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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF SAGAL-COTLER,

Appellant,

-against-

No. 73

BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF THE CITY OF
NEW YORK,

Respondent.

MATTER OF THOMAS,

Appellant,

-against-

No. 74

NEW YORK CITY DEPARTMENT OF
EDUCATION,

Respondent.

20 Eagle Street
Albany, New York 12207
March 20, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

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1 CHIEF JUDGE LIPPMAN: Number 73 and 74,
2 Sagal-Cotler and Thomas.

3 MR. LICHTEN: Could I reserve two minutes
4 for rebuttal?

5 CHIEF JUDGE LIPPMAN: Two minute, sure. Go
6 ahead, counselor.

7 MR. LICHTEN: My name is Stuart Lichten. I
8 represent Josephine Thomas, the appellant. Perhaps
9 in recognition of the fact that a typical civil
10 servant might be wiped out by funding - - -

11 CHIEF JUDGE LIPPMAN: Counsel, but hasn't
12 corporal punishment been outlawed in our state?

13 MR. LICHTEN: Yes.

14 CHIEF JUDGE LIPPMAN: Doesn't that factor
15 into the earlier statute that you're relying on - - -

16 MR. LICHTEN: It factors in.

17 CHIEF JUDGE LIPPMAN: - - - where there's
18 been superseding statute and in the interim corporal
19 punishment has been outlawed in the state?

20 MR. LICHTEN: Those are all true facts, but
21 the statute remains. Section 3028 is still on the
22 books.

23 CHIEF JUDGE LIPPMAN: Yeah, but can't
24 statutes be superseded by later statutes?

25 MR. LICHTEN: They can be, but this one

1 wasn't. In 1979, when the legisl - - -

2 CHIEF JUDGE LIPPMAN: Was it - - - why
3 couldn't it, in effect, be superseded?

4 MR. LICHTEN: Because in 1979 when the
5 legislature overhauled all the laws regarding defense
6 and indemnification - - - there are about forty
7 statutes giving different employees defense
8 indemnification rights - - - the legislature amended
9 almost every one of those statutes by putting in
10 language that says things like "the provisions of
11 this section shall not apply to the City of New
12 York." But in Section 3028, even though they were
13 urged to do so by various commentators, they didn't
14 touch it. They let - - -

15 JUDGE GRAFFEO: But in 2560, they did
16 reference 50-k.

17 MR. LICHTEN: That's correct.

18 JUDGE GRAFFEO: So that's not an indication
19 that they intended to embrace where there's a
20 violation?

21 MR. LICHTEN: It's an indication that they
22 intended to put everybody else, almost every employee
23 who was - - - who was sued for acts committed on the
24 job under Section 50-k, but they didn't go to Section
25 3028 and they didn't inter - - - put any amendment in

1 that language.

2 JUDGE GRAFFEO: So because they didn't
3 repeal 3028, we can't give precedence to 2560? Is
4 that your argument?

5 MR. LICHTEN: Yes. You shouldn't give
6 precedence to 2560 because 3028 was not amended.

7 JUDGE SMITH: So you - - - are you saying
8 that if he's entitled or she's entitled to
9 indemnification under either statute, she gets it?

10 MR. LICHTEN: I'm not - - - we're not
11 arguing indemnification here. We're not arguing - -
12 -

13 JUDGE SMITH: Not indemnification, or
14 defense.

15 MR. LICHTEN: Yes. She's entitled to
16 defense under Section 3028; she should get the
17 defense. She's not entitled to it under Section 50-k
18 or Section 2560. We admit that.

19 JUDGE GRAFFEO: So the legislature has to
20 repeal 3028 if they don't want people in your
21 client's position to be entitled to defense?

22 MR. LICHTEN: Right, particularly if
23 they're amending almost every other statute that
24 deals with defense and indemnification and they leave
25 that one and it's the same state it's been in since

1 1960.

2 CHIEF JUDGE LIPPMAN: Why isn't 3028 the
3 more general statute and 2560 more specific to this
4 case?

5 MR. LICHTEN: Because Section 3028 deals
6 solely with a situation where a person is sued for
7 acts arising out of the imposition of discipline. It
8 doesn't come up very often. It's a very small group
9 of people. Narrowing a statute to just people in New
10 York City, which is eight million people, I don't
11 think that makes it the more specific statute.

12 CHIEF JUDGE LIPPMAN: But can't it be read
13 together when you - - - when the other statute talks
14 about breaking the rules, that you can't get
15 representation if you violate one of the rules?

16 MR. LICHTEN: Well, Section 3028 doesn't
17 talk about breaking any of the rules.

18 CHIEF JUDGE LIPPMAN: I know. I'm talking
19 about - - - about the other statutes - - -

20 MR. LICHTEN: Well - - -

21 CHIEF JUDGE LIPPMAN: - - - 2560 and 50-k.

22 MR. LICHTEN: Well, if those statutes
23 control, then - - - then we lose. But I don't think
24 those statutes control, and that doesn't make them
25 for specific just because they say that if you

1 violate a rule or regulation you can't take advantage
2 of the benefits that they provide.

3 CHIEF JUDGE LIPPMAN: But again, all of it
4 - - - isn't this all of this in the context of
5 there's no corporal punishment in the schools
6 anymore?

7 MR. LICHTEN: Well, there's no corporal
8 punishment, but even the respondent, the City,
9 concedes that, that you can use force in self-
10 defense, you can use force in defense of others, and
11 this is a statute that provides not indemnification
12 but just a lawyer, so it's - - -

13 JUDGE PIGOTT: What's the practical effect
14 of this?

15 MR. LICHTEN: Of Section 3028?

16 JUDGE PIGOTT: Let's assume you don't get a
17 defense. What's the practical effect of it?

18 MR. LICHTEN: Probably the people in this
19 situation will default.

20 JUDGE PIGOTT: I would think I'd been on
21 the phone to the plaintiff's lawyer. I mean, I just
22 don't see where the City benefits because obviously
23 you're in the scope of your employment whenever this
24 thing happened, and I would think that the - - - that
25 if I was the City, I'd want to keep you on my side,

1 but if - - - if you're not providing me with a
2 defense, I would think I'd been talking to the
3 plaintiff's lawyer about how I - - - how I'm supposed
4 to testify.

5 MR. LICHTEN: Well, people in this
6 situation, they - - - I don't know what they're
7 supposed to do because they can't afford to hire an
8 attorney to defend themselves against a regular
9 lawsuit. That would take in these cases probably a
10 year or two of their - - -

11 JUDGE PIGOTT: Would their homeowner's kick
12 in?

13 MR. LICHTEN: I don't think so, not for on-
14 the-job allegations.

15 JUDGE SMITH: Let me ask, and I think maybe
16 this is going in the same direction Judge Pigott was
17 going. As a practical matter, if we go your way in
18 this case, does that make it more or less likely that
19 plaintiffs in these kinds of cases are going to wind
20 up getting money out of the City, or is it completely
21 irrelevant?

22 MR. LICHTEN: I don't think it's relevant
23 either way. I mean, what'll happen is what happened
24 for fifty years which is that the City, which is
25 almost always a co-defendant in these cases, will

1 have the same lawyer, the same Assistant Corporation
2 Counsel representing both.

3 JUDGE GRAFFEO: Do we have - - - in the
4 course of deciding this case, do we have to determine
5 if engaging in corporal punishment is acting outside
6 the scope of your employment?

7 MR. LICHTEN: Well, the court below found
8 that this was - - - it was within the scope of the
9 employment because it was in a classroom but found
10 that it wasn't in discharge of her duties. I mean, I
11 don't understand how that could be. I mean, there
12 has to be a finding that it's within the scope of the
13 employment and within the discharge of her duties in
14 order for her to receive a defense under Section
15 3028, but the court below found that it wasn't within
16 the discharge of the duties. The dissent said that
17 defies common sense, and I agree with them.

18 CHIEF JUDGE LIPPMAN: Okay, counselor.
19 You'll have your - - - your rebuttal.

20 MR. LICHTEN: Thank you.

21 MS. GAMBELLA: Good afternoon, Your Honors.
22 Ariana Gambella, I'm of counsel to Richard
23 Casagrande, and I'm the attorney for the appellant,
24 Deb - - - Deborah Sagal-Cotler.

25 CHIEF JUDGE LIPPMAN: Do you want any

1 rebuttal time, counselor?

2 MS. GAMBELLA: I've given my - - -

3 CHIEF JUDGE LIPPMAN: Okay.

4 MS. GAMBELLA: I'll go with my length of
5 time.

6 CHIEF JUDGE LIPPMAN: So you're going to
7 take your full - - -

8 MS. GAMBELLA: Five minutes.

9 CHIEF JUDGE LIPPMAN: - - - five minutes.

10 MS. GAMBELLA: Thank you.

11 CHIEF JUDGE LIPPMAN: Go ahead.

12 MS. GAMBELLA: Respondent's contention that
13 Education Law Section 3028 does not apply to Ms.
14 Sagal-Cotler, a modestly paid, public servant of New
15 York City, is an argument that fails, and it's
16 unfortunately one that the majority bought. 3028 is
17 still alive and well.

18 CHIEF JUDGE LIPPMAN: But it's what the
19 legislature decided to do. It - - - you know, it
20 can't be based obviously on the income of, you know,
21 your client. It's what it - - - what's the intent of
22 the two later statutes and why does 3028 stay in
23 effect?

24 MS. GAMBELLA: I'm glad you brought up
25 legislative intent, Your Honor because - - -

1 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

2 MS. GAMBELLA: - - - the legislature intent
3 underlying Education Law Section 3028 was to protect
4 precisely the employees such as Ms. Sagal-Cotler,
5 modestly paid, fallible, public employees - - -

6 CHIEF JUDGE LIPPMAN: Does that change when
7 there's a change in the - - - in the law in New York
8 State in relation to corporal punishment and then
9 these two other statutes?

10 MS. GAMBELLA: No, it hasn't. And both the
11 courts and the legislature alike have acknowledged
12 that. The courts have found in cases such as
13 Timmerman, Inglis, Morel, Blood, Cutler, and Cromer
14 that 3028 is still alive and well because the
15 prohibition on corporal punishment was not something
16 just simply limited to New York City; it was done
17 statewide in 1985, and all of the cases I briefly
18 reference have all been decided since then.

19 CHIEF JUDGE LIPPMAN: So your argument is
20 that the - - - the intent of the legislature that
21 fallible human beings should be represented is not
22 changed by the - - - the sea change in how we look at
23 corporal pun - - - corporal punishment?

24 MS. GAMBELLA: That's correct, Your Honor.
25 And if we look at the trend through the legislature's

1 actions through the years, we see a broadening rather
2 than a restriction in the rights of - - -

3 JUDGE SMITH: None of the cases seem to
4 talk about and you don't - - - one of them mentions
5 it, but you don't seem to talk about is 50-k(9), the
6 subdivision 9 of 50-k, which is the 1979 statute. It
7 said, "The provisions of this section shall not be
8 construed in any way to impair, alter, limit, modify,
9 abrogate or restrict any right to defense and/or
10 indemnification provided for any governmental officer
11 in accordance with any other provision of state,
12 federal, local common law." Is that relevant here?

13 MS. GAMBELLA: It is relevant in that what
14 we see is a broadening. Again, in 1979 - - -

15 JUDGE SMITH: So you - - - I mean, you
16 would read that as saying that all they did in 1979
17 was increase the protection and not limit it?

18 MS. GAMBELLA: They did by leveling the
19 playing field and brought other employees besides
20 firefighters, policemen, and teachers up to the level
21 that those three categories of employees were at in
22 1979, finding that there is no justification to limit
23 rights to legal representation and indemnification to
24 just those three groups; let's bring everyone else up
25 such as ambulance drivers, other employees of the

1 city to the level that teachers, firefighters, and
2 policemen were at.

3 Additionally, looking at the plain meaning
4 of the - - - or plain reading of the statutes that
5 are at issue here, we feel that they each apply
6 notwithstanding any inconsistent provisions of law to
7 the contrary. That shows, again by the plain wording
8 of the statutes, that they were meant to apply
9 despite any inconsistency that we might find exists,
10 specifically inconsistencies between 3028 and 50-k of
11 the General Municipal Law.

12 JUDGE SMITH: But they both say
13 notwithstanding anything else, right?

14 MS. GAMBELLA: They do say that, Your
15 Honor.

16 JUDGE SMITH: But if they're inconsistent,
17 it doesn't work. They can't both be - - - be
18 notwithstanding each other.

19 MS. GAMBELLA: That's correct. And if I
20 can direct your attention to the case of Alweis,
21 which was a case that this court decided in 1987, I'd
22 just to highlight Judge Kaye's particular note that
23 repeal by implication is distinctly not favored in
24 the law, and it's respectfully submitted that the
25 judiciary should not lightly infer that the

1 legislature has repealed one of its own enactments
2 when it's failed to do expressly. And we have 3028;
3 it's alive and well.

4 CHIEF JUDGE LIPPMAN: What about the
5 Dutchess County case about, you know, prior yields to
6 the later? How do you read that?

7 MS. GAMBELLA: Correct. Prior - - - the
8 statute - - - Dutchess stands for the proposition
9 that statutes which relate to the same suggest matter
10 must be constru - - - construed together, excuse me,
11 unless a contrary legislative intent is expressed.
12 And if we construe them together, a contrary
13 legislative intent is expressed, and moreover, we
14 have an inconsistent result.

15 What we have is employees in New York City
16 - - - for instance, let's take Ms. Sagal-Cotler. If
17 she were sued criminally, which she could have been
18 under a theory of assault or battery for her act of
19 slapping the student, she'd actually be entitled to
20 an attorney; however, she was sued civilly instead
21 for monetary damages, and now she's not. It's
22 respectfully submitted that the legislature could not
23 have intended that kind of inconsistent result.

24 Along the lines of - - -

25 JUDGE SMITH: Well, what is it that gives

1 her the right in a criminal case?

2 MS. GAMBELLA: I'm sorry. Could you repeat
3 that? I didn't - - -

4 JUDGE SMITH: Well, what is it that would
5 give her the indemnity in a criminal - - - the
6 defense in a criminal case?

7 MS. GAMBELLA: It would be Educational Law
8 Section 3028 which applies to civil and criminal
9 actions arising out of the discipline of a student.

10 JUDGE SMITH: Right, right, okay. You're
11 right.

12 CHIEF JUDGE LIPPMAN: Okay, counselor,
13 thanks.

14 MS. GAMBELLA: Thank you.

15 MR. REPHEN: Good afternoon. Paul Rephen
16 for the Department of Education. It's our position
17 that the right to representation for employees of
18 City School District is governed by Education Law
19 2560.

20 CHIEF JUDGE LIPPMAN: But why does 3028
21 still - - - still exist? The intent was clear and
22 the interpretation - - -

23 MR. REPHEN: Well, the intent - - -

24 CHIEF JUDGE LIPPMAN: - - - of the statute
25 that people in this situation should be represented.

1 Why - - - why - - - why is that?

2 MR. REPHEN: Because 2560 is a later
3 specific statute. It does provide - - -

4 CHIEF JUDGE LIPPMAN: Is it specifically
5 superseded though - - -

6 MR. REPHEN: It specifically - - -

7 CHIEF JUDGE LIPPMAN: - - - the flip side
8 of what we're asking your adversary?

9 MR. REPHEN: It - - - well, by implication,
10 it go - - - it extends 50-k to 2560. 25 - - - 50-k
11 specifically excludes violations of rules and
12 regulations.

13 JUDGE SMITH: But what about 50-k(9)?

14 MR. REPHEN: 50 - - - 50-k(9) - - - I don't
15 think 50-k(9) changes that, Your Honor, and I don't
16 think under - - -

17 JUDGE SMITH: What does it - - - what does
18 it mean to say that we - - - this does not impair,
19 limit or modify any - - - any right to defense under
20 any other provision of state law? Why doesn't it
21 preserve 3028?

22 MR. REPHEN: Well, our position is, if you
23 look at 3028, both on the 2560 and under 3028, after
24 the abolition of criminal - - - of corporal
25 punishment in New York State, that 3028 would not

1 extend to representation in corporal punishment
2 cases.

3 JUDGE SMITH: But - - - but why doesn't - -
4 -

5 MR. REPHEN: What we're saying, we have two
6 defenses. We're - - - we are also saying that 3028,
7 after the prohibition against corporal punishment,
8 would - - -

9 JUDGE SMITH: You're saying - - - you're
10 saying that even if there were no 2560 - - -

11 MR. REPHEN: Yes.

12 JUDGE SMITH: - - - you - - - you - - -
13 there wouldn't - - -

14 MR. REPHEN: Yes, because - - -

15 JUDGE SMITH: - - - you couldn't get a 3028
16 defense?

17 MR. REPHEN: Because 3828 (sic) states that
18 it has to be both in the scope of employment and the
19 discharge of your duties. It's our position - - -

20 JUDGE SMITH: Okay.

21 MR. REPHEN: - - - that the legislature - -
22 - the legislature, by abolishing corporal punishment,
23 making corporal punishment illegal - - -

24 JUDGE SMITH: Means you're not discharging
25 your duties if - - -

1 MR. REPHEN: Exactly.

2 JUDGE SMITH: - - - you hit a child.

3 MR. REPHEN: Exactly.

4 JUDGE SMITH: Okay. I understand that
5 point, but that's - - - that's one of your two
6 alternative arguments. Suppose we - - - suppose you
7 don't win on that one. Suppose we find that there's
8 a tension between that - - - that 3028 would cover
9 this case and that 50-k wouldn't. Why doesn't 50-
10 k(9) say even if we don't cover, you still get every
11 - - - you still get 3028?

12 MR. REPHEN: Because I think 50-k and 2560,
13 the intention of the legislature, clearly was to deny
14 representation in all cases where there's a violation
15 of a rule or a regulation.

16 JUDGE SMITH: I - - - I see the point, but
17 then why did they write a whole section to say we're
18 not denying anything cau - - - under any other
19 provision of law?

20 MR. REPHEN: I don't know exactly what that
21 means, but clearly I think in this situation it is
22 clear that the intention of the legislature here was
23 not to provide representation in civil cases where
24 there's a violation of a rule or regulation. And
25 that has - - -

1 CHIEF JUDGE LIPPMAN: As opposed to
2 criminal cases which - - -

3 MR. REPHEN: Section 50-k is a civil - - -
4 it denies representation to - - -

5 CHIEF JUDGE LIPPMAN: So 3028 still exists
6 for criminal cases?

7 MR. REPHEN: It exists, I believe, for
8 criminal cases. We're not dealing with a criminal
9 case here.

10 CHIEF JUDGE LIPPMAN: Right. But - - - but
11 it - - -

12 MR. REPHEN: And again, I guess, under our
13 argument, if there's a corporal punishment charge
14 that results in criminal prosecution, I think we
15 believe that the prohibition against corporal
16 punishment would extend to criminal cases.

17 JUDGE SMITH: Then why - - - why didn't
18 they just - - - if they're not going to protect
19 someone who hits a child - - - if 3028 doesn't
20 protect someone that hits a child under either - - -
21 in either a criminal or a civil case, why did they
22 leave it on the books? Why not just repeal it? What
23 else is it for?

24 MR. REPHEN: It - - - there are going to be
25 other disciplinary - - - it talks about situations -

1 - -

2 CHIEF JUDGE LIPPMAN: But - - - but why is

3 - - -

4 JUDGE SMITH: How - - - how do you get
5 indicted for discipline when you don't touch the
6 child?

7 MR. REPHEN: I don't know. I don't know
8 what other situations there may be which may result
9 in criminal prosecution. We're not talking about a
10 criminal prosecution, whether it has any validity in
11 criminal cases.

12 JUDGE PIGOTT: What do you envision the
13 practical effect of this if - - - if you're right?

14 MR. REPHEN: They would not be denied - - -
15 they would not have representation by the City. We
16 would not provide conflict counsel to them.

17 JUDGE PIGOTT: Then what would happen?

18 MR. REPHEN: The case would proceed. I
19 don't know that the - - -

20 JUDGE GRAFFEO: They have to retain private
21 counsel then, right?

22 MR. REPHEN: Yes, if they want to, they
23 could.

24 JUDGE PIGOTT: And then what would happen?

25 MR. REPHEN: I don't know but - - - I don't

1 know, but in the end, the interpretations of these
2 statutes shouldn't turn on the outcome of a - - - of
3 a subsequent court litigation.

4 JUDGE PIGOTT: When I was looking at the
5 logic of it, I then, I would think that if I was
6 representing one of these students I'd be in touch
7 with them in a heartbeat.

8 MR. REPHEN: That may be the case, but
9 we're dealing with statutes that talk about the right
10 to representation, and if under 2560 - - -

11 JUDGE SMITH: Yes, I mean, though in the
12 corporate world when a - - - when the individual and
13 the company are sued, very often the company is
14 delighted to defend the individual who could - - -
15 rushes to do it because they want to - - - they want
16 the defense to be consistent. Why - - - why - - -

17 MR. REPHEN: But here - - - but here - - -

18 JUDGE SMITH: Why is it not in the City's
19 interest to defend the - - -

20 MR. REPHEN: Here we're dealing with
21 statutes, one, which expressly limit the right to
22 representation which - - -

23 JUDGE PIGOTT: But you would like to
24 represent her - - -

25 MR. REPHEN: - - - which we would have - - -

1 -

2 JUDGE PIGOTT: But you - - -

3 MR. REPHEN: We would abide by - - -

4 JUDGE PIGOTT: But you - - - but you
5 can't.

6 MR. REPHEN: But the question is whether
7 the taxpayers should pay for the legal representation
8 of individuals - - -

9 JUDGE PIGOTT: I may be - - - I may be
10 exaggerating here, but I would think that if a
11 plaintiff has got a case against the City and I can
12 get the teacher to say, yeah, I just kind of lost it
13 and I don't know what happened but I hit the child
14 and I'm so sorry and he was in such pain and every -
15 - -

16 JUDGE SMITH: And I wish they trained me
17 better.

18 JUDGE PIGOTT: - - - and on and on and on.
19 And you are right in the crosshairs of now two
20 people, one of whom you could have represented and
21 you didn't. And talk about the taxpayers paying, I
22 would think that the defense cost might be less. I'm
23 - - - I'm just - - - I know it's not the statute.
24 I'm just saying - - -

25 MR. REPHEN: Be that - - -

1 JUDGE PIGOTT: - - - that the logic of it -
2 - -

3 MR. REPHEN: Be that as it may, but it
4 still - - - it doesn't turn on the question of
5 whether 2560 is applicable or 3028.

6 CHIEF JUDGE LIPPMAN: What about the
7 fairness perspective? Let's say that - - - that they
8 don't get your representation; they get a private
9 attorney and they win. Did they have no recourse?

10 MR. REPHEN: Well, they would have - - -
11 they would have no recourse. If we are correct under
12 2560 and 3028 - - -

13 CHIEF JUDGE LIPPMAN: But is that fair? Is
14 that - - - is that fair?

15 MR. REPHEN: Yes, I think that is - - -
16 that is the application of the statute.

17 CHIEF JUDGE LIPPMAN: In other words, that
18 basically the finding was they didn't do anything
19 wrong.

20 MR. REPHEN: Well - - -

21 CHIEF JUDGE LIPPMAN: It was in the
22 discharge of their duties.

23 MR. REPHEN: In - - - in Sagal-Cotler,
24 there was admission of corporal punishment. In the
25 Sagal-Cotler case - - -

1 CHIEF JUDGE LIPPMAN: Right, um-hum.

2 MR. REPHEN: - - - she admitted that there
3 was corporal punish - - - there was no doubt about
4 that. She engaged in corporal punishment.

5 JUDGE SMITH: And what about the Thomas
6 case where it's denied? Suppose she's telling the
7 truth?

8 MR. REPHEN: She was - - - there was an
9 investigation. She was given every opportunity - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but suppose she
11 wins in the lawsuit?

12 MR. REPHEN: It doesn't turn - - - as long
13 as the determination - - -

14 CHIEF JUDGE LIPPMAN: I know, but I asked
15 you is it fair?

16 MR. REPHEN: Yes, I think the denial of
17 representation is fair if it is consistent with the
18 statute, yes.

19 CHIEF JUDGE LIPPMAN: Even if it was found
20 that - - - that she acted totally within the course
21 of her employment and it was the proper thing to do
22 and there's no impropriety on her part?

23 MR. REPHEN: If the determination by the
24 Corporation Counsel not to represent, as in these
25 cases - - -

1 CHIEF JUDGE LIPPMAN: No, no, but if in the
2 case that's brought - - -

3 MR. REPHEN: No, no, no. I'm trying to
4 answer your question.

5 CHIEF JUDGE LIPPMAN: Yeah. Go ahead. I'm
6 sorry.

7 MR. REPHEN: If the Corporation Counsel
8 determination not to represent is based on factual
9 evidence and is not arbitrary and capricious, that
10 determination, then, is reasonable and fair.

11 JUDGE PIGOTT: Well, if - - -

12 MR. REPHEN: And that is the statute for
13 representation.

14 JUDGE PIGOTT: In the - - - in the
15 insurance cases where they say we're not going to
16 represent you because your act was intentional and
17 not negligent and it turns out that it wasn't, then
18 they have to pay the attorneys' fees of their insured
19 because they chose not to but they should have and
20 didn't, and then they pay it. Wouldn't that be - - -
21 wouldn't that apply here?

22 MR. REPHEN: I don't know if it would apply
23 in subsequent litigation. I don't know if there are
24 any cases on that, but I think the standard would be
25 was our determination reasonable under the

1 circumstances, and if it was, it would be sustained.

2 JUDGE PIGOTT: Think so?

3 MR. REPHEN: What would happen - - - yes.
4 What would happen in a subsequent tort case - - -

5 CHIEF JUDGE LIPPMAN: You're saying it's
6 fair because that's - - - that's what, in your view,
7 the statute says, but you're not saying it's fair
8 that they wouldn't be compensated for the having to
9 hire a private - - -

10 MR. REPHEN: Your Honor - - -

11 CHIEF JUDGE LIPPMAN: - - - because that's
12 not - - -

13 MR. REPHEN: - - - I don't know the an - -
14 -

15 CHIEF JUDGE LIPPMAN: That's not fair,
16 right?

17 MR. REPHEN: - - - an analysis of this case
18 whether or not it's fair, she should be compensated;
19 the question is whether New York City, in light of
20 the fact that these individuals engaged in corporal
21 punishment, has to provide for their defense, and we
22 believe - - -

23 CHIEF JUDGE LIPPMAN: So really that's the
24 bottom line in your - - -

25 MR. REPHEN: That's the bottom - - - the

1 legislature has said, no - - -

2 CHIEF JUDGE LIPPMAN: But the bottom line
3 is that corporal punishment was outlawed - - -

4 MR. REPHEN: It's outlawed.

5 CHIEF JUDGE LIPPMAN: - - - and therefore -
6 - -

7 MR. REPHEN: There were findings of
8 corporal punishment.

9 CHIEF JUDGE LIPPMAN: - - - that's the end
10 of - - - end of the story, yeah. Okay.

11 MR. REPHEN: In one - - - in one of the
12 cases, there was admission of corporal punishment.
13 In the other case, following an investigation - - -

14 JUDGE PIGOTT: Let's assume you're right
15 and - - - and is it part of your defense then that
16 you're not responsible for what the teacher did
17 because the teacher was using corporal punishment?

18 MR. REPHEN: New York City, in respondeat
19 superior, the Board of Education would be
20 responsible. We are not responsible for her defense
21 in a subsequent civil case.

22 JUDGE PIGOTT: I get that, no, but what - -
23 - so what I'm saying is you're fully - - - you're
24 fully prepared to pay a judgment if the proof - - -

25 MR. REPHEN: Yes, there's no doubt that

1 there was respondeat superior. But we have statutes
2 which deal with the right to representation and
3 indicate circumstances where you are not entitled to
4 representation.

5 JUDGE PIGOTT: All right. Let's assume
6 there's a judgment and let's pick a number of 50,000
7 dollars against the City who's respondeat superior.
8 Do you then proceed against the teacher for - - - for
9 indemnification?

10 MR. REPHEN: We don't know. It depends
11 upon the fact of each case. Each case would be - - -
12 we can. Each case would be decided individually at
13 the end of the case. There are questions of
14 allocation of resources, whether we would seek
15 contribution, but all that is decided at the end of
16 the case, not the - - -

17 JUDGE PIGOTT: Could you represent them if
18 you chose?

19 MR. REPHEN: On the 50-k, I think the
20 answer is no.

21 JUDGE SMITH: And so - - - could - - - is
22 this - - - I mean, has the legislature been penny
23 wise and pound foolish here? They're saving - - -
24 they're not saving anything if the Corporation
25 Counsel can do the - - - can represent two as cheaply

1 as one which sometimes it can - - -

2 MR. REPHEN: But they say - - -

3 JUDGE SMITH: - - - and they're losing
4 control of a case where they - - - where they're on
5 the hook to indemnify.

6 MR. REPHEN: What the legislature - - -
7 legislature is saying where individuals violate rules
8 and regulations - - -

9 JUDGE PIGOTT: No, we understand that.
10 What I'm saying - - - I think what we're asking you
11 is it's your nose, you can cut it off to spite your
12 face.

13 MR. REPHEN: Yes.

14 JUDGE PIGOTT: Okay.

15 CHIEF JUDGE LIPPMAN: Okay. Thanks,
16 counselor.

17 Counselor.

18 MR. LICHTEN: I'd just like to compare the
19 legislature's treatment of 3020 - - - of 3028 in 1979
20 with another statute that was enacted the same year
21 as 3028 which is - - - general municipal law Section
22 50(d) which provides for defense and indemnification
23 of physicians who work for public institutions. That
24 - - - in 1979, the legislature added a subsection 2
25 to that law, saying the provisions of this action - -

1 - of this section shall not apply to the City of New
2 York. They didn't say that with Section 3028. They
3 said that with a lot of other statutes, but Section
4 3028 they left alone.

5 And with regard to the practical aspects of
6 this, I actually represent Ms. Thomas in the
7 underlying civil case. It's turning out, I think, to
8 cost the City - - - they're not only not saving any
9 money and they're not only benefitting from having
10 control over the - - - not benefitting from having
11 control over Ms. Thomas, but it's costing them more
12 because they have to - - - they have to depose Ms.
13 Thomas, they have to respond to motions that Ms.
14 Thomas makes, they have to deal with this litigation,
15 and I don't see practically what this purpose of it
16 is.

17 CHIEF JUDGE LIPPMAN: Well, you know, could
18 it be that it's not fair but that's what it - - -
19 that's what the legislature did?

20 MR. LICHTEN: It could be, but I don't
21 think it - - -

22 JUDGE PIGOTT: What I don't understand is
23 why you wouldn't move to exclude the Corporation
24 Counsel from representing the City since there's a
25 clear conflict since they represent her in her

1 employment, in her - - - in her benefits, in
2 everything else having to do with her job and
3 employment, and now they're - - - they're deposing
4 her in a case in which - - - there - - - they - - -
5 they're in conflict with her. I don't know how they
6 can stay in the case.

7 MR. LICHTEN: Well, that may be true.

8 JUDGE PIGOTT: I guess that's another
9 issue.

10 JUDGE SMITH: In your case, if the - - - if
11 it goes to trial and the City wins and Ms. Thomas is
12 found liable for a million dollars, does the city
13 have to pay the million?

14 MR. LICHTEN: And the City wins?

15 JUDGE SMITH: The City - - - the City wins,
16 but Ms. Thomas loses.

17 MR. REPHEN: I don't think - - - I don't
18 think the City would have to pay the million, but Ms.
19 Thomas obviously can't pay the million. Then I think
20 the plaintiff and - - - the plaintiff's lawyer made a
21 big mistake.

22 JUDGE SMITH: And she - - - so she has - -
23 - the City would have no respondeat superior
24 liability for her?

25 MR. LICHTEN: But you're saying that the

1 premise of the hypothetical is the City wins.

2 JUDGE SMITH: I see what you mean, but if
3 the City is found without fault - - -

4 MR. LICHTEN: But there's - - -

5 JUDGE PIGOTT: - - - Ms. Thomas is found to
6 be at fault, the City would still pay?

7 MR. LICHTEN: Yeah, the City would pay
8 under respondeat superior. They wouldn't win. I
9 mean, they - - -

10 JUDGE SMITH: So you're saying it's
11 basically impossible for the City to win if she
12 loses?

13 MR. LICHTEN: It's impossible?

14 JUDGE SMITH: Or unlikely.

15 MR. LICHTEN: It's unlikely because I think
16 the City has already conceded that this happened
17 within the scope of employment.

18 CHIEF JUDGE LIPPMAN: Okay, counselor.
19 Thank - - - thank you, everybody. Appreciate it.

20 (Court is adjourned)

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

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of the Matter of Sagal-Cotler v. Board of Education of the City School District of the City of New York, No. 73, and the Matter of Thomas v. New York City Department of Education, No. 74 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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