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COURT OF APPEALS

STATE OF NEW YORK

JEANETTA STEGA,

Appellant,

-against-

NO. 80

NEW YORK DOWNTOWN HOSPITAL,

Respondent.

20 Eagle Street
Albany, New York
June 6, 2018

Before:

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:

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Official Court Transcriber



1 JUDGE RIVERA: The last appeal on today's
2 calendar, number 80, Stega v. New York Downtown Hospital.

3 MR. BERANBAUM: Good afternoon, Your Honors.

4 JUDGE RIVERA: Good afternoon.

5 MR. BERANBAUM: My name is John Beranbaum. I
6 represent the appellant, Dr. Jeanetta Stega. This case
7 shows - - -

8 JUDGE RIVERA: Counsel, would you like to reserve
9 rebuttal time?

10 MR. BERANBAUM: Oh, thank you, yeah.

11 JUDGE RIVERA: How much time would you like?

12 MR. BERANBAUM: Two minutes.

13 JUDGE RIVERA: Thank you.

14 MR. BERANBAUM: This case shows why the Court of
15 Appeals has repeatedly said that absolute privilege is a
16 limited doctrine that should be used sparingly. Here, Dr.
17 Stega, a research - - - a health researcher, who's
18 dedicated her life - - -

19 JUDGE GARCIA: Counsel, if we go with that - - -
20 your position here, are we, in effect, overruling parts of
21 Rosenberg?

22 MR. BERANBAUM: I don't think so, Your Honor. I
23 - - - the - - - for - - -

24 JUDGE GARCIA: Because I think your argument's a
25 very good one, ex - - - except you have the problem of



1 Rosenberg coming in middle of the stream here.

2 MR. BERANBAUM: No, no, no.

3 JUDGE GARCIA: So - - -

4 MR. BERANBAUM: I - - - I - - - the - - - what
5 distinguishes this case from Rosenberg, is that Rosenberg
6 permitted the defamed party in the administrative
7 proceedings to challenge the defamatory statements. And in
8 - - -

9 JUDGE RIVERA: Well, we didn't say that was
10 dispositive in the case.

11 JUDGE STEIN: And that - - -

12 JUDGE RIVERA: We had already reached that
13 decision, and then re - - - recognized that that was true.

14 MR. BERANBAUM: You're saying that that's dicta?
15 Well, I - - - I think the way that - - - if I could - - -

16 JUDGE GARCIA: It also does a status type - - -
17 I'm sorry - - - it does a status type analysis of the
18 individual, rather than the process. And I don't think we
19 ever want to go down that road. So then it would be if you
20 have an FDA inquiry, the way you do here, and it's someone
21 who has some type of right, yes, they would only have qual
22 - - - we want to do it in terms of the proceeding, and I
23 think that's what Rosenberg said.

24 And I think if your - - - what the difficulty to
25 me is, if you're going to say that in this type NASD



1 inquiry, and this is this public interest, and now you have
2 an FDA inquiry into arguably much more serious types of
3 issues in terms of the public. How can we not apply
4 Rosenberg there?

5 MR. BERANBAUM: Well, there are a few questions
6 on the table, so let me see if I can - - -

7 JUDGE GARCIA: I know that.

8 MR. BERANBAUM: - - - start with Judge Rivera,
9 the point about that this is not the key element of
10 Rosenberg. I think if you take the three cases that this
11 court has addressed the quasi-judicial proceeding, you can
12 take out of that, the central point that one way or
13 another, the defamed party has the right to contest the
14 harm done to her. And that's - - - and I can get into the
15 - - - in - - - in more depth if you need to.

16 So I don't think if you - - - I don't think it's
17 dicta. I think it's a - - - a key point in distilling
18 those three cases.

19 JUDGE STEIN: That's not about the status of the
20 person inasmuch as it is the nature of the proceedings. In
21 other words, I - - - I mean, it seems to me that if you - -
22 - if you - - - if you expand - - - or if you apply
23 Rosenberg to this situation, that we're really saying that
24 any time that you speak to a governmental authority doing
25 an investigation, there's - - - there's - - - there's



1 complete immunity, which then doesn't make it a limited
2 doctrine.

3 MR. BERANBAUM: Right. I - - - I think that - -
4 -

5 JUDGE RIVERA: No, but isn't the difference here
6 that you have human specimens?

7 MR. BERANBAUM: Well, I don't think - - -

8 JUDGE RIVERA: We're talking about people's lives
9 - - -

10 MR. BERANBAUM: Yeah - - -

11 JUDGE RIVERA: - - - and health potentially on
12 the line. This is not like some other administrative
13 proceeding.

14 MR. BERANBAUM: Yeah, but I don't think - - - I
15 don't think that is the key point, because you have a vast
16 number of cases dealing with me - - - medical malpractice,
17 qualifications and competence of doctors, and in those
18 cases, consistently from the 1950s through the statutory
19 law, the - - - there's - - - there's - - - that compelling
20 interest is not so compelling that a protected - - - excuse
21 me - - - a qualified immunity wouldn't protect the
22 individual.

23 JUDGE GARCIA: Let's say in Rosenberg, same
24 facts, same inquiry, the statements made about someone
25 who's not the subject, does not have the right to challenge



1 it, but it's the same proceeding. So in that case, would
2 the person making the statement only have qualified
3 immunity, because the person they made the statement about
4 isn't a - - - able to challenge?

5 MR. BERANBAUM: I think that's - - - yes, that's
6 our position.

7 JUDGE GARCIA: So how could that not be a status-
8 based rule?

9 MR. BERANBAUM: Well, I think - - - and by saying
10 it's a status-based rule - - -

11 JUDGE GARCIA: It depends on the person. It's
12 not - - - depend on the proceeding, it doesn't give you a
13 blanket rule for this proceeding in the U-5 in - - - in
14 Rosenberg, it just gives you - - - the immunity is
15 dependent on who you say it about.

16 MR. BERANBAUM: There's some truth to that, but I
17 think that this court has made analogous distinctions, so
18 in *Front v. Khalil* where the issue was pre-litigation
19 statements of attorneys. You could say that there - - -
20 there should be a - - - a common rule that all those
21 statements are either qualified or - - - or absolutely
22 protected. But the court - - - your court - - - did - - -
23 did something different than that, and said that if the
24 statement was made in good faith and was relevant to
25 anticipated litigation, that's qualified. But it was not



1 made in good faith, it was not relevant, and therefore,
2 it's - - - I'm sorry - - - I'm reversing, excuse me. It's
3 absolute, and if it's otherwise, it's qualified.

4 So the - - - the court is willing to make those
5 kinds of distinctions when such an important principle is
6 at stake, as somebody having a right to challenge - - -

7 JUDGE RIVERA: So can I ask, is - - - is your
8 position then that the person must be able to challenge in
9 whatever this qua - - - quasi-judicial proceeding that
10 we're talking about - - - versus having an opportunity
11 within the administrative framework to try and get some
12 kind of relief from the agency?

13 MR. BERANBAUM: I'm - - - my position is that the
14 person - - -

15 JUDGE RIVERA: Let me put this way. Let's say in
16 this example - - -

17 MR. BERANBAUM: Yes.

18 JUDGE RIVERA: - - - I'm assuming for the moment
19 this is not true; you'll tell me otherwise. Let's say
20 hypothetically that although she could not proceed if there
21 was a hearing to, in any way, inject herself into the
22 hearing, nevertheless the administrative framework allows
23 for someone like her, where someone has made a comment that
24 she thinks is false and defames her, to write a letter to
25 the agency seeking for some kind of removal of her name



1 from the record. Would you say in that case, that person
2 still has an action for defamation?

3 MR. BERANBAUM: Oh, yes, I do.

4 JUDGE RIVERA: Okay, so - - -

5 MR. BERANBAUM: And - - - and - - -

6 JUDGE RIVERA: - - - even - - - even if they're
7 not proceeding under the judicial - - - in the quasi-
8 judicial proceeding, all right, so the administrative
9 adjudicatory arm of the administrative entity - - -

10 MR. BERANBAUM: That's - - -

11 JUDGE RIVERA: - - - you would recognize that as
12 long as this person has, within this administrative
13 framework, some relief, right - - - yes?

14 MR. BERANBAUM: Yes.

15 JUDGE RIVERA: That then the person who spoke
16 would have absolute immunity against the defamation claim?

17 MR. BERANBAUM: If - - - if that person, like in
18 Toker, that - - - Toker made that distinction. And in
19 Toker it found that the individual - - - the defamed party,
20 did not have any opportunity at the hearing to contest the
21 defamation, and therefore - - - there were other factors,
22 but this was a central factor in my view - - - therefore,
23 this was not a quasi-judicial proceeding, so in - - -

24 JUDGE WILSON: Can you help me with the following
25 - - - maybe you can or maybe you can't - - - as I



1 understand it, the reason for granting an immunity, whether
2 it's qualified or it's absolute, is to protect, in this
3 case, the investigative process. Are you with me so far?

4 MR. BERANBAUM: Yes.

5 JUDGE WILSON: Okay. Here, the investigative
6 process is the FDA's process, right?

7 MR. BERANBAUM: I'm with you.

8 JUDGE WILSON: I'm sorry?

9 MR. BERANBAUM: I'm with you.

10 JUDGE WILSON: Okay. The FDA is a federal
11 agency, right?

12 MR. BERANBAUM: Right.

13 JUDGE WILSON: Okay. Why does New York law have
14 anything to do with this? Why isn't this governed by
15 federal immunity law? And if that's right, can you point
16 me to anything that would tell me under federal law what -
17 - - whether it would be qualified or absolute immunity?

18 MR. BERANBAUM: Well, because the action is not
19 against the FDA. The action against - - - is against the
20 citizen of - - - of New York, and therefore the common law
21 of New York applies.

22 JUDGE WILSON: To the defamation claim, but to
23 the claim of immunity, why would New York law govern that?
24 That would mean that if the FDA were investigating this in
25 several different states, it's investigative process might



1 be subject to different immunity rules depending on where
2 the particular witness was located?

3 MR. BERANBAUM: I - - - I think that's - - - that
4 it - - - that might be the consequence. I haven't - - - to
5 be honest, I haven't researched that, but I can tell you
6 that in most states, I - - - from my understanding - - -
7 would - - - would apply a par - - - a qualified privilege
8 here and not an absolute privilege.

9 JUDGE RIVERA: Well, what - - - what's the
10 federal rule on it?

11 MR. BERANBAUM: I don't know, in truth.

12 JUDGE RIVERA: Your time is up, thank you.
13 You'll have your rebuttal.

14 MR. BERANBAUM: Okay.

15 MR. PORZIO: May it please the court, my name is
16 Christopher Porzio, and I represent the defendants-
17 respondents in this matter. I'd like to - - -

18 JUDGE RIVERA: Counsel, I'd like to just ask
19 upfront. Is - - - is it correct - - - I - - - I believe
20 that's the representation here - - - you can tell me
21 otherwise when you back on rebuttal - - - is it correct
22 that this plaintiff would not have any recourse in the
23 administrative setting or - - - to - - - to somehow protect
24 her reputation, to purge these statements about her?

25 MR. PORZIO: Well, Your Honor, with respect to



1 that point made by appellant, the - - - the only argument
2 that appellant's ever made here is that Ms. Stega
3 specifically doesn't have the opportunity in this
4 particular quasi-judicial proceeding to challenge the
5 veracity of the statements that were made to the FDA
6 investigator. So there's never been an argument one way or
7 the other about whether or not it gives her alternative
8 avenues to clear her name. But - - -

9 JUDGE RIVERA: Do - - - do you know if there are?

10 MR. PORZIO: I do - - -

11 JUDGE RIVERA: If Dr. Stega has some other way to
12 deal with the reputational harm she alleged has occurred?

13 MR. PORZIO: I do not, but I think it should be
14 recalled, Your Honor, that - - - the fact is, this process
15 and this FDA investigation that occurred here, arose out of
16 a complaint that Ms. Stega made in the first place to the
17 FDA.

18 The other point I would make is - - -

19 JUDGE RIVERA: Well, we don't want to chill
20 someone, right? We don't want to discourage complaints?

21 MR. PORZIO: No, but, Your Honor, my - - - my
22 point in - - - in making that statement is that, having
23 this idea of name-clearing and making the application of an
24 absolute privilege predicated on that opportunity to clear
25 one's name, creates sort of a perspective - - -



1 JUDGE FAHEY: Well, I think it - - - I don't
2 think - - -

3 MR. PORZIO: - - - where I think Judge Garcia
4 said - - -

5 JUDGE FAHEY: I don't - - - to say it clears
6 someone's name is to presume it clears someone's name. I -
7 - - I don't think that's the purpose. I think it's to have
8 an opportunity before a neutral factfinder to - - - to
9 present or respond to an allegation that you allege is a -
10 - - a lie. So - - - and - - - and since the consequences
11 of the decisions of - - - of a particular administrative
12 body affect Dr. Stega or someone in her position, just - -
13 - the - - - the argument is that they should be able to
14 have an opportunity to speak. Here they don't have an
15 opportunity to speak. That's the way I understand that
16 argument.

17 MR. PORZIO: Well, Your Honor, with respect to
18 that issue, I - - - I think, you know, the court's decision
19 in Rosenberg, the application - - -

20 JUDGE FAHEY: Let me ask you this about
21 Rosenberg. You know, we've been talking about it a little
22 bit. Do think Rosenberg overturns or negates the reasoning
23 in Pollak - - - or Toker v. Pollak?

24 MR. PORZIO: It negate - - - it negates it to the
25 extent that the To - - - to the extent the Toker holding



1 was based on not - - - was not - - - did not apply the
2 absolute privilege because the statements were not made in
3 an - - -

4 JUDGE FAHEY: But - - -

5 MR. PORZIO: - - - actual quasi-judicial - - -

6 JUDGE FAHEY: It doesn't say that in the
7 decision, of course, that - - -

8 MR. PORZIO: In Rosenberg?

9 JUDGE FAHEY: Yeah.

10 MR. PORZIO: It does not say that.

11 JUDGE FAHEY: Right.

12 MR. PORZIO: But the point - - - it's the only
13 logical reading of Rosenberg, because Rosenberg holds that
14 sta - - -

15 JUDGE FAHEY: So are - - - are we in a position
16 then that we have to choose between the analysis in Toker
17 or the analysis in Rosenberg? Or can Ro - - - can
18 Rosenberg be distinguished from Toker and we can move
19 forward?

20 MR. PORZIO: Well, I think Rosenberg is an
21 evolution of the absolute privilege in the eyes of this
22 court in - - - based on the fact that, as we get into
23 modern society with a - - - administrative agencies
24 functioning much more in an adjudicatory process - - -

25 JUDGE FAHEY: Well, wouldn't - - - wouldn't - - -



1 wouldn't that mean that the Toker idea that you should be
2 able to speak up when somebody's making a decision about
3 you even more important as we move into that kind of a
4 society?

5 MR. PORZIO: Well, I think it's - - - again, it's
6 the process - - - I mean, the - - - the point of - - - the
7 quasi-judicial privilege here is an extension of the
8 judicial privilege. Statements made in the judicial
9 proceeding are absolutely privileged.

10 JUDGE FAHEY: Right, but - - - but these
11 statements weren't made in a judicial proceeding.

12 MR. PORZIO: No, but my point is the recognition
13 is that we - - - the - - - the - - - this court's holdings
14 are to the effect that the privilege has been extended to
15 the quasi-judicial context - - -

16 JUDGE STEIN: So with that - - -

17 MR. PORZIO: - - - based on the - - - the
18 fundamental aspects of these proceedings that make them
19 judicial in nature.

20 JUDGE STEIN: So are you suggesting that it's no
21 longer a limited doctrine? It's - - - it's - - - it's now
22 - - - I mean, it just - - - it seems to me that as you say,
23 there's - - - there's such a proliferation of - - - of
24 these quasi - - - these administrative agencies. They're
25 everywhere in our lives, and - - - and there are all kinds



1 of proceedings, formal and informal and whatever before
2 these proceedings, and - - - and if every time a person is
3 called to - - - to speak to - - - you know, in an
4 investigation is entitled to absolutely immunity, then, you
5 know - - - then it's no longer a - - - a restricted
6 concept.

7 And my question to you though is, why isn't
8 qualified immunity enough here? Why - - - I mean, you
9 still have to prove - - - you'd have to prove malice,
10 right, to - - - to - - - right? And so why should someone
11 be able to make false statements, defamatory statements,
12 about another person to any agency under these
13 circumstances with malice?

14 MR. PORZIO: Well, because I think it - - - it
15 comes down to the policy considerations behind it. And
16 under this court's holdings - - - in Rosenberg, the court
17 held that the policy consideration of protecting the
18 investing public from unscrupulous and unethical brokers
19 was sufficient to support the application of an absolute
20 privilege over a merely a qualified privilege. Similarly,
21 going back to this court's decision in Weiner v. Weintraub,
22 it held that the policy consideration of upholding the
23 standards of the - - - of the bar, required an absolute
24 privilege to apply about complaints - - -

25 JUDGE STEIN: What about the judiciary?



1 MR. PORZIO: What about - - - I'm sorry?

2 JUDGE STEIN: Don't - - - haven't we said in the
3 case of - - - of - - - of judicial reviewing potential
4 judge candidates that a qualified immunity was sufficient?

5 MR. PORZIO: Oh, you're referring to the - - - to
6 the Toker case? I think Toker can be reconciled because
7 this - - - in reaching its decision, the court in Toker
8 first found that the Department of Investigation had no
9 ability to - - - to create a remedy based on its findings.
10 And that there was not the possibility of a hearing, so I
11 think Toker can be reconciled with Rosenberg and the
12 others, because Toker stands for the - - - the process in
13 Toker wasn't truly quasi-judicial.

14 In contrast here, the FDA had the ability to
15 sanction the hospital IRB and conduct an administrative
16 hearing to revoke the approval.

17 JUDGE FAHEY: But - - - but it - - - it couldn't
18 provide any remedy at all to - - - to the plaintiff.

19 MR. PORZIO: Well, be - - - that's because the
20 subject of this proceeding was, in fact, the IRB - - -

21 JUDGE FAHEY: And that - - - that would argue - -
22 - I agree with you about that. It - - - it is a limitation
23 on the hearing. You're right about that. The problem is,
24 is that it creates a situation then where in an ancillary
25 hearing, you can do damage to somebody, and they can't even



1 confront the challenge to their reputation, or this case,
2 their livelihood.

3 And it's - - - you know, Toker had this language
4 a - - - about these kinds of investigations that Judge
5 Jasen used, that's - - - it's - - - it talks about it - - -
6 he said with - - - to not challenge it "would provide an
7 unchecked vehicle for silent but effective character
8 assassination" is the language that - - - that Judge Jasen
9 used there.

10 And - - - so ultimately the question may come
11 down to whether or not the party affected is silent in
12 whatever proceeding that comes up. And I guess - - - so
13 our question here is, is she silent here? Does it - - - it
14 seems to me she is, and that's why I'm asking it.

15 MR. PORZIO: Well she - - -

16 JUDGE FAHEY: You - - - you tell me she's not.
17 Tell me how she's not silent.

18 MR. PORZIO: Well, certainly she wasn't silent
19 with respect to - - -

20 JUDGE FAHEY: No, in the context of the - - -

21 MR. PORZIO: - - - making the complaint and co -
22 - - and communicating with the FDA with respect to the
23 issues that it was investigating - - -

24 JUDGE FAHEY: No, she actually brought in the
25 complaint, right? The original investigation, she - - -



1 she brought it?

2 MR. PORZIO: That's correct.

3 JUDGE FAHEY: Right. So, but she won't be heard
4 at any hearing?

5 MR. PORZIO: No, but, Your Honor, I think the
6 other thing to - - - to remember is, with respect to - - -

7 JUDGE RIVERA: Well, that's not - - - she might
8 be heard at a hearing. The question is not that.

9 MR. PORZIO: I mean, I guess - - -

10 JUDGE RIVERA: The question is whether or not - -
11 - and I thought you said you don't know, because that was
12 my question as she - - -

13 MR. PORZIO: I don't know - - -

14 JUDGE RIVERA: - - - excuse me.

15 MR. PORZIO: - - - I don't know if she has the
16 right - - -

17 JUDGE RIVERA: Has she got any recourse within -
18 - -

19 MR. PORZIO: - - - to intervene in here.

20 JUDGE RIVERA: - - - the agency? Whether it's at
21 the hearing or otherwise? And I - - - I asked both of you,
22 and it seems there's not certainty about this.

23 MR. PORZIO: Right, but again, in the - - - in
24 the prior quasi-judicial context addressed by this court,
25 it's the subject of the investigation that has the rights



1 in the quasi-judicial proceeding - - -

2 JUDGE FAHEY: That would be the IRB here, right?

3 MR. PORZIO: Correct.

4 JUDGE FAHEY: Right. It would not be Stega. So
5 she has no rights in this hearing.

6 MR. PORZIO: Right, but - - - but - - -

7 JUDGE RIVERA: Can she bring a - - -

8 MR. PORZIO: - - - in Rosen - - - the - - - the
9 reason - - -

10 JUDGE RIVERA: Excuse me, counsel.

11 MR. PORZIO: Yes, sorry.

12 JUDGE RIVERA: Can she bring a complaint to the
13 FDA regarding the statements that were made in this
14 investigation?

15 MR. PORZIO: Your Honor, I - - - I'm - - - I'm
16 not sure if she could - - -

17 JUDGE RIVERA: You don't know, okay.

18 JUDGE FEINMAN: I have a different question,
19 which is in - - - in Weintraub, Toker, Park Knoll,
20 Rosenberg, the declarant who made the statements that are
21 at issue were all under oath. Here the declarant who made
22 the statements is not under oath. Does that matter - - -
23 does that distinguish this sufficiently from all of these
24 other cases?

25 MR. PORZIO: Your Honor, I - - - I'm not sure



1 that's entirely accurate. I mean, with regard to the U-5,
2 I mean, it's - - - it's - - - there's, I guess, some
3 certification language, but it's not a sworn oath, and the
4 person making the statement about the employee on the Form
5 U-5 isn't under oath. It's not notarized and sworn to.
6 And - - - and I don't believe in - - - in Weiner, the
7 complaint to the grievance committee was, I believe, via a
8 letter by the - - - by the aggrieved client against the
9 lawyer. So I'm not sure the - - - the - - - the require -
10 - - that it was - - - all of those statements were under
11 oath.

12 And I would submit it - - - it shouldn't make a
13 difference and it shouldn't matter, because the point here
14 is, the policy consideration of protecting human subjects
15 involved in clinical trials, which is what the FDA was
16 investigating here in - - - in investigating the IRB, is so
17 important that you want to foster absolute candor by those
18 who were involved in that investigatory process. And I
19 think given that policy consideration, the absolute
20 privilege should be applied here.

21 JUDGE RIVERA: Thank you, counsel.

22 MR. BERANBAUM: Let me try to address some of the
23 questions you asked. First of all, under - - - Judge
24 Feinman's question, does it matter that these - - - that
25 there wasn't an assurance of truthfulness because it wasn't



1 under oath, it wasn't a certification, and I say the answer
2 is yes. The re - - -

3 JUDGE FEINMAN: Well, the - - - the response I
4 suppose could be that lying to a federal investigator is
5 punishable is it not? Because - - - even if not under
6 oath? I mean, certainly if you're interviewed by the FBI,
7 for example, you can't lie to an FBI agent. You're not
8 under oath.

9 MR. BERANBAUM: You know, I don't know if that's
10 the case, but the - - - it's - - - the - - - but the
11 hearing itself before the FDA is - - - there's no provision
12 in the regulations, in the staff manual, that it's under
13 oath. There's no provision that the pre - - - presiding
14 judge can subpoena somebody. There's a provision that the
15 - - - that - - - that says these hearings are informal and
16 that the presiding judge, in fact, can close them to the
17 public.

18 The key issue here - - - there are two key issues
19 here. One, are the procedural safeguards in place to
20 protect the defamed party. And two, is this a - - - a
21 proceeding that's court-like, that has the attributes of a
22 court. And for all those reasons, I'd say, leaving aside
23 the procedural - - - the absence of procedural safeguards -
24 - - it doesn't have those attributes.

25 I'd like to respond to Judge Stein's question



1 about doesn't the qualified privilege protect the free flow
2 of information? I think I already said that qualified
3 privilege has been applied in - - - in all sorts of
4 situations as - - - as compelling as the situation is here.
5 And I think it's a - - - there is no - - - there's no
6 authority cited in any case, that the qualified privilege
7 is somehow inadequate, you know, in - - - insufficient.

8 There is authority that says that applying the
9 absolute privilege has led to abuses, and that's the First
10 Department's decision in Cicconi, and that - - - that - - -

11 JUDGE STEIN: So - - - so what is the rule that
12 you would have us adopt here? You know, we have Rosenberg,
13 we have Toker, and, you know, we have all of this, so - - -
14 so if - - - if we synthesize all of that, what - - - what
15 is the rule that - - - that we should be - - -

16 MR. BERANBAUM: Okay, on a - - - on a very narrow
17 basis, and I'll get to your question more adequately later
18 - - - on a very narrow basis, this is not a quasi-judicial
19 proceeding, because it doesn't have court-like attributes,
20 and it doesn't pre - - - have these procedural safeguards
21 for the defamed party.

22 On a more general approach, that a quasi-judicial
23 proceeding has to allow the defamed party an opportunity to
24 protect her reputation. And if that's - - - if that's not
25 in the administrative process, it's unjust to say that she



1 can't go to court.

2 JUDGE RIVERA: But I asked you, and you said you
3 weren't sure. I understand your point about the - - - the
4 possible proceeding, but again, like in this case, there
5 may never be that proceeding. And I asked you, is - - -
6 does she have some other recourse within the administrative
7 framework and you said you're not sure.

8 MR. BERANBAUM: Not that I know of. I've - - -
9 I've, you know, read through - - -

10 JUDGE RIVERA: Did you have to - - -

11 MR. BERANBAUM: - - - I've read through - - -

12 JUDGE RIVERA: Let me ask you this.

13 MR. BERANBAUM: - - - a sea of - - - can I answer
14 - - -

15 JUDGE RIVERA: No, no, did you have to plead
16 that? Did you have to plead that she has no other recourse
17 within the administrative framework? Is the pleading then
18 insufficient?

19 MR. BERANBAUM: I don't think you have to plead
20 it, because I don't think the absence of - - - of some
21 other complaint proceeding, like writing a letter,
22 rehabilitates the central inadequacy of the FDA inspection
23 process.

24 JUDGE RIVERA: No, but if the - - - if the
25 problem is she doesn't have an opportunity to speak on her



1 own behalf, on her defense, and - - - and someone in the
2 agency to measure that, like - - - like the administrative
3 law judge or the hearing officer within such a proceeding -
4 - - but she has a mechanism to file a complaint, based on
5 those statements. A separate - - - would that not meet
6 what you say is some of the concern in the case law?

7 MR. BERANBAUM: No, I - - - I don't think so,
8 because the damage has been done. And you know, we're
9 talking about this hy - - - hypothetical complaint. Does
10 she have the oppor - - -

11 JUDGE RIVERA: But what - - - what - - - how can
12 - - -

13 MR. BERANBAUM: - - - does she have - - -

14 JUDGE RIVERA: What if they expunge everything?

15 MR. BERANBAUM: That - - -

16 JUDGE RIVERA: Isn't that her concern?

17 MR. BERANBAUM: Yeah, but I think this is all so
18 - - - it's - - - none of this is in the record, and none of
19 this is - - -

20 JUDGE RIVERA: Well, that's why I'm asking you,
21 about the sufficiency of the complaint.

22 MR. BERANBAUM: Well, with all inferences in - -
23 - supporting the - - - the adequacy of the complaint, I
24 don't think that this factor would be considered. And I
25 think - - -



1 JUDGE FEINMAN: Well, and also arguably, wouldn't
2 that really be on them to assert as part as their defense
3 if they're claiming absolute immunity, as opposed to your
4 pleading requirement for your defamation complaint?

5 MR. BERANBAUM: Yeah, and I think that's a very
6 good point.

7 JUDGE RIVERA: Well, no, the - - - because I
8 asked you before about - - - and we were going on about
9 whether or not it's dicta, or you seem to suggest that it
10 all turns on whether or not she's got an opportunity in the
11 administrative proceeding to defend herself. So no, it
12 sounds to me like you have to actually plead that.

13 MR. BERANBAUM: But I - - -

14 JUDGE RIVERA: That she cannot.

15 MR. BERANBAUM: But in this judicial - - - I did
16 plead it, and in this ju - - - in this proceeding, this FD
17 - - -

18 JUDGE RIVERA: But I asked you now - - -

19 MR. BERANBAUM: - - - excuse me - - -

20 JUDGE RIVERA: - - - but yes, but I asked and you
21 don't know.

22 MR. BERANBAUM: - - - this FDA inspection, she
23 didn't have any of that - - - she didn't have the
24 opportunity.

25 JUDGE RIVERA: Yes, but the question was, within



1 the framework of our laws, and - - - and our decisional
 2 law, if indeed, she had some other mechanism, not in that
 3 hearing process, but within the administrative structure,
 4 an opportunity to expunge whatever is this damaging
 5 statement, and protect her reputation, how does she still
 6 have that claim?

7 MR. BERANBAUM: But she doesn't, because there's
 8 nothing in the CFR - - - I've read through the manual - - -
 9 that - - - that gives her the - - - the right. The only -
 10 - - the only way there's a hearing - - - the only context
 11 for a hearing is when the FDA's disqualifies an IRB. So
 12 it's - - - it's - - - it's - - - she - - - there's - - -
 13 there's nothing - - - there's no evidence - - - there's
 14 nothing to support that contention.

15 JUDGE RIVERA: Your light is off so - - -

16 MR. BERANBAUM: Okay, my light is off - - -

17 JUDGE RIVERA: - - - do you want to take one
 18 moment to - - -

19 MR. BERANBAUM: No, I - - - I'm going to close.

20 JUDGE RIVERA: Thank you, counsel.

21 MR. BERANBAUM: Thank you very much.

22 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Jeanetta Stega v. New York Downtown Hospital, No. 80 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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