

NEW YORK COURT OF APPEALS ROUNDUP

WADE HEARINGS AND IDENTIFICATION PROCEDURES IN CRIMINAL CASES

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In this month's column we discuss cases addressing the application of the Federal Arbitration Act, the procedure for evaluating the suggestiveness of out-of-court identifications of criminal defendants, and the legal duties owed by doctors and those who provide medical services to third parties injured by a patient. We note that these cases were all decided in December before the retirement of Chief Judge Jonathan Lippman when the Court of Appeals still had six sitting judges.

The Senate has scheduled a public hearing on Governor Andrew Cuomo's nomination of Janet DiFiore as chief judge for Jan. 20, 2016. Governor Cuomo has until Jan. 21 to nominate a candidate to replace Judge Susan Phillips Read. Until replacements have been confirmed for Judges Lippman and Read, the Court of Appeals will continue to hear cases with only five sitting judges.

Waiver of Right to Arbitrate

In *Cusimano v. Schnurr*, Chief Judge Lippman, writing for a unanimous Court of Appeals, determined that three intra-familial disputes relating to commercial real estate met the interstate commerce standard for application of the Federal Arbitration Act (FAA) but that plaintiffs had waived their right to arbitrate by actively litigating the matter in Supreme Court before seeking to compel arbitration.

The case involves three commercial agreements entered into among members of the Cusimano family related to the ownership and development of several pieces of commercial real estate. Each of the three agreements had a provision stating that disputes will be settled through arbitration pursuant to the rules of the American Arbitration Association (AAA). Plaintiff Rita Cusimano and her husband commenced this action for fraud and malpractice in New York County Supreme Court in August 2011 against the family's accountants alleging that the accountants had aided and abetted fraud and other misconduct on the part of plaintiffs' family members.

Defendants moved to dismiss the complaint on several grounds, including statute of limitations. At the hearings on this and other motions, defendants asserted that the case belongs in arbitration but plaintiffs argued that they were not required to arbitrate. The Supreme Court dismissed the complaint and gave plaintiffs 20 days to replead certain causes of action with specificity but made clear its view that many of the claims were time-barred.

On the 20th day, instead of filing a new complaint, plaintiffs filed a demand for arbitration and statement of claim with the AAA. Plaintiffs moved to dismiss the action in Supreme Court or, in the alternative, to stay the

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action pending arbitration. Defendants cross-moved to dismiss the action with prejudice or, in the alternative, to permanently stay the arbitration claims as time-barred.

The Supreme Court ruled that the FAA—under which timeliness is an issue for the arbitrator to decide—was inapplicable because the totality of economic activity did not have a sufficient effect on interstate commerce and, additionally, that plaintiffs had waived their right to arbitration by their aggressive participation in the litigation. Accordingly, the Supreme Court ruled that it—rather than an arbitrator—should decide the statute of limitations issue.

The Supreme Court granted the motion to stay arbitration with respect to certain claims it found to be time barred and directed the parties to arbitrate the remaining timely commenced claims. Plaintiffs appealed and the Appellate Division, First Department reversed the judgment, finding that the FAA did apply and that plaintiffs had not engaged in protracted litigation or caused prejudice to defendants sufficient to effect a waiver of their right to arbitrate.

The Court of Appeals granted leave to appeal and reversed the First Department’s order. The court noted that the U.S. Supreme Court has interpreted the reach of the FAA broadly and that it will apply even if the individual transaction at issue does not have a substantial effect on interstate commerce as long as the type of activity at issue had such an effect. The court noted that the agreements at issue here concern ownership of and investment in commercial properties that include property leased to an international hotel chain and a national drug store chain—activity which affects interstate commerce.

As to the waiver argument, the court observed that federal policy favors arbitration and that doubts should generally be resolved in favor of arbitration and against waiver. Nevertheless, in this instance where plaintiffs did not seek arbitration until after the Supreme Court granted a motion to dismiss and made clear its view that the claims were largely time-barred and where plaintiffs had previously made express representations to the Supreme Court that they did not want to arbitrate, plaintiffs had clearly waived any right to arbitrate and the timeliness issues should be decided by the Supreme Court.

Identification, Criminal Cases

As the U.S. Supreme Court noted in *United States v. Wade*, 388 U.S. 218, 228 (1967), “the annals of criminal law are rife with instances of mistaken identification.” More pertinent to the Court of Appeals’ decision in *People v. Marshall*, was the Supreme Court’s further observation in *Wade* that “[a] major factor contributing to the high incidence of the miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to the witnesses for pre-trial identification.” *Wade* gave rise to the right of a criminal defendant to a “Wade” hearing to determine whether an identification procedure was unduly suggestive and therefore subject to suppression.

At issue in *Marshall* was notice under CPL §710.30(1)(b), which requires that if the prosecution intends to offer trial testimony regarding the observation of a defendant at the time of the offense or on some other relevant occasion by a witness who has previously identified the defendant, the prosecution must provide notice to the defendant of its intention and the evidence to be offered. In *People v. Herner*, 85 N.Y.2d 877 (1995), the Court of Appeals held that the prosecution’s use with a witness of a lineup photograph that included the defendant was not for identification purposes, but rather for trial preparation, and that no CPL §710.30(1)(b) notice was therefore required. Prosecutors have since frequently used *Herner* as an exception to the requirement for statutory notice and a *Wade* hearing.

Kaitly Marshall was accused of offenses arising out of an assault on a New York City public bus. After the altercation, the assailant exited the bus and could not be located by the police although they were given a description by the victim. Two months later, while the victim was at a hospital pharmacy she saw Marshall and recognized her as the assailant. The victim called the police who came to the hospital where the victim identified Marshall. Marshall was arrested and charged with assault and other offences.

Eighteen months after the assault, the Marshall prosecutor disclosed that, on the prior day as part of trial preparation, he had shown the complainant a photo of Marshall taken on the day of her arrest to enable him to understand the complainant's description of Marshall's hairstyles. Marshall's counsel requested a "Herner" hearing to establish that the showing of the arrest photo to the complainant was in fact an identification procedure under New York's CPL §710.30(1)(b)—and not for trial preparation—and that a Wade hearing was therefore required.

The motion court granted the request for a Herner hearing at which the complainant testified as to her identification of Marshall at the assault and at the hospital and as to her meeting with the prosecutor. She said that she had only glanced at the arrest photo, which was blurry and did not change her memory with respect to the identification of Marshall. The motion court held that the display of the arrest photo was for trial preparation purposes and that, because of complainant's prior identification at the hospital, the brief viewing of the blurry photograph would not taint a subsequent in-court identification. Thereafter at a non-jury trial, the complainant identified Marshall as the assailant and Marshall was found guilty of attempted assault and related offenses. The Appellate Term, Second Department, affirmed.

Judge Jenny Rivera wrote an opinion for a four-judge majority noting that the potentially unduly suggestive nature of an out-of-court identification procedure is a concern regardless of the prosecution's purpose in conducting that procedure. Accordingly, the court held that upon a defendant's motion, a court must hold a Wade hearing (without a threshold Herner hearing). The majority nonetheless affirmed the Second Department's order on the grounds that the court's error in denying Marshall a Wade hearing was harmless because the prosecution had established that the complainant's identification of Marshall at the hospital was an independent source to support the in-court identification.

Chief Judge Jonathan Lippman, joined by Judge Leslie E. Stein, filed a dissent asserting that Marshall was never afforded a Wade hearing to which she was entitled and that the issue of independent source had therefore not been litigated or preserved. Nor, the dissent asserted, did the People meet its initial Wade burden to demonstrate the non-suggestiveness of the arrest photo because, inter alia, the arrest photo was never offered in evidence. The dissent also concluded that having no means to assess the suggestiveness of the arrest photo, it was unable to conclude that the presumption of suggestiveness was overcome by the "independent source" evidence relied upon by the majority.

Medical Providers' Liability

The opinion by Judge Eugene M. Fahey for a four-judge majority in *Davis v. South Nassau Communities Hospital* can be seen as dramatically changing New York law. The case raised the issue of whether a hospital and related medical personnel (the "hospital") which administered drugs to a patient without warning the patient that the drugs could impair her ability to safely operate a car can be liable to third parties who were injured in a roadway accident caused by the patient's impaired condition.

The majority held that the medical provider has a duty to third parties to warn the patient of that danger. The decision, as the strong dissent points out, was in tension with New York's long-standing precedents holding that a physician's duty of care does not extend beyond his or her patient to the community at large.

As alleged in the complaint, on the morning of March 4, 2009, Lorraine Walsh (not a party named in this action) went to the hospital emergency room complaining of internal pain. She informed the hospital that she had arrived by car, but did not state whether she was the driver. The hospital administered to her an opioid pain killer and a drug used as a muscle relaxant and sedative. Plaintiffs' expert opined that any emergency room physician administering these drugs would know that they could impair a patient's ability to drive and that the standard of care in the medical community requires the physician to so warn the patient.

Walsh was discharged and, on her drive from the hospital, she crossed a double yellow roadway line striking a bus driven by plaintiff Edwin Davis. Davis and his wife, suing derivatively, thereafter sued the hospital

asserting causes of action sounding in medical malpractice and negligent hiring and training of medical personnel.

Defendants moved to dismiss the complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action because there was no allegation of a physician-patient relationship between the plaintiffs and the hospital. Supreme Court granted the defendants' motions to dismiss, and the Appellate Division, Second Department, affirmed. The Court of Appeals granted plaintiffs leave to appeal.

In its decision, the majority acknowledged that modifying the reach of an established legal duty must be limited by foreseeability and exercised cautiously. Based upon these principles, the majority held that where a medical provider has administered drugs to a patient that could impair the patient's ability to safely operate an automobile, the medical provider has a duty to third parties to warn the patient of that danger. Expanding the scope of a duty in this way, the court acknowledged, was an issue of law. The court relied upon concepts of morality and logic and consideration of the social consequences of imposing the duty, including with respect to which party was in the best position to protect against the risk of harm.

The court also cited precedents in which it had not imposed a duty on medical defendants on the basis that there was no special relationship between them and the public at large but in which it acknowledged the existence of special circumstances where a defendant does have sufficient authority and ability to control the conduct of a third party and therefore a duty to do so. The court also cited a significant array of non-New York cases holding that in situations involving the administration of medications with potential impairing effects on drivers, a hospital owes a duty to third-party motorists to warn its patients of those effects.

A strong 25-page dissent by Judge Stein, in which Judge Sheila Abdus-Salaam concurred, presented a comprehensive list of negative effects that would be caused by adoption of the rule articulated in the majority opinion. Additionally, the dissent conducted a careful review of the Court of Appeals' precedents and concluded with an appeal to the Legislature to consider the majority's holding which the dissent suggested was inconsistent "with New York's statutory medical malpractice schemes and the aims of tort recovery in New York."

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