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## **Appellate Division, Third Department, Novara ex rel. Jones v. Cantor Fitzgerald, LP**

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**SUPREME COURT OF NEW YORK  
APPELLATE DIVISION, THIRD DEPARTMENT**

Novara ex rel. Jones v. Cantor Fitzgerald, LP<sup>1</sup>  
(decided May 5, 2005)

The September 11, 2001 terrorist attacks initiated vast shifts in the United States government's interests and priorities. First and foremost was the main goal of providing for family members who relied on those who perished in the attacks; further, there was a concern of added inflation of welfare rolls due to the limited categories of dependents entitled to receive death benefits under Workers' Compensation Law section 16.<sup>2</sup> Due to the "unprecedented and unparalleled nature and scale of the terrorist attacks,"<sup>3</sup> the legislature enacted Workers' Compensation Law section 4,<sup>4</sup> which expanded the categories set forth in Workers' Compensation Law section 16, to provide death benefits for September 11, 2001

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<sup>1</sup> 795 N.Y.S.2d 133 (App.Div. 3d Dep't 2005).

<sup>2</sup> *See id.* at 137; WORKERS' COMPENSATION LAW §16 (McKinney 2005) provides in pertinent part: "If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following: . . . a surviving spouse and a surviving child or children of the deceased under the age of eighteen years . . ."

<sup>3</sup> *Novara*, 795 N.Y.S.2d at 136.

<sup>4</sup> WORKERS' COMPENSATION LAW §4 (McKinney 2001) provides in pertinent part:

The domestic partner, at the time of death, of any employee shall, if such employee had no spouse at the time of his or her death, be deemed to be the surviving spouse of such employee for the purposes of any death benefit, including but not limited to funeral expenses, to which a surviving spouse would be entitled upon the death of such employee, and any and all such benefits shall be paid to such domestic partner.

decedents' domestic partners.<sup>5</sup> Claimant, on behalf of the child of a September 11, 2001 decedent, challenged section 4 on the basis that the provision violated the Equal Protection Clause of the United States Constitution<sup>6</sup> and the "quid pro quo" provisions of the New York State Constitution.<sup>7</sup> The appellate court held that the statutorily imposed classification was rationally related to a legitimate governmental objective and therefore could be upheld against an equal protection challenge.<sup>8</sup> The *Novara* court also found that the provision set forth in article I, section 18 of the New York State Constitution granted the Legislature the freedom to implement a system which creates specifications as to who is entitled to compensation for employment related injuries and therefore the domestic partner classification did not violate the state constitution.<sup>9</sup>

Paul Innella (decedent) was killed in the World Trade Center terrorist attacks on September 11, 2001, leaving behind his fiancée Lucy Aita and a daughter from a previous relationship.<sup>10</sup> Following the attacks, in compliance with Workers' Compensation Law section 16,<sup>11</sup> decedent's child received a \$400.00 per week death benefit.<sup>12</sup>

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<sup>5</sup> *Novara*, 795 N.Y.S.2d at 137.

<sup>6</sup> U.S. CONST. amend. XIV states in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>7</sup> *Novara*, 795 N.Y.S.2d at 136, 137; N.Y. CONST. art. I, §18 provides in pertinent part: "Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees."

<sup>8</sup> *Novara*, 785 N.Y.S.2d at 137.

<sup>9</sup> *Id.* at 137-38.

<sup>10</sup> *Id.* at 135.

<sup>11</sup> WORKERS' COMPENSATION LAW §16 states in pertinent part:

The Board, aware of pending legislation, suggested that Aita file an objection to the claimant's award on the grounds that she was decedent's domestic partner and therefore was entitled to a part of decedent's death benefit.<sup>13</sup> Shortly thereafter, Workmans' Compensation Law section 4<sup>14</sup> was enacted to enable the domestic partners of employees who were killed in the terrorist attacks to apply for death benefits.<sup>15</sup> As a result of the new legislation, Aita was entitled to \$220.00 per week, thus requiring decedent's child to share her portion of the death benefits.<sup>16</sup> Upon this finding, claimant, decedent's employer, and the employer's workers' compensation carrier sought review to determine if Aita was, in fact, decedent's domestic partner.<sup>17</sup> Claimants also contended that Workmans' Compensation Law section 4 violated the federal and state constitutions.<sup>18</sup> The Board affirmed the finding that Aita was decedent's domestic partner, but did not reach the constitutional

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If there be a surviving child or children of the deceased under the age of eighteen years or a dependent blind or physically disabled child or children of any age, but no surviving spouse then where the death occurs . . . the support of each such child until the age of eighteen years, or until the removal of the dependency of such blind or physically disabled child or children, thirty per centum of the wages of the deceased . . .

<sup>12</sup> Novara, 785 N.Y.S.2d at 135.

<sup>13</sup> *Id.*

<sup>14</sup> WORKERS' COMPENSATION LAW §4 provides in pertinent part: " 'Domestic partner' means a person at least eighteen years of age who: (a) is dependent upon the employee for support . . . as evidenced by a nexus of factors including, but not limited to, common ownership of real or personal property, common householding, children in common, signs of intent to marry . . . "

<sup>15</sup> *Novara*, 795 N.Y.S.2d at 135 (The enactment was given a retroactive effect to September 10, 2001).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

issues.<sup>19</sup> Claimant, the employer, and the carrier appealed on the grounds, among other things, that Workers' Compensation Law section 4 violates the Equal Protection Clause of the United States Constitution<sup>20</sup> and violates article I, section 18 of the New York Constitution (the "quid pro quo" provision).<sup>21</sup> Claimant contended that the expansion of categories of dependants who could avail themselves of the death benefits set forth by section 4, created a disparity between the children of non-September 11, 2001 decedents, who were entitled to the whole amount of decedents' death benefits, and the children of September 11, 2001 decedents, who would have to share the death benefits with decedents' domestic partners.<sup>22</sup>

In order to ascertain whether or not there was an equal protection violation, the court first needed to assess the classification created by the statute and, through this evaluation, determine what standard of review to apply. The court, in examining the classification invoked by section 4, concluded that a rational basis review was applicable which required the court to determine whether the statute was rationally related to a legitimate government objective.<sup>23</sup> The *Novara* court, although acknowledging that the disparity created an inequity of the law, found a clear connection between the intent and reasoning behind the passage of section 4 and the classification.<sup>24</sup> The distinction drawn among the children of

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<sup>19</sup> *Id.*

<sup>20</sup> U.S. CONST. amend. XIV.

<sup>21</sup> *Novara*, 795 N.Y.S.2d at 137; NY CONST. art. I, §18.

<sup>22</sup> *Novara*, 795 N.Y.S.2d at 136.

<sup>23</sup> *Id.* (citing *Tilles v. Gulotta*, 733 N.Y.S.2d 438 (App. Div. 2d Dep't 2001)).

<sup>24</sup> *Novara*, 795 N.Y.S.2d at 136.

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*EQUAL PROTECTION CLAUSE*

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decedents was not based on classifications such as race, national origin, gender or illegitimacy; therefore, a rational basis standard was appropriate.<sup>25</sup>

The crux of a court's determination in an equal protection challenge lies in the type of classification at issue. In *Clark v. Jeter*, the Supreme Court of the United States invalidated a Pennsylvania statute which provided that an illegitimate child, in order to seek support from his or her father, had to prove paternity through a suit which had to be brought within six years of the child's birth.<sup>26</sup> The law evinced a clear distinction between illegitimate children and legitimate children who are at any time entitled to seek support from their parents.<sup>27</sup>

The *Clark* Court, in distinguishing between the different levels of scrutiny that are applied to different types of statutory classifications, stated, "classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny."<sup>28</sup> The Court explained that between rational basis review and strict scrutiny, there exists a level of intermediate scrutiny which is employed where the classification creates a disparity based on sex or illegitimacy.<sup>29</sup> The Court recognized that they "[h]ave invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is

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<sup>25</sup> *Id.* at 136.

<sup>26</sup> *Clark v. Jeter*, 486 U.S. 456, 457 (1988).

<sup>27</sup> *Id.* at 457.

<sup>28</sup> *Id.* at 461.

<sup>29</sup> *Id.*

illogical and unjust.’ ”<sup>30</sup> The Court therefore found that the classification created by the statute was subject to an intermediate scrutiny and in order to uphold such a categorical distinction, the Court must find that the classification is substantially related to an important governmental objective.<sup>31</sup>

In *Massachusetts Board of Retirement v. Murgia*,<sup>32</sup> the Supreme Court of the United States held that a Massachusetts statute<sup>33</sup> requiring state police officers to retire by the age of 50 years, was not in violation of the Equal Protection Clause of the United States Constitution.<sup>34</sup> The Court, in determining that the disparity created among officers was not subject to strict scrutiny stated, “equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.”<sup>35</sup>

The *Murgia* Court found that the implementation of a mandatory age limit for retirement of police officers did not interfere with the exercise of a fundamental right due to the fact that there is “[n]o support [for] the proposition that a right of government employment *per se* is fundamental.”<sup>36</sup> Furthermore, the Court found that the officers were not part of a suspect class, articulating that “a

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<sup>30</sup> *Id.*

<sup>31</sup> *Clark*, 486 U.S. at 461-62.

<sup>32</sup> *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 301 (1976).

<sup>33</sup> MASS. GEN. LAWS ANN. ch. 32 §26(3)(a) (West 2005) (requiring mandatory retirement of police officers at age 50).

<sup>34</sup> *Murgia*, 427 U.S. at 317.

<sup>35</sup> *Id.* at 312.

<sup>36</sup> *Id.* at 313.

suspect class is one ‘saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’ ”<sup>37</sup> While distinctions based on age may be grounded with discriminatory animus, it cannot be said that the elderly constitute a “discrete and insular group” that is epitomized by the suspect classifications the Court has pronounced.<sup>38</sup>

Finding that a rational-basis review was suitable, the *Murgia* Court’s analysis then turned to whether the distinction in question was one which furthered a legitimate or rational purpose identified by the State and fulfilled a governmental objective.<sup>39</sup> The Court found a valid connection between protecting the citizens of the state, by assuring the physical abilities of its police force, and the mandatory retirement age; thus, validating the legislative intent behind the statute.<sup>40</sup>

In *Affronti v. Crosson*,<sup>41</sup> the New York Court of Appeals held that a judiciary law which created pay disparities between family court judges based on geographic regions,<sup>42</sup> was not in violation of

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 313-14.

<sup>39</sup> *Murgia*, 427 U.S. at 314.

<sup>40</sup> *Id.* at 314-15.

<sup>41</sup> 746 N.E.2d 1049 (N.Y. 2001) Plaintiffs, current and former judges of Monroe County, asserted that their equal protection rights under the United States and New York Constitutions were violated by statutorily enacted pay disparities between them and those judges who served in Sullivan, Putnam and Suffolk Counties. *Id.* at 1049.

<sup>42</sup> N.Y. JUD. LAW §§ 221-d, 221-e (McKinney 2005) (providing pay levels for family court judges depending on locality of the court).



the equal protection clause of the United States Constitution<sup>43</sup> or article I, section 11 of the New York State Constitution.<sup>44</sup> In *Affronti*, the court determined that a rational-basis review was applicable, stating, “[w]here a governmental classification is not based on an inherently suspect characteristic and does not impermissibly interfere with the exercise of a fundamental right, it need only rationally further a legitimate state interest to be upheld as constitutional.”<sup>45</sup> The court found that the salary differentials did not implicate a restriction of fundamental rights, nor did they involve a suspect class, thus the pay disparities set forth by the statute did not evoke a heightened scrutiny.<sup>46</sup>

As in *Affronti*, a violation of the equal protection clauses of the United States and New York Constitutions was claimed in *Tilles v. Gulotta*.<sup>47</sup> A rational basis test was applied by the court where a New York Real Property Tax Law imposed changes in assessing the taxes on property.<sup>48</sup> The court found that the challenged law neither involved a suspect class nor did it interfere with the exercise of a fundamental right therefore upholding the settled principle that a

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<sup>43</sup> US CONST. amend. XIV.

<sup>44</sup> NY CONST. art. I, §11 states in pertinent part:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state . . . .

<sup>45</sup> *Affronti*, 746 N.E.2d at 1052 (citing *Nordlinger v. Hahn*, 505 U.S 1, 10 (1992)).

<sup>46</sup> *Id.*

<sup>47</sup> 733 N.Y.S.2d 438; *See Affronti*, 746 N.E.2d at 1050.

<sup>48</sup> *Tilles*, 733 N.Y.S.2d at 440; REAL PROP. TAX. LAW §1801 (McKinney 2003) (imposing a heavier tax on owners of commercial property in Nassau County that are subject to the statute than commercial property owners in other counties throughout New York State, owners of residential property in Nassau County and commercial owners that are not subject

rational-basis review is sufficient when evaluating classifications in the context of tax law.<sup>49</sup> Supporting this notion, the court stated, “in reviewing the validity of taxation classifications, ‘the equal protection clause does not prevent State Legislatures from drawing lines that treat one class of individuals or entities differently from others unless the difference in treatment is palpably arbitrary or amounts to an invidious discrimination.’ ”<sup>50</sup> In *Tilles*, the statutorily imposed taxation distinctions made between Nassau County commercial property owners and commercial property owners in other counties throughout New York State, did not rise to the level of “invidious discrimination.”<sup>51</sup> The court found that there existed a rational basis for imposition of the statute, and the equal protection of the law under the Fourteenth Amendment and under the New York State Constitution was upheld.<sup>52</sup>

The *Novara* court found that the disparity created between children of September 11, 2001 decedents and non-September 11, 2001 decedents, did not involve a suspect class or a quasi-suspect class for purposes of equal protection analysis and therefore was not subject to a heightened level of scrutiny.<sup>53</sup> The court’s holding in *Novara* was consonant with the findings of the Supreme Court and the New York Court of Appeals, illuminating the immutable characteristics that must be present in order for a classification to be

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to the statute).

<sup>49</sup> *Tilles*, 733 N.Y.S.2d at 440-41.

<sup>50</sup> *Id.* at 441 (quoting *Trump v. Chu*, 478 N.E.2d 971, 975 (N.Y. 1985)).

<sup>51</sup> *See id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Novara*, 795 N.Y.S.2d at 136.

considered suspect.<sup>54</sup> While the statute in *Novaro* clearly creates disparate treatment through its classifications, the statute was nonetheless constitutional because it established a rational relationship between the disparate treatment and the furtherance of the state's legitimate interest in assisting its citizens.<sup>55</sup> Thus, there is no departure from the analysis set forth by the Supreme Court for an equal protection challenge under either the United States Constitution or the New York State Constitution. The underlying basis for a statutorily imposed classification presents the determinate standard to be applied by a federal or state court. The equal protection clauses of the United States Constitution and the New York State Constitution both enforce the bounds and limitations by which the legislature must abide in invoking the laws of the state and the Supreme Court and the courts of New York have both been consistent in the application of different levels of scrutiny for different types of classifications.

*Kerri Grzymala*

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<sup>54</sup> *Id.* at 54; *See Clark*, 486 U.S. at 461.

<sup>55</sup> *Novara*, 795 N.Y.S.2d at 136.