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COURT OF APPEALS  
STATE OF NEW YORK

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MATTER OF LANCASTER, et al.,  
Appellants,

-against-

No. 181

INCORPORATED VILLAGE OF FREEPORT,  
et al.,  
Respondents.

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MATTER OF GLACKEN, et al.,  
Appellants,

-against-

INCORPORATED VILLAGE OF FREEPORT,  
et al.,  
Respondents.

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20 Eagle Street  
Albany, New York 12207  
October 9, 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  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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David Rutt  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 181, Matter of Lancaster.  
2 Counselor, you want any rebuttal time?

3 MR. SPOLZINO: I would, Your Honor. Thank you.  
4 Two minutes.

5 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

6 MR. SPOLZINO: Chief Judge Lippman, and may it  
7 please the Court, my name is Robert Spolzino, and I  
8 represent the appellants in this case.

9 CHIEF JUDGE LIPPMAN: Counselor, what's wrong  
10 with Water Works requesting this provision as a condition  
11 of settlement?

12 MR. SPOLZINO: There was nothing wrong with  
13 Water Works requesting this as a condition of settlement.  
14 What was wrong was when the Village attempted to impose  
15 this charge for this - - - I'm thinking about the last guy  
16 - - - to impose this condition on the appellants here and  
17 then revoking their defense and indemnification when they  
18 - - -

19 CHIEF JUDGE LIPPMAN: What's wrong with that?  
20 If you comply with the provision, they'll indemnify you,  
21 and if you don't, you're on your own. What's wrong with  
22 it from a policy perspective?

23 MR. SPOLZINO: Well, from a policy perspective -  
24 - -

25 CHIEF JUDGE LIPPMAN: Policy and legal. Let's

1 take policy first.

2 MR. SPOLZINO: Okay.

3 CHIEF JUDGE LIPPMAN: What's wrong with it?

4 MR. SPOLZINO: From a policy perspective, it  
5 says to public employees that they can be coerced not to  
6 speak, that they - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but don't - - -  
8 aren't there restraints built in, in general, to public  
9 employment?

10 MR. SPOLZINO: Well, if - - -

11 CHIEF JUDGE LIPPMAN: Don't you have certain  
12 limitations on what you can do or not do - - -

13 MR. SPOLZINO: Well - - -

14 CHIEF JUDGE LIPPMAN: - - - as a public  
15 employee?

16 MR. SPOLZINO: If by that, Judge Lippman, you're  
17 talking about the Garcetti limitations - - -

18 CHIEF JUDGE LIPPMAN: Yes.

19 MR. SPOLZINO: - - - those don't apply here or  
20 haven't been satisfied. First of all, of the appellants  
21 that are here, three or four - - - all but two of them  
22 were no longer public employees at the time this happened.  
23 So Garcetti has no application whatsoever in that  
24 circumstance. The other two, one was the Village  
25 treasurer and one was a trustee. There's nothing in this

1 record whatsoever that establishes a justification - - - a  
2 public justification for restricting their free speech.

3 The burden is on - - -

4 JUDGE SMITH: Doesn't the case - - - doesn't the  
5 case turn on where this - - - on who wanted this  
6 restriction? If the plaintiffs asked for it - - - I mean  
7 the plaintiff in the other case, Melius, if he asked for  
8 it, he demanded as part of a settlement, there's no  
9 problem with giving it, is there?

10 MR. SPOLZINO: There's a problem from the  
11 appellant's perspective, giving up their First Amendment  
12 right to speak.

13 JUDGE SMITH: Even if it's a bona fide  
14 settlement - - - part of a settlement demanded by a third  
15 party?

16 MR. SPOLZINO: Right. There's nothing wrong  
17 with two parties agreeing to a nondisparagement clause.  
18 What - - -

19 CHIEF JUDGE LIPPMAN: Yeah, but what - - - I  
20 guess what I'm driving at is, you're right, your clients  
21 don't have to agree to this, but then they don't have to  
22 be indemnified. You follow what I'm saying?

23 MR. SPOLZINO: I see what you're saying, Judge  
24 Lippman.

25 CHIEF JUDGE LIPPMAN: Why isn't that a fair

1 trade-off? If it's so important to you, to the client, to  
2 speak out on this settlement, so then fine, then you're  
3 not indemnified and you go back and you say whatever you  
4 want.

5 MR. SPOLZINO: Two responses to that. First of  
6 all, it would be if the government could condition the  
7 receipt of a public benefit on a waiver of a First  
8 Amendment right, but it can't. That's very clear First  
9 Amendment law. The second thing - - -

10 JUDGE SMITH: But how - - - I mean, isn't - - -  
11 the question as you heard it, how do we know it's the  
12 government doing it?

13 MR. SPOLZINO: Because the government, the  
14 Village, revoked their defense and indemnification.

15 CHIEF JUDGE LIPPMAN: Yeah, but the government  
16 didn't ask for the settlement - - -

17 MR. SPOLZINO: No, but when they didn't agree -  
18 - -

19 CHIEF JUDGE LIPPMAN: - - - to those terms in  
20 the settlement.

21 JUDGE SMITH: You'd have a better case, wouldn't  
22 you, if the facts were that some - - - that the new mayor  
23 had had this bright idea, say let's shut up these old guys  
24 and write into this contract a noncriticism clause.

25 MR. SPOLZINO: Well, Judge Smith, I've been

1 assuming the fact that Judge Lippman posited initially - -  
2 -

3 JUDGE SMITH: I understand. You say those are  
4 the facts or at least they - - -

5 MR. SPOLZINO: Those facts certainly aren't  
6 established here.

7 JUDGE SMITH: You're saying - - - you're saying  
8 that on this record maybe he did, maybe that's what did  
9 happen.

10 MR. SPOLZINO: I'm saying that the condition was  
11 communicated - - - there's nothing in this record that  
12 says there was any discussion of the condition between the  
13 plaintiffs in the underlying lawsuit and the appellants.

14 JUDGE PIGOTT: Are you suggesting there should  
15 be a hearing on that issue as - - -

16 MR. SPOLZINO: I don't think there needs to be.  
17 I don't think there needs to be, Judge Pigott, because I  
18 don't think it matters - - -

19 JUDGE SMITH: You think you are entitled to  
20 summary judgment on this record?

21 MR. SPOLZINO: Absolutely, because what happened  
22 is the Village then communicated this and attempted to  
23 coerce the appellant into giving up their First Amendment  
24 rights by saying take it or leave it, here's the offer.

25 CHIEF JUDGE LIPPMAN: What should they have

1           said?  What should they have said?

2                       MR. SPOLZINO:  Well, first of all, Judge  
3           Lippman, I think they should have gotten out of this  
4           business entirely.  They had made a decision six months  
5           before that there is a conflict and that the Village and  
6           Village Attorney Colton had to have separate counsel and  
7           that the appellants had to have separate counsel.

8                       JUDGE ABDUS-SALAAM:  Well, they did get out of  
9           the business, didn't they?  They settled, and even after  
10          they settled, the plaintiffs still - - - in the federal  
11          action, still insisted on the nondisparagement clause.  
12          And it's just you and - - - or they and your clients now  
13          who are involved in this.

14                      MR. SPOLZINO:  Right.  But Judge Abdus-Salaam,  
15          what I'm saying is that if there - - - once the Village  
16          has settled out - - - has decided their separate counsel  
17          and has settled out of the case, they had no business  
18          being an intermediary in the settlement negotiation.

19                      JUDGE SMITH:  Well, what if they can't settle  
20          unless they get - - - unless they get your clients to sign  
21          on to the deal?

22                      MR. SPOLZINO:  Then the case - - - then the  
23          clients, who have the right to decide whether to settle  
24          the case - - -

25                      JUDGE SMITH:  Or to continue litigating at the

1 Village's expense?

2 MR. SPOLZINO: The Village has an obligation to  
3 defend and indemnify. It accepted that obligation.

4 JUDGE SMITH: The Village has agreed to defend  
5 and indemnify and they can't, and so your clients can be  
6 as hard-lined as they want and can say no, I'm not  
7 agreeing to anything that would restrict my freedom of  
8 action and continue - - - and continue to defend the case  
9 and the cost and judgment are all at the Village's  
10 expense. Is that fair?

11 MR. SPOLZINO: I don't think it's a question of  
12 fairness, Judge Smith. I think it's a question of the  
13 statute and the constitution. I think the statute says  
14 the only way they get out of defending and indemnifying,  
15 once they've accepted - - -

16 JUDGE SMITH: You're saying whether it's fair or  
17 not, it's their constitutional right?

18 MR. SPOLZINO: It's their constitutional right  
19 not to be forced or punished for waiving their First  
20 Amendment rights. And secondly, the statute says, failure  
21 to cooperate is the basis to get out, failure to cooperate  
22 in the defense. There's nothing in the statute - - -

23 JUDGE SMITH: Agreeing to a reasonable  
24 settlement isn't part of cooperation, in your view?

25 MR. SPOLZINO: Not cooperation in the defense.

1 It says - - - the statute says nothing about that.

2 JUDGE PIGOTT: Well, there's some question I - -  
3 - at least in my mind as to the fairness of the  
4 settlement. I suppose if you don't - - - if you're one of  
5 these people, I guess, that you represent and you don't  
6 think it's fair, you apparently can't put that forward  
7 because if you do, you're going to lose your defense, your  
8 - - -

9 MR. SPOLZINO: Right.

10 JUDGE PIGOTT: And I don't - - - if I understand  
11 the facts here, you've got a seven million dollar lawsuit  
12 in federal court where there are incredible allegations -  
13 - - I mean, there's an allegation, I think, in there that  
14 somebody's got two wives or - - - I mean, it's almost  
15 scurrilous some of the things that are going on or that  
16 are said in there. And when you look at the face of it,  
17 when the plaintiff, who now all of a sudden gets referred  
18 to by his first name in the complaint as if he's Bambi,  
19 says he made a business decision not to pay his taxes. I  
20 mean, it just seemed to me there was a number of issues  
21 that should have been raised, and I'm not sure if I saw an  
22 answer. Was an answer filed in this case?

23 MR. SPOLZINO: Yes, yes. I don't know if it's  
24 in this - - - an answer - - - an answer in this case or in  
25 the underlying litigation?

1 JUDGE PIGOTT: The underlying litigation.

2 MR. SPOLZINO: I - - - I don't know.

3 JUDGE PIGOTT: Were deposition - - -

4 MR. SPOLZINO: But certainly not in this record.

5 JUDGE PIGOTT: Were depositions held?

6 MR. SPOLZINO: I believe there were. The case  
7 has since been settled. I don't - - - I believe they got  
8 through depositions. I wasn't handling that case, so I'm  
9 not fully conversant with the facts of that case.

10 JUDGE GRAFFEO: If we agree with you, won't it  
11 severely reduce the chances that municipalities can settle  
12 any of the litigations that they have pending?

13 MR. SPOLZINO: Well - - -

14 JUDGE GRAFFEO: If they - - - because it sounds  
15 like they're going to need a hundred percent consent from  
16 everyone on the town board or city council or whatever in  
17 order to do any kind of settlement - - -

18 MR. SPOLZINO: Judge Graffeo, I think that - - -

19 JUDGE GRAFFEO: - - - where you have this kind  
20 of clause if somebody doesn't like it.

21 MR. SPOLZINO: I think that's what the statute  
22 requires, first of all. The statute could be changed if  
23 that becomes a problem. I don't think it has been a  
24 problem because we haven't seen any cases like this  
25 before. Our research didn't reveal anything like this - -

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JUDGE GRAFFEO: But this is a fairly common clause - - -

MR. SPOLZINO: - - - before.

JUDGE GRAFFEO: - - - in settlements in all kinds of litigation - - -

MR. SPOLZINO: Right.

JUDGE GRAFFEO: - - - even in - - - especially in even commercial litigation you see this nondisparagement-type clauses.

MR. SPOLZINO: Right. But the different here is this is the government. This is the government that's subject to the First Amendment saying you have to stop speaking or we're not going to pay you - - - give you what you're entitled to under the law. That's not permissible.

The other issue here is the Open Meetings Law.

CHIEF JUDGE LIPPMAN: Not permissible when you no longer work for the government. Is that what you're saying?

MR. SPOLZINO: Right, because the government is still subject to the First Amendment. It's - - - and there's nothing in the statute that says you don't - - -

JUDGE GRAFFEO: You can do other things that will lose you your defense and indemnification rights.

MR. SPOLZINO: That's true, but I would say this

1 way - - -

2 JUDGE GRAFFEO: As a government employee.

3 JUDGE SMITH: Do you have an alternative  
4 argument? I understand you're saying that on this record,  
5 as a matter of law, you're entitled to judgment. Do you  
6 say in the alternative there are issues of fact as to the  
7 origin of where this clause came from?

8 MR. SPOLZINO: I think that if the Court finds  
9 it to be dispositive that - - - whether this issue came  
10 from the plaintiffs in the underlying lawsuit or the - - -  
11 the Village, that then there is an issue of fact that has  
12 to be resolved.

13 JUDGE SMITH: Given that, so a question you  
14 probably won't have trouble with. It is pretty clear that  
15 if this was indeed, as I hypothesized earlier, this was  
16 the mayor's bright idea, and Mr. Melius couldn't have  
17 cared less whether this clause is in there or not, but the  
18 mayor insisted on it and got the plaintiffs to put it in,  
19 then you've got a pretty good case? You would agree with  
20 me?

21 MR. SPOLZINO: I would agree a hundred percent.  
22 But I also think we have a pretty good case, Judge Smith,  
23 on the Open Meetings Law question. The government can't  
24 act - - - can't revoke defense and indemnification in  
25 private. There's no exemption for that.

1 JUDGE SMITH: Aren't you allowed to discuss  
2 litigation in private?

3 MR. SPOLZINO: Well, first of all, we don't even  
4 know what they discussed because the record doesn't say  
5 that, but what they did was revoke defense and  
6 indemnification, and that is a subject not of the  
7 litigation, the underlying litigation but of the  
8 relationship between the Village and its employee. That's  
9 not a litigation matter. The statute has been construed  
10 to say the purpose of the litigation exception is to  
11 protect the municipality from having to reveal its  
12 litigation strategy. This has - - -

13 JUDGE RIVERA: But to reach that conclusion,  
14 don't they have to think about how the appellants  
15 conducted themselves during the course of the litigation?

16 MR. SPOLZINO: As far as - - -

17 JUDGE RIVERA: - - - or failed to conduct  
18 themselves?

19 MR. SPOLZINO: As far as the underlying  
20 litigation is concerned, Judge Rivera, they were out of  
21 it, so they had no reason to discuss the underlying  
22 litigation. As far as the - - -

23 JUDGE RIVERA: Well, with respect to decide  
24 whether or not they've cooperated.

25 MR. SPOLZINO: Well, as far - - - but that - - -

1 but there's no litigation pending over that. That's - - -  
2 maybe that's a risk of litigation.

3 JUDGE SMITH: You're saying that litigation to  
4 which they are an indemnitor doesn't count as litigation?

5 MR. SPOLZINO: That - - - that's right because  
6 they had no strategy to discuss in that case. They're - -  
7 - they're either going to pay or not pay. What's at issue  
8 now is their relationship with the employee and the  
9 indemnitee, and that's not litigation yet. The Weatherwax  
10 case says the fact that somebody may sue you doesn't allow  
11 you to act on the Open Meeting - - - on the Open Meeting  
12 Law. Thank you.

13 CHIEF JUDGE LIPPMAN: Okay, counselor, you'll  
14 have your rebuttal. Thanks, counselor.

15 MR. CAMHI: May it please the Court, my name is  
16 Stanley Camhi. I represent the respondents.

17 CHIEF JUDGE LIPPMAN: Counselor, what is your  
18 contention as to who requested this provision?

19 MR. CAMHI: I think it's clear from the record  
20 there's only one conclusion that can be reached, and that  
21 was that the Water Works plaintiffs insisted on this  
22 provision, and the reason - - -

23 JUDGE SMITH: What says that in the record?

24 MR. CAMHI: The way we know that, Your Honor, is  
25 that if, in Mr. Edwards' affidavit - - - one of the

1 petitioner's affidavits, he says in the section entitled  
2 "Undisputed Facts," he says that it was the Water Works  
3 plaintiffs who insisted upon this provision. In the  
4 Lancaster petition, paragraph 28 - - -

5 JUDGE SMITH: You don't have an affidavit from  
6 the guy who negotiated for the - - - the settlement for  
7 the town, do you?

8 MR. CAMHI: We have an affidavit from the  
9 Village attorney who - - -

10 JUDGE SMITH: Who says on information and  
11 belief.

12 MR. CAMHI: That's correct, because it really  
13 wasn't - - -

14 JUDGE SMITH: Who's his informant and why  
15 doesn't that informant put in an affidavit?

16 MR. CAMHI: You have to go back and you have to  
17 look at what was being alleged in the original petitions,  
18 Your Honor. The Glacken petition really didn't even raise  
19 First Amendment issues.

20 JUDGE SMITH: Right.

21 MR. CAMHI: The other petition did raise a very  
22 limited First Amendment issue, but that petition also said  
23 in paragraph 28 that it was the Water Works plaintiffs  
24 that were insisting upon this provision.

25 JUDGE SMITH: You're talking about the Lancaster

1 petition.

2 MR. CAMHI: The Lancaster petition. Paragraph  
3 28 talks about the fact that after the Village was no  
4 longer part of this litigation, there was a court hearing  
5 in front of the magistrate judge in federal court, and at  
6 that point - - -

7 JUDGE SMITH: But it says - - - it says that you  
8 offered to execute an unconditional stipulation that  
9 discontinues with prejudice. That offer was again  
10 rejected, and it's in the passive voice, but I gather that  
11 was in a meeting from - - - which the Village wasn't  
12 present, so it had to be the plaintiffs that rejected it.

13 MR. CAMHI: That's correct. If you could look  
14 at - - -

15 JUDGE SMITH: How do we know that it wasn't part  
16 of the previous deal between the plaintiff and the  
17 Village? Such things have happened. The Village says, oh  
18 yeah, I'll give you the money you want, I just want to be  
19 sure there's a clause in here that shuts up my political  
20 opponents. You agree that if that's the deal it's a  
21 constitutional problem?

22 MR. CAMHI: No, but I agree that it's a totally  
23 different case.

24 JUDGE PIGOTT: Well, let's look at it a  
25 different way. Let's assume you got two parties that have

1 conflicts and that's - - - as Mr. Splozino points out, the  
2 Village has got lawyers for people that they have a  
3 conflict with. Now, the one half, pick a half, says we'll  
4 settle this case, this is great, but don't forget we're  
5 elected officials, and these people who we have a conflict  
6 with and have different lawyers are going to criticize us  
7 if we settle this by giving away three and a half million  
8 dollars of the Village's money.

9 So maybe you should put in here that no one can  
10 criticize it. And that's what happens - - - they don't  
11 sign, but the people who do, they praise the thing. They  
12 say, well, we got the Village out of trouble, we - - - it  
13 was a previous administration. They're disparaging the  
14 other half, and yet we're saying that's okay, you can  
15 disparage the other people - - - the other defendants, but  
16 they can't disparage you. And that seems to me to be a  
17 problem here, isn't it?

18 MR. CAMHI: Except that there's nothing in the  
19 record to support what - - - your hypothetical.

20 JUDGE PIGOTT: Well, Glackens was saying we  
21 saved a Village, we avoided, he says, millions of dollars  
22 of attorney's fees. I mean, he makes these broad  
23 statements that - - -

24 MR. CAMHI: Mayor Hardwick you're referring to?

25 JUDGE PIGOTT: I'm sorry, Hardwick, yeah. And

1 so he's disparaging them, but this agreement apparently  
2 has got to say but you can't fire back, you can't go after  
3 your political opponents, you can't - - - you can't say I  
4 would not have agreed to this because it's too much money  
5 from the Village, and why would the plaintiff care? Why  
6 would the plaintiff want to do this in the first place?

7 MR. CAMHI: Why would the Water Works plaintiffs  
8 care?

9 JUDGE PIGOTT: Yeah.

10 MR. CAMHI: Because if you look at the history  
11 of this, and there's a footnote actually included in the  
12 record, is this defamation action which occurred in which  
13 Mr. Glacken accused Mr. Melius, the Water Works plaintiff,  
14 of extortion. And my assumption is, which is the  
15 assumption that the Village attorney also stated in his  
16 affidavit was that Mr. Melius had a concern that he did  
17 not want the petitioners here to continue to defame him.

18 JUDGE PIGOTT: Well, that's separate though. I  
19 mean, this was Water Works, Inc., and I don't know, was he  
20 suing personally, too, Mr. Melius?

21 MR. CAMHI: Yes, he was.

22 JUDGE PIGOTT: And so he could say selling any  
23 and all causes of action, and you get the general release  
24 from here until the end of time, and that takes care of  
25 that. He can say anything he wants, but you're going to

1 say, well, then he settled. But why would - - - I mean,  
2 why wouldn't you then say no disparagement from whoever  
3 you say was defaming Melius as opposed to Lancaster and  
4 the other people who - - -

5 MR. CAMHI: Well, this was a condition that was  
6 being insisted upon by the Water Works plaintiffs. I have  
7 to go back to what the record says here. They don't put  
8 in anything into their affidavits in opposition to our  
9 papers that it was the Village that was insisting upon  
10 this.

11 JUDGE SMITH: Is this - - - I've been thinking  
12 of this as a summary judgment motion. Is it really a  
13 summary judgment motion or were the petitions found  
14 insufficient on their face or is this something else?

15 MR. CAMHI: No. I think the petitions were  
16 found to be, yeah, insufficient in all because we - - -

17 JUDGE SMITH: So we should view this - - - I  
18 realize you don't have it in an Article 7 - - - we view  
19 this essentially as a 3211 motion that was granted?

20 MR. CAMHI: I would - - - I would say that's  
21 true, Your Honor. The problem with the petitioner's  
22 argument here is the ramifications that this could have  
23 almost every jurisdiction in the state because what it  
24 basically says is that a government employee who - - - for  
25 whatever reason they choose, they can reject a settlement.

1 They can reject a settlement and take - - -

2 CHIEF JUDGE LIPPMAN: What about the First  
3 Amendment rights that your adversary is talking about?

4 MR. CAMHI: Well, I think that - - -

5 CHIEF JUDGE LIPPMAN: Are there anything  
6 impinged here? Why is it not a - - -

7 MR. CAMHI: No, I think it's - - -

8 CHIEF JUDGE LIPPMAN: - - - restriction on First  
9 Amendment rights?

10 MR. CAMHI: I think their First Amendment  
11 arrangement actually is illusory because, again, the  
12 record does not support that it was a Village that was  
13 insisting upon this.

14 JUDGE PIGOTT: If you sue the Village, all  
15 right, and the Village settles, it doesn't make any  
16 difference what the minority says. I mean, it - - - they  
17 lost, Village settles. If on top of that you say, well,  
18 there's a conflict here between two parties, and the one  
19 party wants to settle, the other one doesn't, so if we put  
20 a - - - if we put a nondisparagement clause in so that we  
21 take the settlement and they can't complain, you're  
22 infringing on their speech rights, whether it's  
23 constitutional or not, but that happens all the time when  
24 you're dealing with the government.

25 MR. CAMHI: Exactly.

1                   JUDGE PIGOTT: And I mean, I was a county  
2 attorney for four and a half years. We settled every - -  
3 - not every day, but a lot. Sometimes the legislators  
4 didn't like it, but we didn't ever put in a settlement  
5 "and by the way, you can't criticize." You got outvoted.  
6 It's 10 to 8. We settled, complain all you want.

7                   MR. CAMHI: As the government, I would suggest  
8 that you're correct, you wouldn't put that in. But that's  
9 not what happened here, and there's nothing in the record  
10 to suggest it did.

11                  JUDGE PIGOTT: But even if the plaintiff wanted  
12 to - - -

13                  MR. CAMHI: Water Works plaintiffs?

14                  JUDGE PIGOTT: - - - and the majority in the  
15 legislature says we're buying that, then it's over, and  
16 it's done.

17                  MR. CAMHI: If the government employee has total  
18 discretion, unfettered discretion to decide under what  
19 conditions he's going to settle, that basically means he  
20 takes control of the Village treasury. He usurps what the  
21 board of trustees, what the trustees are elected to do,  
22 and that is to determine what is the best interest of the  
23 Village and how the taxpayers' money should be spent.

24                  JUDGE PIGOTT: Well, let's assume you only have  
25 one defendant, you've got the Village, all right, not the

1 individuals - - -

2 MR. CAMHI: Right.

3 JUDGE PIGOTT: - - - and there's no conflict,  
4 and you want this nondisparagement clause and they agree  
5 to it. There's no problem, right? And all these  
6 legislators can complain all they want. It's the Village  
7 that's got the nondisparagement which means that they  
8 can't pass a resolution saying this was badly negotiated  
9 or anything else, but the individuals can say anything  
10 they want and do, and that's the way it is.

11 MR. CAMHI: Well, here, we would never tell - -  
12 - we never told the petitioners they could not say what  
13 they want. They wanted to engage in what we viewed as a  
14 personal agenda. They had a personal agenda here. The  
15 Village was able to fashion a settlement which ended the  
16 lawsuit, exposed them to no monetary obligation, did not  
17 require them to admit to any wrongdoing, did not expose  
18 them to any third-party liability.

19 JUDGE PIGOTT: If they thought that the new  
20 mayor was colluding with the plaintiff to get more money  
21 than the lawsuit was worth, this settlement, wouldn't you  
22 agree, would prevent them from ever mentioning what they  
23 believed was a collusive settlement?

24 MR. CAMHI: Well, first of all, there's nothing  
25 in the record to that, but up until the point that the

1 settlement is signed, they certainly had a right to speak  
2 out and do and say whatever they felt about the  
3 settlement, including Mr. White who was the trustee.

4 During the debate, during the negotiations,  
5 during the Village's determining whether or not to enter  
6 into the settlement, certainly he had an opportunity to  
7 speak out and voice his opinion with regard to the  
8 settlement. He had the ultimate ability to criticize that  
9 settlement by voting against the settlement as a trustee  
10 if he felt that it was inappropriate. And in fact, he  
11 didn't vote against it, he simply abstained.

12 So the limitation that was actually placed in  
13 this stipulation of discontinuance which was going to be  
14 between the Water Works plaintiffs and the petitioners  
15 without the Village's participation in that document, that  
16 was a very limited restriction on their ability, and those  
17 types of restrictions, as Your Honor said, are common in  
18 settlement negotiations, clauses that limit a party's  
19 ability to discuss the terms of the settlement.

20 JUDGE PIGOTT: Not in my experience as a  
21 government lawyer, but I'm no expert on all of that. But  
22 let me ask you this. If you've got a - - - let's take an  
23 auto accident lawsuit where there's a plaintiff and  
24 there's two cars that are involved and they want to settle  
25 the whole thing, and the plaintiff says, well, I'll settle

1           it only if both sides say they won't criticize the amount,  
2           and one of them says I'm not liable, I'm not signing  
3           anything, and you agree with the one, you can't tell the  
4           other one that they're no longer entitled to be - - - to  
5           continue their lawsuit or to be indemnified if that's, in  
6           fact, what was happening because you got a conflict there,  
7           right?

8                       MR. CAMHI: Well, if you're talking about  
9           whether an insurance company can disclaim coverage where  
10          one of its insureds refuses to - - - or insists upon a  
11          confidentiality provision, for example, I think that was  
12          one of the cases that was actually cited here, and the  
13          Southern District said that that type of objection was  
14          illusory and yes, the insurance company can disclaim  
15          coverage under that.

16                      JUDGE PIGOTT: But not if you've got conflicts.  
17          In other words, if you got two cars both insured by  
18          Allstate and this one says I'm not liable, I'm not  
19          settling, and you say you - - - and Allstate says, well,  
20          you have to settle because we're settling with our other  
21          insured. They say, well, that's irrelevant to me, I'm  
22          being sued separately and I think this is a bad  
23          settlement. So it would seem to me that Allstate's got a  
24          conflict, and they can't tell the other defendant what to  
25          do. Isn't that what we have here?

1                   MR. CAMHI: Well, if it goes into a litigate - -  
2                   - I'm sorry. If it goes into a litigation strategy as to  
3                   who is ultimately going to become responsible for a  
4                   particular payment, that would be true, you could not - -  
5                   - the insurance company, if we're talking about insurance  
6                   companies, could not take a position which would be  
7                   adverse to its client.

8                   JUDGE PIGOTT: Right.

9                   MR. CAMHI: But that's really not what we have  
10                  here. And what I think has to be recognized is Mr.  
11                  Glacken put in an affidavit which is before this Court,  
12                  and basically what he said in his affidavit was, I settled  
13                  this case - - - ultimately settled this case because I  
14                  could not proceed because of the possibility I may face  
15                  financial ruin for myself and my family. Well, that is  
16                  exactly why the Village needed to settle this case, to get  
17                  a global settlement to avoid the possibility of financial  
18                  ruin for the Village, and they needed to have the  
19                  petitioners cooperate with them. And under the Public  
20                  Officers Law, there's an obligation for cooperation. And  
21                  unless they cooperated, we could not get this global  
22                  settlement, and the reason - - -

23                  JUDGE ABDUS-SALAAM: Should we read the  
24                  cooperation so narrowly as to be only with respect to a  
25                  defense of a litigation, as your adversary has suggested,

1 or is there a broader reading?

2 MR. CAMHI: Once the Village has done what it's  
3 obligated to do under the Public Officers Law, and that is  
4 to defend and indemnify them to the point that the case  
5 can be resolved without any money being paid by them,  
6 without any admission of wrongdoing by them, without any -  
7 - - without any provision which subjects them to greater  
8 liability to third parties, for example, and once that  
9 happens and if they reject it because they want to pursue  
10 a personal agenda that they may have, they have violated  
11 the cooperation clause, and the cooperation clause has to  
12 be viewed in conjunction with the gift and loan clause in  
13 the state constitution, because what's happening there,  
14 there would be no public purpose in continuing the  
15 litigation at that point in time.

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

18 Counselor, rebuttal?

19 MR. SPOLZINO: Yes. Thank you, Your Honor.

20 I'd submit that the Village can't violate the  
21 First Amendment to save money. That's what the Village's  
22 argument is here, whether - - -

23 JUDGE PIGOTT: Practically speaking. If you're  
24 not going to have to pay any money, if the case has  
25 already been settled, if three and a half million's gone

1 or on its way or whatever, why is anybody continuing in  
2 this thing?

3 MR. SPOLZINO: Because First Amendment rights  
4 have value, Judge. They have no rights - - -

5 JUDGE PIGOTT: I mean, why wouldn't they just  
6 walk away and say, fine, go disparage, go do what you  
7 want, we got our money, we're happy?

8 MR. SPOLZINO: I don't know, but they have a  
9 First Amendment right. That has value. And whether the  
10 Village is insisting on this and punishing the plaintiffs  
11 - - - punishing the appellants because they've insisted on  
12 that right - - -

13 JUDGE SMITH: You've alleged that in your  
14 petition?

15 MR. SPOLZINO: I'm sorry?

16 JUDGE SMITH: Does the petition allege that they  
17 - - - that the Village insisted on this to punish the  
18 appellant?

19 MR. SPOLZINO: I think it's inherent in what the  
20 - - -

21 JUDGE SMITH: You think it's a fair inference  
22 from the petition?

23 MR. SPOLZINO: Fair inference from what they  
24 did. When they said accept it or else and the appellants  
25 said else, they revoked it. But whether they're doing it

1 because somebody else wants it or because they want it,  
2 the Village did it here, and whether or not there are - -  
3 - there may be other conditions that would not be  
4 noncooperation or that would be noncooperations here, the  
5 condition can't be a condition that violates the First  
6 Amendment.

7 JUDGE ABDUS-SALAAM: Counsel, if we adopt what  
8 you're saying, then the Village, as I think one of my  
9 other colleagues said, or a municipality will never be  
10 able to settle a lawsuit as long as one of its current or  
11 former employees feels that the settlement is not in that  
12 person's best interests and would like to discourage or  
13 disparage the settlement, if there is an insistence on a  
14 nondisparagement clause. Why would we do that?

15 MR. SPOLZINO: Because the First Amendment gives  
16 them the right to say it, Judge. They have a  
17 constitutional right to say it.

18 JUDGE READ: So you'd have to litigate to the  
19 last taxpayer's dollar?

20 MR. SPOLZINO: When the condition is a violation  
21 of the First Amendment or takes away First Amendment  
22 rights - - -

23 JUDGE READ: Yes? It is - - - your answer is  
24 yes then, that - - -

25 MR. SPOLZINO: I think the answer is yes, Judge

1 Read. The - - - they - - - the government - - - they have  
2 an entitlement to a benefit that the government can't take  
3 away because they insist on being able to speak. That's  
4 the essence of the First Amendment.

5 JUDGE PIGOTT: Is this defense that you're  
6 providing to them individually? In other words, let's  
7 take Vilma Lancaster - - -

8 MR. SPOLZINO: In the underlying litigation?

9 JUDGE PIGOTT: Yeah.

10 MR. SPOLZINO: Yeah, the Village was defending  
11 them individually.

12 JUDGE PIGOTT: All right. Was there any reason  
13 why - - - I mean, I know they were sued individually and  
14 as officials, but isn't that a conflict too? I mean, I'm  
15 - - - I would think that you can defend them personally  
16 and the Village is over doing its own thing. So if they  
17 settle with the Village, they get their money, what's the  
18 point in going forward after that? I mean, I'm missing  
19 this.

20 MR. SPOLZINO: I don't - - - I can't honestly  
21 say I know enough about the underlying litigation, Judge  
22 Pigott, to answer that question. There may be - - - there  
23 may have been Monell (ph.) issues or something like that  
24 that - - -

25 JUDGE PIGOTT: I mean - - -

1 MR. SPOLZINO: - - - separated the two.

2 JUDGE PIGOTT: - - - couldn't they have been  
3 dismissing everything they're alleging that we did we did  
4 in our official capacity and there's nothing here for us  
5 to be in the lawsuit for?

6 MR. SPOLZINO: That might very well be, but I  
7 don't - - - I can't honestly tell you the answer to that.

8 Thank you.

9 CHIEF JUDGE LIPPMAN: Okay, counsel, thank you.

10 Thank you both.

11 (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 Matter of Lancaster v. Incorporated Village of Freeport and Matter of Glacken v. Incorporated Village of Freeport, No. 181 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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