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October 28, 2020

Hon. John P. Asiello
Clerk of the New York State Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-4095

Re: Alexandra R. v Krone
APL-2020-00148

Dear Mr. Asiello:

This office represents the plaintiffs-appellants, Alexandra R., Alexis R., Sr., as p/n/g of Alexis R., Jr., Yamaris R., and Christieann G., and Demaris M., as Guardian of Jaicob G. and Jaiden G., and as Administrator of the Estate of Luis A., Jr., in the above-referenced appeal. This letter will constitute our Jurisdictional Response, as requested in the correspondence of Heather Davis, Deputy Clerk, dated October 19, 2020.

The plaintiffs-appellants are appealing from an order of the Appellate Division, Fourth Judicial Department, entered August 20, 2020. The Appellate Division order reversed a judgment of the Supreme Court, Erie County, entered February 1, 2019.

THE TRIAL COURT VERDICT

The judgment, which was entered against all defendants on the issue of liability, was based upon a verdict of the Hon. Frederick J. Marshall, dated January 8, 2019, after a bench trial. In his verdict, Justice Marshall found that the defendant Krone, who was employed by the New York State Thruway Authority, had acted with reckless disregard for the safety of others and that such reckless disregard was a substantial factor in causing a motor vehicle collision that occurred on April 18, 2013, resulting in serious injuries to the plaintiffs and multiple deaths. Justice Marshall further found that the decedent, Luis A., had been negligent in the operation of his motor vehicle and that such negligence was a substantial factor in causing the collision of April 18, 2013. Justice Marshall apportioned 65% of the fault to the decedent Luis A., and 35% of the fault to the defendant Krone. The court found that the defendant Jessica G. was vicariously liable for the conduct of Luis A.

The verdict was based upon fourteen separate findings of fact that were set forth in the written verdict. With regard to the liability of the defendant Krone, those findings are summarized as follows:

- On April 18, 2013, Mr. Krone and his two-man crew were engaged in a cleanup operation on the median and shoulder of the I-90 eastbound Thruway;

- The truck's flashing yellow lights were engaged during this operation;

- The defendant Krone's Thruway truck was parked approximately 18 inches from the yellow fog line separating the left travel lane from the shoulder;

- New York State Thruway regulations provided that a vehicle engaged in cleanup operations, such as that in which Krone was involved, should be parked as far from traffic as feasible;

- Contrary to Krone's testimony that it was too wet to operate the vehicle on the grassy area to the left of the shoulder, meteorological, photographic, and testimonial evidence established that the grassy area was dry enough to accommodate Krone's truck;

- Even if the court had credited Krone's testimony that it was too wet to operate the vehicle on the grassy median, the operation either should not have been conducted or better traffic control measures should have been taken;

- The truck was parked either on, or so near, the rumble strips located on the left shoulder that this safety feature was rendered useless;

- Mr. Krone did not use any signs or channeling devices to alert traffic that work on the median and shoulder close to the highway was being conducted;

- At the time of the collision, Krone was a long-time employee of the New York State Thruway Authority and had engaged in many cleanup operations on the New York State Thruway;

- Mr. Krone knew, or should have known, that vehicles sometimes leave the roadway at a high rate of speed due to drivers being tired, distracted or inattentive;

- The defendant Luis A. fell asleep, became distracted or became inattentive, causing the vehicle that he was driving at a high rate of speed to drift from the left driving lane to the shoulder and to collide with the defendant Krone's Thruway truck;

- Uncontroverted expert testimony established that the collision would have been avoided if Krone had operated and parked his vehicle further to the left on the grassy median;

- If the vehicle operated by Luis A. had engaged the rumble strips, it was more likely than not that the accident would not have occurred because Luis A. would have been alerted to his vehicle going off the road.

The final finding of fact was the following:

> 14. Defendant Krone's operation of the New York State Thruway truck on the shoulder of the road only 18 inches from high-speed traffic was intentional, unreasonable and in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. Defendant Krone's parking of the truck on the shoulder was done with a conscious indifference to the possibility that the truck would pose a hazard to oncoming traffic.

THE ORDER OF THE APPELLATE DIVISION

The defendant Krone appealed from the judgment. In its August 20, 2020, order, the Appellate Division reversed the judgment insofar as appealed from and dismissed the amended complaint against the defendant Krone. The Appellate Division order stated that that the reversal was "on the law." Two of the justices on the five-justice panel dissented and voted to affirm the judgment in the plaintiffs' favor.

In their decision, the Appellate Division majority stated that, after reviewing the record, "we conclude that the weight of the evidence does not support the court's determination that defendant acted with reckless disregard for the safety of others as required to impose liability against him under Vehicle and Traffic Law § 1103(b)." The court then discussed the recklessness standard applicable to vehicles "actually engaged in work on a highway," stating that the standard was established " 'upon a showing that the covered vehicle's operator has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious disregard to the outcome,' " citing this Court's decision in *Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1105 (2015).

After reviewing certain of the evidence in the record, the Appellate Division majority stated,

> [I]t cannot be said that defendant's actions were of an "unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and . . . done . . . with conscious indifference to the outcome," given the favorable weather and road conditions for motorists, as well as the safety precautions taken by defendant in positioning the truck completely off of the travel lane and activating various hazard lights.

(citations omitted).

The majority opinion next addressed the argument of the plaintiffs, and the finding of Justice Marshall, that Mr. Krone had been reckless because of his violation of Thruway Authority safety regulations and his positioning of the truck such that the rumble strips were useless. The majority continued as follows:

> We reject plaintiffs' contention and the court's conclusion. Even if defendant, despite his belief that he was in compliance with the regulation by positioning the truck as far from traffic as feasible without getting stuck in wet ground on the median, could have positioned the truck even farther to the left and off of the rumble strips, that failing establishes, at most, a lack of due care under the circumstances, which is insufficient to impose liability under the recklessness standard.

(citations omitted).

The Appellate Division majority did not make any new findings of fact or state disagreement with any of the facts found by Justice Marshall. Rather, it concluded that Justice Marshall's determination that Mr. Krone had acted recklessly was not warranted by the facts that the trial court found. Accordingly, the conclusion that must be drawn from the Appellate Division decision was that it found that the evidence received at trial, even when viewed in the light most favorable to the plaintiffs, was insufficient to support the finding of reckless disregard.

The dissenting justices stated that they could not "join the majority in holding the verdict to be against the weight of the evidence in light of the significant proof supporting the trial judge's conclusions." They voted to affirm the judgment.

The dissent reviewed the evidence in detail and pointed out that there was unrebutted testimony from two expert witnesses who opined that Mr. Krone's conduct recklessly disregarded the safety of others. The dissenting justices concluded that the testimony of the experts was compelling proof that the trial court had correctly found that the defendant Krone had acted recklessly.

The dissenting justices disagreed with the majority's analysis of the recklessness standard, stating, "[W]e ought not to inadvertently conflate the criminal recklessness standard with the civil recklessness standard." The dissenting justices pointed out that, in defining civil recklessness, the courts had never required that the defendant's conduct be committed with a depraved heart, or for the purpose of bringing about a particular injury. The dissenting justices stated that the reasonableness of a defendant's excuse or explanation for his conduct was a question best left to the trier of fact. The dissenting justices thus included as a ground for the dissent the issue of whether the majority had applied an incorrect standard in its determination of the issue of reckless disregard.

FINALITY

The Appellate Division order found the defendant Krone not liable as a matter of law and dismissed the plaintiffs' amended complaint against him. The action remained pending against the Estate of Luis A. and Jessica G.

A final order or judgment is one that disposes of all causes of action between the parties in an action and leaves nothing for further judicial action apart from mere ministerial matters. *Burke v Crosson*, 85

NY2d 10, 15 (1995). Numerous cases recognize the concept of "party finality." Party finality exists where an action has been dismissed against one defendant, though it remains pending against other defendants. *See, 981 Third Ave. Corp. v Beltramini*, 67 NY2d 739 (1986). This Court may consider an appeal on the merits when party finality exists, and frequently does so. *See, e.g., Hain v Jamison*, 28 NY3d 524 (2016); *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 (2001); *Matter of Miller v Board of Assessors*, 91 NY2d 82 (1997); *Tenuto v Lederle Labs., Div. of American Cyanamid Co.*, 90 NY2d 606 (1997).

In accordance with the above-referenced cases, the case at bar may be reviewed by this Court under the principle of party finality.

SUBJECT MATTER JURISDICTION

There are two issues presented in this appeal that are within the Court's subject matter jurisdiction. The Court may also interpret the Appellate Division decision as presenting an additional factual issue that is also within the Court's subject matter jurisdiction. The legal issues concern (1) the sufficiency of evidence on the question of reckless disregard; and (2) the legal standard to be applied in determining the question of reckless disregard. These issues are discussed individually below. The factual question (subsection 3. below) concerns the determination of the weight of the evidence received at trial. If this Court determines that the Appellate Division decision makes a finding on this issue, the issue presented to this Court will be whether the decision of the Appellate Division, or that of the trial court, more closely comported with the weight of the evidence.

1. Sufficiency of Evidence

While there are multiple references to the weight of the evidence in the opinions at the Appellate Division, the majority opinion ultimately concluded that the evidence received at trial, even when viewed in the light most favorable to the plaintiffs, was insufficient to establish that Mr. Krone acted with reckless disregard for the safety of others. The court's order reversed the judgment "on the law." Whether there was sufficient evidence to support a factual finding is a legal issue. *See, Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 498 (1978). A finding that a verdict was against the weight of the evidence is a factual issue. *See, Heary Bros. Lightning Protection Co. v Intertek Testing Servs., N.A., Inc.*, 4 NY3d 615, 618 (2005); *Cohen Hallmark Cards, Inc., supra*. By reversing the judgment "on the law," the Appellate Division was making a finding that, in its view, the evidence received at trial was insufficient to establish the necessary element of reckless disregard for the safety of others. This determination is more explicitly stated in the last paragraph of the majority decision, where the justices state that the evidence relied upon by the plaintiffs and the trial court was "insufficient to impose liability under the recklessness standard."

That the Appellate Division was making a finding of insufficiency is further evidenced by the fact that the Appellate Division did not specify any findings of fact which were reversed or modified and did not set forth any new findings of fact made by that court. Such a recitation would have been required by CPLR 5712(c)(2) if the reversal was upon the facts, or upon the law and the facts.

The Appellate Division majority decision did not identify any factual issue upon which that court reached a different conclusion than that of Justice Marshall. Rather, the Appellate Division disagreed only with Justice Marshall's ultimate conclusion that the conduct that was the subject of the trial testimony supported a finding of reckless disregard.

The fact that both the majority and dissenting opinions employed the term "weight of evidence" does not deprive this Court of subject matter jurisdiction. The circumstances are similar to those presented in *Heary Bros. Lightning Protection Co. v Intertek Testing Servs., N.A., Inc., supra*. *Heary Bros.* was a breach of contract action that was tried before a jury, which found that the defendant had breached the contract and awarded the plaintiffs damages for lost profits. On the defendant's post-trial motion, the Supreme Court upheld the liability verdict, but ordered a new trial on damages unless the plaintiffs accepted a reduced award. The Appellate Division modified in an opinion that stated that the modification was "on the law," but which also referred to the jury's award of damages being against the weight of the evidence. On the appeal to this Court, a question arose as to whether the Court had jurisdiction. This Court ruled that the result reached showed that, in reality, the Appellate Division had ruled on the sufficiency, not the weight, of the evidence. This Court therefore determined that it had subject matter jurisdiction of the appeal.

This same result should follow here. The Appellate Division reversal was on the law, and the court's decision showed that, while there were references to the weight of the evidence, the court was really determining that the facts as found by Justice Marshall, which the Appellate Division did not dispute, were insufficient to justify a finding of reckless disregard. This Court therefore has subject matter jurisdiction of the appeal.

The dissenting justices disagreed with the majority's determination of insufficiency and stated that Justice Marshall's verdict should stand. The dissent was therefore on a question of law and the plaintiffs' appeal from the Appellate Division order is as of right pursuant to CPLR 5601(a).

2. The Legal Standard

The dissenting justices stated that the majority had "inadvertently conflate[d] the criminal recklessness standard with the civil recklessness standard." The dissenters thus were of the view that the majority had applied an incorrect standard in determining the question of recklessness, applying the criminal recklessness standard in place of that applicable to civil matters. An issue as to whether a court has applied an incorrect legal standard is a question of law. *See, e.g., Baba-Ali v State of New York*, 19 NY3d 627 (2012); *Maule v NYM Corp.*, 54 NY2d 880 (1981).

In *People v Olson*, 9 NY3d 968 (2007), the defendant was convicted after a bench trial. He appealed to the Appellate Division, arguing that the verdict was against the weight of the evidence. The Appellate Division affirmed. In this Court, the defendant argued that the Appellate Division had applied an incorrect legal standard in determining that the verdict was not against the weight of the evidence. This Court reached the merits of the defendant's argument and affirmed the Appellate Division order. The Court could

not have reached the merits had it not determined that the defendant had raised a legal issue by arguing that an incorrect legal standard had been applied by the Appellate Division.

The circumstances at bar are similar. A verdict was reached after a bench trial and was reviewed by the Appellate Division. The dissenting justices raised the issue of the application by the majority of an incorrect legal standard. The plaintiffs are entitled to raise this issue of law on appeal and this Court has subject matter jurisdiction with respect to that issue. Because the dissent was on a question of law, the plaintiffs' appeal is as of right pursuant to CPLR 5601(a).

3. Weight of Evidence

This Court may determine, in light of the "weight of evidence" language in the Appellate Division decision, that the reversal was also based on the facts, and that the Appellate Division made findings of fact that differed from those of the trial court. In the circumstances of this case, this Court has subject matter jurisdiction of the appeal of the factual question.

This Court is not bound by the Appellate Division's characterization of a reversal as on the facts or on the law. *See, Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 551-552 (2015). Should this Court determine that the Appellate Division reversed on the facts as well as on the law, it may examine the Appellate Division decision in order to determine the new findings made by the Appellate Division. *See, Matter of Goldstein*, 299 NY 43 (1949).

This Court is authorized to review questions of fact where the Appellate Division has reversed or modified a judgment of the trial court entered after bench trial. *See,* Constitution Article VI, §3(a); CPLR 5501(b); *Matter of Town of Hempstead v Little*, 22 NY2d 432 (1968). Such a review is permitted where the Appellate Division has made factual findings different from those of the trial court. *See, Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 504 (1983). In such cases, this Court must determine whether the findings of the Appellate Division, or those of the trial court, more closely comported with the weight of the evidence. *See, Dryden Mut. Ins. Co. v Goessl*, 27 NY3d 1050 (2016); *Pegasus Aviation I, Inc. v Varig Logistica S.A., supra; Matter of Wilson v McGlinchey*, 2 NY3d 375 (2004). This Court is required to take into account the fact that the trial court had the advantage of seeing the witnesses. *See, Miller v Merrell*, 53 NY2d 881 (1981).

A dissent solely on a factual issue would not qualify as an appeal as of right pursuant to CPLR 5601(a). As stated above, however, the instant matter qualifies as an appeal as of right on multiple grounds and any factual issue raised by the Appellate Division reversal is within the Court's subject matter jurisdiction. Thus, to the extent that the Court might determine that the Appellate Division made new findings of fact, the issue should be reviewed on its merits.

Pursuant to the Court's rules, we have provided the Court with digital copies of the record on appeal and briefs filed at the Appellate Division.

If any further information is required, please feel free to contact the undersigned at any time.

Very truly yours,

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