

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF NICHOLAS LEMMA,

Appellant,

-against-

NO. 70

NASSAU COUNTY POLICE OFFICER
INDEMNIFICATION BOARD, ET AL.,

Respondents.

20 Eagle Street
Albany, New York
May 2, 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:

MITCHELL GARBER, ESQ.
WORTH, LONGWORTH & LONDON, LLP
Attorney for Appellant
111 John Street, Suite 640
New York, NY 10038

ROBERT F. VAN DER WAAG, ESQ.
OFFICE OF THE NASSAU COUNTY ATTORNEY
Attorney for Respondents
One West Street
Mineola, NY 11501

Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on the
2 calendar is number 70, Matter of Lemma v. Nassau County
3 Police Officer Indemnification Board.

4 Good afternoon, counsel.

5 MR. GARBER: Good afternoon. May it please the
6 court, my name is Mitchell Garber, and I represent the
7 appellant, Nicholas Lemma.

8 The statute under question here - - -

9 JUDGE RIVERA: So counsel, what - - - what does
10 the word "proper" mean in 50-L?

11 MR. GARBER: The word "proper", I would contend,
12 Your Honor, relates to the scope of employment and not the
13 actual duties itself. I - - - I think that - - -

14 JUDGE RIVERA: Okay, but what does the word
15 "proper" mean? Let's assume you're right. What does it
16 mean, proper?

17 MR. GARBER: The dictionary definition would be
18 correct or appropriate. But I think that the dictionary
19 definition in the context of the analysis of - - -

20 JUDGE RIVERA: And what does the word "scope"
21 mean?

22 MR. GARBER: "Scope" means that - - - in the
23 context of an indemnification statute, that the officer is
24 performing his or her duties as expected of a police
25 officer, in other words, in the furtherance of the role of



1 a police officer, which I would submit, Your Honor, clearly
2 Mr. Lemma was doing here. He was investigating a robbery.
3 Now, while clearly - - -

4 JUDGE RIVERA: So if they're interchangeable and
5 they're the same, why have both?

6 MR. GARBER: I'm sorry?

7 JUDGE RIVERA: If they're interchangeable, they
8 mean the exact same thing, which I think is what your
9 argument is, why have both of these phrases - - -

10 MR. GARBER: Well, I - - -

11 JUDGE RIVERA: - - - in the statute? What's the
12 point of the redundancy?

13 MR. GARBER: The - - - it's unclear. The
14 Appellate Division determined that there - - - it was
15 inconclusive. They found here that there was ambiguity in
16 the statute. So I think that under the circumstances, when
17 you consider the legislative history, which clearly both
18 the bill sponsors, as well as the colloquy that took place
19 between the members of the Senate - - - which is part of
20 the record here - - - the intent was to cover, not only
21 imperfect conduct, but unique amongst these type of
22 representation statutes, the intent was to cover and to
23 indemnify any judgment, including punitive damages.

24 JUDGE STEIN: But - - - but wasn't - - - wasn't
25 the legislative history really that - - - that the purpose



1 was to combat a chilling effect on police actions when they
2 were properly discharging their duties, in other words, the
3 - - - the idea that even though they were doing what they
4 were properly supposed to do, it's possible that a jury
5 somewhere might find to the contrary, and - - - and so the
6 - - - the legislature didn't want to discourage police
7 officers from going out and doing what they thought was
8 right, not to necessarily cover intentional wrongful
9 conduct.

10 MR. GARBER: Well, that view, while it's been
11 expressed, and there was some colloquy about that in the
12 bill jacket, that undermines the role of the courts in
13 considering a judgment for punitive damages. It eliminates
14 the check that the trial court would have in determining
15 whether or not conduct should properly stand as punitive.

16 And that very small colloquy within the
17 legislative history, I think is superseded by the actual
18 debate in the Senate, as well as the bill sponsor's
19 discussion, where he was asked specifically by one of his
20 colleagues during the debate, whether or not it covered
21 reckless conduct, and he said it did. And the bill sponsor
22 even went so far as to say that that was unprecedented in
23 these representation statutes.

24 And that's all part of the record that - - -
25 that's been presented to this court.



1 JUDGE RIVERA: So can I ask you about the
2 Superior Officers Association, though?

3 MR. GARBER: Well, I - - - I - - - I - - -

4 JUDGE RIVERA: Member of the force, obviously,
5 they're high-level officers, and I thought their own
6 statement is that it doesn't - - - "The bill doesn't
7 provide blanket immunity dis - - - so that a disregard for
8 a consequence will result. The bill contains important
9 safeguards against police officers abusing their authority.
10 No action or omission occurring outside an officer's proper
11 performance of duty will be indemnified."

12 MR. GARBER: I - - - I would suggest that that
13 letter was submitted after the bill was actually voted by
14 the legislature while it was awaiting signature by the
15 executive. And it's during that period of time - - - and I
16 think that I - - - I addressed that in my reply brief - - -
17 that period of time doesn't accurately portray what the
18 intent of the law was. When - - - when you consider the
19 legislative history, which is to provide for punitive
20 damages, punitive damages' textbook definition - - -

21 JUDGE GARCIA: Isn't that - - - counsel, isn't
22 that really - - - what they're saying is, you can be acting
23 within the proper scope of your duties. The language is,
24 go to a jury, the jury for whatever reason comes back with
25 a verdict, then there may be a check on it, but you still



1 get indemnification.

2 The thing that strikes me as so different in this
3 case, is not that you're waiting for that jury verdict or
4 not. Here, you're not arguing about what was said in a
5 deposition and what his statements are and what his conduct
6 was. And I don't think there's any argument, if you have a
7 rational sense of what proper is, it's difficult to see how
8 that would fit within the definition.

9 MR. GARBER: Well, the - - - the definition,
10 though, it - - - it really relates to this court adhering
11 to a prior decision of the court. And - - - and that's the
12 Sagal-Cotler case, because the - - -

13 JUDGE STEIN: But that didn't have the word
14 "proper". That statute didn't have the word "proper". And
15 - - - and - - - and if we - - - if we view them exactly the
16 same, then aren't we reading out of the statute the - - -
17 that - - - that word that the legislature clearly put in
18 there?

19 MR. GARBER: Well, I - - - I think by analogy,
20 one - - - one of the things that the Sagal court hinged
21 upon was the fact that the statute covered criminal
22 defects, and the - - - the court indicated that the scope
23 of the coverage was intended to cover that type of conduct.
24 So if you compare the scope of coverage in Sagal to the
25 scope of coverage here for punitive damages, or intentional



1 conduct for that matter, I - - - I think that Sagal-Cotler
2 is controlling in this case.

3 The - - -

4 CHIEF JUDGE DIFIORE: So counsel, so at bottom,
5 is it your argument that if the Board finds that the
6 subject of the inquiry intentionally failed to reveal that
7 a jailed suspect could not have possibly committed this
8 crime, that the Board has no discretion in making the
9 decision that it's called upon to make?

10 MR. GARBER: The Board would have discretion if
11 they were properly instructed. I think that the record is
12 clear that the Board was never instructed as to what proper
13 means. It's not in the statute, and it's never been
14 defined. That - - - that part is not disputed in - - - in
15 this matter. So - - -

16 CHIEF JUDGE DIFIORE: So you're saying there's no
17 discretion there?

18 MR. GARBER: The Board would have discretion
19 assuming that they had the criteria to make that decision
20 in the first place. And here they didn't.

21 JUDGE RIVERA: But I thought your position is
22 that scope and proper duties - - - scope of employment and
23 proper duties are - - - are exactly the same - - -

24 MR. GARBER: Not - - - not exactly the same, Your
25 Honor, but under the context of the case, those phrases are



1 interchangeably. And that interpretation of being
2 interchangeable is the only interpretation which gives
3 meaning to the legislative intent. And that - - -

4 JUDGE STEIN: You - - - you - - - you say that
5 the - - - that - - - that the statute is ambiguous, right,
6 so if it's ambiguous, don't - - - aren't we supposed to
7 look at whether the Board's interpretation was irrational?

8 MR. GARBER: Yes, of course, but the - - -

9 JUDGE STEIN: So you say it's irrational.
10 There's no reasonable way of reading this statute the way
11 that - - -

12 MR. GARBER: No, if the Board was properly
13 charged, if they were given the definition, then they would
14 have had the discretion by a - - - a three-person vote.
15 But here, the record is clear that not only were they not
16 instructed on what the definition of 50-L is, but in fact,
17 as the record makes clear, in other cases involving conduct
18 as wrongful, or even more egregious than the conduct here,
19 the Board acted differently. And the - - -

20 JUDGE RIVERA: And - - - and what is, in your
21 opinion, the source of the - - - of the correct definition?

22 MR. GARBER: The proper discharge pertains to
23 acting as a police officer acts within the scope of
24 employment.

25 JUDGE RIVERA: Yes, but where - - - where is that



1 definition? What's the source of that?

2 MR. GARBER: I think that the - - - the Sagal-
3 Cotler case makes clear that those definitions, the court -
4 - - this court in analyzing comparable representation
5 statutes has said that it's always been considered
6 interchangeable. There's never been an instance where it
7 hasn't.

8 And lastly - - - I - - - I see my time is up - -
9 - but in - - - in terms of the limitation, the court in
10 Sagal-Cotler said quite specifically, had the legislature
11 intended to limit coverage to correct or appropriate
12 conduct, they would have done what the statute does in
13 50-K, pertaining to representation of New York City
14 employees. It would say specifically that the coverage was
15 limited if the person was found to have engaged in conduct
16 that was in violation of the employer's rules.

17 Here, in the absence of that, given the
18 legislative history, given the coverage which - - - which
19 is unprecedented in representation statutes, the - - - the
20 County should have covered my client. Thank you.

21 CHIEF JUDGE DIFIORE: Thank you, Counsel.
22 Counsel?

23 MR. VAN DER WAAG: Good afternoon, Bob Van der
24 Waag for the respondent, the County. The - - - the
25 County's position is - - - is rather simple, actually.



1 This is an Article 78 proceeding. We have a determination
2 by a panel set up by the general municipal law. It's an
3 administrative proceeding. When a court reviews that and a
4 court obviously has and should review it, if there's a
5 rational basis for the determination, it remains, even if
6 we disagree with it. This particular - - -

7 JUDGE RIVERA: Can I - - - counsel, let me ask
8 you a question. As I understand your briefing, you
9 maintain that the - - - the statute says that the "proper
10 discharge and scope shall be determined by the majority
11 vote of a panel." Correct?

12 MR. VAN DER WAAG: And that's - - - and that's
13 the statute.

14 JUDGE RIVERA: So - - - oh, yes, all right. So
15 is it your position that that - - - what any respective
16 panel - - - whoever's on the panel at any respective time -
17 - - their view of what is the proper discharge or the scope
18 may change, even if the facts are the same?

19 MR. VAN DER WAAG: Un - - - un - - - unless when
20 looking at the facts, the - - - the judge determines that
21 there's no rational basis to come to that conclusion, then
22 just like any other review of an Article 78 - - -

23 JUDGE FAHEY: How - - - how about this? How
24 about if - - - if the act itself could be considered
25 punitive damages, then you would say it would be covered by



1 the statute; is that correct?

2 MR. VAN DER WAAG: There are many - - -

3 JUDGE FAHEY: So if it was an act - - - let me
4 just finish - - -

5 MR. VAN DER WAAG: Yes.

6 JUDGE FAHEY: - - - an act with malice, an
7 intentional act, that would be covered by the statute;
8 wouldn't it?

9 MR. VAN DER WAAG: Yes, I believe it would, but -
10 - -

11 JUDGE FAHEY: All right. So let - - - so let me
12 just go through the logic of this.

13 MR. VAN DER WAAG: Okay.

14 JUDGE FAHEY: So if this detective intentionally
15 failed to report the ally - - - the alibi that would
16 support a finding of punitive damages, we'd have to say yes
17 to that, if he intentionally did it, because it would be an
18 act taken with malice. I - - - I thought he testified that
19 - - -

20 MR. VAN DER WAAG: No.

21 JUDGE FAHEY: - - - he didn't?

22 MR. VAN DER WAAG: Okay, maybe I'm not following
23 you or - - -

24 JUDGE FAHEY: Well, follow me. Stay with me on
25 it, all right?



1 MR. VAN DER WAAG: Okay.

2 JUDGE FAHEY: Because I want to know was if he
3 intentionally did this, and there - - - there's no proof in
4 the record that I saw that said he intentionally did it,
5 that that would support a finding of punitive damages.
6 Punitive damages are covered by the statute. So that would
7 then mean that he would be covered for an intentional act,
8 but not for an act where there's no proof of intent.

9 MR. VAN DER WAAG: May I disagree with your
10 premise, though?

11 JUDGE FAHEY: Sure.

12 MR. VAN DER WAAG: When - - - when - - -

13 JUDGE FAHEY: Go ahead.

14 MR. VAN DER WAAG: - - - you said that there's no
15 evidence in the record that he intentionally acted. I
16 think there is.

17 JUDGE FAHEY: The only thing I saw - - - I don't
18 know it probably as well as you; I'm sure I don't - - - the
19 only thing I saw was, I guess, he testified and - - - and
20 they asked him that question directly, didn't they?

21 MR. VAN DER WAAG: Correct.

22 JUDGE FAHEY: Yeah.

23 MR. VAN DER WAAG: And he said that - - - there
24 was a whole - - - there was a number of questions, and he
25 said that he'd just let the chips fall where they may.



1 Then he was further - - -

2 JUDGE FAHEY: That's true.

3 MR. VAN DER WAAG: - - - he was further
4 questioned as to - - - a scrivener - - - there was a
5 typographical error in the file, so anyone else looking at
6 the file for a period of time, would not know that this
7 particular defendant was in jail at that time, because the
8 - - - the date of the - - - of the robbery was in error.
9 And he was asked at that time, because he said, well, I - -
10 - I figured that they'd pick it up at arraignment and what-
11 have-you, and the plaintiff's attorney - - -

12 JUDGE FAHEY: Right, what - - - what I have is on
13 the record at page 627. He was asked whether he had
14 intentionally failed to report his discovery and he
15 responded in the negative.

16 MR. VAN DER WAAG: But - - - but the evidence is
17 otherwise, including his own deposition. And in fact - - -

18 JUDGE FAHEY: So - - -

19 MR. VAN DER WAAG: - - - at that particular time
20 - - -

21 JUDGE FAHEY: - - - your argument then is - - -
22 let me just go through it - - -

23 MR. VAN DER WAAG: Yes.

24 JUDGE FAHEY: - - - that he did intentionally
25 fail to report this.



1 MR. VAN DER WAAG: Yes.

2 JUDGE FAHEY: Is that correct?

3 MR. VAN DER WAAG: Yes.

4 JUDGE FAHEY: So that would be an intentional
5 wrongdoing, and - - - and you would argue malice. And
6 isn't that covered by punitive damages?

7 MR. VAN DER WAAG: No. Well, it's - - -

8 JUDGE FAHEY: How come?

9 MR. VAN DER WAAG: - - - it's punitive damages,
10 but it - - - it's not the proper exercise of his duties,
11 and it's not covered under this statute.

12 JUDGE STEIN: Can you give us an example of
13 conduct that would - - - that would qualify for
14 reimbursement for punitive da - - - that would qualify for
15 punitive damages, but would also be in the proper discharge
16 of duties?

17 MR. VAN DER WAAG: It's very difficult, but as I
18 - - - one of your colleagues indicated, this is coming out
19 at a time before a trial.

20 JUDGE STEIN: Right.

21 MR. VAN DER WAAG: I deal with a lot of 1983
22 cases and a lot of appeals. There are, unfortunately, a
23 number of situations where juries, for whatever reason,
24 come back and find punitive damages. We believe they're
25 wrong. We may appeal it. Then again, we may settle and



1 what-have-you. It happens. But that punitive - - -

2 JUDGE STEIN: But you're talking about situations

3 - - -

4 MR. VAN DER WAAG: - - - but the intent - - -

5 JUDGE STEIN: - - - where you disagree with the
6 jury. You're essentially talking about situations where
7 you disagree with a jury verdict as - - - they - - - they
8 give punitive damages, but you don't think punitive were
9 warranted.

10 MR. VAN DER WAAG: Well, and - - - and also there
11 could be a situation where we were disputing that it's
12 intentional conduct and representing - - -

13 JUDGE FAHEY: Is there - - - is there - - -

14 MR. VAN DER WAAG: - - - the position in the
15 trial - - -

16 JUDGE FAHEY: - - - is there any language in the
17 statute that you can point that supports that?

18 MR. VAN DER WAAG: Do I have any points - - -

19 JUDGE FAHEY: Language in the statute that
20 supports your theory?

21 MR. VAN DER WAAG: That punitive damages - - -

22 JUDGE FAHEY: That you can be both proper and
23 punitive? Judge Stein's question. Give us an example.

24 MR. VAN DER WAAG: Oh, I couldn't find anything
25 in the statute that - - - that's - - - the statute's a very



1 simple statute.

2 JUDGE FAHEY: Yeah.

3 MR. VAN DER WAAG: It's right before you. And -
4 - -

5 JUDGE RIVERA: I - - - I - - - I thought what
6 your position was that you - - - you say we only look at
7 the plain language. The plain language has the word
8 "proper". That word means something in particular, and
9 that's works against the plaintiff in this case.

10 And then you say, alternatively, if it's either
11 ambiguous or the court wishes to look at legislative
12 history to show how it supports the plain language, the
13 legislative history shows exactly what my - - - my
14 colleagues on the bench are asking you about, which is your
15 argument that the legislative history shows that there was
16 a concern that even if locally the Board had decided the
17 officer's conduct fit within the statute, that
18 nevertheless, they might be subject to punitive damages,
19 and that the legislature had decided that even under those
20 circumstances, the County would be liable.

21 MR. VAN DER WAAG: I - - - I - - - first of all,
22 I disagree with your conclusion as to legislative intent.
23 We - - - I believe we - - - we completely answered the
24 argument of the - - - of the appellant that the legislature
25 intended some sort of blanket immunity. Quite the



1 opposite, number one. Number two - - -

2 JUDGE RIVERA: Oh, no, no. That's not what I'm
3 saying.

4 MR. VAN DER WAAG: Okay, I'm misunderstanding.

5 JUDGE RIVERA: No, no, my - - - my point was, I
6 thought you were arguing in your briefs as an alternative
7 position in terms of the legislative history, that what the
8 legislative history is showing that you're maintaining
9 local control, that is, the Board decides what is proper
10 conduct in any particular case, but also recognizing that
11 even if the Board - - - what Judge Stein says - - - you - -
12 - you all might decide differently than a jury would, but
13 you decide or the Board decides something is proper, the
14 majority of the Board, but nevertheless, if it ends up
15 getting to a verdict and punitive damages are imposed,
16 that's where the legislature decided nevertheless the
17 County will be liable for those damages.

18 MR. VAN DER WAAG: No, I think - - -

19 JUDGE RIVERA: I'm not talking about blanket
20 immunity.

21 MR. VAN DER WAAG: No, I - - - I think that - - -
22 to the extent that we're looking at intent, and of course,
23 we take the position it's clear what there's - - - there's
24 no reason legally to look for intent, otherwise you could
25 pull out one senator's and one assemblyman's comment and



1 what-have-you. It's clear and what-have-you. There are
 2 situations in which pre-trial and what-have-you, the - - -
 3 the conduct is such that we believe, as a County attorney,
 4 and the panel itself after hearing believe, that it could
 5 be a situation where it might lead to a - - - a finding of
 6 - - - of intentional conduct.

7 But this case is - - - is so egregious, where a
 8 person remains in jail for four months, then the police
 9 officer says, yeah, I knew about it and what-have-you; I
 10 found out, but I didn't do anything about it. Let the
 11 chips fall where they may. And when even questioned as to
 12 - - - he said, well, may - - - basically, he's saying,
 13 well, maybe they'll find it out later. And then it's
 14 pointed out that they - - - they won't find it out later,
 15 because they - - - the date of the arrest is - - -

16 JUDGE RIVERA: Can I ask you? Since your
 17 argument has been that the Board has been legislatively
 18 authorized to determine case-by-case what is - - -

19 MR. VAN DER WAAG: Yes.

20 JUDGE RIVERA: - - - proper conduct, how is an
 21 officer to know in advance?

22 MR. VAN DER WAAG: Well, I - - -

23 JUDGE RIVERA: There - - - I want you to respond
 24 to their argument in the reply brief about the vagueness of
 25 the statute.



1 MR. VAN DER WAAG: You know, if - - - if the leg
2 - - - and first, the legislature has not taken upon itself
3 to give a definition of things to the panels that they set
4 up, and I think for obvious reasons, because they want to
5 give the greatest latitude they can to this panel to hear
6 what is going on and make a determination, probably for the
7 benefit of an officer.

8 But in this particular case, it is so egregious,
9 that - - - that it needs no definition or explanation.
10 Quite frankly, if they came back and said this is a proper
11 discharge of the duties, I think we'd be shocked.

12 JUDGE WILSON: So it's so egregious, your answer
13 to the panel here really couldn't articulate what standard
14 they were applying, or what they were doing when they were
15 asked about it? Is - - - is that how you respond to that
16 argument?

17 MR. VAN DER WAAG: Yes, I think so. And - - -
18 and when - - - when examined - - - certainly Commissioner
19 Mulvey, the police commissioner for part of this time, and
20 Kreitman, and what-have-you, Ryan has been around for a
21 long time, an attorney - - - you know, they used their
22 common sense. They - - - you know, would anyone - - -
23 would - - - would be shocked if they - - - if they said,
24 well, you know, you have to make the determination whether
25 it's the proper discharge or the duty. This police officer



1 has indicated that, well, he knew that he couldn't possibly
2 have committed the crime, but I'm going to let him sit in
3 jail for the next four months, and maybe somebody will find
4 out about it.

5 And then he says nothing for four years or so.
6 The - - - the 1983 action starts, and twenty minutes before
7 his deposition, he says, by the way, I did know about that.
8 That's the County's position.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. VAN DER WAAG: Thank you.

11 CHIEF JUDGE DIFIORE: Counsel, I took the liberty
12 of reserving two minutes.

13 MR. GARBER: Yes.

14 CHIEF JUDGE DIFIORE: Would you care to - - -

15 MR. GARBER: Thank you, Your Honor.

16 CHIEF JUDGE DIFIORE: - - - exercise that option?

17 MR. GARBER: The - - - the standard is not
18 whether the conduct was egregious. The standard is whether
19 or not he - - - he acted consistent with the statute, and
20 the proper discharge, and - - -

21 JUDGE RIVERA: Well, the officer's position, now,
22 I thought in your briefing, was that he just forgot. It -
23 - - it wasn't - - - it's a misinterpretation of his
24 deposition statements.

25 MR. GARBER: Well - - -



1 JUDGE RIVERA: Correct? His position now isn't:
2 I intentionally chose not to reveal this.

3 MR. GARBER: That's exactly correct.

4 JUDGE RIVERA: Okay.

5 MR. GARBER: And - - - and - - -

6 JUDGE RIVERA: But the Board could hold against
7 him on that, right?

8 MR. GARBER: They shouldn't. The - - - the - - -
9 the elephant - - -

10 JUDGE RIVERA: But they could? You're not saying
11 it's beyond their authority to do so, are you?

12 MR. GARBER: Well, it's beyond their authority
13 when they're not properly charged. I mean the standard,
14 Your Honor, is not egregiousness.

15 JUDGE RIVERA: No, no, but this is a factual
16 finding. I'm not talking about whether or not it's proper
17 and so forth. This question about whether or not, as - - -
18 as counsel got up and argued, that he knew and he
19 specifically chose not to inform anyone, versus his
20 position that he takes, which is, no, you're misreading my
21 statements or misunderstanding them. I mistakenly - - - I
22 forgot - - - that's his position now. All I'm saying is
23 the Board could read this record, decide on what he said in
24 the deposition, observe his testimony, and decide they
25 disagree, correct?



1 MR. GARBER: They could decide to disagree, but
2 all that would mean is that they found that he acted
3 wrongfully. But the egregiousness standard which - - -
4 which was discussed, that leads to the results that have
5 taken place. The - - - the record - - - and it's in my
6 reply brief - - - shows how the same Board chose to
7 represent and indemnify somebody who not only testified
8 improperly and perjured himself in the grand jury but took
9 a criminal plea to perjury.

10 So that conduct, if you accept the County's
11 definition of "proper", perjuring yourself in the grand
12 jury about the recovery of a firearm - - -

13 JUDGE RIVERA: So, counsel, when you said they
14 could find that he acted wrongfully, but you're saying it -
15 - - it doesn't necessarily rise to what the statute means
16 by proper?

17 MR. GARBER: I - - - I - - - I would say that
18 perjuring oneself in the grand jury is never proper. It -
19 - - it's the epitome - - -

20 JUDGE RIVERA: No, no, no, please. I'm talking
21 about this officer. I've been talking about the case in
22 front of us.

23 MR. GARBER: I - - - I'm sorry. Could you repeat
24 the question?

25 JUDGE RIVERA: Yes, because you said before, when



1 I asked you, you said well, yes, the Board could find that
2 he acted wrongfully. So then my question was, your
3 position is that having found that he acted wrongfully - -
4 -

5 MR. GARBER: Does not ex - - -

6 JUDGE RIVERA: - - - they - - - they couldn't
7 then decide so that doesn't satisfy the statutory standard
8 - - -

9 MR. GARBER: No.

10 JUDGE RIVERA: - - - of "proper"?

11 MR. GARBER: No, not under - - -

12 JUDGE RIVERA: Okay, so how is wrongfully and
13 proper - - -

14 MR. GARBER: Not - - -

15 JUDGE RIVERA: - - - how do you harmonize that?

16 MR. GARBER: - - - not under the intent of the
17 statute, because the intent of the statute clearly is to
18 indemnify for wrongful conduct. That's what the
19 legislative history said; that's how the County's been
20 practicing the application of the statute. And I submit to
21 the court, that's the way that this court should analyze it
22 as - - - as well, thank you.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 (Court is adjourned)

25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 Matter of Lemma v. Nassau County Police Officer Indemnification Board, No. 70 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: May 08, 2018

