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.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, etc.

REPLY ARGUMENT

RESPONDENT'S ARGUMENT APPEARS TO BE BASED ON SPECULATION AS WELL AS THE DOCTRINE OF EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.

Respondent argues that the foregoing principle limits the expansion of a right or expectation (page 25 of the respondent's brief) and respondent further argues that this is what the plaintiffs-appellants are seeking to do. This argument is completely not applicable to the case under review by this Honorable Court.

While the principle of Expressio unius est exclusio alterius does limit the expansion of a right or expectation, this is clearly not what plaintiff-appellants are attempting to do, but rather what the respondent, the City of New York, has attempted to do, by insisting upon the sequestration of one claimant from the other. There is absolutely nothing in section 50(h) of the General Municipal Law which allows the municipality the exclusive right, when there is more than one claimant, to examine each claimant separately. In this case, each claimant's rights are precisely the same, except for the damages claim which will have to be separately considered by the fact trier. Plaintiffs are not, however, as urged by respondent attempting to expand their rights in a 50(h) examination by asserting, as they properly had every right to assert, that each claimant has a right to appear not only at his own deposition, but at the deposition of any other co-claimant. However, it is the City of New York, without any authority by statute which seeks to expand its right as provided under section 50(h) of the General Municipal Law to go beyond the right to examine claimants pre action, by sequestering one while the other

is testifying. Thus, the City clearly seeks to expand its right to conduct a pre action deposition by the use of sequestration when two or more claimants are involved.

The statute in question merely gives the municipality the right to a pre action deposition, but does not confer on the municipality the additional right to exclude one claimant when the other is testifying. Since the City of New York seeks to sequester one claimant while the other is testifying, it is the City which seeks to expand its statutory right by its practice of sequestration. This, it may not do, and an interpretation of the statute therefore is necessary as follows:

As Justice Duffy stated, "As the clearest indicator of legislative intent is the statutory intent, the starting point in any case of interpretation must always be the language itself." As also asserted by Justice Duffy in her dissenting opinion, all parts of the statute must be construed together; citing *People v. Mobil Oil Corp.* 48 NY2d 192, 422 NYS2d 33 as well as *Notre Dame Leasing, LLC v. Rosario* 308 AD2d 164, 761 NYS2d 292. In viewing Section 50(h) of the General Municipal Law, as noted in Justice Duffy's dissent, we see the following language:

"The various parts of the statute must be construed so as to harmonize with one another" [R vi]

The statute states that whenever a notice of claim is filed against a municipality, it has the right to demand an examination of the claimant which examination shall be upon all questions (as well as the physical examination if desired) [R vii]. Again, Justice Duffy in her dissenting opinion, *to which there is no argument to the contrary,* states that the

provisions of the statute have always been and should always be strictly construed so as to limit the municipality's authority to the express terms of the statute [R vii].

With respect to the foregoing, as counsel for the plaintiff argued when he appeared with his two clients for the 50(h) hearing to be conducted by the City, there was absolutely nothing in the statute to allow the municipality to sequester any non-testifying claimant from the co-claimant's examination by the municipality. The City respondent's brief concludes that by allowing one claimant to sit in on the deposition of a co-claimant, will be to allow the non-testifying claimant to conform to the testimony of the other claimant. However, there is absolutely no support for that conclusion in the statute itself or in its legislative history. Indeed, that principle is never applied when a trial of an action is in progress. Any party to the litigation has a right to appear during the testimony of any other party and we submit that the same principle of a party's rights at the trial of an action should apply during the course of a 50(h) hearing.

It is submitted that there has been absolutely no evidence submitted to validate the majority's concern that a sworn claimant would tailor his or her testimony to mirror the other claimant's testimony and despite the commentary by the majority that tailoring the testimony of one claimant is simply part of human nature, there are cases where this Honorable Court has decided appeals pertaining to 50(h) issues in, which as a matter of course, co-claimants in those cases were present at each other's 50(h) hearing [R viii-vix]. The cases to this effect were cited in the Appellate Court's dissenting opinion, including *Nasca v. Town of Brookhaven* 10 AD3d 415, 781 NYS2d 137 and *Rupp v. City of Port Jervis* 10 AD3d 391, 780 NYS2d 766, and there were no concerns about tailored

testimony in any decisions in those cases. Furthermore, the respondent does not cite anything in the legislative history of Section 50(h) of the General Municipal Law which covers this issue. The legislative history of General Municipal Law, Section 50(h), does not address this issue one way or the other, and even the CPLR contains no prohibition disallowing co-plaintiffs from appearing at depositions or at the trial testimony of each other during the action [R ix].

As this Court will note, the dissent by Justice Duffy completely agreed with plaintiff's counsel that the City's refusal to commence the examinations of each plaintiff while the other was present, in effect, constituted a constructive waiver of the right to the examination, citing *Ambroziak v. County of Erie* 177 AD2d 974, 577 NYS2d 1020.

It is further submitted that to permit a dismissal of the plaintiff's complaint, including as insisted by the City when plaintiff's attorney refused to allow his one client to be excluded when the other is testifying, is wholly improper. As we have noted, the only reason given by the City of New York in refusing to allow each claimant to attend the deposition of the other claimant is its fear that the non-testifying claimant will tailor his or her testimony. This is without any support, especially when counsel for the City of New York stated that the sequestration of one claimant while the other one is testifying is simply the practice and policy of the City of New York, as opposed to being based on any statutory or case law authority.

The plaintiffs' complaint alleged a hit in the rear of the claimant's vehicle by a New York City owned vehicle. Accordingly, liability against the City was essentially one establishing a prima facie case of liability on behalf of both claimants. Therefore, both

claimants asserted *one claim involving one accident* in which both were involved. Counsel for the plaintiff also stated that both Mr. Colon and Ms. Cordero were ready, willing and able to proceed that very day for their respective examinations so long as both testified while the other was present [R100].

We respectfully reiterate the statement made in the dissent that the statute does not authorize the municipality to impose an internal policy of the City to conduct individual hearings without the other person present, which is exactly what the City insisted upon in its intended examination of the claimants. The statute neither expressly permits nor authorizes that which the defendants contend and the City's position ignores the statute's plain language and the precept that construction of the statute should be strictly construed in the plaintiff's favor and not in favor of the City of New York [R viii]. Further, the contention by the City that the purpose of the 50(h) section of the General Municipal Law would be undermined if the Court were to find the statute does not authorize the City to exclude one claimant from another claimant's 50(h) examination is completely without any legal basis. It is therefore speculation to conclude that the legislature intended the statute to authorize a municipality to exclude one claimant from the 50(h) hearing of the other claimant. In order to reach that conclusion, the legislature should have explicitly created such a provision in the statute; *Sandak v. Tuxedo Union School District* 308 NY 226, which it clearly did not.

The City's appellate counsel complains to this Honorable Court that we have basically duplicated Judge Duffy's dissenting opinion. In this regard, counsel for the City of New York, to some extent, is correct. Indeed, appellants would be hard pressed not to

adopt Justice Duffy's dissent. However, what respondent's counsel seems to ignore is the fact that there is nothing in section 50(h) of the General Municipal Law which confers upon any municipality the right to conduct a 50(h) hearing when there is more than one claimant to be deposed by sequestering all other claimants from the deposition of the testifying claimant. The fact that this is the City's practice and policy is irrelevant since there is nothing in the statute that gives the City the exclusive right or discretion to make the rules in conducting the 50(h) hearing. In view of the silence of the statute concerning that debatable issue, as we have noted, it is necessary to judicially interpret the statute and the first place to look is the statute itself. Since it cannot be determined solely from the language in the statute that the Municipality has any right to sequester any one claimant from the deposition testimony of another claimant and since the statute is in derogation of the common law, *the statute must be strictly construed in favor of the claimant.*

In construing the statute in favor of the claimant, we submit that each claimant in any situation when multiple claimants are involved should have the opportunity to attend the deposition of any other claimant. Therefore, even though the attorney for Mr. Colon and Ms. Cordero, stated that he and his clients appeared at the place designated by the City for the holding of the 50(h) hearing and were ready to proceed, and would have gone forward with the 50(h) hearing if the attorneys for the City could demonstrate to him what statutory or case law authority they had to justify the City's position, the City attorney refused to provide any such statutory authority. Counsel therefore would not

comply with the City's unreasonable request to sequester one claimant while the other is testifying.

Counsel for the plaintiff also made it plain at the time of the designated hearing that he would proceed that very day if the City could give him any statutory or common law authority to support the City's sequestration practice. Thus, he was ready, able and willing to have his clients testify that very day when all three of them, the claimants and their lawyer were present at the place designated by the City for the holding of the 50(h) examination. Further, the City ignored the fact that plaintiff's counsel, upon returning to his office following the aborted hearing, sent a letter to the Corporation Counsel's office again stating that he would submit both claimants to examination with one being sequestered while the other is testifying, provided the City could provide any statutory or case law authority to justify the City's position and he gave the City 30 days in which to comply with his position [R105].

Clearly, plaintiff's counsel was not being obstructive in any way. First, it is not disputed that plaintiff's counsel appeared with both claimants at the place designated by the City of New York for the holding of the 50(h) examination and they were then ready, willing and able to proceed, with the sole provision that he would not follow the general practice of the City concerning the sequestration of one client while the other is testifying unless the City would present any statutory or case law authority to the contrary. As we have repeatedly noted, the statute itself (50[h]) is totally silent with respect to that issue. Again, we totally agree with Judge Duffy's dissenting opinion in which she noted that the statute is in derogation of common law and therefore must be strictly construed in favor

of the claimant. Based on the City's refusal to go forward with the examinations, plaintiff's counsel asserted that the hearing was waived by the City of New York [R23].

The City in its brief urges in substance the mere fact there have been cases where the municipality involved conducted a 50(h) hearing involving multiple claimants where all of the claimants were able to sit in when the deposition of another claimant was being deposed is not binding on the City of New York whose practice is to the contrary (Page 29 of respondent's brief). The City's refusal to allow both claimants to attend the other's hearing apparently is because it feared the testimony of the non-testifying claimant would be persuaded by the testimony of the claimant who was being examined. However, there is absolutely no support for that argument. Therefore, as Judge Duffy pointed out in her dissenting opinion there were several cases before the Court of Appeals involving 50(h) hearings where multiple claimants were involved and all were permitted to attend the hearing of another claimant. While the City seems to believe what other municipalities do in 50(h) hearings is irrelevant, we submit that it is not irrelevant and rather quite relevant since it shows that the City's practice is not exclusive. Consequently, any sequestration by the City of New York in conducting its 50(h) hearing is not a sufficient basis for the City's reliance on its own practice and policy when it is not given such right in the General Municipal Law. The argument made in the City's brief we submit is based strictly on speculation.

We also disagree with the City's contentions contained on pages 28 and 29 thereof, where respondent's counsel argues that the claimants, Colon and Cordero, may have different theories of liability, different injuries, or even different memories in

attempting to justify its practice. As clearly pointed out in the plaintiffs' summary judgment motion, there is full liability on the City's part to both claimants equally. Claimant Colon was the operator of the vehicle which was struck in the rear while plaintiff, Cordero, was his passenger. The vehicle was stopped and struck in the rear. The defendant, Willie Martin, Jr., admits that he struck the plaintiff's vehicle in the rear. The only excuse as given to the police officer is that the plaintiff's vehicle stopped short [R58].

In his affidavit in support of the City's cross motion, Mr. Martin states that he observed a car in front of him with two occupants, a male driver and a female passenger, and that he was behind the Colon vehicle for several minutes during which time he observed the car in front of him move forward. He also stated that the driver of the car appeared to touch the passenger and there appeared to be a dispute between occupants of the vehicle. He started to move forward with traffic and observed the Colon car made a sudden stop. He attempted to pull his vehicle to the right to avoid contact but was unable to do so and struck the rear bumper of the Colon vehicle [R115]. Consequently, there is no dispute to the fact that the vehicle operated by Mr. Martin struck the rear of the vehicle operated by Mr. Colon and in which Ms. Cordero was a passenger. The only purported excuse was as Mr. Martin was driving behind the Colon vehicle for several minutes, he saw the driver attempted to touch the passenger and there appeared to be a dispute between the occupants of the vehicle [R115]. This, we submit, is a meritless assertion which cannot in any way constitute a non-negligent excuse for the cause of the

accident. Full liability to both claimants, therefore, can not be avoided under any circumstances.

A rear end collision establishes a prima facie case of negligence on the part of the operator of the rear vehicle requiring the operator of that vehicle to rebut the inference of negligence by providing a non-negligent excuse for the collision, see *Martinez v. Martinez*, 93 AD3d 767, 941 NYS2d 189: *Denezzo v. Joseph*, 95 AD3d 1060, 944 NYS2d 299; *Giangrasso v. Callahan*, 87 AD3d 521, 928 NYS2d 68. Thus, the fact that the Colon vehicle may have stopped short in heavy traffic is no reasonable excuse for the rear end strike, see *Volpe v. Limoncelli,* 74 AD3d 795, 902 NYS2d 152. No matter if any testimony by Ms. Cordero might differ from Mr. Colon's testimony in this respect, all sides agree that the City-owned vehicle struck the rear of the Colon vehicle, whose operator's only excuse is that the Colon vehicle made a sudden stop in traffic. Therefore, no matter what Ms. Cordero might possibly say that could differ from Mr. Colon's account of the happening of the accident, it cannot change the fact that the City vehicle struck the rear end of the Colon vehicle without a sufficient explanation therefor and there is no possibility that one claimant could have a meritorious claim while a co-claimant does not, as argued by the City on page 28 of its brief. In this case, therefore, there was no basis for sequestering Ms. Cordero while Mr. Colon testified.

Based upon the arguments asserted in the plaintiffs' summary judgment motion and the arguments asserted in the appellants' brief to the Appellate Division, it is submitted that the City of New York's practice and policy of sequestration is not authorized by any statute or case law authority. It is therefore further submitted that a

proper interpretation of section 50(h) of the General Municipal Law demonstrates that the City's sequestration practice at 50(h) hearings is completely unauthorized or permitted.

Based on the foregoing, we submit the Supreme Court of Richmond County erred in granting the City's cross motion for summary judgment, and denying the motion for summary judgment made by the plaintiffs, and the affirmance by the Appellate Division was equally erroneous.

CONCLUSION

THE ORDER OF THE SUPREME COURT, RICHMOND COUNTY WHICH WAS AFFIRMED BY THE ORDER OF THE APPELLATE DIVISION, SECOND DEPARTMENT SHOULD BOTH BE REVERSED AND THE COMPLAINT OF THE PLAINTIFFS-APPELLANTS SHOULD BE REINSTATED IN ITS ENTIRETY. IT IS FURTHER SUBMITTED THAT THIS COURT'S RULING SHOULD DECLARE THAT THE CITY OF NEW YORK WAIVED ITS RIGHT TO CONDUCT THE 50(h) HEARINGS OF EACH CLAIMANT WHEN IT IMPROPERLY INSISTED UPON SEQUESTERING ONE CLAIMANT AT THE DEPOSITION OF THE OTHER CLAIMANT.

Dated: September 6, 2019
Lake Success, New York

Respectfully Submitted,

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