NEW YORK COURT OF APPEALS ROUNDUP:

EXPERT TESTIMONY ON EYEWITNESS ID, ABSOLUTE IMMUNITY FOR STATEMENTS TO NASD, GRANDPARENT VISITATION, COURT OF CLAIMS REQUIREMENTS

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This month we discuss four interesting decisions of the Court of Appeals on a variety of topics. In one of them, the Court set forth the circumstances in which it would be an abuse of discretion to exclude from a criminal trial expert evidence on the reliability (or unreliability) of eyewitness identifications.

In another matter, it ruled that, due to the National Association of Securities Dealers Inc.'s (NASD) quasijudicial function, statements made to the organization in a Form U-5 regarding the reasons for a broker's discharge are entitled to absolute immunity. It also rejected a constitutional attack on Domestic Relations Law §72(1), which addresses the circumstances in which a grandparent may be awarded visitation, on the ground that New York courts, in practice, apply a "strong presumption" that a parent's wishes represent the best interests of a child and award visitation over a parent's objection only when the "high hurdle" of that presumption is overcome.

And the Court strictly construed the requirements of Court of Claims Act §11(b) in a personal injury action, to hold that a claimant who does not identify in her claim the "total sum" of monetary damages sought may not maintain an action against the state.

Eyewitness ID Experts

The admissibility in a criminal case of expert testimony concerning the reliability of eyewitness identification has evolved over time. In People v. Nico LeGrand, a unanimous Court, in an opinion by Judge Theodore T. Jones Jr. (his first since recently joining the Court) held that, where the guilt or innocence of the defendant can turn on the accuracy of the eyewitness identification and there is little or no corroborating evidence connecting the defendant to the crime, the trial court will be held to have abused its discretion by excluding such testimony if (1) the testimony is relevant to the identification of the defendant, (2) the

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opinion is based on principles generally accepted by the scientific community, (3) the expert is qualified, and (4) the subject is beyond the ken of the average juror. The Court concluded these criteria were met in LeGrand, and that the Supreme Court had erred in excluding the expert testimony. The background facts amply justify the Court's ruling.

In 1993, when he was arrested on other charges, Mr. LeGrand was identified as a possible suspect in a 1991 homicide due to his resemblance to a composite sketch of the assailant in that crime. None of those who had witnessed the attack could be located in 1993, and the case was dormant until 1998 when Mr. LeGrand was again arrested. The police at that time located five witnesses, only one of whom was able to identify Mr. LeGrand in a photo array and lineup. There was no other evidence connecting him to the crime. He was nonetheless indicted for second-degree homicide. The jury in his first trial, which took place a decade after the murder, was unable to reach a verdict. Mr. LeGrand sought an order permitting an expert identification witness to testify at his second trial, which motion the prosecution opposed. The Supreme Court conducted a Frye hearing,[1] and thereafter precluded the testimony on the basis that the expert's conclusions were not generally accepted in the relevant scientific community. Mr. LeGrand was convicted and sentenced to 25 years to life.

Based upon the state of the law at the time of the Frye ruling, it is fair to say that the motion judge reasonably could have concluded that he had the discretion to exclude the expert testimony. While there clearly was at the time an "emerging trend" in the direction of admitting expert testimony on the reliability of eyewitness testimony, including in the dissent of then-Associate Judge Judith S. Kaye in People v. Mooney, 76 NY2d 827 (1990), and continuing thereafter in other cases, the issue generally was left in the discretion of the motion judge. That remained the law until 2006, when the Court, although finding that the exclusion of expert identification testimony in the case before it was not an abuse of discretion, stated that if the proof of a defendant's guilt "turned entirely" on uncorroborated eyewitness identification testimony, it might be an abuse of discretion to deny the jury the opportunity to hear the expert. People v. Young, 7 NY3d 40 (2006). The Court reached that precise conclusion in LeGrand, reversed the ruling below, and ordered a new trial.

While the result in the case is important and will cause increased efforts by the defense to challenge eyewitness identification with expert testimony, it is not nearly the death knell of support for the exercise of discretion by the motion judge to exclude such testimony.

Absolute Privilege for Form U-5

In Rosenberg v. MetLife Inc., a decision important to the securities industry, the Court, in response to a question certified to it by the U.S. Court of Appeals for the Second Circuit, held that statements made by employers in filings with the National Association of Security Dealers (NASD) upon the termination of a broker are subject to an absolute privilege in an ensuing defamation suit. Judge Victoria A. Graffeo delivered the opinion for the majority of the Court; Judge Eugene F. Pigott Jr. filed a dissent, joined in by Judge Robert S. Smith. Chief Judge Judith S. Kaye took no part.

Plaintiff Rosenberg was employed in 1987 as a broker by MetLife to work in an agency office in Brooklyn. In a 1999 audit of that office, MetLife found that the agency had accepted third-party checks in payment of life insurance premiums, which the company believed could be indicative of speculative insurance sales or money laundering. When this practice continued, MetLife closed the agency and transferred Mr. Rosenberg and all other brokers at that agency to another office. He was terminated three years later, following another audit.

Under NASD rules, members are required to file a Form U-5 with the association within 30 days of a broker's dismissal. Where the termination is based upon the employee having been subject to criminal charges, customer complaints, or a violation of internal investment-related rules, the employer is required to explain in the Form U-5 the nature of the actions that resulted in the termination.

In the Form U-5 filed upon Mr. Rosenberg's termination, MetLife stated in substance that its internal review appeared to show that Mr. Rosenberg had violated the company's policies involving speculative insurance sales and that he was a possible accessory to money laundering.

Later, upon obtaining a new job, Mr. Rosenberg filed a required Form U-4 with the NASD. In that filing he repeated MetLife's statements in its Form U-5 filing, but asserted that those statements were "completely untrue" and that he had been terminated because he is a Hasidic Jew.

He then sued for damages in the federal court, claiming employment discrimination, fraudulent misrepresentation, breach of contract, and libel. Mr. Rosenberg alleged that the Form U-5 statements were defamatory and made with malicious intent. The district court held that the statements were absolutely privileged and therefore granted MetLife's summary judgment motion dismissing the fraudulent misrepresentation and libel claims.[2] Mr. Rosenberg's ensuing appeal was bottomed on the position that the Form U-5 statements were only qualifiedly privileged.

After a careful review of the distinction between absolute and qualified privilege, the Court of Appeals concluded that the NASD rules requiring the filing of Forms U-5 serve a public purpose in protecting the investing public from fraudulent practices and are a significant part of NASD's quasijudicial role in investigating and adjudicating potential violations of the federal Securities and Exchange Act, SEC regulations, and NASD rules.

The Court drew an analogy to its decision in Wiener v. Weintraub, 22 NY2d 330 (1968), in which persons filing complaints with the Disciplinary Committee concerning alleged dishonest or unethical conduct of lawyers were afforded the protection of an absolute privilege in order to maintain the high standards of the bar and in furtherance of the administration of justice.

Judge Pigott's dissent disagreed that Form U-5 filings are part of a quasijudicial

process because they do not automatically trigger any NASD or New York Stock Exchange disciplinary action and did not do so in this case. Moreover, the dissent was troubled by the potential for false Form U-5s with resultant harm to brokers because new employers have access to such filings, and a broker seeking relief through a defamation claim would be blocked by an absolute privilege when a qualified privilege, requiring proof of malice, would be adequate to protect the former employer.

Finally, the dissent pointed to the law in various other states ruling that Form U-5s were not protected by an absolute privilege, and the desirability for uniformity.

Grandparent Visitation

In Matter of E.S. (Anonymous) v. P.D. (Anonymous), the Court upheld §72(1) of the Domestic Relations Law, which allows a grandparent to seek visitation in certain circumstances, against a challenge that the statute was unconstitutional on its face and as applied.

Petitioner had moved in with her daughter's family when her daughter was diagnosed with breast cancer, in order to help care for her daughter and grandson, then age four. After the mother died, the father invited petitioner to continue living with the family in order to help care for the child and perform household duties, which she did for four years. The relationship between father and grandmother became strained, however, principally over issues of discipline, and the father eventually demanded that his mother-in-law leave the home. He at first forbade the petitioner from having any contact with her grandson, and then permitted only sporadic and limited visits. Petitioner sought a court intervention. Following a trial, the Supreme Court granted petitioner visitation rights, finding that visitation was in the best interests of the child. The Appellate Division affirmed the finding, and the Court of Appeals was without jurisdiction to revisit that factual determination.

The Court did consider the father's constitutional arguments. Relying upon Troxel v. Granville, 530 US 57 (2000), he asserted that §72(1) violates the due process rights of parents because it does not require that their decisions concerning how to raise their children are entitled to "special weight." This argument was rejected in an opinion for a unanimous Court by Judge Susan Phillips Read (Judge Theodore T. Jones Jr. taking no part).

The Court reasoned that, first, the law does not vest rights in grandparents, but only grants them standing to seek visitation in two circumstances, either when one or both of the child's parents are deceased, or when "conditions exist which equity would see fit to intervene." A court may then order visitation, "as the best interest of the child may require." Second, while the statute does not explicitly direct them to do so, New York courts have applied it to afford deference to a parent's decisions. Because the statute is read to require that courts employ a "strong presumption that the parent's wishes represent the child's best interests," it cannot be ruled unconstitutional on its face.

The statute also was found to be constitutional as applied in this case. The trial court had stated it was mindful of the father's prerogatives as a parent, and the record reflected

that the court had considered many factors in reaching its decision, including the history of the relationship between petitioner and her grandchild, the views of the law guardian, and the reasonableness of the father's objections to visitation.

Claims Against the State

The Court of Claims Act requirement that a claim filed against the state must identify "the items of damage or injuries claimed to have been sustained and the total sum claimed," is jurisdictional, and failure to comply with it is therefore fatal to an action, even in the case of personal injury for which the extent of the claimant's damages may not yet be known. So held the Court unanimously in Kolnacki v. State of New York, in a decision by Judge Carmen Beauchamp Ciparick.

Ms. Kolnacki had a slip-and-fall accident at a park. She filed a claim asserting that she had incurred injuries and hospital and medical expenses, and would incur loss of earnings. The claim did not provide any amount of damages being sought, however, and instead explained that the full extent of her injuries was not then known. Although the trial court determined after a liability trial that the state was partially at fault, it ultimately agreed with the state's position that the action must be dismissed due to Ms. Kolnacki's failure to identify in the claim the "total sum" of her damages. The Appellate Division reversed in a 3-2 decision, with the Judge Eugene F. Pigott Jr., then of the Fourth Department, in the majority. (Now a member of the Court of Appeals, Judge Pigott, along with Judge Theodore T. Jones Jr., took no part in the decision.)

The Court of Appeals decision to reverse removed any ambiguity over whether its recent decision in Lepkowski v. State of New York, 1 NY3d 201 (2003), applies to personal injury cases. Claimants there were civil service employees seeking overtime pay, and their action was dismissed for failure to adequately allege where and when their claims arose or the total sum claimed. These notice provisions of the statute are "substantive conditions on the State's waiver of sovereign immunity," the Court there explained. Id. at 207. In Kolnecki, the Appellate Division distinguished Lepkowski on the basis that the employees' damages were "definite and ascertainable," whereas Ms. Kolnacki's damages were not at the time her claim had to be filed.

The Court of Appeals found Lepkowski applicable to the case before it, however. It acknowledged that in the personal injury context damages are harder to quantify at the outset, but stated that does not excuse a claimant from providing "any estimate whatsoever." While the Court held that, "the total amount of damages must be specified" in a claim, the opinion seems to give some leeway to an injured person whose damages are not fully knowable by the time a claim must be filed, because it observed that, "[a] claim may always be amended at a later time, if necessary."

Endnotes:

1. See Frye v. United States, 293 F 1013 (D.C. Cir. 1923).

2. The District Court denied MetLife's motion for summary judgment on the discrimination and breach of contract claims. After trial, the District Court dismissed the contract claim and the jury found for MetLife on the discrimination claim.