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An Organized Compilation of the Decisions Released by the New York State Court of Appeals January – March, 2021. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York State Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There.

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CONSTITUTIONAL LAW, CRIMINAL LAW.

EXECUTIVE LAW 552 (PART OF THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS ACT), WHICH CREATED A SPECIAL PROSECUTOR TO PROSECUTE CRIMES OF ABUSE AND NEGLECT OF VULNERABLE PERSONS IN STATE FACILITIES, IS UNCONSTITIONAL TO THE EXTENT IT ALLOWS THE PROSECUTION OF CRIMES BY AN UNELECTED APPOINTEE OF THE GOVERNOR (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over two concurring opinions, determined Executive Law 552 (part of the Protection of People with Special Needs Act), which created a special prosecutor to prosecute crimes of abuse or neglect of vulnerable persons in facilities operated by the state, is unconstitutional to the extent it allows an unelected appointee of the governor to prosecute crimes. The portions of the statute which do not relate to the prosecution of crimes, however, remain viable:

Given that the purpose of enacting the Special Needs Act was to "bolster the ability of the state to respond more effectively to abuse and neglect of vulnerable persons" … , it is apparent that the Legislature would wish that as much of Executive Law § 552 aimed at protecting that class of victims as can be preserved remain in effect. Nor would excising the offending provisions leave the remainder without any beneficial impact. Therefore, while the subdivisions of the statute that provide the special prosecutor with the discretionary authority to bring criminal cases … must be struck as unconstitutional … , the portion of Executive Law § 552 (1) that provides the special prosecutor with non-prosecutorial functions should remain in force. Likewise, we leave intact Executive Law § 552 (2) (a) (ii), which empowers the special prosecutor "to cooperate with and assist district attorneys and other local law enforcement officials in their efforts against . . . abuse or neglect of vulnerable persons," without interfering with those efforts (emphasis added). Cooperation with the local District Attorney furthers the overarching goal of the Legislature—providing resources to address crimes of abuse and neglect committed against vulnerable persons—without infringing on that constitutional officer's essential authority. People v Viviani, 2021 NY Slip Op 01934, CtApp 3-30-21

CRIMINAL LAW, EVIDENCE.

THE BRADY MATERIAL, A WITNESS STATEMENT REVEALED AFTER TRIAL, WOULD NOT HAVE ALTERED THE RESULT OF THE TRIAL; DEFENDANT'S CONVICTION SHOULD NOT HAVE BEEN REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the Brady material, a witness statement, revealed after trial would not have altered the result of the trial and therefore reversal of the conviction was not warranted:

"To make out a successful Brady claim, 'a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material'" … . Where, as here, the defendant made a specific request for the evidence in question, "[w]e must examine the trial record, evaluat[e] the withheld evidence in the context of the entire record, and determine in light of that examination whether there is a reasonable possibility that the result of the trial would have been different if the evidence had been disclosed" … . …

The undisclosed witness's description of the shooter and his flight path did not differ in any material respect from that of the eyewitness who identified defendant in court as the perpetrator. Moreover, the jury's verdict was supported by considerable other evidence, including the testimony of a cooperating witness who planned the crime with defendant, provided a weapon and cellphone for defendant's use, observed defendant approach and leave the site of the shooting at the time it occurred, and described the manner in which the weapon was destroyed after the shooting; testimony by the spouse of the cooperating witness confirming defendant's involvement; the testimony of additional witnesses who described the perpetrator's clothing and his movements following the shooting; telephone records; and surveillance videos showing defendant's proximity, clothing, and behavior immediately after the crime. People v McGhee, 2021 NY Slip Op 01836, CtApp 3-25-21

CRIMINAL LAW, OFFICE OF VICTIM SERVICES, ATTORNEYS.

2016 REGULATIONS RESTRICTING ATTORNEY'S FEES FOR CLAIMS MADE TO THE OFFICE OF VICTIM SERVICES (OVS) ARE CONSISTENT WITH THE STATUTORY LANGUAGE (EXECUTIVE LAW) AND RATIONAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissent and a concurrence, reversing the Appellate Division, determined that the Office of Victim Services (OVS) regulations limiting attorney's fees for crime victim claimants were consistent with the statutory language and rational:

OVS regulations formerly provided that claimants had a "right to be represented . . . at all stages of a claim" … and, "[w]henever an award [was] made to a claimant who [was] represented by an attorney, [OVS was required to] approve a reasonable fee commensurate with the services rendered, up to $1,000," unless the request for attorneys' fees was premised on a claim "submitted without legal or factual basis" … . OVS acknowledges that this meant that attorneys' fees, if reasonable, were available at all stages of a claim. However, effective January 13, 2016, OVS amended 9 NYCRR § 525.9 to provide that "[a]ny claimant . . . may choose to be represented before [OVS], at any stages of a claim, by an attorney-at-law . . . and/or before the Appellate Division upon judicial review of the office's final determination," but "only those fees incurred by a claimant during: (1) the administrative review for reconsideration of such decision . . . ; and/or (2) the judicial review of the final decision of [OVS] . . . may be considered for reimbursement" … .

OVS issued a regulatory impact statement indicating that the "purpose of th[e] rule change [wa]s to limit attorneys' fees pursuant to article 22 of the Executive Law." OVS stated that the amendments were "designed to conform the regulations to the enacting statute," explaining that the prior regulations permitted claimants to recover attorneys' fees that "far exceed[ed]" the "reasonable expenses" specified under Executive Law § 626 (1). OVS indicates that Victim Assistance Programs (VAPs) are federally funded with a state match, and it emphasized in its regulatory impact statement that it "fund[ed] 228 [VAPs] across New York State, distributing in excess of $35 million to these programs to assist and advocate on behalf of victims and

claimants." The required services provided by the VAPs include, among other things, "assist[ing] victims and/or claimants in completing and submitting OVS applications and assist[ing] claimants through the claim process." OVS determined that the legislature did not intend that attorneys' fees incurred in relation to assistance within the scope of services provided by VAPs would be considered reasonable under the statute. Matter of Juarez v New York State Off. of Victim Servs., 2021 NY Slip Op 01091, CtApp 2-18-21

CRIMINAL LAW, SEARCHES.

THE SEARCH WARRANT DID NOT AUTHORIZE THE SEARCH OF DEFENDANT'S VEHICLES; SEIZED ITEMS PROPERLY SUPPRESSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a three-judge dissent, determined that the search warrant did not authorize the search of defendant's vehicles and the items seized were properly suppressed:

The requirement that warrants must describe with particularity the places, vehicles, and persons to be searched is vital to judicial supervision of the warrant process … . Warrants "interpose the detached and independent judgment of a neutral Magistrate between the interested viewpoint of those engaged in ferreting out crime and potential encroachments on the sanctity and privacy of the individual" … . To further that role, our constitution assigns to the magistrate the tasks of evaluating whether probable cause exists to initiate a search and defining the subjects to be searched … .

The particularity requirement protects the magistrate's determination regarding the permissible scope of the search. Thus, to be valid, a search warrant must be "specific enough to leave no discretion to the executing officer" … . So important is the role of the neutral and detached magistrate that we have in the past parted ways from federal constitutional jurisprudence when we believed that an emerging rule of federal constitutional law "dilute[s] . . . the requirements of judicial supervision in the warrant process" …

… The application contained no mention of the existence of the vehicles ultimately searched, much less evidence connecting them to any criminality. Indeed, the observed pattern, as described in the affidavit, was for Mr. Gordon [defendant] to proceed from the residence to the street and back, without detouring to any vehicles parked at the residence. … "[N]o observation was reported as to any movement of persons between the house and the [vehicles]" … that would substantiate a belief that the vehicles searched were utilized in the alleged criminal activity.

Nor do we believe that the warrant for Mr. Gordon's "person" or "premises"—in the context of the factual allegations averred by the detectives—authorized a search of the vehicles. … [T]he mere presence of a vehicle seen at the sight of premises wherein the police suspect criminal activity to be occurring does not by itself provide probable cause to search the vehicle … . People v Gordon, 2021 NY Slip Op 01093, CtApp 2-18-21

CRIMINAL LAW, SEARCHES.

THE WARRANT CORRECTLY DESCRIBED THE PREMISES TO BE SEARCHED AS A SINGLE FAMILY RESIDENCE BASED UPON THE INFORMATION AVAILABLE TO THE POLICE; DEFENDANT'S ALLEGATION THE RESIDENCE WAS ACTUALLY THREE SEPARATE APARTMENTS WAS NOT SUPPORTED BY SWORN AFFIDAVITS; THE MOTION TO SUPPRESS WAS PROPERLY DENIED WITHOUT A HEARING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the defendant's motion to suppress, alleging the premises to be searched was not adequately described in the warrant, was properly denied without a hearing. The warrant described a single family residence. Defendant alleged each of the three floors was a separate apartment. The Court of Appeals looked only at the evidence supporting the warrant and held the evidence available to the police established the building was a single residence. The defendant did not submit any sworn affidavits in support of the "three apartments" argument, so the motion court properly denied the motion without holding a hearing:

The warrant's description of the place to be searched as "a private residence," located at a unique, specified street address, was not facially deficient; given a commonsense reading, the warrant clearly commanded a search of "a" single residence, not a multi-unit building, at the marked street address. Because the warrant was facially sufficient, the case does not implicate the U.S. Supreme Court's ruling in Groh v Ramirez that courts may not rely on documents not incorporated and attached to the warrant in order to provide particularity that the warrant, on its face, lacks (see 540 US at 557-558). The motion court did not rely on the unincorporated warrant application materials to cure a facial deficiency in the warrant, which Groh forbids. Rather, the court considered those materials for a different purpose—to determine whether the warrant's description of the place to be searched as a single private residence was supported by the information available to the detective who applied for the warrant and the court that issued the warrant. * * *

In People v Mendoza, we held that a suppression motion's "factual sufficiency should be determined with reference to the face of the pleadings, the context of the motion and defendant's access to information" (82 NY2d at 422; see also People v Jones, 95 NY2d 721, 729 [2001]). Although [defendant] lacked access to the materials that were before the warrant court, he had ready access to information about the actual conditions of the premises at the time of the search, but failed to provide it in support of his suppression motion. For example, he, his mother, or any other resident of the premises could have provided sworn affidavits or other evidence as to the separateness of the alleged residences on the three floors; the existence of unrelated tenants on the second floor; the obviousness to a visitor that the building contained separate residences—such as allegations that each unit had separate locking entry doors—or a variety of other types of evidence plainly known to residents of the house. People v Duval, 2021 NY Slip Op 00896, CtApp 2-11-21

CRIMINAL LAW.

USING ANOTHER'S CREDIT CARD ACCOUNT NUMBER TO MAKE PURCHASES, WITHOUT PHYSICAL POSSESSION OF THE CARD, SUPPORTS A GRAND LARCENY CONVICTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a two-judge dissent, determined that using a credit card number without physically possessing the credit card itself supported the grand larceny conviction:

The primary question presented by this appeal is whether the definition of credit card for purposes of Penal Law § 155.00 (7) includes the credit card account number, such that the People need not prove that a defendant physically possessed the tangible credit card in order to support a conviction of grand larceny based upon credit card theft. Here, defendant's conviction of grand larceny in the fourth degree was based on defendant's theft of the victim's credit card account number to purchase goods, although there was no evidence that defendant possessed the physical card itself. We conclude that the definition of credit card in General Business Law § 511 (1), as supplemented by General Business Law § 511-a, is the controlling definition as designated by Penal Law § 155.00 (7) and, as a result, the evidence is legally sufficient to support defendant's conviction of grand larceny for stealing an intangible credit card account number. People v Badji, 2021 NY Slip Op 00897, CtApp 2-11-21

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPLE).

WHERE THE BANK ATTEMPTS TO DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIRMENTS OF RPAPL 1304 WITH PROOF OF THE STANDARD OFFICE MAILING PROCEDURE, A DEFENDANT BORROWER MAY REBUT THE PRESUMPTION OF PROPER MAILING AND RECEIPT WITH PROOF OF A MATERIAL DEVIATION FROM THE BANK'S MAILING PROCEDURE; WHERE THERE ARE MULTIPLE BORROWERS, THE BANK NEED ONLY NAME ONE IN THE ELECTRONIC FILING REQUIRED BY RPAPL 1306 (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurring opinion, answering two certified questions from the Second Circuit, determined: (1) where, in an action for foreclosure, the bank attempts to demonstrate compliance with the mailing and notice requirements of RPAPL 1304 with proof of the standard office mailing procedure, a defendant borrower can rebut the presumption of proper mailing and receipt with proof of a material deviation from the bank's mailing procedure; and (2) where there are multiple borrowers, the bank need only provide information about one borrower in the bank's electronic filing required by RPAL 1306. Here the defendants alleged there was a material deviation from the bank's mailing procedure because the bank averred the envelopes for the RPAPL 1304 notice are "created upon default," but the notices were dated almost a year after the initial payment default. The Court of Appeals expressed no opinion whether the "nearly one-year gap" was a material deviation from the bank's mailing procedure such that the presumption of proper mailing and receipt was rebutted. The court noted the borrowers' claim they never received the notice is not, standing alone, sufficient to rebut the presumption:

What is necessary to rebut the presumption that a RPAPL 1304 notice was mailed will depend, in part, on the nature of the practices detailed in the affidavit. Moreover, contextual considerations may also factor into the analysis. For example, here, [the bank] points out that residential notes and mortgages are negotiable instruments that often change hands at various points during their duration, which may impact the timing of the creation and mailing of RPAPL 1304 notices—a contextual factor a

court could consider in assessing whether a purported deviation from routine procedure was material. We reject defendants' argument that a single deviation from any aspect of the routine office procedure necessarily rebuts the presumption of mailing. Such a standard would undermine the purpose of the presumption because, in practice, it would require entities to retain actual proof of mailing for every document that could be potentially relevant in a future lawsuit. CIT Bank N.A. v Schiffman, 2021 NY Slip Op 01933, CtApp 3-30-21

FORECLOSURE.

A MORTGAGE DEBT CAN BE ACCELERATED ONLY BY AN UNEQUIVOCAL OVERT ACT, I.E., COMMENCING A FORECLOSURE ACTION OR A DOCUMENT MAKING IT CLEAR THE ENTIRE DEBT IS IMMEDIATELY DUE (NOT THAT IT WILL BE DUE IN THE FUTURE); A MORTGAGE DEBT CAN BE DE-ACCELERATED BY A VOLUNTARY DISCONTINUANCE, EVEN IF ITS PURPOSE IS TO STOP THE STATUTE OF LIMITATIONS FROM RUNNING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a partial dissent and a concurrence, clarified how courts should handle two recurring issues in the sea of foreclosures which have inundated the courts: (1) how is the mortgage debt accelerated such that the entire amount becomes due and the six-year statute of limitations for a foreclosure action starts running; and (2) how is the debt de-accelerated such that the statute of limitations for a foreclosure action stops running and the borrower can resume monthly installment payments? The Court of Appeals held that acceleration of the debt must be done by an unequivocal overt act. In the Vargas case, the foreclosure action did not refer to the correct loan, which had been modified and did not therefore accelerate the debt. In the Wells Fargo case, the letter did not ask for immediate payment of the entire debt and therefore did not accelerate the debt. As for de-acceleration, that can be accomplished by voluntarily discontinuing the foreclosure action:

There are sound policy reasons to require that an acceleration be accomplished by an "unequivocal overt act." * * *

[Re: Acceleration, the Vargas case] … [W]here the deficiencies in the [foreclosure] complaints were not merely technical or de minimis and rendered it unclear what debt was being accelerated—the commencement of these [foreclosure] actions did not validly accelerate the modified loan … . * * *

[Re: Acceleration, the Wells Fargo case] … [T]he letter did not seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written. * * *

[Re: De-acceleration or Revocation of the Acceleration] … [W]hen a bank effectuated an acceleration via the commencement of a foreclosure action, a voluntary discontinuance of that action—i.e., the withdrawal of the complaint—constitutes a revocation of that acceleration. In such a circumstance, the noteholder's withdrawal of its only demand for immediate payment of the full outstanding debt, made by the "unequivocal overt act" of filing a foreclosure complaint, "destroy[s] the effect" of the election … . …

We reject the theory … that a lender should be barred from revoking acceleration if the motive of the revocation was to avoid the expiration of the statute of limitations on the accelerated debt. A noteholder's motivation for exercising a contractual right is generally irrelevant. Freedom Mtge. Corp. v Engel, 2021 NY Slip Op 01090, CtApp 2-18-21

HUMAN RIGHTS LAW, EMPLOYMENT LAW.

WHERE PLAINTIFF'S EMPLOYER IS A BUSINESS ENTITY, HERE BLOOMBERG L.P., AN OWNER OR OFFICER OF THE COMPANY, HERE MICHAEL BLOOMBERG, IS NOT AN EMPLOYER WITHIN THE MEANING OF THE NYC HUMAN RIGHTS LAW; THE EMPLOYMENT DISCRIMINATION ACTION AGAINST MICHAEL BLOOMBERG WAS PROPERLY DISMISSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive dissent, determined Michael Bloomberg, in his status as "owner" and officer of the

company, Bloomberg L.P., is not an "employer" within the meaning of the NYC Human Rights Law, and therefore cannot be liable for harassment of the plaintiff (Doe) by her supervisor, Ferris. Bloomberg L.P. can be vicariously liable as the employer, but Michael Bloomberg cannot:

Plaintiff, an employee of Bloomberg L.P. using the pseudonym "Margaret Doe," brought suit against defendants Bloomberg L.P., her supervisor Nicholas Ferris, and Michael Bloomberg, asserting several causes of action arising from alleged discrimination, sexual harassment, and sexual abuse. The question before us is whether Bloomberg, in addition to Bloomberg L.P., may be held vicariously liable as an employer under the New York City Human Rights Law (Administrative Code of City of NY, title 8 [City HRL]) based on his status as "owner" and officer of the company. We hold that Bloomberg is not an "employer" within the meaning of the City HRL and accordingly, we affirm the dismissal of plaintiff's claims that seek to hold Bloomberg vicariously liable for Ferris's offending conduct. * * *

The language in the City HRL … requires no external limiting principle exempting employees from individual suit as employers. … [W]here a plaintiff's employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not employers within the meaning of the City HRL. … [T]hose individuals may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct (Administrative Code of City of NY § 8-107 [1], [6], [7]). This rule [is] consistent with the principles of vicarious and limited liability governing certain business structures (see e.g. Partnership Law §§ 26, 121-303; Limited Liability Company Law § 609; Business Corporation Law § 719). Doe v Bloomberg, L.P., 2021 NY Slip Op 00898, CtApp, 2-11-21

LANDLORD-TENANT, MUNICIPAL LAW.

PLAINTIFF LANDLORD, PURSUANT TO THE VILLAGE WATER DEPARTMENT'S RULES, CAN NOT BE HELD PERSONALLY LIABLE FOR THE TENANT'S UNPAID WATER BILLS (CT APP).

The Court of Appeals, reversing Supreme Court, determined plaintiff landlord was not personally responsible for the tenant's unpaid water bills. The village water department's rules provided only a lien on the property and cutting off water as remedies:

The Water Department Rules and Regulations of the Village of Herkimer, on which the Village relies, do not authorize a claim against plaintiff for personal liability upon nonpayment of water rents. To the extent the Rules and Regulations determine the Village's remedies for unpaid water bills, they refer to "a lien on the premises where the water is used" (Rule No. 8; see also Village Law § 11-1118 [providing that unpaid water rents constitute a lien on real property]) and to shutting off water supply, upon notice (see Rule No. 9; see also Village Law § 11-1116 [providing that a village may enforce observance of its water use rules and regulations by cutting off water supply]). Herkimer County Indus. Dev. Agency v Village of Herkimer, 2021 NY Slip Op 01835, CtApp 3-25-21

MEDICAID, MUNICIPAL LAW.

FUNDS FOR PERSONAL CARE SERVICES ARE MEDICAID FUNDS SUBJECT TO THE AUDIT AND RECOUPMENT AUTHORITY OF THE CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION; APPELLATE DIVISION REVERSED (CT APP)..

The Court of Appeals, reversing the Appellate Division, determined funds paid for personal care were Medicaid funds which were subject to the audit and recoupment authority of the City of New York Human Resources Administration (HRA). The facts are explained in the Appellate Division decision:

For the reasons stated in the dissenting opinion below (Matter of People Care Inc. v City of New York, 175 AD3d 134, 147-152 [1st Dept 2020] [Richter, J.P., dissenting]), we conclude that the funds for personal care services paid to petitioner People Care, Inc. under the Health Care Reform Act (Public Health Law §§ 2807-v [1] [bb] [i], [iii]) are Medicaid funds subject to the audit and recoupment authority of the City of New York Human Resources Administration (HRA) in accordance with the parties' 2001 contract. Matter of People Care Inc. v City of N.Y. Human Resources Admin., 2021 NY Slip Op 01834, CtApp 3-25-21

MENTAL HYGIENE LAW, CIVIL PROCEDURE.

BASED UPON JUROR MISCONDUCT, THE TRIAL JUDGE SET ASIDE THE JURY VERDICT FINDING DEFENDANT SEX OFFENDER DID NOT SUFFER FROM A MENTAL ABNORMALITY AND ORDERED A NEW TRIAL; THE APPELLATE DIVISION REVERSED; THE COURT OF APPEALS REINSTATED THE TRIAL JUDGE'S RULING (CT APP).

The Court of Appeals, without any discussion of the facts or the law, reversed the Appellate Division (Matter of State of New York v Donald G., 2020 NY Slip Op 04716, Fourth Dept 8-20-20) and reinstated the trial court's setting aside the verdict based on juror misconduct. The jury had decided defendant, a sex offender, did not suffer from a mental abnormality requiring civil commitment and should be released. The trial judge set aside that verdict and ordered a new trial. The trial judge's ruling was here reinstated by the Court of Appeals:

Under these circumstances, Supreme Court did not abuse its discretion as a matter of law in ordering a new trial in the interest of justice on the ground of juror misconduct. Respondent's remaining contentions have been considered and are without merit. Matter of State of New York v Donald G., 2021 NY Slip Op 01935, CtApp 3-30-21

NEGLIGENCE, ZONE OF DANGER.

GRANDMOTHER WHO WITNESSED DEBRIS FROM THE FACADE OF A BUILDING INJURE HER TWO-YEAR-OLD GRANDDAUGHTER IS "IMMEDIATE FAMILY" WITHIN THE MEANING OF "ZONE OF DANGER" JURISPRUDENCE; GRANDMOTHER CAN THEREFORE MAINTAIN AN ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over two concurrences, reversing the Appellate Division, determined that a grandmother who witnesseD the death of her grandchild is "immediate family" such that she may recover damages for emotional distress under the "zone of danger" theory (negligent infliction of emotional distress):

This case begins with the heart-breaking death of a child. Our responsibility is to determine whether plaintiff-grandparent Susan Frierson, who was in close proximity to the decedent-grandchild at the time of the death-producing accident, may pursue a claim for bystander recovery under a "zone of danger" theory.

We have applied the settled "zone of danger" rule to "allow[] one who is . . . threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress" flowing only from the "viewing [of] the death or serious physical injury of a member of [that person's] immediate family" … . Unsettled at this juncture, however, are "the outer limits" of the phrase "immediate family" … . Once again, we are not asked to fix permanent boundaries of the "immediate family." Instead, our task simply is to determine whether a grandchild may come within the limits of her grandparent's "immediate family," as that phrase is used in zone of danger jurisprudence.

We conclude that the grandchild comes within those limits. Consistent with our historically circumspect approach expanding liability for emotional damages within our zone of danger jurisprudence, our increasing legal recognition of the special status of grandparents, shifting societal norms, and common sense, we conclude that plaintiff's grandchild is "immediate family" for the purpose of applying the zone of danger rule.

On May 17, 2015, plaintiff Susan Frierson and her two-year-old granddaughter, decedent Greta Devere Greene, were in front of a building when they were suddenly struck by debris that fell from the facade of that edifice. Emergency measures taken to save Greta's life failed, and she died the next day. Greene v Esplanade Venture Partnership, 2021 NY Slip Op 01092, CtApp 2-18-21