

1 COURT OF APPEALS

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STATE OF NEW YORK

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MATTER OF

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NEW YORK CITY ASBESTOS LITIGATION,

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MARY ANDRUCKI,

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Appellant,

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-against-

No. 185

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ALUMINUM COMPANY OF AMERICA, ET AL.,

10

Respondents.

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11

20 Eagle Street  
Albany, New York 12207  
October 15, 2014

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Before:

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CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Appearances:

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Sara Winkeljohn

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Official Court Transcriber

CHIEF JUDGE LIPPMAN: 185, Matter of New

York City Asbestos Litigation.

Counsel, wait one second until the  
courtroom clears.

MR. GOLANSKI: Yes, Your Honor.

CHIEF JUDGE LIPPMAN: Okay, counsel.  
You're on.

MR. GOLANSKI: Thank you, Your Honor.

CHIEF JUDGE LIPPMAN: You want any rebuttal  
time?

MR. GOLANSKI: One minute, please, Your  
Honor.

CHIEF JUDGE LIPPMAN: One minute, go ahead.

MR. GOLANSKI: Thank you. The first point  
I would make is that we can separate - - - separate  
out the survival and personal injury part of the  
judgment from the wrongful death part of the  
judgment. I think the wrongful death part is the - -  
- is the trickier part, and we definitely win for a  
number of reasons on that. On the personal injury  
survival part, it's clear that subject matter  
jurisdiction does not end with the death of the  
plaintiff. If - - - if you - - - under EPTL 11-3.2,  
no cause of action is lost and the person whom - - -

1 CHIEF JUDGE LIPPMAN: What was there - - -  
2 was there a pending action here at the time of the  
3 death?

4 MR. GOLANSKI: At the time of the death,  
5 there was no pending action yet. There was a notice  
6 of claim that was - - - that strictly complied with  
7 7108. It was a - - -

8 JUDGE GRAFFEO: It was timely?

9 MR. GOLANSKI: It was timely, and it was a  
10 perfect notice of claim. Subsequently, the - - - the  
11 plaintiff died. And the - - - a valid complaint was  
12 then filed pursuant to 7107, no problem there. The  
13 first complaint that was filed was a nullity and - -  
14 -

15 CHIEF JUDGE LIPPMAN: Wait a minute, but  
16 does the - - - was the - - - was the notice of claim  
17 good enough for the - - - after the death, for the  
18 wrongful death?

19 MR. GOLANSKI: That's exactly the issue  
20 here.

21 CHIEF JUDGE LIPPMAN: Yeah.

22 JUDGE SMITH: Could you - - - I'm sorry,  
23 could you take me a little more slowly through the  
24 point where you began? You distinguished between the  
25 survivorship claim and the death claim?

1                   MR. GANNON: Yes, I'm distinguishing that  
2 for - - - for basically analytic reasons. I think  
3 there's no issue whatsoever that the - - - that when  
4 we get to the survivor and the personal injury claim  
5 that - - - that certainly continues. This court's  
6 decision in Winbush in 1954, in the education law  
7 cases - - -

8                   JUDGE SMITH: Okay, I - - - I - - - I - - -  
9 I got the - - - I get the idea.

10                  MR. GOLANSKI: No, you don't - - -

11                  JUDGE SMITH: You - - - you got through the  
12 second time.

13                  MR. GOLANSKI: Right, the - - - the - - -  
14 the identical - - -

15                  CHIEF JUDGE LIPPMAN: So what are you  
16 doing? You're enlarging the complaint? Is that - -  
17 - is that what happened here?

18                  MR. GOLANSKI: Well, for the personal  
19 injury side the identical claimant does not - - - in  
20 - - - in the - - - in the action that's actually  
21 filed does not have to file the notice of claim.  
22 That's Winbush and Baker (ph.). You can have a next  
23 of kin. So the - - - so the - - - the personal  
24 injury survival component should be reinstated.  
25 That's the first point. Now - - -

1                   JUDGE GRAFFEO:  What - - - what about our  
2 precedent in Heslin that indicates these are two  
3 separate causes of action, different parties,  
4 different damages?

5                   MR. GOLANSKI:  Well, in Heslin it's very -  
6 - -

7                   JUDGE GRAFFEO:  Because we're looking at -  
8 - - we're looking at personal injury versus wrongful  
9 death.

10                  MR. GOLANSKI:  Yes, okay.

11                  JUDGE GRAFFEO:  Correct?

12                  MR. GOLANSKI:  Let's - - - let's look at  
13 that issue.  That's the trickier issue.  On that  
14 issue, in Heslin, there was a very particularized  
15 claim involved or - - - or issue involved.  And  
16 that's whether an infancy toll, which applied in  
17 wrongful - - -

18                  JUDGE GRAFFEO:  Right, we know.  I - - -  
19 I'm wondering why the same rationale would not apply  
20 in this type of situation?

21                  MR. GOLANSKI:  Because the underlying  
22 consideration here, the reason for having the notice  
23 of claim, as the defendant admits in their brief at  
24 page 4, and as numerous cases say, is - - - is to  
25 give the Port Authority the opportunity to

1 investigate the claim and possibly to settle. Now  
2 here there - - - the - - -

3 JUDGE GRAFFEO: So your posture is they  
4 were adequately notified, they knew about the  
5 accident?

6 MR. GOLANSKI: That's not just - - -

7 JUDGE GRAFFEO: Not accident, I mean they  
8 knew about his workplace contracting the disease?

9 MR. GOLANSKI: Yes, that's not just my  
10 posture. That's - - - that's what this court said in  
11 Caffaro v. Trayna, that personal injury claim gives  
12 notice of the exact same transaction and occurrence  
13 as the wrongful death claim for purposes of the - - -  
14 of the statute of limitations.

15 JUDGE SMITH: Why - - - why is - - - isn't  
16 - - - your position is that Holmes is directly on  
17 point, isn't it, that this is Holmes?

18 MR. GOLANSKI: Holmes is - - - yes, is  
19 directly on point. It was prior to any substantial  
20 compliance provisions in the municipal law or  
21 anything like that. The statute was for all  
22 structural and in - - - intents and purposes exactly  
23 what it is here. And this court in Holmes affirmed  
24 two decisions - - -

25 CHIEF JUDGE LIPPMAN: But there was a valid

1 pending complaint in that case, right?

2 MR. GOLANSKI: There was valid com - - -

3 CHIEF JUDGE LIPPMAN: Holmes.

4 MR. GOLANSKI: There was a valid pending  
5 complaint in the case that had been - - - that had  
6 been litigated. But that is really a small - - - a  
7 small difference. Here you can - - - you can file a  
8 - - - a complaint and - - - a summons and complaint  
9 for wrongful death and personal injury adding a new -  
10 - - adding a new party. It's done all the time.  
11 There's no reason that there has to be a prior  
12 personal injury existing complaint for the - - -

13 JUDGE READ: Now I - - - I see the  
14 Appellate Division - - - the Appellate Division noted  
15 that when they decided this case, that there was a  
16 limited exception to the notice provision that you  
17 still could have moved for leave to serve a new  
18 notice and commence a new suit. Is that right?

19 MR. GOLANSKI: I - - - I think that's a  
20 very tricky issue. It's definitely not right with  
21 respect to the personal injury side of things. Three  
22 year - - -

23 JUDGE READ: I take it you didn't do that?

24 MR. GOLANSKI: We didn't do that. More  
25 than three years had passed. But under - - -

1 JUDGE READ: Not at the time the Appellate  
2 Division decision came down?

3 MR. GOLANSKI: Yes, more than three years  
4 had passed - - -

5 JUDGE READ: Three years - - - three years  
6 - - -

7 JUDGE SMITH: That's not what they said.

8 MR. GOLANSKI: - - - on the personal injury  
9 - - - on the personal injury - - -

10 JUDGE READ: On the personal injury?

11 MR. GOLANSKI: - - - side of things. For -  
12 - -

13 JUDGE SMITH: But you - - - but you didn't  
14 do it on either - - -

15 JUDGE READ: They didn't - - - yeah.

16 JUDGE SMITH: - - - either cause of action?

17 MR. GOLANSKI: No, we didn't do it on  
18 wrongful death.

19 JUDGE SMITH: Why - - - why not? They  
20 invited you to.

21 MR. GOLANSKI: Well, we thought that that  
22 would invite a lot of wasteful litigation, because  
23 there's a state - - - under the CPLR, once your  
24 personal injury claim is extinguished, you don't have  
25 a wrongful - - - a right to a wrongful death cause of

1 action. And that's exactly what the - - - what the  
2 defendant would have - - - would have raised at the  
3 time. We felt that the Appellate Division's decision  
4 was legally wrong and we had a right to appeal and  
5 seek appeal to this court and this court granted  
6 that.

7 JUDGE RIVERA: But coun - - - can I just  
8 clarify on the - - -

9 JUDGE READ: Can you - - -

10 MR. GOLANSKI: Can I clarify on the  
11 wrongful - - - excuse me, on the wrongful death.  
12 This is her independent claim?

13 MR. GOLANSKI: No, the wrong - - - well,  
14 the wrongful death is not her independent claim.  
15 That's - - - that's wrapped into the personal injury  
16 survival claim. That's - - -

17 JUDGE RIVERA: As the administrator - - -

18 MR. GOLANSKI: Yeah, she is.

19 JUDGE RIVERA: - - - of the estate? She  
20 steps into his shoes. I understand that.

21 MR. GOLANSKI: She - - - in the wrongful  
22 death she has been appointed the executrix. And - -  
23 - and that - - - and that's the wrongful death side.

24 JUDGE RIVERA: So it's - - - I'm sorry. So  
25 it's the - - - it's the estate's wrongful death - - -

1 MR. GOLANSKI: Yes.

2 JUDGE RIVERA: - - - claim? Not her  
3 independent wrongful death claim.

4 MR. GOLANSKI: Well, it's not her  
5 independent.

6 JUDGE RIVERA: Just to clarify. I'm - - -

7 MR. GOLANSKI: It's the - - - it's the  
8 distributees of the - - - of - - - of the estate.

9 JUDGE SMITH: The - - - the - - - the - - -  
10 the - - -

11 JUDGE RIVERA: I see. I see.

12 JUDGE SMITH: - - - fiduciary that he - - -

13 JUDGE RIVERA: Okay.

14 JUDGE SMITH: - - - on behalf of the  
15 distributees - - -

16 JUDGE RIVERA: Okay.

17 JUDGE SMITH: - - - is the way it sounds.  
18 Is that right?

19 MR. GOLANSKI: Yes, exactly.

20 JUDGE RIVERA: Okay.

21 MR. GOLANSKI: That's the wrongful death.

22 JUDGE GRAFFEO: Do we have to adopt a  
23 substantial compliance rule in order to agree with  
24 your position?

25 MR. GOLANSKI: We absolutely do not have to

1 do that. If - - - if the court does that, certainly,  
2 the defendant admits on that - - - on that ground, we  
3 would certainly win. But there is no reason at all  
4 to even reach the issue of substantial compliance.  
5 And I know substantial compliance was in the briefs.  
6 It's not necessary. There was a strict compliance  
7 here with - - - with the statute.

8 Let me - - - if I can make one point about  
9 7108, about the words of the statute, the - - - the  
10 statute itself contemplates that a notice of claim  
11 may have preceded the death of the - - - of the  
12 claimant and - - -

13 CHIEF JUDGE LIPPMAN: Where - - - where  
14 does it contemplate that?

15 MR. GOLANSKI: In 7108 it says, "If there's  
16 a death, the - - - that prevents either the filing of  
17 the notice of claim or of - - - of the suit, the  
18 plaintiff can apply for leave to sue and serve the  
19 notice of claim up to three years," and then - - -  
20 and then it specially charts out, "if the notice of  
21 claim has not yet been served." By saying, "If the  
22 notice of claim has not yet been served," it - - - it  
23 particularly contemplates that a notice of claim may  
24 have been served before the death.

25 JUDGE SMITH: And - - - and - - - and - - -

1 JUDGE GRAFFEO: What about earlier that  
2 says leave - - - to seek leave of court?

3 MR. GOLANSKI: Yes, to seek - - - to seek  
4 leave of court to file per - - - for permission to  
5 file a notice of claim if one has not been filed  
6 previously or to file the lawsuit, if one has not  
7 been filed, within the one-year period.

8 JUDGE SMITH: So you're saying implicit in  
9 that is that one could have been filed previously and  
10 would not lose all its forth - - - force at death?

11 MR. GOLANSKI: Absolutely. That's the only  
12 possible interpretation of the - - - of the word if  
13 in - - - in 7108. I have one other point that's - -  
14 - that - - -

15 CHIEF JUDGE LIPPMAN: Make it quick,  
16 counselor.

17 MR. GOLANSKI: Yeah.

18 CHIEF JUDGE LIPPMAN: Your light's on.

19 MR. GOLANSKI: Very important point which  
20 is that the interpretation of wrongful death versus  
21 personal injury here is a federal issue. That's what  
22 this court decided in American Sugar in 1982. It's  
23 what the Supreme Court decided in Petty v. Tennessee-  
24 Missouri Bridge Commission in 1959. And therefore,  
25 we have to look at wrongful death versus pers - - -

1 personal injury as it's seen in the federal - - -  
2 federal common law, not necessarily in - - - in the  
3 New York - - - New York common law, which, as I said,  
4 New York common law totally supports our position.  
5 But the federal common law does even - - -

6 CHIEF JUDGE LIPPMAN: Okay, counselor.

7 MR. GOLANSKI: - - - even tenfold. Thank  
8 you.

9 CHIEF JUDGE LIPPMAN: Let's hear from your  
10 adversary and then we'll get you some - - -

11 MR. GOLANSKI: Thank you, Your Honor.

12 CHIEF JUDGE LIPPMAN: - - - rebuttal.

13 MR. GANNON: Good afternoon, Your Honor.

14 CHIEF JUDGE LIPPMAN: Counselor.

15 MR. GANNON: Chris Gannon on behalf of the  
16 Port Authority of New York and New Jersey. Your  
17 Honor, the statute is very clear. The fact that the  
18 Port Authority gave up their immunity in order to be  
19 subject to suit, there were conditions precedent that  
20 were set - - -

21 CHIEF JUDGE LIPPMAN: Do we have to allow  
22 substantial compliance, in your view, to - - -

23 MR. GANNON: You do not have to have - - -  
24 no, they got it wrong. It's simple as that. When  
25 they filed their initial notice - - -

1 JUDGE SMITH: Would you say that any - - -  
2 any typo in the notice would be fatal?

3 MR. GANNON: Yes, Your Honor. They got the  
4 claim wrong. They got the - - - the name of the  
5 party wrong.

6 JUDGE SMITH: No, I'm talking  
7 hypothetically. Supp - - - yeah, suppose they got -  
8 - - yeah, suppose somebody typed - - - typed the year  
9 wrong or typed the month wrong. You can't - - - you  
10 can - - - that's it?

11 MR. GANNON: Yes, Your Honor.

12 JUDGE SMITH: You can't go forward with  
13 that?

14 MR. GANNON: Yes, it has to be strictly  
15 compliant under - - -

16 JUDGE SMITH: Mis - - - mis - - -  
17 misspelling the - - -

18 CHIEF JUDGE LIPPMAN: Strict compliance and  
19 they didn't do it.

20 MR. GANNON: And they didn't do it.

21 JUDGE SMITH: If they misspelled the name  
22 of the - - - misspelled the name of the Port  
23 Authority?

24 MR. GANNON: Your Honor, I - - - I think in  
25 those situat - - -

1 JUDGE SMITH: Hit - - - hit a Q instead of  
2 an O in Port - - - Port Authority.

3 MR. GANNON: I think in those situations,  
4 Your Honor, the Port Authority would have to look at  
5 the actual language of the notice of claim. And  
6 obviously, an error like that I - - - I think  
7 obviously would pass. But we're talking about a  
8 totally new claim, totally new party. The first pers  
9 - - -

10 JUDGE ABDUS-SALAAM: Counsel, why doesn't  
11 that work in New Jersey where they have substantial  
12 compliance?

13 MR. GANNON: Your Honor, I - - - I think  
14 the - - -

15 JUDGE ABDUS-SALAAM: The same?

16 MR. GANNON: I think the - - -

17 JUDGE ABDUS-SALAAM: The Port Authority is  
18 in New Jersey - - -

19 MR. GANNON: Yes, they are. And I think  
20 the - - -

21 JUDGE ABDUS-SALAAM: - - - and they would  
22 also - - -

23 MR. GANNON: I think the case law in New  
24 Jersey was incorrectly decided. Because by  
25 introducing substantial compliance what you're doing

1 is essentially saying the Port Authority has received  
2 as much information as they need to know to  
3 investigate the claim. And by saying that you're  
4 raising a prejudice argument that the Port Authority,  
5 therefore, is not prejudiced by the language, and  
6 that's wrong.

7 JUDGE SMITH: Well, what's - - - what's  
8 wrong with the New Jersey court's reasoning? They  
9 say that the substantial compliance is a just  
10 doctrine that's generally - - - generally followed.  
11 There's no evidence that the legislature intended to  
12 exclude it.

13 MR. GANNON: Your Honor, I think in New  
14 York the legislature could have included it. They'd  
15 included it in 50-e, they included substantial  
16 compliance.

17 JUDGE SMITH: Okay, doesn't - - - doesn't  
18 50-e - - - doesn't 50-e really go beyond substantial  
19 compliance? Doesn't - - - doesn't 50-e say even if  
20 you haven't got substantial compliance, if there's no  
21 prejudice you can overlook the error?

22 MR. GANNON: Yeah, it's - - - if there's a  
23 mistake you can make a motion to fi - - - to correct  
24 it or to file a notice of claim out of time.

25 JUDGE SMITH: Or the - - -

1 MR. GANNON: And it also says - - -

2 JUDGE SMITH: Or the error can be ignored?

3 MR. GANNON: Or - - - yes, but it also - -  
4 - also introduces into 50-e the - - - the concept of  
5 prejudice, that you have - - - that you have to show  
6 the party receiving the notice of claim was not  
7 prejudice. We don't have that in this situation.  
8 The notice - - -

9 JUDGE GRAFFEO: Well, why is it that if we  
10 have two identical plaintiffs, one in New Jersey and  
11 one in New York, the one in New Jersey can have a  
12 lawsuit that goes forward; the one in New York ends  
13 up with a dismissal? Does that - - - I mean there's  
14 a certain inherent unfairness there.

15 MR. GANNON: Your Honor, I think in the - -  
16 - I think the situation that's currently facing the  
17 Port Authority in New York and New Jersey, on the New  
18 Jersey side, requires a legislative reform is what -  
19 - -

20 CHIEF JUDGE LIPPMAN: What's - - - what's  
21 fair? What's fair in this? Why isn't the New Jersey  
22 view of this fair? I mean this is a very, very  
23 serious injury that results in death. Why isn't it  
24 fair the position that - - - that they take?

25 MR. GANNON: Your Honor, when you read the

1 case law - - -

2 CHIEF JUDGE LIPPMAN: Putting aside whether  
3 you're right or wrong - - -

4 MR. GANNON: I agree.

5 CHIEF JUDGE LIPPMAN: - - - if you read  
6 strict compliance, what's - - - what's the policy  
7 argument as to why we should do what you want us to  
8 do?

9 MR. GANNON: The policy argument, Your  
10 Honor, is that prior to 1951, the Port Authority's  
11 immune from suit. And in order to now be subject to  
12 suit, there were conditions precedent that were set  
13 up. That - - -

14 JUDGE SMITH: But aren't - - - but aren't  
15 you assuming your conclusion that they - - - that - -  
16 - that when they set up those conditions they  
17 intended that every tiny failure, no matter how  
18 harmless, would - - - would - - - would - - - would  
19 nullify their consent?

20 MR. GANNON: Your Honor, we have cases in  
21 New York where a plaintiff has filed a complaint  
22 fifty-four days after filing a notice of claim and  
23 not sixty.

24 JUDGE SMITH: Well - - - well, aren't - - -

25 MR. GANNON: The case was dismissed.

1 JUDGE SMITH: - - - the time periods  
2 different? The time - - - I mean I - - - I - - -  
3 yeah, sure, when they say sixty days they may mean  
4 sixty days. But when they say give notice of the  
5 claim, couldn't they be reas - - - reasonably read to  
6 mean give such notice as will make the reader  
7 understand what the claim is?

8 MR. GANNON: Your Honor, there - - - there  
9 are cases that have been dismissed where the notice  
10 of claim was filed and not verified. There have been  
11 cases where, in recreation of - - -

12 JUDGE GRAFFEO: But certainly here you knew  
13 - - - you knew the nature of this illness.

14 MR. GANNON: Well, no - - -

15 JUDGE GRAFFEO: This - - -

16 MR. GANNON: - - - Your Honor. What we  
17 knew was that there was a personal injury complaint.  
18 That - - - that's what we knew.

19 JUDGE SMITH: Were - - - were you surprised  
20 that the man died and you got a wrongful death claim?

21 MR. GANNON: Your Honor, I - - - it - - -  
22 it doesn't matter. Amendments are required all the  
23 time under New York law.

24 JUDGE PIGOTT: No, you're missing the - - -  
25 I think there's - - - there's several questions here

1 saying does this make any sense? Is this fair? And  
2 you - - - and you say well, we were immune before and  
3 now we're not immune so it must be fair. And that -  
4 - - that doesn't really answer the question. The - -  
5 - you - - - you're not prejudiced. You knew this - -  
6 - you knew the case was pending. The guy dies and  
7 now you want your - - - and - - - and now you want to  
8 say we win on a technicality.

9 MR. GANNON: Well, it's not a technicality,  
10 Your Honor, because what you're - - -

11 JUDGE PIGOTT: It certainly is. And you -  
12 - - you even say it's a technicality.

13 MR. GANNON: What you're asking, though, is  
14 to say that now let's introduce prejudice into this  
15 scenario. And because the Port Authority - - -

16 JUDGE PIGOTT: No, I'm - - - what - - -  
17 what I'm saying is that - - - that Judge Smith was  
18 asking you if they put in a Q instead an O and you're  
19 - - - and you're fencing. You think maybe that's not  
20 good enough. And - - - and your point being we win  
21 on almost any technical possibility. And what we're  
22 asking you is does that make sense. And when you  
23 have a death and you know everything about the death,  
24 to say, well, you know, because there was a Q instead  
25 of an O, we win.

1 MR. GANNON: Your Honor, where would it end  
2 then? If - - - if we - - -

3 CHIEF JUDGE LIPPMAN: Counsel, what he  
4 means is in - - - and the context is you're on  
5 notice. That's - - - that's the context for all of  
6 this. So when these - - - you're - - - we're asking  
7 you these questions, we're trying to figure out,  
8 you're on notice; why - - - why does it make any  
9 sense to be - - - whether you are going hyper-  
10 technical, when you're going to call it strict  
11 compliance, why does that make sense when you know  
12 about this injury? There's nothing new here.

13 MR. GANNON: But, Your Honor, because the  
14 statute re - - - is set up to require this. And it's  
15 not a matter of what the Port Authority could have  
16 known. There are cases where the Port Authority's  
17 actually - - -

18 CHIEF JUDGE LIPPMAN: Not what you could  
19 have known.

20 MR. GOLANSKI: - - - negotiating - - -

21 CHIEF JUDGE LIPPMAN: It's what you know.

22 MR. GANNON: No, there are cases where the  
23 Port Authority's actually negotiating with the  
24 claimant during the sixty-day period. And they file  
25 the suit and the case is dismissed.

1 JUDGE PIGOTT: You're - - - you're - - -  
2 you're saying we have - - - we have screwed people  
3 for the last thirty years - - -

4 MR. GANNON: No, Your Honor.

5 JUDGE PIGOTT: - - - and now you're telling  
6 us we can't. I mean you keep bringing up examples of  
7 how people have tried to get it adjusted - - - things  
8 adjusted and guess what, they didn't file a notice of  
9 claim while we're negotiating. They lose.

10 MR. GANNON: But, Your Honor, from the time  
11 Mr. Andrucki died in November 2011, Weitz & Luxenberg  
12 had one year to comply with the statute.

13 JUDGE PIGOTT: Here's the point, as Judge  
14 Graffeo said, if this guy died in New Jersey, he  
15 wins. He dies in New York, he loses, right?

16 MR. GANNON: Right.

17 JUDGE PIGOTT: Okay.

18 MR. GANNON: Right, so that - - - I think  
19 that's a legislative - - - and I think the problem  
20 was any change in the statute should not be done  
21 judicially. It should be done by the legislature,  
22 and I think the problem in New Jersey is that they  
23 did that. They introduced that into the statute when  
24 it didn't exist before.

25 JUDGE ABDUS-SALAAM: Counsel, what's your

1 response to the Holmes case where there was a - - - a  
2 survivorship claim even though a new notice of claim  
3 was not filed after the death?

4 MR. GANNON: Your Honor, in this case there  
5 is no preceding complaint. There's no preceding  
6 action. When they filed their notice of claim  
7 October 4th and then - - -

8 JUDGE SMITH: Why - - - why does that make  
9 a difference?

10 MR. GANNON: Because - - - because under -  
11 - - under EPTL there has to be a pending action in  
12 order to get the enlargement of time for the wrongful  
13 death and the survivor action.

14 JUDGE SMITH: So you're - - - so if - - -  
15 if this case were exac - - - you - - - you say the  
16 Holmes would apply if we had exactly the same facts?

17 MR. GANNON: It does not apply and should  
18 not apply. And we - - - we're not dealing with that  
19 in this situation because we don't have a prior  
20 pending complaint in this case. We have nothing up  
21 until they file a complaint in January of 2011.

22 JUDGE SMITH: So - - - so if - - - if they  
23 did - - - you - - - you would concede that if they  
24 did have a prior pending complaint for - - - and a  
25 valid complaint for personal injury, the - - - the

1 plaintiff died and they began a new action for a  
2 wrong - - - or added - - - or added a cause of  
3 action, either one, for wrongful death, they could  
4 rely on the previous notice?

5 MR. GANNON: No, Your Honor. I think what  
6 they would rely upon at that - - -

7 JUDGE SMITH: That is Holmes, isn't it?

8 MR. GANNON: They would rely on the EPTL  
9 which gives them the enlarg - - - enlargement of time  
10 but there's a prior pending complaint.

11 JUDGE SMITH: Well, but it - - - doesn't  
12 Holmes say they can rely on the previous notice?

13 MR. GANNON: Yeah, under - - - and it's - -  
14 - it turns out it's a municipal law case.

15 JUDGE SMITH: And also, would that apply if  
16 - - - in this case if the facts were identical? In  
17 other words, does it make a difference that Holmes  
18 wasn't under - - - wasn't under 7107?

19 MR. GANNON: Yes, Your Honor. I think  
20 because - - -

21 JUDGE SMITH: It does?

22 MR. GANNON: Yes, because it's a separate  
23 statute. We're dealing with - - - not general  
24 municipal law, we're dealing with 7107. And - - -  
25 and this all could have been taken care of. The - -

1 - the First Department invited them to file a motion.

2 JUDGE RIVERA: Do - - - counsel, do you  
3 agree that the real issue is over the wrongful death?

4 MR. GANNON: I think the real issue - - -

5 JUDGE RIVERA: On the personal injury  
6 they've satisfied the requirements? He's even - - -  
7 he's not even arguing substantial compliance.

8 MR. GANNON: No, Your Honor. I - - - I  
9 think they got it wrong on both. I think the fact  
10 that they filed their complaint one day after they  
11 filed their notice of claim means that that action  
12 was never commenced properly, did not exist. It's  
13 not an amended complaint against the Port Authority  
14 when they - - -

15 JUDGE RIVERA: But then they filed the - -  
16 - the next complaint after the sixty days.

17 MR. GANNON: Right, and it doesn't - - -

18 JUDGE RIVERA: Why - - - why doesn't that -  
19 - - the - - - why doesn't then the personal injury  
20 survive? What's - - - what's your issue with that?

21 MR. GANNON: Because the notice of claim -  
22 - - all they had to do was file a new notice of claim  
23 when they learned that - - -

24 JUDGE RIVERA: But why would they have to  
25 do that - - -

1 JUDGE SMITH: Why - - - why - - -

2 JUDGE RIVERA: - - - is what I'm saying.

3 MR. GANNON: To identify the - - - the  
4 proper party, to identify the new nature of the claim  
5 under 7108-2.

6 JUDGE SMITH: Why - - - why - - -

7 JUDGE RIVERA: Is it because the - - - the  
8 - - - the gentleman died they've got to - - -

9 MR. GANNON: Yes.

10 JUDGE RIVERA: - - - refile?

11 MR. GANNON: Yes.

12 JUDGE RIVERA: Um-hum.

13 JUDGE SMITH: Is that - - - is that - - -  
14 that - - - that generally the case that when a - - -  
15 when you - - - you've got a personal injury - - - if  
16 you have a - - - a valid personal injury claim  
17 pending with the proper notice of claim and the - - -  
18 the - - - the plaintiff dies and for some - - - let's  
19 for some - - - let's say for some reason you don't or  
20 you don't want or you decide not to bring a death  
21 claim. You want to just stick with your survivorship  
22 claim. You still have to file a new notice of claim?

23 MR. GANNON: No, Your Honor. You'd - - -  
24 you'd have that - - - oh, I see. No, you would not.

25 JUDGE SMITH: Well, why isn't - - - why

1 doesn't that - - - I don't understand why then his -  
2 - - his notice of claim isn't perfectly good here for  
3 the survivorship claim?

4 MR. GANNON: I see your point, Your Honor.  
5 I - - - I - - - I - - - I'll retract. You do need -  
6 - - what you need to do is you need to notify the  
7 Port - - - the Port Authority of the new party in the  
8 action, who the new estate is. And that - - - that  
9 could easily have been done by - - - by Weitz &  
10 Luxenberg in this case.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MR. GANNON: Thank you, Your Honor.

13 CHIEF JUDGE LIPPMAN: Thanks. Rebuttal?

14 MR. GOLANSKI: Thank you, Your Honor.  
15 Counsel says that for the purposes of the wrongful  
16 death claim we got the name of the party wrong. As I  
17 said earlier, Winbush - - - this court's decisions in  
18 Winbush and Baker say that that's not relevant or  
19 important. The next of kin can file a notice of  
20 claim and it can carry over. In Baker an architect  
21 can file the notice of claim. And even though the -  
22 - - the suit is brought by the architect's firm,  
23 there's no failure to strictly comply based on the  
24 name of the - - - of the party being here George and  
25 Mary Andrucki instead of Mary Andrucki as executrix.

1 It simply is not an important distinction. Counsel -  
2 - -

3 JUDGE GRAFFEO: It may not be important in  
4 this case, but what about a case where someone  
5 doesn't have a spouse or a next of kin and it's going  
6 to be someone that the Port Authority has no contact  
7 or knowledge of is becoming the administrator of the  
8 estate? Should you seek leave of court in that  
9 instance?

10 MR. GOLANSKI: The - - - the question is  
11 always whether the notice of claim sufficiently  
12 allows the Port Authority to investigate the claim  
13 and to settle the claim prior to the parties - - -

14 JUDGE GRAFFEO: So is that a yes or no in  
15 the example I gave you?

16 MR. GOLANSKI: It - - - it would - - - it  
17 would depend on whether the four prongs of the - - -  
18 of 7108 were satisfied. And I can't answer that in  
19 the abstract without knowing.

20 JUDGE GRAFFEO: They don't - - - they - - -  
21 they have no idea who this administrator is. It's  
22 not any person - - - it's not any named individual  
23 that's on the existing notice of claim or the  
24 complaint.

25 MR. GOLANSKI: If they have no idea to the

1 point that they cannot investigate the claim and they  
2 cannot negotiate a settlement and settle it, then - -  
3 - then the plaintiff would have to refile.

4 JUDGE SMITH: Well, I understand the  
5 question that Judge Graffeo's asking is you get - - -  
6 you get a notice with the name of a live person.  
7 Then the person dies and someone you've never heard  
8 of becomes administrator. Do you have to serve a new  
9 notice to warn them they're going to be sued by the  
10 administrator?

11 MR. GOLANSKI: No, because the underlying  
12 transaction and occurrence has been adequately  
13 conveyed, assuming that all the other portions of the  
14 statute are - - - are fulfilled.

15 JUDGE GRAFFEO: Well, how do they know who  
16 to send anything to?

17 MR. GOLANSKI: Well, they - - - the - - -  
18 the plaintiff would have to - - - would have to take  
19 care of that and notify the - - - the Port Authority  
20 one way or the other - - -

21 JUDGE PIGOTT: Well - - -

22 JUDGE RIVERA: Well, they got to let them  
23 know and they're going to file the - - - the claim,  
24 right? They're going to file a complaint or they're  
25 otherwise going to let them know.

1 MR. GOLANSKI: Yes.

2 JUDGE RIVERA: Without necessarily - - -  
3 not in the format of a notice of claim.

4 MR. GOLANSKI: Yeah, exactly.

5 JUDGE RIVERA: I take it as your argument  
6 that they don't need to do it again as a notice of  
7 claim.

8 MR. GOLANSKI: No, exactly. It's just a  
9 common sense, I think, response - - - response to  
10 that. And - - -

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MR. GOLANSKI: Thank you very much.

13 CHIEF JUDGE LIPPMAN: Thank you. Thank you  
14 both. Appreciate it.

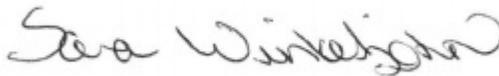
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of New York City Asbestos Litigation; Andrucki v. Aluminum Co. of America, No. 185 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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