State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Wednesday, February 11, 2015

No. 30 Matter of Trenasia J. (and other proceedings) *(papers sealed)*

The New York City Administration for Children's Services (ACS) brought these child protective proceedings against Frank J. under Family Court Act article 10, alleging that he attempted to sexually abuse his 11-year-old niece, Brije D., who was staying overnight at his Brooklyn home to play with his two daughters in January 2011. ACS alleged that Frank entered the bathroom while Brije was taking a shower, asked if she wanted to make $5, and began taking off his pants. Brije ran out of the bathroom, threw on clothes, and left the house. Based on this conduct, ACS also claimed Frank derivatively neglected his own three children, two of whom were in the house at the time.

Frank, supported by the attorney for his own children, moved to dismiss the petitions for lack of jurisdiction on the ground he was not a person legally responsible for Brije. The Family Court Act authorizes agencies to bring abuse and neglect proceedings against "any parent or other person legally responsible for a child's care...." Section 1012(g) defines "person legally responsible" as "the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child...." In Matter of Yolanda D. (88 NY2d 790), this Court said the term applies to those who "serve as the functional equivalent of parents."

Family Court denied the motion, saying, "Under the Matter of Yolanda D. I don't believe there's any serious question that [Frank] is a person legally responsible" under the statute. "The evidence establishes that the subject child had an ongoing and close familial relationship with [Frank], the child regularly saw [him] over the course of the year preceding the incident and indeed common sense requires the conclusion that they had a normal uncle, niece relationship." The court noted that it relied on hearsay statements, but deemed them admissible.

After a fact-finding hearing, Family Court found that Frank abused Brije by attempting to sexually abuse her and, thereby, derivatively neglected his own children. While ACS conceded that Frank did not touch Brije, the court said "it is not necessary to actually have a completed touching in order to make out a finding of attempted sexual abuse in the second degree.... Here it is plain that an attempt was made, it was for purposes of sexual gratification, that the child was under the age of fourteen and, therefore, the finding is warranted." The Appellate Division, Second Department affirmed, ruling, in part, that Frank was "a person legally responsible for his niece" within the meaning of section 1012(g).

Frank D. argues, "The Article 10 petition ... should have been dismissed because he was not a Person Legally Responsible..., and thus, the Family Court had no jurisdiction to hear the case." He was not Brije's parent or guardian, and "evidence supports that Appellant was not Brije's custodian; Appellant and Brije were never 'continually or at regular intervals found in the same household.'" He says his relationship was of a kind "excluded from Article 10 jurisdiction" by Yolanda D., which said the statute does not apply to "persons who assume fleeting or temporary care of a child such as a supervisor of a play-date or an overnight visitor...." He also argues there was insufficient evidence of attempted sexual abuse and derivative neglect.

For appellant Frank J.: Maxine H. Park, Manhattan (347) 788-0579
For the children of Frank J.: Barbara H. Dildine, Brooklyn (718) 522-3333
For respondent ACS: NYC Assistant Corporation Counsel Kathy Chang Park (212) 356-0855
For the child Brije D.: Marcia Egger, Manhattan (212) 577-3562

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To be argued Wednesday, February 11, 2015

No. 31 Nicometi v The Vineyards of Fredonia, LLC

Marc Nicometi was injured on a construction site in Fredonia in January 2006, while working for a subcontractor at a newly built apartment complex owned by The Vineyards of Fredonia, LLC. He was working on stilts, which raised him three to five feet above the floor, installing insulation between ceiling rafters above his head when his stilts slipped on a 16-square-foot patch of ice and he fell. Nicometi brought this negligence action against Vineyards, general contractor Winter-Pfohl, Inc., and another contractor, Western New York Plumbing.

Supreme Court granted Nicometi's motion for partial summary judgment on liability under Labor Law § 240(1), which imposes liability on owners and contractors who fail to provide safety devices to protect workers from elevation-related risks. "The issue of whether or not the plaintiff was told by the foreman not to work in an icy area does not raise a question of fact; providing safety instructions is not a substitute for furnishing proper safety devices...," the court said. It denied a defense motion to dismiss, rejecting the argument that an icy floor is not an elevation-related risk covered by the statute.

The Appellate Division, Fourth Department modified by denying Nicometi's summary judgment motion in a 3-2 decision. It said the lower court properly found that his fall was the result of an elevation-related risk. However, it said "there is a triable issue of fact whether plaintiff's actions were the sole proximate cause of his injuries" based on "evidence that he was directed not to work in the area where the ice was located. Thus, '"[u]nlike those situations in which a safety device fails for no apparent reason, thereby raising the presumption that the device did not provide proper protection within the meaning of Labor Law § 240(1), here there is a question of fact [concerning] whether the injured plaintiff's fall [resulted from] his own misuse of the safety device and whether such conduct was the sole proximate cause of his injuries"'...."

The dissenters voted to affirm, arguing that, because the statute was violated, Nicometi "cannot be solely to blame" for the accident. "The nondelegable duty ... under Labor Law § 240(1) 'is not met merely by providing safety instructions..., but [rather is met] by furnishing, placing and operating such devices so as to give [plaintiff] proper protection'.... In our view, 'stilts on ice' is the wrong device from which to work at an elevation, and we thus conclude that plaintiff was not furnished with a proper safety device as a matter of law...." Even if he "was provided with proper protection, we further conclude that his actions cannot be the sole proximate cause of the accident because ... the stilts were not 'so ... placed ... as to give proper protection to plaintiff,...."

For appellant-respondent Nicometi: Michael J. Hutter, Jr., Albany (518) 465-5995
For respondent-appellant Winter-Pfohl: Robert D. Leary, Buffalo (716) 853-3801
For respondent-appellant Vineyards: Laurence D. Behr, Buffalo (716) 856-1300
For respondent-appellant WNY Plumbing: Arthur Joseph Smith, Hicksville (516) 997-7330

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To be argued Wednesday, February 11, 2015

No. 32 People v Darius Dubarry

In December 2007, Darius Dubarry and Herburtho Benjamin engaged in a gunfight on Eastern Parkway in Brooklyn. Neither of them was wounded, but a bullet from Dubarry's gun struck and killed a bystander, Carol Simon. Dubarry was charged with two counts of second-degree murder for the death of Simon: depraved indifference murder, alleging that he recklessly engaged in a shoot-out in a public place under circumstances evincing a depraved indifference to human life; and intentional murder based on a theory of transferred intent, alleging that he killed Simon while intending to kill Benjamin.

Supreme Court submitted the depraved indifference and intentional murder counts to the jury in the conjunctive, permitting it to consider whether he was guilty of both reckless and intentional murder, rather than the alternative. The court also allowed the prosecution to use the grand jury testimony of an unavailable witness, finding the witness was frightened out of testifying by threats against his family. Dubarry was convicted of depraved indifference and intentional murder, along with related charges, and was sentenced to 20 years to life in prison.

The Appellate Division, Second Department affirmed, ruling the trial court properly submitted the depraved indifference and intentional murder counts to the jury in the conjunctive. "'Where, as here, more than one potential victim was present at the shooting, a defendant may be convicted of both counts because he or she may have possessed different states of mind with regard to different potential victims' (People v Page, 63 AD3d 506 [1st Dept] ...)," it said. "To the extent that the Appellate Division, Third Department, held differently in [People v Molina (79 AD3d 1371)], we disagree and decline to follow that holding." It also held the grand jury testimony of an unavailable prosecution witness was properly admitted. "The People established by clear and convincing evidence that the witness's unavailability was procured by misconduct on the part of the defendant...."

Dubarry argues the trial court violated due process by submitting the murder charges in the conjunctive and "instructing the jury to render a verdict on intentional murder regardless of its verdict on depraved indifference murder. The verdict convicting appellant of both counts thereby multiplied his criminal liability for a single death, and relieved the jury of its responsibility to decide whether appellant acted intentionally or recklessly, depriving him of due process and a fair trial." He says use of a transferred intent theory "does not justify imposing double liability for the death of a single bystander.... To hold otherwise would be contrary to the general prohibition against multiple convictions for a single criminal act." He says admission of a witness's grand jury testimony violated his right to confrontation because "[t]here was no evidence that appellant had communicated with anyone ... who could have conveyed a threat."

For appellant Dubarry: Denise A. Corsi, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Thomas M. Ross (718) 250-2534

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To be argued Wednesday, February 11, 2015

No. 33 Barreto v Metropolitan Transportation Authority

Raul Barreto, an employee of PAL Environmental Safety Corp., was injured in January 2005 while working on an underground asbestos removal project for the Metropolitan Transportation Authority (MTA) and New York City Transit Authority (NYCTA) in Manhattan. PAL, the general contractor, retained IMS Safety Corp. as a consultant. PAL employees gained access to the work sites through manholes and, at the start of each shift, they would build a wooden structure covered with plastic sheeting around the manhole to contain any asbestos. Two workers would then remove the manhole cover and set it outside the enclosure. On the date of the accident, Barreto and two coworkers climbed out of a manhole on Lafayette Street at the end of their shift. Without first replacing the manhole cover, they began dismantling the enclosure and Barreto fell into the open manhole. He said in a deposition that his supervisor told him earlier in the day to cover the manhole before breaking down the enclosure, but he did not check to see if the manhole was still open "because the supervisor is supposed to do that." Alleging violations of Labor Law §§ 240(1) and 241(6), among other claims, he brought this negligence action against the MTA, NYCTA, IMS, and the City of New York as owner of the site.

Supreme Court denied Barreto's motion for summary judgment on liability and granted defense motions to dismiss the suit, finding that his failure to wait until the manhole was covered was the sole proximate cause of his injuries.

The Appellate Division, First Department affirmed on a 3-1 vote. Regarding the Scaffold Law claim (section 240[1]), it said Barreto "was provided with the perfect safety device, namely, the manhole cover, which was nearby and readily available. He disregarded his supervisor's explicit instruction given that day to replace the cover before dismantling the enclosure.... There is no reason that other devices were necessary ... or that the manhole cover was inadequate. Moreover, neither a guardrail, netting nor a harness would have prevented the accident as they would have been opened or removed to allow the workers to exit the manhole and to deconstruct the enclosure." It said the Industrial Code violations Barreto alleged in his claim under section 241(6) "did not proximately cause the accident."

The dissenter agreed that IMS was not liable, but said Barreto should have been granted summary judgment on liability against the others because they "failed to provide safety devices adequately protecting him from falling through the hole." Citing testimony that a metal guardrail would typically be placed around an open manhole under OSHA regulations, he said, "I do not find sufficient support in the record for the majority's statement that, had this guardrail been provided, it would have been opened or removed from the manhole before the accident occurred and therefore would not have prevented plaintiff's injuries.... At the very least, these facts raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his accident.... Even if plaintiff's [conduct] was a contributing cause..., [h]is actions merely amount to comparative negligence, and do not provide a defense to his Labor Law § 240(1) claim...."

For appellant Barreto: John M. Shaw, Manhattan (212) 267-9222
For respondent IMS: Clifford I. Bass, Scarsdale (914) 472-2300
For respondent City: Assistant Corporation Counsel Susan Paulson (212) 356-0821
For respondents MTA and NYCTA: Patrick J. Lawless, Manhattan (212) 490-3000