State of New York Court of Appeals

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To be argued Monday, January 7, 2013

No. 11 Applewhite v Accuhealth, Inc.

Tiffany Applewhite was 12 years old in February 1998, when she suffered anaphylactic shock after receiving an intravenous steroid medication from a private nurse in the Applewhites' Bronx apartment. While the nurse began cardiopulmonary resuscitation, Tiffany's mother called 911 and said her daughter was having difficulty breathing. A basic life support (BLS) ambulance was dispatched because no advanced life support (ALS) ambulance was available at the time. Tiffany was in cardiac arrest and was not breathing when it arrived. Her mother said she asked the ambulance EMTs to immediately take Tiffany to a nearby hospital, about four minutes away, but they advised her to wait for an ALS ambulance while they continued CPR. The ALS ambulance arrived about 20 minutes later and its paramedics administered oxygen and epinephrine, then took Tiffany to the hospital. She survived, but suffered severe brain damage. Her mother brought this action on her behalf against New York City, among other parties, claiming the BLS ambulance EMTs were negligent in failing to bring oxygen to the apartment and in waiting for the ALS ambulance to transport the girl.

Supreme Court granted the City's motion to dismiss the suit, ruling Applewhite failed to prove the City owed a special duty of care. That would require her to show, among other things, that the City assumed an affirmative duty to act on her behalf and that she justifiably relied on its assurances to her detriment. The court said there was no proof of "detrimental reliance" because Tiffany's mother had no other options for providing oxygen or transporting her and, thus, "there is no showing that Plaintiff was deprived of assistance that reasonably could have been expected from another source because of the government's conduct...."

The Appellate Division, First Department reversed and reinstated the suit, holding that justifiable reliance was established. It said the mother wanted to go to the hospital immediately, but the EMTs allegedly assured her it was best to wait for the ALS ambulance to arrive with paramedics and proper equipment, without telling her it would take another 20 minutes. It said, "The mother justifiably relied on the [EMTs], who had taken control of the emergency situation, and who elected to await the arrival of the ALS ambulance." It said any questions regarding the mother's credibility and the issue of proximate cause, including the degree to which Tiffany's brain damage could have been avoided or mitigated, could not be resolved on the existing record.

The City argues that Applewhite "failed to state a claim, as she did not allege that the City assumed or breached a special duty." Even if she did allege a special duty, it says, she failed to establish the justifiable reliance element because the EMTs' response to her request for immediate transport to the hospital -- that they should wait for the ALS ambulance -- "did not constitute an assurance or guarantee of her daughter's safety." It also argues that Applewhite cannot prove that any reliance by her on the EMTs' statements was detrimental because "no alternative transport could possibly have been utilized within the limited time frame for successful resuscitation and, in any event, [] no viable alternative means of transport existed, given Tiffany's need for uninterrupted CPR."

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For respondent Applewhite: Matthew Gaier, Manhattan (212) 267-4177

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No. 12 Sunrise Check Cashing and Payroll Services, Inc. v Town of Hempstead

In 2006, the Town of Hempstead (Nassau County) amended article XXXI of its Building Zone Ordinance by adopting section 302(K), which restricts check-cashing businesses to industrial and light manufacturing districts. The new section required check-cashing businesses in other districts to shut down or relocate to industrial or light manufacturing zones within five years. Eight check-cashing businesses located in Hempstead's business district brought this action against the Town to strike down the new law. They argued, among other things, that section 302(K) is preempted by the New York State Banking Law, which gives licensing and regulatory authority over the check-cashing industry to the Superintendent of Financial Services (formerly the Superintendent of Banks).

Supreme Court granted the Town's motion for summary judgment and declared that section 302(K) is valid. It said there was no evidence the State Legislature intended to preempt such local zoning laws and held that section 302(K) did not run afoul of either the conflict preemption or field preemption doctrines.

The Appellate Division, Second Department reversed and granted the check cashers' motion for summary judgment, holding that section 302(K) is invalid under the doctrine of conflict preemption. "[A]s the clear language of Banking Law § 369(1) demonstrates, the Legislature has vested the Superintendent with the duty to determine whether each applicant for a check-cashing license proposes to perform that function in an appropriate location, whether there is a community need for a new licensee in that location, and whether the granting of such an application will be advantageous to the public...," it said. "Accordingly, we conclude that the Town's attempt to control the determination of the appropriate locations of these establishments by enactment of section 302(K) is in conflict with existing state law."

Hempstead argues, "[T]he State Banking Law deals merely with the licensing of the operators of check cashing facilities with the stated goal of maintaining the stability of that industry in the general community. Distinguishably, the subject Zoning Ordinance deals, as it must, only with land regulation. Thus, there is no conflict and, therefore, no preemption. Banking is not land." The Superintendent of Financial Services, supporting the Town as amicus curiae, argues there is no conflict between the Banking Law and the local zoning law. He says his department, in granting a check-cashing license, "does not make the full range of determinations that inform land-use decisions. DFS determines whether a particular area is saturated with check-cashing establishments or can support another one, but defers to local zoning authorities for other questions about the proper siting of this type of business." He says DFS requires applicants to certify that they are in compliance with local zoning laws, and regards noncompliance as grounds to deny or revoke a license.

For appellant Hempstead: Peter Sullivan, Garden City (516) 222-6200
For respondent Sunrise et al (check cashers): Jeffrey G. Stark, Uniondale (516) 248-1700
For amicus curiae DFS: Assistant Solicitor General Matthew W. Grieco (212) 416-8014

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To be argued Monday, January 7, 2013

No. 13 People v Damien Warren

Damien Warren and three co-defendants were charged with second-degree murder and weapon possession for the fatal shooting of Keone Littlejohn on Sherman Street in Buffalo in March 2006. One co-defendant was allowed to plead guilty to a misdemeanor in exchange for testifying on behalf of the prosecution, and Warren and the remaining defendants went to a joint trial. One defendant, Marvin Howard, waived his right to a jury and chose to proceed by a bench trial, while Warren and the other defendant were tried by a jury. The parties dispute whether Warren sought to sever his trial from Howard's, but the trials remained joined.

After the prosecution, Warren and the other jury defendant rested, Howard took the stand to testify in his own defense. Warren's attorney requested that Howard testify outside the presence of the jury, arguing that the issue of Howard's guilt was not before the jury and that the proof had closed with respect to Warren. County Court denied the request. Howard then testified before the jury that Warren, not he, was the shooter. The jury convicted Warren of both counts and acquitted his co-defendant, and County Court acquitted Howard. Warren was sentenced to 25 years to life in prison on the murder count.

The Appellate Division, Fourth Department reversed, ruling County Court's refusal to excuse the jury during Howard's testimony deprived Warren of a fair trial. It said the refusal was "particularly egregious in view of the fact that such testimony was obviously damaging to [Warren], was not properly a part of the jury trial and was easily severable from the evidence presented at the jury trial." The court said, "[I]t is difficult to imagine a more classic case in which the defenses of [Warren] and [Howard] 'were antagonistic at their crux'.... The jury should not have heard the defense set forth by [Howard] inasmuch as only the court, not the jury, was the trier of fact with respect to that codefendant. Moreover..., the People in essence received a windfall witness, and in effect a second prosecutor, i.e., counsel for [Howard]..., after resting their case against the two jury trial defendants."

The prosecution argues that Warren's "severance claim is both unpreserved and meritless." It says, "By the time the jury heard Howard's testimony, they had already heard similar proof incriminating [Warren] from the prosecution witnesses. Clearly, Howard's testimony which linked defendant to the crime was cumulative to the evidence elicited by the People, and thus it could not have caused the jury to unjustifiably infer defendant's guilt...." It says, "The evidence against all four defendants was identical and was provided by the same witnesses and exhibits.... While it may have been a wiser choice for the trial court to have excused the jury while Howard testified, whatever testimony Howard had to offer was properly before the jury as it bore on their consideration of the guilt or innocence" of Warren and the other jury trial defendant. It also argues that any error was harmless in view of the "overwhelming" proof of Warren's guilt.

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For respondent Warren: Michael L. D'Amico, Buffalo (716) 885-2889

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No. 14 People v Michael Palmer *(papers sealed)*
No. 15 People v Cornell Long *(papers sealed)*

The convicted sex offenders in these appeals are challenging their risk level assessments under the Sex Offender Registration Act (SORA). A question raised in both cases is whether an offender's use of alcohol at the time of an offense, by itself, can constitute clear and convincing evidence of drug or alcohol abuse under SORA risk factor 11.

Michael Palmer was 40 years old in March 2006, when he engaged in sexual conduct with an 11-year-old girl in Brooklyn. The abuse continued for nearly two years. He told the Probation Department he had been drinking at an after-work party prior to the first encounter. He also said he avoided drugs and alcohol because his stepfather was an alcoholic. He pled guilty to criminal sexual act in the second degree and was sentenced to two years in prison.

Cornell Long was arrested in January 2009 for forcing his girlfriend, with whom he had lived for six years, to engage in deviate sexual intercourse after an argument in their apartment in Buffalo. He told detectives that he began drinking "a few beers" about an hour and a half before the incident. He pled guilty to criminal sexual act in the third degree and was sentenced to 12 months in jail.

In separate Supreme Court proceedings to determine their risk of re-offending, Palmer and Long were designated level two sex offenders based, in part, on 15 points assessed for having "a history of drug or alcohol abuse" under SORA risk factor 11.

The Appellate Division upheld the level two designation for both men. The Second Department said Palmer was properly assessed points for alcohol abuse "based upon his admission that he was using alcohol at the time of the offense...." In Long's appeal, the Fourth Department said the lower court "failed to set forth its findings of fact and conclusions of law" as required. but found the record was sufficient for it to make its own findings and conclusions. It said, "[W]e conclude that [Long's] admission that he was drinking alcohol during the 1½-hour period immediately preceding his offense provides a sufficient basis upon which to assess the points" for drug or alcohol abuse.

Palmer and Long argue that their statements that they consumed alcohol prior to their offense (just the first offense in Palmer's case) did not provide clear and convincing evidence of alcohol abuse in the absence of any evidence of their level of intoxication or evidence they had a history of alcohol abuse. Palmer says the SORA Risk Assessment Guidelines and Commentary "makes clear [that] its purpose is to properly account for the risk of recidivism posed by offenders who compulsively abuse drugs or alcohol. The Guidelines repeatedly refer to 'abuse' of alcohol and explicitly state that points should not be assessed for 'occasional social drinking.'" Long also argues he was deprived of due process by Supreme Court's failure to make required findings of fact and by the Appellate Division's affirmance based on an insufficient record.

No. 14 For appellant Palmer: Anna Pervukhin, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Adam M. Koelsch (718) 250-3823
No. 15 For appellant Long: Vincent F. Gugino, Buffalo (716) 853-9555
For respondent: Erie County Assistant District Attorney David A. Heraty (716) 858-2424