To be Argued By:
Marshall D. Sweetbaum, Esq.
(*Time Requested: 15 Minutes*)

State of New York
Court of Appeals

APL -2019-00071

WILFREDO COLON and RAMONA CORDERO,

Plaintiffs-Appellants,

-against-

WILLIE MARTIN, JR., NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE CITY OF NEW YORK,

Defendants-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS

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JURISDICTION TO HEAR THE APPEAL

The action originated in Supreme Court, Richmond County. The Appellate Division Order from which Appellant appeals, dated and entered March 27, 2019, affirmed the dismissal of a plaintiff's complaint and thus finally disposed of the action [R. at iii]. In view of the fact that the Appellate Division decision had three Justices affirming and two dissenting Justices voting to reverse the same, this Court has jurisdiction to hear the case pursuant to CPLR 5601(a).

PRESERVATION OF THE ISSUE

In interposing the motion seeking summary judgment for liability and interposing the cross-motion by the City of New York, Appellant argued that the City of New York constructively waived its right to conduct the 50(h) hearing.

In compliance with section 50(h) of the General Municipal Law, the issue before this Court is whether or not it should be deemed that the City of New York waived its right to conduct the 50(h) hearing.

Appellants assert that the City of New York improperly directed that the examination of each claimant be sequestered since it had no statutory authority to do so and appellants assert therefore that the Supreme Court, Richmond County erred in granting the City's cross- motion to dismiss the complaint and further, that the Appellate Division, Second Department also erred in affirming that decision.

Appellants assert that the within case is distinguishable from other matters where a plaintiff's complaint was dismissed by failure to comply with section 50(h) of the General Municipal Law because the facts showed that the two plaintiffs were ready willing and able to proceed with the hearing but the City refused to conduct such hearing. In view of its refusal to conduct such hearing the argument before this Court is whether or not the City constructively waived its right to conduct the hearing. "R" refers to the references to the "Record".

QUESTIONS PRESENTED

1. Q. Was the dissenting opinion of Justice Duffy, in which Justice Connelly concurred, correct to the effect that since section 50(h) of the General Municipal Law was silent with respect to the issue of sequestering one or more claimants from the examination of a co-claimant, that the City of New York had no authority to insist upon sequestrating one claimant from the examination of the other, and in doing so, did the City of New York constructively waive its right to a 50(h) hearing?

A. Yes, as stated in the dissenting opinion of Justice Duffy concurred in by Justice Connelly, since the statute in question must be strictly construed in favor of the claimants, the City of New York had no right to enforce its own policy, unauthorized by statute, to sequester one claimant while the other was testifying. Since the claimants refused to agree to any such sequestration, and since the City refused to proceed with the examinations of either claimant, under those circumstances, the City of New York constructively waived its right to a 50(h) hearing.

2. Q. Did the trial Court err by dismissing the Colon case not based on the merits, and was such extreme remedy an abuse of judicial discretion when the Court could have simply compelled plaintiffs to undergo sequestered 50(h) hearings?

A. Yes.

FACTS

We refer essentially to the facts as outlined in the dissenting opinion of the Appellate Division, Second Department, which has been submitted to this Honorable Court.

To summarize the foregoing, we again note that the appeal revolved about the interpretation of section 50(h) of the General Municipal Law with respect to the issue of whether or not the municipality, namely the City of New York, had the right to sequester one or more claimants from the testimony of another claimant and whether such right was authorized by statute in any manner.

The issue arose following a motor vehicle accident involving a vehicle owned and operated by the City of New York and a vehicle operated by the claimant, Wilfred Colon [R78], in which the plaintiff, Ramona Cordero was a passenger. As a result of the motor vehicle accident in which the City vehicle struck the rear of the Colon vehicle, plaintiffs allege that both plaintiffs sustained serious injuries. Following the service of the notice of claim, pursuant to section 50(h) of the General Municipal Law [R77], both plaintiffs appeared for a hearing.

After the plaintiffs, Wilfredo Colon and Ramona Cordero appeared with their attorney at the designated time and place for the 50(h) hearings, the City of New York insisted on sequestering one claimant while the other testified. Claimant's counsel objected to such procedure and insisted on the other hand that

both claimants be examined concurrently since the matter arose from the same accident, same set of facts and same law [R100-109]. Claimant's counsel argued that unless the City could demonstrate that there was any statutory or common law authority for the City's position, claimant's counsel would not permit his clients to be separately examined [R102-103]. Claimant's counsel therefore insisted upon concurrent examinations unless the City could demonstrate to him any statutory or common law authority to the contrary.

In the absence of any statutory or common law authority, counsel would not allow his clients to be separately examined [R102-103]. As a result of the unresolvable dispute noted between the City's representative and claimant's counsel, claimants and their counsel left the designated place of the hearing, at which time counsel returned to his office and sent a letter to the City of New York dated June 29, 2015 giving the City another thirty days before commencing suit to provide the alleged authority for conducting the separate examination of each claimant. Therefore, and since the City did not provide any such authority, counsel drafted a summons and complaint in which he alleged, inter alia, that the City of New York waived its right to a 50(h) hearing constructively. Following service of the summons and complaint, counsel moved for summary judgment on liability [R7]. The City of New York followed plaintiff's motion for summary judgment on

liability with a cross motion seeking to dismiss plaintiff's complaint for the alleged failure to comply with section 50(h) of the General Municipal Law [R65].

Following the submission of the motion in Supreme Court, Richmond County the Motion Court denied the plaintiff's' motion as moot and granted the City's cross motion [R6]. From that Order, the plaintiffs appealed to the Appellate Division, Second Department [R2].

Following oral argument of the appeal in the Second Department, the Second Department rendered its decision affirming the Order of the Supreme Court, Richmond County, a complete copy of which is made a part of the additional record to this Court. As noted, the decision of the Appellate Division, Second Department affirmed the Order of the Supreme Court, Richmond County in its entirety with three Justices affirming and two dissenting Justices voting to reverse the same [Riii].

The notice of appeal to this Court thereafter followed [Ri].

ARGUMENT

THE SUPREME COURT OF RICHMOND COUNTY WHICH ORDER WAS AFFIRMED BY THE APPELLATE DIVISION, SECOND DEPARTMENT ON A THREE TO TWO BASIS ERRED IN FINDING THAT THERE WAS A VIOLATION BY THE PLAINTIFFS OF SECTION 50(h) OF THE GENERAL MUNICIPAL LAW, WHICH UNDER THE CIRCUMSTANCES SHOWN IN THE RECORD AND BRIEFS WAS NOT VIOLATED BY THE PLAINTIFFS.

The record demonstrates that the two plaintiffs, Wilfredo Colon and Ramona Cordero, appeared with their counsel at the time and place designated by the City of New York for the 50(h) examination of the two claimants. When the two claimants appeared with their counsel, the representative of the City of New York declared that the examinations were to take place separately with one claimant being sequestered while the other claimant was being deposed. Claimant's counsel objected to this procedure on the basis of the fact that there were *two claimants in one notice of claim* concerning the same accident and he therefore insisted that unless the representative of the City of New York could demonstrate to him by statutory law or common law decision why the City was entitled to conduct a sequestered examination of each claimant, he would not submit them to separate examinations. The City of New York counsel stated that it was the practice of the City to conduct separate examinations and so counsel refused to honor claimant's counsel's request for joint examinations.

Claimant's counsel made it plain in the record that he was ready to proceed immediately with one claimant testifying while the other was sequestered, provided the City of New York would produce any statutory or common law authority to support the City's position [R104]. As noted above, counsel for the City of New York refused to do so resulting in claimant's counsel leaving the place of the hearing along with his clients.

Thereafter, claimant's counsel sent the letter dated June 29, 2015 giving the City thirty days to conduct the 50(h) hearings before commencing suit. Since the thirty days lapsed, counsel prepared a summons and complaint wherein he set forth the negligent allegations pertaining to the liability of the City of New York in the subject motor vehicle accident, adding a separate allegation attesting to the fact that the City of New York constructively waived the 50(h) examinations of the claimants by refusing without any statutory or other legal basis, to conduct joint examinations in lieu of the one claimant being examined while the other was sequestered and vice versa. Following the service of the summons and complaint, and the City of New York's answer, plaintiff's counsel brought on a motion for summary judgment seeking partial summary judgment on liability, again asserting the allegation of a constructively waived 50(h) hearing. The City of New York cross moved to dismiss plaintiff's complaint based upon the City's contention that a 50(h) hearing was never waived, actually or constructively.

Following the submission of the motion and cross motion to the Supreme Court of Richmond County, the Supreme Court rendered its decision denying plaintiffs' motion for summary judgment and granting the City's motion to dismiss plaintiffs' complaints on the basis of the fact that the plaintiffs refused to undergo the 50(h) examinations.

An appeal was thereafter taken by the plaintiffs from the Order of the Supreme Court, Richmond County which appeal was fully perfected. The City of New York responded accordingly and eventually the matter came on for oral argument where counsel for both plaintiffs and the City of New York attended and argued. The decision of the Appellate Division followed.

The Order of the Appellate Division, Second Department affirmed the Order of the Supreme Court, Richmond County, by a vote of three justices affirming and two justices dissenting. The dissenting opinion was given by the Honorable Colleen D. Duffy and concurred in by Justice Connelly.

The entire decision of the Appellate Division including the dissent of the two dissenting Justices is now before this Honorable Court. We submit that the most erudite dissent delivered by Justice Duffy should be the law of the case and in submitting our brief to this Honorable Court we completely adopt the decision of Justice Duffy in its entirety. In this regard we refer to the dissent commencing on page 4 of the decision of the Appellate Division wherein Justice Duffy states that

when interpreting any statute, the Court should attempt to effectuate the intent of the legislature and that the clearest indicator of legislative intent is the statutory text, and that the starting point in any case of interpretation must always be the language itself.

Justice Duffy continued and urged that every part of a statute must be given meaning and effect and the various parts of a statute must be construed so as to harmonize with one another and interpreted as they are written according to the ordinary meaning of their language. We agree totally with the provision of law set forth by Justice Duffy as aforesaid, and in accordance with the rules governing the interpretation of statutes. It is submitted that a reading of General Municipal Law, section 50(h) establishes that it does not contain any provision authorizing the defendants to exclude any individuals from the 50(h) examination and there is no basis under common law or statute to allow sequestered examinations when there are multiple claimants involved.

Justice Duffy further noted that General Municipal Law section 50(h) specifically provides that when a notice of claim is filed against a municipality, the latter shall have the right to demand an examination of the claimant which examination shall be upon all questions and may include a physical examination of the plaintiff by a duly qualified physician. In italicized verbiage, Justice Duffy continues with her interpretation of section 50(h) of the General Municipal Law,

wherein she notes that the statute states that if a party to be examined desires, he or she is entitled to have such examination in the presence of his or her own personal physician, and such relative or other person as he or she may select and that claimant shall have the right to be represented by counsel, and the testimony taken at the 50(h) hearing together with the report of the examining physician who conducted the physical examination required by section 50(h) of the General Municipal Law shall constitute the record of the examination.

Justice Duffy continued and stated that although the notice of claim provisions of the General Municipal Law were enacted to enable municipalities to pass upon the merits of a claim before the initiation of litigation in order to forestall unnecessary lawsuits and to make prompt investigation of the circumstances of the claim by examining the claimant about the facts of the claim, the *provisions of section 50(h) should be strictly construed* so as to limit the City's authority to the statutes' express terms, citing *Alouette Fashions Inc. v. Consolidated Edison Co. of New York* 119 AD2d 481, 501 NYS2d 23. Since section 50(h) of the General Municipal Law is in derogation of the common law, it should be strictly construed in plaintiff's favor; *Goodwin v. Bretorious*, 105 AD3d 207 and *Sandak v. Tuxedo Union School District No 3*, 308 NY 226. Justice Duffy further stated that General Municipal Law section 50(h) should be strictly construed to disallow municipal defendants the type of broad discovery permitted

by the discovery provisions of the CPLR, specifically noting that the CPLR provisions do not pertain to pre action proceedings, such as the notice of claim proceeding created by section 50(h) of the Municipal Law. Further, the 50(h) examination requirements are in derogation of plaintiff's common law rights, and therefore the statute creating such a requirement should be strictly construed in plaintiff's favor.

The principals of strict construction should be applied to ascertain whether General Municipal Law 50(h) permits a municipality to exclude a co claimant from his or her co-claimant's 50(h) hearing. As can be observed, Justice Duffy's dissent notes that the majority construed the statute in favor of the municipal defendant, rather than the plaintiff and ascribed a meaning to the word "examination" in favor of the municipality, not supported by the text of the statute. In fact, the plain language of the statute neither expressly permits nor authorizes that which the municipality contends, (namely that one claimant can be excluded while the other is testifying). It is therefore submitted that the majority's opinion does not construe the statute in plaintiff's favor as it should.

As noted above, the plain language of section 50(h) of the General Municipal Law refers to one examination of the claimants by the municipality and permits the claimant the option of who is to be present at the examination and not the municipality. The statute also provides that a claimant can have such

"examination" in the presence of a relative or other person and that although the majority disagrees with Justice Duffy's interpretation to what is permitted under the statute, *the statute does not delineate between the different types of examinations* and speaks only about the municipality's entitlement to conduct an examination which may also include a physical examination. It is further submitted that while the majority proclaims that the claimant's option to decide who may attend applies only to the physical examination, as noted by the dissent, the plain language of the statute is not clear enough in this regard. The dissenting opinion therefore should be afforded the more appropriate one. If the legislature had intended the statute to authorize a municipality to exclude a co claimant from the 50(h) examination of another claimant, it is submitted that it could have clearly and explicitly created such a provision when it enacted the statute.

In responding to the contention that if all of the claimants should be present at the examination of a fellow claimant, the attending claimant would tailor his or her testimony to mirror the other claimant's testimony, is unsupported as suggested by the majority. In fact, no evidence was submitted to validate the majority's concern and it was pointed out by Justice Duffy that there are cases where the Court of Appeals has decided appeals pertaining to 50(h) issues where co claimants in those cases were present at each other's 50(h) examination. Justice Duffy further noted that the City of New York cites nothing in the legislative

history of General Municipal Law section 50(h) that would support the City's conjecture. Justice Duffy continued in the dissenting opinion and pointed out that no concerns about tailored testimony appear in any of the decisions in the cases cited and further the City on the other hand cites to nothing in the legislative history of the statute that would support the contention that the New York State legislature in enacting the statute to allow municipalities to investigate and evaluate claims to avoid litigation would support such a determination. Since the legislative history of General Municipal Law, section 50(h) does not expressly address the issue, one way or the other, the discovery rules adopted by the legislature as set forth in the CPLR are instructive as to the legislative intent as intended to prevent potential dishonesty of a claimant at a 50(h) examination. Since the legislative history of General Municipal Law 50(h) does not expressly address the issue one way or another, it should under strict construction favor plaintiff's position in this respect.

By stating that strict determination should be decided in plaintiff's favor, Justice Duffy and her dissenting colleague opined that neither the plain language of General Municipal Law, nor the legislative intent of the statute authorizes the municipality to exclude one claimant from the 50(h) examination of his or her co claimant, and that although compliance with the demand for the examination pursuant to the statute is a condition precedent to the commencement of an action

against the municipal defendant, the City's refusal to commence the examinations of either claimant while the other was present *constituted a constructive waiver of a right to the examination*. To rule otherwise, we submit would constitute a far more harsh interpretation of the statute than the New York State legislature ever intended.

As we have noted in our briefs to the Appellate Division, the refusal to proceed with the 50(h) examinations by sequestering one claimant while the other was testifying, was not an act of willful refusal to comply with the provisions of section 50(h) of the General Municipal Law. Plaintiff's counsel was acting solely in the interest of his clients when insisting upon joint examinations. His statement to the City's representative that he would proceed immediately as the City so demanded, provided they could give him any statutory or common law authority to support the City's position, demonstrated his attempt to comply with the pre action statute in issue. This we submit also demonstrates the absence of an avowed intent to violate the provisions of section 50(h) of the General Municipal Law. To result in the dismissal of the plaintiffs' complaints, where plaintiffs have what appears to be a full liability case involving a striking of the plaintiffs' vehicle in the rear, by a City operated vehicle, rendering very serious injuries to the two plaintiffs, and to disallow their case to proceed based on all of the foregoing would be tantamount to a violation of the plaintiffs' due process rights.

In view of the foregoing, we urge that the arguments made by Justice Duffy in her dissent supported by Justice Connolly constitutes the most logical and the fairest determination of the issues herein that may be made. We therefore urge this Honorable Court of Appeals to reverse the order of the Appellate Division, Second Department and the Order of the Supreme Court, Richmond County dismissing the plaintiffs' complaints and to simultaneous reinstate the complaints and direct that the plaintiffs have a right to proceed with jointly held examinations under section 50(h) of the General Municipal Law.

We also refer to Justice Duffy's dissent when she noted that if the legislature intended 50(h) of the General Municipal Law to authorize the municipality to sequester joint claimants from the testimony of any other, it should have expressly so stated, citing *Sandak v. Tuxedo Union School District No. 3*, supra. Finally, it must be recognized that the Appellate Division, Second Department has decided appeals pertaining to 50(h) issues where co-claimants were present at each other's 50(h) hearings, citing *Nasca v. Town of Brookhaven,* 10 AD3d 415, 781 NYS 2D137 and *Rupp v. City of Port Jervis* 10 AD3d 391. As the dissent further noted, no concerns about tailored testimony appear in the Court's decisions in those cases. Moreover, the CPLR by example contains no prohibition disallowing co-plaintiffs from appearing at a deposition or the trial testimony of each other during the action; *Carlisle v. County of Nassau* 64 AD2d 15, 408 NYS2d 114. We therefore

urge this Honorable Court to reject the Appellate Division's majority opinion and to adopt the dissenting opinion as the law of the case.

CONCLUSION

THE ORDER OF THE SUPREME COURT, RICHMOND COUNTY AND THE AFFIRMANCE THEREOF BY THE APPELLATE DIVISION, SECOND DEPARTMENT SHOULD BE REVERSED, THE PLAINTIFFS' MOTION ON LIABILITY SHOULD BE GRANTED AND THE CITY'S CROSS MOTION SHOULD BE DENIED.

Dated: June 4, 2019
Lake Success, New York

Respectfully Submitted,

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PRINTING SPECIFICATIONS STATEMENT

The foregoing brief was prepared on a computer using Times New Roman 14 point typeface and is double-spaced, except where the Rules of the Court permit otherwise. The total number of words in the brief, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of authorities, or any authorized addendum, including, if applicable, a statement pursuant to C.P.L.R. § 5531, is 3,678 words.