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COURT OF APPEALS

STATE OF NEW YORK

TOWN OF OYSTER BAY,

Appellant,

-against-

LIZZA INDUSTRIES, INC.,

Nos. 214 to 223
(and nine other actions)

Respondent.

20 Eagle Street
Albany, New York 12207
November 12, 2013

Before:

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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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Town of Oyster Bay v.
2 Lizza.

3 Counsel, do you want any rebuttal time?

4 MR. INGHAM: Two minutes, please, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes - - -

7 MR. INGHAM: Two minutes.

8 CHIEF JUDGE LIPPMAN: Sure, go ahead.

9 MR. INGHAM: May it please the court, my
10 name is Mike Ingham. I represent all of the local
11 municipal plaintiffs in this case.

12 I think this case breaks down to a very
13 simple question for this court. Presented to this
14 court are two very distinct lines of cases, one going
15 back to at least 1942 in Coley v. Cohen, where this
16 court recognized and applauded local cities and
17 counties for protecting their inhabitants by
18 inserting a no fault, hold harmless clause in their
19 sewer contracts, which protected their inhabitants
20 and local utilities and sidewalks - - - village
21 sidewalks - - - from damage that inevitably occurs
22 when massive sewer projects are installed.

23 That line of cases, established basically
24 by this court in Coley v. Cohen in 1942, was not
25 novel even in 1942, stated by this court - - -

1 Are these contracts in the record? Or is there just
2 - - -

3 MR. INGHAM: Oh, yes.

4 JUDGE GRAFFEO: Or is there just no
5 dispute?

6 MR. INGHAM: Oh, yes, there's contracts
7 from the record. Yeah, they're in the briefs too.
8 The contracts are in the record. There's a specific
9 clause in the Suffolk County contract - - -

10 JUDGE GRAFFEO: I mean, I know the clause
11 that's in both of your briefs.

12 MR. INGHAM: I - - -

13 JUDGE GRAFFEO: But the actual text of the
14 contracts, do you have them?

15 MR. INGHAM: I firmly believe those clauses
16 are in the contract - - - are in the record on
17 appeal. The record on appeal - - -

18 JUDGE SMITH: I - - - I saw an affidavit
19 that quoted the main clause. I didn't - - - I wasn't
20 able to find the contracts themselves. I had the
21 same problem as Judge Graffeo.

22 MR. INGHAM: I don't believe there's an
23 issue of fact as to whether these contracts include a
24 hold harmless clause. And these clauses - - -

25 JUDGE PIGOTT: So that gives you the right

1 to sue the town, right?

2 MR. INGHAM: I have a right to sue the town
3 on four separate causes of action, and that's where
4 these clauses come into play. The Suffolk County
5 Water Authority v. J.D. Posillico case and the Town
6 of Babylon v. Lizza case affirm this line of cases,
7 which say I have a cause of action in negligence - -
8 -

9 CHIEF JUDGE LIPPMAN: Where's the
10 continuing tort? Assuming you have, where - - -
11 where is the continuing tort here?

12 MR. INGHAM: The continuing tort arises out
13 of the Second Department citation to this court's
14 decision in Village of Haverstraw, wherein there is
15 an erosion of subjacent support in the streets
16 because there was improper backfill, and that erosion
17 of lateral support causes a defect in the overlying
18 street, and there's - - -

19 CHIEF JUDGE LIPPMAN: So where's the
20 defendant's continuing responsibility? What do they
21 have to do?

22 MR. INGHAM: I believe that ties directly
23 into this court's decision in Bloomingdales. In
24 Bloomingdales, especially once you take a hard look
25 at the Fourth - - - First Department decision, there

1 are two separate issues of injury or damage that are
2 set forth in Bloomingdales. One is the negligence
3 cause of action, which is damage to the pipe. In the
4 Cranesville Block, there was a severing of the - - -
5 of the railroad track easement.

6 Here, in our cases, we understand that
7 there was some damage - - - it could have been
8 property damage - - -

9 JUDGE SMITH: But - - - but as I understand
10 Bloomingdales - - - isn't it clear from our opinion
11 in Bloomingdales that if all you had was the severing
12 of the pipe, the statute would have run?

13 MR. INGHAM: And that's precisely correct,
14 and precisely - - - the other alternative section in
15 Bloomingdales was that if you interfere with easement
16 rights - - -

17 JUDGE SMITH: Isn't it - - - isn't it - - -

18 JUDGE RIVERA: Okay, so what are your
19 easement rights?

20 MR. INGHAM: It's an interference with the
21 easement. So it's - - -

22 JUDGE RIVERA: Yes, so what - - - so what's
23 the easement rights you're referring to?

24 MR. INGHAM: The easement rights stem from
25 two independent lines of law. The first is the

1 Haverstraw case. And the Haverstraw case which was
2 reaffirmed by this court in Kim, fairly recently,
3 indicates that anyone who digs in or near a public
4 highway has a common law obligation to make sure that
5 they restore the road to its usual condition, and
6 make sure the line and the grade is in place.

7 JUDGE SMITH: Okay, but if that obligation
8 was breached, it was breached a long time ago. How
9 come the statute hasn't run out?

10 MR. INGHAM: Because that breach interfered
11 with the overlying street easement owned by the local
12 towns and villages.

13 JUDGE PIGOTT: On an ongoing basis? On an
14 ongoing - - -

15 MR. INGHAM: There's a statutory basis as
16 well. The statutory basis - - -

17 JUDGE GRAFFEO: Even if for ten or fifteen
18 years there was no problem?

19 MR. INGHAM: Absolutely. Under the county
20 - - - under county - - -

21 JUDGE GRAFFEO: If it's twenty years later?

22 MR. INGHAM: Under County Law 263, anybody
23 who - - - when the county goes in and puts their
24 sewers in, they must restore - - - the contractor and
25 the county - - - must restore their road to its usual

1 condition. The failure to do so - - - the same as
2 severing the pipe - - - has called a continued
3 interference with that easement. We have - - - we
4 cannot snowplow our roads. We cannot drive on these
5 roads.

6 JUDGE RIVERA: So if they fixed it - - -
7 I'm sorry. If they did the work, there's damage,
8 they went back and fixed it, but they didn't fix it
9 very well and twenty years later you had the damage
10 again. Are you saying that at that point - - -

11 MR. INGHAM: Well, what the - - - no, what
12 the count - - -

13 JUDGE RIVERA: - - - they still have a
14 liability?

15 MR. INGHAM: What the county did was
16 install sewers in - - - in the streets. In doing so,
17 the contractor failed to compact the backfill.

18 JUDGE PIGOTT: Why didn't you sue them
19 then?

20 MR. INGHAM: Because I can't sue until the
21 common law substance gives me a cause of action to
22 find substance on the street surface.

23 JUDGE PIGOTT: Did you know that there was
24 - - - that there was bad fill?

25 MR. INGHAM: Even if I did know there was

1 bad fill, I can't sue until there's surface
2 substance. In the law in the State of New York, in
3 common law substance - - -

4 JUDGE PIGOTT: As I understand it, you're a
5 third party beneficiary of the contract between the
6 county, whatever - - -

7 MR. INGHAM: I am.

8 JUDGE PIGOTT: - - - and the contractor.
9 All right? If it's not done right, you can go to the
10 county and say, it's not done right; fix it. And if
11 they don't, you can sue them and say, fix it.

12 MR. INGHAM: I would say that I think that
13 really looks to - - - I think - - - let me see if I
14 can articulate that that third party beneficiary
15 cause of action clearly. It's a very limited claim.
16 It only takes place during the execution of the work
17 itself, primarily when there's excavation and
18 backfilling, where you have damage to the local
19 utilities or streets or sidewalks or - - - or
20 driveways. That cause of action can only accrue at
21 the time the activity is going on, the excavation
22 activity.

23 JUDGE SMITH: So that - - - so that one
24 must be time barred, because it accrued - - -

25 MR. INGHAM: Absolutely; so is the

1 negligence. And just - - - just as you have - just
2 as you - - - just as you've gone in the cause - - -
3 in Bloomingdales and Cranesville Block - - -

4 JUDGE SMITH: So what you're saying is you
5 have a lot of different causes of action, and one of
6 them is not time barred.

7 MR. INGHAM: That is correct. Only one.
8 And that - - -

9 JUDGE SMITH: And that one is the
10 continuing nuisance - - -

11 MR. INGHAM: That is the continuing wrong
12 doctrine of continuing nuisance, continuing - - -

13 CHIEF JUDGE LIPPMAN: But isn't this
14 different than Bloomingdales? This is exactly - - -
15 in your mind, this is analogous to Bloomingdales?

16 MR. INGHAM: Well, I think to better look
17 at it is to take a hard look at the First Department
18 decision - - -

19 CHIEF JUDGE LIPPMAN: I know about the
20 First Department decision - - -

21 MR. INGHAM: In the First - - - and the
22 First Department decision relies on a case which I
23 think is directly on point. In Cranesville Block,
24 the railroad company had a street easement or a road
25 easement over the top of the road, on top of the

1 land. The contracting company came in, destroyed the
2 overlying railroad tracks. That cause of action was
3 in negligence only. It expired three years after
4 injury and fact, and the railroad couldn't sue for
5 that injury.

6 What Cranesville Block and what the First
7 Department did in Bloomingdales was say you have a
8 distinct cause of action and a possessory right to
9 the easement. And if you - - -

10 JUDGE SMITH: But in Bloomingdales and
11 Cranesville, wasn't it based on an encroachment?
12 There was a conduit in Bloomingdales. I forget what
13 it was. There was something to make - - -

14 MR. INGHAM: There was also a gas main
15 installed in Cranesville Block.

16 JUDGE SMITH: So where's your con - - -
17 what's your conduit? What's your gas main?

18 MR. INGHAM: Mine is the fact that they
19 failed to install and recompact the sewer trench to
20 the same extent that they impaired the easement to my
21 sewage - - -

22 JUDGE SMITH: Isn't failing to do something
23 different from encroaching on your property?

24 MR. INGHAM: No, I disagree with that,
25 because the failure in Cranesville Block to install

1 the gas pipe in the proper way, so it would not
2 interfere with the overlying easement, is the direct
3 analogy to the failure to install that sewer pipe in
4 the correct way, and it continued - - - and the
5 failure to do so continually interfered with my
6 overlying easement in my streets. It's a continuing
7 wrong; it's a continuing nuisance.

8 The Second Department in the Suffolk County
9 Water Authority case specifically held and sustained
10 a continuing nuisance public cause of action, based
11 on Haverstraw. You have Haverstraw; you've got Kim.
12 You've a legal obligation to restore the line and
13 grade. If you don't restore the line and grade,
14 you've interfered with the easement rights of the
15 village and the town.

16 JUDGE PIGOTT: But you were able to use it
17 for years.

18 MR. INGHAM: No, not true.

19 JUDGE PIGOTT: The day - - - the day that
20 the - - - the - - -

21 MR. INGHAM: It took years for that soil to
22 subside - - -

23 JUDGE PIGOTT: Right. What did you do in
24 those years?

25 MR. INGHAM: We had the use of the

1 overlying easement at that point, and that - - - and
2 that was there. But at this stage of the game, once
3 that's subsided, I've got manholes sticking up out of
4 the ground and I've got broken curb and gutter, and I
5 can't plow my streets. And I've had men who've gone
6 through the windshields on their snowplows. They
7 still today can't plow those streets. They mark them
8 with a stick, and they lift their plows and you have
9 improper snowplowing.

10 CHIEF JUDGE LIPPMAN: Okay, counsel. Okay.

11 MR. INGHAM: Thank you.

12 CHIEF JUDGE LIPPMAN: Thanks, counsel.

13 MR. INGHAM: Thank you.

14 CHIEF JUDGE LIPPMAN: You'll have rebuttal.
15 Counsel?

16 MR. DENBY: May it please the court, my
17 name is John Denby. I'm appearing for the
18 defendants, Hendrickson Brothers and Lizza
19 Industries. With the court's permission, I would
20 like to address the issues of statute of limitations
21 and accrual pertaining to breach of contract. And my
22 colleague, Jared Greisman, will address issues
23 pertaining to accrual of statute of limitations with
24 respect to tort, continuing nuisance, and the public
25 policies issues - - -

1 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

2 MR. DENBY: - - - presented by this case.

3 CHIEF JUDGE LIPPMAN: So you deal with the
4 breach of contract.

5 MR. DENBY: A breach of contract is never
6 considered a tort unless it involves a legal duty
7 that is separate from the contract. The duty to
8 install sewers in this case and to restore the
9 roadway to its pre-construction condition was a duty
10 that was subsumed within the contract and was a
11 material part of the contract.

12 JUDGE GRAFFEO: Well, are - - - are the - -
13 - are the towns an owner or are they a third party
14 beneficiary?

15 MR. DENBY: They're - - - they've been
16 adjudicated to be a third party beneficiary. My
17 adversary - - -

18 JUDGE GRAFFEO: Does that make a
19 difference?

20 MR. DENBY: It makes no difference,
21 whatsoever. There's no - - - no, there's no
22 difference at all. The status as a third party
23 beneficiary gives them the same rights as any other
24 signatory to the contract.

25 JUDGE SMITH: Are they sue - - - are they

1 suing under the contract?

2 MR. DENBY: Are they sue - - - it's - - -
3 it is my position that they are. If you look at
4 their complaint, paragraph 6 of the complaint says
5 that the defendants committed defective construction
6 under the contract by failing to properly excavate
7 the backfill the - - -

8 JUDGE SMITH: But as I understand it, the
9 only rights they have under the contract are, that
10 you got to leave their equipment alone, or if you
11 damage it, you've got to fix it. That's - - - that's
12 not what they're suing for.

13 MR. DENBY: They're suing for repairs - - -
14 millions of dollars - - - for repairs to the
15 roadways. Those are contract damages. They're not
16 suing to abate a nuisance. They're not - - -

17 JUDGE SMITH: Well, where - - - where in
18 the contract does it say that you've got to give
19 subjacent support to their roadways?

20 MR. DENBY: The - - - the con - - - the
21 contracts - - - the - - - as conceded by my
22 adversary, County Law Section 263 requires the
23 contractors to restore the roadways to the pre-
24 construction condition. And that - - - that would be
25 that they would have to provide adequate support for

1 the roadways, otherwise the roadways subside.

2 JUDGE GRAFFEO: So if this damage had
3 occurred within six years, would they have a valid
4 claim?

5 MR. DENBY: Absolutely. And they sued - -
6 - six years is after substantial completion. And if
7 you look at the cases that are cited in the - - - in
8 the briefs, particularly the Bethpage case, where my
9 adversary sued on behalf of Bethpage Water District,
10 he sued as a third party beneficiary for defective
11 construction and he prevailed.

12 JUDGE SMITH: And following Judge Graffeo's
13 question, what is the - - - what is the language in
14 the contract that would have given them a right to
15 sue if they'd come in within the six years?

16 MR. DENBY: The - - - the county - - -
17 County Law Section 263 - - -

18 JUDGE SMITH: It's not in the contract?

19 MR. DENBY: This - - - well, my - - - as my
20 adversary concedes, stipulates and agrees, and writes
21 in his brief at page 10 to 12, this County Law
22 Section was written in to the contract. So the
23 County Law Section says that the roadways - - - the
24 highways - - - have to be restored to their original
25 condition.

1 JUDGE SMITH: Do we - - - do we have
2 anywhere before us contract's text that says that?

3 MR. DENBY: We do not have the contracts in
4 the record. These - - - as my adversary just
5 conceded in oral argument, it does not present a
6 question of fact. He has stipulated and agreed that
7 - - -

8 JUDGE SMITH: Okay, so he stipulated as to
9 what they say? What do they say? What are the
10 words?

11 MR. DENBY: Well, the words in County Law
12 263 is exactly what I just said, that they have to be
13 restored to their pre-construction condition.

14 JUDGE GRAFFEO: So the statutory language
15 was made a provision of the contract?

16 MR. DENBY: That's exactly what my
17 adversary said.

18 JUDGE GRAFFEO: The statutory language and
19 that's what you folks have stipulated?

20 MR. DENBY: Yes, well, that's what's said
21 at my - - - in my adversary's brief from 10 to 12 of
22 the brief, it says that this is in the contract.
23 It's a material part of the contract, and that's what
24 he's suing on. Look at the complaint.

25 JUDGE PIGOTT: If I'm not bifurcating

1 properly here, but if it's a con - - - if you're
2 supposed to have done that and you did not, isn't it
3 a continuing problem, a continuing wrong?

4 MR. DENBY: Well, I - - - my adversary will
5 deal with that in much greater detail.

6 JUDGE PIGOTT: I thought that's what - - -

7 MR. DENBY: But - - - but a - - - in many
8 cases you have a - - - an incident - - - a wrongful
9 incident that creates continuing damages. That's not
10 a continuing tort.

11 JUDGE PIGOTT: No, what I was thinking of
12 is so often in these construction contracts, you
13 agree to do X, Y, and Z, and the last thing is - - -
14 is backfill. And they get underbid sometimes because
15 the contractor's got all of his money upfront, and
16 the last thing he's got to do is this, so in order to
17 win the bid in the first instance, if they underbid
18 on the backfill, they may get the contract. Then
19 they're going to walk away, and the only remedy the
20 county's got is to - - - is to hire somebody to do it
21 and sue you for the damages, not you personally.

22 MR. DENBY: Right, that's - - - that's - -
23 -

24 JUDGE PIGOTT: All right? But the third
25 party beneficiaries, they got a pretty road. They've

1 got nice sidewalks. They got the grass back, and
2 they don't know that underneath this where there
3 should have been select fill, is nothing but rocks
4 and sand. And so ten years later, when - - - when
5 the sidewalk sinks, they're saying what in the world
6 happened?

7 And what happened was that ten years ago,
8 you did not honor your con - - - not you personally,
9 but the contractor, I'm figuring out - - - did not
10 honor his contract, did not do what 263 required, and
11 it's a continuing wrong up until the time that it's
12 discovered by the third party beneficiary.

13 MR. DENBY: It's not a - - - it's not a
14 continuing wrong. You're correct, that 263 requires
15 them to do it. What you're articulating just now is
16 a pure breach of contract. And in this case, when
17 you say that they didn't know what happened, at page
18 389 of the record, they acknowledge that these
19 defects arose in 1985, one year after they're
20 alleging substantial completion.

21 In the Bethpage Water District case, he's -
22 - - he's acknowledging in 1988 that these defects
23 occurred and they occurred because of improper
24 jetting, which is the theory that he has - - - that
25 he has raised in every single case throughout this

1 sewer construction case, saying that that's what's
2 called the subsidence.

3 So they knew about it in 1985. They knew
4 about it in 1988. It's - - - you cannot say that
5 they didn't know about it. This is a pure breach of
6 contract case. And since I - - - it accrued upon
7 substantial completion of the contract which is
8 alleged to be 1984 in the complaint, it is time
9 barred.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.

11 MR. DENBY: Thank you very much.

12 CHIEF JUDGE LIPPMAN: Thanks, counsel.

13 Counsel?

14 MR. GREISMAN: Good afternoon. May it
15 please the court, my name is Jared Greisman and I
16 represent the balance of the contractors - - -

17 CHIEF JUDGE LIPPMAN: Counsel, when you
18 talk about ongoing tort, is this case distinguishable
19 from Bloomingdales?

20 MR. GREISMAN: Absolutely.

21 CHIEF JUDGE LIPPMAN: Tell us why.

22 MR. GREISMAN: In Bloomingdales, you - - -
23 in Bloomingdales you had an ongoing encroachment by a
24 particular object that was interfering with
25 Bloomingdales' easement, their right to have ongoing

1 flow from the drainage pipe. Similar to 509 Sixth
2 Avenue, where there was an encroachment by a
3 particular object that had been constructed and
4 placed in a - - - in a - - - it was essentially a
5 trespass. It was placed in someplace that the
6 plaintiffs had a right to.

7 CHIEF JUDGE LIPPMAN: And in our case?

8 MR. GREISMAN: In our case, you have
9 consensual work that was preformed on the - - - under
10 the roadways. And what the claim is, in its very
11 essence, is defective construction. It's about a
12 particular act. It's about an allegation that there
13 was shoddy backfilling.

14 JUDGE GRAFFEO: Did these towns have
15 inspectors there, or was this entirely a county
16 project?

17 MR. GREISMAN: Outside of the record, I
18 would be able to tell you that they had inspectors
19 there, but the towns are - - - are integral to the
20 contracts. The contracts cannot be entered into
21 without the town's permission. The towns are
22 responsible for the roadways as the plaintiff pleads
23 expressly in his - - - in his complaint: who was it
24 that has performed any maintenance on these roads
25 since we've packed up our equipment in 1987 at the

1 very latest? It was the towns; it's the towns who
2 continue to maintain these roads.

3 JUDGE GRAFFEO: I - - - I understand you're
4 arguing that it's not a continuing tort here, but
5 would the statute of limitation in a hypothetical
6 situation run from the date of completion or the date
7 of injury?

8 MR. GREISMAN: The date that the invasion
9 of the legal right took place was essentially
10 substantial completion of the work.

11 JUDGE SMITH: Isn't that - - - why - - - I
12 thought that was the contract rule?

13 MR. GREISMAN: It's also the rule in tort.

14 CHIEF JUDGE LIPPMAN: In tort; it's the not
15 the date of injured?

16 MR. GREISMAN: When the question arises,
17 when can the plaintiff bring the case?

18 JUDGE PIGOTT: Well, design defect cases,
19 it - - - would argue against that and there's a lot
20 of tort cases that - - - that don't have that type of
21 a statute of limitations. Black & Decker can't say I
22 made this saw in 1952. The fact that you lost your
23 hand in 2001, because I didn't design a guard, you
24 know, doesn't mean that you can't sue them.

25 MR. GREISMAN: The application of the rule

1 is different in that type of a case - - -

2 JUDGE PIGOTT: Well, I know, but you're
3 saying in tort, there's a - - -

4 MR. GREISMAN: And in - - - and personal
5 injury.

6 JUDGE PIGOTT: There's different - - -
7 there's different statutes of limitations depending.
8 And in this one it strikes me - - - if I remember
9 right - - - this was the heyday of sewers. This is
10 when the government - - - the federal government was
11 paying like ninety-seven-and-a-half - - - or eighty-
12 seven-and-a-half percent, and it was a big deal to
13 get these sewers in, and - - - and there was a lot of
14 it going on.

15 And the towns, of course, would love to
16 have them. But they're not the ones that are
17 contracting to do them. They're the ones that say,
18 okay, you can come down my roads; you can - - - you
19 can tear up my sidewalks and - - - as long as you
20 promise to put them back. But they don't know that
21 underneath there may be these defects until the
22 sidewalk collapses or, as your opponent is arguing,
23 you can't plow your streets anymore.

24 And they're left without a remedy as a
25 result? I mean, wouldn't it be better to say the

1 statute runs from the time of the - - - of the
2 injury?

3 MR. GREISMAN: Well, the settled law as my
4 colleague, Mr. Denby, pointed out, is when the
5 liability that's alleged arises out of a contract,
6 you have six years, and the statute or the cause of
7 action accrues at substantial completion.

8 JUDGE PIGOTT: But if you assume my
9 hypothetical - - - not again, of course, your
10 contractors - - - but contractors who do underbid on
11 the select fill at the end, so that they can get the
12 - - - win the contract and then - - - and then don't
13 do the appropriate backfill. You know, is it - - -
14 is it fair or is it your argument that if they escape
15 for six months - - - six years, they're done?

16 MR. GREISMAN: The statutes of limitations
17 are enacted by the legislature to draw lines, so - -
18 -

19 JUDGE PIGOTT: So your answer is yes.

20 MR. GREISMAN: The answer is yes.

21 JUDGE RIVERA: Does it matter if it's a
22 public nuisance? Does it matter if it constitutes a
23 public nuisance?

24 MR. GREISMAN: Well, part of the basis for
25 the dismissal of these claims is failure to state a

1 claim upon which relief may be granted from the sewer
2 contractors. The sewer contractors, as pled in the
3 complaint, packed up their equipment no later than
4 1987.

5 There's no allegation of an ongoing duty of
6 any type. There's no ongoing duty to maintain,
7 correct, or anything. Any ongoing duty to maintain
8 is pled essentially as being the towns' and villages'
9 job, because they're the ones who have done any
10 construction or repairs since.

11 There's no ongoing deliberate conduct that
12 can be - - - that has been alleged on the sewer
13 contractors that would create an ongoing tort.

14 The - - -

15 JUDGE GRAFFEO: In the Cubito case, in the
16 Second Department decision, they used the date of
17 injury, because they found that the injured party was
18 a stranger to the contractual arrangement.

19 MR. GREISMAN: When you have a - - -

20 JUDGE GRAFFEO: Is that - - - is there any
21 analogy to the facts of this case? I guess that's
22 why I asked if the record shows any involvement of
23 the town in this contract.

24 MR. GREISMAN: Personal injury is really
25 the distinguishing factor when you're talking about a

1 stranger to the contract. And if you have somebody
2 who's claiming property damage or defective
3 construction, but they're not a stranger to the
4 contract like our towns and villages, because even if
5 the beneficiary clauses weren't stipulated to by the
6 towns and villages, they'd be beneficiaries to the
7 contract, because they benefited from the sewers.

8 JUDGE SMITH: If we - - - suppose we
9 disagree with you, and we think it's not that the
10 time runs from the date of injury, not from the date
11 of substantial completion. What's the date of
12 injury?

13 MR. GREISMAN: Substantial completion. The
14 work that is the essence of the defective
15 construction allegation.

16 JUDGE SMITH: So you're - - - even - - -
17 you're saying that even if they - - - if they injured
18 - - - or you injured their property - - - your
19 clients injured their clients' property at a
20 particular point, the statute doesn't start to run
21 until the work is completed?

22 Let me rephrase my question. You - - - I
23 see - - - you argue that the statute runs from
24 substantial completion. Do you argue in the
25 alternative that even if it runs from date of injury,

1 it's still time barred?

2 MR. GREISMAN: The date of injury here - -
3 - yes, absolutely. The date of injury here - - - the
4 date of the invasion of the legal right that forms
5 the essence of plaintiff's complaint, shoddy backfill
6 - - - may I continue, please?

7 CHIEF JUDGE LIPPMAN: Yes, please answer.

8 MR. GREISMAN: - - - is defective
9 construction.

10 JUDGE SMITH: You say - - - you say the
11 date of injury is the date of substantial completion.

12 MR. GREISMAN: It's when this backfill was
13 allegedly done.

14 JUDGE GRAFFEO: Why not the - - - why not
15 the date that the - - - a sidewalk collapses?

16 MR. GREISMAN: The legislature has set
17 forth accrual rules for discovery for instances such
18 as 214(a), 214(c), where there have been movements
19 and efforts, and the legislature wanted to change
20 accrual rules. Some say the accrual - - -

21 CHIEF JUDGE LIPPMAN: Yeah, but you're
22 saying it's not an ongoing tort. Isn't that the
23 basic - - - basis - - -

24 MR. GREISMAN: It's absolutely not an
25 ongoing tort.

1 CHIEF JUDGE LIPPMAN: That's the basis of
2 why the statute of limitations has run regardless of
3 whether it's the date of injury or not.

4 MR. GREISMAN: That's right.

5 JUDGE SMITH: But can't the - - - can't the
6 - - - can't the starting date - - - I'm just coming
7 back to the same - - - can't the starting date be the
8 day that they failed to - - - that they failed to
9 shore up the land?

10 MR. GREISMAN: The date that the alleged
11 wrong took place was when - - - was sometime prior to
12 1987, when we were there doing the backfilling work.

13 JUDGE SMITH: I - - - I understand that.
14 It doesn't - - - I'm just suggesting it's - - - I
15 don't know why - - - I wouldn't see why you'd resist
16 it - - - if it's not the date of substantial
17 completion, then it's the date that they committed
18 the wrong.

19 MR. GREISMAN: The date of commission of
20 the wrong was be - - - at substantial completion or
21 earlier.

22 CHIEF JUDGE LIPPMAN: Okay, thanks,
23 counsel.

24 MR. GREISMAN: Thank you.

25 MR. INGHAM: The line of cases that I'm

1 talking about, you have a hold harmless, no fault
2 cause of action, occur only in the excavation of the
3 trench and the backfilling of the trench. Injury and
4 fact, when the contractors back flow - - - back hoe -
5 - - hits - - - hits the sidewalk. The line of cases
6 cited by Lindenhurst and by the Islip cases drag in
7 the causes of action and defective construction that
8 go from Sears, Sosnow, Lundin, Ossining, and
9 Newburgh. They are totally different causes of
10 action in contract. The hold harmless clauses - - -

11 JUDGE SMITH: But even - - - even - - - but
12 even if you're right about that, don't you have a
13 problem, because the ordinary tort claim runs from
14 the - - - forget about - - - plus there's no contract
15 in the picture - - -

16 MR. INGHAM: I'll agree with that and I'll
17 stay with that. If there's no contract in this
18 picture, which is what the state does; the state
19 doesn't include these clauses in their contracts - -
20 - that means what I have is a cause of action in
21 negligence and trespass to my pipes, and a cause of
22 action of continuing trespass under Haverstraw to my
23 roads.

24 CHIEF JUDGE LIPPMAN: Yeah, but it's - - -
25 but your whole thing is based on whether it's

1 continuing, right?

2 MR. INGHAM: Continuing in that there is a
3 continuous interference with this easement.

4 CHIEF JUDGE LIPPMAN: I understand - - -

5 MR. INGHAM: That's my argument.

6 CHIEF JUDGE LIPPMAN: But that's the part
7 of your argument that we - - - the continuing tort.

8 MR. INGHAM: If we can't apply - - - if we
9 can't get Bloomingdales and Cranesville Block in
10 here, and if we abandon Haverstraw, and you can't
11 have to support these roads to bring them back to
12 their usual condition, I don't have a continuing
13 public nuisance cause of action. I've got a problem.

14 But I urge upon you to look at the Second
15 Department decision which specifically held that I
16 had a cause of action here, and I believe I do, under
17 both Cranesville Block, under the common law of
18 Haverstraw.

19 JUDGE RIVERA: But your whole argument is
20 based - - - it's not really a - - - it's a continuing
21 consequence of the wrong, which happened years ago.

22 MR. INGHAM: It's a continuing interference
23 with the nuisance with the easement today. There is
24 a continuing interference with the - - -

25 JUDGE RIVERA: But there's no volitional

1 act by them; it's that you claim they - - - they did
2 very bad construction years ago - - -

3 MR. INGHAM: I agree. They did.

4 JUDGE RIVERA: - - - and that has now had
5 consequences into today.

6 MR. INGHAM: And that's exactly what
7 happened in Cranesville Block.

8 CHIEF JUDGE LIPPMAN: Okay, counsel.

9 MR. INGHAM: Thank you.

10 CHIEF JUDGE LIPPMAN: Thank you. Thank
11 you. Appreciate it. Thank you all.

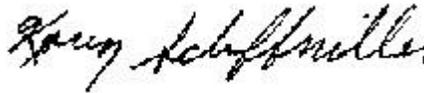
12 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Town of Oyster Bay v. Lizza Industries, Inc., Nos. 214 to 223 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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