

# State Loses Bid for Immunity Over Organ Donation Error

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ALBANY

THE STATE is liable for damages to the family of deceased Bronx woman whose eyes were harvested against her wishes after she was mistakenly included in an organ donor registry, a Court of Claims judge has held.

Judge Judith Hard said in *Drever v. State*, 118931, that the state is not entitled to immunity because the operation of an organ donation registry is a proprietary function, not a governmental one.

Although Hard dismissed claims based on intentional infliction of emotional distress and found that punitive damages were not available, she said the state is liable for violating the common law right of sepulcher—the right of next of kin

to possess a loved one's body.

The case was brought by Jo Drever, the only child of Margaret Lanza.

Records show that

Lanza did not want to be an organ donor. In August 2009, three weeks before her death, Lanza filled out a form to renew her license with the Department of Motor Vehicles. The form offers applicants the option of becoming an organ donor.

Lanza did not sign the consent and, in fact, a line was drawn through that portion of the application.

Regardless, DMV advised the state Department of Health, which administers the donor program, that Lanza had signed up. The Health Department mailed Lanza a letter on Aug. 24, 2009 thanking her. Lanza died suddenly Aug. 25,



Judge Hard

2009, at the age of 62, without having received the letter.

In her claim, Drever, represented by Bonita Zelman of Lake Success, accused the state of violating her right of sepulcher and asserted claims for negligence, infliction of emotional distress and punitive damages.

Assistant Attorney General Joan Matalavage claimed that the line drawn through the signature portion of the form constituted consent, even though her own witness, an official with the DMV, testified that the mark should not have been treated as a signature. Matalavage also argued that if there was an error it was a good-faith mistake and that the state was immune from liability for such miscues.

Hard concluded that Lanza "did not consent to being an organ donor, and that the harvesting of the decedent's eyes constituted an unauthorized interference with claimant's right to immediate possession of her mother's body intact."

The immunity issue turned on whether DMV's actions in enrolling organ donors into the registry is a governmental or a proprietary act.

Hard relied on a 2013 Court of Appeals decision, *Applewhite v. Accuhealth*, 21 NY3d 420.

In *Applewhite*, the court said a government entity performs a government function when the acts are "undertaken for the protection and safety of the public pursuant to the general police powers." The Court of Appeals said a government action is proprietary, and not immune from liability, when it supplements or substitutes for something done by a private enterprise.

Here, Hard said, the DMV was merely a "conduit for the charitable donation of body parts" and its involvement with the registry was "not undertaken for the protection and safety of the public." Additionally, she said several private enterprises as well as governmental entities perform the same function in enrolling organ donors.

"[I]f the court were to conclude that DMV's activity was governmental, it would be constrained to find that no special duty existed, thereby immunizing the act at issue and effectively abolishing the right of sepulcher whenever asserted against the state," Hard wrote. "Affording defendant immunity ... would allow employees of DMV to carelessly process driver's license renewal applications without giving due consideration to the licensee's intention to be an organ donor."

Hard dismissed the claim for intentional infliction of emotional distress on the grounds that such claims were contrary to public policy. She said that while there are some instances where a claim of negligent infliction of emotional distress, including the negligent mishandling of a corpse, can be sustained against the state, the claim in this case was duplicative with the loss of sepulcher cause of action. The judge said punitive damages are not allowed under the Court of Claims Act.

Zelman said Hard's decision marked the first time that a court

has held that the operation of an organ donor registry is a proprietary and not governmental action.

"I think it is an important and novel decision," Zelman said. "The judge gave it a lot of thought and discussed the law in detail and came to the right and just conclusion."

Zelman said her client brought the case primarily to effect change, and succeeded. As a result of this matter, the Health Department now waits three weeks after sending the "thank you" letter before actually enrolling the prospective donor, Zelman said.

"My client went through this because she wanted to effect a change in the protocol and the way they operate the registry so this will not happen to anyone else," Zelman said. "Had we not brought this action and brought this to light the Department of Health would not have changed the protocol and instituted the safeguard."

The Attorney General's office declined comment. The Department of Health declined comment.

Online

➤ The Court of Claims decision is posted at [nylj.com](http://nylj.com).

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