 20 years in prison.

The Appellate Division, Second Department reversed, finding Henderson was deprived of effective assistance of counsel. "The People argue that defense counsel limited disclosure of information to her own expert as a trial strategy, because if the expert knew all the facts, he 'could not have testified in a manner helpful to the defense.' However, the defendant had a psychiatric history, and there was evidence ... that he favorably responded to psychotropic medication. The expert's explanation of the significance of these facts would have formed an adequate defense...," it said. "The so-called strategic decision to withhold information from the expert allowed the prosecutor to demonstrate to the jury that the expert was ill-informed. Further, defense counsel's explanation during summation for her failure to disclose the nature of the complainant's injuries to the expert was not logical and indicated that the failure to disclose was intentional, and possibly misleading. Assuming that the failure to disclose was a strategic decision, it was not consistent with the actions of a reasonably competent attorney."

The prosecution argues, "Counsel's representation, based on a well-prepared multi-pronged defense against overwhelming proof of guilt, was effective, and the Appellate Division's contrary conclusion -- founded exclusively on what was at most a lone, strategically-motivated tactical trial decision as to one aspect of a single witness's testimony -- was fatally flawed.... The court failed to heed this Court's admonitions about single errors, used hindsight to substitute its tactical choices for counsel's, and never even attempted to perform a prejudice analysis or assess whether the error was 'dispositive.'"

For appellant: Queens Assistant District Attorney Christopher J. Blira-Koessler (718) 286-5988
For respondent Henderson: Leila Hull, Manhattan (212) 693-0085