

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

VERNEAU,

Appellants,

-against-

NO. 64

CONSOLIDATED EDISON,

Respondents.

REXFORD,

Appellants,

-against-

No. 65

GOULD ERECTORS & RIGGERS,

Respondents.

20 Eagle Street
Albany, New York
October 7, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

ALLYSON LEVINE, ESQ.
ATTORNEY GENERAL'S OFFICE
Attorney for Appellant
The Capitol
Albany, NY 12224

MATTHEW R. MEAD, ESQ.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STOCKTON, BARKER & MEAD, LLP.
Attorney for Appellant
433 River Street
Suite 6002
Troy, NY 12180

DAVID W. FABER, ESQ.
CHERRY, EDSON & KELLY
Attorney for Respondent
One Huntington Quadrangle
Suite 3S12
Melville, NY 11747

GLENN D. CHASE, ESQ.
WALSH AND HACKER
Attorney for Respondent
18 Corporate Woods Boulevard
Floor 3
Albany, NY 12211

Karen Schwarzlose
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Please be seated. Good
2 afternoon.

3 Next up on the calendar are appeals number 64 and
4 65. 64, Matter of Verneau v. Consolidated Edison, number
5 65, Matter of Rexford v. Gould Erectors & Riggers.

6 We'll start with number 64.

7 Counsel?

8 MS. LEVINE: Good afternoon. May it please the
9 Court, Allyson Levine for Appellate, the Workers'
10 Compensation Board.

11 May I please have two minutes for rebuttal, Your
12 Honor?

13 CHIEF JUDGE DIFIORE: You may.

14 MS. LEVINE: Thank you. The question in this
15 case is whether a state created fund or the original
16 insurance carrier should be liable for new death benefit
17 claims that accrued after the legislature closed the fund
18 to new claims.

19 This Court's decision in Zechmann, the statutory
20 text of the provision closing this Special Fund, and the
21 legislature's intent in closing the fund made clear that
22 death benefit claims are new claims that cannot now be
23 transferred to the fund and therefore should be paid by the
24 insurance carrier.

25 JUDGE GARCIA: But Counsel, the statute actually



1 says a liability for claim, right? It doesn't say claim.
2 If it said claim, I think you have a different argument,
3 but it says liability for the claim.

4 And under Fitzgerald, right -- he's Third
5 Department case, 2011, I think -- at the time the statute
6 was passed, you -- the fund had a liability for the claim,
7 a death claim. You didn't have to file a new application.
8 You didn't have to do anything. It's -- it was there.

9 So to me, that liability is there doesn't need to
10 be transferred to the fund. And I'm assuming the fund was
11 operating under that rule in 2013, 2014 when the statute
12 was passed.

13 MS. LEVINE: It -- it was at that point operating
14 under that understanding, but it was doing so wrongly
15 because that understanding can simply not be squared with
16 this Court's decision in Zechmann.

17 JUDGE GARCIA: Put that aside. We never decided
18 that. But put that aside, the practice of the agency at
19 the time the legislation was passed, you have liability for
20 these claims. You didn't have to transfer them, you didn't
21 have to apply. It was there.

22 The fund knew that. The fund was involved in the
23 legislative fix, I'm imagining. And yet, this language is
24 in there. It would've been an easy thing to address that,
25 especially if you thought it was wrong. But it isn't.

1 MS. LEVINE: Well, the -- they did have to apply
2 it. These insurance companies were applying to transfer
3 these death benefit claims. They were --

4 JUDGE GARCIA: Even in the Fitzgerald case?

5 MS. LEVINE: Yeah, I -- I'm not sure if there was
6 a formal application there, but -- but it was raised before
7 the workers' compensation law judge, and the workers'
8 compensation law judge found that that claim should be
9 transferred, Your Honor.

10 JUDGE FAHEY: But my understanding of
11 Fitzgerald -- tell me if I'm wrong -- was you didn't have
12 to make a new application to the fund after Fitzgerald
13 if -- let's say facts of that case, the fund had a claim,
14 they were paying out benefits. They stopped. A certain
15 time later, that person's spouse died, that death claim was
16 in the fund. There was no new application.

17 MS. LEVINE: No, I believe a new application was
18 made because there was nothing -- there was nothing to do.
19 They had to put in an application for death benefit claims,
20 and then either the Special Fund was put on notice or an
21 insurance carrier was put on notice. And then -- and then
22 an application might ensue from there. I don't think it
23 was automatic that the Special Fund would remain liable for
24 those death benefit claims.

25 JUDGE GARCIA: But let me ask you this. Did you



1 have to separately meet the factors to transfer?

2 MS. LEVINE: Yes. Yes.

3 JUDGE GARCIA: At the time of the death claim?

4 MS. LEVINE: I believe so. I believe so, yes.

5 JUDGE FAHEY: In which case are you saying that
6 that was --

7 MS. LEVINE: Fitzgerald. They're referring --

8 JUDGE FAHEY: Oh, Fitzgerald. Yes.

9 MS. LEVINE: -- to Fitzgerald. It's a 2011 case.

10 JUDGE FAHEY: Fitzgerald. I'm not sure that
11 that's correct, but I might be -- we'll both have to look
12 at it. The -- go ahead.

13 JUDGE CANNATARO: Oh, I'm sorry.

14 JUDGE FAHEY: No, no, you go ahead. I'll --

15 JUDGE CANNATARO: Before we get too far away from
16 the statutory language, I -- you know, liability for a
17 claim is a phrase that's been bouncing around in my head.
18 As it's used in the statute, you started off your argument
19 by saying the death claim is a separate claim, which I
20 assume you mean separate from the underlying disability
21 claim that was made however many years before.

22 So when the statute says liability for a claim,
23 do they mean liability for each claim as you define it, a
24 disability claim, and then a death claim, and then whatever
25 an after death claim might be. I'm laughing under here, if



1 you can't see that.

2 MS. LEVINE: Yeah. Yes.

3 JUDGE CANNATARO: Or do you mean -- or does it
4 mean liability for the case?

5 MS. LEVINE: It -- it refers to liability for the
6 claim, that the statute says transfer of liability for a
7 claim. It refers to the claim.

8 And again, and this Court said in Zechmann that
9 death benefit claims are separate and distinct claims.
10 They have different claim numbers from --

11 JUDGE FAHEY: Yeah.

12 MS. LEVINE: -- a death benefit claim has a
13 different claim --

14 JUDGE FAHEY: But to follow up on -- on the
15 judge's questions, I think that there's a conceptual error
16 in argument. Liability -- and this is constantly discussed
17 in all forms of negligence in negligence laws and personal
18 injury law, it's very common. The way I understand it is
19 liability is you have a duty, you breach the duty, and then
20 there's proximate cause connecting the damages to the duty
21 that has been breached.

22 Here, the liability part of this -- portion of
23 this has been -- has been established, and the claim that
24 comes forward are the damages. I have a claim for death
25 benefits. I have a claim for an injury over here. I have



1 a claim for lost wages. Those are claims. And the
2 legislature seem to be very careful in laying these out and
3 that conceptual distinction, I think -- the way I read it
4 seems to be at the core of the Third Department's decision.

5 What they're saying is, okay, they've established
6 liability now. The -- this is in here. So when you come
7 up with each new claim, it -- there's not separate
8 liability that had to be established. That's an element of
9 the damages that arose through the liability.

10 MS. LEVINE: I don't agree with that analysis,
11 Your Honor, because liability is different for a disability
12 claim than it is for a death benefit claim. When you're
13 looking at liability for a disability claim, you're looking
14 at whether or not the injury is causally related to the
15 underlying accident.

16 JUDGE FAHEY: Right. That's proximate cause.

17 MS. LEVINE: Right. But when you're looking
18 at --

19 JUDGE FAHEY: The -- that's not --

20 MS. LEVINE: -- the death, you're looking at
21 whether the death was proximately caused. So --

22 JUDGE FAHEY: Of course.

23 MS. LEVINE: -- if a claimant, for example, was
24 hit by a car, as opposed to dying here, in both cases of
25 organ failure --



1 JUDGE FAHEY: Uh-huh.

2 MS. LEVINE: -- that would be a totally different
3 analysis here. So liability for each claim has -- is a
4 different analysis.

5 JUDGE FAHEY: Those are all proximate clause
6 questions. But the original liability that's set up for a
7 duty that was breached and established a responsibility,
8 and the establishment of that responsibility occurred
9 within the statutory framework. This is the way that I
10 read the third -- that's the way their argument is.

11 And once that's established in there, that the
12 claims that flow or the allegation of a claim that flows
13 out of it, if it's approximate -- if it's proximate clause,
14 if it can be connected to that liability, they're
15 responsible for it because the liability was established
16 within the statutory framework.

17 That's the way I read this. To do otherwise
18 would mean that every time you have a damages claim, you
19 would have to reestablish a duty and a breach of that duty
20 to go forward. And that's not what this is saying.

21 MS. LEVINE: I -- again, I want to push back on
22 that, Your Honor.

23 JUDGE FAHEY: Sure.

24 MS. LEVINE: Because they're referring to claims
25 here. These -- these are entirely separate claims, as this



1 Court said in Zechmann. They have different claim numbers.
2 They have entirely different beneficiaries. So they have
3 different elements.

4 It would be like a personal, you know -- like in
5 a car accident, it would be a personal injury claim, and
6 then like wrongful death. There's different beneficiaries,
7 different dates of accrual, different claim numbers.

8 JUDGE FAHEY: Right. But the liability will all
9 be established at the time of the car accident. And I
10 think that's what you're miss -- I think that's what your
11 argument misproceeds.

12 MS. LEVINE: Well, in fact it won't because that
13 liability is different. There's -- the liability is
14 whether or not the -- you know, the death is causally
15 related versus whether or not the injury is causally
16 related. They're -- there are two different analysis on --
17 on different -- on liability here.

18 JUDGE GARCIA: Here's my problem still with
19 liability versus claim. We have said it's a different
20 claim, the death claim. It's a different claim, but the
21 way I read it, and I just looked at it again, Fitzgerald
22 says the liability for that death claim, separate as it may
23 be, the liability passes to the fund at the time the case
24 goes over there and the initial benefits are paid.

25 So no one's -- under the Fitzgerald, no one's



1 transferring liability for that claim, new claim though it
2 may be, no one's transferring liability for that claim to
3 the fund after the date of the closure. That's how I read
4 those cased together.

5 MS. LEVINE: Yes. And that would -- that would
6 make sense, Your Honor, if that claim had yet accrued, but
7 basically there's -- again, there's no way to square that
8 with this Court's decision in Zechmann because that claim
9 does not yet exist.

10 JUDGE GARCIA: So do we have to --

11 MS. LEVINE: And that claim might never --

12 JUDGE GARCIA: -- decide that? Do we have to
13 decide whether Fitzgerald's right or wrong here?

14 MS. LEVINE: I think a correct decision in this
15 case would have to abrogate the decision in Fitzgerald and
16 it -- and it should, Your Honor. Because again, there's no
17 way to possibly square this Court's very unambiguous
18 language in Zechmann with the language of Fitzgerald.

19 Because that -- that death benefit claim, even if
20 it arises out of the same injury as an already transferred
21 lifetime benefit claim, has not yet accrued at the time of
22 the transfer, and in fact, may never accrue. And --

23 JUDGE FAHEY: Can I -- can I just go to Zechmann
24 for a second?

25 MS. LEVINE: Please.



1 JUDGE FAHEY: I had thought that in Zechmann,
2 that the issue of whether the death claim was properly
3 assigned to the -- to the fund was not in dispute. The
4 only dispute there was whether that claim was time barred.
5 That was the only dispute in Zechmann.

6 MS. LEVINE: Well, because --

7 JUDGE FAHEY: It's not -- it -- excuse me. The
8 way I read it is it's not the same issue as the issue we
9 have here.

10 MS. LEVINE: It -- it wasn't at issue there
11 because it hadn't -- because it meant -- it otherwise met
12 the requirements, Your Honor. So the Special Fund wasn't
13 denying liability.

14 JUDGE FAHEY: Yeah.

15 MS. LEVINE: But it wasn't transferred simply
16 because lifetime -- the lifetime claim transferred. And in
17 fact, that's exactly why this Court -- that's exactly why
18 Zechmann is so controlling here because if they just went
19 together, right -- if they just went automatically
20 together, this Court wouldn't even have to analyze if it
21 was just automatic that the lifetime benefit claim and
22 the -- and the death claim went together automatically to
23 the Special Fund.

24 JUDGE FAHEY: Well, you misunderstand me. I
25 don't think they go together automatically. They're



1 still -- you still have to establish proximate cause.

2 The question is the day of liability when the
3 duty was breached, and that is the liability that's being
4 referred to in Fitzgerald. And it seems to be a
5 fundamental disconnect here between those two concepts.

6 JUDGE GARCIA: But Zechmann, the claim hadn't
7 gone over. Zechmann, the claim was from the '50s. The
8 insurance company paid it. So it wasn't that that claim
9 had been paid out of the fund before. It wasn't a
10 Fitzgerald situation. It was just those deadlines, those
11 818, whatever those time frames are, is that going to apply
12 to this new claim that's now going over.

13 But Zechmann is not this. Zechmann, the fund
14 didn't have the original claim. And I think that's what
15 you were just saying, that Zechmann, the fund had the
16 original claim, so why would they consider it? They
17 didn't. The '50s claim was paid by the insurance company.

18 MS. LEVINE: I believe that's right, Your Honor.
19 And so it - in -- the fact that the death benefit claim in
20 Zechmann was a separate and entirely different claim was
21 controlling there. And so it -- it has to be that -- that
22 that's here --

23 JUDGE GARCIA: But claim versus liability again.
24 See, in Zechmann, they didn't have the liability for the
25 claim because the insurers paid the original claim. But in



1 this case arguably, they have the liability already because
2 the fund has been paying the earlier Zechmann-type damages.

3 MS. LEVINE: Well, I'm -- I'm having trouble
4 remembering in Zechmann whether or not the initial claim
5 was paid by the fund.

6 I believe, actually, I misspoke that the initial
7 claim was paid by the fund there. And that's why Zechmann
8 again, is -- is controlling. Because otherwise, if they
9 both went over together, you know, that that would -- that
10 would change things.

11 JUDGE GARCIA: The initial claim in Zechmann was
12 1954. So was the fund in operation then?

13 MS. LEVINE: The fund was enacted in 1933, Your
14 Honor. And the reason why the fund was enacted in 1933 is
15 because there was this idea that insurance companies needed
16 to be, you know, covered for these unanticipated
17 liabilities.

18 But since then, in 2013, the legislature
19 unambiguously closed the fund to new claims. And the
20 reasoning there was that it was no longer needed to -- to
21 protect workers from insolvent claims because there were
22 other mechanisms put in place. And also because at this
23 point, the insurance companies were double dipping. They
24 were collecting sufficient money in their premiums to cover
25 these diverted claims, and they were also passing the



1 assessments to support the fund onto their --

2 JUDGE GARCIA: But in -- again, I hate to beat
3 this to death, but in Zechmann, the injury is '51. The
4 last payment is made in '55. So how would that ever be in
5 the fund?

6 MS. LEVINE: I have to look back at Zechmann,
7 Your Honor. But -- I'm sorry. The last payment -- oh.
8 Oh. Because it's -- I'm sorry. No, no, no. It was in the
9 fund because it was only three -- it's three years from the
10 last date of the claim, from the last date of payment.

11 JUDGE GARCIA: Yeah. But if the injury --

12 MS. LEVINE: So that's only -- that's four years,
13 Your Honor.

14 JUDGE GARCIA: -- happens in '51 and they're
15 paying '51 to '55, how does that go into the fund?

16 MS. LEVINE: They're paying from '51 to '55, Your
17 Honor?

18 JUDGE GARCIA: Right. The last payment's made in
19 '55.

20 MS. LEVINE: The last payment was in '55. I
21 believe there's through -- in Zechmann, there is three.
22 I'll have to look back before rebuttal.

23 JUDGE GARCIA: That's okay.

24 MS. LEVINE: But I believe there's --

25 JUDGE GARCIA: I'll look at it.



1 MS. LEVINE: -- three years in between the last
2 payment, such that the claim went to the Special Fund, Your
3 Honor.

4 JUDGE GARCIA: Okay.

5 JUDGE FAHEY: Well, I have to say that I do have
6 my notes on Zechmann and I have questions. And I asked you
7 some of the questions that I have on there. I'm not sure
8 about the facts. So it's -- we'll have to go back and look
9 at it.

10 MS. LEVINE: Okay.

11 CHIEF JUDGE DIFIORE: Thank you, Counsel.

12 MS. LEVINE: Thank you.

13 CHIEF JUDGE DIFIORE: Counsel?

14 MR. MEAD: Good afternoon.

15 CHIEF JUDGE DIFIORE: Good afternoon.

16 MR. MEAD: May it please the Court, I'm Matthew
17 Mead for the Special Fund. Picking up on the Zechmann line
18 of discussion, my recollection of Zechmann is that the
19 issue was whether the -- the claim for transfer was timely
20 in the sense that the Special Fund question whether the
21 Board still had jurisdiction to reopen that claim.

22 And when we consider that the claim was initially
23 in 1951, the last payment in 1955, 1955 is the beginning of
24 the count date for the three years since the last payment
25 on compensation.



1 So the claim had to be reopened at some later
2 date.

3 JUDGE GARCIA: Right.

4 MR. MEAD: Much later. And the fact that it was,
5 well, much later in the -- in the case of Zechmann because
6 it was beyond eight years from the last payment of
7 compensation, and beyond eighteen years from the -- from
8 the date of injury.

9 So this Court resolved in that case that the
10 claim would not be time barred because the death claim is a
11 separate claim.

12 Now, I don't know whether I'll have time to
13 really get into the negligence analysis, but I think it's
14 misplaced. If you're going to analyze this as a duty
15 breach causation and damages --

16 JUDGE FAHEY: No, what I was trying to say to --

17 MR. MEAD: Well, who -- who --

18 JUDGE FAHEY: -- what I was trying to do is say,
19 what do we mean by liability.

20 MR. MEAD: Yes, sir.

21 JUDGE FAHEY: Yeah. That's my argument, poorly
22 given as it was, is what do we mean by liability. And
23 here, liability means the same -- same thing across all
24 forms of personal injury in -- in whatever way -- whatever
25 way it crops up.



1 And the language in the legislature does not
2 equate claim with liability. That's not what they're doing
3 with the language there. It -- these things are finely
4 crafted, and you deal with them more than I do. But it
5 seems to be clear that the word claim is not -- is not the
6 same as not -- not equivocal with liability. It's not
7 equal to liability. That's incorrect.

8 MR. MEAD: Yes. But the -- the liability is that
9 of the employer.

10 JUDGE FAHEY: Right. So --

11 MR. MEAD: It's not that of the carrier. It's
12 not that --

13 JUDGE FAHEY: What you take --

14 MR. MEAD: -- of the Special Fund.

15 JUDGE FAHEY: -- when you assume liability for
16 the claim -- for the injury, which is really the correct
17 way to do it, that's the date that matters in terms of
18 whether you come before the deadline. And then the statute
19 that sits on a process by which you may assert a claim,
20 which is a claim based on liability that exists, and that
21 has existed in this fund.

22 MR. MEAD: The you -- the you that you're
23 referring to, sir, you mean the carrier --

24 JUDGE FAHEY: I mean the claimant.

25 MR. MEAD: -- the initial payer --



1 JUDGE FAHEY: Yeah. The -- right.

2 MR. MEAD: -- of compensation --

3 JUDGE FAHEY: The claimant --

4 MR. MEAD: -- asserting a claim for reimbursement
5 from the Special Fund.

6 JUDGE FAHEY: Right.

7 MR. MEAD: So that's what I'm talking --

8 JUDGE FAHEY: Mr. Mead, right?

9 MR. MEAD: Yes, sir.

10 JUDGE FAHEY: Yeah. Mr. Mead, that's what I
11 mean. Yes.

12 MR. MEAD: Okay. Well, it -- it is possible that
13 the word liability is misused in this context. And it
14 is -- it is -- the --

15 JUDGE FAHEY: I see the word liability as
16 responsibility. And it -- this is -- I don't expect
17 somebody to give me an answer standing on their feet if
18 they haven't really thought about it.

19 MR. MEAD: Okay.

20 JUDGE FAHEY: So that's not fair. I'm not asking
21 --

22 MR. MEAD: So --

23 JUDGE FAHEY: for that. What I'm just saying is
24 that that's how my understanding of what the Third
25 Department's analysis and the underlying legislative scheme



1 was based upon.

2 MR. MEAD: So if you're talking about the Third
3 Department's analysis in Fitzgerald and Mesquita --

4 JUDGE GARCIA: Yeah.

5 MR. MEAD: -- I think that they improperly
6 leveraged some language from this Court in the De Mayo
7 case. And the reason I think it's improperly leveraged in
8 Fitzgerald and Mesquita is that De Mayo was not a death
9 case. De Mayo had nothing to do with the issues, but it
10 had a great little sound bite that once -- once liability
11 is transferred, the carrier has nothing more to do with the
12 claim. But --

13 JUDGE GARCIA: But Counsel, just to stop there
14 for -- I'm sorry. One second.

15 MR. MEAD: Yes, sir.

16 JUDGE GARCIA: After Fitzgerald comes down under
17 the Third Department, I think we deny leave. But anyway,
18 it never gets here. What's the practice of the fund with
19 respect to death claims on cases where they had been paying
20 benefits out to previously?

21 MR. MEAD: I think the analysis differs depending
22 on what -- when benefits were last paid because remember
23 that Section 25-a(1) enumerates three circumstances in
24 which the fund becomes liable. The third of those
25 circumstances is death occurs more than seven years from



1 the original injury.

2 And so the -- that's an independent basis for
3 establishing liability -- I -- I'm sorry -- for
4 transferring liability from a carrier to the fund in a
5 death case. There's a statutory provision that does that.

6 And my experience -- you're not going to find
7 this anywhere in the record -- but my experience is that
8 most of these things were done informally. There would be
9 a letter to the Workers' Compensation Board asking for an
10 administrative adjudication of 25-a liability is how we
11 referred to it.

12 And the Board would communicate with the Special
13 Fund, at that time, administered by the Special Fund
14 conservation committee, asking whether they would accept
15 liability or not accept liability.

16 I don't -- I don't know that a lot of these cases
17 were litigated. As a matter of fact, I can't think of a
18 case in my -- in my time that was litigated on that -- on
19 that question. The Special Fund had an expertise in what
20 Section 25-a said. The Special Fund took a lot of cases up
21 to the Appellate Division to define what that statute said.
22 And in many cases, they would simply accept the transfer of
23 liability.

24 JUDGE FAHEY: Thank you. Thanks.

25 MR. MEAD: So --



1 JUDGE FAHEY: It makes some sense in the
2 evolution of it.

3 MR. MEAD: Yes, sir.

4 JUDGE FAHEY: It's helpful. Thank you.

5 MR. MEAD: So fundamentally -- I'm sorry. My
6 time is up. But fundamentally, the legislative intent in
7 1933 is different than the legislative intent in 2013. The
8 legislature intended to make a change in this statute and
9 how it was administered, intended to close the Special Fund
10 for reopened cases.

11 That's what -- that's what we're asking this
12 Court to ratify. Thank you.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 Counsel?

15 MR. FABER: Good afternoon.

16 CHIEF JUDGE DIFIORE: Good afternoon.

17 MR. FABER: May it please the Court, my name is
18 David Faber. I'm the attorney for the self-insured
19 employer, Consolidated Edison, the respondent in the Matter
20 of Verneau.

21 What we're dealing here with 25-a(1-a) is precise
22 language in a statute. It's our contention and based upon
23 Chrysler in 2011, the Third Department, the clearest
24 indicator of legislative intent is the statute's text and
25 the language itself.



1 JUDGE RIVERA: And so Counsel, if I can interrupt
2 you, please.

3 So 25-a(1-a), which the operates of language
4 we're dealing with here is "Transfer of liability of a
5 claim to the funds" (audio interference) you have to look
6 at the claim.

7 MR. FABER: Forgive me, Your Honor. You broke up
8 at the end there.

9 JUDGE RIVERA: Oh. My apologies. I -- regarding
10 the (audio interference) 25-a(1-a) that says, "Transfer of
11 liability of a claim to the fund," that to determine the
12 liability you have to look to the claim, correct?

13 MR. FABER: Yes, Your Honor.

14 JUDGE RIVERA: Okay.

15 MR. FABER: To the original claim, yes.

16 JUDGE RIVERA: So -- well, where does it say
17 original claim? It just says claim. Isn't it the claim
18 you're trying to transfer?

19 MR. FABER: Well, no, Your Honor. The --
20 the -- it is a death benefit claim, but it's part and
21 parcel of the underlying accident or injury, which in this
22 case, was in June 1st of 2000. And --

23 JUDGE RIVERA: But that again -- but let me -- it
24 doesn't say liability for the original disabling event.
25 All it says is liability of a claim. And so you have to



1 look at the claim to figure out the liability.

2 And if we have said that that -- or death benefit
3 claims are separate and apart and distinct from the
4 original claim for disability, doesn't it follow that this
5 is exactly as is argued by the Board?

6 MR. FABER: I don't believe so, Your Honor. It -
7 - it is true that in Zechmann, there is that language to
8 the effect of disability and death or distinct, legally
9 distinct, different accrual dates to a statute of
10 limitation purposes. "But death is not a new injury or
11 accident. Death is a new claim consequential to the
12 original." That's stated in Chrysler in 2011, the Third
13 Department. The Commissioner of the State Insurance --
14 Commissioners of the State Insurance Fund in 2009.

15 And once 25-a has been triggered, this Court said
16 this is De Mayo, "The Special Fund steps into the shoes of
17 the carrier and succeeds all of it's rights and
18 responsibilities." And it has always been handled in the
19 Appellate Division and in our -- in the -- in the relevant
20 caselaw here that when you have a consequential injury,
21 that would be the liability of the underlying claim. It
22 was a consequential stroke. It would clearly be the -- it
23 would be a claim for a stroke, but it would be the
24 liability underlying claim, whether date of the accident or
25 a date of disablement.



1 In this case, you have a consequential death.
2 You have a new claimant, if you will, but -- and it is
3 legally distinct, but it has been found that this is a new
4 and -- this is not a new and distinct injury or accident.
5 It is consequential to the underlying injury. And in this
6 particular claim.

7 JUDGE CANNATARO: But Counsel, I think this is
8 Judge Rivera's point. She's reading the statute and it
9 doesn't say liability for an accident. It says liability
10 for a claim. And she's pointing out, I think, that the
11 only way to reconcile that is to say that as -- as Zechmann
12 said, the death claim and some earlier claim are two
13 distinct events.

14 MR. FABER: They're two distinct events --
15 they're legally distinct as far as accrual date for the
16 statute of limitations purposes. That's what Zechmann was
17 talking about. The statute of limitations in Section 1
18 through 3 of the workers' compensation law.

19 JUDGE WILSON: Would you -- would you at least
20 agree that had the statute been written to say transfer
21 of -- liability for an injury or liability for an accident,
22 we wouldn't be here?

23 MR. FABER: I think if the statute specifically
24 said a claim for consequential death due to an underlying
25 disability matter where the Special Fund was already deemed



1 liable, would that be part of the Special Funds at this
2 point. That would be something. That's not what the
3 statute states.

4 JUDGE WILSON: Yeah. I was just asking
5 something -- I'm asking something a little bit different so
6 you can answer my question, which is if we substitute the
7 worked accident or substitute the word injury for a claim,
8 wouldn't that be a lot clearer?

9 MR. FABER: I believe so, Judge.

10 JUDGE WILSON: Okay.

11 MR. FABER: Judge, I would note though that the
12 legislative intent here is -- is -- I don't believe is in
13 question, frankly. The memorandum's support of this
14 amendment of the statute and the statute language itself
15 does not go against what the respondents are arguing here.

16 There is clear and unambiguous statutory
17 language. At no time did the respondent here make an
18 application for transfer to the Special Fund. There's
19 caselaw in our -- there's caselaw that supports our
20 position as well.

21 You -- this Court said in De Mayo that, "Once
22 Section 25-a is triggered, the Special Fund steps into the
23 shoes of the carrier and succeeds all of its rights and
24 responsibilities." That would include any consequential
25 injury, including a consequential death.



1 I would note that the Appellate Division Third
2 Department in Misquitta got it right. That's our
3 contention anyway. They clearly took notice of the history
4 here and made the determination that, "Where liability
5 previously was transferred to the Special Fund in a
6 disability claim, the Special Fund will remain liable for
7 any claim for a consequential death."

8 If you look at the history of Misquitta, when it
9 went through the Appellate Division process, the Board
10 agreed with us at that time, exactly -- they were agreeing
11 with us throughout the entire Misquitta arguments, but
12 because of your decision in American Economy in 2017, they
13 all the sudden rejected the Misquitta finding, which made
14 no sense to us, frankly. Because -- at least our
15 interpretation of your decision in America -- American
16 Economy was that you rejected a constitutional challenge to
17 the amended statute.

18 But you did state in American Economy that the
19 Special Fund remains open to administer cases that were
20 previously assigned to it. That's exactly what we have
21 here. We have a claim that was previously administered by
22 the Special Funds with a consequential injury.

23 So we would contend, Your Honors, that there was
24 no violation of a statutory sentence at issue. There was
25 no application for transfer of liability. And none was



1 needed, frankly, because a consequential death is not a new
2 accident. It is not a new injury. It is a new claim,
3 consequentially related to the original injury.

4 There is no language in 25-a(1-a) that suggests
5 the Board should reject longstanding legal precedent. If
6 the legislature wanted this to be the case, it would've
7 stayed the same in a clear and unambiguous matter.

8 CHIEF JUDGE DIFIORE: Thank you, Counsel.

9 MR. FABER: Thank you.

10 CHIEF JUDGE DIFIORE: Counsel?

11 MR. CHASE: Good afternoon. Glenn Chase with
12 Walsh and Hacker on behalf of the State Insurance Fund and
13 it's insured -- in the Matter of the Rexford claim.

14 So we do have two claims, but basically the same
15 fact pattern, similar fact patterns to all of the cases
16 we've been discussing involving transfer of -- of liability
17 to the Special Funds.

18 We have Section 25-a(1), which allows for
19 transfer under three circumstances. The first one doesn't
20 apply because this is a claim that was establish -- or both
21 these cases were established and resolved.

22 Section A(1-2) applied in both of these
23 instances. That's why 25-a liability was fine with respect
24 to the underlying claim. That requires seven and three
25 years from the date of injury -- seven years from the date



1 of injury and three years from the last payment of
2 compensation to the transfer of liability.

3 If you take those facts and you look at the
4 caselaw that has been promulgated all the way to 1971 in
5 Riccardi, it --

6 JUDGE RIVERA: Counsel, let me -- Counsel, if I
7 may ask, how -- let's say the Court agrees with your view,
8 how does that further what is clearly the legislative
9 purposes we quoted in American Economy -- it's obvious from
10 the legislative history to avoid the windfall that the
11 legislature had determined carriers and employer were
12 enjoined based on the state of the law before they closed
13 the fund.

14 MR. CHASE: Well, I think that American Economy
15 also has a -- a very specific statement in it. And that
16 was that it was the closed claims for new transfers, not
17 cases that had previously been transferred.

18 And as found by the Appellate Division below, and
19 as argued in our briefs, this case was previously
20 transferred.

21 JUDGE FAHEY: Tell me, Counselor. If we were to
22 rule in favor of the Compensation Board, would we be
23 overturning both Fitzgerald and Misquitta?

24 MR. CHASE: I believe you would be, yes.

25 JUDGE FAHEY: Yeah.



1 MR. CHASE: And -- and the -- you -- someone
2 had -- you had asked, I believe, a question earlier, what
3 was the Board's practice after Fitzgerald.

4 JUDGE FAHEY: Uh-huh.

5 MR. CHASE: It's practice, and it's the same
6 practice that happened in this instance, neither carrier
7 made an application in this instance. The Board's
8 practice, based on Fitzgerald, which it affirmed in
9 Misquitta, was to index the claim, and bring it against the
10 Special Fund.

11 The Special Fund was named as the party. They
12 said, we're not liable because of 25(1)(a) in our -- our
13 claim.

14 At a hearing, we were put on notice. Once we
15 were put on notice, we then said, no, wait a minute. This
16 claim has already transferred. It's not our liability.
17 And that -- you -- word was used previously.

18 So our position has been and -- in accordance
19 with Misquitta was that the liability transfer, and as
20 noted by Mr. Faber previously, it is not a new claim for
21 liability purposes. It is a consequential claim to the
22 original injury. And that's soft --

23 JUDGE FAHEY: Well, you know, I -- I -- part of
24 the confusion, and Judge Wilson hit it right on the head.
25 Part of the confusion is the terminology that's used. It



1 means different things in different areas of the law.

2 MR. CHASE: That -- that's --

3 JUDGE FAHEY: And one of the reasons I'm always
4 trepidatious with dealing with these Third Department cases
5 because they deal with this language all the time, and
6 sometimes if you -- if you -- if it's not your life, you
7 might not deal with it with the same way.

8 And so that's why I asked the overturning
9 question because it's an area that we have to -- if
10 necessary, of course, we'll overturn it, but it -- it's a
11 finely tuned engine.

12 MR. CHASE: And I --

13 JUDGE CANNATARO: Counsel, here's -- here's my
14 concern about Fitzgerald and Misquitta. Both, you know --
15 Fitzgerald is a 2011 case, Misquitta's sometimes before
16 that, I think. And these -- you know, these are preclosure
17 cases. The Special Fund was closed in 2014. And I feel
18 like when we talk about what the common practice was, like
19 you said, after a claim was accepted into -- or after a
20 case, whatever it is, was accepted into the Special Fund,
21 the -- the death claim would automatically get indexed to
22 the Special Fund. It was just the custom and practice.

23 And I wonder whether the decisions in those cases
24 incorporated the understanding, preclosure, that once a
25 case was assigned to the Special Fund, all subsequent



1 claims would go there pretty much automatically. And then
2 if these cases had been decided after 2014, it -- the --
3 the decisions may have at least looked different than the
4 way they do.

5 MR. CHASE: Well -- well, if I may, Your Honor,
6 Fitzgerald was decided in 2011 before the amendment of the
7 statute.

8 JUDGE CANNATARO: Right.

9 MR. CHASE: Misquitta was filed after 2014. That
10 was a date of injury after 1/1/14. In Misquitta, the Board
11 had taken the exact opposite position it's taking today.
12 They accepted that, in accordance with Fitzgerald -- again,
13 as Mr. Faber made the same argument. I apologize for --
14 for repeating things. After Fitzgerald, the Board had that
15 policy. They can establish it. They index it against the
16 carrier -- against the Special Funds.

17 They continued that after Misquitta in January
18 '14, which is why we're here. We objected and said, no,
19 liability was already transferred.

20 In Misquitta, it was the same thing, the same
21 facts as -- as --

22 JUDGE RIVERA: But Counsel, aren't -- aren't
23 bound by -- since we had not ruled, aren't they bound by
24 the -- the Appellate Division's law? I mean, I'm not sure
25 I'm understanding your argument.



1 MR. CHASE: There would --

2 JUDGE RIVERA: Are you saying they should've
3 taken the position of Misquitta, that the --

4 MR. CHASE: The -- the -- they -- they
5 could've --

6 JUDGE RIVERA: -- Appellate Division should've
7 reconsidered with you?

8 MR. CHASE: I -- I apologize, Judge. I didn't
9 mean to cut you off. But they could have and should have
10 appealed if they did not believe that that case was
11 appropriate. They didn't.

12 The only reason we're here today is because as
13 the Court said -- or -- or the Board said, we find American
14 Economy controls, and since American Economy is
15 constitutional, then we're closing the fund, and that
16 applies to this case.

17 That was the Board's rationale and -- before the
18 Court and why they were denying the application here. It
19 was not anything to do with, was this claim previously
20 transferred. It was -- and -- and that was the Court's
21 rationale.

22 JUDGE RIVERA: So Counsel, if -- if we thought
23 they were correct on the statutory interpretation as
24 they've advocated, are you saying that because they took a
25 different position, that we could not decide now that the



1 statute reads as they advocated reads?

2 MR. CHASE: I can't say that. You of course, can
3 make a different decision, your interpretation of the law,
4 Your Honor. But I think that it goes to the merits of our
5 position that this has been the policy and the procedures
6 and how the Board has acted on these times -- types of
7 claims, and -- and this same issue.

8 JUDGE GARCIA: And Counsel, weren't they acting
9 that way when the legislation passed? When the legislature
10 did this, we assume the legislature, and certainly the
11 fund, knew that's what the practice was, and they wrote the
12 legislation this way.

13 MR. CHASE: Exactly. And I think that was my
14 second point, and it was, I think, part of Mr. Faber's
15 point, is they were aware of Fitzgerald when they wrote the
16 law in 2013. They didn't change -- they didn't
17 specifically carve out an exception to Fitzgerald in the
18 statute.

19 And again, I didn't get to say it earlier, and I
20 know my time is up, but Zechmann is a very interesting
21 claim because the fund conceded liability under Section 25-
22 a(1), the seven and three-year portion.

23 Again, the only issue raised in that claim was
24 whether there was a statute of limitations applied, and
25 they attempted to argue that -- that death claim is -- goes



1 back to the original claim. And the -- the Court said no,
2 they're different proceedings.

3 And this goes to another question or words.
4 There are -- it seems that the Board, the Court have used
5 words interchangeably, proceeding, claim, and that has led
6 to some of the confusion. But I think the bottom line is
7 the liability issue.

8 And the Court has been very clear that once the
9 liability transfers, and this Court as well in De Mayo, the
10 Special Fund steps into the shoes and they remain liable
11 for the claim, whether it be a penalty case in De Mayo, or
12 payment of benefits for death, a consequential death, as in
13 these claims.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.

15 MR. CHASE: Thank you, Your Honor.

16 CHIEF JUDGE DIFIORE: Counsel?

17 MS. LEVINE: The entire reason why the Board
18 moved away from the language in Fitzgerald and Misquitta is
19 because this Court's decision in Zechmann is controlling,
20 but also because once this Court came down with a decision
21 in American Economy and made it very clear that the
22 legislatures intent was to close the fund as expeditiously
23 as possible, there was no other conclusion except to
24 determine that these claims -- these death benefit claims
25 were new and separate claims that could not be transferred



1 to the fund after the statutory closure date of 2014.

2 That comports well with the legislature's intent
3 here. Under Respondent's reading, the fund would have to
4 stay open to new cases for two year after the last lifetime
5 beneficiary last -- lifetime beneficiary.

6 JUDGE RIVERA: Counsel, let me ask you something,
7 please. In -- in the statute again, that language, for
8 transfer of liability of a claim to the fund. Would it --
9 could the legislature have written that for transfer of
10 liability to fund? Because it seems to me that that is
11 what is being argued that this means. Could it have
12 written it that way?

13 MS. LEVINE: I -- well, it -- it didn't. It
14 said, "Transfer of liability of a claim". The fact that
15 they included --

16 JUDGE RIVERA: No, I understand. My question is
17 if the real intent of the legislature is to say -- or
18 if what the legislature understood is if someone's --
19 if -- if the disability benefits had already been
20 transferred, then of course the consequential death
21 benefits will also follow that.

22 Could it have just written liability?

23 MS. LEVINE: Yes. Of course you --

24 JUDGE RIVERA: And that would suggest a new
25 claim?



1 MS. LEVINE: If -- if that's what the legislature
2 intended, then yes, they could've just said liability. But
3 they said liability of a claim.

4 And so the legislature is attempting to say that
5 liability of a new claim cannot be transferred. Death
6 benefit claims, as this Court has repeatedly said, not just
7 in Zechmann, but also in Hroncich are --

8 JUDGE GARCIA: How would your interpretation of
9 the statute change if liability wasn't in there? If it
10 just said transfer of a claim? Would that be different?

11 MS. LEVINE: I don't -- I don't think so.
12 Liability here, it just means responsibility.

13 JUDGE GARCIA: No, but -- no, but let's just stay
14 with that first. So --

15 MS. LEVINE: Okay.

16 JUDGE GARCIA: -- if you drop liability from the
17 statute and it just says, transfer of a claim to the fund,
18 how does your rule change?

19 MS. LEVINE: I -- I -- I don't think it -- I
20 think it --

21 JUDGE GARCIA: So then why would you put
22 liability in there?

23 MS. LEVINE: Well, I -- I think it's more
24 precise. Transfer of the claim or transfer of liability
25 for the claim. But either -- it's saying who is on the



1 hook for -- for that claim.

2 JUDGE GARCIA: And you --

3 MS. LEVINE: It's transferring the claim or
4 transferring liability.

5 JUDGE GARCIA: But I think it's the reverse
6 argument, right? So if you wanted to just say claim and
7 this is a new claim, any transfer of claim is barred. They
8 knew we called it a new claim. But they didn't say that.
9 They said transfer of liability for a claim.

10 So liability has to mean something.

11 MS. LEVINE: Well, liability means, you know,
12 whether or not the death was causally related to the
13 underlying injury. It's a matter of whether or not they've
14 made out their case for liability. Or they're -- I mean,
15 the Special Fund also has other --

16 JUDGE GARCIA: If they didn't have the case,
17 nothing transfers, right?

18 MS. LEVINE: I'm sorry?

19 JUDGE GARCIA: I mean, if there's no liability --
20 like nothing transfers then.

21 MS. LEVINE: Right.

22 JUDGE GARCIA: But to transfer liability for a
23 claim assumes that there's a valid claim there, right? So
24 it's the liability on that claim that they're getting at,
25 not the claim itself. And that's, I think what I'm having



1 trouble with, with your rule.

2 MS. LEVINE: Well -- well, it's both. There's
3 liability for a disability claim, and then liability for a
4 death benefits claim. They -- they don't -- they're --
5 they're separate and apart from each other.

6 JUDGE GARCIA: Yes. But I think Fitzgerald said
7 that liability, once you get the first, you get the second.

8 MS. LEVINE: That is -- that is what Fitzgerald
9 said, but again, that language simply can't be squared with
10 this Court's decision in Zechmann, and again, with its
11 decision in Hroncich, which said the same thing, that death
12 benefit claims are -- are separate claims.

13 And that means sense under the legislature's
14 intent here, Your Honor. If Respondent's reading is
15 correct, that would mean that the fund would have to stay
16 open for two years after the last lifetime beneficiary has
17 died. And there are more than 9,000 current lifetime
18 beneficiaries.

19 So the fund -- that would mean that up to 9,000
20 additional new claims could still -- that have not even yet
21 accrued, Your Honor, could still be transferred to the fund
22 well after the 2014 cutoff date.

23 And that simply cannot be what the legislature
24 intended here. It's contrary to the legislature's intent
25 to pass on 9,000 additional new claims to a fund that was



1 supposed to have closed in 2014. And to end these
2 assessments. The assessments in -- this Court said in
3 American Economy that the assessments at that point were
4 \$95 million in -- I'm sorry. In 2006, there were \$95
5 million. In 2020, those assessments were \$425 million.

6 The legislature intended to end those assessments
7 and to stop this huge windfall that insurance companies
8 were getting. And if those 9,000 -- even a fraction of
9 those 9,000 claims are allowed to accrue and then be
10 transferred to the fund, not only would the fund have to
11 remain open for the lifetime of all the current lifetime
12 beneficiaries, but also for the lifetime of all of their
13 survivors.

14 JUDGE RIVERA: Counsel, let me -- I just want to
15 be clear about something you said before. Let's just stick
16 with the number that you have. It -- are you saying though
17 that in each of those -- in whatever case -- that someone
18 wanted -- a survivor wants to claim death benefits, they're
19 nevertheless going to satisfy the elements of causation and
20 show that indeed, it -- it is causally related to the
21 underlying events that led to the disability?

22 MS. LEVINE: No, no. You're right, Your Honor.
23 That -- that's fair. I mean, it -- it would likely be a
24 portion of -- of those 9,000 -- 9,000 claims. I mean,
25 there -- you know, there's no indication that all 9,000



1 claims would -- would become new death benefit claims that
2 would transfer to the fund. But if --

3 JUDGE RIVERA: No, no. I'm -- I'm -- I'm -- yes,
4 I get that. But I'm saying that it -- whoever seeks --
5 whoever seeks this transfer would still have to -- the
6 survivor -- they're still going to have to be a showing of
7 that causality? Correct. Yes?

8 MS. LEVINE: Oh, yes, of course, Your Honor. And
9 in fact in both cases, in Rexford and Verneau, the -- those
10 issues were heavily litigated, whether or not the way that
11 both men died was causally related to their -- to their --

12 JUDGE RIVERA: No. But I just want to -- I may
13 have misunderstood the other Counsel, but it struck me that
14 their argument was in part, you know, the whole case, not
15 liability -- it's the case. The claim, that's transferred,
16 everything flows from it. If the employee dies, you're
17 going to get death benefits anyway.

18 I may have misunderstood them, but I was
19 concerned that perhaps you were seeing it the same and it
20 struck me -- you had said something before where you left
21 an opening that indeed, there could be a challenge to this
22 causality.

23 MS. LEVINE: No. It's -- the case doesn't
24 transfer. All the -- all that transferred in both cases
25 here was the lifetime benefit claim. Nothing else

1 transferred at the time of the lifetime benefit claim.

2 And the reason is because a death benefit claim,
3 again, is an entirely separate claim and has a different
4 claim number -- different beneficiaries, different payment
5 structure. It falls under a different Workers'
6 Compensation Law section.

7 So it simply can't be that anything else
8 transfers at the time of the lifetime benefit claim. And
9 the reason is also because that -- that claim has not yet
10 even accrued at the time that the lifetime benefit claim
11 transferred to the fund. The death benefit claim has not
12 accrued and may never accrue, depending on how the
13 underlying individual passes away or if their loved ones
14 even seek benefits. The claim might never even accrue.

15 JUDGE RIVERA: Well, the claim might accrue at
16 the point of death whether or not they can substantiate the
17 claim and their -- and their rights to the benefits is sort
18 of a different story. But --

19 MS. LEVINE: Right.

20 JUDGE RIVERA: But if I'm understanding you
21 correctly, your argument is that even upon death, that
22 doesn't mean that there's going to be any benefits paid out
23 because there still has to -- the determination that there
24 is liability for that death. That is to say that to
25 establish the causality.



1 MS. LEVINE: That's exactly right, Your Honor.
2 And I'm also going a step further to say that someone might
3 not even apply for death benefits.

4 So you know, that -- that claim just might never
5 lie because it's -- you know, it's not clear that a loved
6 one would even -- would even seek -- seek those claims.
7 That's something that, you know, surely cannot be
8 anticipated at the time that the lifetime benefit claim
9 was transferred to -- to the fund.

10 You know, in this case, one was transferred in
11 1997 and the other in 2011. And it -- at that point,
12 neither the -- the legislature had not spoken, nor had
13 this -- this Court spoken in American Economy. And again,
14 in American Economy, this Court made it very clear that the
15 fund should close as expeditiously as possible.

16 And under our reading, it would be allowed to do
17 so.

18 CHIEF JUDGE DIFIORE: Thank you, Counsel.

19 (Court is adjourned)
20
21
22
23
24
25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Karen Schwarzlose, certify that the foregoing transcript of proceedings in the Court of Appeals of Verneau v. Consolidated Edison, No. 64, and Rexford v. Gould Erectors & Riggers, No. 65 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Karen Schwarzlose

Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: October 15, 2021

