

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

CAPTAIN LORI ALBUNIO, et al.,

Appellants,

-against-

No. 49

THE CITY OF NEW YORK, et al.,

Defendants,

MARY D. DORMAN

Respondent.

-----

20 Eagle Street  
Albany, New York 12207  
February 18, 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:

LEON FRIEDMAN, ESQ.  
LAW OFFICE OF LEON FRIEDMAN, ESQ.  
Attorney for Appellants  
148 East 78th Street  
New York, NY 10075

PAUL O'DWYER, ESQ.  
LAW OFFICE OF PAUL O'DWYER  
Attorneys for Respondent  
134 West 26th Street, Suite 902  
New York, NY 10001

Sharona Shapiro  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 49, Albunio v.  
2 City of New York.

3 MR. FRIEDMAN: I'd like to reserve two  
4 minutes for rebuttal.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure.  
6 You're on. Go ahead.

7 MR. FRIEDMAN: Mary Dorman, who was the  
8 attorney for the plaintiffs in the underlying action,  
9 did a wonderful job. She got her clients 1,551,000  
10 dollars; 781 for Lieutenant Connors, 770 for Albunio.  
11 She then applies for attorneys' fees. She gets  
12 616,000 dollars. She gets attorney - - - statutory  
13 fees for her trial work of 387-, and then for appeal  
14 work she gets 228-. So she ends up with 616,000  
15 dollars, more than the contingent fee.

16 CHIEF JUDGE LIPPMAN: But that's what she  
17 agreed - - - if that's what the parties agreed to - -  
18 -

19 MR. FRIEDMAN: Well, that's fine. That's  
20 fine.

21 CHIEF JUDGE LIPPMAN: Okay. So tell us - -  
22 -

23 MR. FRIEDMAN: But then she - - -

24 CHIEF JUDGE LIPPMAN: Tell us why this is  
25 not what the parties - - -

1 MR. FRIEDMAN: No, because she asked for  
2 more, and the lower court gave her another 258,000  
3 dollars. So she ends up - - -

4 JUDGE READ: What's ambiguous about this  
5 agreement?

6 MR. FRIEDMAN: I'm sorry?

7 JUDGE READ: What's ambiguous about the  
8 agreement?

9 MR. FRIEDMAN: "A sum recovered"; what does  
10 "a sum recovered" mean? Do clients know? Every  
11 retainer agreement has to be interpreted in a way  
12 that an ordinary client, an ordinary person of common  
13 intelligence. You go to someone and said you're  
14 going to have to give up thirty-three percent of the  
15 sum recovered. What does that mean?

16 JUDGE READ: Doesn't - - -

17 MR. FRIEDMAN: What does that mean to an  
18 ord - - -

19 JUDGE READ: Doesn't the logical meaning  
20 mean - - -

21 MR. FRIEDMAN: I'm sorry.

22 JUDGE READ: - - - everything?

23 MR. FRIEDMAN: No, it means whatever the  
24 jury gives me; that's the sum recovered.

25 JUDGE RIVERA: Well, no it - - - well, no

1 because the phrase actually mentioned also a  
2 settlement and something else, so it doesn't  
3 necessarily mean what the jury's award is.

4 MR. FRIEDMAN: Well, what - - - if there's  
5 interest; whatever the jury gives plus interest,  
6 whatever the final judgment in my favor is. That - -  
7 - that certainly makes a lot - - -

8 JUDGE READ: So the ordinary - - -

9 MR. FRIEDMAN: - - - of sense.

10 JUDGE READ: So the ordinary layperson  
11 would say, oh, it doesn't mean statutory?

12 MR. FRIEDMAN: Well, they don't know about  
13 statutory fees. Does everyone know that in a civil  
14 rights case a client comes to you and - - - and you  
15 say, well, that's what it means - - -

16 JUDGE RIVERA: So it doesn't matter that -  
17 - -

18 MR. FRIEDMAN: - - - that statutory fees -  
19 - -

20 JUDGE RIVERA: - - - perhaps your clients  
21 may - - - or the clients may have been more aware  
22 than a layperson? Would that matter at all?

23 MR. FRIEDMAN: They're a layperson. They  
24 are laypersons.

25 JUDGE RIVERA: No, no - - -

1 MR. FRIEDMAN: Why would they know - - -

2 JUDGE RIVERA: - - - well, I'm sorry. Not  
3 - - - you're right, nonlawyers. But I'm saying they  
4 had entered another - - - had they not entered  
5 another - - -

6 MR. FRIEDMAN: They - - -

7 JUDGE RIVERA: - - - prior - - -

8 MR. FRIEDMAN: And someone else - - -

9 JUDGE RIVERA: - - - retainer agreement?  
10 Don't they have - - -

11 MR. FRIEDMAN: - - - had mentioned - - -

12 JUDGE RIVERA: - - - some other kind of - -  
13 - excuse me. Don't they have some other kind of  
14 information that perhaps - - -

15 MR. FRIEDMAN: They know - - -

16 JUDGE RIVERA: - - - someone who only  
17 interacts with the attorney and had signed off that  
18 agreement would have?

19 MR. FRIEDMAN: They know that there is such  
20 a thing as statutory fees. But no one tells them.  
21 When you say a "sum recovered", why should they  
22 assume, when the lawyer doesn't say anything at all  
23 to them, that the term "sum recovered" includes  
24 statutory fees that may or may be awarded.

25 JUDGE GRAFFEO: What's your interpretation

1 of Exhibit B on page 68 of the record? That was the  
2 - - - the e-mail on the motion for leave to appeal.  
3 Did that change - - - did that change anything in the  
4 retainer agreement?

5 MR. FRIEDMAN: 68? I - - - I'm sorry.

6 JUDGE GRAFFEO: The December 2nd, 2009  
7 e-mail - - -

8 JUDGE SMITH: The one - - -

9 MR. FRIEDMAN: Right.

10 JUDGE GRAFFEO: - - - that's in the record.

11 JUDGE SMITH: It says, "I will credit the  
12 fees" - - -

13 MR. FRIEDMAN: "I will credit the fees".  
14 Well, that's - - -

15 JUDGE GRAFFEO: What's - - -

16 MR. FRIEDMAN: "I will credit the fee" - -  
17 -

18 JUDGE GRAFFEO: - - - your interpreta - - -  
19 what - - - what are you trying to tell us the meaning  
20 of this e-mail is? Did this somehow modify the  
21 retainer agreement, or was it consistent with the  
22 retainer agreement?

23 MR. FRIEDMAN: Absolutely consistent with  
24 the retainer agreement, because what it says is that  
25 if I get statutory fees, those will be deducted from

1 any contingency that I - - - that you owe me.

2 JUDGE SMITH: So you're saying that on  
3 December 2, 2009, Ms. Dorman read this the same way  
4 you're now reading it?

5 MR. FRIEDMAN: Well, of course. How else  
6 can you read it? "I will credit the fees" - - - "I  
7 will credit the fees to you." I'm giving you  
8 something. I am crediting something to you.

9 JUDGE SMITH: Is it your - - - are you  
10 essentially asking us to make the rule that if a  
11 lawyer wants to get what might be called a fee on a  
12 fee, he's got to spell it out, F-E-E - - -

13 MR. FRIEDMAN: That's what the federal  
14 courts say. Every federal - - -

15 JUDGE SMITH: But are you - - - are you  
16 saying it?

17 MR. FRIEDMAN: I am saying it too.

18 CHIEF JUDGE LIPPMAN: Are you saying that's  
19 what we should do?

20 MR. FRIEDMAN: I am saying that you should  
21 follow - - -

22 CHIEF JUDGE LIPPMAN: Adopt the rule or  
23 follow the general - - -

24 MR. FRIEDMAN: Follow the - - - you should  
25 - - - you're not bound by federal precedence, but you

1 should follow - - -

2 CHIEF JUDGE LIPPMAN: We should follow  
3 that?

4 MR. FRIEDMAN: - - - the federal - - -

5 CHIEF JUDGE LIPPMAN: What's - - - assuming  
6 we agree with you - - -

7 MR. FRIEDMAN: Right.

8 CHIEF JUDGE LIPPMAN: - - - and the - - -  
9 the agreement as to the trial is ambiguous, what's  
10 the consequence of that?

11 MR. FRIEDMAN: Well, what - - - the  
12 consequence is that she gets exactly the statutory  
13 fees, but we - - - we don't add - - - she ends up  
14 with 875,000 dollars.

15 JUDGE GRAFFEO: So tell me - - - tell me  
16 the math. What are you asking us to do - - -

17 MR. FRIEDMAN: Here's the math.

18 JUDGE GRAFFEO: - - - and what's the math -  
19 - -

20 MR. FRIEDMAN: Here's the math, Your Honor.

21 JUDGE GRAFFEO: - - - so we - - - so we  
22 understand clearly - - -

23 MR. FRIEDMAN: All right.

24 JUDGE GRAFFEO: - - - what you're asking us  
25 to do.

1 MR. FRIEDMAN: The lower court gave her  
2 875,000 dollars - - - 875-. And the - - - and that  
3 means that the clients get 652- and 640-. So she  
4 gets 250,000 more than either one of the clients.  
5 Now, there - - - there are two additions.

6 JUDGE GRAFFEO: So what's the math?

7 CHIEF JUDGE LIPPMAN: What - - - yeah.

8 JUDGE GRAFFEO: So what are you asking - -  
9 -

10 MR. FRIEDMAN: What I'm saying - - -

11 JUDGE GRAFFEO: The bottom - - - the bottom  
12 line is how much do your clients get and how much  
13 does she get, if we agree with you?

14 MR. FRIEDMAN: The clients should get  
15 exactly what the - - - what the jury awarded them,  
16 781- for Connors, 769- for Alburnio; she gets 616-.

17 JUDGE SMITH: This is - - - all these  
18 numbers are without interest?

19 MR. FRIEDMAN: Yes, without interest. The  
20 money's already been paid, so it's sitting in - - -  
21 in Mary Dorman's - - -

22 JUDGE GRAFFEO: So her total contingency  
23 fee is 616,000?

24 MR. FRIEDMAN: No, no, her total  
25 contingency fee is 517-.

1 JUDGE GRAFFEO: I thought you just said  
2 616.

3 MR. FRIEDMAN: Yeah, but the statutory  
4 fees; she gets 387- for her - - -

5 JUDGE GRAFFEO: Well, that's what - - - I'm  
6 asking you for the final figure, so we know - - -

7 MR. FRIEDMAN: No - - - no, she gets - - -  
8 she got three - - -

9 JUDGE GRAFFEO: I'm missing what the bottom  
10 line - - - I guess I'm asking you for the bottom  
11 line.

12 MR. FRIEDMAN: The bottom line is she gets  
13 616,403 - - - 616,403.

14 CHIEF JUDGE LIPPMAN: Which includes what?

15 MR. FRIEDMAN: Which includes statutory  
16 fees she got for the trial work and the statutory  
17 fees she got for the appeal work.

18 I mean, let me just say something about sum  
19 recovered. Suppose - - - and there are a lot of  
20 cases like this - - - where the statutory fees are  
21 more than the judgment. You add the statutory - - -  
22 that one-third - - - she has to pay one-third of the  
23 statutory fees - - -

24 JUDGE RIVERA: Isn't that - - - isn't - - -  
25 doesn't -- isn't that to encourage the private bar to

1 take these kinds of cases?

2 MR. FRIEDMAN: Well, Your Honor, that is  
3 fine. I mean, in other words, if she gets the  
4 statutory fees - - - we want them to get statutory  
5 fees, but you don't then ask the client to pay a  
6 portion - - -

7 JUDGE RIVERA: Well, but she could - - -

8 MR. FRIEDMAN: - - - of the statutory fees.

9 JUDGE RIVERA: No, but that's not - - - I  
10 don't think that's your position. Your position is  
11 but if she wants to go ahead and do that, then she  
12 has to negotiate that with those clients - - -

13 MR. FRIEDMAN: That's correct.

14 JUDGE RIVERA: - - - and make it absolutely  
15 clear, so if they don't want to do that they can get  
16 another lawyer.

17 MR. FRIEDMAN: That's correct, Your Honor -  
18 - -

19 JUDGE PIGOTT: Well - - -

20 MR. FRIEDMAN: - - - absolutely.

21 JUDGE PIGOTT: - - - could I - - -

22 JUDGE RIVERA: But it's not a bar; you're  
23 not saying there's a bar to her entering - - -

24 MR. FRIEDMAN: No.

25 JUDGE RIVERA: - - - such an arrangement.

1                   MR. FRIEDMAN: Absolutely not, Your Honor,  
2 but they have to say so. Otherwise, as I say, it  
3 leads to this - - -

4                   JUDGE SMITH: So in the federal courts,  
5 there is a bar, or at least under some - - - some  
6 federal cases there is a bar; it's just plain out  
7 forbidden to get both - - - to get more than - - - to  
8 get more than either the - - - than the greater of  
9 either the statutory or the agreed-on fee?

10                  MR. FRIEDMAN: You get the high - - - you  
11 get the higher of the two. But you don't add the  
12 statutory fee to the judgment to - - - to add - - -  
13 because if you add - - -

14                  JUDGE SMITH: But in fairness, he's not  
15 saying you add all of it to the judgment.

16                  MR. FRIEDMAN: No, no - - -

17                  JUDGE SMITH: He - - -

18                  MR. FRIEDMAN: - - - you get one-third.

19                  JUDGE SMITH: He wants a third of it,  
20 essentially.

21                  MR. FRIEDMAN: A third. So that one-third  
22 of the statutory fees have to be paid by the client,  
23 even though the statutory fees end up being more than  
24 the contingency.

25                  JUDGE SMITH: Well, talk for a minute about

1 the situation where you do have a, like, a - - - a  
2 30,000-dollar judgment and a 90,000-dollar fee award.

3 MR. FRIEDMAN: That's correct.

4 JUDGE SMITH: On your adversary's view,  
5 what - - - under this agreement, so the total is  
6 120-, so the fee is 40-?

7 MR. FRIEDMAN: That's correct.

8 JUDGE SMITH: And your client's left with -  
9 - -

10 MR. FRIEDMAN: Nothing. Nothing.

11 JUDGE SMITH: Wait a minute; what happened  
12 to the 50-?

13 MR. FRIEDMAN: Well, the 30 - - -

14 JUDGE SMITH: Well, wait a minute. There's  
15 120-; your client's up with 70- on that.

16 MR. FRIEDMAN: No, no, because you don't  
17 get any part of the attorneys' fees.

18 JUDGE SMITH: Yeah, that's what I was sort  
19 of asking. If you - - -

20 MR. FRIEDMAN: No, the client - - -

21 JUDGE SMITH: I guess what I'm suggesting  
22 is this. If you read it lit - - - read the agreement  
23 as he reads it, and read it literally, then in that  
24 situation, in the situation where the fee is larger  
25 than the award, your clients are - - - are sharing

1 the lawyer's fee.

2 MR. FRIEDMAN: It can't be.

3 JUDGE SMITH: But that's not kosher.

4 MR. FRIEDMAN: That's not kosher, not  
5 allowed. There's no law at all that allows that to  
6 happen. So you end up losing your entire judgment,  
7 and you have to pay more money because the statutory  
8 fee is added to the judgment and they get one-third?  
9 It's just absurd; you cannot have a result like that.  
10 But that is exactly the result that the lower court -  
11 - - that the lower court required.

12 JUDGE SMITH: But can - - - can this  
13 agreement be read more reasonably as saying I - - -  
14 I, the lawyer, get one - - - yeah, in the event of  
15 statutory fees, two-thirds of those statutory fees  
16 will be credited against my fee award, and the  
17 remaining third goes to enhance my fee award? Is  
18 that so outrageous?

19 MR. FRIEDMAN: Well, if they say it in the  
20 agreement, okay. If they put it into - - -

21 JUDGE PIGOTT: Well, Mr. Friedman, I wanted  
22 - - -

23 MR. FRIEDMAN: - - - the agreement - - -

24 JUDGE PIGOTT: - - - I wanted to ask you,  
25 you know, when these cases start, you don't know

1 where they're going to go.

2 MR. FRIEDMAN: Right.

3 JUDGE PIGOTT: So you've got a lawyer  
4 that's taking the case on, and in this particular  
5 case, takes it on for a contingent fee.

6 MR. FRIEDMAN: Right.

7 JUDGE PIGOTT: If it settles before you  
8 ever get to court, there won't be any statutory  
9 amount - - -

10 MR. FRIEDMAN: That's correct; then you  
11 only get the contingency, which is what the lawyer  
12 negotiated for to begin with.

13 JUDGE PIGOTT: Exactly. And then - - - and  
14 then if you go to trial, and there are statutory  
15 fees, your argument is that you get the greater.

16 MR. FRIEDMAN: That's correct.

17 JUDGE PIGOTT: You either get the one-third  
18 or you get the statutory fees - - -

19 MR. FRIEDMAN: Whichever is higher.

20 JUDGE PIGOTT: - - - whichever is greater,  
21 and that ends the story - - -

22 MR. FRIEDMAN: And that's - - -

23 JUDGE PIGOTT: - - - as far as you're  
24 concerned.

25 MR. FRIEDMAN: And that's what the Supreme

1 Court said in Venegas v. Mitchell. That's fine;  
2 there's nothing wrong with that. It's just throwing  
3 the statutory fees on top of the judgment, so that  
4 the client ends up having to pay one-third of the  
5 statutory fees on top of any contingency that's due.

6 CHIEF JUDGE LIPPMAN: Okay, counselor.  
7 You'll have your rebuttal.

8 MR. FRIEDMAN: Yes. Thanks.

9 CHIEF JUDGE LIPPMAN: Let's hear from your  
10 adversary.

11 MR. O'DWYER: Good afternoon. My name is  
12 Paul O'Dwyer, and I'm the attorney for Mary Dorman,  
13 who's the nonparty respondent in this case.

14 CHIEF JUDGE LIPPMAN: Counselor, you don't  
15 think that the trial agreement is at all ambiguous,  
16 could be read in different ways?

17 MR. O'DWYER: No, I do not, Judge. The - -  
18 - the agreement for the representation at trial was  
19 absolutely clear. It said that Ms. Dorman - - - that  
20 the plaintiffs would get two-thirds of the sum  
21 recovered, and Ms. Dorman would get one-third of the  
22 sum recovered. Now - - -

23 JUDGE SMITH: And how - - - what about the  
24 situation I was asking your adversary about, where  
25 the statutory - - - where the fee is actually higher

1 than the recovery? You - - - you apply that  
2 literally - - -

3 MR. O'DWYER: Yes.

4 JUDGE SMITH: - - - the client - - - the  
5 client's going to get more than full recovery. That  
6 can't be, can it?

7 MR. O'DWYER: Yes.

8 JUDGE SMITH: You say the - - - you say the  
9 client can take home a piece of the lawyer's fee?

10 MR. O'DWYER: Yes, because the - - -

11 JUDGE SMITH: Aren't there ethical problems  
12 with that?

13 MR. O'DWYER: Well, the - - - well, first  
14 of all, my adversary has taken the position that if  
15 they agreed to do it, then there's absolutely no  
16 problem.

17 JUDGE PIGOTT: No, I think the answer's  
18 yes; I don't think you can split fees with a  
19 nonlawyer.

20 MR. O'DWYER: So - - - and however the - -  
21 - the federal court cases - - -

22 JUDGE SMITH: If you read it literally,  
23 this does call for you to split the fee with a  
24 nonlawyer, doesn't it? Isn't that a reason not to  
25 read it literally?

1                   MR. O'DWYER: The - - - the federal court  
2 cases say that the - - -

3                   JUDGE PIGOTT: I take that as - - -

4                   MR. O'DWYER: - - - attorney fees - - -

5                   JUDGE PIGOTT: - - - I agree. You agree  
6 you can't split fees with a nonlawyer, right?

7                   MR. O'DWYER: Correct.

8                   JUDGE PIGOTT: Okay.

9                   MR. O'DWYER: The - - - however, in these  
10 cases, it's a somewhat unique situation because the  
11 fees are the property of the client, not the  
12 attorney.

13                   JUDGE PIGOTT: Well, you know, this is a  
14 beautiful case, I mean, obviously well done. I - - -  
15 I don't know if anybody ever - - - this is like "The  
16 Gods Must be Crazy". I mean, there's - - - there's  
17 too much; now - - - now what are we going to do?

18                   MR. O'DWYER: Yes.

19                   JUDGE PIGOTT: And your opponent is saying,  
20 you know, one-third makes an awful lot of sense when  
21 you're digging into these things, because they're  
22 hard, you're going up against, in this case, a city  
23 that's got, you know, a battery of attorneys, and  
24 you're successful, and that's great. But the whole  
25 idea, as I think Judge Rivera was - - - you know, you

1 want people to take these cases. You say if you take  
2 them and prevail, you're going to get - - - you're  
3 going to get attorneys' fees, separate and apart from  
4 your - - - your client's award, because half the time  
5 you're fighting for lost pay - - -

6 MR. O'DWYER: Um-hum.

7 JUDGE PIGOTT: - - - you're fighting for  
8 small - - - small change. So they end up getting  
9 50,000 dollars and your fee is 75-, and you take the  
10 75- and go home and they take the 50-. That works.  
11 When it happens like this, it seems to me that it  
12 makes a lot more sense to say you get the greater of  
13 the two. To - - - to say you're going to get paid  
14 twice doesn't seem to make sense.

15 MR. O'DWYER: Except that's not what they  
16 agreed to. They - - -

17 JUDGE PIGOTT: Did she, when she made her  
18 application for the attorneys' fees to the court,  
19 disclose that she had the one-third contingency that  
20 she was going to keep in any event?

21 MR. O'DWYER: Yes.

22 JUDGE PIGOTT: Because I didn't see it in  
23 the decision. The - - - the judge that awarded all  
24 the fees, he - - - he talked about how much time had  
25 been spent and the - - - and the hourly rate, et

1           cetera, but nowhere in there does - - - did he  
2           indicate that there was another vein of - - - of  
3           remuneration.

4                   MR. O'DWYER: Well, my - - - it was - - -  
5           it's my understanding that the retainer agreement  
6           would be submitted with the fee application - - -

7                   JUDGE PIGOTT: Yeah, but that doesn't  
8           explain - - -

9                   MR. O'DWYER: - - - as a requirement.

10                   JUDGE PIGOTT: That doesn't explain that,  
11           because, as your opponent is arguing, that's unclear.  
12           And - - - and if I was a judge looking at this thing,  
13           I would have thought that - - - that the attorney is  
14           making an application under the appropriate statutes  
15           to get paid for the work she did on this case. And  
16           I'd say she's entitled to it. And he was fairly  
17           generous; he didn't question too much of her - - - of  
18           her hourly rate, and - - - and gave it to - - - but I  
19           didn't see anything in there that says, you know,  
20           that - - - that I'm also considering the fact that  
21           you're going to get a double - - - double settlement.

22                   MR. O'DWYER: Except for the fact that the  
23           judge who decided the - - - who heard the order to  
24           show cause on this part of the proceeding was the  
25           judge who heard the entire case and who decided the

1 fee application.

2 JUDGE PIGOTT: Not the one-third.

3 MR. O'DWYER: Yes.

4 JUDGE SMITH: Did - - -

5 JUDGE PIGOTT: He doesn't decide that.  
6 Nobody decides the one-third; you just take it.

7 MR. O'DWYER: Correct, but - - - but - - -  
8 but the entire facts of the - - - the retainer  
9 agreement providing for the one-third contingency was  
10 submitted to Judge Shulman, certainly on the - - -

11 JUDGE RIVERA: You're saying the judge was  
12 aware?

13 MR. O'DWYER: Yes.

14 JUDGE SMITH: Was the judge aware at the  
15 time - - -

16 MR. O'DWYER: It was the same judge.

17 JUDGE SMITH: Was the judge aware - - - I  
18 mean, obviously the judge ultimately held you were  
19 right, so - - - but was the judge aware - - - at the  
20 time he awarded the statutory fee, was he aware that,  
21 as Ms. Dorman interpreted the agreement, she would  
22 get not only the higher of the two but would get  
23 something on top?

24 MR. O'DWYER: Correct.

25 JUDGE SMITH: You say - - - you say that -

1 - - did she spell that out to him at that time?

2 MR. O'DWYER: I can't speak to what - - -  
3 what was the - - - because I didn't do that fee  
4 application, so I can't speak to what the actual  
5 substance of it was. But it's my understanding that  
6 the retainer agreement was - - -

7 JUDGE SMITH: He had the text in front of  
8 him and he later - - -

9 MR. O'DWYER: Yes, and the - - -

10 JUDGE SMITH: - - - he later said - - -

11 MR. O'DWYER: - - - retainer agreement.

12 JUDGE SMITH: And granted, he later said  
13 that it says what you say it said. But she didn't  
14 say, when she made the application, you should  
15 understand, judge, that on top - - - that I'm getting  
16 not ju - - - that I'm not going to credit all of this  
17 against my one-third.

18 MR. O'DWYER: Correct.

19 JUDGE GRAFFEO: And what weight do we give  
20 to the December 2nd, 2009 e-mail? Does that have  
21 anything to do with this?

22 MR. O'DWYER: I think it has - - -

23 JUDGE GRAFFEO: And what does that language  
24 about crediting mean?

25 MR. O'DWYER: Well, our position is that

1           that - - - what that e-mail means is that she will  
2           credit the fees to it, as in that she will add the  
3           fees to the verdict to determine the sum recovered.

4                   JUDGE SMITH:   You take credit to mean add?

5                   MR. O'DWYER:   Yes - - -

6                   JUDGE PIGOTT:   Do you think that - - -

7                   MR. O'DWYER:   - - - because - - -

8                   JUDGE PIGOTT:   - - - had to be spelled out?

9                   MR. O'DWYER:   - - - if she meant subtract,  
10           she would say I will credit them against it.

11                   JUDGE SMITH:   Well, but surely she didn't  
12           mean she would credit in the sense of add a hundred  
13           percent to her fee.

14                   MR. O'DWYER:   I believe that's what it  
15           meant.  But - - - but furthermore, I - - - I also  
16           think that it is a - - - it's a precarious basis on  
17           which to determine what - - - what - - - I mean, when  
18           even - - -

19                   JUDGE SMITH:   Well, whatever - - - whatever  
20           - - -

21                   MR. O'DWYER:   - - - we are all disagreeing  
22           - - -

23                   JUDGE SMITH:   - - - whatever she - - -  
24           whatever she said - - -

25                   MR. O'DWYER:   - - - about that.

1 JUDGE SMITH: - - - whatever it means, it  
2 doesn't mean what you say the agreement now means.  
3 It doesn't mean I will credit two-thirds to my fee  
4 and - - - credit two-thirds against my fee and add  
5 the remaining third to it.

6 MR. O'DWYER: Well, I - - - I think it does  
7 mean that - - - that I will credit the fees to that,  
8 as in I will add in the statutory fees to the  
9 verdict.

10 JUDGE PIGOTT: Do you think that was clear?

11 MR. O'DWYER: Yes.

12 JUDGE PIGOTT: Okay.

13 MR. O'DWYER: But I - - - but I also think  
14 that this e-mail was written four years after the  
15 retainer agreements were entered into, so what's  
16 controlling is what the parties entered into at the  
17 time, not what Ms. Dorman - - -

18 JUDGE GRAFFEO: That's what - - -

19 MR. O'DWYER: - - - may or may not have  
20 said.

21 JUDGE RIVERA: Well, if it's not ambiguous

22 - - -

23 JUDGE GRAFFEO: That's why I asked you what

24 - - -

25 JUDGE RIVERA: - - - we focus on the

1 language of the agreement.

2 MR. O'DWYER: Right, the - - -

3 JUDGE RIVERA: So let's get back to why  
4 this is not ambiguous. He says no client would  
5 understand - - -

6 MR. O'DWYER: Because what - - -

7 JUDGE RIVERA: - - - sums recovered means  
8 the fees.

9 MR. O'DWYER: Because what they contracted  
10 with Ms. Dorman for was that they would get two-  
11 thirds of - - - at a minimum, by their reckoning, by  
12 their construction of it, that they would get two-  
13 thirds of the verdict, and Ms. Dorman would get one-  
14 third. And that is what they got.

15 JUDGE PIGOTT: I keep reading this. It  
16 says - - -

17 MR. O'DWYER: And so they're complaint now  
18 - - -

19 JUDGE PIGOTT: It says, "My retainer  
20 agreement for the basic case for each of you is one-  
21 third. I will credit the fees awarded to me to that  
22 one-third."

23 MR. O'DWYER: Yes.

24 JUDGE PIGOTT: So you'd subtract it.

25 MR. O'DWYER: I would - - - I would read -

1 - - read it differently. I would read it that it  
2 would be that she would add the fees, that she would  
3 credit the fees to it, as distinct from credit the  
4 fees against it.

5 JUDGE READ: But I guess your position is  
6 it's not - - - the contract's not ambiguous, the  
7 agreement's not ambiguous.

8 MR. O'DWYER: Correct, because - - -  
9 because the agreement is very clear that they are  
10 going to get two-thirds.

11 JUDGE SMITH: Isn't the - - - isn't the  
12 idea, though, of a fee on a fee, which is essentially  
13 what you're ask - - - isn't that odd enough,  
14 counterintuitive enough, that if you want it you  
15 should spell it out in so many words in the retainer  
16 agreement?

17 MR. O'DWYER: Well, we believed that it had  
18 been spelled out.

19 JUDGE SMITH: Well, it couldn't have been -  
20 - -

21 MR. O'DWYER: And interestingly enough - -  
22 -

23 JUDGE SMITH: I mean, it is possible to say  
24 - - - it's possible to say I will ta - - - my - - - I  
25 will get one-third of all sums recovered, which will

1 include any statutory fees awarded.

2 MR. O'DWYER: Correct. But - - -

3 JUDGE SMITH: And she didn't say that.

4 MR. O'DWYER: Right, but she could also  
5 have said I will take one-third of all sums recovered  
6 and from which I will deduct any statutory fees that  
7 are awarded.

8 JUDGE SMITH: But she didn't say either  
9 one. Why doesn't that - - -

10 MR. O'DWYER: And she clearly didn't say  
11 that.

12 JUDGE SMITH: Why doesn't that make the  
13 agreement ambiguous?

14 MR. O'DWYER: Because it was - - - because  
15 what could be deducted was made clear. It said "all  
16 sums recovered". It didn't say "damages". It didn't  
17 say the amount of the verdict. It says - - -

18 JUDGE PIGOTT: Yeah, but we have case law  
19 that says "sum recovered" should - - - is the amount  
20 awarded to compensate a victim for the wrong.

21 MR. O'DWYER: Which would include the  
22 counsel fees.

23 JUDGE PIGOTT: Compensate the victim for  
24 the wrong.

25 MR. O'DWYER: The - - - so to the extent

1           that federal courts' decisions can be relevant here -  
2           - - and you're talking about one, is - - - but I  
3           think if we look at the Supreme Court decision in  
4           Venegas v. Mitchell, they explicitly allowed this.  
5           And I - - - I would disagree with Mr. Friedman and  
6           his interpretation of that. But Venegas v. Mitchell  
7           was very clear that the purpose of the statutory fee  
8           award is not to reduce the obligation of the client  
9           to the attorney. It doesn't reduce their contingency  
10          fee obligation. What - - - the purpose of the  
11          statutory fee award is what the losing party pays to  
12          the attorney. And so that Venegas v. Mitchell upheld  
13          the obligation of - - -

14                         JUDGE PIGOTT: What are they paying the  
15          money for?

16                         MR. O'DWYER: I beg your pardon?

17                         JUDGE PIGOTT: What are they paying the  
18          money for?

19                         MR. O'DWYER: As a disincentive to - - -

20                         JUDGE PIGOTT: No, no - - -

21                         MR. O'DWYER: - - - not violating that - -  
22          -

23                         JUDGE PIGOTT: - - - to compensate the  
24          lawyer that brought the case, so that she doesn't  
25          take or he doesn't take the money that has been given

1 to the victim for what he or she suffered.

2 MR. O'DWYER: Venegas said exactly the  
3 opposite. Venegas said that - - -

4 JUDGE PIGOTT: No, it does, but I'm - - -  
5 I'm saying that it - - - it would make sense, doesn't  
6 it, that - - - that you pay the lawyer so that he or  
7 she can - - - you know, these two people who suffered  
8 this wrong get to keep their money.

9 MR. O'DWYER: Well, Venegas recognized that  
10 there may be people who are in positions where they  
11 can only do that. But it also recognized that - - -  
12 that people have the right. And in furtherance of  
13 the need for attorneys to take on these cases, the  
14 need for attorneys to be compensated because, as Ms.  
15 Dorman did - - -

16 JUDGE RIVERA: So it's - - -

17 MR. O'DWYER: - - - to take huge risks.

18 JUDGE RIVERA: - - - it's a statutory  
19 incentive - - -

20 MR. O'DWYER: It's a statu - - -

21 JUDGE RIVERA: - - - to encourage the  
22 private bar to take on what would otherwise perhaps  
23 not be a very money-making case. It might be, but it  
24 might not be. And it'll take years to get that money  
25 - - -

1 MR. O'DWYER: Yes - - -

2 JUDGE RIVERA: - - - if it is.

3 MR. O'DWYER: - - - as - - - as has  
4 happened in this case.

5 JUDGE RIVERA: So I just have one - - -  
6 because your light went off. So what, if anything,  
7 does it matter that the retainer agreement is entered  
8 into before you know whether or not you're going to  
9 get any statutory fees? It's certainly possible to -  
10 - -

11 MR. O'DWYER: Well, because you - - -

12 JUDGE RIVERA: - - - to not get any  
13 statutory fees, or of course, for those fees to not  
14 fully represent what - - - what you might have  
15 charged someone else.

16 MR. O'DWYER: Well, because obviously, at  
17 that point you wouldn't know whether or not you were  
18 going to be able to get statutory fees because you  
19 wouldn't have won. So - - -

20 JUDGE GRAFFEO: So what clause do the  
21 statutory fees fall under? Because it says "thirty-  
22 three and a third percent of the sum recovered,  
23 whether recovered by suit, settlement or otherwise".  
24 So the client - - - would the - - - is it reasonable  
25 for the client to think the statutory fees fall under

1 the "otherwise"? You seem to be saying that it falls  
2 under the "sum recovered".

3 MR. O'DWYER: Yes.

4 JUDGE GRAFFEO: Or it doesn't fall under  
5 that clause at all?

6 MR. O'DWYER: I think it - - -

7 JUDGE GRAFFEO: The fee is - - - the fee is  
8 - - - the statutory fee is separate from that  
9 sentence?

10 MR. O'DWYER: I - - - I - - - I think that  
11 it can be either, but it boils down to the same  
12 thing. Certainly, in this case, where the plaintiffs  
13 were on notice, they had previously contracted with  
14 somebody to retain them on the terms exactly that  
15 they're saying Ms. Dorman should have agreed, or that  
16 their retainer agreement with Ms. Dorman should now  
17 be modified to reflect. So whether or not the - - -  
18 the sum - - - whether or not the sum recovered is  
19 interpreted to include statutory fees or whether or  
20 not the - - - it is simply added in on top of the sum  
21 recovered as part of her overall agreement, that she  
22 would split her statutory fees on the same basis as  
23 she would split the rest of the sum recovered - - -

24 JUDGE GRAFFEO: But we asked your adversary  
25 - - -

1 MR. O'DWYER: - - - you end up with the  
2 same - - -

3 JUDGE GRAFFEO: - - - for the math. Why  
4 don't you give us your final figures?

5 MR. O'DWYER: I believe that the math is as  
6 was set out accurately by Justice Shulman in his  
7 decision, and I had it right here. The math is that  
8 the amount of the verdict, on the basis of our  
9 calculation, that Mr. Connors would get 656,000 for  
10 the amount of the verdict plus his - - - his share of  
11 the verdict and his share of the fees for the trial.  
12 And then Alburnio would get 649,000, and Ms. Dorman  
13 would get 649,000. And then there are the fees for  
14 representation on appeal, which we feel very strongly  
15 are completely separate from that. The parties  
16 entered into separate retainer agreements for  
17 representation on appeal and for the allocation - - -

18 JUDGE GRAFFEO: And the clients get - - -

19 MR. O'DWYER: - - - of the fees on appeal.

20 JUDGE GRAFFEO: - - - no part of that.

21 MR. O'DWYER: And the clients get no part  
22 of that.

23 CHIEF JUDGE LIPPMAN: Okay. Thank you,  
24 counsel.

25 MR. O'DWYER: Thank you.

1                   MR. FRIEDMAN: I have two responses. Let  
2 me quote from Venegas. Here's what it says, "Civil  
3 rights plaintiffs, if they prevail, will be entitled  
4 to an attorneys' fees that Congress anticipate will  
5 enable them to secure reasonably competent counsel.  
6 If they take advantage of the system, they will avoid  
7 having their recovery reduced by contingent-fee  
8 arrangements."

9                   JUDGE SMITH: Well, but that's if they take  
10 advantage of the system, but they don't have to take  
11 advantage of the system.

12                  MR. FRIEDMAN: Well - - -

13                  JUDGE SMITH: They can - - - they - - -  
14 they want a higher-powered lawyer, they can make a  
15 deal more favorable to the lawyer.

16                  MR. FRIEDMAN: Well, that - - - well, that  
17 is true, but what they says is "if their attorney".  
18 You can only interpret the "if their attorney applies  
19 the statutory fees", that will reduce the amount that  
20 they're - - - under the contingency. You can't - - -

21                  JUDGE SMITH: Let me ask you this. On your  
22 theory of this agreement, when Ms. Dorman did her fee  
23 application and applied for the statutory fees, was  
24 she working for nothing? Was that - - - I mean, was  
25 she entirely for the client's account at that point?

1                   MR. FRIEDMAN: Well, she's working for - -  
2                   - she's applying for attorneys' fees. And if she  
3                   gets more than the contingency amount, which she did  
4                   in this case, so she's working for herself. The more  
5                   statutory fees she gets, she keeps that. She gets  
6                   above the contingency amount, which is what happened  
7                   here. The contingency amount is 515; the courts gave  
8                   her 617 (sic). So she's working for herself because  
9                   if her statutory fees are more than the contingency,  
10                  she keeps all that. That's fine. We're very happy  
11                  with her keeping the 616. We don't think she should  
12                  get 258,000 more so she ends up with 875- and the  
13                  clients only get 640-. I mean, really, there's  
14                  something amiss there, particularly for an agreement  
15                  - - -

16                 JUDGE RIVERA: But sometimes attorneys, in  
17                 these cases, do get more than the award to the  
18                 client.

19                 MR. FRIEDMAN: Well, that's fine, Your  
20                 Honor, and I mentioned that; in a couple of other  
21                 cases, the clients get 10,000, they get 100,000 in  
22                 fees. Fine.

23                 JUDGE RIVERA: And sometimes it's a big  
24                 difference, that's correct.

25                 MR. FRIEDMAN: Well, that's fine. But what

1 Ms. Dorman is saying, that 100,000, that's added to  
2 the judgment and you have to pay me. You don't get  
3 anything, and you have to pay me another 30,000,  
4 because the statutory fees are part of the  
5 contingency. That's their claim.

6 JUDGE RIVERA: Well, it would - - -

7 MR. FRIEDMAN: Statutory fees are part of  
8 the contingency.

9 JUDGE RIVERA: They wouldn't have been  
10 there anyway without - - - without - - -

11 MR. FRIEDMAN: No, it wouldn't.

12 JUDGE RIVERA: - - - the court ordering the  
13 fees, right? I mean, they wouldn't have been there  
14 anyway.

15 MR. FRIEDMAN: Well, no, no. The point - -  
16 -

17 JUDGE RIVERA: Unless she actually put in  
18 the paperwork and got awarded the fees, they wouldn't  
19 have been there anyway.

20 MR. FRIEDMAN: Well, she - - - but the  
21 client would only have to pay 3,000; they wouldn't  
22 have to pay 30,000 to the client. If it's 10,000  
23 dollars, and there's a contingency amount, she pays  
24 3,000. If she applies for statutory fees and get  
25 100, suddenly she has to pay 30,000? She has to pay

1           the 10,000 that she got and all the others? Why?  
2           Because statutory fees are part of the sum recovered.  
3           That's their argument. And it just doesn't make any  
4           sense.

5                           CHIEF JUDGE LIPPMAN: Okay. Thank you.

6                           Thank you both.

7                           (Court is adjourned)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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 Captain Lori Albunio, et al. v. The City of New York, et al. No. 49 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

Signature: \_\_\_\_\_

AAERT Certified Electronic Transcriber (CET\*\*D-492)

Agency Name: eScribers

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

Date: February 22, 2014