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COURT OF APPEALS  
STATE OF NEW YORK

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MATTER OF P.C.,

Respondent,

-against-

NO. 25

STONY BROOK UNIVERSITY,

Appellant.

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20 Eagle Street  
Albany, New York  
February 13, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Christian C. Amis  
Official Court Transcriber

1 CHIEF JUDGE WILSON: Good afternoon. We are  
2 happy to have our - - - one of our semi-regular visits from  
3 Professor Bonventre and his law students. Welcome.

4 First case on the calendar is a matter of P.C. v.  
5 Stony Brook.

6 MS. BRODY: May it please the court. Elizabeth  
7 Brody for Stony Brook University. I'd like to reserve  
8 three minutes for rebuttal.

9 CHIEF JUDGE WILSON: Yes.

10 MS. BRODY: In this substantial evidence case,  
11 the Second Department committed error by drawing its own  
12 inferences, reweighing the evidence, and substituting its  
13 judgment for that of the university. The proper inquiry  
14 here is whether any reasonable fact finder could have  
15 reached the determination that the respondent was  
16 responsible for sexual misconduct - - -

17 JUDGE RIVERA: Can you give an example where in  
18 the majority opinion it - - - one would read it as  
19 reweighing the evidence?

20 MS. BRODY: Certainly. So for the example of  
21 choking. So in the hearing, the complainant consistently  
22 stated that she quote snapped back into it at some point  
23 because of how hard the respondent was choking her. She  
24 remembered trying to pry his hands off of her neck, but he  
25 was stronger than she was and didn't budge. The respondent

1 cross-examined her on this issue at the hearing, and she  
2 confirmed her earlier testimony. And there was no evidence  
3 at the hearing that respondent either didn't choke the  
4 complainant or obtained her consent to do so. The Second  
5 Department did not discuss this evidence at all. Instead,  
6 it completely dismissed it based on a theory that had not  
7 been raised by the respondent, either to the university, or  
8 even in his brief to the Second Department. They also  
9 reweighed the evidence - - -

10 JUDGE RIVERA: What - - - ~~what~~ that theory  
11 was about incapacitation based on the alcohol or something  
12 else?

13 MS. BRODY: No, it was something else.

14 JUDGE RIVERA: Oh, that it didn't fit into the  
15 three charges.

16 MS. BRODY: I believe the Second Department's  
17 theory was that within the student handbook, there was a  
18 fourth charge.

19 JUDGE RIVERA: I see.

20 MS. BRODY: I think it's sexually violent contact  
21 during sexual - - -

22 JUDGE RIVERA: Yes.

23 MS. BRODY: - - - intercourse. And even though,  
24 again, the respondent didn't raise this to the university,  
25 didn't raise it in its briefs, the Second Department's sua

1           sponte said, well, it seems like choking really falls under  
2           that theory. That wasn't charged; therefore, we're not  
3           going to discuss the choking evidence at all. But - - -

4                   CHIEF JUDGE WILSON: Well, so that's not really a  
5           reweighing, right? It's - - -

6                   MS. BRODY: But it is an impermissible  
7           disregarding.

8                   CHIEF JUDGE WILSON: Okay. But - - -

9                   MS. BRODY: It - - - it is ~~it is~~ also  
10          giving that evidence zero weight. But I can give another  
11          example - - -

12                   CHIEF JUDGE WILSON: Well, it - - - but it sounds  
13          like it's not on a weight of the evidence instead of  
14          sufficiency sort of thing and not substantial difference.  
15          It sounds like it's a legal error, is what you're saying  
16          there? See if you can give an example that fits Judge  
17          Rivera's question.

18                   MS. BRODY: Certainly. So the complainant  
19          testified at the hearing that she had fallen asleep during  
20          intercourse with the respondent, and that, quote, "I woke  
21          up, and it was still happening. He didn't stop." The  
22          respondent himself admitted that the complainant had lost  
23          consciousness, thus confirming it wasn't a mere feeling  
24          that she had lost consciousness. He said - - - he  
25          initially said, no, you didn't when she asked, and then he

1 said, you were only out for a second. So that, again,  
2 confir - - - but ~~but~~ what the Second Department found  
3 when it itself reweighted the evidence, was that she had  
4 merely felt like she had lost consciousness. But there was  
5 other evidence in the record as well.

6 JUDGE HALLIGAN: It ~~it~~ seemed to me that in  
7 the initial notice that he was given, that it relied on  
8 incapacitation as ~~as~~ the theory for why he was liable  
9 for these violations. But then the determination seems to  
10 me not to rest on incapacitation. There's not a finding.  
11 What ~~what~~ do we make of that?

12 MS. BRODY: So I want to be very clear on this,  
13 Judge Halligan, any argument about the notice of charges is  
14 not properly preserved because it was not presented to the  
15 university or - - -

16 JUDGE HALLIGAN: I ~~I~~ understand your - - -  
17 but setting aside the preservation point, is there not some  
18 shift in terms of the basis for liability? How ~~how~~  
19 would he have known what to defend himself against if the  
20 theory is failure to show affirmative consent as opposed to  
21 incapacitation?

22 MS. BRODY: So I - - - there ~~there~~ are two  
23 reasons for that that go to Your Honor's question. The  
24 first is that the notice charged the respondent with  
25 violating three provisions of the student code, each of

1 which had as an element, respectively, that the conduct was  
2 unwelcome, that it was without consent, and that it was  
3 unwanted. The word nonconsensual is also in the name of  
4 two of the charges, and that's seems on notice - - -

5 JUDGE HALLIGAN: But ~~but~~ it seems like - -  
6 - you know, generally with any sort of proceeding, you ~~you~~  
7 ~~you~~ have, you know, a theory of the case, if you will.  
8 Right. And ~~and~~ it seemed to me that the initial  
9 theory was incapacitation, and then ~~and then~~ it  
10 changed gears and was more the failure to establish  
11 affirmative consent.

12 MS. BRODY: What ~~what~~ the notice of charges  
13 said was that our office has received a complaint that you  
14 allege - - - that you engaged in the following conduct when  
15 she was incapacitated by alcohol and unable to consent.  
16 Nowhere in the notice to say - - - does it say she  
17 otherwise consented, consent won't be at issue, we're  
18 stipulating to consent. And I'll - - -

19 JUDGE CANNATARO: Is this a dis - - - you might  
20 have just answered my question, but I was going to ask you,  
21 is this a disputed issue because I had the impression that  
22 both sides agreed that incapacitation due to intoxication  
23 wasn't an issue in this case, and that it was really just  
24 about whether or not consent was present. Am I incorrect?  
25 Are ~~are~~ you disputing - - - or is your adversary

1 disputing that?

2 MS. BRODY: I ~~-----I~~ agree with you that it's -  
3 - - that it's not a - - - that it's not an issue - - -

4 JUDGE CANNATARO: Yeah. Well, I kind of figure  
5 you would. Was it presented - - - I ~~-----I~~ thought it was  
6 presented as a concession below, at least at the Appellate  
7 Division, that incapacity by intoxication was no longer an  
8 issue in this case.

9 MS. BRODY: Right. I ~~-----I~~ want to make sure  
10 I'm understanding Your Honor's question correctly. So  
11 that's - - - that's correct. The ~~-----the~~ hearing board  
12 and the university made the finding regardless of whether  
13 she was incapacitated by alcohol. That was their finding.

14 JUDGE CANNATARO: Okay.

15 MS. BRODY: And the way that its findings were  
16 structured were as follows. For each charge, you know, it  
17 said, for example, nonconsensual sexual contact. This  
18 occurs when the conduct is unwelcome or unwanted.

19 The next sentence, the complainant stated - - -  
20 gave the following evidence in support of the fact that it  
21 was unwanted, and then it listed all the evidence. So - -  
22 - and then at the end, it concluded that regardless of  
23 whether or not she was incapacitated by alcohol, there was  
24 simply no affirmative consent in the first place.

25 And just returning to Judge Halligan's question

1           briefly, how was he supposed to know? Well, he in fact did  
2           know. He did, in fact, present evidence about affirmative  
3           consent, as we discussed in our brief. Part of his  
4           prepared statement, which he had prepared with counsel  
5           before the hearing, was devoted to the issue of what parts  
6           of her statement constituted affirmative consent. That's  
7           at page 163 to 164 of the record. And among the few types  
8           of questions that he chose to answer at the hearing were  
9           those about affirmative consent and - - -

10                   JUDGE HALLIGAN: The student - - - the student  
11           code of conduct appears to me to have a presumption of not  
12           responsible, right?

13                   MS. BRODY: Yes.

14                   JUDGE HALLIGAN: What does that mean as a  
15           practical matter?

16                   MS. BRODY: So I believe this also came up during  
17           oral argument in the matter of Haug. And so what that  
18           means is that if the complainant had gotten up there and  
19           said, I don't have a single memory of the night, I don't  
20           know what happened, but I know intercourse occurred, then  
21           he would be not responsible because there would be no  
22           evidence in the record that there was no affirmative  
23           consent.

24                   CHIEF JUDGE WILSON: Well, so when you - - -

25                   JUDGE HALLIGAN: And you're - - - does - - -

1 CHIEF JUDGE WILSON: - - - look at the board - -  
2 - I'm sorry. Go ahead.

3 JUDGE HALLIGAN: I was - - - just to follow up if  
4 I can.

5 So ~~so~~ does that mean that there is no  
6 requirement for the student to present evidence? I realize  
7 there may be evidence on ~~on~~ the other side in the  
8 record, but is that correct?

9 MS. BRODY: That is correct, yes.

10 JUDGE HALLIGAN: Okay. So ~~so~~ when I look  
11 at the findings from each of the panel members, it seems to  
12 me that - - - I can't remember if it's all or ~~or~~ all  
13 but one - - - of them expressly note that he did not  
14 present any evidence. And I find that a little hard to  
15 square with the proposition that you don't have to defend  
16 yourself, and that you have a presumption of not  
17 responsible. I ~~I~~ mean, there is also other evidence  
18 in the record, I realize. But the fact that that appears  
19 to be an explicit ground on which the panel members are  
20 relying seems hard to square with ~~with~~ that  
21 presumption.

22 MS. BRODY: So the operative findings here are  
23 not the handwritten notes from each member of the panel,  
24 but the decision - - - decision after - - -

25 JUDGE HALLIGAN: And we can't take into account

1 the handwritten notes in the record as to what the basis  
2 for their determination is?

3 MS. BRODY: You can consider it, but I think~~---~~  
4 ~~but I think~~ what the determination makes clear is that  
5 there was evidence in the record that the conduct was  
6 unwanted or unwelcome, and I ~~---~~I would like to use some  
7 of my time to ~~---~~to talk about that evidence - - -

8 CHIEF JUDGE WILSON: I do want to go back to that  
9 question, because that's actually where I was going to go.  
10 Is - - - so put aside the difference between the  
11 determination and the - - - ~~and the~~ ~~---~~let's assume that  
12 the things that are in the actual board member's notes were  
13 in the determination. Would that be proper to rest on the  
14 silence, given the presumption of innocence?

15 MS. BRODY: No, but I ~~---~~I don't think that's  
16 what each panel member did. And the determination - - -

17 CHIEF JUDGE WILSON: The instructions the panel  
18 member in those sections say provide basis for decision  
19 below - - -

20 MS. BRODY: Yes.

21 CHIEF JUDGE WILSON: - - - reference evidence and  
22 testimony presented provided. And then I think each of  
23 them does say, well, he ~~---~~he refused to answer these  
24 questions, and they're listing that as a reason for the  
25 decision.

1 MS. BRODY: But the decision itself makes clear  
2 that there was substantial evidence in the record - - - and  
3 evidence by a preponderance of the record - - - that there  
4 was no consent to at least three of the acts. And I want  
5 to be ~~be~~ clear. I mean, she - - -

6 JUDGE CANNATARO: I can - - - can I approach that  
7 question from a different angle? You ~~you~~ started by  
8 saying that if ~~if~~ a complainant were to testify, I  
9 don't remember what happened, and it's all a haze to me,  
10 that the - - - that that presumption would probably operate  
11 to create a finding of nonresponsible, right?

12 MS. BRODY: Yes.

13 JUDGE CANNATARO: Now, if ~~if~~ the  
14 complainant does testify and says certain things - - -  
15 which the review board, that's the first level, right?

16 MS. BRODY: Correct.

17 JUDGE CANNATARO: The review Board. Which the  
18 review board accepts - - - finds credible. Does that  
19 relieve the respondent of the responsibility of rebutting  
20 that testimony?

21 MS. BRODY: No. If there's evidence in the  
22 record - - -

23 JUDGE CANNATARO: Yes.

24 MS. BRODY: - - - that would establish the  
25 charges - - - and it's the school's burden, but if the - -



1 JUDGE CANNATARO: Well, I'm a lot older than you  
2 are, so - - -

3 JUDGE HALLIGAN: But we don't ~~we don't we~~  
4 ~~don't~~ have any way to know that one way or the other, do  
5 we?

6 MS. BRODY: Well, in the written decision, again,  
7 the university said, here are the elements of the charges.  
8 It's that specific conduct, you know, respectively advances  
9 sexual contact, sexual intercourse are unwanted. Here is  
10 the - - - and then it goes through and lists, here's the  
11 substantial evidence in the record that it's - - - that  
12 it's unwanted - - -

13 JUDGE HALLIGAN: And my point is just to - - -

14 MS. BRODY: - - - and at the end - - -

15 JUDGE HALLIGAN: - - - it - - - does - - -

16 MS. BRODY: I'm sorry.

17 JUDGE HALLIGAN: Go ahead.

18 MS. BRODY: And at the end, it says, you know,  
19 that regardless of her incapaci - - - regardless of whether  
20 or not she's incapacitated by alcohol, he didn't put  
21 forward any evidence to rebut that. So - - -

22 JUDGE GARCIA: But isn't - - - isn't this  
23 somewhat - - - this whole argument - - - it seems to me  
24 confusing a bit, the right against self-incrimination with  
25 the burden of proof, because it seems like part of the

1 problem here may be he didn't testify and almost holding  
2 that against the respondent, but in a civil proceeding,  
3 there's a burden of proof to prove somebody did something.  
4 Let's say a securities fraud case. That - - - and you  
5 don't have to testify, but if you don't, or you take the  
6 fifth, then, you know, that actually can be held against  
7 you in that civil proceeding. So it seems to me like  
8 there's a mixing of things here. Like there's a  
9 presumption, so there's a burden on the school to come  
10 forward with proof. But there's no right against self-  
11 incrimination here. You can not answer, and you have the  
12 right to do that. But there's no then instruction that you  
13 can't use that against somebody. Why would that be the  
14 case? It's a civil proceeding.

15 MS. BRODY: That's ~~that's~~ correct. And the  
16 Second Department dissenting opinion made that point, and I  
17 do - - - I do think it's really important. I see that my  
18 time has expired, so if I could just briefly conclude.

19 CHIEF JUDGE WILSON: Yes, there was ~~there~~  
20 ~~was~~ something you wanted to get to. Go ahead.

21 MS. BRODY: There are at least - - - I ~~I~~  
22 just want to emphasize there are at least three times in  
23 the evening where the complainant unequivocally revoked any  
24 consent that she allegedly may have given. First, she  
25 physically resisted being choked by trying to pry the

1 respondent's hands off of her neck. She was unsuccessful.  
2 She verbalized being uncomfortable once the students were  
3 already inside of her car, and she fell asleep and lost  
4 consciousness during intercourse in the car. Thank you.

5 MR. KLEIN: May it please the court. I'm  
6 Alexander Klein with Barket Epstein Kearon Aldea & LoTurco.  
7 I'm here on behalf of the respondent, P.C.

8 The Appellate Division's vacatur of the  
9 disciplinary penalty should be affirmed. This case was  
10 brought based upon one question alone that permeated the  
11 charges, the hearing, the ~~the the~~ thinking of  
12 the panel members afterward, and of the appeals decision.  
13 And that was, was the accuser too incapacitated to consent?  
14 Now, there's two ways that a - - - a nonconsent can be  
15 found. One is if it is not offered for - - -

16 JUDGE CANNATARO: Too ~~too~~ incapacitated by  
17 reason of intoxication or something else?

18 MR. KLEIN: Just intoxication, Your Honor. And -  
19 - - and this formed the basis of the charges that were  
20 given to my client, which said - - -

21 JUDGE CANNATARO: Was that - - - so was ~~was~~  
22 that objected to at some point during the proceeding?

23 MR. KLEIN: Was what objected to, Your Honor?

24 JUDGE CANNATARO: That ~~that~~ the ultimate  
25 evidence in the case didn't establish that the complainant

1 was too intoxicated to give consent.

2 MR. KLEIN: It was. And ~~and~~ not only was  
3 it contested; it was the only thing that was in issue at  
4 the hearing. The whole case - - - the whole hearing  
5 revolved around whether there was consent. In fact, my  
6 client - - -

7 JUDGE CANNATARO: No, but that's a different  
8 question. You know, let - - - take a look at - - - I'm  
9 sure you've looked at it many times - - - but the ~~the~~  
10 Enough is Enough Law, 6441. It ~~it~~ lays out two ~~the~~  
11 ~~two~~ theories of consent. The one that you started by  
12 referring to, which I think is in the second sentence,  
13 which is that depending on the degree of intoxication,  
14 someone under the influence may be incapacitated and  
15 therefore unable to give consent. But there's a whole  
16 preceding section that talks about lack of consent in other  
17 ways.

18 MR. KLEIN: Absolutely.

19 JUDGE CANNATARO: So you know, I ~~I~~ think  
20 what your adversary is saying - - - and ~~and~~ the  
21 reason why I'm holding you to account just for using the  
22 word consent is you might not have the second kind of  
23 consent, but that doesn't foreclose the possibility that  
24 you don't have the first one.

25 MR. KLEIN: I ~~I~~ a hundred percent agree,

1 Your Honor. The ~~the~~ question is, can a school play  
2 bait and switch with those two different types of consent.  
3 When you have the entire apparatus of the school focused on  
4 one kind of ~~of~~ consent or nonconsent, you can't then  
5 switch. After the hearing is done - - -

6 JUDGE CANNATARO: I might not disagree with you  
7 about that, but is that something that was litigated  
8 through the course of ~~of~~ the Article 78 and ~~and~~  
9 the Appellate Division and all of that?

10 MR. KLEIN: It - - - it was ~~it was~~  
11 litigated as soon as it could be litigated, which is to  
12 say, there was no showing - - - no sign that this could  
13 have been the decision of the school until after the school  
14 had made this decision on new grounds. For instance, the  
15 charges were based upon the notion that the accuser was,  
16 quote, unable to give consent. And so - - -

17 JUDGE SINGAS: Well, I'm going to stop you there  
18 for a second because I'm looking at page 214 of the record,  
19 and it's a document dated on December 30th, 2019, which is  
20 a notice of charges. And it says that the university, in  
21 the first paragraph, received a report about a female  
22 student while she was incapacitated due to alcohol, which  
23 seems to me that it indicates what the report is alleging.  
24 And then it says on the next page that you are alleged to  
25 have violated the following sections of the Code of Student

1 Responsibility, and it lays out sexual misconduct, sexual  
2 harassment, nonconsensual sexual conduct, and the rest of  
3 the charges without talking about incapacity due to  
4 alcohol. So how ~~how~~ is it that you're not on notice?

5 MR. KLEIN: Your Honor, I don't want to put this  
6 - - - turn this into a notice question. The fact that the  
7 - - -

8 JUDGE SINGAS: Well, where's the bait and switch,  
9 then? I'll use your words. Yeah.

10 MR. KLEIN: I'll - - - okay. So the bait and  
11 switch is as follows. Starting with the charges, they lay  
12 out that it is alleged that you engaged in sexual contact  
13 with a female student while she was incapacitated due to  
14 alcohol and unable to give consent, but that doesn't end  
15 there. That's just the beginning. We then have the  
16 hearing where the accuser goes through, in her own words,  
17 the serial affirmative consents that she provided  
18 throughout the night. She - - -

19 JUDGE TROUTMAN: But she can at any time withdraw  
20 consent.

21 MR. KLEIN: She ab - - - so she can withdraw  
22 consent at any time. But in her own words, she overcame  
23 his protestations of no. He said it would be a bad idea.  
24 She said that my friends don't get to control my body - - -

25 JUDGE RIVERA: So ~~where~~ where's the consent



1 to the choking?

2 MR. KLEIN: A few ~~----- a few~~ things, Your Honor,  
3 about the choking, and I - - - there - - - the choking  
4 itself does not form a basis of the school's decision until  
5 after the decision has already been made. The appeals  
6 decision, for example, claims to affirm the - - - the ~~-----~~  
7 ~~the~~ school's decision based upon incapacitation again, and  
8 yet that is not the basis that the ~~----- the~~ underlying  
9 panel rendered the decision on. To the choking, she says,  
10 she wouldn't have allowed the choking, quote, if she were  
11 not intoxicated.

12 JUDGE CANNATARO: Did she not testify at some  
13 point during her hear - - - the hearing that she - - - when  
14 she became aware that she was being choked, she tried to  
15 remove his hands, but he was too strong, and she couldn't  
16 remove them.

17 MR. KLEIN: She testified that, and it was in her  
18 statement.

19 JUDGE CANNATARO: Could that not form the basis  
20 of an implicit revocation of consent?

21 MR. KLEIN: What she also said is that she was  
22 blackout during this entire time, and she only - - - she  
23 only remembers that for a moment while she was present.  
24 The - - - the - - -

25 JUDGE CANNATARO: I know she was threading in and

1 out of - - - I don't know exactly what blackout means. I  
2 think it probably means something different than passed  
3 out, right? I ~~-----I~~ don't know. But she does say, but  
4 what I do remember is that he was choking me, and I tried  
5 to take his hands off my neck, but I couldn't. He was too  
6 strong.

7 MR. KLEIN: Right. So she says that she was,  
8 quote, only present for a, quote, short amount of time.

9 JUDGE TROUTMAN: But doesn't that go to - - -  
10 some of the things that you're pointing to seems to go to  
11 credibility, and isn't it - - - that for the fact finders  
12 to determine how much weight to give to her testimony as to  
13 what she actually remembers?

14 MR. KLEIN: What I want to focus - - -

15 JUDGE TROUTMAN: And if there's nothing to  
16 contradict her version?

17 MR. KLEIN: Sure. What I want to focus on is  
18 what the school actually decided. And it - - - and then -  
19 - - if ~~-----if~~ we were here based upon a finding that she  
20 had not had the capacity to consent, or even if there had  
21 been a finding here that she had withdrawn consent because  
22 she tried to pry his hands off her neck, this would be a  
23 different case. If you look at the actual decision from  
24 the panel or from the appeals board, no one mentions the  
25 attempt to pry his hands off of her neck, and that's

1 probably because she says that she wasn't with it long  
2 enough to determine how probably - - -

3 JUDGE HALLIGAN: So her - - -

4 JUDGE RIVERA: So - - - so ~~so~~ being clear,  
5 as you ~~as you~~ read the university's decision, what is  
6 it that they have determined?

7 MR. KLEIN: If - - - it - - -

8 JUDGE RIVERA: It could be more artfully crafted,  
9 yes; but when you read it, what are you arguing it has  
10 found?

11 MR. KLEIN: Okay. So it ~~it~~ depends upon  
12 what you look at.

13 JUDGE RIVERA: Well, I'm asking you what you look  
14 at it? It's your argument. What's your argument about  
15 what they actually decided that's the bait and switch?  
16 What ~~what~~ is it - - -

17 MR. KLEIN: The - - - the school decided that  
18 there was a lack of affirmative consent.

19 JUDGE RIVERA: Okay.

20 MR. KLEIN: Not that there was consent vitiating  
21 incapacitation. That's what they held after the hearing -  
22 - -

23 JUDGE RIVERA: Well, if ~~if~~ she's  
24 intoxicated, and that's why she blacks out and she's out,  
25 that's of course, an obvious example of incapacitation.

1 MR. KLEIN: Absolutely.

2 JUDGE RIVERA: But ~~but~~ it's also  
3 incapacitation as in you cannot consent. You are blacked  
4 out.

5 MR. KLEIN: It is. But it's not just that the  
6 school left the issue alone. They affirmatively came  
7 forward and said - - -

8 JUDGE RIVERA: But I'm saying, why aren't you on  
9 notice of that? Why ~~why~~ isn't that clear notice?

10 MR. KLEIN: Because it's not a matter of notice.

11 JUDGE RIVERA: Well, I thought it was. I thought  
12 that was your point about the bait and switch.

13 MR. KLEIN: No, the bait and switch - - -

14 JUDGE RIVERA: That your ~~that your~~ client  
15 did not know how to defend themselves.

16 MR. KLEIN: No. That's - - - it's ~~it's~~ not  
17 a matter of not knowing how to defend himself. The bait  
18 and switch is a question of arbitrariness.

19 JUDGE RIVERA: Okay.

20 MR. KLEIN: We - - - the school has an obligation  
21 to live up to its own rules and to not act arbitrarily and  
22 capriciously.

23 JUDGE HALLIGAN: So what rule are you saying what  
24 - - - they didn't adhere to?

25 MR. KLEIN: Two rules, and ~~they're~~ ~~they're~~

1 ~~-----~~they're formed into the same sentence in the Code,  
2 which is that the students are entitled to a presumption of  
3 not responsible absent a finding by a preponderance of the  
4 evidence - - -

5 JUDGE HALLIGAN: So ~~-----so~~ how is that ~~-----~~  
6 ~~that-----that~~ violated here? I mean, Judge Garcia  
7 suggested that there's a burden of proof that is at play  
8 here. And if there is evidence in the record from the  
9 victim and it's not rebutted, then ~~-----then~~ it's fair to  
10 draw whatever inferences you might draw from that. How is  
11 the presumption violated?

12 MR. KLEIN: The - - - in the appeals decision and  
13 ~~in the panel-----~~ in the panel's decision and in their  
14 deliberations, which are - - - which you commented on  
15 during my friend's argument - - - they all talk about of  
16 three reasons for finding in favor of the school that he  
17 could not step forward and identify the affirmative  
18 consent, or chose not to answer questions.

19 CHIEF JUDGE WILSON: But why isn't that okay?

20 MR. KLEIN: Because - - - ~~there-----~~ there's a  
21 difference between this case versus a ~~-----a~~ plenary civil  
22 action. And I think that there was a question earlier  
23 about, well, you know, could certainly use it against  
24 someone in a normal civil case if they don't take the  
25 witness stand. And - - -



1 CHIEF JUDGE WILSON: Well, suppose it's a  
2 criminal case, right? And let's even say the Fifth  
3 Amendment is at play, but ~~---~~ ~~but~~ the defendant takes the  
4 stand.

5 MR. KLEIN: Sure.

6 CHIEF JUDGE WILSON: So you think if the  
7 defendant then refu - - - has testified affirmatively a  
8 bunch of stuff and is asked a question on cross-examination  
9 and says, I'm not going to answer that, that the jury can't  
10 take a negative inference from that.

11 MR. KLEIN: They can, Your Honor, perhaps, but my  
12 ~~---~~ ~~my~~ client didn't come up and take the witness stand  
13 and didn't go through all that - - -

14 CHIEF JUDGE WILSON: Well, he made an opening  
15 statement and then answered a bunch of questions, and we  
16 think, established he had the right not to show up at all.

17 MR. KLEIN: Right. But - - - this court has held  
18 that there is not a presumption of innocence in a normal  
19 civil action, and that's what allows someone to have an  
20 adverse inference held against them. For example, if they  
21 refuse to testify in a manner that they otherwise would.  
22 There - - - the most recent case that I found that this  
23 court held that was in a case called Reid v. State.

24 JUDGE HALLIGAN: But so are you suggesting that  
25 if there's testimony from a victim, and whoever is ~~---~~ ~~is~~

1 accused of the violation declines to provide any evidence,  
2 that the panel cannot simply draw whatever inferences or  
3 conclusions it wants from the testimony that's in the  
4 record.

5 MR. KLEIN: It absolutely can. And - - - and we  
6 - - -

7 JUDGE HALLIGAN: So how is that - - -

8 JUDGE CANNATARO: Does - - - is it your argument  
9 that that involves taking some sort of adverse inference  
10 against the nontestifying witness because they drew  
11 reasonable conclusions based on the evidence that they did  
12 have in front of them?

13 MR. KLEIN: No. What ~~----- what~~ I'm ~~----- what~~  
14 ~~I'm~~ saying is that if - - - if the accused doesn't testify  
15 in the case - - -

16 JUDGE CANNATARO: Yeah.

17 MR. KLEIN: - - - then the question as to whether  
18 the ~~----- the~~ decision should be upheld has to be based  
19 upon the evidence that is brought to bear against the  
20 accused. And in this case - - -

21 JUDGE GARCIA: So if they note that he didn't  
22 provide any evidence to the contrary, then that's no good.  
23 If they had said everything they said but just not noted he  
24 didn't provide any response, that would have been okay.

25 MR. KLEIN: Yeah - - -

1 JUDGE GARCIA: But because they noted, he didn't  
2 respond to that question, then it's not okay under your  
3 theory. Let's say the victim came in, she testified to X,  
4 Y, and Z, you know, same facts. That's one decision.

5 MR. KLEIN: Sure.

6 JUDGE GARCIA: Second decision, same part, same  
7 exact lead up, but then they say, and the - - - you know,  
8 the respondent didn't testify.

9 MR. KLEIN: And - - -

10 JUDGE GARCIA: So the second one would be bad in  
11 your view - - -

12 MR. KLEIN: Absolutely, Your Honor. I mean, just  
13 like if ~~if~~ they came up with three reasons why they  
14 wanted to confirm the findings against him, two of which  
15 were the accuser's testimony, and the third was that they  
16 flipped a coin, that wouldn't be appropriate. And it ~~and it~~  
17 ~~and it~~ would take away from the decision making that had  
18 come in before. But - - -

19 JUDGE CANNATARO: So simply noting that he didn't  
20 provide evidence vitiates whatever findings they made based  
21 upon the evidence that they did have?

22 MR. KLEIN: The - - - ~~the~~ ~~the~~ what  
23 they - - - what did they actually find? I mean - - -

24 JUDGE CANNATARO: Well, there are two things, the  
25 choking, which we discussed a lot - - -

1 MR. KLEIN: Which - - -

2 JUDGE CANNATARO: - - - and we could go over it.

3 And then there's the ~~the~~ passing out in the car - - -

4 MR. KLEIN: Right.

5 JUDGE CANNATARO: - - - which - - - and ~~and~~

6 I read - - - you know, I ~~I~~ was talking to your

7 adversary about 6441. I ~~I~~ read the first part of

8 6441 saying that incapacitation may be caused by lack of

9 consciousness, or being asleep, or being involuntary

10 restrained, et cetera, et cetera. And it goes on to say, I

11 think - - - but ~~but~~ the point is her - - - her loss

12 of consciousness in the car, which I believe she testified

13 not only that she was unconscious, but that she asked him

14 if - - -

15 MR. KLEIN: Uh-huh.

16 JUDGE CANNATARO: - - - she lost consciousness,

17 and he confirmed it, ends ~~ends~~ consent.

18 MR. KLEIN: But - - - Your Honor, but that's - -

19 - that is a - - - purely an incapacitation claim.

20 JUDGE CANNATARO: No, but that's not ~~that's~~

21 ~~not~~ lack of ability to give consent due to intoxication.

22 That's ~~that's~~ the negation of consent by loss of

23 consciousness. That's different.

24 MR. KLEIN: Loss of - - - ~~loss~~ ~~loss~~ of

25 consciousness - - - there's no theory here that she lost

1 consciousness for any reason other than incapacitation.

2 JUDGE CANNATARO: Whatever. She could be  
3 narcoleptic. Maybe said - - - maybe she got hit on the  
4 head with a brick, or maybe she was really drunk, and she  
5 lost consciousness. But the rule says any loss of  
6 consciousness for - - - you know, it's a list, but it's  
7 effectively any reason at all ends consent. And I think it  
8 even says you have to stop what you're doing right there.

9 MR. KLEIN: It's - - -

10 JUDGE CANNATARO: And we - - - and her testimony  
11 was, which I assume was credited by the review board, was  
12 that he didn't stop. He kept on going after she lost  
13 consciousness.

14 MR. KLEIN: So there's no ~~there's no~~  
15 version of the facts here that there - - - that the  
16 incapacity - - - that the falling asleep in the car would  
17 have been related to anything other than - - - than her  
18 intoxication, but - - -

19 JUDGE CANNATARO: I ~~I~~ understand that's  
20 your argument, counsel, but I'm saying so what? What  
21 ~~what~~ever the reason is for the loss of consciousness, she  
22 lost it, and - - - and that ends consent, doesn't it?

23 MR. KLEIN: It ~~it~~ does if the - - - if  
24 that's what the school finds, which is not what they found.  
25 They - - - the school didn't find that he was liable

1 because of her - - - her falling asleep in the car for some  
2 reason other than intoxication.

3 One ~~one~~ ~~one~~ final note I would make  
4 about the choking, which is the most serious charge that  
5 was brought to bear against my client, was nonconsensual  
6 sexual intercourse. The choking would not bear upon that  
7 charge. It - - -

8 CHIEF JUDGE WILSON: But the car - - -

9 JUDGE SINGAS: Say that again. That - - - what  
10 would not bear on that?

11 MR. KLEIN: Choking.

12 JUDGE SINGAS: Would not bear on?

13 MR. KLEIN: Would not bear upon the charge of  
14 nonconsensual sexual intercourse.

15 JUDGE SINGAS: Really?

16 MR. KLEIN: It ~~it~~ wouldn't. I mean - - -

17 CHIEF JUDGE WILSON: I'm not sure what you mean  
18 by it doesn't bear on it.

19 MR. KLEIN: It - - - it wouldn't - - - so let's  
20 say - - -

21 CHIEF JUDGE WILSON: It wouldn't be necessary to  
22 prove it?

23 MR. KLEIN: Let's say the court found that the  
24 only thing - - - let's ~~let's~~ say the court found that  
25 the choking was done without affirmative consent.



1 CHIEF JUDGE WILSON: Okay.

2 MR. KLEIN: Okay. And that that was the only  
3 finding that it was going to uphold against my client.  
4 Okay. That would not be enough to sustain a charge of  
5 intercourse without affirm - - - without affirmative  
6 consent. It could possibly pertain to a charge of sexual  
7 harassment or - - - but it would not support a charge of  
8 intercourse because the choking was not the - - - what - -  
9 - the intercourse would not have been what was done without  
10 affirmative consent - - -

11 JUDGE TROUTMAN: Does it not affect consent - - -  
12 if ~~if~~ there's force or intimidation, is that still  
13 consent?

14 MR. KLEIN: Right. But the choking - - - the - -  
15 - the - - -

16 JUDGE TROUTMAN: Choking is ~~is~~ not forceful  
17 contact?

18 MR. KLEIN: No, it is, but it's not intercourse.  
19 Right. It - - -

20 JUDGE TROUTMAN: But if it allows you to ~~to~~  
21 do the intercourse, is that not - - -

22 MR. KLEIN: That's ~~that's~~ not the  
23 allegation. The allegation is that she ~~she~~  
24 instigated the sex - - -

25 JUDGE TROUTMAN: So is it your argument that he



1 could hit her, slap her, do anything that he wanted because  
2 of the way they wrote the charges?

3 MR. KLEIN: No. But in - - - ~~in~~ - - - let's say  
4 she ~~she~~ affirmatively consented to sex, and then he  
5 became violent during sex in a way that was lacking in  
6 affirmative consent. That would not vitiate the  
7 affirmative consent to the sex, but it could give a - - -  
8 it could give rise to a different violation of the code - -  
9 -

10 JUDGE RIVERA: How ~~how~~ ~~how~~ is it - -  
11 -

12 JUDGE TROUTMAN: How - - -

13 JUDGE SINGAS: Well, no, under the - - - no - - -

14 JUDGE RIVERA: - - - that's part of the sexual  
15 act.

16 JUDGE SINGAS: Under the University Code of  
17 Student Responsibility, it says consent may be revoked or  
18 withdrawn at any time, and such revocation may take place  
19 through physical resistance.

20 MR. KLEIN: Right.

21 JUDGE SINGAS: So when she's saying she's prying  
22 off his hands as he's choking her, the consent is gone.

23 MR. KLEIN: The ~~the~~ consent to the choking,  
24 not ~~not~~ the consent to the sexual intercourse. After  
25 this took place - - - keep in mind, this took place in the

1 woods.

2 JUDGE RIVERA: But is - - - it's - - -

3 MR. KLEIN: After - - - after this takes place -

4 - -

5 JUDGE SINGAS: No, this - - -

6 MR. KLEIN: - - - they go to her car - - - she

7 leads him to her car - - -

8 JUDGE RIVERA: Where - - - ~~where~~ where's

9 the consent to the choking that is then revoked?

10 MR. KLEIN: She says that she wouldn't have done

11 it, quote unquote, if she were not intoxicated, i.e. she

12 did consent to it, but she was intoxicated.

13 JUDGE RIVERA: It was on the choking?

14 MR. KLEIN: She said - - - yes, that's with

15 regard to the choking. She says she went along with

16 everything he did. She says that - - - well, she admits

17 that she continued having sex with him afterward in the

18 woods and then back at - - - in her own car, which she led

19 him to, which she unlocked, and where she performed oral

20 sex on him - - -

21 JUDGE TROUTMAN: Can she - - - can she - - - sir,

22 can she not initially give - - - she can give consent in

23 the woods, right?

24 MR. KLEIN: Correct.

25 JUDGE TROUTMAN: Separate and distinct from what

1           happened in the car.

2                   MR. KLEIN:    Sure.

3                   JUDGE TROUTMAN:  She can go to some other place  
4                   and have consented to other things and then withdraw her  
5                   consent at any time.  Do you not agree?

6                   MR. KLEIN:    Absolutely, I agree.

7                   JUDGE TROUTMAN:  And just because she consents to  
8                   one thing does not mean she necessarily consents to any and  
9                   everything he may wish to do.

10                  MR. KLEIN:    Correct.  But it's not - - - just  
11                  because it doesn't prove it on its own, doesn't mean that  
12                  we throw the entire story out the window.  What we know  
13                  from the facts of this case, just from a big picture, is  
14                  she instigated the sex.  She made him get a condom - - -

15                  JUDGE SINGAS:  Okay.  There you go again, because  
16                  the - - - you're ~~---~~ ~~you're~~ treating this as if it's one  
17                  episode and because she consented to some part of it, then  
18                  she must have consented to all of it, and I for one reject  
19                  that - - -

20                  MR. KLEIN:    Uh-huh.

21                  JUDGE HALLIGAN:  And I - - - I think - - -

22                  JUDGE SINGAS:  - - - and I think the university  
23                  rejected that.  But I think ultimately we're going back to  
24                  a credibility finding, which is not what we're going to  
25                  engage in, and which is not what the AD should have engaged

1 in. Your arguments to us are credibility. Don't believe  
2 her because she led him on. She led him to the car, so  
3 everything was ~~was~~ fine.

4 MR. KLEIN: My argument is to the contrary.  
5 Believe her. Believe what she says. She says that she  
6 wouldn't have consented if she were not intoxicated. I  
7 believe her, i.e. she consented, but she claims  
8 intoxication. She says that she went along with everything  
9 she - - - that he wanted. I believe her. The court should  
10 believe her.

11 JUDGE CANNATARO: Wasn't that all in the early  
12 part of it? The - - - that's - - - if you ~~if you~~  
13 accept the notion that's presented to you by some of my  
14 colleagues, that consent at the outset doesn't give consent  
15 to everything that happens after, the part about her being  
16 ready to do whatever happened all was much, much earlier in  
17 the evening.

18 MR. KLEIN: No, that - - - that - - - I'm ~~I'm~~  
19 ~~I'm~~ referring specifically to the moment in time where  
20 there - - - there was - - - there's three chapters of the  
21 story. They're in the woods a first time. They leave the  
22 woods. She makes him buy condoms. They go back to the  
23 woods. That's where the ~~the~~ alleged choking takes  
24 place.

25 JUDGE CANNATARO: Right.

1 MR. KLEIN: They then leave the woods - - -

2 JUDGE CANNATARO: And they go to her - - -

3 MR. KLEIN: - - - car, where she gets on top of  
4 him during sex and performs oral sex.

5 JUDGE CANNATARO: Uh-huh. And then she - - -  
6 after that, she ~~she~~ passes out.

7 MR. KLEIN: Claim she passes out. And - - -

8 JUDGE CANNATARO: Well, she claims she passed out  
9 - - -

10 MR. KLEIN: Yeah - - -

11 JUDGE CANNATARO: - - - but it was apparently  
12 believed by the Review Board.

13 MR. KLEIN: Except that the Review Board didn't  
14 make a decision on that basis.

15 JUDGE CANNATARO: Or - - -

16 JUDGE GARCIA: Counsel, what were you reading  
17 from originally that you said, "I believe her." What's  
18 that document?

19 MR. KLEIN: Oh, well, it - - - ~~it~~ it's from  
20 her - - - it's from her statements.

21 JUDGE GARCIA: Original statement, not her  
22 testimony at the hearing, right?

23 MR. KLEIN: Right. I - - - let me - - - let me  
24 give it to you, Your Honor.

25 JUDGE GARCIA: But if she said that in an initial

1 statement, and then she testified, and it's not entirely  
2 consistent with that, isn't that, again, for the trier of  
3 fact to determine which of those versions they're going to  
4 credit?

5 MR. KLEIN: I mean, her ~~her~~ testimony  
6 tracked her statement very, very - - -

7 JUDGE GARCIA: She never said those things you  
8 read in her testimony.

9 MR. KLEIN: But in ~~in~~ her statement, she  
10 said, he kept saying it was a bad idea, but I kept telling  
11 him it would be fine. The key - - -

12 JUDGE HALLIGAN: How ~~how~~ is that relevant  
13 to what happens after she withdraws consent? I mean, isn't  
14 this really of a piece with she initiated it, and - - - ~~and~~  
15 ~~it~~ sounds to me the implication is therefore lost the  
16 right to withdraw consent. I think it's pretty clearly to  
17 the contrary.

18 MR. KLEIN: No, but what I'm - - - what I'm  
19 talking about - - - when I - - - when I refer to, you know,  
20 she ~~she~~ wouldn't have done it if she were not  
21 intoxicated, that - - - that ~~that~~ was actually a  
22 finding from the school. That was in the ~~that was in~~  
23 ~~the~~ school's finding that she had said that. That she went  
24 along with everything he did was in reference to - - -

25 JUDGE GARCIA: The school's - - - I'm sorry. The

1 school's finding where?

2 MR. KLEIN: In - - - in - - -

3 JUDGE GARCIA: But - - - what part of this  
4 proceeding is that finding?

5 MR. KLEIN: It's ~~it's~~ initial findings  
6 after the hearing. And so - - - and then what you have  
7 from the appeal's decision is kind of a ~~a~~ strange  
8 change in tone, because right after the hearing, the school  
9 says we are not going to find a lack of intox - - - we're  
10 not going to base this on intoxication.

11 And then the appeal's decision really appears  
12 that it goes back on that and says that they are going to  
13 base this on - - - you know, that ~~that~~ the evidence,  
14 quote unquote, substantiated an inability to consent. That  
15 was the appeals board making that finding. And now the  
16 school is going back and saying, no, we're actually not  
17 going to base this on incapacitation. We're going to go  
18 back to what the school originally said. This is what  
19 arbitrariness looks like - - -

20 JUDGE RIVERA: Let - - - let's talk about the  
21 choking - - - let's talk about the choking you're quoting.  
22 I - - - because I think I found the language that Judge  
23 Garcia was asking you where - - - where is it located?  
24 It's under nonconsensual sexual intercourse and/or  
25 penetration.

1 "The complainant stated in the investigative  
2 report and in the hearing that she did not want the  
3 respondent to choke her during sexual intercourse, and that  
4 she would not have allowed that to happen if she were not  
5 intoxicated." Correct?

6 MR. KLEIN: Correct.

7 JUDGE RIVERA: Okay. But she does then say she's  
8 trying to remove his hand. So ~~let~~ let's go with what  
9 I perceive to be your argument that she is agreeing to this  
10 part of this sexual encounter, the choking. But then she  
11 revokes it when she says it - - - ~~it~~ that it was too  
12 much, that she's trying to pull his hands away, and she  
13 can't.

14 MR. KLEIN: Right. Your Honor, but that - - -

15 JUDGE RIVERA: Why is that not - - - let's - - -  
16 let's accept what you're saying here - - -

17 MR. KLEIN: I'll tell you why. I'll tell you  
18 why.

19 JUDGE RIVERA: - - - why is that not revocation?

20 MR. KLEIN: Because - - - this discussion, I  
21 think, is premised on the idea that this is a case all  
22 about substantial evidence. But this case is also about  
23 very much the question of arbitrariness. And it is - - - a  
24 school cannot come up with new reasons after its decision-  
25 making is over to substantiate the decision it made. And I

1 used an example earlier about flipping a coin. If - - - if  
2 we had here rec - - - evidence that said that they made  
3 this decision based upon the flip of a coin, I think we  
4 would all agree that that was arbitrary and would have to  
5 be vacated, and that would remain true even if, you know, a  
6 few lawyers came by and said, well, the coin was right  
7 because there's other evidence that supported what the coin  
8 said.

9 What we have here is the actual decision making  
10 from the school, which never talks - - - it never says that  
11 the reason why they found him responsible was because she  
12 tried to pry his hands off of her neck. And the appeals  
13 decision, which is the operative decision, never does that  
14 - - -

15 JUDGE TROUTMAN: So your argument - - -  
16 counselor, so your argument is that their initial  
17 determination, they said one thing, and then when it goes  
18 up on appeal, they changed the basis of the determination?

19 MR. KLEIN: The problem is, is that the hearing  
20 and this case was all - - -

21 JUDGE TROUTMAN: So did - - - ~~did~~ ~~did~~  
22 was the determination one thing and then the sustaining of  
23 the charges on appeal something different?

24 MR. KLEIN: It - - - it ~~is~~ is hard to keep  
25 track of for one reason. On one - - -

1 JUDGE TROUTMAN: Well, what are you claiming they  
2 did?

3 MR. KLEIN: I'm ~~-----I'm~~ telling you my - - -  
4 what I'm - - -

5 JUDGE TROUTMAN: Succinctly.

6 MR. KLEIN: - - - I'm claiming that it was  
7 arbitrary because on one hand, the appeals decision says  
8 that we're not disturbing the findings of the panel - - -  
9 the panel being the hearing panel - - - we're not  
10 disturbing the findings. Well, the - - - those findings  
11 were not based upon incapacitation.

12 However, in the next breath, the appeals decision  
13 says that it is based upon the fact that the evidence  
14 substantiated an inability to consent, which is not what  
15 the panel found.

16 And so what could be more arbitrary than you  
17 begin the case based upon incapacitation? The hearing is  
18 based upon incapacitation. The accuser says that she  
19 provided consent. She says I wouldn't have been allowed to  
20 consent to getting a tattoo. I wouldn't have been allowed  
21 to consent to putting a down payment on a house. Why  
22 should I have been allowed to consent to sex? Admitting  
23 that she consented. All - - - the whole case is about  
24 consent - - - lack of capacity to consent rather than  
25 whether she consented.

1           Then, however, in the first step, the panel says,  
2 we're not - - - we're not deciding it on that basis. And  
3 then in the - - - and then in the appeals decision, it  
4 says, actually, we are kind of deciding it on that basis,  
5 because we're going to say that this is all about inability  
6 to consent.

7           And then after that's done, the school, in its  
8 arguments, as was identified earlier, is going back and  
9 saying, no, we're not ~~we're not~~ going to base this on  
10 inability to consent.

11           What is arbitrariness and capriciousness if not -  
12 - -

13           JUDGE RIVERA: I'm ~~I'm I'm~~ a little  
14 confused. Maybe I'm not - - - maybe I've missed something  
15 in the review panel, but it does seem to me that under the  
16 findings, they are - - - they do say on more than one  
17 occasion that there's no evidence of affirmative consent,  
18 and it is not in the same breath or sentence that they're  
19 referring to intoxication.

20           MR. KLEIN: Are you referring to the appeal  
21 decision, Your Honor?

22           JUDGE RIVERA: No.

23           MR. KLEIN: Okay. So the - - - ~~the~~ that's  
24 right, Your Honor. So the appeals decision is  
25 affirmatively saying we are not going to base this on

1 intoxication. Right. Even though that's what the whole -  
2 - -

3 JUDGE RIVERA: But I thought your argument was,  
4 that the review panel never made a determination that there  
5 was a lack of affirmative consent, and I just don't read it  
6 that way - - -

7 MR. KLEIN: No ~~no~~ ~~no~~, if I said that,  
8 that's not what I meant.

9 JUDGE RIVERA: Okay. What - - - okay - - -

10 MR. KLEIN: What I mean to say is this case from  
11 the starting gun - - -

12 JUDGE RIVERA: Yes.

13 MR. KLEIN: - - - until the conclusion of the  
14 hearing - - -

15 JUDGE RIVERA: Yes.

16 MR. KLEIN: - - - was not about whether she  
17 affirmatively consented. She admitted she consented. She  
18 said, I consented, but I shouldn't have been allowed to  
19 consent. But in the panel's decision, it then says, we are  
20 not going to base this on the intoxication question that  
21 formed the entire basis of the case. We are going to base  
22 this on an affirmative consent question. Okay. Then the  
23 appeals decision appears to change and say - - -

24 JUDGE RIVERA: And you ~~you~~ agree, and I  
25 think it was in response to Judge Cannataro's questions

1 that the incapacitation based on ~~on~~ intoxication can  
2 also be the inability to affirmatively consent. Not just I  
3 consented, but I was drunk, so no one should consider that  
4 consent, but actually physically unable to do so.

5 MR. KLEIN: Yes, Your Honor, but in ~~in~~ this  
6 case, you know, we can't - - - we don't leave context at  
7 the door. Right. The context of an inability to consent  
8 was only litigated on one question, and that was, was she  
9 incapacitated due to intoxication. And don't take it from  
10 me, take - - -

11 JUDGE RIVERA: Well, that was my point before,  
12 that if you black out due to intoxication, that that's sort  
13 of the same issue in questions, correct?

14 MR. KLEIN: It - - - ~~it is~~ it is. Except -  
15 - - except the panel affirmatively says we're not going to  
16 find that. We have a whole case - - - you've got - - - I  
17 mean, the - - - the educational hopes and dreams of my  
18 client built up in this all about one question, which is,  
19 was the accuser too intoxicated to consent? It's  
20 everything of the - - - about this case. There - - -  
21 that's why the videos mattered, and the text messages  
22 afterward about, you know, her friend saying she didn't  
23 seem drunk. And ~~and~~ my ~~my~~ client was talking  
24 at the hearing about, oh, she doesn't look like she's  
25 stumbling, and their text messages are lucid. The whole

1 thing - - -

2 CHIEF JUDGE WILSON: Counsel, you're ~~you're~~  
3 way over time - - -

4 MR. KLEIN: I - - - I - - - I - - -

5 CHIEF JUDGE WILSON: - - - so if you want ~~a text~~  
6 ~~ten~~ seconds to wrap up, take them.

7 MR. KLEIN: I appreciate the extra time that you  
8 all gave me today. The Appellate Division found what the  
9 record shows, which is that this case was about one thing,  
10 intoxication. It is arbitrary and capricious and not  
11 supported by substantial evidence to then decide this case  
12 based upon something else. We respectfully request that  
13 the Appellate Division's decision vacating this discipline  
14 be affirmed. Thank you.

15 CHIEF JUDGE WILSON: Thank you.

16 JUDGE HALLIGAN: So can I ask you this? The  
17 panel says that it finds that he's responsible for the  
18 charges, and I'm quoting here, "regardless of whether the  
19 complainant was or was not incapacitated by alcohol." And  
20 the appeals committee says that - - - that there's ~~there's~~  
21 ~~there's~~ evidence that substantiates her inability to give  
22 consent.

23 So in response to your ~~your~~ adversary's  
24 comments, how do you square those, and why does that not  
25 render the determination arbitrary and capricious, not for

1 substantial evidence reasons, but because there's a  
2 shifting basis for the decision without explanation?

3 MS. BRODY: There's - - - thank you, Your Honor.  
4 There's not a shifting basis for the decision. And I just  
5 ~~--- I just~~ want to clarify what occurred here. So that  
6 decision by the appeals committee should be understood in  
7 terms of what his appeal to the committee said. And he  
8 made several arguments to the appeals committee, two of  
9 which are relevant here.

10 His first argument was she's not credible. Don't  
11 believe her testimony. And he concludes that by saying,  
12 and therefore, you can't find substantial evidence based on  
13 this incredible testimony.

14 And the second point he makes is that there is  
15 substantial evidence in the record of affirmative consent,  
16 and he recites largely the sort of same evidence he's  
17 pointed to about the beginning of the evening.

18 So that portion of the appeals committee's  
19 determination is simply saying we do find her credible.  
20 She's been consistent. She's been consistent about her  
21 ability. But the appeals committee is not revisiting the  
22 basis for the ~~--- for the~~ review of incapacitation - - -

23 JUDGE CANNATARO: Well, they do - - -

24 JUDGE HALLIGAN: I'm ~~--- I'm~~ just reading,  
25 though, from what they say. They - - - I ~~--- I~~ think

1 this is a quote. You'll correct me if I'm wrong, but I ~~---~~  
2 ~~I~~ think that they say that she consistently maintained  
3 details surrounding the incident that substantiated her  
4 inability to give consent to the sexual activity. How is  
5 that not in tension with what the review panel says, which  
6 is that their determination is regardless of whether there  
7 was incapacitation by alcohol?

8 MS. BRODY: They're not - - - again, as ~~---~~ ~~as~~  
9 I've explained, his letter to the appeals committee - - -  
10 the two arguments he made that are relevant here - - -  
11 there were some other procedural ones that I won't go into,  
12 but are discussed in our brief - - - but his argument to  
13 the appeals committee was they did not make a finding of  
14 incapacitation. He says that in his letter to the appeals  
15 committee. He says that in his petition. He says that in  
16 his brief to the Second Department - - -

17 JUDGE GARCIA: I would like to go to that point.  
18 It seems to me this argument isn't in the Article 78  
19 petition at all. This argument about this bait and switch,  
20 or that the appeals panel did something different. As ~~---~~  
21 ~~as~~ I read it, it says he argued that the record before  
22 the school did not prove lack of affirmative consent by a  
23 preponderance of the evidence. Nevertheless, Stony Brook's  
24 Appellate Committee affirmed the findings.

25 MS. BRODY: Agreed. Agreed that it's ~~---~~ ~~it's~~

1 not - - -

2 JUDGE GARCIA: I ~~-----I~~ don't see this argument  
3 anywhere.

4 MS. BRODY: I ~~-----I~~ agree it's not preserved,  
5 but I do - - - I do want to answer Judge Halligan's  
6 question, and I ~~-----I~~ really ~~-----I~~ really think that  
7 the way to understand that sentence is in response to the  
8 particular arguments that he was raising in his letters to  
9 - - - his letter to the appeals committee. The argument  
10 was - - - there were ~~-----there were~~ two arguments, again,  
11 that are relevant. One, she's not credible. Don't believe  
12 her testimony at all. And you certainly can't find  
13 substantial evidence based on it.

14 And what the appeals committee is saying is, yes,  
15 she is credible. She has ~~-----she has~~ consistently  
16 maintained her story. They don't at any point indicate  
17 that they're departing in any way from the findings that  
18 were made by - - - by the review panel. And again, that's  
19 because they're just responding to this argument that he  
20 spent several pages on in his administrative appeal saying  
21 she's not credible. That's just the - - -

22 JUDGE CANNATARO: Can I ask you who is the  
23 appeals committee? Are they judges? Are they lawyers?  
24 Who are they?

25 MS. BRODY: I believe they're faculty and staff



1 that - - -

2 JUDGE CANNATARO: They're faculty? So - - -

3 MS. BRODY: Yes. This is ~~--- this is~~ common in  
4 various agency proceedings where there's some kind of  
5 appeals committee or appeals board that consists of agency  
6 employees, and there's - - -

7 JUDGE CANNATARO: Okay.

8 MS. BRODY: - - - sort of a fact-finding body and  
9 then an administrative review body. Sometimes there's an  
10 express exhaustion requirement by statute. But this is  
11 just - - -

12 JUDGE CANNATARO: I - - - okay.

13 MS. BRODY: So I just want to conclude by  
14 reminding the court that even to the - - - even if there  
15 was allegedly consent for some of the activity at the  
16 beginning of the evening, there were at least three times  
17 when she expressly revoked her consent, and the court  
18 should find that the university's determination was based  
19 on substantial evidence. Thank you.

20 CHIEF JUDGE WILSON: Thank you.

21 (Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of P.C. v. Stony Brook University, No. 25 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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