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COURT OF APPEALS

STATE OF NEW YORK

ARTIBEE,

Appellant,

-against-

No. 5

HOME PLACE CORPORATION,

Respondent.

20 Eagle Street
Albany, New York 12207
January 05, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Good afternoon,
2 everyone.

3 The first matter on this afternoon's calendar is
4 appeal number 5, Artibee v. Home Place Corporation.

5 Counsel.

6 MR. COUGHLIN: May it please the court.
7 I'm Rob Coughlin, I'm of counsel to the law firm of
8 Towne, Ryan, and Partners in Albany, New York, and we
9 are - - - I'm here on behalf of the plaintiff-
10 appellants Carol and James Artibee.

11 I'd like to reserve three minutes for rebuttal,
12 please.

13 CHIEF JUDGE DIFIORE: You may have three
14 minutes, sir.

15 MR. COUGHLIN: Thank you, Your Honor.

16 The issue is whether CPLR 1601 should be
17 interpreted to allow a claimant in Supreme Court to submit
18 proof or against the liability of the State who could not
19 otherwise be sued in Supreme Court.

20 JUDGE RIVERA: But what's the impact,
21 counsel, of the judgment in Supreme Court on the
22 court of claims?

23 MR. COUGHLIN: Zero. There is no res
24 judicata effect.

25 JUDGE RIVERA: Just de novo consideration.

1 MR. COUGHLIN: Correct. The court of
2 claims would have to - - - to decide it on its own
3 merits. However, that is not to say that there isn't
4 some significant impact upon the State that should be
5 avoided by virtue of this - - - this statute.

6 In fact, the statute does address the situation
7 where the State is sued in the court of claims, and allows
8 apportionment of a nonparty tortfeasor under those
9 circumstances to allow the State to reduce its liability
10 to, perhaps, below fifty percent, so that it would only
11 have to pay its equitable share.

12 JUDGE ABDUS-SALAAM: But how would that
13 work, counsel, if the Artibeas have to sue Home
14 Place, your - - - the defendant, in Supreme Court,
15 and if Supreme Court - - - and then sue the State in
16 the court of claims, if the - - - in Supreme Court,
17 Home Place is found not liable, then there is no
18 apportionment in the court of claims, right?

19 MR. COUGHLIN: I don't - - - I believe that
20 the State would still have the right, because it was
21 not bound by the determination in Supreme Court to
22 allege that Home Place was, indeed, liable under
23 these circumstances, which is, you know, obviously
24 going to result in a potentially inconsistent
25 verdict. But unfortunately, that's the nature of

1 these parallel court systems.

2 JUDGE ABDUS-SALAAM: But your client could
3 get complete relief, or your clients could get
4 complete relief in the court of claims then.

5 MR. COUGHLIN: No, because of the
6 responsibility - - - if the State were successful in
7 - - - in establishing significant liability against
8 the Home Place Corporation, in fact, a hundred
9 percent, because that - - - that case will go
10 undefended by Home Place Corporation, then the
11 plaintiffs would - - - could theoretically end up
12 with zero in both circumstances, because they're
13 faced with a situation where, either in Supreme
14 Court, if there's an empty chair, or in the court of
15 claims there's an empty chair, the defendant, in
16 either of those cases, could try to slough off and
17 complete liability onto the empty chair, rendering
18 the verdict at zero in both instances.

19 JUDGE FAHEY: Let me ask you this.

20 MR. COUGHLIN: Yes.

21 JUDGE FAHEY: What would the verdict sheet
22 like - - - look like under the trial court's
23 decision, just - - - by way - - - by way of
24 background? The way I read it, it seems to be, what
25 the trial court is saying, is that there's going to

1 be - - - the normal negligence question is, number
2 one, was Home Place negligent; and number two, was
3 Home Place negligence the proximate cause of the
4 accident, and that the evidence against the State, if
5 there is no apportionment against the State, would go
6 to the proximate cause issue.

7 Is that your understanding?

8 And the other attorneys, I'll ask to comment on
9 it when you come up, too.

10 Is that your understanding of the way the
11 verdict sheet would look?

12 MR. COUGHLIN: I'd suppose that would be
13 the way it would look, but then there would be - - -

14 JUDGE FAHEY: I'm not talking about the
15 instruction.

16 MR. COUGHLIN: Correct.

17 JUDGE FAHEY: Just the verdict sheet.
18 Right.

19 MR. COUGHLIN: Correct.

20 JUDGE FAHEY: The instruction, itself, may
21 be something different, and no one is exactly sure
22 what that would be, because it came up before there
23 was instruction on it, right?

24 MR. COUGHLIN: Correct. And I wasn't part
25 of that, and I'm not sure what - - - what it would

1 ultimately look like - - -

2 JUDGE FAHEY: Right.

3 MR. COUGHLIN: - - - but ult - - - you
4 know, ultimately, it would be confusing to the jury,
5 for sure, because - - -

6 JUDGE FAHEY: Well, either way, it's - - -
7 these cases are always confusing to the jury, one way
8 or the other. So that's - - - that goes without
9 saying. These are not - - - they aren't simple to
10 litigate; I understand that. But usually, the
11 procedure is, is that you litigate in Supreme Court
12 first, and then whatever verdict you get, you go to
13 court of claims, and you litigate that separately.

14 MR. COUGHLIN: Right.

15 JUDGE FAHEY: So you could conceivably
16 result it both parties being over the fifty percent
17 in 6101.

18 MR. COUGHLIN: Correct.

19 JUDGE FAHEY: Right.

20 JUDGE STEIN: Can we assume, from your
21 answer, that the trial has not taken place?

22 MR. COUGHLIN: That is correct. It's been
23 on hold for a while now to - - - pending the result
24 of this - - - this particular issue.

25 So that, you know, I think, unless the court

1 disagrees, I think we can all agree, let me know if you
2 need me to explain it, that in the court of claims, they
3 have the right - - - the State has the right to apportion
4 liability against the nonparty defendant.

5 So the statute specifically addresses that
6 situation. What it doesn't address, apparently, in - - -
7 in either the statute does address the converse situation,
8 or it doesn't.

9 Let's assume, for the purposes of this portion
10 of my argument, that Judge Rose is correct in the Rezucha
11 case, and Judge - - - Professors Alexander and Siegel were
12 correct, that the statute is silent. Let's assume that
13 for the time being.

14 That silence is resounding, because, in fact,
15 the court, the legislature, in passing 1601, recognized
16 the problems associated with the parallel court system.
17 And it specifically addressed the situation where the
18 nonparty tortfeasor could be apportioned liability in
19 court of claims.

20 It did not, however, address that in this
21 situation where the - - - the converse situation, where
22 the State is not - - - is a nonparty in the Supreme Court
23 action. That silence is significant, because this court
24 has stated in the Rangolan case, which also addressed
25 Article 16, that the statutory canon of construction,

1 exclusio unius est expressio alterius - - - I've always
2 wanted to say something Latin in court - - - says the
3 exclusion of one - - - the inclusion of one is the
4 exclusion of the other.

5 JUDGE GARCIA: Counsel, I'm sorry to
6 interrupt you - - -

7 MR. COUGHLIN: Yes.

8 JUDGE GARCIA: - - - but before your time
9 runs out, one of the arguments, as I understand
10 defendant is making, is if your interpretation of the
11 statute's jurisdictional requirement is correct, why
12 do you need the worker's compensation carve-out?

13 MR. COUGHLIN: I'm sorry, Your Honor?

14 JUDGE GARCIA: Why do you need the worker's
15 compensation carve-out in 1601? Why would they have
16 passed that in '96?

17 MR. COUGHLIN: Well, they - - - they - - -
18 in '96, - - -

19 JUDGE GARCIA: You wouldn't have subject
20 matter juris - - -

21 MR. COUGHLIN: - - - there was a - - - a
22 massive tort reform, associated with workers' comp,
23 to get around Dole v. Dow. There was, apparently, a
24 push back that employers were being sued for doing an
25 end around. And so to address that, a number of

1 statutes were changed to allow what the court - - -
2 the legislature determined should be the sole-
3 exclusive remedy.

4 JUDGE GARCIA: But I understand that.

5 MR. COUGHLIN: Yeah.

6 JUDGE GARCIA: And I understand the
7 statute. But why would you need it in this statute?
8 I understand 1602(4), but why would you need it here,
9 where, if your interpretation is correct, you
10 wouldn't have been able to go against the employer
11 anyway, because of the lack of subject matter
12 jurisdiction.

13 MR. COUGHLIN: Well, ex - - - they - - -
14 they addressed in this situation to - - - to assure
15 that the exclusive provisions of workers' comp were
16 allowed, except for the situation of grave injury.

17 They had to use - - - they had to synchronize
18 those statutes to allow - - -

19 JUDGE GARCIA: Right. What - - - what this
20 1601 says to me, and I'm sorry, I know your time is
21 out, if I might just - - -

22 CHIEF JUDGE DIFIORE: Yes.

23 JUDGE GARCIA: - - - follow through on
24 this.

25 1601 says to me is, no ma - - - if it isn't a

1 grave injury, under the workers' comp law, then forget
2 that party, for equitable, for impleading, for the share,
3 for - - - if your interpretation is correct, why would you
4 need that provision in 1601?

5 MR. COUGHLIN: I'm not sure I understand
6 your question, I have to admit.

7 JUDGE GARCIA: You see, we can leave it,
8 and maybe someone else will answer, but it seems to
9 me that it's a carve-out that would be unnecessary,
10 because it would already be prohibited by the plain
11 language of the statute, under - - - under your
12 reading.

13 MR. COUGHLIN: The - - - it's not a
14 question of personal jurisdiction, though, in regard
15 to a claim against an employer.

16 JUDGE GARCIA: It's subject-matter
17 jurisdiction.

18 MR. COUGHLIN: It - - - no, it's exclusive
19 remedy carved out by the statute that says, it's just
20 a bar that - - - to allow an employer to only have to
21 pay one to the workers' compensation.

22 It's not - - - I don't look at it as - - -

23 JUDGE ABDUS-SALAAM: Why isn't sovereign
24 immunity just a bar?

25 MR. COUGHLIN: Well, sovereign immunity

1 would be a bar, but for the Constitution and the
2 Court of Claims Act. Certainly, the legislature, in
3 this particular case, had every right to treat the
4 State differently from the defendants, although the
5 defendant takes the position, here, that the State
6 should not be treated differently. There are ample
7 reasons that the legislature may have wanted to have
8 treated the State differently. Sovereign immunity
9 being one, perhaps allowing the State to not - - -
10 the legislature may have determined that the State
11 should not be subject to a jury determining the
12 negligence of a State, when it's constitutionally
13 mandate - - - mandated that it's negligence should
14 only be considered in a court of claims.

15 So there are significant differences
16 between the State and other defendants to justify the
17 distinction made that we're propounding is - - - was
18 recognized by the legislature in passing Article 16.

19 CHIEF JUDGE DIFIORE: Thank you, Mr.
20 Coughlin.

21 MR. COUGHLIN: Thank you.

22 CHIEF JUDGE DIFIORE: Counsel.

23 MR. BRODIE: May it please the court.
24 Frederick Brodie for the State as amicus.

25 Section 1601 is not silent on this question;

1 it's plain language requires reversal. By authorizing
2 apportionment in some circumstances, Section 1601 creates
3 an incentive on plaintiffs to sue all the potential
4 defendants, and rope everyone in.

5 In line with that logic, apportionments - - -

6 JUDGE RIVERA: So how is this
7 disincentivized if we follow the Third Department, if
8 we agree with the Third Department's view?

9 MR. BRODIE: I'm sorry, how does - - -

10 JUDGE RIVERA: What is the disincentive to
11 that? You've got to sue - - - you can only sue the
12 State in court of claims, right?

13 MR. BRODIE: Right.

14 JUDGE RIVERA: Right. Does everyone else,
15 you've got to try and sue in Supreme Court.

16 MR. BRODIE: Right.

17 JUDGE RIVERA: And either you have
18 jurisdiction over them or you don't, personal
19 jurisdiction.

20 MR. BRODIE: Right. And if you - - - well,
21 if you don't have jurisdiction, personal - - -

22 JUDGE RIVERA: Personal jurisdiction.

23 MR. BRODIE: - - - or subject matter
24 jurisdiction, I think the statute - - -

25 JUDGE RIVERA: Well, how are you not going

1 to have subject matter jurisdiction in a personal
2 injury action in Supreme Court?

3 MR. BRODIE: Well, you don't have subject
4 matter jurisdiction over claims against the State.

5 JUDGE RIVERA: Well, I understand the
6 State. No, I'm asking about everybody else.

7 MR. BRODIE: Everybody else - - - every - -
8 - everybody else can apportion among themselves in
9 Supreme Court. I'm here for the State.

10 JUDGE RIVERA: I understand. Let me try it
11 a different way. Is your position that the language
12 in 1601 that referenced the jurisdiction is
13 jurisdiction to personal, or subject matter, or both?

14 MR. BRODIE: Both.

15 JUDGE RIVERA: Okay.

16 MR. BRODIE: It can be reasonably read, and
17 it should be read - - -

18 JUDGE RIVERA: All right.

19 MR. BRODIE: - - - to - - -

20 JUDGE RIVERA: So what I'm asking then is,
21 how - - - how is subject matter jurisdiction
22 applicable to everybody else, not the State? If it -
23 - - it's a personal injury action, right? What would
24 be the ground that you wouldn't have subject matter
25 jurisdiction?

1 MR. BRODIE: I suppose if they were a
2 federal defendant, you wouldn't have subject matter
3 jurisdiction over them either.

4 CHIEF JUDGE DIFIORE: Mr. Brodie, what's
5 the harm in apportionment in the Supreme Court?

6 MR. BRODIE: Well, there - - - it distorts
7 the apportionment process in three ways. First is
8 the empty chair issue. That because it's - - - the
9 State can't defend itself in Supreme Court, the
10 defendant would receive a windfall, because the jury
11 will likely inflate the percentage of fall
12 attributable to the State. Second is - - -

13 JUDGE GARCIA: But how does that affect
14 you?

15 JUDGE STEIN: But it's not binding, right?

16 JUDGE GARCIA: It's not binding in the
17 court of claims. How would that affect the State in
18 any meaningful way?

19 MR. BRODIE: Well, that - - - that follows
20 from the second issue, which is the whipsaw issue.
21 Because when the plaintiff then turns to sue the
22 State in the court of claims, the State mounts a full
23 defense, and the plaintiff winds up bearing the loss
24 occasioned by Supreme Court's overestimate of State -
25 - - of the State's fault in the original action.

1 Now, the court of claims judge might be
2 sensitive to that whipsaw, and they might try to avoid
3 whipsawing the plaintiff by acting consistently with
4 Supreme Court's jury verdict. But if they do that, then
5 the State will, again, have its fault overestimated.

6 So you've got those three distortions. Now, the
7 State's reading of - - -

8 JUDGE ABDUS-SALAAM: How does the - - - how
9 does the court of claims judge find out about the
10 verdict in Supreme Court? Is that because the State
11 would bring it up?

12 MR. BRODIE: Well, I'm sure the judge - - -

13 JUDGE ABDUS-SALAAM: You think they would?

14 MR. BRODIE: Well, for one thing, when
15 these cases go through discovery, they should,
16 ideally, be coordinated. You shouldn't be taking two
17 sets of depositions of the same people, and having
18 potentially conflicting motion practice and
19 conflicting trial dates. So it makes sense - - -

20 JUDGE GARCIA: But what if the court of
21 claims goes first - - -

22 MR. BRODIE: If - - - if the court of
23 claims goes - - -

24 JUDGE GARCIA: - - - then it doesn't affect
25 any of the things you just said, right?

1 MR. BRODIE: That's right. In this
2 situation, it appears that Supreme Court is going
3 first.

4 JUDGE FAHEY: That - - - that isn't usually
5 the situation though, is it? Usually you - - -
6 usually - - - I was a court of claims clerk for a
7 while, about thirty years ago, a long time ago, but
8 at that time, it seemed that - - - that there were
9 times, states - - - if you had multiple defendants,
10 the State Supreme Court verdict would come in first,
11 and then the court of claims could - - - judge could
12 then react to it.

13 Can I just follow up on the one question I asked
14 the other party, is, what do you - - - what would the
15 verdict sheet look like in the trial court judge's
16 decision here? You heard that question.

17 MR. BRODIE: Well, under the - - - the
18 State's interpretation - - -

19 JUDGE FAHEY: Um-hum.

20 MR. BRODIE: - - - the verdict sheet would
21 - - - would just say, is the defendant liable, or is
22 the defendant not liable. And what happens then - -
23 -

24 JUDGE FAHEY: Well, no. Slow down. First,
25 he'd say is he negligent - - -

1 MR. BRODIE: Right.

2 JUDGE FAHEY: - - - and then is there
3 proximate cause.

4 MR. BRODIE: Right.

5 JUDGE FAHEY: So those are the questions
6 he'd ask.

7 MR. BRODIE: The elements meant - - -

8 JUDGE FAHEY: Right.

9 MR. BRODIE: - - - and is the defendant
10 liable. But there's no apportionment. And so what
11 happens then to the defendant - - -

12 JUDGE FAHEY: Slow down. So yes, so that's
13 what the - - - that's what the plaintiffs also agree
14 with you. That's what the verdict sheet then would
15 look like - - - you're both saying that that's what
16 the verdict sheet should look like under the trial
17 court's jurisdiction.

18 So do you object to the trial court saying,
19 proof of your negligence can come in, even in the absence
20 of - - - of your presence, but - - - but there is no
21 apportionment. Are you objecting to that decision, or are
22 you just objecting to the apportionment requirement that
23 the AD set up?

24 MR. BRODIE: We're just objecting to the
25 apportionment.

1 JUDGE FAHEY: Okay.

2 MR. BRODIE: I think the court can give a
3 curative instruction saying - - -

4 JUDGE FAHEY: In other words, you can put
5 in proof of somebody who is not there, that's fine,
6 just like you could - - -

7 MR. BRODIE: Right.

8 JUDGE FAHEY: - - - in any other case, but
9 - - -

10 MR. BRODIE: But the court - - -

11 JUDGE FAHEY: But there is no
12 apportionment.

13 MR. BRODIE: - - - gives a curative
14 instruction - - -

15 JUDGE FAHEY: Right.

16 MR. BRODIE: - - - and says, look, don't -
17 - - don't consider this as to the State.

18 JUDGE FAHEY: Thank you.

19 JUDGE STEIN: So - - - so in this case,
20 nobody objected to having the proof of the State's
21 negligence be part of the case, is - - - so - - - so
22 the - - -

23 MR. BRODIE: I - - - I think - - - I think
24 the plaintiff did object to that, but that issue
25 hasn't been raised in this appeal.

1 JUDGE STEIN: And - - - and was it raised
2 in - - - in the Appellate Division?

3 MR. BRODIE: It was raised in the Appellate
4 Division. And the Appellate Division didn't reach it
5 because they didn't need to. They said, well, you're
6 going to have apportionment. So the evidentiary
7 issue became moot.

8 If I - - -

9 JUDGE STEIN: Was there - - - was - - - I -
10 - - I have a letter in the - - - in the file - - - in
11 the record, I should say, of September 30th, 2014,
12 and - - - in which the - - - the plaintiff writes,
13 "It's plaintiffs' position that nothing bars the
14 Supreme Court jury from hearing evidence at trial as
15 to the State of New York's potential liability for
16 Mrs. Artibee's injuries."

17 Did that position change, at some point, during
18 - - - at - - - before the trial court?

19 MR. BRODIE: I - - - I think the - - - the
20 briefing in the Appellate Division, the plaintiff
21 took the position that there shouldn't be evidence
22 introduced.

23 JUDGE STEIN: But to your knowledge, that
24 position was not taken in the trial court.

25 MR. BRODIE: I - - - I don't know, Your

1 Honor, you would - - - you would have to ask
2 plaintiffs' counsel for what their definitive
3 position is.

4 If I may conclude - - -

5 JUDGE ABDUS-SALAAM: Assuming - - -
6 assuming that is the plaintiffs' position, that it
7 would be fine to have evidence of the State's
8 liability before the jury, but no apportionment, I -
9 - - I am having a little difficulty understanding
10 what the jury is supposed to do with that.

11 MR. BRODIE: Well, you would - - - you
12 would need a curative instruction saying, you, the
13 jurors, are only supposed to decide the liability of
14 the defendant before you, and you're not supposed to
15 decide the liability of the State.

16 Now, specific evidentiary questions would -
17 - - are really best considered in the context of a
18 concrete offer and a specific objection. We don't
19 have that here, so we're all talking hypothetically.
20 But our - - - the State's position is that you could
21 have a curative instruction that when some evidence
22 comes in that suggests the State is liable, you can
23 say, look, you, the jury, you're only supposed to be
24 deciding liability of the defendant here.

25 JUDGE FAHEY: But in the absence of

1 apportionment - - - if an apportionment question in
2 the verdict sheet, I'm assuming that the charge would
3 be that the evidence goes - - - it's really only
4 going into the proximate cause question.

5 MR. BRODIE: Well, that's right.

6 JUDGE FAHEY: Right.

7 MR. BRODIE: If - - - if the State did
8 something that means the defendant is not liable.

9 JUDGE FAHEY: Right.

10 CHIEF JUDGE DIFIORE: Mr. Brodie, you had
11 another point you wanted to make?

12 MR. BRODIE: I did. Thank you, Your Honor.

13 I - - - I've explained the three distortions
14 that are caused by the st - - - by the defendant's reading
15 of the statute, and I just wanted to explain why the
16 State's reading of the statute yields the most accurate
17 allocation of fault.

18 It's the most accurate because what happens is,
19 the defendant, in the first instance, winds up liable for
20 a hundred percent of - - - of the damage in Supreme Court.
21 But then, the defendant has the right to go to the court
22 of claims and sue the State for contribution.

23 In that action, both - - - both of the alleged
24 tortfeasors are before the court. Both the State and the
25 defendant are incentivized to, and are allowed, to make a

1 full case on the allocation of fault. So finally, you
2 have a court with both defendants, both tortfeasors,
3 before it, that can allocate fault among them based on a
4 full record.

5 And then ultimately, the defendant will be able
6 to recover its proportionate - - - the proportionate - - -
7 the correct proportional amount from the State, because
8 the State, of course, is able to pay a judgment.

9 CHIEF JUDGE DIFIORE: Thank you, sir.
10 Counsel.

11 MR. JOHNSON: May it please the court. My
12 name is Tom Johnson, I'm the attorney for Home Place
13 Corporation.

14 JUDGE STEIN: What's wrong with the - - -
15 the State's analysis? I mean, it seems to me that no
16 - - - no matter which way we look at this - - -

17 MR. JOHNSON: Right.

18 JUDGE STEIN: - - - there's going to be an
19 empty chair - - -

20 MR. JOHNSON: Of course.

21 JUDGE STEIN: - - - in some situations.

22 MR. JOHNSON: There's nothing that this
23 court or anyone can do, unless - - -

24 CHIEF JUDGE DIFIORE: Um-hum.

25 MR. JOHNSON: - - - the Constitution is

1 changed.

2 JUDGE STEIN: So why isn't the State's
3 analysis the fairest way to go about this?

4 MR. JOHNSON: Well, because the - - - there
5 is an assumption that the - - - that there will be a
6 verdict for the plaintiff, and that why should the
7 defendant be the one who has to go and pursue the
8 State. I think that the better - - -

9 JUDGE STEIN: Well, no, I don't think
10 there's a presumption that the - - - that they'll - -
11 - there'll be a plaintiffs' verdict. It's just that
12 in - - - in the - - - in the case in which there is a
13 plaintiffs' verdict - - -

14 MR. JOHNSON: Right.

15 JUDGE STEIN: - - - it reaches the best
16 result.

17 MR. JOHNSON: Well, I don't think that it
18 is fair to the defendant. I think that the plaintiff
19 is the one that is - - - has chosen, and has
20 actually, in most cases, sued both parties, both the
21 non-State entity, and the State, and the court of
22 claims, which is, of course, is the situation here.

23 JUDGE STEIN: But in your scenario, the
24 defendant then gets this opportunity to, you know, to
25 argue against the - - - the empty chair, which even

1 though it's not collateral estoppel, or res judicata

2 - - -

3 MR. JOHNSON: Right.

4 JUDGE STEIN: - - - there's a risk that the
5 court of claims would take that into account.

6 MR. JOHNSON: Well, I don't like to think
7 that the court of claims would necessarily advocate
8 its responsibility there. I think that, you know,
9 they - - -

10 JUDGE STEIN: Well, I'm not suggesting that
11 the court of claims - - -

12 MR. JOHNSON: Right, right.

13 JUDGE STEIN: - - - would do that. What
14 I'm - - - I think we all know that there is, you
15 know, that there's always a range. There's - - -
16 there's no exact right answer, and, you know, and
17 even court of claims judges are human.

18 MR. JOHNSON: Of course. Yes. Well, it is
19 a possibility, but I - - - I don't think that the
20 statute requires that possibility. I think that the
21 statute's language, I mean, in doing the statutory
22 analysis, is you would look at the statute first, and
23 I think that it's very clear that the word
24 jurisdiction used in the first proviso - - -

25 JUDGE STEIN: Well, it doesn't say personal

1 jurisdiction.

2 MR. JOHNSON: It doesn't.

3 JUDGE STEIN: Wouldn't that make it
4 perfectly clear?

5 MR. JOHNSON: It would make it perfectly
6 clear.

7 JUDGE STEIN: Okay.

8 MR. JOHNSON: So that's why we have to be
9 here, of course - - -

10 JUDGE STEIN: That's why we're here.

11 MR. JOHNSON: - - - it's because - - -

12 JUDGE STEIN: Exactly.

13 MR. JOHNSON: - - - it isn't perfectly
14 clear. But what we - - - what the devices that we
15 have, that are available to you to interpret this
16 word, are that, that's the interpretation that has
17 been placed on the word by the other lower courts,
18 which, of course, are not binding on you.

19 JUDGE STEIN: Well, I find that a little
20 curious, because it seems to me that that all stems
21 from Professor Siegel. That everybody reverts back
22 to Professor Siegel, who, when I read his
23 commentaries, he just sort of makes that assumption
24 on his part, and curiously - - - even more curiously,
25 Professor Connors disagrees with that, apparently.

1 So I'm not sure where that leaves us.

2 MR. JOHNSON: Well, it - - - it wouldn't,
3 except for the fact that the passage of time, and as
4 Judge Garcia noted, and which I, of course, noted, is
5 that we did revisit the statute, when we added the
6 second proviso, involving the workers' compensation
7 bar, which would be completely unnecessary if the
8 word jurisdiction applied to both.

9 And so, we, you know, cannot, of course, assume
10 - - -

11 JUDGE GARCIA: So it's your view, counsel,
12 that the inability to bring in an employer would be
13 subject matter jurisdiction?

14 MR. JOHNSON: Yes. That is my
15 interpretation. And so that - - - that argument that
16 the second proviso means nothing, I think, slights
17 the legislature. I mean, the legislature added the
18 parenthetical that we talk about, which was to
19 expand, give apportionment to - - - available to the
20 State, in a situation where it's very clear there
21 would be no personal jurisdiction over anyone.

22 And so that's crystal clear, that the only
23 party in a court of claims case could be the State.
24 And so they added the parenthetical, as they said in
25 the legislative history, to be sure that they got the

1 same rights as everybody else.

2 And I think that that legislative history
3 indicates that the legislature was not intending at all to
4 have that parenthetical revert back to further limit the
5 rights that it was clearly giving in the general
6 provision, which is - - -

7 JUDGE STEIN: But doesn't the legislative
8 history also indicate that - - - that - - - that it
9 was concerned about - - - there was a crisis of
10 insurance, and low-liability, deep-pocket - - -

11 MR. JOHNSON: Deep pocket, yes.

12 JUDGE STEIN: - - - defendants. But that
13 doesn't - - - does that apply when the State is the
14 other tortfeasor?

15 MR. JOHNSON: Well, let me - - - let me
16 answer the question in this way, Judge. First of
17 all, the one entity that is going to always be
18 available in one place, is the court - - - is the
19 State. The indi - - - the problem, of course, for
20 non-State entities, which are not parties to that - -
21 - the Supreme Court action, would be that there may
22 not ever be a forum where the plaintiff could recover
23 this amount of money.

24 But the plaintiff always could get
25 jurisdiction over the State. It's always subject to

1 personal jurisdiction in the State. Not in the
2 Supreme Court, of course, but in the court of claims.
3 So they've - - - the - - - the damage of
4 apportionment - - -

5 JUDGE RIVERA: But why isn't the language
6 unable to obtain jurisdiction over such person? Why
7 - - - why - - - why have the rest of the language?

8 MR. JOHNSON: In said action? Well, I
9 think that the - - -

10 JUDGE RIVERA: What's the rest of it; what
11 - - - what does that further? Let me put it that
12 way.

13 MR. JOHNSON: I think that furthers the
14 situations where there can be, you know, the - - -
15 the tortious act, it occurred outside of the state,
16 which has consequences in this state, that may give
17 personal jurisdiction - - -

18 JUDGE RIVERA: Um-hum.

19 MR. JOHNSON: - - - in some circumstances,
20 to an out-of-state defendant.

21 And so I think that the in said action does not
22 have the import that the Attorney General suggests, which
23 means that it's got to be subject jurisdiction.

24 JUDGE FAHEY: Well, staying on - - - on
25 your jurisdictional argument.

1 MR. JOHNSON: Sure.

2 JUDGE FAHEY: If - - - the way I understand
3 the argument is, is that the position of the
4 plaintiff doesn't change. The plaintiff still cannot
5 get jurisdiction in State Supreme Court. But this
6 decision at the Appellate Division, would allow the
7 defendant to get jurisdiction, in essence, over the
8 State, in State Supreme Court, for apportionment
9 purposes, but no one else.

10 Is that correct; am I reading that
11 correctly?

12 MR. JOHNSON: Well, the defendant, of
13 course - - -

14 JUDGE FAHEY: Because it's an odd situation
15 that the plaintiff wouldn't be able to, but you can
16 get, as a defendant, can get - - - can get - - -

17 MR. JOHNSON: The defendant, if it feels
18 that it's been wronged by the State, can always sue
19 the State in the court of claims. So I don't think
20 that the Appellate Division decision is granting the
21 defendant any more rights than it already had.

22 JUDGE FAHEY: You don't think it's giving
23 the defendant a right that the plaintiff clearly does
24 not have.

25 MR. JOHNSON: The right to end - - -

1 JUDGE FAHEY: Apportionment against the
2 State, that the plaintiff couldn't - - - couldn't
3 claim itself. You see the anomaly here? One party
4 is being - - - is, in essence, granted a right that
5 another party clearly does not have - - -

6 MR. JOHNSON: Right.

7 JUDGE FAHEY: - - - by, either Constitution
8 or by statute.

9 MR. JOHNSON: Well, I have to say, Judge, I
10 did not consider that. I did not - - -

11 JUDGE FAHEY: I didn't either until this
12 afternoon. I want you to know, this is - - - the
13 light went on about this afternoon.

14 MR. JOHNSON: Okay.

15 JUDGE FAHEY: But it seemed a very strange
16 anomaly, and I think we all recognize that this is a
17 difficult convoluted area of the law, but - - - but
18 it seems pretty clear that that would be the case if
19 we follow the AD.

20 JUDGE RIVERA: But isn't that - - - is that
21 in line with the purpose - - -

22 MR. JOHNSON: Of the statute.

23 JUDGE RIVERA: - - - of the statute?

24 MR. JOHNSON: I don't believe it is. The
25 statute, of course, was designed to give relief to

1 defendants. That's what it was designed to do.

2 There - - - they were, of course - - -

3 JUDGE RIVERA: But that's what I'm saying.
4 Doesn't this further this, if the plaintiff is,
5 perhaps, not on equal footing with the defendant in
6 this way? Because you're seeking to protect the low-
7 fault, deep-pocket defendant.

8 MR. JOHNSON: Defendant. That's right. I
9 think so. Let's - - - could I answer your question -
10 - -

11 JUDGE FAHEY: Sure.

12 MR. JOHNSON: - - - about the verdict
13 sheet?

14 JUDGE FAHEY: Yeah, yeah.

15 MR. JOHNSON: I'm going to disagree with
16 you, Judge, that - - -

17 JUDGE FAHEY: I want to hear it.

18 MR. JOHNSON: - - - I don't think it goes
19 to the proximate cause issue; I think it goes to the
20 negligence issue.

21 JUDGE FAHEY: Um-hum.

22 MR. JOHNSON: Because having been in that
23 situation, where you are - - - you're presenting all
24 of the facts concerning the event that - - - and - -
25 - and you're pointing to - - - that there are other

1 people who had other duties, and actions, and
2 responsibilities, then the argument that would be
3 made at the summation would be, my client was not
4 negligent, because it did not violate any duty, it
5 did not have notice - - -

6 JUDGE FAHEY: That's - - - that's a good
7 argument. You might be right. We're - - - we're
8 never going to know because we haven't seen how it's
9 played out.

10 MR. JOHNSON: No.

11 JUDGE FAHEY: But - - - but that's
12 certainly a legitimate point of view.

13 MR. JOHNSON: But it's certain - - -

14 JUDGE FAHEY: But I've always found that
15 the proof really applies against both questions. You
16 know, question - - -

17 MR. JOHNSON: Of course, it does.

18 JUDGE FAHEY: - - - A, negligence, and B,
19 proximate cause.

20 MR. JOHNSON: It does. But I think that
21 when we see how Judge Krogmann, in his hypothetical,
22 and the decision at page 7 in the record, and how it
23 played out in the Cabrera case, which was tried in
24 Westchester Supreme Court, referred to by the
25 Attorney General, is that what happens is that there

1 becomes not an apportionment at all, but simply a
2 defense verdict.

3 JUDGE FAHEY: Um-hum.

4 MR. JOHNSON: And so that's not - - - so
5 all that parade of horribles doesn't really effect
6 the question of apportionment.

7 Thank you very much.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.
9 Counsel.

10 MR. COUGHLIN: Judge Fahey, I appreciate
11 your looking at this from a practical standpoint.
12 And - - - and I want to talk about some of the
13 practicalities of - - - of a lawsuit brought by a
14 plaintiff in a Supreme Court action, where the
15 State's liability, or negligence, can be determined.

16 And one of the reasons that it should not be
17 allowed, and maybe the legislature didn't, in fact, make a
18 distinction. From a practical standpoint, the plaintiff
19 proves his case against the defendant, the defendant
20 submits uncontradicted proof against the empty chair.

21 Not only does that skew the verdict, but it also
22 could leave the jury with the impression, and we're
23 talking practical here, that the State is totally
24 incompetent.

25 The State was not there to defend its position,

1 and therefore, the State's liability, or negligence, will
2 be skewed, jury would go away saying, well, it's the
3 State's - - -

4 JUDGE ABDUS-SALAAM: Is that your position?
5 Judge Stein asked earlier, counsel, did you change -
6 - - did the plaintiffs change their position from
7 when they were before Supreme Court, and then they
8 got into the Appellate Division? Because as I read
9 the Supreme Court decision, it seemed that plaintiffs
10 were consenting to evidence against the State coming
11 into the Supreme Court trial, but were against
12 apportioning liability.

13 MR. COUGHLIN: I think the record does show
14 that that was the case at the Supreme Court level.

15 JUDGE ABDUS-SALAAM: So did you change your
16 position when you got to the Appellate Division?

17 MR. COUGHLIN: When I was - - - yes. That
18 was when - - - I was not involved with that at
19 Supreme Court level; I came into the firm, I looked
20 at it and said, you know what, I don't - - - so yes,
21 I made a different argument at the Appellate Division
22 level.

23 JUDGE GARCIA: Counsel, if we adopt your
24 rule, would it effect apportionment in these issues
25 for bankruptcy issues, or for settling tortfeasors?

1 MR. COUGHLIN: No, Your Honor. The
2 settling tortfeasors situation under General
3 Obligations Law 15-108 was specifically addressed by
4 the legislature, and I think that's a separate
5 entity, that's - - - that system has been set up, and
6 ready to - - -

7 JUDGE GARCIA: And how about bankruptcy?

8 MR. COUGHLIN: Bankruptcy, I do believe is
9 an issue that has not been decided by this court.

10 JUDGE GARCIA: But would we be deciding it
11 here?

12 MR. COUGHLIN: There - - - you probably
13 could forge a decision that did not have that impact.
14 I haven't thought that all the way through, but to
15 the extent that the state courts, as opposed to the
16 federal courts, who decided that, you know, it's not
17 effective jurisdiction, but the state court has found
18 that - - - that that court, the Supreme Court can, in
19 fact, exercise jurisdiction over a debtor, and that
20 the automatic stay is not a jurisdictional issue.

21 But one - - - one last point though, is that the
22 goal that the - - - the proposition that the plaintiffs
23 are proposing here could, in fact, be readily accomplished
24 by the deletion of ten small words in the first proviso.

25 If we struck out "In said action", and the

1 language after that, we can estab - - - the - - - the goal
2 that the defendants are proposing would be achieved.

3 Two things. One, if - - - "The liability of a
4 nonparty defendant shall not be considered if they cannot
5 obtain jurisdiction." If those lang - - - if that
6 language was stricken from the - - - from the statute,
7 then the plaintiff could always obtain jurisdic - - - the
8 plaintiff can always obtain jurisdiction over the State,
9 and therefore, the goal that they're trying to achieve
10 would be established by the omission of those small ten
11 words.

12 Those - - - the inclusion of those words makes a
13 significant difference, and lends support to our
14 proposition that the State's liability should not be
15 apportioned in Supreme Court.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Artibee v. Home Place Corporation, No. 5 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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