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, May 5, 2016

No. 93 S.L. v J.R. *(papers sealed)*

The parties in this child custody case, S.L (the mother) and J.R. (the father), were married in 1997 and have two minor children. The father was a partner in a Manhattan law firm and the mother practiced law part-time in White Plains, near their home. The father moved out of the home in May 2012 and the mother sued for divorce in September 2012. Also in September, the mother texted the father threatening to burn down his house and set his clothes on fire, then sent him photographs of piles of his burning clothes. He went home to find broken windows in his house and his burned clothing in the driveway. He obtained an order of protection against her and she was charged with misdemeanor harassment, but the charge was later dropped when he failed to appear to testify at her trial. When he sought temporary sole custody of the children, she admitted her involvement in the clothing fire and several other incidents, including a 2008 suicide attempt for which she was hospitalized, and that she was charged with aggravated harassment in 2011 for emailing nude photographs of a former lover to members of his family.

In October 2012, Supreme Court found there were "enough red flags" to justify granting the father's motion for temporary custody of the children, with visitation for the mother supervised by Supervised Visitation Experts (SVE). Her visitation and family therapy were suspended in April 2013 by SVE and the therapist, who found it would not be in the children's best interest to continue unless the mother entered anger management therapy.

In October 2013, the court awarded sole physical and legal custody to the father without a hearing. "In consideration of the history of this case and all the facts present here...," it said, "[a] hearing is not necessary ... since the allegations are not controverted." Among other things, it said the mother "has been charged in three criminal cases in the Integrated Domestic Violence part, all of which are still pending. Two of those cases involve alleged violations of orders of protection" that prohibit her from having any contact with the children or father.

The Appellate Division, Second Department affirmed. "Although a custody determination generally may only be made following a full and comprehensive evidentiary hearing..., no hearing is necessary where, as here, 'the court possesses adequate relevant information to enable it to make an informed and provident determination as to the child's best interest,'" it said, citing its 2004 ruling in Matter of Hom v Zullo (6 AD3d 536).

The mother argues that "a parent's constitutional due process rights mandate a full and fair opportunity to present evidence" at a hearing in a contested custody case. She also contends the "adequate relevant information" standard is "impermissibly vague" and undefined. "Because a thorough and comprehensive evaluation of the facts as derived from the evidence is not performed when this standard is employed," she says, "children may be wrongly deprived of the companionship and guidance of both parents or placed in the custody of an ill-suited parent who is simply a better litigant."

For appellant S.L. (mother): Harold R. Burke, West Harrison (203) 219-2301
For respondent J.R. (father): John Rogers, Manhattan (212) 808-2727
For the children: John A. Pappalardo, White Plains (914) 761-9400

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No. 94 People v Anthony Berry

Anthony Berry was arrested in October 2008 when narcotics officers executed a search warrant at the Brooklyn apartment of a friend, T.H., who supported herself by dealing drugs. Berry, who was not mentioned in the warrant, was homeless and occasionally spent the night there. He was sleeping in the living room with T.H. and three of her minor children when the police entered and seized quantities of loose and bagged cocaine. Berry was charged with three counts of unlawfully dealing with a child in the first degree under Penal Law § 260.20(1), as well as various drug possession charges.

T.H. admitted the drugs belonged to her, pled guilty is exchange for a sentence of probation, and testified on Berry's behalf at his trial. She said that Berry had no authority over her children and she had never told him about the drugs in her apartment. Berry was acquitted of the drug charges, but convicted of three counts of first-degree unlawfully dealing with a child. He was sentenced to a year in jail.

On appeal, Berry argued there was insufficient evidence to prove his guilt under Penal Law § 260.20(1), which applies when a defendant "knowingly permits a child less than eighteen years old to enter or remain in or upon a place ... where ... activity involving controlled substances ... is maintained or conducted...." He said there was no proof he had any authority to permit T.H.'s children to stay in her apartment and no proof he had assumed a parental role, so he had no legal duty to act on their behalf.

The Appellate Division, First Department affirmed. "The evidence supports a reasonable inference that defendant 'permit[ted]' several underage children to 'enter or remain' in a place of drug activity..., even though, in permitting the children to enter or remain, defendant may be viewed as having acted jointly with his codefendant," it said. "The statute does not require a defendant to have a legal responsibility for the care or custody of the child (compare Penal Law § 260.10[2]), and defendant's guilt was not negated by the fact that the codefendant may have been even more blameworthy, by virtue of her relationship with the children."

Berry argues there was insufficient evidence to sustain his convictions because he "did not have control over the apartment necessary to commit the required statutory act of 'permit[ing]' the children to enter or remain on the premises, nor did he have the legal duty that the law requires to impose criminal liability for his failure to act to remove them from their home.... [T]he Appellate Division effectively imposed an unprecedented duty on non-parents to take action with respect to other people's children whenever they are aware of certain illicit activities or face criminal prosecution themselves."

For appellant Berry: Barbara Zolot, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Grace Vee (212) 335-9000

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To be argued Thursday, May 5, 2016 *(papers sealed)*

No. 95 Wally G. v NYC Health and Hospitals Corporation (Metropolitan Hospital)

In June 2005, Wally G. was born prematurely at 26 or 27 weeks' gestation (40 is the norm) at Metropolitan Hospital, a New York City Health and Hospitals Corporation (HHC) facility in Manhattan. He was delivered by emergency cesarean section, due to his mother's medical condition and signs of fetal distress, and was treated in the hospital's neonatal intensive care unit (NICU) for nearly two months.

His mother brought this medical malpractice action against HHC on his behalf, claiming he suffers from cerebral palsy, seizures, and speech and cognitive defects due to the hospital's negligent medical care of her prior to the birth and of Wally in the NICU. The notice of claim was not served on HHC until more than a year after the 90-day notice period expired. Four years later, in January 2011, his attorney moved for permission to file a late notice of claim, asserting that the hospital's own records put HHC on notice soon after his birth that Wally's injuries might have been caused by negligent medical care.

Supreme Court denied the motion and dismissed the suit, finding the plaintiff "failed to prove that the medical records alone evince that [HHC], by its acts or omissions, inflicted injuries on the infant-plaintiff.... There is insufficient evidence to support the finding that the infant's condition upon delivery and the subsequent issues that developed during his admission to the NICU were caused by any malpractice as opposed to the infant's extremely premature birth, which could not have been avoided."

The Appellate Division, First Department affirmed in a 3-2 decision. "In view of the fact that plaintiff's injuries are typical of children born as prematurely as he was, as well as HHC's undisputed lack of fault for the necessity of a preterm delivery, we ... are not persuaded by plaintiff's argument ... that the medical records put HHC on notice that plaintiff's injuries may have been caused by the alleged deviations from the standard of care that plaintiff's experts perceive to be documented in the record, rather than by the unavoidable necessity of delivering the child only 27 weeks into the pregnancy...," the court said. "Given that the medical records, even as interpreted by plaintiff's experts, do not yield a nonspeculative basis for determining whether the deficits of this prematurely born child would have been less severe absent the alleged deviations, it cannot be said that the medical records put HHC on notice of the claim."

The dissenters argued, "[T]he hospital chart demonstrates that HHC had actual notice of the essential facts constituting the claim within 90 days of accrual or a reasonable time thereafter.... Notably, the medical records need not conclusively demonstrate that malpractice caused the injury...," but "merely need to suggest injury attributable to malpractice.... The defendant's delay in performing an emergency cesarean section and in providing immediate ventilation through intubation, and its discussion of subsequent neurological sequelae with the parents..., suggest injury attributable to medical malpractice...." That HHC's experts "provided a different interpretation of the medical records does not show that the hospital lacked actual knowledge of the records. Instead, it shows that there is an issue as to the merits of the claim."

For appellant Wally G.: John M. Daly, Yonkers (914) 378-1010
For respondent HHC: Assistant Corporation Counsel Marta Ross (212) 356-0857

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To be argued Thursday, May 5, 2016

No. 96 Littleton Construction Ltd. v Huber Construction, Inc.

Littleton Construction and Huber Construction formed a joint venture in 2007 to carry out a series of renovations at Buffalo public schools. The memorandum of understanding and amending rider (collectively, MOU) that govern the joint venture provide that Huber is entitled to a nine percent management/overhead fee on the renovation projects. Littleton claims it is entitled to a share of the management fees proportional to the share of work it performed for the joint venture. Its claim is based on an operating agreement that it says was executed after the MOU by both companies. Huber contends the operating agreement is fraudulent and was never signed by its president. Littleton concedes the operating agreement is "a cut and paste" of prior documents executed by the parties, but denies creating it and argues that it is valid because it was duly executed by both companies. When Huber refused to share the management fees, Littleton brought this breach of contract action against Huber and the joint venture.

Supreme Court denied Huber's summary judgment motion to dismiss Littleton's claim to a share of the management fees, finding that "a triable issue of fact exists as to the validity of the allegedly fraudulent" operating agreement.

The Appellate Division, Fourth Department reversed and dismissed Littleton's claim in a 3-2 decision. "Huber's president tendered an affidavit in which he averred that he had never signed or even seen the operating agreement at issue, and that Huber had never had a copy of it. He further averred that, despite those facts, the signatures, dates, and notary stamp on the allegedly fraudulent operating agreement were identical to those on the MOU that he had in fact signed," the court said. Based on that and other evidence, it concluded, "defendants' submissions were sufficient to meet their initial burden of establishing that the operating agreement at issue was forged and is therefore void.... In opposition to defendants' motion, [Littleton] failed to raise a triable issue of fact either that the allegedly fraudulent operating agreement was not forged, or that the MOU was ambiguous with respect to management/overhead fees, thereby requiring extrinsic evidence to determine the parties' intentions concerning such fees...."

The dissenters said, "In support of their motion for summary judgment..., [Huber] submitted, inter alia, deposition testimony from [Littleton's] owner, in which he stated that he signed the allegedly fraudulent operating agreement. 'It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)'.... Consequently, we cannot conclude as a matter of law that the operating agreement at issue is a forgery."

For appellant Littleton: Wayne I. Freid, Williamsville (716) 565-2000
For respondents Huber et al: Michael B. Powers, Buffalo (716) 847-8400