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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF HAUG,

Respondent,

(Papers Sealed)

-against-

No. 102

STATE UNIVERSITY OF NEW YORK AT
POTSDAM,

Appellant.

20 Eagle Street
Albany, New York
September 13, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is number 102, Matter of Haug v. State
3 University of New York at Potsdam.

4 Counsel.

5 MR. GINSBERG: May it please the court, I'd like
6 to reserve two minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: Of course.

8 MR. GINSBERG: Your Honors, the Third Department
9 made two legal errors, and I'd like to turn first to its
10 erroneous conclusion that the complainant's reports were
11 rendered insubstantial simply because they were
12 controverted by the petitioner's live testimony. This
13 court has always held that probative hearsay evidence is
14 substantial so long as it's reliable.

15 JUDGE FEINMAN: So - - - so let me ask you this.
16 Have we ever adopted this language that crops up in a lot
17 of the Third Department cases and apparently now cropped up
18 in a Fourth Department case that if you controvert it in a
19 - - - in a way that is substantial that that somehow
20 renders the hearsay unreliable or not substantial evidence?

21 MR. GINSBERG: Your Honor, I'm not sure because
22 the one case in which a - - - of this court in which it's
23 cropped up, 125 Bar Corporation from 1969 I believe, it was
24 dicta in that case because the court in that case announced
25 this serious controversy principle but then also said,



1 well, the evidence at issue here in the 125 Bar Corp. case,
2 fails on its face. So we - - -

3 JUDGE STEIN: Don't - - - don't we have other
4 cases such as - - - as Vega and - - - and I suppose a
5 number of cases in the prison disciplinary realm where in
6 fact we have held evidence to be substantial evidence
7 notwithstanding - - - hearsay evidence to be substantial
8 notwithstanding contrary testimony?

9 MR. GINSBERG: Absolutely, Your Honor. And that,
10 if nothing else, is what I'd like the court to take away
11 from today that the Third Department's holding that mere
12 contradiction by a live hearsay testimony does not render -
13 - - a mere contradiction by live testimony does not render
14 hearsay testimony per se insubstantial. And the reason - -
15 -

16 CHIEF JUDGE DIFIORE: So does the majority make a
17 rule where a complainant must attend the hearing and be
18 cross-examined?

19 MR. GINSBERG: Well, I mean, that's the - - -
20 that's how the opinion reads because if the complainant,
21 according to the Third Department majority's test, again,
22 as long as there's a - - - as long the testimony quote
23 differs on a quote critical issue the college or an
24 administrative agency cannot proceed unless there's live
25 testimony there. And it's simply not the case. It's



1 antithetical to, A, the fact that cross-examination is not
2 required constitutionally in the administrative process,
3 nor is it required by the governing statutes, in this area
4 the education law, and again, there's no - - -

5 JUDGE RIVERA: So - - - so what should have the
6 majority done? What was their review? What should they
7 have done?

8 MR. GINSBERG: Their review was first, I mean
9 they - - - they were perfectly entitled to examine the
10 evidence and see it - - - the hearsay evidence and see if
11 it was unreliable because hearsay evidence - - - by the
12 way, like any evidence, hearsay or live, if it's unreliable
13 then the - - - they're under no - - - then it cannot be the
14 basis of substantial evidence finding. But assuming there
15 are no reliability issues - - - and in a case like this I
16 actually counted eight separate indicia of reliability, I
17 hope to get through at least some of them, but assuming
18 there are no reliability issues as the case is here then
19 deference to the college's reasonable judgment is
20 appropriate. Then there's only one question to ask, could
21 the college starting with this collection of evidence - - -

22 JUDGE STEIN: Well - - - well, you don't disagree
23 that if there was some sort of evidence that - - - some
24 documentary or testimonial evidence that she wasn't on
25 campus that night, that she was in another city or whatever



1 that would certainly be enough to rule her - - - the
2 hearsay evidence, well, insufficient.

3 MR. GINSBERG: I think we would be hard-pressed
4 to defend that, again, because of some of these indicia of
5 reliability I'm hoping to get into. Just because someone
6 else might have testified and said that there could be
7 deficiencies in that testimony which would render it
8 unreliable, but I think Your Honor is - - - is getting at
9 exactly the right point.

10 JUDGE FEINMAN: But the - - - so who makes that
11 liability determination, the hearing board? Or you're
12 saying that the Appellate Division should actually look at
13 this reliability and re-weigh them? I mean we don't
14 generally have the Appellate Division re-weighing the
15 evidence.

16 MR. GINSBERG: No, you're not re-weighing the
17 probative force of the evidence. Absolutely not. But this
18 court is always entitled - - - appellate courts and
19 judicial review are always entitled to say in an extreme
20 case, not this case, that, look, the evidence here,
21 whatever it's facial probative value, was simply not
22 reliable. For example, let's say there was a videotape
23 that contradicted it. Then the hearsay while probative - -
24 -

25 JUDGE FEINMAN: So why isn't it that that's not



1 what they did, however inartfully? Why is that not what
2 the majority did? I don't know if you're following my
3 question.

4 MR. GINSBERG: I think I'm following it, Your
5 Honor. As I read the majority's opinion, it's certainly
6 not what they said. They said that as long there's - - -
7 when you have a hearsay account on the one hand, live
8 testimony on the other hand, whenever that live testimony
9 quote differs from the hearsay account on the critical
10 issue which when the petitioner takes the stand it always
11 will - - -

12 JUDGE FEINMAN: So - - - so your position is the
13 majority - - - and I think we're getting back to what was
14 stated earlier, is that they've created this blanket rule
15 that automatically if you have live testimony that
16 contradicts the hearsay - - -

17 MR. GINSBERG: It certainly seems - - -

18 JUDGE FEINMAN: For - - - for the - - - you know,
19 for the hearing board to - - - to rely on that hearsay.

20 MR. GINSBERG: It certainly seems susceptible of
21 that reading. That's how we read it, but let me take a
22 stab then at convincing you that even if - - -

23 JUDGE RIVERA: Well, before - - - before you go
24 down that road, is it - - - could we looking at this case
25 say if - - - if the complaint - - - in this kind of a case



1 on these facts with this record, the complainant doesn't
2 show up to testify, you can't really have the
3 administrative entity rendering a credibility determination
4 because at some part - - - some point it is a credibility
5 determination? But they certainly could, because he showed
6 up, determine that he is not credible, right? And - - -
7 and to the extent he - - - he concedes that indeed they did
8 have sex that his testimony is in-credible and as a result
9 decide that he indeed committed the offense - - -

10 MR. GINSBERG: The answer to your - - - I'm
11 sorry.

12 JUDGE RIVERA: No, no, go ahead.

13 MR. GINSBERG: The answer to Your Honor's
14 question is yes, the college could absolutely do that. But
15 I want to push back a little bit on the - - - what sounded
16 like the first premise of your question. I think there was
17 enough material here to make a credibility determination.
18 Not a classical one as we would expect, for example, in a
19 criminal trial. But here, it wasn't just a plain written
20 statement from the alleged victim submitted and that's it.
21 We have the - - - the complainant met with two college
22 personnel, Lieutenant Ashley (ph) and Ms. Robbins and gave
23 her stories to them. Ms. Robbins and Lieutenant Ashley,
24 they testified in person at the hearing, so petitioner was
25 free to - - - and he was asked if he wanted to - - -



1 JUDGE RIVERA: Yeah, but they're not the ones who
2 are going to decide her reliability.

3 MR. GINSBERG: They're not the ones who are going
4 to decide her reliability but - - -

5 JUDGE RIVERA: And - - - and he has conceded that
6 they had sex and that they met in the way she - - - she
7 describes.

8 MR. GINSBERG: Oh, yes, Your Honor, my - - -

9 JUDGE RIVERA: It does boil down to whether or
10 not he thought she consented, right?

11 MR. GINSBERG: No, it doesn't boil down to
12 whether or not he thought she consented, it boils down to
13 whether or not she did affirmatively consent. But I want
14 to return to that point before - - -

15 JUDGE RIVERA: But that boils down to the view
16 each of them have, that scenario and how the administrative
17 entity views that; does it not?

18 MR. GINSBERG: Yes, it absolutely does. My - - -

19 JUDGE RIVERA: Okay. So that's my point. Even
20 though she's not there, they can't make an assessment of
21 whether or not she's credible and you would believe her
22 story, but to the extent he does show up and testify and he
23 agrees with part of the story and concedes part of the
24 story and then gives other information, that they could
25 decide that he's not credible.



1 MR. GINSBERG: It sounds like a friendly question
2 in part, so I'm trying to agree. But there's a premise
3 there that I really want to - - -

4 JUDGE RIVERA: I won't - - - I won't give a
5 subjective characterization to it.

6 MR. GINSBERG: Fair enough, Your Honor. But
7 there's a premise there that I want to continue to push
8 back on.

9 JUDGE RIVERA: Okay.

10 MR. GINSBERG: Even though she did not appear in
11 person and a - - - what might be called a classical
12 criminal-trial-style credibility determination could not be
13 made there still were ways, albeit indirectly - - - and
14 I'll sit down after I finish this thought - - - for her
15 credibility to be probed. The petitioner could have asked
16 but did not ask Lieutenant Ashley or Ms. Robbins so what
17 was her demeanor when she talked to you? What else did she
18 say? Was she fidgety? Did I have to - - - did you have to
19 pull the story out of her or did it just flow? There were
20 ways, albeit indirectly, to assess her credibility.
21 Petitioner did not take the board up on any of those ways.
22 And I'll reserve the remainder of my time. Thank you.

23 CHIEF JUDGE DIFIORE: Thank you.

24 Counsel.

25 MR. GRANDY: Thank you, Your Honor. May it



1 please the court, Lloyd Grandy appearing for the
2 respondent. Your Honors, we have a he-said-she-said-they
3 said.

4 JUDGE FEINMAN: So if - - - if that's the case,
5 why isn't it accurate as the dissent at the Appellate
6 Division contend that you look at the gestalt here and they
7 look at, you know, what your client said, what the
8 complainant reportedly said to Ms. Robbins and Lieutenant
9 Ashley, and they made a determination? They don't believe
10 your client and they rely on the testimony as it came in
11 through the hearsay.

12 MR. GRANDY: Your Honor, I think that - - -

13 JUDGE FEINMAN: Why - - - why is that wrong?

14 MR. GRANDY: Because my position would be, as the
15 Third Department took, that when you have hearsay evidence
16 that is seriously controverted - - - and this is not a
17 minor inconsistency.

18 JUDGE FEINMAN: Well, so - - - so you're going to
19 focus on the seriously controverted?

20 MR. GRANDY: I'm going to start there, Your
21 Honor, and I'll go wherever we - - -

22 JUDGE FEINMAN: So - - - so if that's the case,
23 when have we used that language? I mean that language
24 comes from the Third Department. When has this court used
25 that language?



1 MR. GRANDY: That is correct, Your Honor, and to
2 my knowledge, you've not used that particular language.

3 JUDGE FEINMAN: Okay.

4 MR. GRANDY: However, I do believe that it is a
5 reasonable interpretation and a reasonable way to test the
6 credibility of the hearsay. I mean - - -

7 JUDGE STEIN: But doesn't that then require that
8 the - - - in this case the complainant's testimony in every
9 case?

10 MR. GRANDY: Your Honor, I don't think so because
11 in this particular case if you look at the facts - - - and
12 as I said before, there's a he, she, and a they. And the
13 they part, the part that everyone agrees to, both from the
14 live testimony and from the hearsay testimony that was put
15 in I think gets us to a position where if you believe all
16 of that, and there's no reason not to, you don't have a
17 conduct violation. I mean I can certainly run through the
18 parts that they agree to.

19 JUDGE STEIN: Yeah, yeah, but it - - - but it
20 doesn't end there because it goes on and each - - - each -
21 - - the petitioner and the complainant from there have very
22 different stories to tell.

23 MR. GRANDY: Right.

24 JUDGE STEIN: So, you know, I think that's just
25 the basis. You can't eliminate everything else that they



1 said because that goes to the critical issue.

2 MR. GRANDY: And I agree completely. And if the
3 outlying facts had been close or had been reasonably
4 equally interpreted or whatever, then that would have been
5 something different. But in this instance, they are so
6 diametrically opposed - - -

7 JUDGE STEIN: So isn't that a classic credibility
8 determination? And - - - and if so, how - - - how does
9 that differ from - - - I came from the Third Department,
10 okay. So we had many, many, many, many prison - - - prison
11 disciplinary determination cases, and oftentimes the - - -
12 the position of the institution was reflected in an
13 incident report or a misbehavior report or something like
14 that. And the - - - the subject of the report would come
15 in and - - - and counter with his or her own testimony what
16 was - - - what was in those reports, and as far as I know,
17 neither the Third Department nor this court has ever said
18 that that means merely because there's a credibility
19 determination that that means it's seriously controverted
20 and that the determination cannot be based upon that
21 hearsay. So aren't we - - - if we - - - if we agree with
22 you then aren't we upending many years of jurisprudence
23 about administrative determinations like that?

24 MR. GRANDY: I think apples and oranges, Your
25 Honor. When you're dealing with prisoners they have a



1 specific set of rights. They have, you know - - -

2 JUDGE STEIN: Well, I'm not - - - I'm using that
3 as an example.

4 MR. GRANDY: Right.

5 JUDGE STEIN: Here we have - - - here we have a
6 school - - - essentially school disciplinary hearing. Why
7 is that any different?

8 MR. GRANDY: And again, Your Honor, just to
9 finish my thought, they have - - - the prison inmates are a
10 very specific set, and the rights that they have and the
11 rights that they don't have I think mitigate to a different
12 read than something like this where you got a student who's
13 being called up - - - and the other thing, the reality - -
14 -

15 JUDGE STEIN: Let's talk about from a policy
16 point of view. Do we want to require complainants in
17 sexual assault situations to testify?

18 MR. GRANDY: And that kind of goes where I was
19 headed, Your Honor, which is this is a unique situation
20 because this is not a plagiarism case or a cheating on a
21 test case. This is a - - - an alleged rape case. And just
22 saying the word rape carries with it a guttural response,
23 not only for the person who is the alleged victim but also
24 when you're going to label someone a rapist. And I think
25 that those - - -

1 JUDGE FEINMAN: Well - - - well, hold on. All
2 right. Because he's not being labeled a rapist here. You
3 know this is sexual misconduct as defined in the code of
4 conduct. All right. And all the criminal penal law
5 definitions of rape and - - - and the - - - what the
6 requirements are in terms of objective evidence and things
7 of that nature, that's not what we're talking about here.
8 And that gets to - - - to my question which is here the
9 Appellate Division focuses on what they call - - - the
10 majority that is - - - "a dearth of proof as to a lack of
11 affirmative consent." And my understanding of the code of
12 - - - of sexual conduct or misconduct here is that there
13 was a requirement to affirmatively prove consent. And
14 wouldn't that burden have been on the petitioner here?

15 MR. GRANDY: I believe that the consent is
16 agreement by - - - by verbal agreement or being an active
17 and willing participant. Those are the two ways that you
18 can get to consent per the code that the school uses. And
19 so, Your Honor, obviously you know where I'm headed with
20 this. The - - -

21 JUDGE RIVERA: Well, I think the question is is
22 it his burden to show or is it the school's burden to show?

23 MR. GRANDY: Well - - -

24 JUDGE RIVERA: Who carries that burden?

25 MR. GRANDY: Under the current guidelines, Title



1 9, it would be the school's burden to show. And I think
2 that when you're going to - - -

3 JUDGE RIVERA: To show that she didn't consent?

4 MR. GRANDY: To show that she didn't consent. To
5 show that after an independent investigation by a third - -
6 - I mean the rules have all changed, as we all know. But I
7 do think that it's still - - - the serious nature of the
8 allegations, the serious guttural connection that comes
9 with these kinds of matters I think require a higher level
10 of review and a higher level of standard - - -

11 JUDGE GARCIA: Counsel, we really - - - it would
12 be difficult I think for this court to do that, wouldn't
13 it, you know, for a serious conduct violation versus what
14 some might perceive as a less serious conduct violation?
15 There has to be one standard, doesn't it?

16 MR. GRANDY: Well, Your Honor, I think that there
17 have been differences in the way the sexual misconduct
18 rules have been applied going forward, and I know that
19 there are certainly even federal circuit courts - - -
20 courts that have said it has to be the same. They have to
21 go across, and I agree with that 100 percent. But if you
22 look at it in federal districts or circuits, they're
23 leaning toward the right to view your accuser - - - to face
24 your accuser.

25 JUDGE RIVERA: But - - - but, counsel, here you



1 have she doesn't attend but much of her story is
2 corroborated by - - - by your client, right?

3 MR. GRANDY: That's correct, Your Honor.

4 JUDGE RIVERA: Much - - - much of the story is
5 corroborated.

6 MR. GRANDY: Yes.

7 JUDGE RIVERA: He conceded they had sex. He
8 conceded they met and the way they met, they went back to
9 her room, and so forth. Much is corroborated.

10 MR. GRANDY: Right.

11 JUDGE RIVERA: So - - - so at that point some of
12 that hearsay is reliable and probative because you've got
13 the corroboration at a minimum, correct?

14 MR. GRANDY: Uh-huh.

15 JUDGE RIVERA: Okay.

16 MR. GRANDY: And that's where - - -

17 JUDGE RIVERA: All right. Okay. Wait, let's - -
18 - let me finish. So then he's giving his version. It's
19 certainly possible that they don't believe his version
20 because she in that hearsay says I didn't consent. She
21 agrees to certain things that she did or didn't do, but she
22 says I didn't consent, right. He says I thought she
23 consented, but then he also says that the next day he sees
24 a rape alert and he texts her to say are we talking about
25 me.



1 MR. GRANDY: And - - - and she says no.

2 JUDGE RIVERA: Could not - - -

3 MR. GRANDY: Right.

4 JUDGE RIVERA: Could - - - would that not be
5 substantial evidence?

6 MR. GRANDY: Your Honor - - -

7 JUDGE RIVERA: That he violated their code?

8 MR. GRANDY: If you're going to set up a scenario
9 where - - -

10 JUDGE RIVERA: That even he believed at that
11 point there was not consent.

12 MR. GRANDY: Well, if you're going to set up a
13 scenario where the best way to avoid getting jammed up in
14 something like this is not to appear yourself I think
15 that's contrary to what we need to do as well.

16 JUDGE RIVERA: Well, there's a risk - - -

17 MR. GRANDY: And so - - -

18 JUDGE RIVERA: - - - that if you don't appear
19 that - - - that eventually the decision is going to be
20 there's not substantial evidence. But here much is
21 corroborated - - -

22 MR. GRANDY: But - - -

23 JUDGE RIVERA: - - - and he himself acts in a way
24 that - - - that certainly could be - - - you might of
25 course disagree, but can we really say it wouldn't be



1 substantial evidence when there's so much corroborated and
2 he's texting her the next day about a rape alert.

3 MR. GRANDY: But, Your Honor, the - - - the other
4 thing that I would point out, again, is that the parts of
5 the story that are not - - -

6 JUDGE RIVERA: And by the way, he said I'm
7 heavily intoxicated, I don't remember a lot of it, I'm
8 piecing it together.

9 MR. GRANDY: Well, and we won't even go to the
10 fact that the code says if you have sex with a heavily
11 intoxicated person that may be rape. We won't go there.
12 But given the fact that the - - - the differences - - - the
13 key differences, did they talk about whether or not they
14 were going to use a condom? That - - - that's a really
15 important detail that goes heavily to what happened. What
16 was their actual position during intercourse? That's a key
17 factor.

18 JUDGE STEIN: But those - - - those are the
19 credibility - - -

20 JUDGE FEINMAN: But those come from - - - I'm
21 sorry.

22 JUDGE STEIN: Those are the parts that I was
23 referring to where - - -

24 MR. GRANDY: Right.

25 JUDGE STEIN: - - - their - - - their versions



1 differ, where they diverge. And - - - and that's where the
2 board can make a credibility determination and in view of
3 all the circumstances, can determine whether to believe him
4 or believe what they're hearing is her version.

5 MR. GRANDY: And - - - and I would urge you that
6 those differences being so diametrically opposed, that's
7 where the language that I would certainly advocate that you
8 adapt, that when there is a serious discrepancy that you
9 cannot rely on the - - - on hearsay.

10 JUDGE RIVERA: But, counsel, what I was pointing
11 out to you is let's just go with where you are at that
12 point. Isn't the rest of what he says, the rest of his
13 conduct the next day enough to perhaps tilt this in favor
14 of the victim at that point? And that gets you the
15 substantial evidence.

16 MR. GRANDY: And, Your Honor, I would - - - I
17 would disagree with that because - - - frankly because of
18 the age of the person that we're dealing with, because of
19 the naivete of the person we're dealing with, and again
20 because of the onerous that goes with allegations of this
21 nature.

22 JUDGE RIVERA: Your red light is off. Let me
23 just ask you this one question - - -

24 MR. GRANDY: I know. I'm sorry.

25 JUDGE RIVERA: I just have one question. It's



1 not related to this. It's related to the sanction. Let's
2 say we disagree with you, we agree with the government, we
3 - - - we think they're - - - the majority erred on the
4 substantial evidence question. Do we have to remit on the
5 sanctions question?

6 MR. GRANDY: Your Honor, I would think that you
7 would have to.

8 JUDGE WILSON: Did you ask us that in your
9 papers?

10 MR. GRANDY: I did not, Your Honor.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.
12 Counsel.

13 MR. GINSBERG: May it please the court, just a
14 few - - -

15 JUDGE FEINMAN: Can we - - - can we just start
16 where he ended? Is this whole issue of the sanction at all
17 preserved at this point or properly before us?

18 MR. GINSBERG: I think you could readily affirm
19 the sanction based upon essentially the Appellate
20 Division's dissent and their cogent explanation, but we
21 certainly have no objection to remitting and instructing
22 the Appellate Division in the first instance to consider
23 the penalty and focus this court's review on the
24 substantial evidence determination only.

25 And when you're focusing on substantial evidence,



1 as Your Honors were discussing, there's plenty of indicia
 2 of reliability of these probative hearsay reports. Much
 3 was corroborated by the petitioner. We've been discussing
 4 that. But also, the complainant of course was an
 5 eyewitness. She made these reports relatively quickly.
 6 Her first one was to the police officer that same night.
 7 The reports are at least moderately detailed. They have
 8 who, what, when, where, and a beginning, middle, and end.
 9 It's not just I was - - - I - - - the victim of sexual
 10 misconduct, period.

11 And when the college is considering this type of
 12 evidence, to be sure we are not asking this court to say
 13 that the college has to turn a blind eye to the hearsay
 14 nature of the evidence. The college is free to draw
 15 negative inferences from the complainant's failure to
 16 appear, free to give her statement less weight. But what
 17 the college is not free to do is disregard reliable
 18 evidence such as was presented here and their reasonable
 19 conclusion from that reliable evidence must be upheld on
 20 substantial evidence review. I just want to make one point
 21 before I sit down - - -

22 JUDGE RIVERA: Let me ask you this, counsel. Let
 23 - - - let's say that - - - let's go with this hypothetical
 24 that they - - - they decide on the hearsay they cannot make
 25 a determination as to reliability but based on his



1 statements that they're persuaded that he is not credible.
2 Could that be enough to get you substantial evidence?

3 MR. GINSBERG: I'm actually not - - -

4 JUDGE RIVERA: And they just can't decide about
5 her credibility, but much is corroborated. But they just
6 can't decide the credibility.

7 MR. GINSBERG: Well, Your Honor, I mean in
8 response to a colloquy that you were having with my friend
9 on the other side, it is the college's burden at the
10 hearing level to prove by a preponderance of evidence that
11 there was a lack of consent. So in the hypothetical you
12 gave, respectfully not the facts here, but in the
13 hypothetical you gave where there was no affirmative
14 evidence of a lack of consent and all you had was - - - I
15 mean we think the petitioner's statements actually supply
16 affirmative evidence of lack of consent, namely, the
17 consciousness of guilt from the actions in response to the
18 rape alert or the like. But if it was really just no
19 reliable hearsay on - - - on one side and nothing on the
20 other side, I mean if it's a wash, then a finding of no
21 responsibility has to issue. That's not - - -

22 JUDGE RIVERA: That - - - that wasn't quite the
23 hypothetical. So the hypothetical is there - - - there is
24 evidence, there's hearsay evidence, but they can't reach a
25 determination on reliability. I get your point the burden



1 is to get past at least fifty percent - - -

2 MR. GINSBERG: Right.

3 JUDGE RIVERA: - - - you've got to establish.
4 But there's really a wash, and part of it is because they
5 would have liked to have heard her testimony. But he is
6 just - - - they're absolutely persuaded he's in-credible
7 even though he's corroborating. You still say they - - -
8 that they have not carried their burden even though they
9 just don't believe his version and that's the only part
10 that's controverted, right?

11 MR. GINSBERG: Well, I mean, if they believe - -
12 - I don't mean to quibble with the hypothetical but he
13 gives various parts of his version. If they believe, for
14 example, the consciousness of guilt testimony then I think
15 that arguably could be enough because there you have
16 affirmative evidence affirmatively establishing or at least
17 allowing a reasonable fact-finder to conclude that there
18 was no affirmative consent on these facts. And that's the
19 conclusion we'd like you to reach. Thank you, Your Honors.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Haug v. State University of New York at Potsdam, No. 102 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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