

New York State Law Digest



REPORTING IMPORTANT OPINIONS OF THE COURT OF APPEALS
AND IN SPECIAL SITUATIONS OF OTHER COURTS

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TOLL OF STATUTE OF LIMITATIONS IN WRONGFUL DEATH ACTION, ALLOWED WHEN INFANT IS SOLE DISTRIBUTE, DOESN'T APPLY IN PERSONAL INJURY ACTION

There's a well known toll of the statute of limitations when the plaintiff is an infant. CPLR 208 provides that if the applicable period is three years (or longer), as it is in a personal injury action, the plaintiff will have at least three years for suit from the time the disability ceases. That simple prescription becomes complicated and even confounding when (1) the infant dies before reaching majority, (2) the claim is against a municipality, thereby invoking the 90-day notice of claim requirement of § 50-e of the General Municipal Law, (3) an application has to be made for leave to file a late notice of claim, thereby invoking as an outer limit on the application the year and 90 days allowed by GML § 50-i, and (4) the case involves claims for both personal injury and wrongful death and the significant distinctions between them.

The infant whose claims produced this case, *Heslin v. County of Greene*, 14 N.Y.3d 67, N.Y.S.2d (Feb. 11, 2010), was a three-year-old beaten so badly by her mother's boy friend that on November 21, 2004, she died of the injuries. Both the mother and boy friend are in prison for the neglect and beatings and will not share in the proceeds of either cause of action, leaving as the sole potential beneficiaries, ultimately – of both the personal injury and wrongful death claims – the infant siblings of the decedent.

The wrongful death claim got the benefit of the CPLR 208 toll and remains viable. The benefit was conferred by the Court of Appeals 1991 *Hernandez* decision (Digest 385), which held that if the sole distributee of the decedent is an infant, and the decedent dies intestate, the statute of limitations on the wrongful death claim will toll until either a guardian is appointed for the infant or the infant comes of age. Applying the toll to the period allowed by §§ 50-e and 50-i for filing a late notice of claim, the wrongful death claim is sustained here in *Heslin*.

The problem was whether to apply similar reasoning to the personal injury claim, so as to award it a like toll. On that the Court divides, the majority, in an opinion by Judge Graffeo, distinguishing the two claims and denying the toll, while the

minority, in an opinion by Judge Ciparick, finds a sufficient parallel between the two to grant the toll and preserve the claim.

The main point of the majority is that the two claims are entirely distinct – so distinct as to bar the parallel. The proceeds of the personal injury claim go into the estate of the decedent and are distributed either as the will dictates, or, where there is no will (as here), to intestate distributees. As the Court describes it in *Heslin*, wrongful death claims, in contrast, “belong to a decedent’s distributees rather than the estate” and (quoting from *Hernandez*) any damages must be “measured by the effect of the wrongful act on the distributees – the pecuniary loss suffered by the individual distributees as a result of decedent’s death”.

To the majority, this is not just a technical distinction. Proceeds going through the estate, as they do on a personal injury claim, are subject to the claims of creditors, for example, which is not so of a wrongful death action. In short, explains the Court, citing its 1978 *Ratka* decision (Digest 224), the two causes of action are “predicated on essentially different theories of loss which accrue to different parties”. There is hence lacking “the necessary connection” between the two that would enable the reasoning behind *Hernandez* to be imported for application to the personal injury claim here in *Heslin*.

The dissent disagrees, stressing that what “tipped the balance” in *Hernandez*, prompting the application of the CPLR 208 toll, “was the infancy of the sole distributee”. To the dissent,

[t]hat same consideration should tip the scale here, where no person was entitled to commence the action other than the infant distributees [who were too young] until the appointment of *Heslin* as administrator.

The dissent sees the majority as denying the toll “merely because any damages must first pass through the estate”, but finds that an insignificant technical point because in *Heslin* the fact is that the decedent’s infant sisters are “the only persons who can inherit from [the] estate and who will benefit from the outcome of both the personal injury and wrongful death claims”. To the dissent, that’s the salient parallel to the *Hernandez* case, which it would therefore import to govern here, allowing the toll under CPLR 208 and invoking the caselaw that allows it to extend as well to the time for serving a late notice of claim under §§ 50-e and 50-i of the General Municipal Law.

The procedural points of the statute of limitations and its tolling were of course the sole issues before the Court. Peeking for a moment behind to the substantive issues, Greene County – the defendant government unit that is charged with not looking deeply enough into the infant’s abuse after being advised of it – is the winner; the personal injury claim against it is defeated for want of a timely notice of claim. But if the infant siblings end up, as seems likely, dependent on public support, it will still be government, although not necessarily Greene County, that ends up with the bill

for helping them. And of course the sums will differ. Theoretically, a personal injury recovery will produce greater sums than the minimums expended for public assistance, but given the long term that the assistance may be needed for, the theoretical may well be reversed by the practical on facts like *Heslin's*.

OTHER DECISIONS

THE JUDGES' SALARIES DISPUTE

Court of Appeals Sustains Claim That Legislature Must Examine Judges' Salaries Independently of Its Own Salaries

Three separate cases, consolidated on appeal, produce this long awaited decision on the controversial issue of the judges' salaries: *Maron v. Silver*, *Larabee v. Governor*, *Chief Judge v. Governor*, N.Y.3d, N.Y.S.2d, 2010 NY Slip Op 01528 (Feb. 23, 2010; 5-1 decision, with the Chief Judge recusing himself).

Since all parties agree that the judges' salaries need raising up, the Court of Appeals assumes that under this decision the Legislature will now address the issue independently, i.e., free of intertwining with legislators' compensation. Hence the Court merely declares this the legislative obligation and lets the case stand with that command and the confidence that the Legislature will – in good faith – return to the subject and keep the matter of its own salaries off the scene as it considers the judges' salaries.

Judge Pigott writes the opinion, reviewing in some detail all of the bases for the judges' claims – all essentially seeking the same relief – and rejecting as bases the equal protection and compensation clauses of the state constitution. The Court alights on and sustains only the claim that the conduct of the Legislature violates the separation of powers that the constitution recognizes among the three branches of government.

The Court attaches much significance to the compensation provisions of each of the articles addressing a branch of government, but only as reflecting on the separation of powers issue. The articles differ. The one governing the Legislature, Article III, provides that legislators' salaries may not be either “increased or diminished” during their terms of service, while the counterpart provision governing the judges, in Article VI, provides only that their salaries can't be “diminished”. This is a major factor grounding the Court's conclusion that legislative insistence that judges' salaries rise only on a parallel with their own violates the separation of powers that are also the separate and distinct missions of the two articles.

Incidental stress is laid on other constitutional differences between the two branches that point against co-treatment: legislators can have outside employment to supplement their incomes, while judges are forbidden any outside practice. By failing to consider the judiciary's compensation increases “on the merits, and instead holding it hostage to other legislative objectives”, the Court says the Legislature weakens the judiciary.

The Court outlines the history, and most particularly the recent history, of the salary problem, noting that the last increase in judicial salaries was in 1998. Inflation alone accounts for a good part of what amounts to the diminution of judicial salaries since that time, but the Court does not make inflation the fulcrum of the opinion because that issue, too, must be left for the Legislature to factor in, once again assuming that under this opinion the Legislature will respond in good faith and debate that on the merits, too. The contemplated good faith debate cannot occur, however, “if the Judiciary is used as a pawn or bargaining chip in order to achieve ends that are entirely unrelated to the judicial mission”.

The Court also recites statistics showing the great increase in judicial business covering the period since the last raise. Related federal and other state decisions are among the Court’s citations as well.

Of course, because of self-interest, the whole judiciary should be recused from considering matters like this, but the Court disposes of that by citing the “Rule of Necessity” that comes into play when a court is confronted with a justiciable issue and there’s no other judicial body that can act. In that situation, the Court must and does act, and does here, and one must assume that the same kind of good faith the Court assumes the Legislature will exercise under its decision in this case has guided the judges in making the decision.

To Judge Smith in dissent, the separation of powers is not violated when one of the branches acts irresponsibly because “that happens all the time” – an acknowledgment if not a salute to tradition – but only when one branch threatens the other in the constitutional scheme. That level of threat has not been reached in this case, because the dissent does not see in prospect the consequences the majority anticipates. Responding to the majority’s apprehension that financial considerations will now deter too many from seeking judicial office, the dissent says that while many may have left the bench for money reasons, and more still may have refrained from going out for the bench for money reasons, it still sees “plenty” of able judges on the bench and “plenty of able people who would willingly become judges” even under the current salaries.

The issue now goes back to the Legislature.

BROWNFIELD CLEANUP PROGRAM

Finding Arbitrary the DEC’s Rejection of Owner’s Request to Admit Its Land Into Cleanup Program, Court Mandates Acceptance

It’s another of those situations in which the Court rejects an administrative agency’s argument that it knows its business best and that the courts should therefore defer to its judgment. Hence in *Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation*, 14 N.Y.3d 161, N.Y.S.2d (Feb. 18, 2010), the Court rejects the DEC’s judgment that the petitioner’s (P’s) land is insufficiently contaminated to meet the program’s criteria, finds the contamination criteria met as a matter of law, and upholds P’s Article 78 proceeding to overturn the

agency's action as arbitrary and capricious. It directs the DEC to admit the subject land into the Brownfield Cleanup Program.

The program was enacted in 2003 as Title 14 of Article 27 of the state's Environmental Conservation Law. In endorsing it, the Division of the Budget described brownfields – so-called as a contrast to green fields – as “abandoned, idled, or underused properties where redevelopment is complicated by real or perceived environmental contamination” that poses “not only environmental, but legal and financial, burdens on communities” because the affected land is often left vacant, itself doing nothing to produce value and in fact even diminishing the value of surrounding land.

In an opinion by Judge Read, the Court of Appeals in *Lighthouse* reviews at length the BCP and the kinds of conditions on which it operates. Land admitted into the program, and then satisfactorily carrying out its requirements, earns a certificate from the state promising that the state will not sue the owners for environmental violations and offers substantial tax benefits as well.

This subject involves analyses of numerous categories of contamination and their sources to see if the land at issue might be deemed to satisfy the complicated demands of the BCP.

To layfolk, it's all abstruse, but we lawyers, although also among the laity in this configuration, do have one advantage over the others: experience in listening to the experts on both sides and balancing them off – at last – into a conclusion. And that's the story here in *Lighthouse*.

One principal issue boiled down to whether the condition of the land would “complicate” its development. P's experts, concluding that it would, pointed to a number of contaminants that seemed to invoke the BCP program, but the DEC and its experts said nay: they see no contaminants rising to “levels that would complicate the redevelopment or reuse of the property”.

If the complicating of redevelopment is the crux of the issue, P would seem to carry the day on this record, and so it seemed to the Court.

The DEC stressed that “large portions” of the land “were formerly used as solid waste landfills”, which the DEC apparently does not consider to be among the “specific sources of hazardous waste” to which the BCP is directed (citing “petroleum contamination” as a more eligible example).

P's position is sustained and the DEC's position dismissed as so much solid waste.

PRIOR NONCONFORMING USE

Reasonable Reliance on State DEC Proceedings Resulting in Five-Year Mining Permit – and Much Expense – Protects Owner from Town’s Later-Adopted Anti-Mining Law

We have another DEC case, this one recalling the Court of Appeals 1996 *Orangetown* decision (Digest 441). In that case, the Court held that an owner’s expenses incurred in reasonable reliance on a building permit barred a town from afterwards revoking the permit and supported a federal civil rights claim against the town for damages. And in its more recent (2009) *Buffalo Crushed Stone* decision (Digest 599), the Court held that a quarrying right survives for an entire parcel if a significant part has already been excavated when a new zoning restriction is adopted purporting to interfere. The combination of those precedents brings an equivalent victory to a mining company in *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127, N.Y.S.2d (Feb. 18, 2010).

Because a town had no zoning – and clearly no anti-mining law – all the plaintiff/owner (P), planning excavations in the town, had to satisfy was the state DEC, and did so by applications to it that ultimately produced a five-year mining permit. Along the way, however, the town, after some hemming and hawing, adopted a moratorium on mining and then purported to make it binding on P. P brought this declaratory action against the town to establish its right to continue excavations without having to obtain a town permit. A jury determined that P had a preexisting right to this now-nonconforming use. In an opinion by Judge Read, the Court of Appeals upholds that determination after reversing the appellate division, which had rejected it.

The revocation in *Orangetown* was for political reasons – local opposition – which was apparently the case here in *Glacial* as well.

The general rule in cases like this is quoted by the Court from its 1952 decision in *People v. Miller*, 304 N.Y. 105, 106 N.E.2d 34:

[N]onconforming uses or structures, in existence when a zoning ordinance is enacted, are ... constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance.

The Court has had a number of similar cases over the years. Another enough in point for the Court to cite in *Glacial* is its 1990 *Ellington* decision (Digest 378), casting the rule in perhaps its most common attire: as involving a “vested” right. The Court held in *Ellington* that a developer with a “vested” right based on the prior approval of a plat is not subject to zoning changes made afterwards.

In applying to the *Glacial* facts what it calls this “vested-rights jurisprudence”, the Court points out that the town had no zoning when P acquired the property, or when P applied for the DEC mining permit, or even when the DEC issued the permit to P. All but two of the improvements P committed itself to make to the land in reliance

on the mining permission had in fact already been completed, moreover, and P was prepared to complete the two outstanding ones as well.

This proof supported the jury determination. So, upholding it, the Court remands the case to the appellate division to consider issues not determined on the earlier appeal.

LABOR LAW § 240(1)

Worker Not Told Where Safety Devices Are, or That He Must Use Them, Gets Summary Judgment on Scaffold-Law Claim

The 2006 Court of Appeals decision in *Robinson v. East Medical Center, LP*, 6 N.Y.3d 550, 814 N.Y.S.2d 589, among many others, involved the so-called “scaffold law”, Labor Law § 240(1), which requires safety devices at construction sites, notably where work at elevations is required. In *Robinson* the Court found that a worker who failed to use a proper sized – and available – ladder had no cause of action under § 240(1).

In the more recent case of *Gallagher v. New York Post*, 14 N.Y.3d 83, N.Y.S.2d (Feb. 11, 2010), the defendant, apparently the owner of the premises, sought summary judgment against the worker on the basis of *Robinson* and like cases, but unsuccessfully. Summary judgment goes instead for the plaintiff/worker.

Preparing for new flooring, the plaintiff, an iron worker, was using a saw to cut a hole in metal decking on the second floor of the premises when the blade jammed and propelled him forward. He fell through the uncovered opening onto a temporary level between the first and second floors and was injured.

The project manager had been told that harnesses were available and that ironworkers should have them on, but there was no indication that the workers themselves were made aware of this. The plaintiff’s foreman stated that plaintiff had not been provided with a harness or lifeline, and that there were no stanchions or safety cables – other protective devices – “in the accident area at the time of the accident”.

In discussing the other cases – the cases in which a § 240(1) recovery was denied – the Court states the rule emanating from those cases:

Liability under section 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the worksite, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff’s own negligence is the sole proximate cause of his injury.

In an opinion by Judge Pigott the Court then concludes that *Gallagher* “is not such a case” because there’s no evidence that plaintiff “knew where to find the safety devices ... or that he was expected to use them”.

The result is a grant of summary judgment for the plaintiff on the issue of liability.

**WHO PAYS FOR ARBITRATION?
ADOPTING FEDERAL APPROACH, COURT HOLDS THAT
PRELIMINARY INQUIRY IS NECESSARY TO DETERMINE WHETHER
PARTY, WHO AGREED TO ARBITRATION, CAN AFFORD ITS FEES**

The Court of Appeals has been through many kinds of arbitrability threshold issues, and issues of enforcement of arbitration awards, too, but here’s a new one for it: under a provision requiring the parties to share the costs of an arbitration that they agreed to, what happens when the claimant, alleging wrongful dismissal by her employer, says she can’t afford it?

Arbitration has several advantages over litigation, so the assumption goes, and it has been widely assumed that expedition and economy are among them. In this case the bill of the arbitrator, the American Arbitration Association (AAA), presented in advance, was for \$42,300. (There’s nothing like that kind of charge for a litigation; and attorneys’ fees, which would have to be added, would presumably be similar in either forum.) In this suit in the brokerage area the AAA, applying its own employer-pays rule, presented the bill to the broker/employer, D, who refused to pay it on the ground that P, the employee, had agreed to share it. Not having been paid by anyone, the AAA cancelled the arbitration.

Now P brought this Article 78 proceeding to compel D to pay the bill or else to compel the AAA to render a default award against D for nonpayment. That brought the issue of the obligation to pay squarely before the New York courts, which find, the Court of Appeals included, that the AAA employer-pays rule is superseded in this case by the parties’ agreement.

The background is that after P was hired by D to sell securities, D issued a manual requiring all employees to agree to the arbitration of disputes before the AAA and requiring that the parties share equally the fees and costs of the arbitrator. The provision adopting the AAA rules was made subject and subordinate, however, to any contrary provision in the parties’ agreement. The fee-sharing provision in this agreement is such a contrary provision; that’s how it comes to govern.

A majority of the appellate division held the “equal share” provision unenforceable as against public policy, but the Court of Appeals rejects that in *Brady v. Williams Capital Group, L.P.*, N.Y.3d, N.Y.S.2d (March 25, 2010). Citing federal cases, the Court finds the provision valid and alights on a 2001 Fourth Circuit decision, *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, as most closely in point. *Bradford* holds that the inquiry about enforcing a fee-splitting

provision should examine “the claimant’s ability to pay ..., the expected cost differential between arbitration and litigation ..., and whether the cost differential is so substantial” that it would discourage the claimant from pursuing an arbitration.

The Court of Appeals, acknowledging the state’s public policy favoring arbitration agreements in an opinion by Judge Jones, also finds a “strong policy requiring the invalidation of such agreements” if they contain “terms that could preclude a litigant from vindicating” the asserted right in an arbitral forum. The Court therefore concludes

that in this context, the issue of a litigant’s financial ability is to be resolved on a case-by-case basis and that the inquiry should at minimum consider ... (1) whether the litigant can pay ...; (2) what is the expected cost differential between arbitration and litigation ...; and (3) whether the cost differential is so substantial as to deter [the arbitration].

That will be an interesting hearing. “Employee” versus “employer” produces an almost knee-jerk assumption that the employee is likely to be unable to pay for dispute resolution, but that may not be the case here. The Court recites some of the annual earnings the employee enjoyed before her 2005 firing, which in some of the latter years passed \$300,000 and even \$400,000.

The Court refuses to say what the next step should be if the trial court on remand does find the “equal share” clause unenforceable. It offers the trial court this follow-up choice, however: sever the clause – relieving the claimant of the obligation to share the cost – and enforce the arbitration agreement without it, or direct the claimant to choose between sharing the cost of arbitration or instead suing on the claim in court.

It would be instructive to count the supposed advantages of arbitration as it was born early in the 20th century in commercial cases, and compare them with the “advantage” list as it stands today. One suspects that a “dis” would prefix some of the “advantages”.

Will *Brady* produce a parade of I-can’t-afford-it claims, each generating an additional threshold question that requires extensive litigation just to determine whether there may be an arbitration? Is that expeditious or economical? We’ll keep an eye out.