Appellate Division Review

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New leadership emerged in the Appellate Division, First Department, this past quarter, with Governor David A. Paterson's appointment of Justice Luis A. Gonzalez as Presiding Justice. The new Presiding Justice is no stranger to these pages, having served with distinction on the First Department bench since March 2002 (and, before that, having been a judge in the New York State court system since 1985).

During the past three months, the persistence of thorny issues and the ingenuity of counsel have continued to generate novel and daunting legal conundrums for Presiding Justice Gonzalez and his colleagues from around the state. Recent advancements in the law from all four departments of the Appellate Division are summarized below.

First Department

Right of Sepulcher

Citing an array of sources ranging from the Greek poet Moschion to Sir Edward Coke and the 17th century Dutch jurist Hugo Grotius, the First Department in *Melfi v. Mount Sinai Hospital*[1] held that common law claims for "loss of sepulcher" become actionable only after the next of kin "has suffered emotional anguish as a result of the wrongful act." A "unique cause of action among the torts recognized at common law," loss of sepulcher arises from interference with the next of kin's "absolute right to the immediate possession of a decedent's body for preservation and burial" or from improper treatment of the corpse.

In this case, the body of playwright Leonard Melfi was transferred from the New York City morgue to a community college embalming class, and finally deposited in a mass grave on Hart Island. Writing for a unanimous panel, Justice James M. Catterson observed that for "thousands of years, the right of sepulcher has encompassed a solely emotional injury."

Thus, "for a right of sepulcher claim to accrue 1) there must be interference with the next of kin's immediate possession of decedent's body and 2) the interference [must have] caused mental anguish."

Employment Discrimination

A travelling salesman who lives and works outside of New York can sue his New York employer for employment discrimination under the New York State Human Rights Law and the New York City Human Rights Law, the First Department held in *Hoffman v. Parade Publications*.[2] Limiting the reach of a prior decision,[3] Justice David B. Saxe wrote

that an out-of-state plaintiff may sue a New York company for discrimination "where the allegations support the assertion that the act of discrimination, the discriminatory decision, was made in this state."

The unanimous opinion explained that "logic and common sense alone would dictate that if an employer located in New York made discriminatory hiring or firing decisions, those decisions would be properly viewed as discriminatory acts occurring within the boundaries of New York."

Hate Crimes

In 2000, early on the morning of Yom Kippur, four people tried to burn down a Bronx synagogue using homemade Molotov cocktails. Mazin Assi was arrested and confessed that he and his accomplices wanted to make a "statement" about "rich Jews in Riverdale" causing violence in the Middle East. Mr. Assi was convicted under the Hate Crimes Act of 2000, which applies to criminal acts committed "in substantial part because of a belief or perception regarding the . . . religion [or] religious practice . . . of a person," among other things.[4]

On appeal Mr. Assi argued to the First Department in *People v. Assi*[5] that "he could not be found guilty of a hate crime where his conduct was directed against a building rather than against a person." The appellate court squarely rejected that argument. Writing for a unanimous panel, Justice Rolando T. Acosta explained that the synagogue was incorporated under the Religious Corporations Law, and thus fell within the legal definition of a "person." Moreover, the Hate Crimes Act's legislative history left "no doubt" that the statute was "intended to include crimes directed against property" that are motivated by bigotry against the religion of persons using the property.

Arbitration Fees

The fee-splitting provision in an arbitration agreement trumped an "employer pays" provision in the arbitration agency's rules, the First Department held in *Brady v. Williams Capital Group*,[6] a 3-2 decision authored by Justice Dianne T. Renwick. However, a fee-sharing clause may be held void as against public policy if the employee makes "a showing of individualized prohibitive expense."

Courts evaluating such a showing, Justice Renwick wrote, "should engage in a case-by-case analysis focused on 'the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether the cost differential is so substantial as to deter the bringing of claims.'"[7] Finding that sharing the arbitration costs would have been prohibitively expensive for the petitioner, the majority struck the fee-splitting provision.

Double Jeopardy

Addressing the effect of an illegal sentence on double jeopardy protection, a unanimous panel of the First Department clarified in *People v. Coston*[8] that "[e]xcessive punishment is not necessarily double punishment." In Coston, the defendant "was punished excessively, but not 'twice for the same offence.'" The defendant had agreed to a plea bargain for felony and misdemeanor charges related to a fatal drunk driving incident. The sentence included six months of intermittent incarceration (to be served on weekends), a five-year probation period and a fine.

After the defendant had served five months of the incarceration, the trial judge learned that the original sentence had overreached the statutory limit. The judge therefore vacated the original sentence and replaced it with four months of incarceration and five years of probation. The defendant argued that the probation constituted a second sentence for the same offense. In a decision authored by Justice James M. McGuire, the First Department disagreed. The original sentence's illegality did not give rise to double jeopardy when the lower court corrected its mistake. The sentence of intermittent imprisonment and the sentence of probation were "not alternative sentences"; rather, "[b]oth [were] authorized."

Second Department

Family Court Act

As changes in science, technology and social mores press upon the boundaries of "family," they may push disputes out of Family Court and into Supreme Court. In *Matter of H.M. v. E.T.*,[9] a child's birth mother sought to have her former same-sex partner adjudicated the child's parent under Article 5 of the Family Court Act. Writing for a 3-2 majority, Justice Joseph Covello observed that the applicant was "never married to or in a civil union" with her former partner, who had "no biological or legal connection to the subject child."

Even though the parties had entered into a monogamous relationship, lived together, agreed that the applicant would be artificially inseminated, and contemplated raising the child together, the Second Department held that Family Court lacked subject matter jurisdiction because Article 5 authorizes only a determination of whether a man is a child's father. The doctrine of equitable estoppel could not justify relief that Family Court, a court of limited jurisdiction, was "not specifically authorized by the Constitution or a statute to grant." The application for child support could, however, be transferred to Supreme Court.

Mental Hygiene Law

Enacted in 1999 in response to incidents of violence committed by people recently discharged from psychiatric facilities, Kendra's Law (Mental Hygiene Law §9.60) provides a framework for judicial authorization of involuntary outpatient treatment programs for mentally ill people who fail to comply with their medical regimens.

Addressing an issue of first impression in the New York appellate courts, the Second Department held in *Matter of William C.*[10] that Kendra's Law authorizes the appointment of a money manager to assist a mentally ill person. The respondent William C. suffered from bipolar schizoaffective disorder and had a history of non-compliance with treatment. Additionally, William refused to pay his rent or medical bills.

Writing for a unanimous panel, Justice Ruth C. Balkin observed that, in addition to medical services, Kendra's Law authorizes "any other services" that would "assist [a mentally ill] person in living and functioning in the community." The court concluded that money management fell under that rubric, particularly in light of the "clear and convincing" evidence that William's refusal to pay medical bills had "jeopardiz[ed] his eligibility for Medicaid and thus access to his medications."

Third Department

Assumption of Risk

The doctrine of "primary assumption of risk" does not apply to injuries sustained while sliding down the banister of a stairway during participation in a summer school program, the Third Department held in *Trupia v. Lake George Central School District*.[11] Courts typically apply the doctrine, which is meant to facilitate participation in athletic activities, to injuries arising from voluntary participation in athletics. Disagreeing with the Second and Fourth departments, the court declined to extend "primary assumption of risk" beyond the context of "sporting and recreational activities." Writing for a unanimous panel, Justice Thomas E. Mercure opined that broad application of the doctrine would be a "throwback" to the now-disfavored notion that contributory negligence bars a plaintiff completely from recovery.

Gun Possession

The U.S. Supreme Court's decision in *District of Columbia v. Heller*[12] did not render New York State's firearm licensing requirement unconstitutional, a panel of the Third Department held in *People v. Perkins*.[13] The defendant Shawn Perkins was convicted of criminal possession of a weapon in the second and third degrees after an argument led to gunfire. Perkins appealed, arguing in light of *Heller* that Penal Law article 265, which prohibits the unlicensed possession of a firearm, violates the Second Amendment and Civil Rights Law §4 (which mirrors the Second Amendment's language).

For a unanimous panel, Justice Leslie E. Stein noted that the right to keep weapons in one's home for self-defense "is not absolute and may be limited by reasonable governmental restrictions." Because Penal Law article 265 does not act as a complete ban on handguns, the court found that it is not a "'severe restriction' improperly infringing upon defendant's Second Amendment rights." The defendant was not in his home at the time of the crime and lacked a valid pistol permit; therefore, his conduct was not protected by the Second Amendment or the Civil Rights Law.

Fourth Department

DWI

Out-of-state convictions for driving while intoxicated that predate Nov. 1, 2006, cannot serve as a predicate for elevating DWI charges in New York from misdemeanors to felonies, the Fourth Department held in *People v. Ballman*.[14] In 2006, Vehicle and Traffic Law §1192(8) was amended to permit the use of out-of-state DWI convictions to elevate DWI offenses to felonies.

Addressing an issue of first impression, the court found the amendment ambiguous as to whether it applied to out-of-state convictions occurring before the effective date of the legislation. After reviewing the legislative history, Justice Elizabeth W. Pine concluded that "the convictions to which [§1192(8)] refers are in fact the predicate, out-of-state convictions" and therefore courts may not use such convictions occurring before Nov. 1, 2006, to elevate to a felony any misdemeanor DWI offense committed in New York.

Labor Law

Under Labor Law §240, ladders or similar devices must afford proper protection to employees who are engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." In *Wicks v. Trigen-Syracuse Energy Corp.*,[15] the plaintiff monitored hoppers at a fuel processing facility and unclogged the hoppers when dust particles built up. The dust particles ultimately were sent to a generating facility to be burned. The plaintiff, who fell from a ladder after unclogging the hoppers, contended that he was "cleaning" at the time of the accident and "was provided with an inappropriate ladder."

Writing for a 4-1 majority, Justice John V. Centra acknowledged that Labor Law §240(1) does not define the term "cleaning." He agreed with the Third Department, however, that the term means "the 'rid[ding] of dirt, impurities or extraneous material.'" Unclogging the hoppers "did not entail the removal of any dirt or extraneous material" because the dust particles "constituted fuel"; further, plaintiff was not removing the particles, "but, rather, was keeping the particles in the hoppers and essentially stirring them around."

Endnotes

1 2009 N.Y. Slip Op. 03404 (1st Dept. April 28, 2009).

2 2009 N.Y. Slip Op. 03678 (1st Dept. May 7, 2009).

3 *Shah v. Wilco Sys. Inc.*, 27 A.D.2d 169 (1st Dept. 2005).

4 N.Y. Penal Law §485.05(1).

5 2009 N.Y. Slip Op. 02306 (1st Dept. March 26, 2009).

6 2009 N.Y. Slip Op. 03458 (1st Dept. April 30, 2009).

7 Id. (quoting *Bradford v. Rockwell Semiconductor Syst. Inc.*, 238 F.3d 549, 556 (4th Cir. 2001)).

8 2009 N.Y. Slip Op. 02257 (1st Dept. March 24, 2009).

9 2009 N.Y. Slip Op. 04240 (2d Dept. May 26, 2009).

10 2009 N.Y. Slip Op. 04232 (2d Dept. May 26, 2009).

11 2009 N.Y. Slip Op. 01571 (3d Dept. March 5, 2009).

12 128 S. Ct. 2783 (2008).

13 2009 N.Y. Slip Op. 03962 (3d Dept. May 21, 2009).

14 2009 N.Y. Slip Op. 03215 (4th Dept. April 24, 2009).

15 2009 N.Y. Slip Op. 03565 (4th Dept. May 1, 2009).