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COURT OF APPEALS

STATE OF NEW YORK

NASH,

Appellant,

-against-

No. 238

THE PORT AUTHORITY OF
NEW YORK AND NEW JERSEY,

Respondent.

20 Eagle Street
Albany, New York 12207
October 9, 2013

Before:

ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
PRESIDING JUSTICE KAREN K. PETERS,
APPELLATE DIVISION THIRD DEPARTMENT
PRESIDING JUSTICE HENRY J. SCUDDER,
APPELLATE DIVISION FOURTH DEPARTMENT

Appearances:

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Official Court Transcriber

1 JUDGE GRAFFEO: Number 238, Linda Nash v.
2 Port Authority of New York and New Jersey. We have
3 to wait for - - - why don't counsel come up and sit,
4 and we'll have to wait a minute for our other
5 colleagues to join us.

6 Okay, we'll proceed. Counsel, do you wish
7 to reserve any time for rebuttal?

8 MR. MANGONE: Yes, Your Honor. Thank you,
9 three minutes, if I might.

10 As this court is aware, Ms. Nash's final
11 judgment was entered in the IAS Court on January 15th
12 of 2010. And the Port Authority immediately took an
13 appeal, the only appeal it ever took from that
14 judgment, of the Appellate Division First Department.
15 Six days later after the final judgment in the Ruiz
16 case was entered, the Port Authority sought leave to
17 appeal Mr. Ruiz's judgment to this court.
18 Ultimately, it was eventually granted.

19 JUDGE PIGOTT: They brought up 5015
20 motions, as I understand it, to set aside this
21 judgment?

22 MR. MANGONE: Yes, they did, Your Honor.
23 They did after they failed - - - after the Appellate
24 Division had held that it had abandoned - - - the
25 Port Authority had abandoned all of its affirmative

1 defenses, and after the Port Authority refused to
2 appeal from that decision. So not only did the
3 Appellate Division's affirmance of Ms. Nash's final
4 judgment, which is at June 2 of 2011, well before
5 this court decided Ruiz.

6 JUDGE GRAFFEO: But isn't the issue before
7 us as to whether that statute applies to this
8 particular judgment? Whether the statute can be - -
9 -

10 MR. MANGONE: I believe that's one of the
11 issues, Your Honor.

12 JUDGE GRAFFEO: - - - for vacature of a
13 final judgment?

14 MR. MANGONE: I believe, Your Honor,
15 because when the Appellate Division affirmed - - -

16 JUDGE SMITH: Why - - - why doesn't
17 subdivision 5 of 5015(a) read right on this case?

18 MR. MANGONE: Well, for two reasons, Your
19 Honor. One, the Ruiz decision was not a decision
20 rendered in this case, but more importantly - - -

21 JUDGE SMITH: But it - - - well, it was a
22 reversal modification of vacature of a prior judgment
23 or order upon which the order is based.

24 MR. MANGONE: I don't think so, Your Honor.
25 But if I could get to my second - - - my second

1 reason?

2 JUDGE SMITH: Sure.

3 MR. MANGONE: The Appellate Division's
4 affirmance of June 2, 2011, it vacated and superseded
5 the interim order that you're talking about, which
6 was the one Ap - - - entered in April of 2008, both
7 in Ms. Nash's case, and then separately in the
8 Appellate Division. So this court - - - it's very
9 clear that once the Appellate Division's affirmance
10 of Ms. Nash's final judgment in 2011 sup - - -
11 vacated and superseded the ori - - - the earlier
12 interim order - - -

13 JUDGE SMITH: You're saying that by
14 affirming the - - - the final judgment, which
15 included the damages component, the inter - - - the
16 interim liability judgment, which was reviewed in
17 this court, ceased to exist?

18 MR. MANGONE: No, no, it never was reviewed
19 in this court, Your Honor. That's really one of the
20 issues.

21 JUDGE SMITH: You say it was never reviewed
22 in this court because it ceased to exist before we
23 decided Ruiz?

24 MR. MANGONE: Well, with respect to Ms.
25 Nash, that's correct. The or - - - the order of 2008

1 was entered separately in Ruiz and in Ms. Nash's
2 case. Ms. Nash's case has always been separate, Your
3 Honor. For twenty years we've fought to keep it - -
4 -

5 JUDGE GRAFFEO: Well, you did - - - you did
6 participate in the First's arguments - - -

7 MR. MANGONE: Yes, I did, Your Honor.

8 JUDGE GRAFFEO: - - - so what - - - what
9 does that mean, in terms of - - -

10 MR. MANGONE: Well - - -

11 JUDGE GRAFFEO: - - - analyzing the
12 situation?

13 MR. MANGONE: Well, I participated, Your
14 Honor. I sought to participate. As this court has
15 held, I was not a party. And actually, in the Ruiz
16 case itself, in a footnote, it said, although I was
17 allowed - - - Ms. Nash was allowed to participate in
18 that appeal, she was not a party, and her case was
19 not within the scope of this court's reversal of the
20 April 2008 as to Ruiz.

21 JUDGE PETERS: Counsel - - -

22 JUDGE PIGOTT: But getting - - - getting
23 back - - - I'm sorry; go ahead.

24 JUDGE PETERS: Counsel, in your - - - at
25 A100, in a letter to the court, you asserted, as I

1 understand it, that your client was a party
2 respondent.

3 MR. MANGONE: I - - - I made that - - - I
4 sought to have that happen, but I lost. And the Port
5 Authority asserted just the opposite, namely, that
6 she wasn't and could not have been.

7 JUDGE PETERS: I believe the Port Authority
8 asserted that she wasn't, prior to your
9 correspondence at A100. And as I understand it, that
10 you were calendared as a respondent, although might -
11 - - you might have been named - - - not named a party
12 respondent. Am I correct so far?

13 MR. MANGONE: Your Honor, I believe - - - I
14 don't have the day calendar for that day, but as this
15 court has already ruled, we were not a party to that
16 action.

17 JUDGE SMITH: Well, isn't it - - - I mean,
18 the record looks to me as though you were a
19 respondent until after you had a final and
20 nonappealable judgment from the Appellate Division,
21 and then you said, you know what? I - - - I don't
22 like being a respondent so much, good-bye.

23 MR. MANGONE: Well, no, Your Honor, the
24 real - - - I - - -

25 JUDGE SMITH: Which - - - which was a good

1 idea. I mean, I give you credit for effort - - -

2 MR. MANGONE: Well, I - - - I - - -

3 JUDGE SMITH: - - - but isn't that what you
4 did?

5 MR. MANGONE: The letter I wrote when I
6 said we wouldn't participate in any further
7 proceedings, was because we no longer had an interest
8 in - - - in the way the court might decide the Ruiz
9 decision, whether it would affirm it.

10 JUDGE READ: Because you had a final
11 judgment. You couldn't - - -

12 MR. MANGONE: We had a final judgment which
13 was not appealed.

14 JUDGE READ: Yeah.

15 MR. MANGONE: Which had to be appealed.

16 Now - - -

17 JUDGE SMITH: Weren't you - - - weren't you
18 a respondent on Ruiz until the moment that you
19 decided you weren't anymore?

20 MR. MANGONE: Ab - - - actually not, Your
21 Honor. We were allowed, as the court said, to
22 participate in the Ruiz appeal, but we were not a
23 party respondent. We couldn't have been. This
24 court's jurisdiction is - - - with respect to parties
25 is very limited. I - - - nobody could even have

1 stipulated it.

2 JUDGE SMITH: You were - - - you were - - -
3 you say you were not a respondent on the Ruiz appeal,
4 because the judge - - - that is you - - - because the
5 judgment - - - the order granting you judgment on
6 liability was then - - - had been superseded by the
7 final judgment.

8 MR. MANGONE: Not - - - not quite, Your
9 Honor. The Port Authority - - - there were two
10 orders. There was an order entered in my case and in
11 the Ruiz case. The Port Authority never appealed the
12 order in my case to this court. It took one appeal
13 to the Appellate Division, which was exclusive - - -
14 exclusive of any appeal to this court. So once - - -

15 JUDGE PETERS: I'm sorry, but didn't you
16 argue that the reason why you should have the
17 opportunity to brief and orally argue the Ruiz appeal
18 was because you - - - your client could be affected
19 by the decision of the Court of Appeals? And it
20 wasn't until the Appellate Division decision was
21 affirmed - - - your Appellate Division decision was
22 affirmed - - - and before the Court of Appeals
23 decision was rendered that you then said, I'm no
24 longer a respondent.

25 MR. MANGONE: Not - - - not quite, Your

1 Honor. It - - - just to be clear about it. When I
2 first asked to be heard on the Ruiz appeal, and wrote
3 probably the letter you're talking about, more than
4 nine months had passed since the Port Authority had
5 filed its notice of appeal for the Nash final
6 decision in the Appellate Division. And it was
7 refusing completely to proceed.

8 JUDGE PIGOTT: Doesn't it get us back to
9 the 5015 issue, in which there's a - - - there's an
10 application to set aside this judgment based on
11 5015(a). And as Judge Smith pointed out, there's a
12 decision upon which they base that, namely the Ruiz
13 decision. And - - - but it struck me that the judge
14 at that level didn't think he had any discretion at
15 all.

16 MR. MANGONE: He - - - the IAS court that
17 granted that motion didn't say he had any discretion.
18 He said this court had already vitiated Ms. Nash's
19 judgment when it - - -

20 JUDGE PIGOTT: So in your view, did he
21 misunderstand his authority under 5015 to say I can -
22 - - I can decide this in my discretion on a number of
23 issues? Not simply because Ruiz is where - - - you
24 know, is the final debate.

25 MR. MANGONE: I don't think so, Your Honor.

1 I just think - - - I argued before that, Judge, he
2 had a lot of - - - he had - - - in fact, the McMahon
3 case the Port Authority relied upon, he didn't do
4 anything like that. He said, the Port Authority - -
5 - the Court of Appeals has done it, so I'm going to -
6 - - it's already done here; I'm just going to do what
7 they say.

8 JUDGE PIGOTT: Well, I'm kind of throwing
9 you a softball. What I'm saying is that - - - that
10 shouldn't it go back to him, so that you can make the
11 arguments that you're making to us, which is they had
12 - - - they had a lot of opportunities to do anything
13 they wanted with respect to Nash, and granted, the
14 paths seem to cross at some point, but in the
15 interests of justice, or whatever the judge wants to
16 do, if he has that type of jurisdiction, he could say
17 I think that you should prevail.

18 MR. MANGONE: First, Your Honor, I did make
19 those arguments. They fell on deaf ears. But to get
20 back to the 5015 issue, once the Appellate Division
21 affirmed Ms. Nash's final judgment, in a superseding
22 order - - - in which, by the way, it held that the
23 Port Authority had waived all its defenses to the
24 merits of Ms. Man - - - Ms. Nash's claim, including
25 the affirmative defense that it had a - - - a

1 governmental immunity.

2 JUDGE SMITH: Now, you say it was a
3 superseding order by the - - - what did it supersede?

4 MR. MANGONE: It superseded the April 29th,
5 2008 order in the Appellate - - - the same court,
6 which was a - - - which was a interlocutory order - -
7 -

8 JUDGE SMITH: Has that - - - has that - - -

9 MR. MANGONE: - - - as entered in Ms.
10 Nash's case. That's the what the Aho - - -

11 JUDGE SMITH: Okay, help - - - help me,
12 because I'm - - - I'm fuzzy on the details. April
13 20, '08, the Appellate Division affirmed what, two
14 different liability determinations?

15 MR. MANGONE: It affirmed the liability
16 verdict rendered in the court, and - - - after a jury
17 trial. And it - - - did it under two - - -

18 JUDGE SMITH: It was one - - - it was one
19 judgment, a jury trial, in which both you and the
20 steering committee - - -

21 MR. MANGONE: It was a verdict, yes.

22 JUDGE SMITH: - - - right after that?

23 MR. MANGONE: Yes, correct, Your Honor.

24 JUDGE SMITH: And that's - - - and that's -
25 - - and that order, that April 8 order, is the

1 interlocutory order, which - - - which was later a
2 basis for a direct appeal to our court from the final
3 judgment of Ruiz.

4 MR. MANGONE: Only in the Ruiz case, not in
5 this case. The Port Authority did not take - - -

6 JUDGE SMITH: But it's the same - - - but
7 it's the same order, right?

8 MR. MANGONE: I don't - - - it may be, Your
9 Honor, but Ms. Nash - - - for all these years, I've
10 had one client with one case on one specific set of
11 facts.

12 JUDGE SMITH: I guess - - - I guess I'm
13 having trouble seeing how that April 8 - - - April
14 2008 order was not an order on which your judgment -
15 - - your final judgment was based?

16 MR. MANGONE: Well, it was, Your Honor.
17 But then it was superseded by the affirmance of 2011.
18 The Aho case in this court is very clear. That once
19 an interlocutory order - - - a judgment is entered on
20 an interlocutory order - - - the judgment and the
21 subsequent order supersedes and vacates the prior
22 interlocutory order.

23 And the only way the Port Authority could
24 possibly - - - could possibly - - - and this is,
25 again, in the Aho case - - - could possibly have

1 secured any review of the April 2008 order as in Ms.
2 Nash's case, was to appeal from the affirmance of her
3 final judgment in the Appellate Division, which I
4 repeat, not affirmance the Court of Appeals held, and
5 the Port Authority admits it in its brief in this
6 appeal.

7 It - - - it abandoned all claims of error
8 in Ms. Nash's final judgment except just to the
9 assessment of interest.

10 JUDGE PETERS: Counsel?

11 MR. MANGONE: Yes, ma'am.

12 JUDGE PETERS: In your brief, you rely upon
13 McMahon, as did the Appellate Division, and actually
14 as does opposing counsel. It seems that everyone has
15 their own interpretation of what McMahon means.

16 And in reviewing McMahon, I - - - I noted
17 that there was a particular statement in that
18 decision, where the court mentioned - - - which I
19 think applies here - - - and that's my question, do
20 you think the same facts apply here - - - "that
21 there's never been a moment from the time of the
22 explosion until today when the plaintiffs were not
23 under legal notice that their claim of liability and
24 any interlocutory or final judgment as to liability
25 was still subject to review."

1 And I'm asking whether you agree that
2 that's the case here, because as you know, when the
3 Ruiz matter was before this court, you requested the
4 opportunity to be heard on the subject of liability.

5 MR. MANGONE: Yes. And let me ask you - -
6 - answer that question in two words. No, Ms. Nash's
7 - - - when Ms. Nash's judgment was affirmed - - -
8 when the Port Authority abandoned its defenses to her
9 claim, which it did when it appealed to the Appellate
10 Division ultimately, as I've said - - - because
11 that's what the Appellate Division held - - - Ms.
12 Nash's claim was no longer subject to being defended
13 against by any affirmative defense, let alone the
14 claim of immunity, which had been waived - - -
15 irrevocably waived.

16 So there was a time when Ms. Nash's - - -
17 when her - - - when her final judgment was affirmed,
18 her claim was never under any jeopardy from any
19 affirmative defense such as - - -

20 JUDGE GRAFFEO: Counsel, you'll have your
21 rebuttal.

22 JUDGE SCUDDER: What - - - what - - -

23 MR. MANGONE: I'm sorry.

24 JUDGE SCUDDER: I just had a question.

25 JUDGE GRAFFEO: One more, please.

1 MR. MANGONE: Yes, Your Honor.

2 JUDGE SCUDDER: What would the purpose of
3 5015(a)(5) be if you could not bring a motion to
4 vacate under that section? Why have it then?

5 MR. MANGONE: Well, you have it, Your
6 Honor, for example, in some of the cases cited by the
7 Port Authority, where an arbitration award was en - -
8 -

9 JUDGE SCUDDER: Yeah.

10 MR. MANGONE: - - - was entered and a
11 judgment confirming the award was entered. The
12 arbitration award was vacated and so the judgment was
13 vacated. That's - - -

14 JUDGE SCUDDER: But you say that it does
15 not apply because your - - - the judgment that you
16 have with Nash is final.

17 MR. MANGONE: Well, it's the same - - - the
18 same parties and the same case where an order in
19 exactly that case - - - not another related case - -
20 - was reversed. The law is very clear that an order
21 that reverses - - - the same issue on another case,
22 can't be the basis for an order reversal of a
23 judgment that's been - - - of a - - - in a case
24 that's been finally concluded, where A, the case is
25 no longer in the pipeline, and B, the issue is no

1 longer in the case.

2 And that was both - - - that was the
3 situation here, I think. The issue of lia - - - of
4 affirmative - - - of, rather, immunity was no longer
5 in Ms. Nash's case when this court decided the Ruiz
6 appeal, and her case in its entirety had been
7 concluded before this court decided the Ruiz appeal -
8 - -

9 JUDGE GRAFFEO: Thank you, counsel.

10 MR. MANGONE: - - - from which it excluded
11 - - -

12 JUDGE GRAFFEO: We'll hear from you during
13 rebuttal.

14 MR. MANGONE: Thank you very much.

15 JUDGE GRAFFEO: Counsel?

16 MR. SILBERT: Yes, Your Honor.

17 JUDGE GRAFFEO: Aren't you trying to use
18 5015(a)(5) to substitute for a direct appeal that you
19 should have taken from the June 2011?

20 MR. SILBERT: We're not, Your Honor. We're
21 using 5015(a)(5) for exactly the purpose it was
22 intended, which is to make a motion, address at the
23 trial court's discretion to vacate a judgment that is
24 based - - -

25 JUDGE GRAFFEO: But is it too late - - -

1 but is it too late?

2 MR. SILBERT: No, Your Honor. In fact,
3 5015 is designed and intended to apply in exactly
4 these circumstances when - - -

5 JUDGE GRAFFEO: But when the Port - - -

6 MR. SILBERT: - - - a judgment has become
7 final and after - - -

8 JUDGE GRAFFEO: The Port Authority was here
9 in the Ruiz case - - -

10 MR. SILBERT: Yes.

11 JUDGE GRAFFEO: - - - you were asked
12 specifically about the cases that had been settled,
13 that were final. And the indication was those cases
14 that were no longer in the pipeline would not be
15 subject - - -

16 MR. SILBERT: We - - - we - - -

17 JUDGE GRAFFEO: - - - to the relief you
18 were asking for in Ruiz.

19 MR. SILBERT: We were asked about the cases
20 that had been settled, the settlements. That was the
21 question, and we said - - -

22 JUDGE READ: So they're final - - - they're
23 - - -

24 MR. SILBERT: - - - no, the settlements
25 would not be unraveled.

1 JUDGE READ: They're final - - -

2 MR. SILBERT: We never said - - -

3 JUDGE READ: They're final, but something
4 where there's a final judgment's not final.

5 MR. SILBERT: If - - - what 5015(a)(5) says
6 expressly is if - - - and it is intended to apply as
7 this court held in Lacks, in Huie, in James and a
8 number of other cases - - - it is intended to apply
9 after final judgment and after direct appeals are
10 exhausted, if the judgment is based on an order that
11 is subsequently reversed, then the judgment itself is
12 subject to vacating. That is - - -

13 JUDGE GRAFFEO: But all you had to do was
14 file a notice of appeal - - -

15 MR. SILBERT: Your Honor, remember the
16 circumstances - - -

17 JUDGE GRAFFEO: - - - after the June 2011?

18 MR. SILBERT: Remember the circumstances
19 that got us here. Ms. Nash wrote - - - and these
20 letters are at page 90 - - - 93 of the record.

21 JUDGE GRAFFEO: But our - - - our court did
22 not grant them respondent - - - her respondent
23 status.

24 MR. SILBERT: We - - - we now understand
25 that, Your Honor, but the - - - but we believed, and

1 Ms. Nash believed, and wrote at page A100 of the
2 record, that the court had, because, remember, she
3 said, this is my - - - this is the order that granted
4 me rights that is going to be reviewed in Ruiz. It
5 is, without question, my rights as against the Port
6 Authority are going to be controlled by the Ruiz
7 decision, so I should be a party respondent.

8 And we wrote back and said, you're right,
9 this is the order that granted you rights. You're
10 right; your rights are going to be controlled by this
11 decision, and you should be allowed to participate.
12 Our understanding of this court's finality
13 requirement was that she would be an interested
14 observer in amicus, not a party respondent.

15 JUDGE SMITH: So why - - - why do you
16 concede that she was - - - that we did not grant her
17 respondent status?

18 MR. SILBERT: The court - - - the court
19 ultimately said - - - I don't know if whether she - -
20 -

21 JUDGE SMITH: Isn't - - - isn't our
22 ultimate decision consistent with the idea that she
23 was a respondent until she decided to stop being a
24 respondent?

25 MR. SILBERT: I - - - if there is such a

1 thing in this court's jurisprudence, then it is
2 consistent with that. We've never seen any example
3 of a role that Ms. Nash played in this appeal in any
4 other case before this court. She was ostensibly a
5 party, but not a party, but this much is clear. She
6 knew at every second - - - because we were clear - -
7 - that her rights were being challenged. We never
8 said and never conceded that the Appellate Division
9 decision on June 2nd would in any way eliminate any
10 right for one - - -

11 JUDGE PIGOTT: First of all, why didn't you
12 appeal?

13 MR. SILBERT: We didn't appeal, Your Honor,
14 because we understood that Ms. Nash - - -

15 JUDGE GRAFFEO: But you could have filed
16 the notice of appeal and then maybe not perfected
17 once you decided - - -

18 MR. SILBERT: Well, the - - - the - - -

19 JUDGE GRAFFEO: - - - the subsequent issue.

20 MR. SILBERT: The appeal would be to this
21 court, Your Honor. We did understand that she was a
22 respondent already at the time.

23 JUDGE PIGOTT: But you were appealing - - -
24 you appealed - - - you appealed the interest.

25 MR. SILBERT: But - - -

1 JUDGE PIGOTT: In other words, you had
2 enough interest that - - -

3 MR. SILBERT: That's right, and - - -

4 JUDGE PIGOTT: I'm almost done.

5 MR. SILBERT: Yes.

6 JUDGE PIGOTT: You had enough interest in
7 the case to appeal the nine percent. It would have
8 been a small matter to have appealed the whole thing.
9 And for some reason, as your - - - your opponent
10 argues, you abandoned all of those.

11 MR. SILBERT: No, no, we absolutely did not
12 abandon anything. The - - - no - - -

13 JUDGE PIGOTT: And that's shown in your
14 notice of appeal and in your argument that you - - -

15 MR. SILBERT: It's shown in the - - -

16 JUDGE PIGOTT: I'm almost done.

17 MR. SILBERT: Yes.

18 JUDGE PIGOTT: That's shown in the notice
19 of appeal and in the argument you made at the court
20 when you were arguing the nine percent?

21 MR. SILBERT: Yes, it is. In fact, we
22 represented clearly in our brief to that court that
23 the issue of Nash's liability was before this court
24 in Ruiz, and this court's Ruiz decision would control
25 liability to her. We also said that the only issue

1 before that court was interest. That's what 5501(a)
2 - - - 5501(a)(1) says expressly. It says an appeal
3 from a final judgment brings up for review any order
4 necessarily affecting the judgment provided that that
5 order has not previously been reviewed - - -

6 JUDGE PETERS: Counsel?

7 MR. SILBERT: - - - by the court to which
8 the appeal is taken. So we had no opportunity to
9 address liability to the First Department - - -

10 JUDGE GRAFFEO: Counsel, Judge Pet - - -

11 MR. SILBERT: - - - and the First
12 Department decision clearly said we didn't.

13 JUDGE GRAFFEO: - - - Justice Peters is
14 asking you a question.

15 MR. SILBERT: Yes, Justice Peters?

16 JUDGE PETERS: What we could be seeing here
17 is some really good lawyering by plaintiff's counsel,
18 because what he did was, he asserted that his client
19 had the right to be heard on the liability portion of
20 the Ruiz case, and at the time he made that
21 assertion, that makes sense, since his client's case
22 was before the Appellate Division, and if the
23 Appellate Division didn't decide his client's case
24 before the Court of Appeals decided the Ruiz case,
25 then his client would be affected by that

1 determination.

2 But the moment the First Department decided
3 his client's appeal before the Court of Appeals
4 decided the Ruiz appeal, he said, okay, once the
5 thirty days is up, I'm golden, and I'm no longer a
6 respondent. One might call that really brilliant
7 lawyering.

8 MR. SILBERT: Maybe it is, Your Honor, but
9 here's the problem with it. Section 55 - - - Section
10 5015 says expressly that if the order on which your
11 judgment is based is reversed, then even your final
12 judgment is subject to vacature. Now, Mr. Mangone
13 conceded - - -

14 JUDGE GRAFFEO: Well, what are you - - -
15 what are you relying - - - you rely on McMahon - - -

16 MR. SILBERT: We rely on a large number of
17 decisions - - -

18 JUDGE GRAFFEO: - - - correct?

19 MR. SILBERT: - - - and - - -

20 JUDGE GRAFFEO: But in - - - in the McMahon
21 case, there was a pending notice of appeal - - -

22 MR. SILBERT: The - - - in - - -

23 JUDGE GRAFFEO: While the - - - when the
24 O'Connor case was being heard, there was a pending
25 notice of appeal.

1 MR. SILBERT: And in many other decisions
2 by this court, there was not a pending notice of
3 appeal. They were applied after final judgment and
4 after appeals were exhausted. But in McMahon, there
5 was a notice of appeal, and McMahon was a harder case
6 than this one, because the Appellate Division
7 affirmed liability after this court had reversed the
8 judgment. So there was an affirmance after - - -

9 JUDGE SMITH: But why - - - why did the - -
10 - did the court in McMahon not rely on 5015(a)(5)?

11 MR. SILBERT: I think for exactly that
12 reason, Your Honor. Because it had held - - - it - -
13 - remember, in the Appellate Division, after this
14 court reversed the liability order, the Appellate
15 Division still affirmed the judgment. So it then - -
16 - it was then, sort of, outside the mainstream of
17 5015(a)(5) but - - -

18 JUDGE SMITH: But affirmed it without
19 prejudice - - - it affirmed without prejudice to
20 post-judgment relief - - -

21 MR. SILBERT: And that's - - -

22 JUDGE SMITH: - - - which sounds like a
23 reference to 5015.

24 MR. SILBERT: It probably was, and the
25 court arguably could've - - -

1 JUDGE SMITH: Then it comes back and they
2 don't - - - and they seem to think 5015 - - - I mean,
3 this is Justice Silverman - - -

4 MR. SILBERT: Yeah.

5 JUDGE SMITH: - - - who was rarely wrong -
6 - - but he seemed to think that 5015 didn't apply.

7 MR. SILBERT: It's a puzzle. But let me
8 make one thing clear. The argument that a - - - that
9 the June 2011 Appellate Division decision superseded
10 the April 2008 order establishing liability, that was
11 waived. That was never argued below; it was not
12 argued in Ms. Nash's opening brief, and it's not what
13 was - - -

14 JUDGE PIGOTT: Everyone seems to be waiving
15 a lot things.

16 MR. SILBERT: Yeah, it's a - - -

17 JUDGE PIGOTT: Let me - - - let me ask you
18 about - - -

19 MR. SILBERT: Yes, sir.

20 JUDGE PIGOTT: - - - 5015, and we said in
21 Woodson that a court can "vacate its own judgment for
22 sufficient reason and in the interest of substantial
23 justice". Now it seemed that the nisi prius court
24 here felt that he did - - - had no choice, that based
25 on Ruiz, he had to vacate this judgment. Now

1 wouldn't you agree that he did have certain
2 discretion here? He could have taken into
3 consideration all of the arguments that both of you
4 are making here and then say, in the interest of
5 justice, I think that it - - - that this judgment
6 should be vacated or that it shouldn't?

7 MR. SILBERT: Yeah, I think it was clear in
8 the briefing at the time that he did have discretion.
9 He wrote a very short decision, but it's even more
10 clear in the Appellate Division's decision that they
11 knew that they had discretion and he - - -

12 JUDGE PIGOTT: Well, no, they said - - -
13 they said that he properly exercised, if I'm
14 remembering it right.

15 MR. SILBERT: Yeah, but - - -

16 JUDGE PIGOTT: But he - - - it sounded like
17 he wasn't exercising any discretion - - -

18 MR. SILBERT: All of the - - -

19 JUDGE PIGOTT: - - - because of Ruiz.

20 MR. SILBERT: I - - - I don't - - - I don't
21 think that's a fair reading. It is - - - admittedly,
22 it's a very short decision, but all of these
23 arguments were made at length to the Supreme Court
24 and I think he well understood that he had discretion
25 under both 5015 - - -

1 JUDGE SMITH: So you acknowledge that even
2 where an order - - - when an order on which a
3 judgment is based has been - - - has been vacated,
4 that the judge has discretion to leave the order in
5 place?

6 MR. SILBERT: We do, Your Honor.

7 JUDGE SMITH: And what - - - what sort of
8 factors would justify that kind of exercise of
9 discretion?

10 MR. SILBERT: I - - - they're not - - -
11 they're not delineated in the statute, but the - - -
12 in this case, I think the exercise of discretion to
13 vacate the judgment was well justified by the fact
14 that Ms. Nash knew at all times during these
15 proceedings that the liability in her favor was
16 subject to challenge. She participated in all of the
17 proceedings to try to impose liability. She knew
18 when she was up here - - -

19 JUDGE SCUDDER: But - - -

20 MR. SILBERT: - - - that this court's
21 decision would affect her liability.

22 Yes, sir?

23 JUDGE SCUDDER: But - - - but how about
24 finality of judgment? That'd certainly be a reason.

25 MR. SILBERT: Well, Your Honor, 50 - - -

1 again, 5015 was designed as this court said in Lacks
2 - - -

3 JUDGE SCUDDER: No, no, no. I'm talking
4 the discretion of the judge. If he decided not to
5 grant the motion, you could do it on the fact that
6 finality of judgments would be more important than
7 vacating the judgment?

8 MR. SILBERT: Well, that - - - that - - -

9 JUDGE SCUDDER: He could have done that,
10 could he not have?

11 MR. SILBERT: He may have. I don't - - - I
12 don't know what - - -

13 JUDGE SMITH: If he had waited a period of
14 years to make the same motion, presumably, it could
15 have been - - - it could have been denied on the
16 ground that he waiting too long.

17 MR. SILBERT: Arguably, it could have been,
18 but in Woodson, for example, the motion was granted
19 years after.

20 JUDGE GRAFFEO: Well, how long can you wait
21 to bring a 5015(a)(5)?

22 MR. SILBERT: In this case we waited two
23 business days, Your Honor.

24 JUDGE GRAFFEO: For default judgments,
25 there's a one-year period in the statute, but you're

1 asking us to apply it where there's no time period.

2 MR. SILBERT: The - - - the - - - and
3 that's exactly what Professor Siegel says, because
4 there is no time limit, because the grounds for which
5 vacature is justified can arise at any time. In this
6 case - - -

7 JUDGE PIGOTT: Before you go, and I know
8 your red light is on.

9 MR. SILBERT: - - - we brought it two days
10 after the - - -

11 JUDGE PIGOTT: I suppose you're going to
12 keep talking.

13 MR. SILBERT: Yes, Your Honor. Yes.

14 JUDGE PIGOTT: Judge Tingling says, "The
15 holding in Ruiz specifically eviscerates any
16 judgments, holding or finding of liability involving
17 tortious liability on behalf of the Port Authority in
18 the 1993 World Trade Center bombing. Accordingly,
19 the Port Authority's motion is granted." It sounds
20 like he didn't - - - he didn't take into
21 consideration all of the things that we're all
22 talking about here in an exercise of discretion. It
23 sounds like he's saying that because we made a
24 decision, he had no choice.

25 MR. SILBERT: Well, Your Honor, he didn't -

1 - - he didn't address those in a written decision.
2 They were ar - - - they were argued in briefing and
3 in multiple sets of letters that the parties
4 submitted to the court. So he was certainly well
5 aware of them. And again, the Appellate Division has
6 the - - - has the right, as you know, to substitute
7 its own discretion for that of the trial court, and
8 it reviewed this matter and the majority of that
9 court determined that the judgment was properly
10 vacated.

11 Yes, Judge?

12 JUDGE PETERS: His use of the term
13 "eviscerate" doesn't feel discretionary.

14 MR. SILBERT: Well, the - - - the - - - I
15 think it's - - - it's correct that the reversal of
16 the order, the April 2008 order, which is the single
17 order that affirmed the single verdict that
18 established liability in favor of every World Trade
19 Center plaintiff: Nash, Cantor Fitzgerald, everyone
20 else - - -

21 JUDGE SMITH: You're saying that any other
22 - - -

23 MR. SILBERT: That's right - - -

24 JUDGE SMITH: - - - any other result would
25 have been an abuse of discretion.

1 MR. SILBERT: Well, I - - - I think it
2 probably would have. But the - - - but - - - but
3 look, it did eviscerate the only order that ever
4 established liability in favor of any of these
5 plaintiffs. So what he said was absolutely correct.

6 JUDGE PIGOTT: No, I mean, he could've - -
7 - he could've said, you know, but - - - and - - - as
8 we keep picking on you about, you only appealed the
9 interest. You didn't - - - you didn't bring this one
10 in. You resisted their attempts to be part of it. I
11 mean, he could have made a lot of reasons that in the
12 interest of justice this judgment should have been -
13 - - should have been sustained, and not say, as far
14 as I'm concerned, the Court of Appeals has decided
15 this case and you lose. I'm - - - I'm speculating, I
16 know.

17 MR. SILBERT: He could have done that, but
18 again, it was clear at the time with the briefing
19 before him that he had discretion. All of these
20 arguments were made to him, and he decided to vacate
21 the judgment under both 5015 - - -

22 JUDGE GRAFFEO: Let me ask you a global
23 question.

24 MR. SILBERT: Yes, Your Honor.

25 JUDGE GRAFFEO: Are there other judgments

1 that are in the same position as Ms. Nash?

2 MR. SILBERT: There are not other judgments
3 that are in the exact same position in the sense that
4 they have become final and relief has been sought
5 under 5015. There are - - - the - - -

6 JUDGE GRAFFEO: There are some - - -

7 MR. SILBERT: As you may know, Cantor - - -

8 JUDGE GRAFFEO: - - - that are still in the
9 pipeline as to Ruiz?

10 MR. SILBERT: Cantor Fitzgerald - - - both
11 Cantor Fitzgerald and another plaintiff, Esposito
12 (ph.), have denied that this court's Ruiz decision is
13 effective as to them.

14 JUDGE GRAFFEO: And the settlements, where
15 do they stand?

16 MR. SILBERT: They're - - - they're - - -
17 as we told Judge Ciparik, nobody has ever contested
18 that a settlement where a party is claiming rights
19 under the settlement agreement and not under the
20 order that was vacated would be affected by this
21 court's decision. So, all - - - all of the
22 settlements are final and undisturbable. The reason
23 this case is different is 5015(a)(5) says expressly
24 if the judgment is based on an order that is
25 subsequently reversed, then the judgment is subject

1 to vacature and that is exactly what happened.

2 JUDGE PIGOTT: I'll leave alone after one
3 question, because - - -

4 MR. SILBERT: Yes, Your Honor.

5 JUDGE PIGOTT: - - - you mentioned that the
6 Appellate Division - - - they said the motion - - -
7 the motion court did not abuse its discretion by
8 vacating a final judgment where the Court of Appeals
9 had reversed the interlocutory judgment of liability.
10 So it seems like they find that Judge Tingling did
11 not abuse his - - - his discretion. They didn't say,
12 in the exercise of our discretion, we're going to
13 affirm it. I'm - - -

14 MR. SILBERT: That's what they said, Your
15 Honor. I think - - - I think you're reading quite a
16 bit into a very short order.

17 JUDGE PIGOTT: Yeah.

18 MR. SILBERT: A few sentences. If he - - -
19 you're making a, sort of, negative implication that
20 because he didn't discuss discretion, he didn't
21 realize he had it - - -

22 JUDGE PIGOTT: Well, as Judge Peters points
23 out - - -

24 MR. SILBERT: - - - but I think it was
25 quite - - - quite - - -

1 JUDGE PIGOTT: - - - when he says that it
2 "eviscerates" it, it does sound like he's saying, you
3 know, where am I going? I've got - - - I've got no
4 authority here.

5 MR. SILBERT: Well, and again, I'm not - -
6 - I'm not sure under the circumstances that he would
7 have any discretion to do anything else, but he
8 certainly knew that the - - - a 5015 motion is
9 addressed to a trial court's discretion and he knew
10 all of the factors that have been brought up here
11 today.

12 Let me just emphasize one thing. And - - -

13 JUDGE GRAFFEO: Very briefly.

14 MR. SILBERT: And please - - - please look
15 at the Appellate Division order of June 2011 as to
16 what it actually affirmed, because what it says is,
17 it - - - it affirms "insofar as appealed from and as
18 limited by the briefs". And - - - so it is affirming
19 purely the interest rate under 5501(a)(1). We didn't
20 even have a right to bring up liability again before
21 that court. We didn't bring up liability. We told
22 that court that Nash's liability would be decided by
23 this court in Ruiz. Nash understood that. The
24 Appellate Division understood that. Everybody has
25 always known - - -

1 JUDGE GRAFFEO: Thank you, counsel.

2 MR. SILBERT: - - - that this court's
3 decision would determine liability. Thank you.

4 MR. MANGONE: Your Honor, what the Port
5 Authority has just said, and that's been its position
6 here, is that even though it filed a notice of appeal
7 from each and every part of Ms. Nash - - - of Ms.
8 Nash's judgment and its totality, and wrote to this
9 court and to the Appellate Division that on that
10 appeal, it reserved the right to argue every single
11 issue in Ms. Nash's case, including its liability to
12 her, including its affirmative defenses and under the
13 2008 order.

14 It is now saying that it could voluntarily
15 limit that appeal, i.e. not raise issues of her
16 liability on that appeal, and reserve them, and raise
17 them at some later date under 5015. You cannot take
18 an appeal from each and every element of a judgment,
19 the judgment - - - any entered part thereof, and say,
20 well, we're only going to argue a couple of those
21 issues; we're going to abandon the others.

22 JUDGE SMITH: Well, but it - - - it - - -
23 it thought it was raising those issues before us in
24 the Ruiz case.

25 MR. MANGONE: I don't think so, Your Honor,

1 because then it wouldn't have said it reserved the
2 right to - - - first of all, it couldn't.

3 JUDGE SMITH: You're not - - - you're not
4 really saying, are you, that the Port Authority
5 intentionally abandoned the - - - its position in
6 Nash and was content to let you collect your judgment
7 even when it won in Ruiz?

8 MR. MANGONE: Your Honor, I'm saying that
9 it did abandon a review of the merits of Ms. Nash's
10 case itself.

11 JUDGE SMITH: You're saying that's the
12 legal effect of what it did. You're not - - -

13 MR. MANGONE: No, no, I'm saying it did it
14 actually - - -

15 JUDGE SMITH: - - - saying that when they -
16 - -

17 MR. MANGONE: - - - because Ms. Nash's case
18 presented the worst possible facts upon which this
19 liability could be determined.

20 JUDGE SMITH: You're - - - you're saying
21 that they intentionally decided to pay Ms. - - -
22 they'd risk paying Ms. Nash her money, rather than
23 have the case - - -

24 MR. MANGONE: Exactly, because the
25 ramifications of its losing its appeal in Ruiz were

1 enormous.

2 JUDGE PETERS: But counsel, if - - - if
3 you're correct, then why did you even request the
4 opportunity to be heard on the liability issue before
5 the Court of Appeals? If in reality, you're saying
6 that all the Port Authority did in your client's
7 appeal was argue interest.

8 MR. MANGONE: Well, at that time, Your
9 Honor, it wasn't clear that that was what it was
10 going to do. At the time I wrote that letter - - -

11 JUDGE PETERS: But now it is.

12 MR. MANGONE: At the time - - - no, at the
13 time, I wrote that letter, my appeal was in limbo. I
14 had no control over it. I was afraid that the Port
15 Authority would rush to judgment in Ruiz and say,
16 without any review - - - I always wanted my client's
17 case to be as - - - to be determined on the facts - -
18 - the particular facts of it. And I thought I was
19 going to get that when the Port Authority appealed to
20 the Appellate Division, because that's what it said
21 it was going to do. At the end of day, it decided it
22 wasn't going to seek that review in that court - - -

23 JUDGE PIGOTT: Were they - - - were they
24 saying - - -

25 MR. MANGONE: - - - or in this court, by

1 the way.

2 JUDGE PIGOTT: Were they saying then that
3 they were waiving any of their - - - any specific
4 claims as to Nash, but the - - - the immunity issue
5 was going up, because I don't know the facts of the
6 case.

7 MR. MANGONE: Well, Your Honor, what the
8 effect of not briefing - - - and the Appellate
9 Division held this - - - they didn't brief or argue
10 any other error in Ms. Nash's final judgment except
11 this - - - the assessment of interest.

12 JUDGE PETERS: Well, it sounds to me - - -

13 MR. MANGONE: That's waiver and
14 abandonment.

15 JUDGE PETERS: - - - like you're trying to
16 have it both ways.

17 MR. MANGONE: Pardon me?

18 JUDGE PETERS: It sounds to me like you're
19 trying to have it both ways. You're arguing they
20 only appealed the interest and therefore liability
21 was never at issue, but on the other hand, I filed a
22 hundred-page brief on the subject of liability and
23 demanded the opportunity to argue before the Court of
24 Appeals.

25 MR. MANGONE: No, I'm not saying - - - I'm

1 saying that when they appealed later, after I asked
2 to be a party to their - - - or to at least appear in
3 the Ruiz appeal, when they subsequently appealed,
4 they appealed from each and every part of Ms. Nash's
5 judgment, including the liability ruling. I didn't
6 know until they submitted their reply brief - - - and
7 actually their oral argument in the Appellate
8 Division - - - that they had actually had abandoned
9 any claim of error other than as to the interest.

10 JUDGE SMITH: Well - - - well, they
11 couldn't - - - they couldn't have briefed the - - -
12 the issues the Appellate Division had already
13 decided, could they?

14 MR. MANGONE: Yes, they could. As a matter
15 of fact, they did it before, Your Honor, because the
16 issue is - - -

17 JUDGE SMITH: Well, okay, people can brief
18 anything they want, but the - - -

19 MR. MANGONE: No, no, Your Honor - - -

20 JUDGE SMITH: - - - but the Appellate
21 Division was not going to recon - - - was not going
22 to reconsider what it already decided.

23 MR. MANGONE: I'm sorry, Your Honor, to
24 interrupt you, but the - - - that issue was decided
25 by Justice Sklar in 2004. That was not an issue in

1 the trial in which - - - the jury trial - - -

2 JUDGE SMITH: I'm losing you. What was
3 decided by Justice Sklar in 2004?

4 MR. MANGONE: Whether or not the Port
5 Authority had an immunity, a governmental function -
6 - - a governmental function immunity, from any of the
7 clients. That was not an issue in the liability
8 trial. On the appeal from the jury's verdict, the
9 Port Authority raised that issue again - - -

10 JUDGE SMITH: Oh, you're saying the
11 Appellate Division never - - - never decided
12 governmental immunity?

13 MR. MANGONE: It did - - - it did twice,
14 because it affirmed Justice Sklar's decision - - -

15 JUDGE SMITH: Oh.

16 MR. MANGONE: - - - and then when the Port
17 Authority raised it again, on its appeal from the
18 jury's verdict, where that was not an issue - - -
19 they raised it again anyway - - - the Court of
20 Appeals again affirmed it.

21 JUDGE SMITH: I guess, I'm - - - I mean,
22 maybe - - - maybe we're getting - - - or maybe we're
23 spinning our wheels, but it - - - it seems to me
24 you're putting an awful lot of weight on the fact
25 that after the Appellate Division had already twice

1 should be, but I was wrong. The Port Authority said
2 you can't make Mr. - - - Ms. Nash a party, and it was
3 right, and it won on that issue.

4 JUDGE SMITH: But you stood here and
5 argued, and - - -

6 MR. MANGONE: I argued because the - - - I
7 - - - the court said I could submit a brief if I want
8 - - - if I elected. And I elected, because at that
9 point, my case was in limbo. I had no idea what they
10 were going to do. I was afraid - - - and this has
11 always been my fear - - - that the Port Authority was
12 never going to - - - never going to submit the merits
13 of Ms. Nash's claim to review on the facts of that
14 claim, and that's what I've always wanted.

15 And that what I thought I was going to get
16 when it appealed to the Appellate Division from her
17 final judgment, which it decided not to do, and
18 that's what it could have done, had it decided to
19 appeal the affirmance to this court, which it again
20 refused to do.

21 So you have a case of a party abandoning
22 appeals, abandoning issues, and coming back later and
23 saying, no, we reserved those issues. We have a
24 right to rely upon those issues which we waived and
25 abandoned, and seek dismissal of Ms. Nash's final

1 judgment affirmed and not appealed, on the ground
2 that we've already waived.

3 JUDGE GRAFFEO: Thank you.

4 MR. MANGONE: Thank you, Your Honor.

5 JUDGE GRAFFEO: Thank you both.

6 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Nash v. The Port Authority of New York and New Jersey, No. 238 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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