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COURT OF APPEALS

STATE OF NEW YORK

KIMMEL,

Respondent,

-against-

No. 185

STATE OF NEW YORK,

Appellant.

20 Eagle Street
Albany, New York
October 20, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

MITCHELL J. BANAS, JR., ESQ.
JAECKLE FLEISCHMANN & MUGEL, LLP
Attorney for Appellant
Avant Building, Suite 900
200 Delaware Avenue
Buffalo, NY 14202

A. VINCENT BUZARD, ESQ.
HARRIS BEACH PLLC
Attorney for Respondent
99 Garnsey Road
Pittsford, NY 14534

Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next matter on our
2 calendar this afternoon is appeal number 185, Kimmel v.
3 State of New York.

4 Good afternoon, counsel.

5 MR. BANAS: Good afternoon, Your Honor. May it
6 please the court, my name is Mitch Banas. I represent the
7 defendant-appellants, the State of New York and the New
8 York State Police. And with the court's permission, I do
9 reserve three minutes of my time for rebuttal.

10 CHIEF JUDGE DIFIORE: You may have three minutes,
11 sir.

12 MR. BANAS: Thank you, Judge. The - - - the
13 issue presented on this appeal is whether the inclusion in
14 the definition of civil action in Article 86 of the
15 C.P.L.R. of the phrase civil action - - - I'm sorry,
16 judicial review, means something or not. I respectfully
17 submit that the Appellate Division erred when it read that
18 limitation on the definition of civil action out of the
19 statute. I think first, you need to start with the general
20 rule, the American rule, with respect to the bearing of
21 fees which is that each party bears its own fees. Since
22 Article 86 is in derogation of the common law, that needs
23 to be strictly construed. So you start off with that basic
24 rule, and then you go to the statute, the. The title of
25 that act is "Attorneys' fees in certain actions against the

1 State," not all actions, certain actions. And the
2 legislature didn't stop at just saying that the - - -

3 JUDGE RIVERA: Counsel, the state statute is
4 modeled on the federal version, correct?

5 MR. BANAS: It is. Yes.

6 JUDGE RIVERA: Yes. Okay. So under the federal
7 version is your interpretation, does that also hold under
8 that version?

9 MR. BANAS: Oh, I think it does, Judge. And - -
10 -

11 JUDGE RIVERA: Why is that?

12 MR. BANAS: Because the - - - while the federal
13 act, first of all, is in - - - in certain respects similar
14 to the state statute and vice versa, it's different in one
15 very critical respect, and that's the respect we're - - -
16 we're talking about. And this court actually, in the - - -
17 I believe it's in the New York State Clinical Laboratories
18 case, recognized that there are critical distinctions
19 between the state statute and the federal statute.

20 And in particular, what the federal statute says
21 is that - - - it's essentially the federal statute applies
22 in - - - in any civil action other than the cases sounding
23 in tort, including action seeking judicial review. That
24 stands in stark distinction to the state statute, which in
25 the very definition of civil action limits the statute to

1 those actions seeking judicial review. So in other words,
2 the federal statute is much broader than the state statute
3 because the state statute - - - state statute limits the
4 applicability of the act to actions seeking judicial
5 review. And I submit that the - - - that the term judicial
6 review is clear and unambiguous. The - - -

7 JUDGE STEIN: Why didn't it just say judicial
8 review of agency actions?

9 MR. BANAS: Because it's implicit in the term
10 judicial review. Judicial review is a - - - is a term of
11 art that's been around for hundreds of years. There's - -
12 - a cardinal rule of statutory construction is when terms
13 of art are used in a statute, the entire history of what
14 resulted in the term of art is basically subsumed or
15 embodied within a statute. And here, we have the use of a
16 term that, for hundreds of years, has meant that very - - -
17 meant that very thing which is the review by the judiciary
18 of acts of either the executive or the legislative branch.

19 JUDGE ABDUS-SALAAM: Counsel, why couldn't - - -
20 why couldn't the definition be read the same way that the
21 statute is written which doesn't say judicial proceeding?
22 It says civil action.

23 MR. BANAS: Because that - - -

24 JUDGE ABDUS-SALAAM: 8601 just says civil - - -
25 any civil action brought against the state.

1 MR. BANAS: That's - - - that's right, Judge.
2 And - - - but it goes on to define what that civil action
3 is. And unless - - - and what the definition says is that
4 it's any action seeking judicial review. So whenever you
5 see the words civil action in the statute, you need to
6 incorporate the definition. And by definition, what the -
7 - - what the statute incorporates is that the action must
8 necessarily, if the statute is to apply, embody some sort
9 of judicial review and this action does not. The - - -
10 essentially, the - - - by reading out the or ignoring the
11 definition of - - - of civil action or other judicial
12 review component in a definition of - - - of civil action,
13 the Appellate Division read that requirement completely out
14 of the statute. If all that quote/unquote "judicial
15 review" means is an action brought in courts, you don't
16 need the definition. Every civil action is brought in the
17 courts. And according to the Appellate Division - - -

18 CHIEF JUDGE DIFIORE: Doesn't the statute say
19 "Any civil action or proceeding brought to seek judicial
20 review"?

21 MR. BANAS: It does, yes. And you - - - but
22 regardless of whether it's a - - - it's a judicial action
23 or whether it's a proceeding, it needs to have that
24 judicial review component in order for the statute to
25 apply.

1 JUDGE STEIN: So you're saying you can read it
2 all together as one or, as the Chief Judge indicates, it
3 can be read as two separate components, right?

4 MR. BANAS: I'm - - - I'm not sure I'm following
5 the - - - the question.

6 JUDGE STEIN: So if any - - - you're reading it
7 as any civil action or proceeding subject to judicial
8 review, right? And I think what the Chief Judge is asking,
9 why - - - why don't you read it any civil action or any
10 proceeding subject to judicial review? It is because the
11 word "any" or "a" is not there?

12 MR. BANAS: It's because you have - - - I think
13 either way judicial review modifies both.

14 JUDGE STEIN: Well, that's the question.

15 MR. BANAS: Yes. It does.

16 JUDGE STEIN: That's the issue.

17 MR. BANAS: Judicial - - -

18 JUDGE PIGOTT: Well, would it - - - would it - -
19 - and I'm going to follow up on Judge Stein's question,
20 would it modify civil action if there was an "a" or "any"
21 before proceeding?

22 MR. BANAS: I - - - I think it would. Yes. And
23 to - - - to read it otherwise would be to ignore the stated
24 intent of the statute, both in the governor's memorandum of
25 approval and also extensive discussion and reference in the

1 legislative history of the object of the statute. And
2 which is - - - which is something, I think, is significant,
3 as well. When you go - - -

4 JUDGE STEIN: Do we look to the legislative
5 history regardless of whether the - - - the language is
6 ambiguous?

7 MR. BANAS: Pardon me?

8 JUDGE STEIN: Do we look to legislative history
9 regardless of whether we think the language is ambiguous?

10 MR. BANAS: Oh, I think you can. Yeah. There's
11 - - - there's no rule of construction that prevents you
12 from - - - from reviewing the legislative history, even if
13 it's clear and unambiguous. And - - - and I think the
14 court in - - - in prior cases has recognized what the
15 object of Article 86 is. One two occasions, in the New
16 York State Clinical Laboratory case and Wittlinger, this
17 court had the opportunity to talk about what the statute
18 was intended to affect. And in the New York State Clinical
19 Laboratory case, the court recognized that the intent of
20 the statute is to help individuals who may not have the
21 resources to sustain long legal battles against an agency
22 that's acting without justification, classic reference to
23 administrative proceedings and judicial oversight and
24 review. And that the - - -

25 JUDGE ABDUS-SALAAM: Could we go back to the

1 language?

2 MR. BANAS: Sure.

3 JUDGE ABDUS-SALAAM: I - - - I just want to go
4 back to the language of - - - of the definition. The
5 definition takes out matters commenced in the Court of
6 Claims.

7 MR. BANAS: Correct.

8 JUDGE ABDUS-SALAAM: And could you bring an
9 action or proceeding in the Court of Claims for judicial
10 review of anything, of - - - of a state action or state
11 agency action?

12 MR. BANAS: Not as the primary object of relief,
13 but the Court of Claims also has the ability to reward
14 declaratory or injunctive relief incidental to claims for
15 monetary damages. So the purpose of - - - of including
16 that language is to - - - to make absolutely clear that
17 even if there's some sort of ancillary, injunctive, or
18 declaratory relief awarded in a Court of Claims action,
19 that that does not serve as the predicate for an Article 86
20 award.

21 JUDGE STEIN: What about like eminent - - -
22 eminent domain proceedings where the state has acquired
23 property? Can that be brought in the Court of Claims?

24 MR. BANAS: I - - - I do believe it can, and I
25 think there's - - - there's some - - - in limited

1 instances, there are provisions in the Eminent Domain
2 Procedure Law which allows for an award of - - - of
3 attorneys' fees. So in that situation, you - - - you could
4 well be back - - - unless one of those particular situation
5 applies, you could be back within the - - - the statute.

6 And a little more about the Court of Claims
7 exception, because I do - - - I do think it's - - - it is
8 an important point to - - - to be understood here. Is that
9 we talked earlier about the federal EAJA and - - - and the
10 fact that the state EAJA is - - - is modeled, to a certain
11 extent, on that statute. And the - - - the federal EAJA,
12 one of the similarities, is that the federal EAJA excludes
13 tort claims. When that got imported into the state's
14 statutory scheme, that became the Court of Claims exception
15 because that's where you bring tort claims against the
16 state. And there is a certain amount of - - - I think of -
17 - - of belt and suspenders or redundancy in including the
18 Court of Claims exception.

19 JUDGE ABDUS-SALAAM: But this is not a tort
20 action, is it?

21 MR. BANAS: No. It's not

22 JUDGE ABDUS-SALAAM: Right.

23 MR. BANAS: No. No. And I was just explaining
24 in terms of - - - of how we get from the federal EAJA to
25 the - - - to the State Equal Access to Justice Act. And -

1 - - but to the extent that there is some redundancy there,
 2 I think the court is obliged to harmonize the two different
 3 provisions of the statute rather than render one of the
 4 provisions entirely superfluous. I think there is a
 5 distinction between redundancy on the one hand and on the
 6 other hand rendering a provision completely meaningless.
 7 And here, the Appellate Division construction of Article 86
 8 didn't render the judicial review component of the
 9 definition of civil action to completely meaningless. And
 10 - - -

11 CHIEF JUDGE DIFIORE: Are costs and fees ever
 12 recoverable under the EAJA when you're seeking lost damages
 13 or compensatory damages? Are there ever any situations
 14 where you could recover it?

15 MR. BANAS: You mean in - - - in the abstract or
 16 have - - - have there been any cases where - - - where that
 17 fact pattern has been - - -

18 CHIEF JUDGE DIFIORE: Both.

19 MR. BANAS: Okay. I'm not aware of any fact
 20 pattern where they - - -

21 CHIEF JUDGE DIFIORE: And what's your position?
 22 Are they recoverable?

23 MR. BANAS: No.

24 CHIEF JUDGE DIFIORE: Um-hum.

25 MR. BANAS: And - - - and that's because that's

1 not the object of the statute. The - - - as this court
2 recognized in Wittlinger and the New York State Clinical
3 Laboratories case, the purpose of the EAJA was to help
4 incentivize litigants who were the victims of
5 administrative, executive, or legislative excess to pursue
6 claims when the - - - the amount at stake, the amount in
7 controversy, did not sufficiently provide the incentive
8 either for a lawyer or for the litigant to - - - to pursue
9 the - - - pursue the claim.

10 JUDGE STEIN: What, if any relevance, does the
11 amendment, the 2015 amendment to the State Human Rights'
12 Law to allow for recovery of legal fees in - - - in this
13 type of proceeding? What - - - what, if any, relevance
14 does that have to our - - -

15 MR. BANAS: I - - -

16 JUDGE STEIN: - - - analysis?

17 MR. BANAS: I don't think it has any relevance at
18 all. Number one, it - - - it expressly applies only
19 prospect - - - prospectively, the actions commenced on or
20 after its effective date. And number two, it applies only
21 to cases of gender discrimination. So notwithstanding the
22 amendment, the state still remains the only employer in the
23 state of New York subject to an award of counsel fees in
24 all discrimination cases other than those cases based on
25 gender.

1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MR. BANAS: All right. Thank you, Judge.

3 CHIEF JUDGE DIFIORE: Counsel.

4 MR. BUZARD: May it please the court, I'm Vince
5 Buzard, and I'm here representing the plaintiff, Betty
6 Kimmel, and her longtime lawyer, Emmelyn Logan-Baldwin. To
7 take - - - to put the State's argument in context, we have
8 to go back to 8601 of - - - of the law which provides that
9 any civil action is to - - - covered for the prevailing of
10 fee - - - for fees to a prevailing party.

11 JUDGE ABDUS-SALAAM: Mr. Buzard, then you have
12 the specific definition in 8602 - - -

13 MR. BUZARD: That's correct.

14 JUDGE ABDUS-SALAAM: - - - of action. So how do
15 - - - how do those those - - -

16 MR. BUZARD: Well - - -

17 JUDGE ABDUS-SALAAM: - - - two provisions - - -

18 MR. BUZARD: 8602 is even stronger because it
19 says "any civil action or proceeding." The only - - - the
20 difference is the judicial review issue, which is, I
21 assume, what you're getting at. But we have - - - that
22 issue has to be looked at through this broad funnel in the
23 statute that says any civil action, and now the State wants
24 to take it down to a pretty rare form of civil - - - civil
25 action.

1 JUDGE ABDUS-SALAAM: But does - - - does that
2 sentence in 8602 make any sense if you just read it as any
3 civil action, what?

4 MR. BUZARD: Yes.

5 JUDGE ABDUS-SALAAM: There's nothing - - - you
6 know, what's the rest of the sentence?

7 MR. BUZARD: Any civil action. Judicial review
8 works there because judicial - - - one of the fundamental -
9 - - the fundamental problem with the State Police's
10 argument is that it says that judicial review has this
11 technical meaning as a term of art and it doesn't. This -
12 - - it can. I mean it can mean agency review and
13 administrative review and review of acts of the
14 legislature. But this court was - - - in Pan Am - - - in
15 the Pan Am case extensively cited in our brief, the court -
16 - - this court held that there were two kinds of
17 proceedings available to a person being discriminated
18 against, administrative proceeding, and then judicial
19 review. Judicial review has to mean the statutory right
20 provided under the executive law to bring a lawsuit. So
21 this court used the language in that case to mean just this
22 - - -

23 JUDGE STEIN: But it - - -

24 MR. BUZARD: - - - a judicial forum.

25 JUDGE STEIN: But it doesn't apply to the Court

1 of Claims.

2 MR. BUZARD: It does not apply to the Court of
3 Claims, and - - - and that's important for a number of
4 reasons. First of all, it's not left to inference like the
5 State Police are trying to do. They say, well, judicial
6 review, it means - - - it says specifically, with specific
7 language, that Court of Claims is not included.

8 JUDGE STEIN: But why - - - why - - -

9 MR. BUZARD: That's the best - - -

10 JUDGE FAHEY: Why would the - - - why would the
11 legislature want to leave the Court of Claims out of it if
12 your analysis that they intended to allow for counsel fees
13 in - - - in civil proceedings as opposed to administrative
14 proceedings?

15 MR. BUZARD: Torts, elimination of torts, which
16 this isn't.

17 JUDGE STEIN: That's the - - - that's the sole
18 reason for it?

19 MR. BUZARD: Well, it - - - it tracks well with
20 the federal statute, which has been pointed out by the
21 court, is supposed to be similar. Both say any civil
22 action, both say - - - the federal action says - - - or the
23 federal action says torts, state statute says Court of
24 Claims. They're - - - they're, therefore, parallel. But
25 the - - - the importance of that explicit phrase in the

1 statute excluding the Court of Claims is that if judicial
2 review means what the State Police says it is - - - does,
3 it's not necessary.

4 JUDGE STEIN: Well, then why wouldn't it just say
5 excepting tort actions?

6 MR. BUZARD: Well, because - - - and the State
7 admitted this in their brief, that the purpose is - - -
8 this is on page 25 of the reply that there are two reasons
9 for judicial review. One's enough to avoid the redundancy
10 issue or the superfluousness issue. "Eliminate from free
11 consideration all prior proceedings that spawned a judicial
12 review." In other words, the purpose of judicial review is
13 to make clear that administrative proceedings are not - - -
14 not covered unless they - - - it's remanded, which is
15 possible in some.

16 But just - - - Judge Stein, you asked the
17 question and it's - - - it's absolutely apt and that is why
18 didn't they just say it? Because they're - - - they're
19 relying on this inference from judicial review and they
20 cite a whole bunch of cases. The only state case that hold
21 - - - that refers to judicial review they cite is in a
22 dissent from - - - from the Fourth Department. The - - -

23 JUDGE STEIN: But there's never - - - as - - - as
24 far as I'm aware, there's never been a case before. All
25 the cases that - - - that address this are - - - are

1 proceedings to review agency action. And - - - and that's
2 all that's talked about, as far as I can tell, in the
3 legislative history. Doesn't that mean something?

4 MR. BUZARD: Well, I think the Fourth Department
5 was right, first of all, because it is clear. But the - -
6 - the legislative history in - - - the early legislative
7 history relied on heavily by the State of New York was
8 specifically addressed to administrative agencies. No
9 question about it. And it was put in the Administrative
10 Procedures Act for agencies. And - - -

11 JUDGE STEIN: But I'm just talking about the - -
12 - the history. Even if we - - - if - - - even if we
13 disregard all that history.

14 MR. BUZARD: Yeah.

15 JUDGE STEIN: Just the history of the 1989 act,
16 that's all they talk about.

17 MR. BUZARD: Well, the assembly bill, the
18 assembly memo, which was from a sponsor of this bill does
19 not re - - - he says just any civil action. I - - - but I
20 go back to the point - - -

21 JUDGE STEIN: Well, but that's in the context of
22 the whole conversation.

23 MR. BUZARD: Yeah.

24 JUDGE STEIN: And in the context of the
25 conversation that they want to make sure that it's not

1 going to cost the State an outrageous amount.

2 MR. BUZARD: Well, they use the - - - use the
3 federal experience to calculate cost and that clearly
4 applies to any action. So that should not be the issue.

5 JUDGE STEIN: So how do you - - -

6 MR. BUZARD: But it's important to go back, also,
7 to the fact that there is this redundancy which they can't
8 overcome. That if it means - - - if judicial review so
9 clearly means only declaratory judgment actions in Article
10 78s, then it render superfluous the very explicit language
11 of the statute. And you cannot - - - the rules of
12 construction are - - -

13 JUDGE ABDUS-SALAAM: But which - - - which part?

14 MR. BUZARD: I'm sorry.

15 JUDGE ABDUS-SALAAM: You mean 8601, any civil
16 action? Is that what you're talking about it would
17 eliminate?

18 MR. BUZARD: Yes. Well, it would be - - - it - -
19 -

20 JUDGE ABDUS-SALAAM: Well, what other action - -
21 - could I just ask - - -

22 MR. BUZARD: Yes, Your Honor.

23 JUDGE ABDUS-SALAAM: - - - what is - - - what
24 other action besides a declaratory judgment action would be
25 brought other than in a Court of Claims to a review a state

1 agency or its officials or anything like that? Is there
2 some other type of action besides a declaratory judgment
3 action that would be brought?

4 MR. BUZARD: Well, the State refers to actions
5 for an injunction, but it is - - - it is a valid point when
6 they say any civil action or proceeding, so proceedings are
7 covered over here, and so that narrows down to this little
8 tiny subset of civil actions declaratory judgment actions
9 which are not - - - not typical.

10 But the other point I want to make that's clear,
11 because we've been kicking around the term agency action,
12 it's not limited to agency action. It's also - - - it
13 includes, for the first time on - - - based on prior - - -
14 contrary to the prior history, it also involves actions of
15 individuals, officers, officials, not just agencies. And
16 there doesn't have to be a - - - a written record. Under
17 Wittlinger, there was an issue of delay and - - - and
18 decided by this court which did not deal with the issue of
19 judicial review, as he said. But it's conduct. It's the
20 conduct of the parties. So we're already way beyond the
21 dictionary definition of - - - that the State cites of
22 agency review of findings of fact and legal conclusions.

23 JUDGE ABDUS-SALAAM: How do you address, though -
24 - - -

25 MR. BUZARD: It's not - - - it's way beyond that.

1 JUDGE ABDUS-SALAAM: How do you address Mr.
2 Banas' distinction between the federal EAJ and - - - JA - -
3 - and the state EAJA, the language there?

4 MR. BUZARD: Well, first of all, they say the - -
5 - the statute in this case, our statute, says it's supposed
6 to be similar and also says that it brings in the body of
7 law. And there's no question about the fact that the
8 federal statute covers any case or any - - - any civil
9 action. And we've talked about the tort. But then it has
10 a subset, the federal statute now, including proceedings
11 for judicial review of agency action. Federal government
12 didn't leave it to chance. They said agency action. Now
13 the state statute arrives at the same conclusion in a
14 different way. It says "any civil action" but then defines
15 action to include "judicial review of an action of the
16 State" but then judicial action of the state is an - - -
17 includes actions not just by agencies, by - - - but by
18 individuals which were involved here. We had an agency
19 involved because they disciplined her for an unprov - - -
20 provoked assault and then we have the acts of the agents
21 who engaged in the discrimination and then the higher-ups
22 who didn't follow up on the complaints.

23 JUDGE ABDUS-SALAAM: Wouldn't that - - -

24 MR. BUZARD: So we have actions in conduct.

25 JUDGE ABDUS-SALAAM: Yeah. But wouldn't - - -

1 wouldn't that make more sense if she had brought some kind
2 of administrative proceeding against the - - - her
3 employer, the - - - both the state troopers and the
4 individuals and there was some decision based on that and
5 then she went to court to have that reviewed?

6 MR. BUZARD: Well, then you're here on arbitrary
7 and capricious standard. She has a statutory right.
8 People who are discriminated against have a statutory right
9 to bring a lawsuit when they're discriminated against, and
10 this is the most poss - - - egregious possible
11 discrimination. She has a right not to be - - -

12 JUDGE STEIN: Counselor - - -

13 MR. BUZARD: I'm sorry.

14 JUDGE FAHEY: What - - - what about the fact that
15 the state statute talks about re - - - refers to the record
16 before the agency or official in determining whether the
17 action in question was substantially justified. Why would
18 it do that?

19 MR. BUZARD: Well, for two reasons - - -

20 JUDGE STEIN: How - - - I mean how - - - how
21 could it be based on that unless there was - - - there was
22 an agency record - - - or record of the official?

23 MR. BUZARD: Well, Your Honor. There will be
24 times when it - - - when it would be. But we know from
25 Wittlinger that conduct is involved. That was a delay case

1 and they looked at the reasonableness of the conduct. You
2 - - - and this court in Wittlinger said we look at the
3 conduct. So here, you could look at the conduct or her
4 complaints, I mean the record, the record would include her
5 complaints, what, if anything, they did about it. It would
6 include the complaint or the fact that she was disciplined
7 for an unprovoked assault, all - - - all the things that
8 happened to her during the thirteen years she was at - - -
9 or 1980 to - - - thirteen years she was a trooper could be
10 - - - there's a record. There's a record. But - - -

11 JUDGE STEIN: But is that an agency record?

12 MR. BUZARD: Well, if - - - if there's an agency,
13 yes. But it doesn't have to be an agency.

14 JUDGE STEIN: But it doesn't if there's an
15 agency. It says in determining whether the action was
16 substantially justified you - - - you consider the record
17 before the agency or official.

18 MR. BUZARD: Well, we know that in judging the
19 conduct under Wittlinger that there was not a record in
20 that case. There was an issue of delay. And so you don't
21 - - - it doesn't have to be a neatly bound set of decision
22 - - - of documents. The court says - - - your - - - this
23 court, said it's conduct.

24 Now if I could - - - also on the issue of the
25 definition of judicial review, the State in its reply cited

1 a number of cases from other states for the proposition
2 that when it says judicial review that means - - - that's
3 limited to agencies. The difference was - - - and we
4 pointed out, the difference was in every one of those
5 statutes, the statute said judicial review of an agency
6 action or decision. They didn't leave it to inference or
7 chance. So all of those statutes reinforce the point that
8 if this legislature had intended to so limit it, they would
9 have - - - they would have said so.

10 I would like to talk - - - if the court pleases,
11 just a moment. The other point I should make is that there
12 - - - the legislature, if it had intended to limit it to -
13 - - to insert administrative proceedings in this - - - in
14 this, which it did not, it's just not there as a Fourth
15 Department administrative proceedings - - - agency
16 proceedings are not in there, it violates a rule of
17 construction to infer that term when the legislature, if
18 that's what it mean, it would have said. The legislature
19 was simply making the distinction the State pointed out
20 that it's got to be a judicial action. That - - - that's
21 why it's in there.

22 I would say, also, that on the issue - - - that
23 we ought to take a look at the purpose this court said in
24 Wittlinger that allows plaintiffs to gain attorney's fees,
25 the statute seeks to - - - to help those rights - - - whose

1 rights have been violated but whose potential damage award
2 may not have enough to induce the lawyer. That's why this
3 - - - we - - - you also need to look at that purpose. The
4 record shows that this - - - that Ms. Kimmel tried to find
5 a lawyer, could not find a lawyer because there wasn't
6 going to be enough involved even though the treatment that
7 she suffered was obviously so terrible, so egregious. So
8 this statute - - - and this statute would provide relief
9 for those people and send them signal to lawyers that they
10 can take these cases under these very limited
11 circumstances. Now to go back to the issue what does
12 certain mean, certain lawsuits.

13 JUDGE STEIN: Well, we don't - - - we don't need
14 that now because - - - well, now at least in some cases,
15 the Human Rights Law, it does allow - - - it statutorily
16 allows counsel fees.

17 MR. BUZARD: Yeah. On gender.

18 JUDGE STEIN: On gender. Yeah.

19 MR. BUZARD: But - - - but all the other people
20 who are out there making very little money and being
21 discriminated against are going to - - - would have a hard
22 time finding a lawyer just like she did.

23 CHIEF JUDGE DIFIORE: Thank you, sir.

24 MR. BUZARD: Oh, okay. May I make one more
25 sentence?

1 CHIEF JUDGE DIFIORE: You may.

2 MR. BUZARD: Thank you. This case demonstrates -
3 - - more than anything could the power of the State when it
4 decides to not settle or to really go after and grind down
5 a needy plaintiff and would serve as a beacon to lawyers
6 who take on these cases that they would be paid and it
7 would also serve as a deterrent. Thank you very much.

8 CHIEF JUDGE DIFIORE: Thank you, sir.

9 Mr. Banas.

10 MR. BANAS: Thank you, Judge. And actually, a
11 lot of what I would have said in rebuttal, it's obvious
12 that the - - - the court grasped by virtue of the
13 questioning so I won't repeat it here. But Article 86, as
14 - - - as Mr. Buzard points out - - -

15 MR. BUZARD: Buzard [Buzz' ard].

16 MR. BANAS: Buzard, I'm sorry. It is a funnel
17 and - - - and part of the funnel is the judicial review
18 component. And the - - - and Mr. Buzard referred to other
19 state EAJAs and the federal EAJAs as including in close
20 proximity to the term judicial review agency action
21 official action. And our - - - and our statute gets to the
22 same, place just via a different route, because it's
23 included in the definition of the State. So when you read
24 it all together, the - - - the, you know, judicial review
25 in our statute applies to agency action and official action

1 just as much as in the other statutes but you still got to
2 have - - - the point is you still got to have some sort of
3 agency action. And in terms of the - - -

4 JUDGE ABDUS-SALAAM: Well, you - - - in this
5 case, as Mr. Buzard points out, there was some difficulty
6 by this claimant in finding a lawyer to represent her, and
7 isn't that one of the purposes of the EAJA? And based on
8 what I - - - I think I read about what she recovered, it's
9 twenty years later and she recovered, you know, something a
10 lot less than she was suing for. And if she had to pay her
11 lawyers out of that for twenty years' worth of work, isn't
12 that really punishing her?

13 MR. BANAS: Well, no - - - no. And it's obvious
14 - - -

15 JUDGE ABDUS-SALAAM: Instead of the State who
16 delayed in getting this going?

17 MR. BANAS: I don't subscribe to that - - - that
18 narrative. There's plenty of blame to - - - to go around
19 on both sides in terms of why the - - - why the case took
20 so long to - - - to get resolved. But that's really
21 immaterial, I think, to the statutory language that the
22 court is charged with - - - with interpreting. And it's
23 very - - - it's a very easy, very subjective thing to say I
24 had a hard time finding a lawyer when the fact of the
25 matter is she did find a lawyer. She found two lawyers.

1 She recovered 800,000 dollars in damages.

2 That's just not the kind of case that Article 86
3 of the C.P.L.R. and the Equal Access of Justice Act was
4 intended to incentivize. The - - - the whole purpose
5 behind the act, as again, this court has recognized in - -
6 - in Wittlinger and the New York State Clinical
7 Laboratories case was to incentivize litigants and
8 attorneys who - - - whose monetary stakes aren't sufficient
9 to incentivize a battle against city hall. And when you
10 use phrasing like against city hall, that's classic Article
11 78-type language that's clearly referring to situations
12 where you're talking about administrative or executive
13 excess or unfairness.

14 CHIEF JUDGE DIFIORE: Thank you, Mr. Banas.

15 MR. BANAS: Thank you, Judge.

16 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. State of New York, No. 185 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite 607
New York, NY 10040

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