The Law Offices of
MARTIN J. ZUFFRANIERI
6024 Main Street
Williamsville, New York 14221
Tele: [716] 565-6050 Fax: [716] 565-6052

October 28, 2020

Sent Via FED EX and Portal E-Filing

State of New York Court of Appeals
Attn: Hon. John P. Asiello, Chief Clerk to the Court
20 Eagle Street
Albany, NY 12207

Re: Alexandra R. v. Krone; Jessica G. v. Krone; Nelson A. v Krone; and Vanessa G. v Krone

Dear Mr. Asiello:

The following constitutes plaintiff-appellant, Jessica Gonzalez's, Jurisdictional Response under Rule 500.10 as requested in this Court's correspondence of October 19, 2020. The Record on Appeal and Brief's submitted to the Appellate Division, Fourth Department, are being simultaneously transmitted herewith, via the Court's E-filing portal.

This matter comes to the Court as 1 of 4 consolidated appeals and is referenced as Appeal No. 2. The Appellate Division's Memorandum Decision is fully set forth in Appeal No. 1 and incorporated into Appeal Nos. 2, 3, and 4 by a corresponding Memorandum and acknowledgment of dissent by Justices Nemoyer and Curran. To the extent that co-plaintiffs-appellants submit Jurisdictional statements, Jessica Gonzalez joins in their responses and incorporates the legal arguments contained therein. The queries posed in this Court's request are addressed in seriatim.

I. Finality

With regard to the question of "finality" of the decision below, Appellant respectfully submits that this requirement is met based upon the majority of the Appellant Division's decision reversing the verdict of the Trial Court and dismissing all claims against Defendant, Eric Krone. Such dismissal is considered "party finality" and suffices as a jurisdictional predicate in this Court. See, *Barile v. Kavanaugh*, 67 NY2d 392, 395 n 2 [1986]; *We're Assocs. Co. v Cohen*, 65 NY2d 148, 149 n1 [1985].

As is also noted in this Court's Civil Jurisdiction and Practice Outline "... party finality is present in any order which fully disposes of that party's claims and all claims, including cross claims and third-party claims, against that party, without resolving the entire litigation (See generally THE NEW YORK COURT OF APPEALS CIVIL JURISDICTION AND PRACTICE OUTLINE at 35-36, citing Arthur Karger, Powers of the New York Court of Appeals § 5.9 at 128-136 [3d ed rev 2005]

As reflected in the Memorandum Decision of the Court below, notwithstanding that the trial Court apportioned liability between the two drivers at 35%, on the part of Defendant-Appellant, Eric J. Krone, and 65% on the part of Defendant, Luis Alberto Arroyo-Soto, the complaints and all claims against Krone were dismissed. Although there are open ministerial issues relating to co-defendant, Luis Alberto Arroyo-Soto, the requirements of "party finality" have been established with regard to defendant, Krone. Hence, jurisdiction is supported in this Court.

II. The dissent by Justices Nemoyer and Curran is on a question of law in favor of Appellants

While the dissenting justices agreed with the majority on a procedural point involving "preservation of contentions" following a non-jury trial, they clearly disagreed with the majority and would have found in plaintiff-appellant's favor on the merits. That is, the dissenting justices wholly disagreed that dismissal of the complaint against defendant, Krone, was warranted under the facts and applicable law. In their lengthy dissent, it is clearly shown that not only would the dissenting Justices have decided the case "substantially" in plaintiff-appellant's favor (See, *Christavo v. Unisul-Uniao de Coop. Transf. De Tomate Do Sul Do Tejo, S.C.R.L.*, 41 NY2d 338, 339 [1977]), they would have decided it completely in plaintiff-appellant's favor, concluding, " . . . the judgment in each appeal should be affirmed." (See Memorandum Decision at P. 6; Nemoyer and Curran dissenting) The trial court found in plaintiff-appellant's favor and rendered a written decision incorporating its Findings and Conclusions. (R at 32-34)

This appeal stems from the majority's decision reversing the trial court and dismissing the claims against Krone. There can be no question that the dissent was in favor of plaintiff-appellant. As such, this jurisdictional predicate has been met. (See, generally, *Arthur Karger,* Powers of the New York Court of Appeals § 6.4 at 202-203 [3d ed rev 2005]).

As it relates to the questions of law unpinning the dissenting opinion, several are implicated supporting Jurisdiction. As an initial matter, the majority decision indicates that it reversed the trial court "on the law." Although their analysis appears at times to suggest that the determination was based on weighing of the evidence, closer scrutiny reveals that it is more accurately characterized as a dismissal based on an "insufficiency of evidence." Such a point was advocated by defendant-respondent in his Reply Brief (See Reply Brief of defendant, Krone at 8-9) and expressly stated in the majority opinion

> "[P]laintiffs nonetheless contend, and the court agreed, that defendant was reckless because Thruway Authority safety regulations require vehicles parked on the shoulder to be positioned "as far from traffic as feasible," and defendant could and should have parked the truck farther to the left on the grassy median and his positioning also

> rendered the rumble strips useless. 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**. Based on the forgoing, we reverse, insofar as appealed from, the judgments in appeal Nos. 1, 2, and 3 and reverse the judgment in appeal No. 4. (See, Majority opinion at P. 3, citations omitted) (Emphasis added)

More importantly, the conclusion that the evidence was insufficient was gleamed through a misapplication of the legal standard set forth in Vehicle and Traffic Law §1103(b).

Here, the majority's application of Vehicle and Traffic Law §1103(b) to the facts found by the trial court resulted in a reversal because the court found that those findings were "...insufficient to impose liability under the "reckless standard." (See, Majority decision at P. 3) As noted by the dissenting Justices, not only did the majority gloss over the standard review of a non-jury verdict, it misconstrued the legal requirements of Vehicle and Traffic Law §1103(b) and imported a requirement that is not found in the Statute or decisional law. Their disagreement with the majorities holding could not be clearer. On this point they wrote

> "[F]rom a broader perspective, we ought not to inadvertently conflate the criminal recklessness standard with the civil recklessness standard. Yes, the majority is correct that this situation "demands more than a showing of lack of 'due care under the circumstances'- the showing typically associated with ordinary negligence claims" but in defining civil recklessness, the courts have never required that the defendant's conduct be committed with a depraved heart, or for the purpose of bringing about a particular injury." (See Decision's below at P 5)

This Court has held that the articulation and application of an incorrect legal standard is reviewable. (See, *Baba Ali v. State of New* York, 19 NY3d 627 [2012]; *People v. Borges*, 69 NY2d 131) Appellant respectfully submits that this Court should accept this Appeal because it is based on a two justice dissent on a question of law, which would have resulted in an outcome in plaintiff-appellant's favor.

Where legal sufficiency and application of a statutory standard of care are the deciding factors, questions of law are implicated this Court has jurisdiction to review the majority decision. (See, *Heary Bros. Lighting Protection Co., Inc. v. Intertek Testing Services, n.a., Inc.*, 4 NY3d 615 [2005]; *Scheer v Koubek*, mot to dismiss appeal denied, 69 NY2d 983 [1987]; *Matter of Garstein v. Kemp & Beatley* mot to dismiss appeal denied, 61 NY2d 900 [1984]).

III. Jurisdiction would be proper under New York Constitution Article VI, § 3(a) and CPLR 5501(b)

As set forth above, plaintiff-appellant respectfully submits that jurisdiction in this Court is warranted under CPLR §5601(a). The majority's decision was based on a sufficiency of the evidence analysis, while applying an erroneous legal standard to the facts found by the trial court. As such, under the CPLR and decisional law cited above, this Court's review should proceed.

In the event this Court finds that the dissent is more apply characterized as on a "question of fact", this Court still properly maintains jurisdiction to review the Findings and Conclusions of the Appellate majority, whom reversed the findings of the trial court. This Court may review the majority's findings to determine which outcome more nearly comports with the evidence in the case. (See, *Northern Westchester Prof. Park Assoc. v. Town of Bedford*, 60 NY 492, 504 [1983])

Following this non-jury trial, the trial court wrote a lengthy Decision with detailed factual Findings and Conclusions of Law. (R 32-35) The majority of the Appellate Division did not make any new factual findings or reject the findings of the trial court, save for finding Number 14. (R at 34) In Finding Number 14, the trial court states

> "[D]efendant 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 on coming traffic." (R at 34)

To the extent that Respondent may argue that the majority decision is based solely on unreviewable questions of fact, it is noted that the majority's decision was rendered in the face of uncontradicted and compelling expert and lay testimony. The majority implicitly disagreed with finding No. 14 of the trial court. (Record on Appeal at P 34-35) and substituted its conclusion that Krone's actions did not meet the standard for liability under Vehicle and Traffic Law §1103(b). This conclusion was, in part, reached by applying an erroneous legal standard. To the extent that the

majority reversed the Judgment, substituted its conclusion and entered a final Judgment pursuant to thereto, such finding is reviewable in this Court. (See, CPLR 5501(b); Arthur Karger, Powers of the New York Court of Appeals §§13:6, 13:8 at 465-467, 473-478 [3d ed rev 2005]) This is especially so when the Decision is premised on a legal issue involving an incorrect legal standard applied in reaching a result. (See, *Hartog v. Hartog*, 85 NY2d 36, 52 [1995]; *People v. Borges*, 69 NY2d 1031 [1987])

For the reasons noted above, Appellant respectfully urges that jurisdiction be retained in this court and an Order setting a schedule for perfecting the Appeals be issued.

Very truly yours,

Martin J. Zuffranieri

MJZ/maw
Enc.

CC: Robert M. Goldfarb, Esq. (w/out enc.)
John R. Condren, Esq. (w/out enc.)
Charles S. Desmond, II, Esq. (w/out enc.)
Ryan J. Mills, Esq. (w/out enc.)
James M. VanDette, Esq. (w/out enc.)