

Court of Appeals

STATE OF NEW YORK



JOSE LUIS TOLEDO, as Administrator of the Estate of JOAQUIN MARTINEZ
a/k/a JOAQUIN MARTINEZ VARGAS, Deceased,

Plaintiff-Respondent,

against

IGLESIA NI CHRISTO,

Defendant-Appellant.

**BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION
OF NEW YORK, INC. AS *AMICUS CURIAE***

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. (hereinafter "DANY") as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

The purposes of DANY are to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated cases and whose representation in such cases is primarily for the defense and also those whose practice consists in representing insurance companies, self-insured firms and corporate defendants; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings related to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standard of trial practice and develop, establish and secure court adoption or approval of a high standard code of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and information in law schools

and emphasizing trial practice for defense attorneys; to inform its members and their clients of developments in the courts and legislatures affecting their practice and by proper and legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just personal injury claim and to present effective resistance to every non-meritorious or inflated claim; to advance the equitable and expeditious handling of disputes arising under all forms of insurance and surety contracts; to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds.

This action raises issues concerning the appropriate application of CPLR Article 50-B in cases involving damages for wrongful death. The methodology advanced by plaintiff, and accepted by the lower courts, allows for pre-verdict interest from the date of death on future damages. However, where, as here, the award for future damages is discounted only to the date of verdict, as opposed to the date of death, that award already includes the interest that would have been earned between the time of death and the verdict. That being the case,

plaintiff's method allows for an impermissible double recovery, which is antithetical to any scheme of just and fair compensation.

Accordingly, the determinations of the courts below should be reversed.

STATEMENT OF FACTS

The Damages Awarded

Plaintiff's decedent lost his life in a construction site accident on September 21, 2002. (A 9) (References to the Appendix are preceded by "A"). Following the entry of summary judgment on the issue of liability on August 14, 2006 (A 8), this wrongful death action proceeded to a seven day trial on damages in late November 2007. (A 8). The jury awarded plaintiffs \$560,000 for past damages, including \$150,000 for pain and suffering, \$310,000 for past lost earnings, \$35,000 for past loss of household services, and \$65,000 for past lost of parental guidance. (A 9). The jury also awarded plaintiff \$2,650,000 of future damages, comprised of \$2,000,000 for future lost earnings and \$650,000 for future loss of parental guidance. (A 9).

The jury, however, did not award any damages for future lost household services. Upon the grant of plaintiff's post-trial motion seeking a new trial as to future lost household services, the parties stipulated on August 7, 2008 to an award of \$912,000 for future lost household services for 38 years. (A 36). The total future damages awarded prior to the application of Article 50-B of the New York Civil Practice Laws and Rules ("Article 50-B"), therefore, was \$3,562,000.

Thereafter, the award for future lost earnings was

discounted to a present value as of the date of the verdict of \$1,743,594. (A 44). The award for future lost household services was discounted to a present value as of the date of the verdict of \$783,064. (A 44). The award for future lost parental guidance was discounted to a present value as of the date of the verdict of \$578,190. (A 44)

Plaintiff's Proposed Judgment

Plaintiff served a proposed Article 50-B judgment on or about August 25, 2008, which was noticed for settlement on September 7, 2008. (A 35-46). While correctly applying the complex Article 50-B formula to most aspects of the judgment, the proposed judgment also included a calculation of pre-verdict interest on future wrongful death damages. Specifically, the proposed judgment further discounted the award for future lost earnings, already discounted to the present value at the time of verdict, to a present value as of the date of death of \$1,396,424. (A 44). It further discounted the already discounted award for future lost household services to a present value as of the date of death of \$627,460, and the already discounted award for future lost parental guidance and further discounted to a present value as of the date of death of \$463,581. (A 44). The plaintiff's proposed judgment then calculated pre-verdict interest on the twice discounted future wrongful death damages from the date of death. (A 44).

The Defendant's Proposed Counterjudgment

Defendant served a proposed judgment which was substantially similar to the plaintiff's proposed judgment with the exception of the calculation of pre-judgment interest. (A 60-70). The defendant's proposed judgment discounted future damages in excess of \$250,000 to present value as of the date of verdict for the purpose of calculating attorney's fees and pre-judgment interest, as required under Article 50-B. (A 60-70). It also calculated the present value of the annuity contract for future damages in excess of \$250,000. (A 63).

However, unlike the plaintiff's proposed judgment, which calculated pre-verdict interest on the future wrongful death damages component of the award from the date of death, defendant's proposed judgment provided for interest on the non-lump sum portion of the future wrongful death damages award from the date of the liability verdict. (A 62-63).

Plaintiff's Opposition to Defendant's Proposed Judgment

On October 17, 2008, plaintiff submitted a revised proposed judgment along with two affirmations from his attorney and another affirmation from the general counsel of a company which brokers structured settlements (A 71-104). This latter affirmation, from Martin Jacobson, Esq., further enumerated plaintiff's position that interest on the future wrongful death damages was to be calculated from the date of death. (A 95-104).

Entry of Judgment and Defendant's Motion to Resettle

On October 23, 2008, the trial court entered plaintiff's proposed judgment. (A 8-23). On or about December 15, 2008, defendant moved to resettle the judgment on the ground that the judgment was contrary to this Court's holding in Milbrandt v. A.P. Green Refractories Co., 79 NY2d 26, 580 N.Y.S.2d 147 (1992). (A 106-124). That application was supported by an affidavit of Fred Goldman, Ph.D., an economist having significant experience in the preparation of judgments pursuant to Article 50-B. (A 126- 131). Dr. Goldman explained in his affidavit that because a judgment under Article 50-B discounts future damages to the date of verdict, further discounting to the date of death results in a double recovery of pre-verdict interest on future damages. (A 130).

Shortly after the defendant's motion was filed, the parties entered into the first of two stipulations which limited the dispute to the sole issue of whether the trial court correctly discounted future wrongful death damages back to the date of death and awarded interest from the date of death to date of judgment. (RA 3-8).

The trial court, by order entered April 1, 2009, construed defendant's application as one for reargument and denied defendant's motion. (A 33).

**Defendant's Appeal from the Judgment and Order
Denying Resettlement**

Defendant timely appealed from both the judgment and the trial court's order denying its motion for resettlement. (A 4-5; 29-30). The parties entered into a second stipulation on December 29, 2009, relating to the scope of the appeal and the parties' obligations which would accrue as a result of the issue's determination. (RA 1-2). As limited by the stipulation, the sole issue before the Appellate Division, First Department was whether the trial court erred in discounting the future wrongful death damages back to the date of death and awarding pre-verdict interest on those damages from the date of death to the date of verdict (RA 1).

By Decision and Order dated March 2, 2010, the Appellate Division unanimously reversed the judgment insofar as appealed from and remanded the matter to the trial court for a calculation of interest only on the non-lump sum portion of the future wrongful death damages commencing on the date of the verdict. (A 177-178); Toledo v. Iglesia Ni Cristo, 71 A.D.3d 404, 894 N.Y.S.2d 869 (1st Dep't 2010).

Plaintiff's Motion to Reargue in the Appellate Division

Thereafter, plaintiffs moved for reargument or, alternatively, leave to appeal to this Court. By Decision and Order dated July 6, 2010, the Appellate Division granted plaintiff's motion and, upon reargument, without explaining any error in its prior decision, vacated and recalled that decision and affirmed the judgment of the trial court. (A 172-173); Toledo v. Iglesia Ni Cristo, 75 A.D.3d 436, 903 N.Y.S.2d 741 (1st Dept. 2010).

This Court then granted leave to appeal on October 26, 2010. (A 164).

POINT I

**THE METHODOLOGY ADOPTED BY THE COURTS
BELOW ALLOW FOR AN IMPERMISSIBLE
DOUBLE RECOVERY**

The issue before this Court is whether the trial court correctly discounted future wrongful death damages to the date of death and awarded interest from the date of death to the date of judgment. It is respectfully submitted that the Supreme Court erroneously answered this issue in the affirmative, and the Appellate Division improperly reversed itself without explanation and agreed with the trial court. These holdings are contradicted by this Court's precedent and the intent of Article 50-B.

Much like its companion statute 50-A, 50-B was a "technical administrative scheme [] intended to regulate and structure payment, and [it] should not be construed in such a way as to increase the underlying liability owed by defendants." (emphasis added) (citation omitted). Pay v. State, 87 N.Y.2d 1011, 1013, 643 N.Y.S.2d 467, 468 (1996). Both 50-A and 50-B were part of a larger package of tort-reform legislation (see, Memorandum of State Consumer Protection Board, Bill Jacket, L.1986, ch. 682) and were devised to reduce costs to government and private businesses. (see, Attorney General's memorandum in support for S.1939-A, July 21, 1986, Bill Jacket, L.1986, ch.

682). The theory behind the statutes was that by structuring a portion of the large awards for future damages, the injured party would be guaranteed that compensation as the need arose, while the defendant/insurer "paying a judgment in periodic installments [would] reduce[] the overall cost of the judgment by permitting the insurer to retain and invest the balance of the award before installments come due". (Governor's Program Mem., Bill Jacket, L.1985, ch. 294, at 7-8).

50-B's basic operation is fairly straightforward: past damages are paid in a lump sum (CPLR 5041(b)). Future damages, which are awarded by the jury without reduction to present value (CPLR 411(f)), are bifurcated for purposes of Article 50-B. The first \$250,000 is paid as a lump sum (CPLR 5041(b)). The remainder, after subtraction of attorney's fees and other adjustments, is to be paid in periodic installments. (CPLR 5041(e), which also requires defendants to purchase an annuity contract). See, Rohring v. City of Niagara Falls, 84 N.Y.2d 60, 614 N.Y.S.2d 714 (1994). But as this Court cautioned, while plaintiffs have a right to be made whole, they have no right to over-compensation. Id., 84 N.Y.2d at 67.

As this was a wrongful death action, §5-4.3(a) of the Estates Powers & Trusts Law is implicated. EPTL §5-4.3(a) provides that distributees in a wrongful death action be awarded "fair and just compensation." And while the statute provides

for interest to be added to the awards, the statute should not be interpreted in such a way that would produce an absurd or unjust result. See, Milbrandt v. Green Refractories Co., 79 N.Y.2d 26, 580 N.Y.S.2d 147 (1992). According to EPTL 5-4.3, wrongful death plaintiffs are entitled to fair and just compensation and interest on "the principal sum" shall be added as follows:

The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought...Interest upon the principal sum recovered by the plaintiff from the date of decedent's death shall be added to and be a part of the total sum awarded.

Both statutes advocate for just awards to plaintiffs. But the First Department's decision allowed precisely what this Court warned against: plaintiffs have been awarded a windfall by being allowed to discount future awards to the date of death and then adding interest on those amounts. Despite plaintiffs requesting and the jury awarding specified amounts for past and future items, plaintiffs demand that the jury's entire award be discounted back to the date of death. This logic is antithetical to the facts and controlling precedent.

The jury in this case gave awards for past and future items. Indeed, it was instructed to separate its awards into

past and future. The jury did not award one lump sum, although plaintiff's calculations would effectively treat the awards as if they were one. The past awards were comprised of items from the date of the decedent's death to the date of the verdict; *i.e.*, pre-verdict. The jury's awards for the future concerned damages from the date of verdict into the future for a period specified by the jury; *i.e.*, post-verdict. They were incurred at different times, and these losses were to be treated differently, not as a combined "principal sum" as advanced by the First Department. Plaintiff misinterprets this Court's holding Rohring that "future damages should be discounted to the date of liability, which by the statute is the date of death, before interest is calculated on them." Id., 84 N.Y.2d at 69. That quoted message actually refers to Milbrandt, supra. The facts and issues in Rohring were different as Rohring did not involve a wrongful death claim, and the issue did not involve pre-verdict interest. And based upon this erroneous interpretation, plaintiffs have demanded a result that undermines the intent of 50-B and this Court's precedent.

In its decision that granted reargument, the Appellate Division cited to Milbrandt, supra, and inexplicably reversed itself citing to this Court's language "[t]he statutory term 'principal sum' is 'simply the discounted sum *without any included interest-i.e.*, discounted to the date of death'."

(emphasis in Appellate Division ruling) Toledo v. Iglesia Ni Cristo, 75 A.D.3d 436, 903 N.Y.S.2d 741 (1st Dep't 2010). The First Department, however, disregarded what this Court previously ruled. Indeed, when this Court in Milbrandt summarized the positions of the parties and the rulings by the appellate courts, it noted that it has acknowledged the merit of "the contrary holding of the Second Circuit" in Woodling v. Garrett Corp., 813 F.2d 543 (2d Cir. 1987). Milbrandt, *supra*, at 33. While this Court approved of the Second Circuit's interpretation of the statute, the First Department abandoned it, and plaintiff disregards it.

Before reviewing this Court's decision in Milbrandt, it is crucial to discuss the precedent it acknowledged and relied upon, namely, the Second Circuit's decisions in Woodling, *supra*, and Lin v. McDonnell Douglas Corp., 742 F.2d 45 (2d Cir. 1984). In Lin, plaintiff argued that interest had accrued on the entire award while the defendants sought to limit it to the losses deemed to have occurred between the date of the decedent's death and the entry of judgment. Id., 742 F.2d at 51. The Second Circuit ruled that EPTL § 5-4.3 should be "*construed as defendants contend.*" (emphasis added) Id. The purpose of the statute was to compensate for "pecuniary injuries" suffered by the distributees of the decedent's estate. Id. The pre-judgment interest provision implemented this goal by ensuring

that the distributees were compensated for the time value of the income stream the decedent would have earned between death and the entry of judgment. Id.

When it came to wrongful death recovery for future lost income under New York law, the Second Circuit noted that it was effectively split into two components: (1) compensation for pre-judgment losses, as to which interest is applied at a statutory rate (CPLR § 5004); and (2) compensation for post-judgment losses, which are discounted to present value in order to offset future earning power of a present lump sum award for future losses. Id. The Lin court decided that if pre-judgment interest were applied to the component of the award intended to compensate the plaintiff for post-judgment losses, plaintiffs would effectively receive a double recovery. Id. The Second Circuit found no basis for such a double recovery and held that pre-judgment interest was limited under New York law to losses suffered between the date of death and the entry of judgment. Id., at 51-2.

The logic of the Second Circuit is sound. In every wrongful death case, including this one, plaintiffs demand recovery for separate and distinct losses. Plaintiffs ask juries to award them, for example, past pain and suffering, past medical expenses, past lost earnings. These represent damages that will compensate the decedent's distributees for injuries

sustained from the date of date of death or an intermediate date until the time of the verdict. These awards are obviously not reduced to present value as they represent pre-verdict awards. By operation of law, 9% interest is applied to pre-verdict awards.

Plaintiffs in wrongful death cases also demand recovery for injuries in the future, for example, future lost earnings, loss of future household services, etc. And plaintiffs in this case specifically asked the jury to award them such damages. These awards for future damages are post-judgment. According to the statutory scheme devised by the Legislature, the first \$250,000 is paid in a lump sum with the remainder being discounted to the present value in order to calculate attorney's fees and pre-judgment (CPLR § 5002) interest. As these damages accrued at the time of the verdict, the Second Circuit's logical reasoning, as approved by this Court, reveals that they should be discounted to the date of the verdict, not the date of death. To hold otherwise would not give plaintiffs "fair and just compensation" but a windfall in interest.

The Second Circuit considered this issue again in Woodling, supra, where the court reiterated its prior holding in Lin that forbade the award of pre-judgment interest for post-judgment losses. Id., 813 F.2d at 559. The Second Circuit explained that if pre-judgment interest was applied to the component of

the award intended to compensate plaintiff for post-judgment losses, they would effectively receive a double recovery. Id., at 559-60. When the future loss award is discounted only to the date of judgment, there should be no pre-judgment interest on those future losses. Id., at 560. Indeed, the Second Circuit noted that in its review of cases, it appeared as though it was "prior practice . . . to discount the plaintiffs post-judgment losses all the way back to the decedent's death, in which case, the award of pre-judgment interest starting from the same date is needed to provide full compensation for the loss." Id.

Essentially, the Second Circuit concluded that adding pre-verdict interest to an award for post-verdict damages is contrary to the express purpose of the EPTL's charge that plaintiffs be awarded "just and fair compensation." This Court in Milbrandt, supra, agreed with the Second Circuit's reasoning. Plaintiff asks this Court to reject its prior rulings and rule contrary to the intent of the EPTL and 50-B.

The flaw in plaintiff's arguments concerns the fundamental difference between past and future awards and how 50-B was intended to treat future awards. According to 50-B, when a jury awards compensation for a future loss, it is to be discounted back to a particular time. This discounted amount represents a sum that, if invested at that time at reasonable rates of

return, would theoretically produce the intended amount at the future time when the loss is incurred. In Milbrandt, this Court held that when the intended amount is not discounted to the date of death, but only to the date of verdict, the award includes the return that would be earned on the principal from the date of death to the date of the verdict. Id. It continued that the effect of adding interest to such an award under EPTL § 5-4.3 would be to pay plaintiff again the return that was already included in the award. Id.

This Court's construction of the statute that excluded double recovery of interest was consistent with the settled goal that damages in a wrongful death action are to compensate the "decendent's distributees for *no more* than their pecuniary loss." (emphasis added) Id., at 35. But the inclusion of this "unearned windfall interest" that plaintiff demands in this case is "the antithesis of compensation." Id., at 35.

The plaintiffs in Milbrandt claimed that the EPTL did not distinguish between pre-verdict and post-verdict damages: only for interest on the *principal sum*. This is what plaintiff advances in this case and what the First Department relied upon. This Court cautioned, however, that the EPTL could "easily be construed to circumvent the unfair and arbitrary effects that could result from the adoption of plaintiff's construction." Id., at 36. This Court then noted that if the statutory term

"principal sum" was given its "natural meaning consistent with the sense of the statute," it would simply be "the discounted sum without any included interest; i.e., discounted to the date of death." Id. This was the language the First Department seized upon in reversing itself. This was error.

Indeed, this Court's reasoning did not end with this cited sentence, and it continued that if the damages were discounted only to the date of verdict, then that award already included interest on the principal sum from the date of death to the date of verdict, and any additional interest would constitute a windfall. Id., at 36. This Court's construction of "principal sum," which contradicts the interpretation demanded by plaintiff and followed by the First Department, avoids this anomaly and furthers the basic policy underlying EPTL 5-4.3. Id.

This Court reasoned that when losses were ongoing and spread over the period from the date of the decedent's death to the date of the verdict (i.e., pre-verdict) they may be viewed as resulting from a series of discrete losses occurring after the decedent's death. Id. at 37. If interest was computed as though losses all occurred simultaneously at the time of the decedent's death, interest was necessarily included for damages that have not yet been sustained. This Court then implicitly rejected the position advanced by plaintiffs when it noted that these amounts did "not represent interest earned on compensation

for losses actually incurred and, if added," would be "a pure windfall." Id.

With respect to an award for future losses, this Court ruled that EPTL § 5-4.3 should be construed to avoid the unfair imposition of a windfall and ruled that "(i)nterest upon the principal sum recovered" means interest computed from the time that the particular loss is sustained upon which the interest becomes due. Id., at 37.

Significantly, this Court agreed with the Second Circuit's holding in Woodling that the procedure to be followed in computing pre-verdict interest on past losses incurred at discrete times from the date of death until the date of the verdict should be as set forth in CPLR sec. 5001(b); i.e., by calculating the interest upon each item from the date it was incurred or upon all of the damages from a reasonable single intermediate date. *Therefore, the interest on future damages should be calculated from the date of the verdict as that was when it was incurred.* Id.

The focus of the Second Circuit that this Court adopted was to consider when the "loss" was incurred. Pre-verdict losses in wrongful death claims accrued at the time of death. The interest to be applied on these awards was from the date of death until the verdict, as that was when past losses ended. A jury's award of future losses accrues on the date of the

verdict, not the date of death. To discount this future award back to the date of death would be antithetical to the intent of the EPTL and 50-B. But plaintiffs continue to advocate for a windfall despite rulings to the contrary. This Court in Milbrandt explained that when damages were only discounted to the date of the verdict and not the date of death, "the award includes the return that would be earned on the principal from the date of death to the date of verdict." Id., 79 N.Y.2d at 35. Therefore, the judgment included pre-verdict interest from the date of death because it was based upon the present value of the award at the time of the verdict. Plaintiff's demands are what this Court warned against—unjust compensation—by demanding pre-verdict interest on post-verdict damages. This resulted in a \$1.2 million windfall. Accordingly, the determinations of the lower courts should be reversed.

CONCLUSION

This Court should reverse and remand this matter back to the Supreme Court for entry of an appropriate judgment consistent with the foregoing.

Dated: Jericho, New York
September 21, 2011

Respectfully submitted,

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