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Summarizing recent significant New York appellate cases

It's another big week of constitutional law in New York. This week, the Court of Appeals reaffirmed its holding that New York's regulatory requirement that employers provide insurance coverage for medically necessary abortion services, and its exemption for "religious employers," are generally applicable and do not violate the Free Exercise Clause. And the Court adopted for the first time a rule that allows, but narrowly circumscribes, the police's power to stop vehicles to see if their passengers are in need of aid. Let's take a look at those opinions and what else has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

CONSTITUTIONAL LAW

Roman Catholic Diocese of Albany v Vullo, 2024 NY Slip Op 02764 (Ct App May 21, 2024)

Issue: **Does New York's regulation requiring New York employer health insurance policies that provide hospital, surgical, or medical expense coverage to include coverage for medically necessary abortion services, and the regulation's exemption for "religious employers," violate the First Amendment?**

Facts: A number of religious organizations and employers challenged New York's requirement that employer-provided health insurance include coverage for medically necessary abortion services, and the regulation's exemption for "religious employers." When the challenge was filed in 2016, the First Amendment free exercise claim was legally identical to a prior claim that sought to strike a similar requirement that health insurance provide coverage for contraception, which the Court of Appeals rejected in *Catholic Charities of Diocese of Albany v Serio* (7 NY3d 510 [2006]). Based on the controlling precedent the New York courts dismissed the challenge to the abortion services requirement. After the United States Supreme Court decided *Fulton v Philadelphia* (593 US 522 [2021]), however, the Supreme Court vacated the Appellate Division order in this case and remanded to reconsider the challenge in light of principles announced in *Fulton*. On remand, the Appellate Division again rejected the plaintiffs' First Amendment challenge, holding that "[b]ecause *Serio* was decided pursuant to [*Employment Div., Dept. of Human Resources of Oregon v Smith* (494 US 872 [1990])], a case the Supreme Court explicitly did not overrule in *Fulton*, . . . *Serio* was still good law.

Holding: The Court of Appeals agreed, holding that the question before the Court was a "very narrow one": "whether *Fulton* impaired *Smith* in a way that undoes *Serio* in whole or in part." Synthesizing the federal free exercise precedent, the Court noted that in *Smith*, the Supreme Court held that "even devoutly held religious beliefs must give way to generally applicable laws where the government has not explicitly targeted a religion. As the Supreme Court explained, the mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. This is true notwithstanding the devastating effects a neutral and generally applicable law may have on religious practices or communities, or the deeply held belief of religious individuals that compliance would make them a party to immoral or sinful behavior." Turning to *Fulton*, the Court of Appeals noted, "[t]he [Supreme] Court in *Fulton* expressly chose not to overrule *Smith* or the precedents it cites in which government action burdening religious beliefs or practices were upheld. Instead, *Fulton* provided elaboration as to a particular circumstance in which a law does not qualify as 'generally applicable.' . . . *Fulton* suggests two different ways in which a governmental policy will fail the test for general applicability and trigger strict scrutiny under the Free Exercise Clause: (1) a law cannot invite the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions; and (2) a law cannot prohibit religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."

Noting that its prior decision in *Serio* was based on neutrality, and the Supreme Court in *Fulton* treated neutrality and general applicability as separate concepts, the Court of Appeals held that its task was to "determine whether the 'religious employer' exemption meets either of *Fulton*'s general applicability tests. We conclude that the regulatory definition for 'religious employer' set forth by DFS is generally applicable within the meaning of *Fulton*." In particular, the Court held, the DFS's four regulatory factor determination for the religious employer exemption was fundamentally different than the individualized exemption scheme that the Supreme Court invalidated in *Fulton*. "The decision to grant or deny the exemption here is not 'at the sole discretion' of any single person or authority, but rather is determined by enumerated factors. The 'religious employer' exemption is not subject to the discretionary determination by a municipal official that allows the government to consider the reasons for the person's conduct and whether noncompliance with the policy is 'worthy of solicitude'. Instead, a 'religious employer' is defined by objective criteria delineated in the regulation itself and once met, the employer may claim the exemption." Thus, the Court held, "[a]s in *Serio*, an entity can qualify for an exemption by meeting the four factors for a 'religious employer' and then requesting said exemption from its insurance carrier. It is then the insurance carrier, not DFS, who issues a rider for

individual coverage. Thus, exemptions are not available for 'good cause,' as prohibited in *Sherbert*, nor does DFS or the insurance carrier have the authority to grant an exemption in its sole discretion as prohibited in *Fulton*."

Nor did the exemption fail the second *Fulton* general applicability test, the Court held. "New York State permits no secular conduct that undermines its interests in the insurance-based provision of medically necessary abortion services. It is also helpful to remember that the "religious employer" exemption is an attempt to ameliorate the burden posed on a class of entities that would likely be the most burdened by the mandate. The exemption provides a way to accommodate religious beliefs in some cases. In doing so, the regulation favors religious exercise rather than discriminates against it." Thus, the Court of Appeals again rejected the challenge to New York's insurance regulation mandating coverage for medically necessary abortion services. This case will now undoubtedly head back to the Supreme Court once again.

CRIMINAL LAW

People v Brown, 2024 NY Slip Op 02765 (Ct App May 21, 2024)

Issue: **Does New York recognize a "community caretaking" function pursuant to which, in certain circumstances, police may stop a moving vehicle without evidence of criminality?**

Facts: After observing a vehicle traveling in front of them open and quickly close the passenger door while driving, but observing no traffic infraction, the police stopped the car to determine if someone in the car "needed some sort of aid." When the police officer approached the car, they smelled marijuana, asked the defendant to exit the car, and the defendant told the officers that he had ecstasy on him. In the subsequent search of the car, the police found marijuana and more ecstasy. The defendant moved to suppress his statements and the evidence. The People sought to justify the stop based on the need to check if a passenger was in need of aid, admitting that there was no other basis to have stopped the car. The trial court agreed with the People, held that the stop was justified, and the Appellate Term affirmed.

Holding: The Court of Appeals, noting that it had never addressed whether the police "may act in an exercise of their 'community caretaking' duty to assist people in need, and that the community caretaking doctrine allows police to stop a moving vehicle," acknowledged that the police do indeed have those powers, but placed limits on what a community caretaking stop allows. As the Court explained, "the police may stop an automobile in an exercise of their community caretaking function if two criteria exist. First, the officers must point to specific, objective, and articulable facts that would lead a reasonable officer to conclude that an occupant of the vehicle is in need of assistance. Second, the police intrusion must be narrowly tailored to address the perceived need for assistance. Once assistance has been provided and the peril mitigated, or the perceived need for assistance has been dispelled, any further police action must be justified under the Fourth Amendment and Article I, section 12 of the State Constitution."

With respect to the first prong of that analysis, the Court held, "a critical component of the community caretaking doctrine is that the police officer's action be based on specific and articulable facts which, viewed objectively and independent of any law enforcement concerns, would suggest to a reasonable officer that assistance is needed. An officer's conclusory testimony that the stop was motivated solely by concern for the occupants, standing alone, cannot satisfy the first prong. There must be an objective basis to support the officer's claimed belief."

And with respect to the second prong, the Court held, "the suppression court should consider whether the police intrusion reasonably matches the problem at hand if there are less intrusive alternatives for addressing the concern. In other words, the level of intrusion must be commensurate with the perceived need for assistance. Once the officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, then any actions beyond that constitute a seizure implicating the Fourth Amendment and Article I, section 12 of the State Constitution. Thus, if a vehicle stop is justified based on specific, objective, and articulable facts that would lead a reasonable officer to conclude that an occupant of the vehicle is in need of assistance, but the officers thereafter determine that no aid is needed, any further police action must be evaluated under the framework applicable to officers acting in their criminal law enforcement capacity. For an automobile stop, this means that any continuation of the stop beyond what is necessary to ascertain whether an occupant needs aid requires at least reasonable suspicion of criminal activity."

Under this test, the Court held, the police officers' stop of the defendant's car was not justified under the first prong, because the mere opening and closing of a door while driving, "standing alone, would not lead a reasonable officer to conclude that an occupant of the vehicle was in need of aid." Thus, the Court reversed the defendant's conviction.

FIRST DEPARTMENT

TORTS, MEDICAL MALPRACTICE

***SanMiguel v Grimaldi*, 2024 NY Slip Op 02881 (1st Dept May 23, 2024)**

Issue: **Does *Sheppard-Mobley v King* (4 NY3d 627 [2005]), in which the Court of Appeals held that "a mother's damages for emotional harm could not be recovered on a cause of action for ordinary medical malpractice where the child was born alive and in the absence of independent physical injury to the mother," bar a plaintiff mother's claim for emotional harm resulting from lack of informed consent for certain prenatal procedures?**

Facts: Following an arduous labor and ineffective attempts of doctor's to deliver the plaintiff mother's child, the child was delivered by C-section and died eight days after birth from "perinatal anoxic/ischemic encephalopathy." The mother then commenced this action for medical malpractice, lack of informed consent on behalf of the child, and lack of informed consent on behalf of herself. One of the doctors and the hospital moved for summary judgment dismissing the mother's lack of informed consent claim on her own behalf, arguing that it was barred by the Court of Appeals' holding in *Sheppard-Mobley*. The trial court denied the motion, holding "there were triable issues of fact as to whether plaintiff consented to use of the vacuum extractor to attempt to deliver the child. The consent document mentioned treatment for 'obstetrical care including vaginal delivery,' but not vacuum extraction."

Holding: The First Department affirmed, distinguishing the Court of Appeals' holding in *Sheppard-Mobley*, which "applies to the claim resolved—one for ordinary medical malpractice. Although a claim for lack of informed consent may be categorized with that for medical malpractice in a customary sense, a claim for lack of informed consent is separate and distinct from general allegations of medical negligence. That ordinary medical malpractice and lack of informed consent are discrete theories of recovery is plain inasmuch as each comprises different elements." Since "Plaintiff's claim for lack of informed consent is thus distinct from the ordinary medical malpractice claim presented in *Sheppard-Mobley*," the Court held that it was not subject to the *Sheppard-Mobley* bar against recovering damages for emotional harm on an ordinary medical malpractice claim where the child is born alive.

Notably, the Court took one step further and urged the Court of Appeals to revisit the *Sheppard-Mobley* rule if it were held to apply to a claim for lack of informed consent. The Court explained, "assuming for the sake of argument that *Sheppard-Mobley* applies similarly to claims for ordinary medical malpractice and lack of informed consent, we respectfully invite the Court of Appeals to revisit the issue. We believe not only that the rule of *Sheppard-Mobley* should not apply to bar the present claim, but also that such a result would be well supported by the history of jurisprudential development in this area."

SECOND DEPARTMENT

CIVIL PROCEDURE, GUARDIANSHIP

***Matter of Joseph J.D. (Robert B.D.)*, 2024 NY Slip Op 02813 (2d Dept May 22, 2024)**

Issue: **May the Court of Appeals' rule in *Matter of Michael B.* (80 NY2d 299 [1992])—that an appellate court may remit a child custody matter for a new hearing if subsequent developments reflect that the record has become insufficient to determine the issues presented—be extended to this appeal from a Surrogate's Court decree determining a guardianship contest between the parents of an adult with a developmental disability within the meaning of article 17-A of the Surrogate's Court Procedure Act?**

Facts: After the parents of a severely autistic and essentially nonverbal child divorced, and the child was approaching age 18, the mother commenced a Surrogate's Court Procedure Act article 17-A guardianship proceeding to be appointed the child's guardian, and the father objected, arguing that he should be the child's guardian. Following an evidentiary hearing, Surrogate's Court determined that appointment of a guardian was in the child's best interests, and determined that, although both parents had shortcomings, the mother should be appointed the child's guardian because she was best able, in the court's judgment, to handle the child's aggressive outbursts and plan for the child's future. Following the father's appeal, the attorney for the child provided the Appellate Division with new information subsequent to the Surrogate's Court decree, including that the child's "aggressive behavior had increased, and because [the child] is much bigger and stronger than the mother, the mother came to believe that she can no longer safely address [the child's] aggressive outbursts on her own." In particular, on one occasion when the child had an outburst while the mother was driving, the mother called the father and asked him to take the child, and since that time, the child has lived exclusively with the father.

Holding: Confronting the issue of first impression of whether the Court could consider the post-decree facts, which are outside the appellate record, in the context of a Surrogate's Court Procedure Act article 17-A guardianship proceeding, the Second Department held that the best interests analysis required for guardianship proceedings closely follows the analysis performed in child custody cases under the Family Court Act. As the Court noted, although appellate courts are not typically permitted to considered facts outside the appellate record, "in *Matter of Michael B.*, the Court of Appeals carved out an exception: an appellate court may take notice of new facts and allegations, which are necessarily dehors the record, when it comes to a child custody matter in order to determine whether the record is no longer sufficient for the appellate court to determine what custodial situation is in the child's best interest." That limited exception, the Court held, should equally apply in the SCPA guardianship proceedings. "As in an appeal related to child custody, we are asked to review a

court's determination as to who among competing caregivers should have the primary responsibility for an individual's overall health and well-being. Such a determination necessarily rests upon a variety of nuanced factors that are dynamic rather than frozen in time. Under all the circumstances present here, the notion that changed circumstances may have particular significance in child custody matters applies equally in this guardianship contest between [the child's] parents." Considering the new facts provided by the attorney for the child on appeal for the limited purposes of determining whether the appellate record was sufficient to determine the child's best interests, then, the Court concluded that it was not, and a new guardianship hearing was necessary.

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