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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF TOWN OF NORTH HEMPSTEAD,

Appellant-Respondent,

-against-

No. 151

COUNTY OF NASSAU,

Respondent-Appellant.

20 Eagle Street
Albany, New York 12207
September 10, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 151, Town of
2 North Hempstead.

3 Counselor, would you like rebuttal time?

4 MR. FINKEL: Yes, Your Honor, two minutes,
5 please.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.
7 Go ahead.

8 MR. FINKEL: Sure. Good afternoon, members
9 of the court. Richard Finkel from the law firm of
10 Bond Schoeneck & King, appearing for the Town of
11 North Hempstead.

12 Our position is relatively straightforward.
13 FIT, the subject of FIT, as it relates to county
14 reimbursement, was taken out of the purview of
15 6305(5) of the Education Law, with the enactment of
16 6305(10) in 1994. And notwithstanding any
17 appropriation bills or other legislation, it has
18 never been placed back into - - -

19 CHIEF JUDGE LIPPMAN: Are you saying it's
20 impliedly repealed?

21 MR. FINKEL: Well, that's one theory. I'm
22 not sure that the - - - that it's not repealed by
23 operation of law. This is a 6305 - - -

24 CHIEF JUDGE LIPPMAN: And if they repeal
25 it, don't they have to say it's repealed?

1 CHIEF JUDGE LIPPMAN: Yes, and I'm asking
2 you what about it?

3 MR. FINKEL: Well, we don't - - - we don't
4 accept that argument - - -

5 CHIEF JUDGE LIPPMAN: Why not?

6 MR. FINKEL: - - - because the legislature
7 did not provide for the contingency that 6305(10)
8 would not be funded. And you have - - - you know,
9 it's a step-by-step logic here. 6305(10), by - - -
10 according to Brusco v. Braun, this court's decision
11 in Brusco v. Braun, the special legislation with
12 6305(10) - - -

13 CHIEF JUDGE LIPPMAN: Why can't you read it
14 together? Why can't you read the provisions
15 together? The State doesn't do what they're supposed
16 to do or what they shall do, then the towns fill in
17 the gap; is the County supposed to be reimbursed?

18 MR. FINKEL: Again, Judge - - - Judge
19 Pigott wrote the decision in People v. Boothe. This
20 court says well - - - and in People v. Tychanski and
21 People v. Boothe, you can't legislate. And if the
22 legislature didn't - - - didn't provide for the
23 contingency, they're the only ones that can. It's
24 got to go back to the - - -

25 JUDGE RIVERA: But what about if - - -

1 JUDGE READ: What about the broader
2 implications of this? I mean, doesn't the
3 legislature do this all the time? In other words,
4 they don't fund something and maybe the notwithstanding
5 statutory law in the appropriations bills, isn't that
6 fairly common?

7 MR. FINKEL: That is common, and that's
8 exactly what this appropriation bill says,
9 notwithstanding any provision to the contrary, which
10 means - - -

11 JUDGE READ: It says not - - -

12 MR. FINKEL: - - - in spite - - - in spite
13 of any provision to the contrary, Judge.

14 JUDGE READ: The appropriation bill you're
15 talking about is one of the bills where the State did
16 put money in?

17 MR. FINKEL: Did not - - - in this case it
18 did not.

19 JUDGE READ: Yeah, well, I mean, but it did
20 for several years, right?

21 MR. FINKEL: From '94 to 2001.

22 JUDGE READ: Right. And you know what the
23 language was then? Do you know, for example, if they
24 notwithstanding 6305?

25 MR. FINKEL: No, in - - - in 2001, it says

1 notwithstanding any provision to the contrary.

2 JUDGE READ: Including 6305?

3 MR. FINKEL: It references 6305. So - - -

4 JUDGE SMITH: Doesn't that
5 "notwithstanding" effectively eliminate that "shall"
6 that you were talking about before?

7 MR. FINKEL: Well, that's interesting,
8 Judge, because part of the confusion, I think, here
9 comes from your decision in Pataki, where you said
10 that the legislature can supersede other pre-existing
11 law. And then the Third Department, in Suffolk
12 County v. King, took that word "supersede", which had
13 its context, and turned that into "abrogated", which
14 I think has the same interpretation as "repeal". So
15 the appropriation bill did not repeal 6305(10). It
16 can't do that - - -

17 JUDGE READ: Well, it didn't - - -

18 MR. FINKEL: - - - under the guise of
19 budgeting.

20 JUDGE READ: It didn't repeal 6305(5)
21 either.

22 MR. FINKEL: Well, 6305(10) did, and the
23 rule of law, as stated by this court in Brusco v.
24 Braun - - -

25 JUDGE RIVERA: But - - -

1 MR. FINKEL: - - - is that a special act
2 repeals a general act, to the extent that the two are
3 in conflict.

4 JUDGE RIVERA: But if 6305(10) is, on its
5 face, seeking to ensure that the counties receive
6 funds, right, that the State shall pay - - -

7 MR. FINKEL: The State shall pay the
8 County.

9 JUDGE RIVERA: The State shall pay.

10 MR. FINKEL: Yes.

11 JUDGE RIVERA: So when the State then does
12 not put in a budget appropriations to satisfy this
13 mandated 63-(10), how likely is it that the
14 legislature, that obviously is seeking to reimburse
15 counties, would say that counties can't - - - if they
16 choose, because 63-(05) is discretionary - - - if
17 they choose to seek that payment to get the charge
18 back from the localities?

19 MR. FINKEL: Well, Judge, 6305(10) was
20 enacted - - - the County always had the ability to
21 charge back towns and cities, okay? So 6305(10)'s
22 enactment was not to provide for the County, because
23 the County was already provided for. 6305(10) was
24 enacted to lift this burden off the towns and the
25 cities. So when the State doesn't appropriate the

1 monies, the ones that are impacted by that are the
2 towns and the cities.

3 JUDGE GRAFFEO: Well, does 6305(10) only
4 apply to FIT?

5 MR. FINKEL: Yes.

6 JUDGE GRAFFEO: So why isn't it that it was
7 enacted to specifically address that educational
8 institution and to ensure that the counties were
9 reimbursed for their - - -

10 MR. FINKEL: The counties were reim - - -

11 JUDGE GRAFFEO: - - - that particular
12 school?

13 MR. FINKEL: The count - - - the Education
14 Law was amended to permit FIT to offer baccalaureate
15 and master's degrees - - -

16 JUDGE GRAFFEO: Right.

17 MR. FINKEL: - - - in 1975 and 1979. At
18 that point, the FIT charge-back was collectible from
19 the towns and county - - - towns and cities under
20 6305(5). It's an enormous financial burden for towns
21 and cities, so in '94, the legislature enacted
22 6305(10). 6305(10), again, was enacted for the
23 benefit of the towns and the cities. The County
24 already had the charge-back authority. So it's a
25 special provision that's in conflict with the general

1 provision that covers all of the other community
2 colleges and, by order of this court, in Brusco v.
3 Braun, it repeals 6305(5) to the extent that 6305(5)
4 formally covered the subject of FIT.

5 JUDGE RIVERA: But 6305(10) is ensuring
6 that the counties get paid.

7 MR. FINKEL: So does 6305(5). They're two
8 distinct - - -

9 JUDGE RIVERA: Correct. Correct. So when
10 the State chooses not to put appropriations in the
11 budget, can't we then recognize that by failing to
12 repeal 6305(5), the State assumes that the County,
13 again, under its discretion, may now choose to get
14 the charge-back from the towns?

15 MR. FINKEL: No, Judge, I disagree, and - -
16 - and maybe I'm being a little stubborn, but that's
17 my job. So 6305(10) was enacted more for the benefit
18 of the towns and cities - - -

19 JUDGE RIVERA: Yes, I understand your
20 argument.

21 MR. FINKEL: Okay.

22 JUDGE RIVERA: But if it was going to do
23 that, it would have said and 6305(5) is repealed.
24 And it didn't.

25 MR. FINKEL: Well - - -

1 JUDGE RIVERA: Because if you really wanted
2 to protect the towns, you would have made clear that
3 the discretionary authority of the County was no
4 longer available.

5 MR. FINKEL: And that would have been an
6 express repeal. And as I've said a number of times
7 already, whether it's a repeal by implication or a
8 repeal by operation of law, under the rule, as
9 expressed in Brusco v. Braun, that the special
10 provision repeals the general prov - - -

11 CHIEF JUDGE LIPPMAN: Why can't - - - yeah,
12 but that's if they're hopelessly in conflict. Why
13 can't this be read as, so if the County can't get it
14 from the State, they still have the authority to get
15 it from the municipalities? What does - - -

16 MR. FINKEL: Because with all due respect,
17 Judge, the statutes don't say that. And the problem
18 that is - - -

19 CHIEF JUDGE LIPPMAN: But they didn't take
20 away that they have that right. You are arguing,
21 basically, that impliedly, it is repealed.

22 MR. FINKEL: Absolutely.

23 CHIEF JUDGE LIPPMAN: But that assumes that
24 they're totally in conflict. I don't know what is
25 wrong with a reading that says if the State doesn't

1 do it, then the County still has the authority to go
2 back to the towns. What's wrong with that, other
3 than - - - I understand what you're saying - - -

4 MR. FINKEL: Right.

5 CHIEF JUDGE LIPPMAN: - - - that impliedly
6 that must be what happens. But we don't favor that
7 kind of repeal by implication.

8 MR. FINKEL: Right.

9 CHIEF JUDGE LIPPMAN: You would think that
10 if they want to repeal it, they're going to say it.

11 MR. FINKEL: The courts do not favor repeal
12 by implication, concededly. However, there is - - -
13 there are circumstances such as this - - - and I
14 don't know how you reconcile the mandatory directive
15 "shall" in 6305(10) with a permissive directive in
16 6305(5). And - - - and it's underscored perhaps
17 nowhere greater than footnote 6 of SUNY's amicus
18 brief where SUNY urges an interpretation that says,
19 you know what, it's a reasonable interpretation of
20 these two statutes, and a harmonious interpretation
21 of these two statutes, that when the State was
22 funding 6305(10), the County still could have charged
23 back the town, and then they could have settled
24 accounts later. That - - - that is an absurd
25 interpretation that the - - -

1 on the statutory question here?

2 MR. FINKEL: Well, Judge, the same students
3 that reside in the Town of North Hempstead reside in
4 the County of Nassau.

5 JUDGE READ: Right.

6 MR. FINKEL: So - - -

7 JUDGE PIGOTT: Yeah, but other towns they
8 don't, and you want them - - - you know, the citizens
9 of the other towns to help pay for the North
10 Hempstead kids.

11 MR. FINKEL: The - - - no, I want the
12 County of Nassau to pay, as the statute implied.

13 JUDGE PIGOTT: They're using the other
14 town's money.

15 MR. FINKEL: The County of - - - you're
16 talking about the towns and the county here? No.

17 JUDGE PIGOTT: What the County wants to say
18 is that if somebody comes from Town A, that Town A
19 ought to pay the tuition. You want to say if he
20 comes from Town A, Towns A through Z, through their
21 county taxes, pay the tuition.

22 MR. FINKEL: Well, from a policy
23 perspective, Judge, at the end of the day, the county
24 doesn't want to raise its taxes, because the pool,
25 the tax money is all the same. I'm a resident of

1 North Hempstead; I'm also a resident of the County of
2 Nassau.

3 JUDGE PIGOTT: If you're - - - let's pick,
4 just out of the thin air, a county called Erie, where
5 you have a big city, that perhaps they - - - they use
6 the count - - - they use the community college more
7 or less than somebody else; to you, that doesn't make
8 any difference, that all - - - that the Town - - -
9 any other town is as much responsible for educating
10 the kids in the City of Buffalo or in the Town of
11 Grand Island, or wherever, as everybody else.

12 MR. FINKEL: I think, again, in the context
13 of community colleges, which are maintained and
14 operated by counties. You know, for example,
15 counties, when they get a charge-back, that money
16 goes to the County; it doesn't get filtered back to
17 the towns and cities, right? So it's a general - - -
18 the monies that the County paid, by statute, under
19 6305(5), are a general county charge.

20 JUDGE PIGOTT: But the money you're getting
21 back is not from anybody in your - - - in your
22 County; it's from, let's say, somebody from Suffolk
23 County that's going to - - - to Nassau Community
24 College.

25 MR. FINKEL: And the - - -

1 JUDGE PIGOTT: You get money from Suffolk.
2 So that - - - you can't whack that up among the
3 towns. It's - - -

4 MR. FINKEL: Well, no, so - - - well, why
5 not? If all - - -

6 JUDGE PIGOTT: Because you don't - - -
7 because it's one kid or a hundred kids, and how are
8 you going to do it? I mean, ad valorem? I mean,
9 you're better off putting it in the County, reducing
10 everybody's taxes than that. But when you've got a
11 kid coming from a town going to somebody else's
12 school, somebody's got to pay for that, and they say
13 the Town should.

14 MR. FINKEL: And you just hit on an
15 interesting point, Judge. If the Count - - - if the
16 County pays, it actually reduces the taxes, because
17 the pie is bigger, okay? You've got three towns in
18 Nassau County, and I'm not totally familiar with the
19 other counties, but you've got three towns in Nassau
20 County, two of them are larger than us. We actually
21 have the least financial stake in this dispute. The
22 other towns are paying significantly more in county
23 charge-backs. Actually, they're not - - -

24 CHIEF JUDGE LIPPMAN: Okay, counselor.

25 MR. FINKEL: Thank you.

1 CHIEF JUDGE LIPPMAN: Thank you.

2 MR. FINKEL: Thank you.

3 CHIEF JUDGE LIPPMAN: Counselor?

4 MR. VAN DER WAAG: Yes, thank you, Judge.

5 Your Honors, Robert Van der Waag for the County
6 Attorney for Nassau County.

7 The County's position is, as you were
8 discussing, that the County charge-back in the
9 6505(5)(sic), which remains, it is the Town's
10 argument that 6505(10)(sic) has repealed 6505(5) - - -

11 JUDGE ABDUS-SALAAM: Counsel, does there
12 have to be an express repeal of that statute?

13 MR. VAN DER WAAG: In a situation such as
14 this, they should have expressed it. What the Town
15 is saying - - -

16 CHIEF JUDGE LIPPMAN: What about the word -
17 - -

18 MR. VAN DER WAAG: - - - there are limited
19 - - -

20 CHIEF JUDGE LIPPMAN: What about the word
21 "shall"?

22 MR. VAN DER WAAG: Well, there are limited
23 situations in which a - - - a - - - a repeal may be
24 implied. But that is a situation where conflicting
25 statutes or provisions cannot be harmonized, they

1 conflict. There's no conflict - - - excuse me - - -
2 here.

3 CHIEF JUDGE LIPPMAN: There's no conflict
4 between "shall" and then coming back - - -

5 MR. VAN DER WAAG: Correct. The - - -

6 CHIEF JUDGE LIPPMAN: - - - after the town.

7 MR. VAN DER WAAG: I mean, and what happens
8 is - - - and you've had the Pataki case, and what
9 have you, and the executive budgets, and what have
10 you. You have appropriations; they just don't fund
11 them. They don't - - - that doesn't mean they're
12 repealed. If they're superseded, you go on to
13 another cat - - - fiscal year and what have you.

14 JUDGE PIGOTT: Well, that's an interesting
15 point, I think. In other words, the implied repeal
16 or - - - or the supersession can be for a year or
17 two. And when it goes away, then we're back to (5),
18 right, which is the - - -

19 MR. VAN DER WAAG: But the County's point,
20 and I believe it's a - - - certainly a very valid
21 one, is 6505(5) was never repealed. We charge back
22 on that; we can charge back on that. If - - - if
23 we're going to take the - - - if this court is going
24 to take the position that somehow that was repealed,
25 you'd be going well beyond any of your - - -

1 JUDGE PIGOTT: Well, that's what I was
2 saying. If you'd stop using the word "repeal" - - -
3 not you personally, but if we stop using the word
4 "repeal" and talk about, you know, having been
5 superseded in the budget bill of whatever year, then
6 the next budget bill would have to do the same thing,
7 or not, and if it didn't, 05 kicks in. That's your
8 argument.

9 MR. VAN DER WAAG: Yes.

10 JUDGE READ: Simply not funded.

11 MR. VAN DER WAAG: Right.

12 JUDGE READ: It just wasn't funded, hasn't
13 been funded now for a couple of years.

14 MR. VAN DER WAAG: You know, the policy
15 considerations, I sym - - - County sympathizes with -
16 - - with all our citizens, and what have you, but as
17 far as the arguments, the - - - the concerns of
18 supervisors, and what have you, that's the point.
19 It's not for - - -

20 CHIEF JUDGE LIPPMAN: Do you think it would
21 be - - -

22 MR. VAN DER WAAG: - - - a court to make
23 that determination. A couple of blocks away, lobby
24 the legislature and say, you know what, the towns are
25 getting hurt here; change it.

1 CHIEF JUDGE LIPPMAN: Do you think it's
2 inequitable that if you had to pick up the tab, and
3 let's say most of the students come from their town,
4 is that inequitable to the other - - -

5 MR. VAN DER WAAG: No.

6 CHIEF JUDGE LIPPMAN: - - - towns?

7 MR. VAN DER WAAG: And Nassau County needs
8 every penny it can get, and so we can't make gifts,
9 and - - -

10 CHIEF JUDGE LIPPMAN: No, but I'm saying
11 you think they're getting an advantage if, let's say,
12 they had - - -

13 MR. VAN DER WAAG: Could be.

14 CHIEF JUDGE LIPPMAN: - - - the bulk of the
15 students?

16 JUDGE PIGOTT: Well, nobody contemplated a
17 four-year college, number one, right? That - - -

18 MR. VAN DER WAAG: Say again, Judge.

19 JUDGE PIGOTT: No one contemplated a four-
20 year school in the community college milieu.

21 MR. VAN DER WAAG: Way back when.

22 JUDGE PIGOTT: Yeah, and so now you're
23 faced with that. And as I understand it, FIT is not
24 inexpensive.

25 MR. VAN DER WAAG: Well, F - - - I don't -

1 - - there's no question that FIT is still a community
2 college, right? It's specifically in the statute.
3 Many cases - - - well, looking at it inversely,
4 there's not a single case or an item - - -

5 JUDGE SMITH: Do you want - - - I mean, are
6 you - - -

7 MR. VAN DER WAAG: - - - that indicates
8 that FIT is anything other than a community college.

9 JUDGE SMITH: Does that lead into your
10 cross-appeal? Do you want to say - - -

11 MR. VAN DER WAAG: Yes.

12 JUDGE SMITH: - - - a few words about the
13 cross-appeal?

14 MR. VAN DER WAAG: Lest I forget. I do
15 have a cross-appeal with the Town that - - -

16 CHIEF JUDGE LIPPMAN: Go ahead.

17 MR. VAN DER WAAG: - - - we moved. And
18 it's just two points. One is the setoff, because the
19 Appellate Division did not permit us to set off the
20 amount that North Hempstead owes us for these
21 charges, as opposed to the sales tax that we owe
22 North Hempstead.

23 JUDGE GRAFFEO: Why should you be allowed
24 to do the setoff?

25 MR. VAN DER WAAG: Well, first of all,

1 there isn't - - -

2 JUDGE GRAFFEO: What's the statutory - - -

3 MR. VAN DER WAAG: There isn't any law that
4 says that we can't - - -

5 JUDGE GRAFFEO: - - - underpinning that
6 permits that?

7 MR. VAN DER WAAG: - - - and we even have a
8 comptroller's opinion saying under the - - - and
9 under the common law we can set it off. This is a
10 liquidated amount. This is not a situation where
11 we're debating how much it is or may be. This whole
12 litigation or prior litigation was - - - was
13 commenced by the County sending an itemized list of
14 the exact amounts. So this is a liquidated amount.

15 JUDGE ABDUS-SALAAM: The amount is not in
16 dispute, but the fact that the Count - - - the Town
17 owes you is in dispute, isn't it?

18 MR. VAN DER WAAG: Well, after you decide
19 this case, there won't be any dispute.

20 JUDGE ABDUS-SALAAM: There won't be, but
21 right now.

22 MR. VAN DER WAAG: But during that time,
23 that's true.

24 JUDGE PIGOTT: Have you ever done it
25 before?

1 MR. VAN DER WAAG: No, because I believe
2 what happened is the County adopted a resolution,
3 pursuant to the legislature, in 203 (sic), to charge
4 back community colleges - - - community colleges.
5 And there was really no charge-back, and what have
6 you, working between the County and the towns and
7 what have you. As things got fiscally difficult,
8 then in 2010, that's when the - - - the first charge-
9 back was started by the County with FIT and the town.

10 JUDGE ABDUS-SALAAM: Well, does the County
11 legislature have to promulgate some sort of
12 legislation for you to charge it back?

13 MR. VAN DER WAAG: There's nothing in - - -
14 in - - - in these statutes which requires the County
15 to have a local law, or what have you. That being
16 the case, they can do it in the normal course of
17 events, which is the legislature adopting a
18 resolution directing the treasurer to charge back.

19 JUDGE SMITH: Even if they hadn't done
20 that, I mean, doesn't anybody have the right to off -
21 - - I mean, you or I or anybody have the - - - if
22 you're writing someone a check for money you owe him,
23 you can take out what he owes you?

24 MR. VAN DER WAAG: Yes, under the common
25 law. And quite frankly, it's a little foolish,

1 the larger amount? Well, how does the treasurer get
2 power to do that?

3 MR. VAN DER WAAG: Well, there are statutes
4 concerning the sales tax, and we're the keeper or the
5 holder of the sales tax and it's - - - it's
6 mathematically computed, via the fiscal people, and
7 it's put in the budget that - - -

8 JUDGE SMITH: I guess what I'm saying is
9 does there have to be a County legislature resolution
10 to say the treasurer is hereby authorized to pay the
11 bill?

12 MR. VAN DER WAAG: A resolu - - -

13 JUDGE SMITH: Isn't that inherent to the
14 treasurer's job? He pays the bills.

15 MR. VAN DER WAAG: It is, and I don't know
16 whether a specific resolution, but a resolution by
17 the legislature directing and authorizing the
18 treasurer to do a number of things, one of which is
19 to distribute the sales taxes among the various
20 entities.

21 JUDGE PIGOTT: Well, he needs that autho -
22 - -

23 JUDGE ABDUS-SALAAM: And had - - -

24 JUDGE PIGOTT: I'm sorry.

25 JUDGE ABDUS-SALAAM: Go ahead.

1 JUDGE PIGOTT: He needs that authority in
2 order - - - as you say, because those computations
3 can be quite - - -

4 MR. VAN DER WAAG: Right.

5 JUDGE PIGOTT: They're not left to him; he
6 needs the legislature to authorize him to do that.

7 MR. VAN DER WAAG: By resolution.

8 JUDGE PIGOTT: Right.

9 MR. VAN DER WAAG: Yes.

10 JUDGE ABDUS-SALAAM: And was there such a
11 resolution here or he - - -

12 MR. VAN DER WAAG: Yes, there was a
13 resolution directing the treasurer to do certain
14 things, yes.

15 JUDGE ABDUS-SALAAM: How long ago was that
16 resolution?

17 MR. VAN DER WAAG: Well, you had the 2003 -
18 - - oh, you mean the one for the - - - for the - - -
19 for the setoff?

20 JUDGE GRAFFEO: But it didn't specifically
21 - - -

22 MR. VAN DER WAAG: I mean, the ones for - -
23 -

24 JUDGE GRAFFEO: - - - mention - - -

25 MR. VAN DER WAAG: - - - FIT - - -

1 JUDGE ABDUS-SALAAM: - - - setoff.

2 MR. VAN DER WAAG: - - - that was done at
3 the same time.

4 JUDGE ABDUS-SALAAM: But did it
5 specifically mention setting off these - - - this
6 debt?

7 MR. VAN DER WAAG: No, I don't think it
8 said specifically setoff.

9 JUDGE ABDUS-SALAAM: So why wouldn't the
10 legislature - - -

11 MR. VAN DER WAAG: But don't hold me to
12 that, but I don't think so.

13 JUDGE ABDUS-SALAAM: - - - do that? Why
14 wouldn't the legislature need to pass a resolution?

15 MR. VAN DER WAAG: Well, it wouldn't need
16 to do that, because it auth - - - it authorizes the
17 treasurer to compute and what have you. So - - -

18 JUDGE READ: You're saying that the
19 legislature doesn't need to have such a resolution
20 but they do have one?

21 MR. VAN DER WAAG: Say - - -

22 JUDGE READ: You're saying that it doesn't
23 have to be a specific resolution?

24 MR. VAN DER WAAG: Well, you're talking
25 about a specific resolution for the setoff - - -

1 JUDGE READ: Setoff.

2 MR. VAN DER WAAG: - - - or a specific
3 resolution - - -

4 JUDGE GRAFFEO: The setoff.

5 JUDGE READ: For the setoff.

6 MR. VAN DER WAAG: - - - for FIT?

7 JUDGE RIVERA: For the setoff.

8 JUDGE READ: Or both, I guess, but let's
9 say the setoff first.

10 MR. VAN DER WAAG: Well, first of all, I
11 don't think you need a specific resolution - - -
12 there was a question about the resolution originally
13 saying community colleges, and then the Town had
14 argued it doesn't say FIT. That, I don't think, is
15 an issue, because FIT is definitely a community
16 college. As far as the legislature specifically
17 having an additional resolution, you know, that's
18 done internally once it's liquidated and the parties
19 agree, after this court's decision.

20 JUDGE ABDUS-SALAAM: Well, again they - - -
21 after this court's decision - - -

22 MR. VAN DER WAAG: Well, because during
23 this case, that was being contested. So I mean, I
24 would argue, as, you know, the County, that we had it
25 liquidated. But until that's resolved, that they owe

1 us, it is something that's - - - that is not final.

2 JUDGE READ: What about the issue about
3 whether it should be two years or four years, the - -
4 - the charge-back - - -

5 MR. VAN DER WAAG: You mean the part - - -

6 JUDGE READ: Whether the - - - yeah,
7 whether the charge-back should be limited for two
8 years - - -

9 MR. VAN DER WAAG: There is nothing - - -

10 JUDGE READ: - - - as opposed to four
11 years.

12 MR. VAN DER WAAG: - - - in any statute
13 that says that FIT's four-year program - - - as a
14 matter of fact, statutes say that FIT has a four-year
15 program.

16 JUDGE GRAFFEO: It says a master's too,
17 doesn't it?

18 MR. VAN DER WAAG: Say again?

19 JUDGE GRAFFEO: The definition of FIT - - -

20 MR. VAN DER WAAG: Yes.

21 JUDGE GRAFFEO: - - - also includes
22 baccalaureate and master's degree.

23 MR. VAN DER WAAG: That is correct.

24 JUDGE GRAFFEO: Are the master's tuition -
25 - -

1 MR. VAN DER WAAG: Yes, it does.

2 JUDGE GRAFFEO: - - - involved here also in
3 the setoff?

4 MR. VAN DER WAAG: That's correct.

5 CHIEF JUDGE LIPPMAN: Okay.

6 MR. VAN DER WAAG: That - - - that's the
7 County's position.

8 CHIEF JUDGE LIPPMAN: Thanks, counselor.

9 MR. VAN DER WAAG: Thank you.

10 MS. FIGUEREDO: May it please the court.
11 Valerie Figueredo for the State University of New
12 York.

13 SUNY's interest in this litigation is in
14 ensuring that FIT, as an institution, is treated as a
15 community college, as the legislature expressly
16 intended, notwithstanding that it is different from
17 the twenty-nine other community colleges in the
18 State. By statute, the legislature provided for FIT
19 to be financed and administered as a community
20 college. Designating FIT as something other than a
21 community college - - -

22 JUDGE SMITH: If I understand it, your
23 direct interest is you're worried that if the County
24 charge-back is - - - is not allowed, you're concerned
25 that maybe the - - - your - - - the - - - your

1 charge-back to the County would be in jeopardy?

2 MS. FIGUEREDO: It depends on how the court
3 reaches the conclusion that the charge-back from the
4 County to the Town would not be allowed.

5 JUDGE SMITH: I understand it depends on
6 things, but - - -

7 MS. FIGUEREDO: SUNY's interest - - -

8 JUDGE SMITH: - - - the reason that someone
9 is paying you to stand here is that SUNY wants to be
10 sure that it doesn't lose the right to charge back to
11 the County.

12 MS. FIGUEREDO: SUNY wants to ensure that
13 FIT does not lose that right, because FIT is a
14 community college and should be treated the same as
15 the twenty-nine other community colleges in the
16 State, all of which are permitted to charge back to
17 the counties for the costs associated with
18 nonresident students attending those schools.

19 JUDGE GRAFFEO: And that's - - -

20 JUDGE PIGOTT: Part of that - - -

21 JUDGE GRAFFEO: And that's all students,
22 all degrees?

23 MS. FIGUEREDO: The twenty - - - the
24 twenty-nine - - -

25 JUDGE GRAFFEO: Not just a two-year degree,

1 but the four-year and the master's?

2 MS. FIGUEREDO: FIT's the only one that
3 permits those degree programs, the adva - - - the
4 advanced degree programs.

5 JUDGE GRAFFEO: I'm asking, all - - -

6 MS. FIGUEREDO: Yes.

7 JUDGE GRAFFEO: - - - all categories - - -

8 MS. FIGUEREDO: And - - -

9 JUDGE GRAFFEO: - - - in - - -

10 MS. FIGUEREDO: - - - it would be all
11 categories.

12 JUDGE GRAFFEO: - - - 6302?

13 MS. FIGUEREDO: Yes, in 6302(3) the
14 legislature made clear that, for all purposes, FIT is
15 a community college, including for the purpose of
16 charging back the charge-back costs to the counties
17 for the advanced degrees, the four-year and the
18 master's degree programs.

19 JUDGE PIGOTT: As part of that, you're
20 arguing that there's no repeal or 6305 in this?

21 MS. FIGUEREDO: 6305(10) did not impliedly
22 repeal 6305(5). 6305(5) can be read harmoniously
23 with 6305(10) to provide full reimbursement for the
24 charge-back provision - - - for the charge-back from
25 the County to the Town.

1 CHIEF JUDGE LIPPMAN: Okay, thanks,
2 counsel.

3 Counselor, rebuttal?

4 MR. FINKEL: Thank you again. Just a
5 couple of quick points on the setoff issue. Judge,
6 you touched on it; the - - - the debt is disputed, so
7 whether there's legislative approval or not, it would
8 be unlawful.

9 JUDGE SMITH: Is it the law that a debtor
10 can't offset a debt that the creditor disputes?

11 MR. FINKEL: It - - - yes, it is.

12 JUDGE SMITH: What says that?

13 MR. FINKEL: Well, there's a legitimate
14 dispute, Judge; this court touched on it in Dunn in
15 1903 or 4, and many Appellate Divisions have touched
16 on it since. It would - - - it would defy logic to -
17 - - to allow a setoff of a debt when that - - - when
18 the very validity of that debt is being litigated.

19 JUDGE SMITH: So if I owe some - - - I owe
20 somebody 100 dollars, and I'm convinced he owes me
21 2,000, and he disputes it, I've got to pay the
22 hundred?

23 MR. FINKEL: That's what the courts are
24 for.

25 JUDGE PIGOTT: Do you collect the real

1 property taxes - - -

2 MR. FINKEL: We do.

3 JUDGE PIGOTT: - - - for the Town?

4 MR. FINKEL: We do.

5 JUDGE PIGOTT: Why aren't you - - -

6 MR. FINKEL: I would like to, actually. I
7 would like to. And - - - and that was considered.

8 That was considered.

9 With res - - -

10 JUDGE PIGOTT: Depending on how this
11 argument goes - - -

12 MR. FINKEL: Right, well - - -

13 JUDGE PIGOTT: - - - it's an arrow in your
14 quiver.

15 MR. FINKEL: - - - respect to a couple of
16 things I heard about the - - - the appropriation
17 bill, again, I'd just like to reiterate that an
18 appropriation bill can do no more than budget monies
19 or not. It can't repeal existing litigation.

20 6305(10) - - -

21 JUDGE READ: You mean existing legislation.

22 MR. FINKEL: I'm sorry?

23 JUDGE READ: You mean existing legislation.

24 MR. FINKEL: Is that - - -

25 JUDGE READ: You said litigation.

1 MR. FINKEL: I'm sorry; I'm - - - I'm tied
2 up in litigation, so yes, legislation. The - - -
3 6305(10) is not the same, wasn't adopted by the same
4 means as the appropriation bill. One was adopted
5 under Article 3 of the Constitution, one under
6 Article 7. The different branches of government
7 assume different roles.

8 JUDGE ABDUS-SALAAM: Does that make them in
9 conflict because they were adopted by different
10 branches of government?

11 MR. FINKEL: It doesn't rend - - - it
12 doesn't put the appropriation bill in conflict with
13 6305(10), but it - - - but it ensures that 60 - - -
14 that the appropriation bill cannot repeal 6305(10).
15 You would need separate general legislation to do
16 that. It's never been done, and nobody's arguing
17 that it's been done. So 6305(10) is there; it's just
18 not funded. Okay? So you have 6305(5), the general
19 rule; you have 6305(10), that specifically treats
20 FIT; it's still standing. And you have an
21 appropriation bill where the State says, you know
22 what, I don't care what 6305(10) says, we're not
23 paying it.

24 JUDGE GRAFFEO: Do you have parallel
25 provisions? Are you reimbursing the County for other

1 community colleges?

2 MR. FINKEL: We do.

3 JUDGE GRAFFEO: Like, if there's residents
4 of Hempstead going to Suffolk community college, do
5 you reimburse those?

6 MR. FINKEL: Yes, Judge, we're not
7 contesting the Town's obligation, under 6305(5), to
8 reimburse the County for students that attend other
9 community colleges.

10 Now, you also brought up the issue of the
11 two-year degree, the four-year degree, the master's
12 degree, and things like that. When - - - when the
13 legislature authorized the creation of FIT as a
14 vocational school, it said FIT is a two - - - it's a
15 two-year - - - it's a community college. Okay? When
16 it expanded the reach of what FIT can offer, in '75
17 and '79, it said that it will be financed and
18 administered in the manner provided for community
19 colleges. So it essentially created a hybrid.
20 There's a distinction between the language it used in
21 creating FIT and the language it used when it
22 authorized it to offer upper class curriculum.

23 It also said that the - - - the master's
24 degree and baccalaureate programs are curriculum that
25 the FIT could offer in addition to its community

1 college curriculum. So what we're saying is - - -

2 JUDGE READ: But FIT - - - FIT doesn't get
3 any state appropriations, does it, in the same way a
4 SUNY College or University Center would?

5 MR. FINKEL: Judge, I can't answer that
6 question. I think, actually, it does, but I'm not
7 sure. And again, in terms of the Attorney General's
8 concerns, the Town has never argued, and does not
9 argue here, that FIT does not have the ability or the
10 authority to charge back the counties. That's a
11 separate provision outside of 6305 and 6305(10).
12 FIT's funding and financing is not threatened by this
13 litigation, regardless of how you decide.

14 CHIEF JUDGE LIPPMAN: Okay, counselor.
15 Thanks.

16 MR. FINKEL: Okay. Thank you.

17 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of Matter of Town of North Hempstead v. County of Nassau, No. 151, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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