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COURT OF APPEALS

STATE OF NEW YORK

TIMPERIO,

Respondent,

-against-

NO. 46

BRONX-LEBANON HOSPITAL,

Appellant.

20 Eagle Street
Albany, New York
April 16, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: Good afternoon. The first
2 matter on today's calendar is Matter of Timperio v. Bronx-
3 Lebanon Hospital. Counsel?

4 MS. ROSENBLUTH: Good afternoon, Your Honors.
5 May it please the court. Sarah Rosenbluth for the Workers'
6 Compensation Board. I'd like to reserve two minutes for
7 rebuttal.

8 CHIEF JUDGE WILSON: Yes.

9 MS. ROSENBLUTH: The 2017 mass shooting at the
10 Bronx-Lebanon Hospital was a horrific tragedy. But the
11 horrific nature of the event does not change the fact that
12 it was, at bottom, an episode of workplace violence.

13 This court held in Rosen that under section 21 of
14 the Workers' Compensation Law, workers' injuries resulting
15 from an intentional assault presumptively - - -

16 JUDGE TROUTMAN: So is it because the perpetrator
17 was a former employee that connects it to the workplace?

18 MS. ROSENBLUTH: That's certainly strengthens our
19 case, Your Honor, but it is not necessary - - -

20 JUDGE TROUTMAN: Would it be different if it had
21 been a random person?

22 MS. ROSENBLUTH: It would not be different, no.
23 And we see that in cases such as DeAngelis and Toro where
24 an unknown assailant, for example in DeAngelis, threw a
25 stone through the windows of those painter's premises and

1 injured him, and there was no evidence as to who this
2 person was or what motivated him. So that's precisely why
3 the presumption did apply and had not been - - -

4 JUDGE HALLIGAN: But in - - -

5 MS. ROSENBLUTH: - - - rebutted.

6 JUDGE HALLIGAN: - - - that respect this case
7 seems different from Rosen, right? Because in Rosen it's -
8 - - I think there was some evidence that it was employment
9 related because they were co-workers, they were there at
10 the same time. And there was actually, I think, some
11 evidence, personal animosity, which the Board didn't find
12 credible. But here, as I take the record, there's no
13 evidence at all with respect to the motivation; is that
14 right?

15 MS. ROSENBLUTH: That's right.

16 JUDGE HALLIGAN: Okay. And so why then, if this
17 is a little bit different than Rosen in that regard, why
18 does the presumption apply, as you say it does, as opposed
19 to - - - you know, there needing to be some evidence on one
20 side of the coin or other? Or is that just how a
21 presumption works?

22 MS. ROSENBLUTH: The presumption is triggered
23 when the injury occurs in the course of employment.

24 JUDGE HALLIGAN: So that's - - - that's all we
25 need, in your view?

1 MS. ROSENBLUTH: Correct. And it is undisputed
2 here, that the injuries - - - that Mr. Timperio was at the
3 job when the shooting occurred.

4 JUDGE SINGAS: And what is your understanding of
5 our nexus requirement from our case law?

6 MS. ROSENBLUTH: So the nexus requirement, our
7 understanding, is that it has no independent relevance in
8 determining whether or not the presumption has been
9 rebutted. It's sort of another way of saying was the
10 person on the job when the injury occurred? And here - - -

11 JUDGE CANNATARO: Could I ask you? If this were
12 a case where the - - - the perpetrator had just ran - - -
13 you know, stuck a pin in a map and randomly selected this
14 place, not having had an employ - - - a past employment
15 relationship, wouldn't - - - would the - - - would that
16 create a sufficient amount of randomness to deprive you of
17 a nexus to the accident?

18 MS. ROSENBLUTH: No. Because again, the inquiry
19 in - - - in looking at whether the presumption has been
20 rebutted is not whether there is a nexus to employment.
21 It's whether the person was on the job when the injury
22 occurred - - -

23 JUDGE CANNATARO: Well, I'm not necessarily
24 talking about a nexus to employment. I'm just talking
25 about some nexus - - - some connection between the actor

1 and - - - you know, the result that occurred. And I'm
2 wondering if the person really just - - - they didn't know
3 each other and the person had no particularized intent with
4 respect to who or where or when they went to go commit this
5 act, whether that sort of removes any argument that there's
6 a nexus?

7 MS. ROSENBLUTH: No. I think that would still
8 mean that the presumption applied had not been rebutted.
9 Because the purpose of only looking for evidence of
10 personal animosity in rebutting the presumption, is looking
11 for some suggestion that the incident still would have
12 happened outside of the workplace.

13 CHIEF JUDGE WILSON: So September 11th attacks,
14 Workers' Comp for everybody?

15 MS. ROSENBLUTH: Correct. Correct.

16 CHIEF JUDGE WILSON: So let me ask you about the
17 genesis of the Workers' Comp laws, going back - - - you
18 know, more than a century. Part of the motivation there,
19 as I understand it - - - let me know if you agree or not -
20 - - was to incentivize employers to remove unsafe working
21 conditions, like meat grinders that chop people's arms off,
22 that sort of thing. Is that fair?

23 MS. ROSENBLUTH: I - - - I think so, yes.

24 CHIEF JUDGE WILSON: So that policy concern
25 doesn't really apply here, would you agree?

1 MS. ROSENBLUTH: That precise policy concern does
2 not apply here but there's a broader policy concern of just
3 ensuring easy access to benefits for workers injured on the
4 job through no fault of their own.

5 CHIEF JUDGE WILSON: That's a - - - that's
6 another motivation the legislature had way back I think,
7 right?

8 MS. ROSENBLUTH: Correct.

9 CHIEF JUDGE WILSON: So one is missing and the
10 other still remains, is your view?

11 MS. ROSENBLUTH: I'm sorry. Yes, I think that's
12 correct.

13 CHIEF JUDGE WILSON: Okay.

14 MS. ROSENBLUTH: And so the - - - the reason, as
15 I started to suggest Judge Cannataro, the - - - thank you.
16 The rule regarding personal animosity makes sense because
17 when a personally motivated assault is carried out in the
18 workplace, it's likely to be pure happenstance that it
19 happened when the victim happened to be at work.

20 JUDGE RIVERA: So - - - so then in a mass
21 shooting, it is that the shooter wants to come in and shoot
22 whoever is in this particular space? That's what matters?
23 That they're just - - -

24 MS. ROSENBLUTH: I mean, the - - -

25 JUDGE RIVERA: - - - they came in - - - in this

1 example, they came into the hospital, they just want to
2 shoot someone, anyone. They want to assault people in the
3 hospital. That's what matters?

4 MS. ROSENBLUTH: That's - - -

5 JUDGE RIVERA: - - - as opposed to if they found
6 them three blocks away, off hospital property?

7 MS. ROSENBLUTH: That's exactly right. Because
8 it is the workplace that did in fact expose the worker to
9 the risk. Here - - -

10 JUDGE RIVERA: But for - - -

11 MS. ROSENBLUTH: - - - it's Timperio, to the - -
12 -

13 JUDGE RIVERA: - - - but for the fact that they
14 were on the job at that workplace, they would not have been
15 subject to the mass shooting?

16 MS. ROSENBLUTH: Essentially, yes. And here
17 there is no basis in the record to conclude that Timperio
18 would have still been shot by Bello had he been elsewhere.
19 We see this arising in cases of domestic violence, for
20 example, where there's a long simmering domestic dispute
21 between husband and wife that, unfortunately, turns deadly.
22 Now, unfortunately, it is the case that - - - you know, the
23 husband is out to get the wife for whatever reason and
24 happens to track her down at her place of employment and
25 injures or possibly kills her.

1 JUDGE HALLIGAN: What - - - what about a natural
2 disaster? Same result as 9/11? If you're - - - if you're
3 on the job, then you are presumptively eligible?

4 MS. ROSENBLUTH: I think likely, yes. That
5 specific case hasn't really been tested in the case law and
6 that's not an assault. It's a little bit different.

7 JUDGE HALLIGAN: Right. I understand. But why
8 would - - - why would that be any different under your
9 reading of the statute than an intentional act, whether
10 it's an assault or an explosion or whatever it might be?

11 MS. ROSENBLUTH: So I think in a scenario where
12 there is a natural disaster, a nuclear weapon that - - -
13 that flattens an entire city, that affects - - -

14 JUDGE HALLIGAN: A hurricane, whatever - - -

15 MS. ROSENBLUTH: Sure.

16 JUDGE HALLIGAN: - - - to pick - - - pick - - -

17 MS. ROSENBLUTH: It's - - - it's possible that
18 the rule would apply differently in that case. We don't
19 exactly have a position on that scenario. However, I do
20 think, in general, the legislative policy judgment here is
21 that in cases of doubt, essentially, the tie goes to the
22 worker.

23 JUDGE HALLIGAN: I'm just asking because it seems
24 to me that your position as I take it, correct me if I'm
25 misunderstanding you, is that if you're "in the course of",

1 which I think means you are in fact at work, working. Then
2 there is a presumption that it arises out of unless there
3 is - - - unless there is some evidence to the contrary, for
4 example, personal animosity. So I'm not sure I see any
5 natural cabining point on that continuum.

6 MS. ROSENBLUTH: I - - - I think that's - - -

7 JUDGE HALLIGAN: And I take it it's not raised
8 here?

9 MS. ROSENBLUTH: It - - - it's not raised here
10 and - - - and I think a natural disaster raises slightly
11 different considerations. But I think the - - - likely, it
12 would be treated in the same way that the presumption would
13 apply and would not be rebutted. Because again - - -

14 JUDGE RIVERA: Well, it is possible, depending on
15 the nature of the natural disaster, that even if you were
16 five blocks away you would have been subject to possible
17 injury, if not a fatality, in the natural disaster?

18 MS. ROSENBLUTH: I - - - I see my time has
19 expired. May I quickly respond?

20 CHIEF JUDGE WILSON: Please go ahead.

21 MS. ROSENBLUTH: Yes. And I mean, certainly
22 workers would - - - assuming there would be a remedy for
23 workers in that scenario, it would extend only to workers.
24 That is the nature of the workers' compensation system.
25 It's not a general citizens' compensation system.

1 JUDGE RIVERA: But I'm just - - - I'm just
2 analogizing it to your example about the domestic incident,
3 right? But that is just, as you say, the attacker is
4 hellbent on either fatality or injury and so they go all
5 the way to someone's workplace and did attack them there.
6 Right? So that is where that - - - that is - - - and if
7 they caught them outside of the workplace, they would have
8 attacked them there. So to the extent that you have a
9 natural disaster - - - an incident that affects the space
10 outside of the workplace and someone is injured there,
11 you're saying that - - - I would assume you would think
12 maybe that presents a different scenario?

13 MS. ROSENBLUTH: I think in the event that a
14 natural disaster - - -

15 JUDGE RIVERA: Yes.

16 MS. ROSENBLUTH: - - - or a nuclear bomb type of
17 situation affected everyone equally - - -

18 JUDGE RIVERA: But that's intentional, right?
19 Not a natural disaster, you know?

20 MS. ROSENBLUTH: I'm sorry?

21 JUDGE RIVERA: The nuclear bomb is intentional -
22 - -

23 MS. ROSENBLUTH: Correct.

24 JUDGE RIVERA: - - - it's not a natural
25 disaster.

1 MS. ROSENBLUTH: Right. I mean, yes, that's
2 different.

3 JUDGE RIVERA: Yes.

4 MS. ROSENBLUTH: But in those scenarios that's
5 dealing, in fact, being that they're in the hypo affect
6 everyone equally, there could be an argument in that case
7 that work was not the, "but for" cause and that could
8 potentially provide a basis - - -

9 JUDGE RIVERA: Being at the workplace?

10 MS. ROSENBLUTH: Correct.

11 JUDGE RIVERA: Being present - - -

12 MS. ROSENBLUTH: Correct.

13 JUDGE RIVERA: - - - at the workplace?

14 MS. ROSENBLUTH: Yes. Yes, that's what I mean.

15 JUDGE RIVERA: Right. Because you're not
16 limiting - - - it matters not. I think in - - - in your
17 view, whether or not, let's say it's me, I got to work
18 early. My shift had not started, but I happen to be at the
19 workplace or it was my day off and I passed by for whatever
20 reason. All that matters is that I'm at the workplace
21 where I am employed?

22 MS. ROSENBLUTH: Well - - -

23 JUDGE RIVERA: Or does it matter?

24 MS. ROSENBLUTH: - - - if - - - if you're on your
25 day off, there would be a question about whether you were

1 acting in the course of your employment - - -

2 JUDGE RIVERA: I see.

3 MS. ROSENBLUTH: - - - at the time, and so that
4 would be a separate issue. But assuming you are in the
5 course of your employment, yes, the presumption is
6 triggered and can really only be rebutted under this
7 court's case law by evidence - - - substantial evidence of
8 purely personal animosity towards the victim.

9 CHIEF JUDGE WILSON: Thank you.

10 MS. ROSENBLUTH: Thank you.

11 MS. LILLING: Good afternoon, Your Honors. May
12 it please the court? I'm Caryn Lilling on behalf of
13 defendants-appellants Bronx-Lebanon Hospital and the State
14 Insurance Fund.

15 In furtherance to this court's questioning about
16 the rebuttable presumption, I think the question in the
17 context of assault is, what analytical framework should be
18 used to make that determination as a matter of law?

19 JUDGE RIVERA: Can I just follow-up on something
20 she - - - she ended with? Does it - - - does it matter
21 from your viewpoint, whether or not - - - let's just take
22 the shooter in this example - - - the shooter is - - - is
23 intending to shoot employees or just anyone who happens to
24 be at the hospital on a particular floor at that point in
25 time? So - - -

1 MS. LILLING: I - - -

2 JUDGE RIVERA: - - - does it have to be directed?

3 MS. LILLING: - - - I understand and I appreciate
4 your question. And I think there is a - - - a - - - I
5 think your - - - like, what you're asking is a very good
6 question. I think the case law bears out it's a different
7 analytical analysis when it's a co-employee versus a random
8 stranger.

9 JUDGE HALLIGAN: So - - -

10 MS. LILLING: And so - - -

11 JUDGE HALLIGAN: - - - so you think that there
12 might not be compensation if he had not worked there
13 previously?

14 MS. LILLING: Oh, no, no, no, no, that's not what
15 I'm suggesting.

16 JUDGE HALLIGAN: Okay. Well, how are they
17 distinct then?

18 MS. LILLING: Okay. What - - - what I'm
19 suggesting is that there is a long line of cases that when
20 it's a random assault, when it's a - - - a - - - you know,
21 an attack by a stranger, dating back to this court's
22 decision in 1929 in the Thomas case. If you look at the
23 evolution of the case law, the outcome is almost always the
24 same when it's a random attacker. And the claim is covered
25 by the exclusive benefit because there is, and can be, no

1 evidence of personal animosity toward the victim, toward
2 the decedent, toward the one that was injured.

3 There are limited, limited exception, and those
4 two cases that I found are Belaska and Wadsworth. And in
5 those cases the difference is, is that the claimant started
6 the scuffle. The claimant was the one who approached the
7 attacker. There was evidence of personal animosity, even
8 though it was someone they didn't know. But in every other
9 case: Thomas, Christiansen, Moran, this court's case - - -
10 this court's decision in Toro, Valenti, Conyers,
11 Rothenberg, Bennett, Boston, all of these cases involved an
12 - - - an unknown assailant. And in all of these cases
13 there was an exclusive protection by the Workers' Comp law.

14 CHIEF JUDGE WILSON: But not Malacarne, right?

15 MS. LILLING: I'm sorry, Your Honor?

16 CHIEF JUDGE WILSON: Not Malacarne, not the
17 parking attendant case?

18 MS. LILLING: The parking attendant case, if you
19 give me one second, Your Honor. I don't know - - - and
20 forgive me if I have that in my list. And - - - and I
21 apologize for not having the facts at hand - - -

22 CHIEF JUDGE WILSON: I think it's in the papers.
23 I think it's cited by the parties.

24 MS. LILLING: The - - - the parking attendant
25 case might be. And I might be incorrect, Your Honor, I

1 apologize. That had more to do with - - - I mean, if that
2 was an assault by a stranger, then it would be - - -

3 CHIEF JUDGE WILSON: Robbery by a stranger?

4 MS. LILLING: Yes. Then that - - -

5 CHIEF JUDGE WILSON: And we held - - - we held
6 non-compensable.

7 MS. LILLING: Then there would be a demonstration
8 of personal animosity.

9 CHIEF JUDGE WILSON: There was none. It was a
10 stranger.

11 MS. LILLING: Then I think the question in that
12 case, going back to the papers, is whether it was - - - not
13 - - - the question wasn't - - - wasn't whether it rose out
14 of the course of the employment but whether it rose in the
15 course of the employment. I think it was a different
16 analytical question in that case.

17 Now, when you look at the cases though, that
18 involve employees or family members of employees, that's
19 when an analysis is employed to see if there were work-
20 related differences. There can be no work-related
21 differences in the context of a stranger. It's impossible.
22 And so that's where I think the Third Department in its
23 analysis strayed from this court's precedent. There can be
24 no nexus, however slender, between the motivation for the
25 assault and the employment if it's not another employee.

1 It's not a litmus test that makes sense in the context of
2 an assailant that's an unknown stranger.

3 I think it's also important to point out that the
4 law on this topic needs to be predictable and fair and
5 consistent. And I see the light is on. If I may finish
6 up?

7 CHIEF JUDGE WILSON: Please conclude. Yes.

8 MS. LILLING: Yes, Your Honor. And that is - - -
9 it's a tradeoff. It's not always going to be the case that
10 in the case of an unknown attack, there's going to be
11 someone or an entity to place blame. And that those
12 claimants, those people who are injured on the job, like
13 the people in the Tops grocery store in Buffalo, that's a
14 public place, and for which there was no liability in terms
15 of the grocery store itself, should have an opportunity to
16 be compensated. It is no different in this case.

17 And I would close by saying that the Board's
18 finding as a matter of law was not arbitrary and that the
19 Third Department's decision should be reversed.

20 CHIEF JUDGE WILSON: Thank you.

21 MS. LILLING: Thank you, Your Honors.

22 MR. KRISS: Good afternoon, Chief Judge, and
23 members of the court. My name is Arnold Kriss. And seated
24 to the right of me is Gabe Taussig, who is co-counsel on
25 this matter. And if it may please the court.

1 Where to begin? I'm going to start with Rosen
2 before any questions are addressed by the court, which I
3 really look forward to.

4 Rosen was a compensable case. Two employees had
5 a fight over money that was loaned. One employee killed
6 the other. What made it compensable, very simply, is that
7 the work environment, the employer, condoned the loaning of
8 money between employees.

9 JUDGE HALLIGAN: But - - - but the court says
10 there, I think, that an assault which arises in the course
11 of employment is presumed to have arisen out of employment
12 absent evidence that it was motivated by personal
13 animosity. And so I take it your argument is that you need
14 some evidence that it is motivated by employment-related
15 animus; is that right?

16 MR. KRISS: Correct, Judge.

17 JUDGE HALLIGAN: Okay. And - - -

18 MR. KRISS: Section 10.1 of the Workers'
19 Compensation Law has two conjunctive elements, connected by
20 that one little word, "and".

21 JUDGE HALLIGAN: Yeah. And - - - and - - - but I
22 take it your argument is that to show arose out of, you
23 have to show affirmative evidence of some employment-
24 related animus; is that a fair - - -

25 MR. KRISS: Yeah. Yes, Judge.



1 JUDGE HALLIGAN: Okay.

2 MR. KRISS: 100 percent fair.

3 JUDGE HALLIGAN: So - - - so if that's correct,
4 then what work is the presumption itself, doing? Because
5 usually I think a presumption fills the space that
6 affirmative evidence would otherwise establish.

7 MR. KRISS: When the legislature enacted, with
8 the governor, 21.1, the presumption is that if you're hurt
9 at work, the only way to rebut that, that it did not come
10 out of the course of employment, is by substantial
11 evidence, which the Third Department unanimously found that
12 there was substantial evidence to rebut it.

13 JUDGE HALLIGAN: But - - - but - - -

14 MR. KRISS: We've met our burden.

15 JUDGE HALLIGAN: - - - the statute instructs, I
16 think, and Rosen says that there is a presumption. Right?
17 And so I'm just trying to grapple with how then we would
18 conclude that affirmative evidence of an employment-related
19 animus, where we don't know what the motivation was, how we
20 would require that?

21 MR. KRISS: I think, Judge, based on, in this
22 case, the substantial evidence. There's no relationship,
23 no risk that Dr. Timperio was engaged in any patient or
24 surgical activity; the flow from his work to the injury
25 doesn't exist. This is a one-off situation that as the

1 Attorney General opened with, is a tragic situation.

2 JUDGE CANNATARO: Counsel, what is the - - -

3 MR. KRISS: There's no connection.

4 JUDGE CANNATARO: - - - what is the significance
5 of that proof that you just listed? Because to me it seems
6 like that establishes an absence of personal animus, which
7 is the rule that was crystalized in Rosen. So you must be
8 arguing that it does something other than that?

9 MR. KRISS: Judge, most respectfully, Rosen
10 leaves out, in the Court of Appeals, two very critical
11 words that are in all other cases. It's between
12 individuals; it's between combatants. If you look at the
13 Third Department's decision on Rosen and if you look at all
14 the other cases that are cited between employees where
15 there is an assault, there are basically a co-employee
16 nexus between two individuals - - - Judge Cannataro, most
17 respectfully - - - Cannataro and Kriss getting into a
18 fistfight - - -

19 JUDGE CANNATARO: Would never happen.

20 MR. KRISS: Never going to happen unless it's a
21 wrong decision and maybe I'll be a little upset. But the
22 most important thing is, is that the in the workplace it's
23 - - - all the cases, most respectfully, that we brief and
24 I've read a number of them - - - it's two co-employees get
25 into a fight. Whether it's compensable or not, you got to

1 look at the total incident. If it's a fight between a co-
2 employee and the girlfriend - - - and I believe there are
3 cases like that - - - of another employee, it may not be
4 compensable. But what the Third Department decided here,
5 unanimously, which to me is unique in these kind of cases
6 to have that, is that there's no relationship. It's like
7 an empty chair was shot. That Justin Timperio was sitting
8 there and in comes this individual and the personal
9 hostility - - or the hostility that he had - - - the
10 shooter - - - the assailant, was to him.

11 JUDGE CANNATARO: So - - -

12 MR. KRISS: It was arbitrary.

13 JUDGE CANNATARO: - - - so would it be fair to
14 say, however inartful this is about to be, that it was so
15 random, so unconnected to the injured party that it
16 couldn't have arisen out of his employment?

17 MR. KRISS: Judge, it was so unconnected,
18 unrelated to the injured party who was a medical resident,
19 who signed on to be a doctor and the Hippocratic Oath, to
20 do no harm, was on the - - -

21 JUDGE GARCIA: But Counsel, let's say - - -

22 MR. KRISS: - - - wound up getting harmed.

23 JUDGE GARCIA: Counsel, let's say it wasn't a
24 doctor here. Let's say it was somebody working in the
25 hospital for a contractor or - - - you know - - - for a

1 subcontractor and same situation, same randomness but they
2 don't have somebody like Bronx-Lebanon Hospital to sue?
3 Let's say it's another situation where the employer does -
4 - - that employee is not entitled to workers' comp benefits
5 under these situation?

6 MR. KRISS: Judge, I'm - - - I'm certain I didn't
7 - - - just didn't understand the question. I apologize.

8 JUDGE GARCIA: So let's say in this case, you
9 want to sue the hospital, right? That's your goal. And
10 you don't want workers' comp benefits because you have this
11 other pocket that you can sue. But let's say it's a
12 situation where gets shot or somebody gets injured in one
13 of these random attacks in a business that does not have
14 that type of resource. And now they're not entitled to
15 workers' compensation either, right?

16 MR. KRISS: If I understand your question. If
17 there was an individual who comes into a bar, for example,
18 and he pulls a gun and he shoots - - -

19 JUDGE GARCIA: Let's say it's a guy who's working
20 in a bodega and somebody comes in and shoots him.

21 MR. KRISS: Anything. A bodega. Anything.

22 JUDGE GARCIA: Right.

23 MR. KRISS: The bottom line really is, is that
24 way the legislature is set up, based on the United States
25 Constitution going back to the Wainwright Commission in 19

1 - - - whatever it was - - - 16, before I was born. The key
2 thing really is, is that if an individual goes in, an
3 assailant, does a shooting, shoots the bodega guy who's
4 behind the counter, the presumption applies that he was
5 hurt at work. And then it falls on the basis to the
6 employer, generally, who doesn't want the claim for
7 whatever reason, to present substantial evidence to rebut
8 it. And basically, in most of the cases that - - -

9 JUDGE GARCIA: So the difference in here is you
10 don't wasn't the benefits?

11 MR. KRISS: Excuse me?

12 JUDGE GARCIA: That's the difference here? Is
13 only the posture of this case that you don't want workers'
14 compensation benefits?

15 MR. KRISS: You know, we have Justin Timperio.

16 JUDGE GARCIA: Yeah.

17 MR. KRISS: Judge, I think to be intellectually
18 honest, I don't believe as an advocate standing before the
19 Court of Appeals, that the facts in this case make out a
20 workers' compensation case. And of course, my argument is
21 we don't want it because we're going to have perhaps
22 another matter in another courtroom that has nothing to do
23 with workers' comp.

24 JUDGE HALLIGAN: Well, you already do have that,
25 right? That's pending in the Southern District, I thought,

1 but stayed. No?

2 MR. KRISS: I'm sorry, Judge?

3 JUDGE HALLIGAN: I thought you already had a
4 separate action pending, no?

5 MR. KRISS: We - - - we do. Judge - - - not - -
6 -

7 JUDGE HALLIGAN: Judge Gardephe, I think. Yeah.

8 MR. KRISS: Judge Gardephe.

9 JUDGE HALLIGAN: Yeah.

10 MR. KRISS: Excuse me. In the Southern District
11 on motion to dismiss a lawsuit who had - - - who didn't
12 even talk about the presumption - - - dismissed the motion
13 of Bronx-Lebanon and dismissed a summary judgment motion
14 that they made, finding that 10.1 that although Timperio
15 was hurt at work, it wasn't connected to his job. So we
16 won in the federal court, which we know - - - we know is
17 not binding to - - -

18 CHIEF JUDGE WILSON: So there's a - - - there's a
19 case - - -

20 MR. KRISS: We know it.

21 CHIEF JUDGE WILSON: - - - there's a - - -

22 MR. KRISS: But it's a good guidance.

23 CHIEF JUDGE WILSON: - - - there is a case of
24 ours that I'm having a lot of trouble figuring out how it's
25 any different from your case and I think you're going to

1 have to get around it. It's a case called Katz v. Kadans
2 from 1922. You're familiar with it?

3 MR. KRISS: I - - - I'm sorry, Judge. I'm losing
4 just a little bit.

5 CHIEF JUDGE WILSON: Sure. Are you familiar with
6 one of our precedents from 1922 called Katz v. Kadans?

7 MR. KRISS: Yes, Judge. I - - -

8 CHIEF JUDGE WILSON: Okay. So - - -

9 MR. KRISS: - - - again, I've read Katz v.
10 Kadans.

11 CHIEF JUDGE WILSON: Yeah. So we held there that
12 the injury was compensable. And what happened there, just
13 to refresh your recollection, is that there was a man who
14 was a cheese proprietor. He had a chauffeur. The
15 chauffeur was delivering cheese for his business. After
16 the cheese delivery, the chauffeur was getting back into
17 his car and he was being chased by an insane man who was
18 stabbing everybody he could who got in his way. He stabbed
19 the man - - - the chauffeur. We held that's compensable.

20 How is that different from this case?

21 MR. KRISS: Well, in Katz, if I remember
22 correctly, he was doing a job - - -

23 CHIEF JUDGE WILSON: Yep.

24 MR. KRISS: - - - for an employer.

25 CHIEF JUDGE WILSON: Same as Timperio.

1 MR. KRISS: And I would bet you, and again, I'm
2 going to get my C-minus on Katz in a moment. I would bet
3 you that the employer probably did not offer any
4 substantial evidence and it turned out to be compensable.
5 A lot of the cases that have been before this court and the
6 Third Department, the employer just surrenders by doing
7 nothing in terms of substantial evidence.

8 CHIEF JUDGE WILSON: What - - - so what evidence
9 would you have wanted the employer there to tender?

10 MR. KRISS: I'm sorry, Judge?

11 CHIEF JUDGE WILSON: What evidence would you have
12 wanted the employer there to tender?

13 MR. KRISS: Good question. In Katz and all
14 similar cases, what the employer should have done - - - and
15 I'm not the attorney for the employer - - - I would have
16 investigated the circumstances. I would have seen if there
17 - - - to defeat - - -

18 CHIEF JUDGE WILSON: I - - - you have - - - you
19 have just pretty much as you have here. An insane man
20 randomly attacking people. Right? What kind of evidence
21 in that circumstance would you want an employer to put
22 forward to say this should not be compensable?

23 MR. KRISS: Probably nothing. He probably would
24 be thrilled that it - - - it was to be random so he
25 wouldn't have to have his insurance company pay benefits.

1 My sense really is, is that it's hard on a random attack -
2 - - this wasn't a random attack - - - Katz, I mean. It was
3 just - - - just not a random attack. There was a lot of
4 things going on and an individual was no different than the
5 other individuals who was stabbed or shot or killed at that
6 - - - or injured at that point in time.

7 I think - - - I would have to look at Katz
8 really, very carefully and try and sit as a judge, weigh
9 whether or not it's compensable or not. I don't see the
10 evidence in the Katz case - - -

11 JUDGE RIVERA: So to be - - - to be - - -

12 MR. KRISS: - - - that works to the benefit of
13 the compensability.

14 JUDGE RIVERA: - - - to be clear then - - -

15 MR. KRISS: Yes, Judge.

16 JUDGE RIVERA: - - - I'm sorry. Is - - - is your
17 position - - - and it was similar to the question I asked
18 the other side. Is your position that - - - let's just use
19 the word, "shooter" here. The shooter had to plan or
20 intend or that was the goal, to shoot Mr. Timperio - - - or
21 Dr. Timperio, specifically?

22 MR. KRISS: I would have to speculate. I have no
23 idea what was in this deranged individual's mind.

24 JUDGE RIVERA: I'm not asking you to speculate.
25 I'm asking you about what should be the law. Your

1 understanding of the law?

2 MR. KRISS: My understanding of the law is, I
3 think that you spoke on it - - - and I'm not going to go to
4 my notes; I don't have the patience to do it. But
5 basically, of taking Section 10.1 - - -

6 JUDGE RIVERA: Okay.

7 MR. KRISS: - - - which the legislature mandated
8 in terms of conjunctive elements for a case to be
9 compensable. The mere fact that the shooter showed up as
10 the assailant, and he just randomly shot in a room - - - -

11 JUDGE RIVERA: All right.

12 MR. KRISS: - - - and hit an individual who had
13 no idea - - -

14 JUDGE RIVERA: But that's what I'm saying. Your
15 position is that if it's random - - - it's not that the - -
16 - again, using this example of a shooter. The shooter
17 comes in and they are looking to shoot that particular
18 person, as opposed to just spraying the room with bullets -
19 - -

20 MR. KRISS: Right.

21 JUDGE RIVERA: - - - right. Is that what you're
22 saying is the way we should understand the law? That's
23 your view of the law?

24 MR. KRISS: What I'm saying is that when - - -

25 JUDGE RIVERA: He had to come in to shoot

1 Timperio?

2 MR. KRISS: When he came in to shoot whoever it
3 was - - -

4 JUDGE RIVERA: Yes.

5 MR. KRISS: - - - he didn't know Timperio;
6 Timperio didn't know him. His state of mind, the assailant
7 pulled that trigger - - -

8 JUDGE RIVERA: Yeah.

9 MR. KRISS: - - - at that point in time, when
10 that bullet left that chamber - - -

11 JUDGE RIVERA: Yeah.

12 MR. KRISS: - - - and entered Timperio, I would
13 only think, God forbid, to be faced with an A.R. 15
14 shooting, that the oh-my-God moment set in, like why is he
15 doing this to me? I don't know this guy. I've never seen
16 him. I've never heard of him. I have no idea. I never
17 got him angry at me. I have nothing.

18 JUDGE RIVERA: Ergo the random shooter. But
19 again, is your rule that the shooter - - - I'm not asking
20 whether or not that's the case here, I just want to know.
21 Is your rule that the shooter should intend to actually
22 injury the person who is claiming the workers' comp
23 benefits? As opposed to, I just want to shoot up this
24 floor of the hospital.

25 MR. KRISS: There is no difference in him

1 shooting Timperio and shooting - - - also which is in the
2 record - - - a patient who was there.

3 JUDGE RIVERA: Yes, yes, yes.

4 MR. KRISS: They - - - they all were the same
5 targets at that point. The one suggestion - - - if I could
6 be so bold to make it, Judge, in listening to your
7 question. A random shooting - - - I mean, this is going on
8 across the country. This - - - this is outrageous. And I
9 don't want to get emotional in the Court of Appeals, but
10 the bottom line is Justin Timperio was shot in 2017. Just
11 think about how many AR-15 shootings across the country - -
12 -

13 JUDGE HALLIGAN: But - - - but your view,
14 counsel, I think is that - - - and this - - - this, I think
15 ties to the question Judge Garcia asked you - - - that
16 whenever you have a shooting in a workplace where the
17 employer does not have resources, that that employee is
18 nonetheless not entitled to any Workers' Compensation.

19 MR. KRISS: I don't agree with you.

20 JUDGE HALLIGAN: Well - - - well, then, in what
21 circumstance - - - in what circumstance would an employee
22 be entitled but is not entitled here?

23 MR. KRISS: The employee has a due process right
24 to file a claim when he's shot - - -

25 JUDGE HALLIGAN: Sure.

1 MR. KRISS: - - - with the Workers' Compensation.

2 JUDGE HALLIGAN: But we're talking about whether
3 the employee is in fact entitled to compensation, right?

4 MR. KRISS: I - - - I think it depends on the
5 incident. I mean, it's so hard to basically parse just
6 getting shot without knowing what happened in the
7 surrounding environment. I think, basically - - -

8 JUDGE GARCIA: But let's say it's exactly the
9 same facts here, except you have an insolvent employer.
10 Exactly the same facts, but you have an insolvent employer.

11 MR. KRISS: What do you mean an insolvent - - -

12 JUDGE GARCIA: You have no recourse against the
13 employer. No insurance, no resources.

14 MR. KRISS: I don't think that's relevant, Judge.
15 Most respectfully, I'm going to disagree with you - - -

16 JUDGE GARCIA: No, you may not. But could you
17 answer my question? So same situation you have here. You
18 have an insolvent employer, no insurance. That person now
19 goes in to file a claim; they are not entitled to workers'
20 compensation.

21 MR. KRISS: Okay. So - - -

22 JUDGE GARCIA: What would the policy reason,
23 consistent with why we have Workers' Compensation be that
24 we would want that?

25 MR. KRISS: Because what you're going to is the



1 exclusivity provision of giving workers' compensation to an
2 individual who is hurt in a workplace. To get there,
3 insolvent or not, the path to workers' compensation is
4 through the conjunctive - - -

5 JUDGE GARCIA: Okay. So your answer is that
6 person would not get benefits? That's the answer to that
7 question.

8 MR. KRISS: Depending on the facts, correct.

9 JUDGE GARCIA: On these facts.

10 MR. KRISS: There is a possibility he would not,
11 that's true. In this case, there is no way that I would be
12 able, as an advocate, to stand up and basically say with
13 all honesty, and I - - - I pride myself on my integrity,
14 that this is a workers' compensation case.

15 CHIEF JUDGE WILSON: Thank you, Counsel.

16 MR. KRISS: I can't do that.

17 CHIEF JUDGE WILSON: Thank you. Your red light's
18 on.

19 MR. KRISS: Am I done?

20 CHIEF JUDGE WILSON: Yes. You're done.

21 MR. KRISS: Judge, thank you very much.

22 JUDGE HALLIGAN: Counsel, can I ask you what you
23 do about Lemon and Malacarne?

24 MS. ROSENBLUTH: Yes. So those are both cases
25 analyzing the, "in the course of employment" prong.

1 JUDGE HALLIGAN: Lemon is the commute, right?

2 MS. ROSENBLUTH: That's right.

3 JUDGE HALLIGAN: And Malacarne?

4 MS. ROSENBLUTH: Malacarne is about a parking
5 valet - - -

6 JUDGE HALLIGAN: Right.

7 MS. ROSENBLUTH: - - - who got into - - -

8 JUDGE GARCIA: He left work.

9 MS. ROSENBLUTH: He left work, yeah.

10 JUDGE HALLIGAN: He was out?

11 MS. ROSENBLUTH: Yeah. So those are both - - -

12 JUDGE HALLIGAN: So these are - - - are we "in
13 the course of", when we're on the way to or leaving?

14 MS. ROSENBLUTH: Correct. Correct. So those are
15 not relevant here and that was one of the points I wanted
16 to make. Second, just to pick up on where Judge Garcia was
17 heading. I mean, I think that is the clear implication of
18 my adversary's argument, which is not only does it leave
19 employees without a remedy if their employers are
20 insolvent, but it - - - it's very likely the case in - - -
21 in many cases that the employee will not even have a valid
22 cause of action against the employer in the first place.
23 So there might be no reason to - - - there'd be no basis to
24 sue and no basis to get recovery against an insolvent
25 employer.

1 And finally, just briefly again, to respond to
2 Judge Halligan's question earlier, which is that if you - -
3 - the Third Department's rule does put the burden on the
4 claimant to come forward with affirmative evidence that it
5 was employment related. And that's exactly the - - - the
6 thing that's wrong with it, which is that it basically
7 vitiates the effect of the presumption. What work is the
8 presumption doing if you have to affirmatively come forward
9 with evidence that it was employment related? So the
10 primary question here is, was there evidence of personal
11 animosity sufficient to rebut the presumption? If no, the
12 presumption has not been rebutted and the claimant is
13 entitled to benefits.

14 The Third Department here asked an entirely
15 different question, was there evidence of an employment
16 related motivation, and found the absence of that evidence
17 sufficient to overcome the presumption, which was rebutting
18 a presumption with a negative essentially.

19 So for all those reasons, we ask the court
20 reverse the Third Department's order. Thank you very much.

21 CHIEF JUDGE WILSON: Thank you.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Timperio v. Bronx-Lebanon Hospital, No. 46 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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