VANDETTE PENBERTHY LLP

October 28, 2020

Via U.S. Mail, Overnight Delivery

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: Vanessa G. v Krone
APL-2020-00148

Dear Mr. Asiello:

Please allow this to constitute plaintiff-appellant, Vanessa Gonzalez., as p/n/g of Adrianna Arroyo, Jurisdictional Response in the above-referenced appeal, as requested in the correspondence of Heather Davis, Deputy Clerk, dated October 19, 2020.

Plaintiff-Appellant is appealing from an order of the Appellate Division, Fourth Judicial Department, entered August 20, 2020, which incorporated the same Memorandum and Order in *Alexandra R. v. Krone*, Appeal Number 1, Appellate Division Docket CA 19-00761. The Appellate Division order reversed a judgment of the Supreme Court, Erie County, entered February 1, 2019. This Jurisdictional Response has been prepared in conjunction with the other plaintiffs-appellants in the consolidated appeals, and Plaintiff-Appellant herein joins in the responses and incorporates the legal arguments of co-plaintiffs-appellants.

Procedural History

The Supreme Court judgment was entered against all defendants — Nelson Arroyo, as Administrator of the Estate of Luis Alberto Arroyo-Soto, and Jessica Gonzalez, on the issue of negligence, and against Eric J. Krone on the issue of reckless disregard for the safety of others. The judgment was based upon a verdict of the Hon. Frederick J. Marshall, dated January 8, 2019, after a bench trial.

In his verdict, Supreme Court Justice Marshall found that 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

A 227 Niagara Street • Buffalo • NY • 14201
P 716.803.8400 F 716.408.0308 W vandettepenberthy.com

James M. VanDette E jvandette@vanpenlaw.com
Brittany Lee Penberthy E bpenberthy@vanpenlaw.com ALSO ADMITTED IN CONNECTICUT
Patrick Makin E pmakin@vanpenlaw.com • **Vincent Parlato** E vparlato@vanpenlaw.com

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 Appellate Division, Fourth Department, reversed the trial court judgment and dismissed the complaint against defendant Krone. The Appellate Division order stated that the reversal was "on the law," and two justices of the five-justice panel dissented and voted to affirm the judgment in Plaintiff-Appellant's favor.

Jurisdiction

A. The Appellate Division order finally determined the action under the doctrine of "party finality."

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

CPLR § 5601(a) vests the Court with jurisdiction over appeals from orders of the Appellate Division, in which two justices dissent, which "finally determines the action". 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). There are exceptions to the rule of finality. Even though an action may remain pending against some defendants, where an action is dismissed against one defendant, the Court may elect to treat an Appellate Division order as final, under the doctrine of "party finality." *See Hain v Jamison*, 28 NY3d 524, 528, n 2 (2016). Party finality may exist as to individual defendants although claims remain pending against another defendant. *See We're Assocs. Co. v Cohen*, 65 NY2d 148, 149 n 1 (1985).

In the Appellate Division's Memorandum and Order for this appeal (which incorporated the Memorandum and Order of Appellate Division Docket CA 19-00761), the judgment of the trial court was reversed, and the complaint was dismissed against Defendant Krone. With the judgment reversed and the complaint dismissed by the Appellate Division against Defendant Krone, the action is finally determined as to Defendant Krone. Plaintiff-appellant respectfully submits this Order resolving the entire action against Defendant Krone constitutes party finality as to Defendant Krone sufficient to confer jurisdiction.

B. The two-justice dissent at the Appellate Division is on a question of law in favor of Plaintiff-Appellant.

The New York Constitution, Article VI, §3 and CPLR § 5601(a) confer jurisdiction to the Court of Appeals for review of questions of law, as of right, following a two-justice dissent at the Appellate Division (as is the case, here).

There are two issues presented in this appeal concern the sufficiency of evidence on the question of reckless disregard, and the legal standard to be applied in determining the question of

reckless disregard. A factual question concerns the determination of the weight of the evidence received at trial.

1. The Appellant Division reversed the Supreme Court judgment "on the law," which is a legal issue.

Notwithstanding multiple references to "weight of the evidence," the majority of the Appellate Division ultimately concluded that the evidence at trial, viewed in a light most favorable to plaintiff-appellant, was insufficient to establish that Defendant Krone acted with reckless disregard for the safety of others. As such, the Appellate Division's order (in this action as well as in Appeal No. 1, Appellate Division Docket CA 19-00761) 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 found 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, in Appeal Number 1, 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 at the Appellate Division 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. In the dissent's view, the majority applied the incorrect legal standard, conflating criminal recklessness with civil recklessness.

The dissenting justices stated that the majority had "inadvertently conflate[d] the criminal recklessness standard with the civil recklessness standard." The dissenting justices 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.

Here, the trial court 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 plaintiff is 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 plaintiff's appeal is as of right pursuant to CPLR 5601(a).

C. The Court also has jurisdiction, under the State Constitution Article VI § 3(a) and CPLR § 5501(b), to review questions of fact where the Appellate Division reversed the trial court's judgment following a bench trial.

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).

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).

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.

For the reasons set forth above, together with those set forth by the co-plaintiff-appellants in the consolidated appeals, it is respectfully submitted that the Court should retain jurisdiction over this appeal as of right and issue a scheduling Order for perfecting this Appeal.

Sincerely,

VANDETTE PENBERTHY LLP

James M. VanDette, Esq.

Enc.

cc: Charles Desmond, II, Esq.
Robert M. Goldfarb, Esq.
John R. Condren, Esq.
Martin J. Zuffranieri, Esq.
Ryan J. Mills, Esq.

COURT OF APPEALS OF THE STATE OF NEW YORK

VANESSA GONZALEZ as Parent and Natural Guardian of ADRIANNA AROYO, an Infant,

Plaintiff-Appellant,

vs.

ERIC J. KRONE,

Defendant Respondent,

NELSON ARROYO, as Administrator of the Estate of LUIS ALBERTO ARROYO-SOTO, and JESSICA GONZALEZ,

Defendants.

Index No. APL-2020-00148

Appellate Division Docket No.: CA 19-00478

AFFIDAVIT OF MAILING

STATE OF NEW YORK)

COUNTY OF ERIE) SS:

Kimberly A. Ralph, being duly sworn, deposes and says; deponent is not a party to the action; is over 18 years of age and is an employee of VanDette Penberthy LLP, with an office at 227 Niagara Street, Buffalo, New York, 14201.

On October 28, 2020, deponent mailed copies of the Jurisdictional Response, as requested by the Deputy Clerk via letter of October 19, 2020, via U.S. Mail, enclosed in postpaid properly addressed envelopes, under the exclusive care and custody of the United States Postal Service to:

Martin J. Zuffranieri, Esq.
6024 Main Street
Williamsville, New York 14221

Philip C. Barth, III, Esq.
43 Court Street, Suite 600
Buffalo, New York 14202

Charles S. Desmond, Esq.
69 Delaware Avenue, Suite 900
Buffalo, New York 14202

Ryan Mills, Esq.
8685 Sheridan Drive
Williamsville, New York 14221

Robert M. Goldfarb, Esq.
Office of the Attorney General
The Capitol
Albany, New York 14224

John R. Condren, Esq.
Barth Sullivan Behr
367 Linwood Avenue
Buffalo, New York 14209

Kimberly A. Ralph

Sworn to before me this 28th day of October, 2020.

Notary Public

VINCENT T. PARLATO
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02PA6387889
Qualified in Erie County
Commission Expires February 25, 2023