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COURT OF APPEALS
STATE OF NEW YORK

CLEMENT,

Appellant,

-against-

No. 118

DURBAN,

Respondent.

20 Eagle Street
Albany, New York
October 11, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 118, Clement v.
3 Durban.

4 Counsel.

5 MR. KATZ: Good morning, Your Honor, Meir Katz on
6 behalf of the plaintiff, may it please the court. If I
7 may, I'd like to reserve two minutes of rebuttal time?

8 CHIEF JUDGE DIFIORE: Two minutes? You may.

9 MR. KATZ: In January of 2010, the plaintiff was
10 a passenger in a car stopped at the red light.

11 JUDGE FEINMAN: So we're familiar with the facts,
12 and I would ask you - - - and I think you addressed it in
13 the footnote somewhere in your brief. But why do you
14 believe that the McBurney and Eggens tests don't apply
15 here?

16 MR. KATZ: Eggens I don't believe - - - well,
17 let's deal with McBurney first. McBurney does apply. I
18 mean it's certainly the Supreme Court - - - recent Supreme
19 Court precedent. We don't contend it doesn't apply. It
20 doesn't say anything that - - - that's dispositive here.

21 With regard to the access to courts, the Supreme
22 Court is very clear, first of all, that there is a right to
23 access to courts. It's protected by the privileges and
24 immunities clauses. What it says is that the - - - that
25 the state may not discriminatively - - - discriminatorily



1 burden that access to court in any substantial way, and
2 there was no substantial burden in that case because there
3 was no information asymmetry. Here this is a substantial
4 burden. My client is facing dismissal. My client is
5 facing at very least a 500 dollar indefinite loan that she
6 will be compelled to - - -

7 JUDGE RIVERA: But isn't the right the right to
8 reasonable and adequate access? And isn't that available?
9 If someone really can't afford it they can seek to proceed
10 without - - -

11 MR. KATZ: Well, Your - - -

12 JUDGE RIVERA: Establish their indigence or their
13 inability to pay?

14 MR. KATZ: Through poor person status. The - - -
15 the question there is why should she have to? She's being
16 asked to do something on account of her non-residency that
17 a resident similarly situated would not have to do. She
18 should - - - a non-resident would not have to go through
19 that poor person status to demonstrate - - -

20 JUDGE RIVERA: Well, the thing is residents and
21 non-residents, there are distinctions made by government
22 between them. They've been upheld by the Supreme Court.
23 So the question is here why isn't that type of framework
24 that allows for those who can't afford it, for whom it
25 perhaps is such a burden, why doesn't that satisfy the



1 reasonable and adequate access to the courts?

2 MR. KATZ: I want to get back to the specific
3 question, but I think the preliminary step I think needs to
4 be clarified. It's true that the Supreme Court has upheld
5 distinctions between residents and non-residents. That - -
6 - we don't question that. The question here is whether
7 under - - - under privileges and immunities jurisprudence
8 they're asked to be first a substantial reason demonstrated
9 by the state - - -

10 JUDGE STEIN: No, no, no. You're getting to the
11 second prong to the test. First, you have to establish
12 whether the - - - whether the access to the courts has been
13 - - - and I think this is what Judge Rivera was getting at,
14 has been unreasonably denied, whether - - - you know,
15 whether there has - - - we know that access to the courts
16 is a fundamental concern, but the first question is has - -
17 - has there been a deprivation of that access?

18 MR. KATZ: Your Honor, I disagree, I - - -
19 respectfully. The - - - once you have a substantial right
20 that's being - - - substantial right is not the right word,
21 it's misused. Once you have a fundamental privilege and
22 immunity, I think is the language that the Supreme Court
23 uses, that's being infringed upon on the basis of
24 residency, that there's discrimination on the basis of
25 residency with regard to that privilege and immunity, de



1 minimis or not it makes no difference. We're talking about
2 federalism here that's ultimately the interest that's being
3 - - - that's being injured.

4 JUDGE STEIN: And so if we disagree with you then
5 is that the end of it?

6 MR. KATZ: Just - - -

7 JUDGE STEIN: As to - - - as to whether there is
8 this first prong and - - - and that you have to meet it?
9 You say you - - - there is - - - I - - - you don't have to
10 do that.

11 MR. KATZ: Just to clarify the question, the
12 first prong regarding whether we have to prove that there
13 is some substantial access being lost?

14 JUDGE STEIN: That - - - yes.

15 MR. KATZ: No. I don't think we lose. I mean
16 it's certainly a harder case, but the - - - the access
17 that's being lost is that my client is - - - is facing
18 dismissal. She, as I understand it - - - I have not - - -
19 I don't have personal contact with her, but as I understand
20 it she's not going to or not able to pay. And she doesn't
21 want to go through the - - - the process of proving
22 indigency which - - - which she doesn't have to.

23 JUDGE WILSON: Doesn't want to or - - - doesn't
24 want to or can't?

25 MR. KATZ: Can't. I - - - I misspoke, can't.



1 JUDGE WILSON: And why can't she?

2 MR. KATZ: Why can't she? I - - - I don't know
3 her personal finances, but she says she can't afford it.

4 JUDGE WILSON: No, no, no. I'm sorry. Why can't
5 she apply for poor person status?

6 MR. KATZ: It's humiliating to - - - to go
7 through that process, to put forth her personal private
8 financial data. She doesn't want to go through that
9 process, and she shouldn't have to. It's a - - - it's a
10 burden that's being placed on her by the state on account
11 of her residency. Well, that - - - and the upshot is that
12 she's going to be denied access to court - - - access to
13 the court on the basis of her - - - her going through that
14 process. Let's say - - - let's back up. Let's say she - -
15 -

16 JUDGE RIVERA: Now there are other requirements
17 that some people individually might find distressing or
18 humiliating.

19 MR. KATZ: But Your Honor - - -

20 JUDGE RIVERA: That doesn't - - - excuse me.
21 That doesn't provide them with a mechanism to avoid the
22 requirements of the law, and I'm not really clear why her
23 personal view that it would be humiliating to present
24 information to allow a judge to determine whether or not
25 she doesn't have to post the security is enough in this



1 case. I'm not persuaded. Tell me why her personal view -
2 - -

3 MR. KATZ: It's - - - it's not a personal view.
4 I mean at least it's not dependent on her personal view. I
5 think it's first of all objectively true that to go through
6 that process to lay out your financial data and have a
7 court decide whether you're adequately poor - - - whether
8 you're a poor person, I mean that's the name the statute
9 uses, I think is - - - is - - - I say most people would
10 find to be upsetting.

11 CHIEF JUDGE DIFIORE: Does - - - does the state
12 have an interest in protecting its residents?

13 MR. KATZ: Of course. But - - -

14 CHIEF JUDGE DIFIORE: And?

15 MR. KATZ: But there's - - - there's no interest
16 here to be protected. The defendant's - - - the
17 defendant's ability to execute a judgment - - - we're
18 talking about 500 dollars. I mean it's a - - - it's an
19 incredibly small amount of money. The - - - the interest
20 in ensuring - - -

21 CHIEF JUDGE DIFIORE: So it's de minimis. That's
22 what you're saying?

23 MR. KATZ: It's more than de minimis. It has
24 nothing to do with the purported interest which the state
25 hasn't even asserted. I mean that's the point we haven't -



1 - - we haven't even mentioned. The state has never said
2 this is the issue. Everyone's assuming that the issue is,
3 well, because we - - - we want the defendants to be able to
4 go and execute their judgments. The state never said that.
5 If that is in fact the issue, why not plaintiffs? Why not
6 intervenors? I - - - I'm sorry. I forgot the question
7 that I was answering.

8 JUDGE RIVERA: The Chief Judge's question.

9 CHIEF JUDGE DIFIORE: Continue.

10 MR. KATZ: I - - - I wanted to come back to
11 another point. That's unfortunate.

12 JUDGE FAHEY: Have you - - - have you thought at
13 all about the Virginia - - - the Virginia - - - Virgin
14 Islands case?

15 MR. KATZ: Sure.

16 JUDGE FAHEY: Gerace v. Bentley?

17 MR. KATZ: Yes.

18 JUDGE FAHEY: What's the status of it right now?

19 MR. KATZ: It is final.

20 JUDGE FAHEY: As I understand, the Third Circuit
21 had denied certiorari.

22 MR. KATZ: Correct. As far as I know, it is
23 final. There's no petition for Supreme Court certiorari as
24 far as I know. The judgment stands.

25 JUDGE FAHEY: I see.



1 MR. KATZ: And it's, as far as I know, the most
2 recent - - - the only certainly state court of last resort
3 to ever address this question head-on, to ever - - - to
4 ever deal with the question of whether or not costs - - -
5 securities for costs are - - - are constitutional in this
6 context, and I - - - I think it's quite persuasive.

7 JUDGE RIVERA: Can you describe what are these
8 burdens that you say don't exist? The - - - the concern
9 that's been raised in the decisions below about the burdens
10 and the difficulties of trying to, excuse me, enforce a
11 judgment against someone who is out of state. Discuss
12 that. Or enforce the costs, excuse me.

13 MR. KATZ: I remember the - - - now the question
14 that I wanted to go back. Let me - - - let me first answer
15 that very briefly. In regard to whether or not there's a
16 subjective burden here, there's no question that there is a
17 constitutional right to privacy that - - - that's being
18 infringed. So - - - so even if you disagree with me that
19 there's an objective right to avoid humiliation - - -

20 JUDGE RIVERA: Did you make that argument below?

21 MR. KATZ: Yes.

22 JUDGE RIVERA: You made a right to privacy
23 argument below?

24 MR. KATZ: We - - - we asserted that her privacy
25 interests are being - - - are being infringed on. We



1 didn't make a claim under right of privacy per se. With
2 regard to - - - to the interests of enforcement you can - -
3 - you can enforce a judgment today between a coffee break -
4 - - in the middle of a coffee break sitting at your desk.
5 I mean there - - - there's nothing to it these days. You
6 don't need a - - - you don't need counsel. You can do it
7 electronically. If there's a hearing, which is unlikely,
8 you can do it by telephone. I mean there - - - it's very
9 simple.

10 Today the - - - most states, forty-seven states I
11 think, have uniform rules, including New York. So the - -
12 - the statute - - - the rules don't differ. We also have
13 to keep in mind we're talking about deferential burdens,
14 right. We're not - - - we're - - - this case is in Queens
15 if I remember correctly. We're not talking about
16 theoretically enforcing in Queens. We're talking about
17 enforcing upstate. You know, possibly quite far upstate in
18 Buffalo.

19 JUDGE FAHEY: Oh, God, not Buffalo.

20 MR. KATZ: I'm sorry?

21 JUDGE FAHEY: That's far. That's far, Buffalo,
22 really? Oh, my, God.

23 MR. KATZ: My apologies, Your Honor.

24 JUDGE FAHEY: You've got to get out a little, you
25 know.



1 MR. KATZ: The - - - the point is not Buffalo.
2 The point is it can be hundreds of miles away.

3 JUDGE FAHEY: Right. Don't worry.

4 MR. KATZ: So the - - - so the difference between
5 enforcing there and enforcing in - - - in New Jersey is - -
6 - is negligible and might in fact be easier to enforce in
7 New Jersey. Thank you.

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

10 MS. FILLow: Good afternoon; MacKenzie Fallow for
11 the defendants. New York's security requirement does not
12 violate the privileges and immunities clause. Access to
13 the courts of course is a fundamental right, but as Your
14 Honors have mentioned, the access needs only be reasonable
15 and adequate for the plaintiff to enforce her rights, and
16 this law provides reasonable and adequate access to the
17 courts. And in the - - -

18 JUDGE FEINMAN: So what - - - if the security for
19 costs, the legislature decides we're going to make it 6,500
20 dollars or 6,000 dollars like the Virgin Islands, then
21 what?

22 MS. FILLow: That would be a closer case, and
23 especially if there were no poor person's exemption, no
24 consideration of one's ability to pay. But here, as my
25 colleague appears to concede, it's a minimal amount of



1 money that we're talking about.

2 JUDGE STEIN: Well, what about the burden of
3 having to bare your financial circumstances and be
4 humiliated?

5 MS. FILLow: Well, we dispute that being poor is
6 humiliating. Just as being rich is not superior, being
7 poor is not humiliating. The courts have to have a
8 reasonable way to know who is entitled to poor person
9 relief. The application, you list your income and your
10 expenses and you swear that you can't pay.

11 JUDGE FAHEY: Isn't there a more fundamental
12 question? Because I don't think it - - - I don't think you
13 can - - - I don't think you can fairly argue that 500
14 dollars is unreasonable. The question is whether or not
15 it's equal justice. Isn't that really the question we
16 should consider?

17 MS. FILLow: Well, so first, he has to show a
18 fundamental right which I think your question seems to
19 imply that it's - - - it's not a serious - - -

20 JUDGE FAHEY: Well, access to the courts, right.

21 MS. FILLow: - - - of that - - - of that - - -

22 JUDGE FAHEY: Go ahead.

23 MS. FILLow: But even if you assumed that it does
24 infringe on a fundamental right, that infringement is
25 justified by the additional difficulty of collecting from



1 non-residents. They are not similarly situated, and so the
2 state is free to treat them differently.

3 JUDGE FAHEY: Is there an additional difficulty?
4 Counsel seems to argue that there really isn't.

5 MS. FILLow: He - - - he does suggest that, but
6 none of the cases or statutes he cites really hold up to
7 that. I actually have been trying to figure out how to
8 enforce a judgment in Georgia, and it's hard to even figure
9 out. And the process of figuring it out, that is the
10 burden even that a New York defendant is faced with when
11 confronted with a meritless lawsuit from someone who lives
12 in another state. So the - - -

13 JUDGE RIVERA: And if she challenged it in
14 Georgia doesn't the defendant have to go and - - - to
15 Georgia potentially?

16 MS. FILLow: In Georgia - - - Georgia has a
17 similar law but - - -

18 JUDGE RIVERA: Make an appearance in Georgia?

19 MS. FILLow: I'm sorry. Can you - - -

20 JUDGE RIVERA: So if - - - if she had challenged
21 it, if indeed there are costs that are imposed and indeed
22 let's say your clients, the defendants, seek to get the
23 costs.

24 MS. FILLow: Right.

25 JUDGE RIVERA: They want them to pay, right?



1 MS. FILLow: Yes, she could challenge it.

2 Exactly.

3 JUDGE RIVERA: She could challenge it in Georgia.

4 MS. FILLow: Yes.

5 JUDGE RIVERA: And then there would have to be an
6 appearance in Georgia or try to do something else, I don't
7 know what.

8 MS. FILLow: Exactly. And of course, the city
9 can't - - -

10 JUDGE RIVERA: So the risk exists.

11 MS. FILLow: Certainly, the risk - - -

12 JUDGE RIVERA: Is the risk enough in addition to
13 some of the other burdens you've already described - - -

14 MS. FILLow: Well, it is - - -

15 JUDGE RIVERA: - - - to satisfy the
16 constitutional standard?

17 MS. FILLow: It does satisfy the constitutional
18 standard. In fact, the Supreme Court has three times held
19 up security for cost as the prime example of something that
20 does not violate the Constitution. And - - -

21 JUDGE RIVERA: How recent was the last time?

22 MS. FILLow: I believe 1923.

23 JUDGE RIVERA: The world has changed in almost a
24 century, correct.

25 MS. FILLow: Certainly, but one of the - - -



1 JUDGE RIVERA: Isn't that really his point? The
2 world has changed. Those ideas, that - - - that
3 justification no longer holds.

4 MS. FELLOW: Well, one of those cases, Eggen from
5 1920, the Supreme Court did cite positively in *McBurney*,
6 just I think five years ago was *McBurney*. And certainly
7 things have changed, but to suggest that there is literally
8 no extra burden when you're trying to go enforce a judgment
9 in another state, that is plainly false. We may one day
10 get to the point where you can really just push a button
11 and - - - and get the money, but we are not there yet.

12 JUDGE STEIN: Isn't part of the issue, too, with
13 - - - with the costs? The costs are applied equally to all
14 of the litigants, plaintiffs, defendants, residents, non-
15 residents? But they're often of such a relatively small
16 amount that the effort and expense of trying to enforce
17 that - - - I mean if you have a million-dollar judgment,
18 obviously you're willing to - - -

19 MS. FELLOW: Right.

20 JUDGE STEIN: - - - go to - - - to certain, you
21 know, lengths to - - - to collect it. But is that relevant
22 to our analysis?

23 MS. FELLOW: Yes, that's certainly relevant. I
24 mean the cost might be 1,000 dollars, 1,500 dollars. A
25 defendant who is holding a judgment that awards him that



1 amount might try to figure out how to enforce it in Georgia
2 and just say, oh, I can't figure it out. This is too
3 complicated. And then not get the money. And that's
4 exactly the problem that this statute is intended to solve,
5 and these kinds - - -

6 JUDGE STEIN: How do we know that?

7 MS. FILLow: Well, the legislative report says
8 that and I think the draft report that my colleague points
9 out in his brief was in fact incorporated by reference into
10 the final report. That page is in our compendium behind
11 tab 1. It's the last page.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 MS. FILLow: Thank you.

14 CHIEF JUDGE DIFIORE: Counsel.

15 MR. KATZ: Thank you, Your Honor. I believe
16 McBurney makes clear - - - it doesn't speak it out this
17 way, but I think from reading the decision it's already
18 clear that there's three steps to the analysis. Step one
19 is you've - - - you determine whether there's a - - -
20 there's a right that's being infringed that impacts the
21 privileges and immunities. Step two is you look to
22 substantial burden and substantial relationship.

23 With regard to step one, which is the - - - so
24 McBurney deals with four separate interests that were - - -
25 that were alleged to be infringed. With only - - - only



1 the fourth of those, the right to access information, the
2 court goes into step one. And there you see a whole
3 discussion on history and - - - and policy and whether or
4 not there is some kind of interest being infringed here and
5 - - - and denying access to information. With regard to
6 the other three prongs of the McBurney decision, the court
7 never goes into any of that, and I - - - thought this was a
8 little too obtuse. It's hard to talk about it without the
9 decision in front of me and the time I have, but when you
10 look back at the decision you'll see what I'm talking
11 about. That on the other three - - - with regard to access
12 to courts, for example, the court - - - the Supreme Court
13 never goes through any of that. The Supreme Court says we
14 have a - - - a burden on access to courts, boom,
15 substantial burden. That's the first question.

16 And - - - and with regard to substantial burden,
17 we're talking about whether or not there's discrimination
18 only. There's no question that whether or not the FOIA, in
19 particular, affects the substantial burden. The question
20 is only whether or not that - - - that access to
21 information is being burdened. And the court said no only
22 because there's no information asymmetry. But if there
23 would have an information asymmetry, there there would have
24 been an information asymmetry that would have been a burden
25 on access to courts. The plaintiff is there. The



1 plaintiff is able to walk into the courtroom and have her
2 case heard. But the - - - the asymmetry, if there would
3 have been an access to information is enough.

4 JUDGE STEIN: Well, what if - - - what if the
5 security that had to be posted was a dollar? Would that -
6 - - would that make any difference?

7 MR. KATZ: I would want to know why the - - - why
8 the legislature did such a thing. It certainly smacks of
9 discrimination and the answer is no. If that's what's
10 going on, if they're discriminating against non-residents
11 it's unconstitutional. If - - - and - - -

12 JUDGE STEIN: Well, what if the reason why they
13 made it a dollar was that they - - - that they didn't want
14 to require people to have to go through an application for
15 poor person status?

16 MR. KATZ: It doesn't serve any purpose. A
17 dollar doesn't do anything, and that - - - that very
18 clearly I think smacks of discrimination. I want to get to
19 the legislative report very briefly. It's a draft. It was
20 a draft, the one that was incorporated into the compendium.
21 Counsel says that it was incorporated into the final
22 version. They don't recall seeing that. Even assuming
23 that's true, we're talking about an advisory committee.
24 We're not talking about the state legislature. There's no
25 indication that this state legislature assented to it.



1 There's no indication anywhere in the statute from the face
2 of the statute or any purpose section in the statute that
3 this is the purpose of the statute. You have the opinion
4 of some lawyer writing a - - - writing a report, and that
5 becomes the position of New York State. Frankly, I think
6 that's quite silly. I mean that's not the position of New
7 York State, and it's - - - it's not apparent from the
8 statute anywhere.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. KATZ: Thank you.

11 (Court is adjourned)

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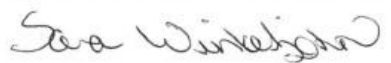
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Clement v. Durban, No. 118 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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