Court Grants Amendment to Complaint For Punitive Damages in Med Mal Suit

Justice Alice Schlesinger
Supreme Court

Plaintiffs moved to amend a complaint to add language providing a predicate for punitive damages claims in this medical malpractice and products liability suit. While the "Sculptra" defendants—Sanofi-Aventis and Aventis Pharmaceuticals—disputed the allegations, they did not object to the requested relief. The plastic surgeon who administered Sculptra to patient Baran objected, with counsel arguing plaintiffs did not have a viable claim for punitive damages. Plaintiffs alleged the drug was "illegally" marketed by the Sculptra defendants, knowing the drug was unsafe for injection into non-HIV people. Counsel claimed the use of the drug "off-label" for non-HIV patients could be considered reckless or wanton by a jury. Plaintiffs also argued the doctor modified Baran's records, and attempted to cover-up his own deficiencies. The court noted the actual query was if the allegations sounded like outrageous, reckless behavior, rather than mere negligent conduct. It granted the motion, permitted the proposed amended complaint to be substituted as discovery is in its early stages, and on-going, but without prejudice to defendants' rights to move to strike when discovery was completed.

Baran v. Swift, 106530/10 (Nov. 29)

Denial of Right to Be at Hearing W Absence Due to Religious Act Susta

Day moved by writ of habeas corpus to vacate his parole warrant, and release from Department of Corrections and Community Supervision's custody. He claimed he was illegally detained as he was deprived the right to be present at a preliminary hearing due to observance of Friday rituals, citing his Muslim status. Day also argued a violation of the 14th Amendment. He failed to appear at a preliminary hearing, but a parole hearing officer conducted the hearing in absentia, finding probable cause existed that Day violated a condition of his release to parole supervision. Respondents conceded that conducting the hearing in absentia was improper, but argued affording Day another heari remedy, rather than vacatur of the warrant and restor Day argued. The court found it "incomprehensible" th and hearing officer both were ignorant of the basis fo attend the hearing. It ruled that nothing done was "i ing religious observance was a legitimate reason for to not conduct a hearing in absentia. Day's writ was s warrant dismissed.

People (ex rel. Day) v. NYS Dept. of Corrections & Comn 250

Habeas Denied Where Sentence Deemed Imposed Under Knowing, Voluntary Plea

Judge Denise Cote
Southern District

Gomez purportedly supervised a long-running heroin distribution conspiracy before returning to his native Dominican Republic in 2003. He was indicted in 2008 for conspiring to distribute and possess with intent to distribute one kilogram or more of heroin, and also of possessing a gun during and in connection with a drug trafficking crime. Arrested in the Dominican Republic in March 2010 and extradited that April, Gomez pleaded guilty, under agreement, to conspiring to distribute heroin. Both he and the government stipulated to a Sentencing Guidelines range of 262 to 327 months in prison. At allocution, Gomez acknowledged that by executing the plea agreement he waived his right to challenge any sentence not exceeding 327 months in prison. Moreover, he acknowledged understanding the court's explanation that neither his attorney nor anyone else could predict sentence, which the court would decide. Rejecting his claim of ineffective assistance of counsel, district court denied Gomez habeas relief vacating his non-guidelines 216-month sentence. The four considerations articulated by the Second Circuit in 2001 in *Garcia-Santos v. United States* supported enforcement of Gomez's guilty plea as knowingly and voluntarily made.

Gomez v. United States, 12 Civ. 4799 (Dec. 6)

Judge Explains Reduced Fee Award To Overtime Action's Prevailing Pa

Kadden had sued former employer VisuaLex under the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL) for unpaid overtime. After a bench trial, the court held Kadden a non-exempt employee entitled to recover unpaid overtime—at 1½ times her hourly pay rate—for all hours worked in excess of 40 hours weekly. A prior order awarded Kadden $21,765 in damages, prejudgment interest of $1,881, and attorney fees and costs. Pursuant to the FLSA and NYLL, Kadden sought $227,574 in attorney fees and costs, as a prevailing party in an employment dispute. The court's $144,592 total award reflected $138,750 in attorney fees, and $5,842 in costs. Rather than the requested by Kadden's respected, experienced coun titioner—who had agreed to take on Kadden's case o basis—the court found an hourly rate of $375 to be re of the lack of complexity in the case, the small size practice, the relative uncertainty of success on the controversy, and VisuaLex's small size. The court fu reductions in the amount of time that counsel, and hi spent on Kadden's case.

Kadden v. VisuaLex, 11

Class Action Removed Under Fairness Act Eligible for Mandatory, Permissive Remand

Richins and co-plaintiff Okano were alums of Hofstra University School of Law. Their purported class suit—asserting claims for fraud, misrepresentation and violation of New York General Business Law §349—alleged Hofstra Law's publica-

Disability Benefits' Denial Affirmed; Opinions Not Supported by Record

Born in 1981, Lewis did not complete high school. His work history included part-time employment as a grocery store stock clerk, a gas station attendant, and in a fast-food restaurant. After review of an administrative law judge's (ALJ)