

## NEW YORK COURT OF APPEALS ROUNDUP

### PRESERVING ISSUES FOR APPELLATE REVIEW

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This month we address a case in which the Court of Appeals considered the application of various criminal statutes to an Internet harassment campaign arising out of a dispute concerning the origin of the Dead Sea Scrolls. We also discuss cases in which the court relaxed the standard for preserving issues for appellate review and provided greater clarity to the question of when a municipality is acting in a proprietary capacity for purposes of a negligence claim.

#### Harassment Statute

In [\*People v. Golb\*](#), a dispute concerning the origin of the Dead Sea Scrolls resulted in the court finding that the state's second-degree aggravated harassment statute is unconstitutionally vague.

Defendant Raphael Golb's father is a professor at the University of Chicago and a Dead Sea Scrolls scholar. There is apparently a difference of opinion within the academic community as to the origin of these ancient religious writings and, between 2006 and 2008, defendant conducted an Internet campaign to discredit and injure the reputations of scholars who disagreed with the views of his father. Defendant published anonymous Internet blogs on the subject, sent emails from fictitious identities criticizing the opposing scholars, and impersonated various professors online to send emails in which the "professors," inter alia, admitted plagiarizing the work of defendant's father. Defendant used computers available to him as an alumni at New York University to send many of these emails.

Defendant's scheme came to light and, after a jury trial, he was convicted of two counts of identity theft in the second degree; 14 counts of criminal impersonation in the second

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degree; 10 counts of forgery in the third degree; three counts of aggravated harassment in the second degree; and one count of unauthorized use of a computer. He was sentenced to six months of incarceration and five years of probation. The Appellate Division, First Department, modified the trial court's judgment by vacating and dismissing one of the identity theft convictions. The Court of Appeals granted leave to appeal.

In a decision written by Judge Sheila Abdus-Salaam and joined by Judges Victoria Graffeo, Susan Phillips Read, Robert Smith, Eugene Pigott and Jenny Rivera, the court vacated defendant's conviction on some but not all of the counts and remitted the case to the Supreme Court for resentencing on the remaining counts.

The court first examined the issues concerning defendant's conviction for criminal impersonation. Penal Law §190.25 provides that someone is guilty of criminal impersonation in the second degree when she "impersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another." Defendant argued that the trial court erred by not placing any limit on or properly defining the terms "injure" and "benefit." The court noted that previous cases applying this statute have traditionally concerned either monetary fraud or interference with government operations.

The court agreed that the statute cannot be applied to any benefit or injury, no matter how slight, but the court found that reputational damage was a sufficient form of injury for purposes of the statute. Accordingly, the court sustained the judgment with respect to the counts arising out of defendant's impersonating emails intended to harm the reputation of scholars who disagreed with his father. The court, however, vacated defendant's conviction on counts arising out of actions that did not do substantial harm to anyone's reputation, such as the mere creation of an email account in a professor's name or the mere use of such an account to solicit information.

The court next considered the aggravated harassment counts. Penal Law §240.30(1)(a) provides that a "person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she...communicates with a person, anonymously or otherwise, by telephone, telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm." This statute has been used by the government to successfully prosecute crimes involving stalking and domestic violence. The court, however, found that it was unconstitutionally vague and overbroad because there was no scope or limitation on the phrase "likely to cause annoyance or alarm." The court accordingly vacated the convictions for aggravated harassment.

The court also upheld the convictions for forgery and vacated the convictions for unauthorized use of a computer and identify theft. Chief Judge Jonathan Lippman issued an opinion concurring in part and dissenting in part in which he asserted that he would vacate all of the convictions on the grounds that the statutes at issue are unconstitutionally overbroad.

In this instance, a dispute concerning ancient religious texts provided an opportunity for the court to apply criminal laws to the modern problems arising out of Internet harassment.

### **Preserving Issues for Appeal**

In a sharply divided decision, the court relaxed the standard regarding preserving for appellate review a claim of insufficient evidence to support a criminal conviction.

The defendant in [\*People v. Finch\*](#) was arrested on three separate occasions for criminal trespass at the Parkside Commons housing complex in Syracuse. On the third occasion, he was also arrested for resisting arrest. On each occasion, he was the invited guest of a Parkside resident who was defendant's girlfriend and the mother of his son. At his arraignment on the second arrest, defendant challenged the sufficiency of the accusatory instrument and argued that the trespass charges should be dismissed because he was present at the property with the consent of a tenant. The court rejected this argument. Defendant did not raise this argument during the arraignment on his third arrest for trespass and for resisting arrest and, after the three cases were consolidated for trial, he did not make a trial motion to dismiss for insufficient evidence on these grounds.

A City Court jury acquitted defendant of the first trespass charge but convicted him on the remaining counts. The County Court found that defendant could not be guilty of criminal trespass since he was on the premises as the invited guest of a tenant but found that the police nevertheless had probable cause to arrest him and accordingly affirmed defendant's conviction for resisting arrest. The court granted leave to appeal.

In order to successfully challenge his conviction, defendant needed to establish that he had successfully preserved for appellate review his argument that the police lacked probable cause to arrest him because they were aware that he had been invited onto the premises by a tenant. The majority found that defendant had done so by challenging the accusatory instrument at his arraignment on the second arrest on the grounds that the police failed to consider that he might have been granted a license to be there by a tenant.

The majority determined that, having received an adverse ruling on this argument at an early stage in the proceedings, defendant did not need to assert the same theory again at trial in order to preserve the issue for appeal. The majority acknowledged that a challenge to the sufficiency of an accusatory instrument is not the same thing as a challenge to the proof established at trial, but rejected the dissent's argument that this was a meaningful distinction.

The majority also distinguished prior decisions requiring that an argument be made in a trial motion to dismiss and asserted that a specific objection in a trial motion is not always required where, as they found here, such a requirement "will not significantly advance the purposes for which the preservation rule was designed." This is particularly true in the present case where it was highly likely that defendant was innocent of the crime for which he was convicted. Accordingly, the majority found that the issue had been adequately preserved for appeal and, because they also found that the police in fact lacked probable cause, they reversed the County Court's decision with respect to the resisting arrest conviction and dismissed the misdemeanor information against defendant.

Judge Abdus-Salaam issued a lengthy dissent that was joined by Judges Graffeo and Read. Read also issued a separate, shorter dissent. Abdus-Salaam described the majority opinion as "time-bending and obfuscatory." She questioned how defendant's objection to the sufficiency of the misdemeanor information in the second case could have preserved anything with respect to defendant's conviction in the third case, even though the cases were consolidated for trial, particularly since the crime for which he was convicted was not even alleged in the second case.

More fundamentally, the dissenters argued, the majority had simply disregarded ample precedent requiring a defendant to make an objection to the sufficiency of the evidence at trial in order to preserve the issue for appeal. They noted that a motion to dismiss the accusatory instrument does not necessarily alert the trial court to the distinct and different claim that the evidence at trial is insufficient to support a finding of guilt beyond a reasonable doubt. Finally, they questioned the majority's conclusion that the defendant was likely innocent and argued that the prosecution could have filled any alleged gap in the proof in response to a proper trial motion to dismiss. In her separate dissent, Read expressed her hope that this "result-oriented" decision will be seen "as an aberration, not a harbinger."

It remains to be seen how this decision will be applied in a case presenting less compelling arguments on the underlying merits.

## Municipality Activity

Whether a municipality is engaged in a proprietary function or is acting in a governmental capacity when an incident giving rise to a negligence claim against it occurs may sound like an issue capable of easy legal resolution. Not always. [\*Wittorf v. City of New York\*](#) shows that this question can be difficult when it arises out of a fact pattern susceptible to different conclusions. In this case, a unanimous court disagreed with both the majority in the Appellate Division and the thoughtful and thorough opinion of the trial court.<sup>1</sup>

In its simplest form, if the municipality performs a purely proprietary role, it is essentially substituting for what private enterprise would do and is subject to suit under ordinary rules of negligence that apply to non-governmental parties. On the other hand, if the government entity at the time of the incident is engaged in a governmental function for the protection and safety of the public generally, it may be immune from liability. While often, as here, the decision can be fact-intensive, it is the court that must decide the issue. Here, the court concluded in an opinion by Judge Graffeo that the city was carrying out a proprietary function (road maintenance) at the time of the occurrence. The facts underlying Rhonda Wittorf's claim were fully laid out by the court.

Wittorf was seriously injured when she crashed her bike into a large pothole on the 65th Street transverse which runs across Central Park. A City Department of Transportation supervisor had arrived earlier that morning at the eastbound entrance to the transverse with his crew. When Wittorf and her friend arrived at the transverse on bikes, the Transportation Department was putting up traffic cones to shut down the road for vehicular traffic. Wittorf's friend asked the Transportation Department supervisor if they could go through and he gave them the "go ahead" to do so. The supervisor explained that he permitted them to go through because his crew had not yet completed their road work preparation. After entering the transverse, Wittorf encountered two large potholes and crashed after riding into the second.

After trial the jury returned a verdict that the transverse was not in a reasonably safe condition, but that the city itself was not liable because the city had not caused or created the condition nor had it received timely written notice of the condition as required by the Administrative Code of the City of New York §7-201[c][2]. The jury did find that the city Transportation Department supervisor was negligent in permitting Wittorf and her friend to enter the transverse and that this was a substantial factor in causing Wittorf's injuries. In assessing comparative negligence, the jury apportioned 40 percent to Wittorf and 60 percent to the city because of the supervisor's negligence.

The city moved under CPLR 4404[a] to set aside the verdict on the grounds that the supervisor was acting in a governmental capacity when the accident occurred or that the verdict was against the weight of the evidence. The trial court dismissed the complaint on the basis that the supervisor was acting in a governmental capacity when he closed the transverse to the vehicular traffic. The balance of the city's motion was denied as academic. The Appellate Division, First Department, affirmed 4-1 and granted Wittorf leave to appeal.

Wittorf argued that the trial court and the Appellate Division erred in holding that the supervisor and the Transportation Department crew were performing a governmental function at the time and that, in fact, highway maintenance and repair and warnings given in connection with such activity have historically been deemed proprietary activities that subjected the city to ordinary negligence standards. The court agreed.

In reaching its conclusion, the court repeated its basic ground rule for deciding whether the government activity is proprietary or governmental as set out in its decision in [\*Miller v. State of New York\*, 62 NY2d 506](#), 513 (1984) that: The court must consider "the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred..., not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred." The court reaffirmed the duty of a municipality to warn of dangerous conditions on its streets and to keep them in a safe condition for public travel.

The court's decision for Wittorf that the city was acting in a proprietary role ultimately rested on the fact that the supervisor and the Transportation Department crew were in Central Park that day to oversee the road repairs project and that when the supervisor failed to warn Wittorf about the existing danger when giving permission to proceed across the transverse, his crew was in fact getting the road ready to be worked on by the placing of cones at the entrance to eliminate traffic. The court found that this activity was proprietary in nature.

While the opinion of the court should help clarify the resolution of cases seeking to impose liability upon municipalities and other government entities for what is claimed to be proprietary action resulting in claimed injury, it has also highlighted the fact that within any claim, in order to resolve whether an activity is proprietary or governmental, there may come a need to carefully examine the full span of government action to determine at what point in the "continuum" the government's alleged negligent action occurred.

In light of the reversal, the court remitted the case to the trial court to resolve matters that the dismissal of the case had rendered moot.

**Endnotes:**

1. The path of this case from the trial court through the Court of Appeals shows in its most flattering way the genius of our legal system in providing a complete review of the legal rights of litigants. After the verdict, the trial court obtained the full trial transcript prior to deciding the CPLR 4404(a) motions and filed a detailed analysis of the facts and the law. The Appellate Division's 4-1 affirmance followed together with a dissent that provided a brief and clear analysis of what turned out to be at the core of the court's reversal. To that was added the granting of plaintiff's motion for leave to appeal, but for which the Court of Appeals would never have had the opportunity to review the matter. While this path is by no means extraordinary it is hard not to take note of it.

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