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COURT OF APPEALS

STATE OF NEW YORK

NEW YORK HOSPITAL MEDICAL CENTER
OF QUEENS,

Appellant,

-against-

No. 1

MICROTECH CONTRACTING CORP.,

Respondent.

20 Eagle Street
Albany, New York 12207
January 6, 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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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: So let's begin with
2 number - - - appropriately so, number 1. Counsel?

3 MR. O'SHAUGHNESSY: Thank you, Your Honor.

4 CHIEF JUDGE LIPPMAN: Counsel, do you want
5 any rebuttal time?

6 MR. O'SHAUGHNESSY: Four minutes, please.

7 CHIEF JUDGE LIPPMAN: How much?

8 MR. O'SHAUGHNESSY: Four - - -

9 CHIEF JUDGE LIPPMAN: Four - - -

10 MR. O'SHAUGHNESSY: - - - minutes, Your
11 Honor.

12 CHIEF JUDGE LIPPMAN: - - - you have it; go
13 ahead.

14 MR. O'SHAUGHNESSY: Tim O'Shaughnessy from
15 Mauro Lilling Naparty, representing the appellant,
16 the hospital.

17 There can be question here that this
18 contract is illegal. Microtech blatantly violated -
19 - -

20 CHIEF JUDGE LIPPMAN: Cou - - - counsel,
21 what does the Workman's Compensation Law have to do
22 with - - - is - - - is it related to the particular
23 issue in this case? Or is it more related to our
24 immigration policies and that kind of thing? Do you
25 follow what I'm saying?

1 CHIEF JUDGE LIPPMAN: What's the relevance
2 to this - - - this case?

3 MR. O'SHAUGHNESSY: What's more important
4 in this case is IRCA.

5 CHIEF JUDGE LIPPMAN: Why is it important
6 to your position?

7 MR. O'SHAUGHNESSY: Because this contract -
8 - -

9 CHIEF JUDGE LIPPMAN: Keeping in mind - - -

10 MR. O'SHAUGHNESSY: - - - is illegal - - -

11 CHIEF JUDGE LIPPMAN: Keeping in mind what
12 the purpose of that provision is. Go ahead.

13 MR. O'SHAUGHNESSY: Yes. This court and
14 all the courts in - - - in New York have enforced
15 common law rule against parties going to court and
16 getting the benefit of illegal activity. Part of
17 that - - -

18 JUDGE SMITH: Is this - - - is this - - -

19 MR. O'SHAUGHNESSY: - - - common law rule -
20 - -

21 JUDGE SMITH: Is this really - - - is this
22 really the benefit of the illegal activity? I mean
23 the - - - the illegal activity was hiring the worker.
24 But the - - - the - - - all they're doing is they're
25 invoking a defense in the statute, which is available

1 if you provide workers' comp. And - - -

2 MR. O'SHAUGHNESSY: There - - -

3 JUDGE SMITH: - - - they did provide - - -
4 they did provide the workers' comp.

5 MR. O'SHAUGHNESSY: There are two strains
6 of cases. One is when a person sues in tort because
7 they are in - - - when they - - - if they're injured
8 during an illegal - - - serious violation of the law.
9 The other strain of cases that we rely on is - - - in
10 this case is that the courts do not enforce illegal
11 contracts.

12 JUDGE READ: Well, isn't the question here
13 - - -

14 JUDGE GRAFFEO: But the Workers' Comp Law
15 doesn't exclude undocumented workers, does it?
16 Coverage? I mean, the legislature - - -

17 MR. O'SHAUGHNESSY: No, what the - - -

18 JUDGE GRAFFEO: - - - could have adopted
19 some statutory language to exclude these individuals,
20 but they didn't.

21 MR. O'SHAUGHNESSY: No, they did not, Your
22 Honor. But the contract is illegal. This court
23 decided - - -

24 JUDGE GRAFFEO: But where's the contract
25 between your client and this employer?

1 MR. O'SHAUGHNESSY: Our - - - there is no
2 contract.

3 JUDGE GRAFFEO: No.

4 MR. O'SHAUGHNESSY: There's just - - - just
5 a small contract to do some construction work. We're
6 suing for indemnification. Microtech is raising an
7 illegal contract in bar to our lawsuit.

8 This court had a case called Clarke v. Town
9 of Russia, where a justice of the peace of the town
10 was working on a highway for the town, and he was
11 killed. His estate sued. This court held, under the
12 common law, it is - - - a contract between a town and
13 an officer of the town is void, and dismissed the
14 lawsuit where the estate was suing for workers'
15 compensation benefits.

16 JUDGE SMITH: Oh, okay, but the - - - but
17 these people got workers' compensation benefits, and
18 they're clearly entitled to them, right, under - - -
19 under - - - under Balbuena and other cases. They - -
20 - you can't say that the two - - - the - - - who are
21 they - - -the Lema brothers couldn't - - - weren't
22 entitled to workers' comp?

23 MR. O'SHAUGHNESSY: That's exactly right,
24 Your Honor, and that's why there's - - - in this
25 case, where we are the landowner, not - - - who's

1 innocent, and is suing the contractor, who have
2 committed the violation of the Labor Law, there is no
3 public policy aspect of the Workers' - - -

4 JUDGE SMITH: What - - -

5 MR. O'SHAUGHNESSY: - - - Compensation Law
6 that bars our lawsuit.

7 CHIEF JUDGE LIPPMAN: Why is it fair for
8 you to be able to - - - to go after them?

9 MR. O'SHAUGHNESSY: Because we did nothing
10 wrong. We hired - - -

11 CHIEF JUDGE LIPPMAN: What's - - - what's -
12 - - what from a policy perspective, what's fair about
13 it?

14 MR. O'SHAUGHNESSY: We hired - - -

15 CHIEF JUDGE LIPPMAN: Why?

16 MR. O'SHAUGHNESSY: Excuse me. We hired
17 Microtech that we thought to be, you know, a
18 responsible contractor, to do to some work in our - -
19 - one of our rooms in our basement. They went out,
20 hired some guys that didn't - - - they met at the gas
21 station, set them to work with no - - -

22 CHIEF JUDGE LIPPMAN: But doesn't that have
23 to do with our immigration policies, not public
24 health and safety?

25 MR. O'SHAUGHNESSY: Yes. The reason this

1 contract is unenforceable is because Congress passed
2 IRCA. And - - -

3 JUDGE GRAFFEO: But - - -

4 JUDGE SMITH: And it would be - - - in your
5 view, it would be just as unenforceable if they had
6 given them the best safety training anyone ever got?

7 MR. O'SHAUGHNESSY: That's, in fact, true.
8 It's - - - it's illegal because they violated IRCA.
9 Congress in 1990 - - -

10 JUDGE SMITH: They - - - on - - - on your
11 theory, could they bring a - - - could they collect
12 their workers' comp, and then bring their personal
13 injury lawsuit directly against their employer?

14 MR. O'SHAUGHNESSY: If that were to happen,
15 you know, I - - - I don't really think it's very
16 likely that an employee would want to sue and - - -
17 and - - -

18 JUDGE SMITH: They don't want money?

19 MR. O'SHAUGHNESSY: - - - disavow workers'
20 comp - - - but if they did - - -

21 JUDGE SMITH: Yeah.

22 MR. O'SHAUGHNESSY: If they did, and that
23 case came to this court, it would have to be decided
24 under all the facts and circumstances of that case.

25 Microtech relied on the Lloyd Capital case,

1 where this court said - - -

2 JUDGE SMITH: Wait, I mean, I - - - I don't
3 see why it would have to be decided under all the - -
4 - wouldn't it - - - doesn't there have to be a rule,
5 either it's barred or it's not under - - - you
6 enforce the Section 11 bar against illegal immigrants
7 or you don't?

8 MR. O'SHAUGHNESSY: Well, in the Lloyd
9 Capital case from this court, this court said, well,
10 we'll apply this analysis. Even if a contract is
11 illegal, we will enforce it, if the denial of
12 enforcement, it - - - would be wholly out of
13 proportion to the requirements of public policy.

14 JUDGE SMITH: Okay, but we're not talking
15 about a suit to enforce a contract. I mean, I - - -
16 if - - - if they're suing for their wages, and, yeah,
17 and the - - - and the employer says, what - - - what
18 wages - - -

19 MR. O'SHAUGHNESSY: Well, I - - -

20 JUDGE SMITH: - - - the whole deal was
21 illegal, there I see that Lloyd applies. But this is
22 a suit for personal injury. They committed a tort
23 against these people, and they - - - the problem
24 isn't an illegal contract; the problem is a statutory
25 defense under Section 11.

1 MR. O'SHAUGHNESSY: Well, the - - -

2 JUDGE READ: Isn't the question here really
3 one of preemption? Whether or not Section 11's safe
4 harbor is preempted by federal law? Isn't that what
5 Lloyd said?

6 MR. O'SHAUGHNESSY: No, not at all, Your
7 Honor. We're not arguing that.

8 JUDGE READ: It's not? Why not?

9 MR. O'SHAUGHNESSY: Why is it not?

10 JUDGE READ: Yeah, why isn't that really
11 the question at the heart of this case?

12 MR. O'SHAUGHNESSY: We have not raised that
13 argument. We are raising the argument about an
14 unenforceable illegal contract.

15 JUDGE READ: So if we don't agree with you
16 on the - - - on the contract, you lose?

17 MR. O'SHAUGHNESSY: It - - - I guess that's
18 true. This is - - -

19 JUDGE GRAFFEO: What's - - -

20 MR. O'SHAUGHNESSY: This is pretty much a
21 single-issue case. We're not arguing preemption.

22 JUDGE GRAFFEO: What's the ramification if
23 we agree with you? Does this mean that any statutory
24 violation would trump Section 11 of the Workers' Comp
25 Law?

1 MR. O'SHAUGHNESSY: If - - -

2 JUDGE GRAFFEO: Like if an - - - if an
3 employer didn't pay prevailing wages, or used
4 underage employees, in any of those situations, you'd
5 claim that was an illegality that trumped Section 11?

6 MR. O'SHAUGHNESSY: Well, in those
7 circumstances, the court can apply the Lloyd Capital
8 analysis based on all the facts and circumstances of
9 the case, and decide the - - - whether the - - - the
10 forfeiture that one party is seeking would be wholly
11 out of proportion to the requirements of public
12 policy. As in Lloyd Capital, this court found that
13 the forfeiture sought, the failure to enforce the
14 contract would, in fact, be wholly out of proportion
15 with the requirements of public policy.

16 If you have a case - - - I mean, this - - -
17 so if we have a case, let's say, an employee is
18 injured, and they - - -

19 JUDGE GRAFFEO: So it sounds like you're
20 trying to make an exception for the immigration
21 policy, versus other - - -

22 MR. O'SHAUGHNESSY: No, not at all.

23 JUDGE GRAFFEO: - - - statutory violations.

24 MR. O'SHAUGHNESSY: Not at - - - as in - -
25 - as in Clarke v. Town of Russia, there's a common

1 law rule that held that that - - - that that contract
2 of employment was illegal.

3 What - - - the ca - - - so let's say we
4 have a case where an employer's injured - - - an
5 employee is injured - - -

6 JUDGE GRAFFEO: But in Clarke - - -

7 MR. O'SHAUGHNESSY: - - - and they want - -
8 -

9 JUDGE GRAFFEO: - - - they were seeking the
10 wages, weren't they, I think?

11 MR. O'SHAUGHNESSY: They were seeking
12 workers' compensation benefits. So let's say we have
13 a case where an employee is injured and wants - - -

14 JUDGE GRAFFEO: They were paid their
15 benefits here. See, I think there's a distinction.

16 MR. O'SHAUGHNESSY: Well, yes, and the - -
17 - the distinction is that in this case we don't have
18 - - - this court doesn't worry - - - have to worry
19 that the purpose of the Workers' Compensation Law,
20 which is to provide swift and sure - - - meaning
21 without fault - - - remuneration to injured workers
22 is not implicated here. They got their - - - they
23 got their workers' compensation benefits. They were
24 able to sue for tort damages as well.

25 So for this court to hold that we are able

1 to sue Microtech, because Microtech entered into an
2 illegal contract, would not take away the workers'
3 compensation benefits that the employees received.

4 JUDGE RIVERA: But isn't that so because
5 under the statute, the employer is not liable for the
6 indemnification unless they fit within the two
7 discrete exceptions set out specifically in the
8 Workers' Comp Law?

9 MR. O'SHAUGHNESSY: That's what the
10 Workers' Comp Law says, but, for example, let's just
11 - - - as a thought experiment, let's say that IRCA
12 preempted the Workers' Compensation Law, no one would
13 say, well, there's no provision in the Workers'
14 Compensation Law saying - - - I mean - - -

15 CHIEF JUDGE LIPPMAN: Yeah, but you are - -
16 -

17 MR. O'SHAUGHNESSY: - - - it's not - - -

18 CHIEF JUDGE LIPPMAN: But you are setting a
19 third statutory - - - in effect, a third condition,
20 beyond the two that's in the statute for situations
21 like this, right?

22 MR. O'SHAUGHNESSY: For situations like
23 this, and again, this is - - - this case involves the
24 innocent hospital suing the party that was engaged in
25 the illegal activity, rendering the contract illegal.

1 CHIEF JUDGE LIPPMAN: Okay, counsel.
2 Anything else, counsel?

3 MR. O'SHAUGHNESSY: I just wanted to
4 mention one other thing, and that is that the
5 legislature, as - - - as we speak, is aware of this
6 common law problem of rendering employment agreements
7 illegal. And that is - - - Micro - - - Microtech
8 cited several cases involving minors. And they said,
9 hey, these are minors; it's illegal to employ minors.
10 And so these contracts were illegal, but yet they
11 were enforced.

12 And the answer to that is Section 14-a of
13 the Workers' Compensation Law. Passed in 1923, the
14 legislature said, if it turns out that the employee
15 is a minor, they get double damages. In other words,
16 the legislature was aware that there was a problem
17 that under the common law, a contract with a minor
18 would be illegal, and would be taken out of the
19 workers' compensation scheme. And so they provided,
20 not only that it remains in the scheme, but also that
21 the minor gets double damages.

22 JUDGE ABDUS-SALAAM: But doesn't that
23 suggest that the legislature to take a look at this,
24 as well?

25 MR. O'SHAUGHNESSY: Well, they're always

1 free to.

2 JUDGE ABDUS-SALAAM: You're asking for - -

3 -

4 MR. O'SHAUGHNESSY: In fact - - - in fact,

5 Your Honor, if the court - - -

6 JUDGE RIVERA: But aren't somehow

7 suggesting they're not aware? I thought you yourself

8 quoted some statistics that show this is a rampant

9 problem nationally. You think they're not aware?

10 MR. O'SHAUGHNESSY: That's - - - well,

11 that's an immigration problem. We made a footnote -

12 - -

13 JUDGE RIVERA: Um-hum.

14 MR. O'SHAUGHNESSY: - - - that Congress - -

15 - that - - - that illegal immigration in undocumented

16 workers does remain a problem.

17 But as far as the legislature, let's say

18 this court rules in our favor. If the legislature

19 doesn't like that result, this court's ruling would

20 be based on the common law doctrine, and the

21 legislature is always free to overrule - - -

22 CHIEF JUDGE LIPPMAN: Okay, counsel.

23 MR. O'SHAUGHNESSY: - - - the common law.

24 CHIEF JUDGE LIPPMAN: You'll have your

25 rebuttal time. Let's hear from your adversary.

1 MR. O'SHAUGHNESSY: Thank you, Your Honor.

2 CHIEF JUDGE LIPPMAN: Thank you.

3 Counselor?

4 MR. WADE: May it please the court, my name
5 is Dennis Wade. My colleague Cheryl Fuchs and I act
6 for Microtech.

7 What the hospital wants here - - -

8 CHIEF JUDGE LIPPMAN: Why is their position
9 unfair to you?

10 MR. WADE: Their position - - -

11 CHIEF JUDGE LIPPMAN: From a policy
12 perspective? What's - - - what's wrong - - -

13 MR. WADE: From a - - - from a - - -

14 CHIEF JUDGE LIPPMAN: - - - with their
15 position?

16 MR. WADE: - - - policy perspective, this
17 court has long held that the grand bargain of
18 workers' compensation is perfectly reciprocal without
19 regard to fault.

20 JUDGE PIGOTT: They're not making that
21 case. They're saying let's assume the Workers'
22 Compensation Law says what it says and that's fine.
23 The Lemas ought to get their workers' compensation.
24 They're also saying the Lemas were hurt and under
25 Labor Law Section 240, they're entitled to da - - -

1 damages as a result of that. And that's fine, and
2 we'll do that.

3 But what we want to do is be able to
4 proceed against the bad actor here, Microtech, who
5 hired the illegal aliens, put them in a situation
6 where they suffered under Labor Law Section 240 these
7 injuries, and the only way we can do it is through
8 the illegal contract because of the other two
9 subsections, which say that unless there's a grave -
10 - - pardon me - - - a grave injury or unless there's
11 an indemnification of the contract - - - none of
12 which apply here - - - they can't do it.

13 But it is unfair to them to let you off the
14 hook, and have them respond entirely on damages for
15 this, because of your bad actions.

16 MR. WADE: It may be unfair, Judge Pigott,
17 from a policy perspective, but it - - -

18 JUDGE PIGOTT: That's right. I'm just
19 teeing up what I think their argument is. It's not
20 workers' comp, and it's not Labor Law. It's - - -
21 it's the fact that in the Labor Law - - - it is the
22 Labor Law to this extent, that unless there's a grave
23 injury or an indemnification, they have to pay. And
24 they're saying, we'll pay; just show me a legal
25 contract and we'll pay it.

1 JUDGE READ: And further, following that
2 thought, isn't it consistent with the objectives of
3 IRCA to discourage the hiring of - - - of illegals?

4 MR. WADE: To be sure, Judge Read; I think
5 the Second Department hit the nail on the head. The
6 Second Department said, if I may read - - - it's at 1
7 - - - page 15 of the record, and I think this goes to
8 your question as well, Judge Pigott.

9 "While depriving the defendant of the
10 protections of the Workers' Compensation Law may
11 ultimately further the policies of IRCA, whereas
12 here, no federal preemption exists" - - - and this
13 court has already decided that in Balbuena - - - "the
14 proper course of action is not to create such a rule
15 through judicial determination, but rather to allow
16 the New York State Legislature to enact an
17 appropriate rule based on policy preferences with
18 respect to the welfare of state workers".

19 JUDGE GRAFFEO: But that doesn't - - -

20 JUDGE PIGOTT: That tees it up, right? In
21 other words - - -

22 MR. WADE: That - - -

23 JUDGE PIGOTT: In other words, they're
24 saying let the legislature do it. What - - - what
25 the appellants are saying here is it's already there.

1 There's a common law that says that - - - that you
2 can't go into a contract, create an illegal contract,
3 violate federal law, put these people in danger,
4 allow them to suffer those injuries without - - -
5 without any - - - any problem on your part - - - you
6 will not be out a nickel; instead, the innocent
7 hospital is going to pay for the 240, and within
8 that, is going to be a reimbursement to the comp - -
9 - to your comp carrier for every nickel they paid for
10 - - - for lost wages and damages that these people
11 incurred.

12 And their argument is, whether it's adopted
13 or not is another question, is that's makes no sense.
14 You should be bearing the - - - the - - - the cost of
15 your illegal contract. That's - - - that's the
16 argument on the other side. Not - - - not should the
17 legislature do something - - - if they do something,
18 that's nice - - - but the fact of the matter is, that
19 there are - - - there are common law claims for
20 illegal contracts.

21 MR. WADE: I think that is a perfect
22 restatement of what they're arguing. But to get
23 where they want to be, you have to, by judicial fiat,
24 create a new exception to the Workers' Compensation
25 Law which does not exist.

1 CHIEF JUDGE LIPPMAN: But do you agree - -
2 -

3 MR. WADE: There are lines of cases - - -

4 CHIEF JUDGE LIPPMAN: Do you agree - - -
5 let me just go back to what you said a minute ago.
6 Do you agree, from a policy perspective, that they're
7 - - - that - - - that's fair that they be able to do
8 that?

9 MR. WADE: Fair, Your Honor, that they be
10 able - - -

11 CHIEF JUDGE LIPPMAN: That - - - that if
12 the equities are involved here, you accept their
13 argument is - - - is - - - is equitable, that that's
14 fair, because you have a - - - you hired the
15 undocumented aliens.

16 MR. WADE: No - - -

17 CHIEF JUDGE LIPPMAN: Is that true? Is
18 that what you're saying?

19 MR. WADE: No, Your Honor, I don't - - -

20 CHIEF JUDGE LIPPMAN: So what are you
21 saying?

22 MR. WADE: I don't accept that it's fair.

23 CHIEF JUDGE LIPPMAN: Why - - - why should
24 we - - - I understand your argument about adding the
25 condition to the statute, but why is it the right

1 thing to do to - - - to adopt your position?

2 MR. WADE: Because the - - -

3 CHIEF JUDGE LIPPMAN: What's the counter
4 argument?

5 MR. WADE: Going back - - - going back to
6 1914 when the Workers' Compensation Law was enacted,
7 Judge Cardozo and others indicated that the
8 exclusivity of the workers' compensation bargain
9 worked without reference to fault.

10 JUDGE PIGOTT: That's true. That's true.

11 MR. WADE: We're not trying to enforce - -
12 -

13 JUDGE PIGOTT: But - - - but - - - but what
14 - - -

15 MR. WADE: - - - an illegal contract, Your
16 Honor.

17 JUDGE PIGOTT: What Mr. O'Shaughnessy
18 pointed out was that once there was child labor, and
19 they wanted to address that, they did. And they did
20 it by penalizing the employer. Now here, they don't
21 want to - - - they don't want to encourage people not
22 to have comp. They - - - they're willing to let
23 illegal aliens, undocumented immigrants, get comp if
24 they're working. That's - - - that's fine.

25 MR. WADE: But - - -

1 JUDGE PIGOTT: What - - - what they want to
2 do is take it one step further. Get it out of fed -
3 - - we're not talking about the federal law. We're
4 talking about what happens in New York, when you do
5 what you did here. And is it true - - - is it fair
6 to hold you harmless, where you don't have - - - you
7 get reimbursed for your comp, and all of the - - -
8 and all of the - - - the - - - the compensatory
9 damages under the Labor Law are going to be absorbed
10 by a hospital who didn't know that you were violating
11 federal law, A, when they hired you, and B, when the
12 work was done.

13 MR. WADE: But I submit, Judge Pigott, we -
14 - - we are entitled to the benefit of the bargain
15 unless the New York Legislature decides otherwise.
16 And this case has a - - - this court has a long
17 history, beginning with Noreen, and beginning with
18 underage workers, where there were violations by the
19 employer - - -

20 JUDGE PIGOTT: Right, but the - - -

21 MR. WADE: - - - arguably much worse - - -

22 JUDGE PIGOTT: But it's not - - - this - -
23 - I want to say again, this isn't a comp case. What
24 - - - what happened here - - - what - - - the reason
25 why we have the two exceptions, the grave injury and

1 the indemnification, is because comp care is getting
2 murdered by 240. I mean, every time there was a 240
3 case, you know, the - - - the Labor Law was - - - was
4 kicked in and the employer who was going - - - you,
5 in most cases, then have to absorb that entire loss.

6 So they said, well, this isn't fair to the
7 employer. So we're going to - - - we're going to
8 change it so there has at least be a grave injury,
9 not just any injury, and there - - - or there has to
10 be a contract indemnification. They're trying to
11 address problems with the Labor Law. They have no
12 interest, I don't think, nor jurisdiction on the
13 immigration law. So in the Labor Law, they made
14 these two exceptions, because they want to protect
15 comp carriers.

16 And what Mr. O'Shaughnessy and the hospital
17 is saying, it's seems to me is, there's also a public
18 policy that says that the employer should not slip
19 the noose here when they're the one - - - when
20 they're the bad - - - the one that created the
21 problem.

22 MR. WADE: Well - - -

23 JUDGE READ: And - - - and going back to
24 IRCA again, why wouldn't allow you to take advantage
25 of the safe harbor thwart one of the objectives of

1 IRCA, which is to discourage this kind of behavior?

2 MR. WADE: I'm sorry, Judge Read, you - - -

3 JUDGE READ: Employment of undocumented
4 workers.

5 MR. WADE: - - - you said going to back to
6 - - - I didn't catch - - -

7 JUDGE READ: Going back to IRCA, why
8 wouldn't - - - why wouldn't the enforcement of the
9 safe harbor in Section 711 significantly, you know,
10 thwart one of the objectives of federal regulation?

11 MR. WADE: Well, I - - -

12 JUDGE READ: Why isn't that a problem? A
13 preemption problem?

14 MR. WADE: Well, Your Honor, they don't
15 argue preemption. This court has decided the
16 preemption issue - - -

17 JUDGE READ: Well, that was in another
18 context, though, wasn't it? That was with - - - that
19 was with respect to compensating the workers. You -
20 - - you would say, we in Balbuena also decided that -
21 - - that preemption had no part to play in whether or
22 not to enforce Section 11?

23 MR. WADE: Well, I think, Your Honor, this
24 court has said on many occasions, the bargain - - -
25 the grand bargain that's represented by Section 11 -

1 - - is entirely reciprocal without regard to fault.
2 And if you're going to - - -

3 JUDGE PIGOTT: That's true. We're going to
4 make sure the Lemas get paid. And we're going to
5 make sure that the Lemas get paid workers'
6 compensation. Done deal. Everything's done. I
7 don't even think the hospital cares.

8 Now they sue - - - they sue the hospital -
9 - - not you, because you're the employer - - - but
10 they sue the hospital saying under Labor Law Section
11 240, we were injured and we're entitled to be
12 compensated for that. Hospital says, you're right.
13 Absolutely, we're going to write you a check, but
14 we're going to go after the person who put you in
15 that position.

16 And you say, you can't, because there's no
17 grave injury, and there's no contract of
18 indemnification. And they're saying the Labor Law is
19 - - - is subject to our common law, and therefore we
20 can assert an illegal contract.

21 Any amendment is not going to be to IRCA or
22 - - - or to the comp law. It's going to be to the
23 Labor Law, where we would say grave injury, contract
24 indemnification, or if you hire illegal aliens. And
25 we may run into a - - - into a preemption problem

1 there with the federal government, wouldn't we, if
2 this legislature did that?

3 MR. WADE: Well, for sure, Your Honor, the
4 issue, really, I think, relates to how this court has
5 decided the child labor cases and how the court
6 decided the Lloyd Capital case, and in that case - -
7 -

8 JUDGE PIGOTT: Well, I don't mean to beat
9 this horse to death, but we took care of - - - or the
10 legislature took care of child labor laws with 14-a.
11 This is the Labor Law. It's the Labor Law that says
12 they can - - - if - - - if they could sue you like
13 they used to, without the grave injury or
14 indemnification, they'd had passed this off and they
15 wouldn't care, because you'd be picking it up.

16 MR. WADE: But when the legislature
17 grappled with the plethora of suits that was plaguing
18 our court system in 1996, and they enacted the grave
19 injury exception to the Workers' Compensation Law, to
20 be sure, they were aware of the problem of
21 undocumented workers - - -

22 JUDGE PIGOTT: You think so?

23 MR. WADE: I believe so, Your Honor. This
24 issue has been weighing on the minds, not only of the
25 legislature, but of the judiciary and, in my

1 contract?

2 MR. WADE: An indemnity contract - - -

3 JUDGE PIGOTT: Right, so - - -

4 MR. WADE: - - - thanks, Judge Smith.

5 JUDGE GRAFFEO: A provision for indemnity -
6 - -

7 JUDGE PIGOTT: So - - -

8 JUDGE GRAFFEO: - - - in a written
9 contract, though, is that what you're saying?

10 MR. WADE: If they had an indemnity in a
11 written contract - - -

12 JUDGE GRAFFEO: Then you'd fall into one of
13 the exceptions under Section 11 of the Workers' Comp
14 Law.

15 MR. WADE: Absolutely. And - - -

16 JUDGE PIGOTT: That - - - that's what I
17 mean. It's a Labor Law question; it's not a comp
18 question, right?

19 MR. WADE: Well, it's Labor Law in the
20 sense - - - only in the sense - - - that they had
21 failed to have a contract in place when this
22 occurrence took place. If they had a contract in
23 place, we wouldn't be here.

24 JUDGE SMITH: Could - - - could I ask you -
25 - - since you seem to have done it - - - can I ask

1 you as a practical question that's been bothering me?
2 Aren't these workers usually off the books?

3 MR. WADE: Well, in this case, Your Honor,
4 there really is no dispute. It's been conceded that
5 the illegals were - - -

6 JUDGE SMITH: I'm not - - - I'm not - - -
7 I'm just asking - - -

8 MR. WADE: - - - were undocumented.

9 JUDGE SMITH: - - - I'm just asking the
10 factual question. I guess I don't understand how
11 this works. Aren't - - - if these guys are off the
12 books, how come - - - who paid the premium to the
13 comp carrier for their coverage?

14 MR. WADE: My client did. My client paid -
15 - -

16 JUDGE SMITH: How - - - how - - - did you
17 tell the comp carrier they existed?

18 MR. WADE: My client - - -

19 JUDGE PIGOTT: After a while.

20 MR. WADE: My client - - - Your Honor - - -
21 I mean, going outside the record, I have absolutely
22 no idea. But all I can say is that - - -

23 JUDGE SMITH: You can stay inside the
24 record, and tell me that.

25 MR. WADE: All I can say to the members of

1 this court is that my client followed the law. It -
2 - -

3 JUDGE SMITH: I'm - - - I'm more in - - -
4 I'm trying to ask a broader question about the - - -
5 the custom and practice of the industry, if you know.
6 How do these guys - - - these - - - these
7 undocumented aliens get covered under workers' comp,
8 unless somebody tells workers' comp carriers they
9 exist and pay a premium? Is there an answer to that
10 question?

11 MR. WADE: My belief, based on my
12 experience - - - and the caveat is I'm by no means an
13 expert - - - is that employer, such as my client,
14 Microtech, purchases workers' compensation insurance
15 and they go about hiring workers to do what they need
16 to do.

17 JUDGE PIGOTT: They list - - - they list a
18 - - - a rough number of employees. They don't list
19 names.

20 MR. WADE: Exactly.

21 JUDGE PIGOTT: So it - - -

22 MR. WADE: And this court recognizes, in
23 the construction industry, much work is shape-up
24 work. The workers show up at the site and they're
25 put to work. And employers recognize that, but it's

1 been long the history of litigation in this area,
2 that undocumented workers could get workers' comp - -
3 -

4 CHIEF JUDGE LIPPMAN: So whoever gets
5 injured - - - whoever gets injured is covered,
6 whether undocumented or not?

7 MR. WADE: Absolutely, one hundred percent.

8 JUDGE READ: On another track - - -

9 JUDGE SMITH: And if you want a completely
10 different - - - sorry. A completely different
11 question, if I can. Isn't - - - isn't federal law -
12 - - doesn't federal law have an exclusivity
13 provision, which basically says no - - - no state can
14 put any sanctions on the employers more than what we
15 put?

16 MR. WADE: I think you're right, Judge
17 Smith. The - - - the - - - IRCA provides a whole
18 panoply of potential civil and criminal sanctions - -
19 -

20 JUDGE SMITH: Yes, but they say that - - -
21 I mean, wouldn't - - -

22 MR. WADE: But - - - but the legislative
23 history has specifically indicated that IRCA was not
24 meant to trump - - -

25 JUDGE SMITH: Isn't - - - I mean, I - - -

1 MR. WADE: - - - the laws of the states
2 regarding health, safety of its workers.

3 JUDGE SMITH: And the - - - as I understand
4 it, the states - - - the states aren't free to put
5 any additional sanction they want. They can't say
6 anybody who hires an undocumented alien has to pay a
7 million-dollar fine. That's - - - that's the
8 exclusive providence of the federal government, isn't
9 it?

10 MR. WADE: That, I believe, Your Honor, is
11 exactly right on - - -

12 CHIEF JUDGE LIPPMAN: Is it - - -

13 MR. WADE: - - - on the preemption issue.

14 CHIEF JUDGE LIPPMAN: Is it important that
15 there are statutory penalties in place? Does that
16 have any meaning in terms of this case?

17 MR. WADE: Well, I think it's very
18 important in the - - -

19 CHIEF JUDGE LIPPMAN: Why is it - - - why?

20 MR. WADE: Well, it's important in the
21 sense that the federal government - - - and it's
22 obviously an ongoing debate - - - enacted IRCA to try
23 to address the problem of illegal immigration.

24 JUDGE PIGOTT: But this isn't - - -

25 MR. WADE: They have criminal and - - -

1 JUDGE PIGOTT: This is not an IRCA case.
2 This is a case where one hospital is being - - - is
3 suing you. They want to - - - they want to say we've
4 taken care of the workers. We've paid our Labor Law
5 judgment. But we want you to indemnify us, because
6 you're the one that did this. And it - - - and it is
7 not an immigration case. It's a case between two - -
8 - two corporations.

9 JUDGE ABDUS-SALAAM: Can I just - - -

10 MR. WADE: It is a case between two corp -
11 - -

12 JUDGE ABDUS-SALAAM: Can I just follow that
13 up with another practical question, because you've
14 mentioned a couple of times that there was no
15 indemnity contract in place. How - - -

16 MR. WADE: Correct.

17 JUDGE ABDUS-SALAAM: How common are they?
18 Is it that easy for an owner to insert in a contract
19 an indemnity - - - an indemnity and contribution
20 provision?

21 MR. WADE: Well, Your Honor, I think if you
22 read Construction for Dummies, the first chapter is
23 have a contract in place before you conduct any work.
24 And that - - -

25 JUDGE SMITH: And does - - - does the - - -

1 MR. WADE: - - - that wasn't the case here.

2 JUDGE SMITH: - - - does the usual contract
3 include indemnification running from the contractor
4 to the owner?

5 MR. WADE: One hundred percent. In my
6 experience, it's a shock to me - - -

7 JUDGE PIGOTT: Oh, oh, oh.

8 MR. WADE: - - - that - - - that - - -

9 JUDGE PIGOTT: Really?

10 MR. WADE: Well, that the hospital did not
11 have - - - an entity such as the New York Hospital in
12 Queens did not have a contract in place. That's not
13 to say, Judge Pigott, that work doesn't take place
14 without a formal written contract, but I would say in
15 the scheme of construction litigation, in the five
16 boroughs, it's more common than not that there are
17 very detailed contracts - - -

18 CHIEF JUDGE LIPPMAN: Okay, counsel.

19 MR. WADE: - - - in place.

20 CHIEF JUDGE LIPPMAN: Okay, thanks,
21 counsel.

22 MR. WADE: Thank you, Your Honors.

23 MR. O'SHAUGHNESSY: The Workers'
24 Compensation Law, by its term, employs - - - applies
25 to employers and employees, but because of

1 Microtech's malfeasance, this contract must be
2 ignored by the court. So they are not - - -

3 CHIEF JUDGE LIPPMAN: If there's a
4 statutory penalty in place, why isn't that all that's
5 involved here? Why - - - why - - -

6 MR. O'SHAUGHNESSY: Because - - -

7 CHIEF JUDGE LIPPMAN: They're going to
8 suffer that if they did something wrong. Why isn't
9 that enough?

10 MR. O'SHAUGHNESSY: This statutory penalty
11 is not effective. It provides that the Attorney
12 General can go after people who do violate IRCA, but
13 when you have a violation of IRCA in this situation,
14 the - - - the employees who are undocumented are
15 never going to contact the Attorney General, because
16 they're undocumented and they stay away from
17 government. And the employers are not going to con -
18 - - contact the Attorney General because they will -
19 - -

20 CHIEF JUDGE LIPPMAN: So you're saying
21 there's no effective - - -

22 MR. O'SHAUGHNESSY: - - - be prosecuted.

23 CHIEF JUDGE LIPPMAN: You're saying there's
24 no effective penalty.

25 MR. O'SHAUGHNESSY: There is no effective

1 penalty.

2 CHIEF JUDGE LIPPMAN: Oh - - -

3 MR. O'SHAUGHNESSY: We stated in our reply
4 brief that we couldn't find any cases under IRCA - -
5 -

6 JUDGE SMITH: Is the - - - is the state - -
7 - is the State of New York allowed to enhance the
8 effectiveness of federal law by loading more
9 penalties on the employer?

10 MR. O'SHAUGHNESSY: Well, they're not - - -
11 as Your Honor's pointed out, they're not allowed to
12 put sanctions on employers - - -

13 JUDGE SMITH: Why - - - aren't you really
14 asking for a sanction?

15 JUDGE PIGOTT: - - - but this - - -

16 JUDGE SMITH: Aren't you saying take away
17 their Section 11 defense as a sanction for the bad
18 thing they did?

19 MR. O'SHAUGHNESSY: No, it's not - - - I
20 don't believe that's a sanction. A sanction is a
21 fine, a civil penalty. This is - - -

22 CHIEF JUDGE LIPPMAN: Well, this is a
23 pretty - - - pretty - - - in common parlance, this is
24 a penalty, isn't it, to them? Don't they suffer as a
25 result - - -

1 MR. O'SHAUGHNESSY: I don't think it's a
2 penalty. It's - - -

3 CHIEF JUDGE LIPPMAN: - - - of their
4 mistake?

5 MR. O'SHAUGHNESSY: It's that - - - it's
6 that we enforce the law of indemnification - - -

7 CHIEF JUDGE LIPPMAN: What about - - -

8 MR. O'SHAUGHNESSY: - - - and contribution.

9 CHIEF JUDGE LIPPMAN: What about the
10 question we asked your adversary? Are there almost
11 always indemnification agreements or are they the
12 rarity or what's the practice?

13 MR. O'SHAUGHNESSY: I have no idea. But -
14 - -

15 JUDGE PIGOTT: Well, you made - - - this -
16 - - as Mr. Wade intimated, I mean, this purchase
17 order wasn't a contract, and it - - - and it - - -
18 and it post-dated the ac - - - the accident, didn't
19 it?

20 MR. O'SHAUGHNESSY: Well, there was an oral
21 contract, clearly. They just - - - they were doing
22 the work. And nobody was volunteering - - -

23 JUDGE PIGOTT: Did you have an oral
24 indemnification there by any chance?

25 MR. O'SHAUGHNESSY: I'm sorry?

1 JUDGE ABDUS-SALAAM: Apparently not.

2 JUDGE PIGOTT: Did you have an oral
3 indemnification in there by any chance?

4 MR. O'SHAUGHNESSY: I wish we did.

5 JUDGE PIGOTT: You got to prepare your
6 witnesses.

7 JUDGE RIVERA: But - - - but counsel - - -

8 MR. O'SHAUGHNESSY: Is - - - I - - -

9 JUDGE RIVERA: Counsel, aren't you asking -
10 - - I'm a little confused by the way this would
11 actually play itself out. Aren't you asking the
12 state courts then to do some significant
13 interpretation of federal law to truly confirm that
14 indeed this is what you're calling an illegal
15 contract? That indeed these people were
16 undocumented; they did it willfully.

17 MR. O'SHAUGHNESSY: Frankly, Your Honor,
18 there's nothing to it. What - - - all that - - -
19 that Microtech had to do was ask - - - everybody - -
20 - anyone at the - - -

21 JUDGE RIVERA: Well, I know what they had
22 to do. I understand the federal law. That's not my
23 question. My question is in order to actually have
24 the kind of ability for you to go after the money,
25 and this indemnification, aren't you asking the state

1 judges to indeed interpret federal law and indeed
2 identify that they have breached federal law, and
3 that it constitutes an illegal contract?

4 MR. O'SHAUGHNESSY: Well, we're not - - -
5 we're not going after them. We're just asking for
6 the contract to be ignored, but it's a very simple
7 question.

8 JUDGE RIVERA: Yeah, but it's only illegal
9 - - -

10 MR. O'SHAUGHNESSY: This is a very simple
11 question.

12 JUDGE RIVERA: - - - if you establish - - -
13 well - - -

14 MR. O'SHAUGHNESSY: Yes - - -

15 JUDGE RIVERA: - - - under your argument
16 you're saying it's illegal because they - - - they
17 have not complied with federal law.

18 MR. O'SHAUGHNESSY: For a very - - -

19 JUDGE RIVERA: So doesn't that mean that a
20 state judge has to figure out whether or not they've
21 complied with federal law? It's just a straight
22 question.

23 MR. O'SHAUGHNESSY: Yes.

24 JUDGE RIVERA: Okay.

25 MR. O'SHAUGHNESSY: But it - - - it's

1 extraordinarily simple what they had to do, and
2 extraordinarily simple to determine whether they
3 complied with IRCA. The requirements are really
4 procedural. The employer is not - - - it - - - IRCA
5 actually provides that if the employer provides false
6 documents, the - - - the employ - - - if the employee
7 provides false documents - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but I think
9 what - - -

10 MR. O'SHAUGHNESSY: - - - the employer is
11 still compliant.

12 CHIEF JUDGE LIPPMAN: - - - Judge Rivera is
13 asking, why are we getting involved on IRCA? Why - -
14 - what are - - - what do we have to do with IRCA?

15 MR. O'SHAUGHNESSY: Because Microtech, by
16 violating IRCA, has brought itself within the well-
17 established common law tradition of this - - -

18 CHIEF JUDGE LIPPMAN: Okay, counsel.

19 MR. O'SHAUGHNESSY: - - - state.

20 JUDGE RIVERA: Can I just ask one other
21 question?

22 CHIEF JUDGE LIPPMAN: Sure, Judge Rivera.

23 JUDGE RIVERA: Was - - - was there any
24 statutory or federal prohibition on you requesting
25 that - - - in - - - in your contract with them - - -

1 providing that they had to indeed establish for you
2 that they were in compliance with IRCA?

3 MR. O'SHAUGHNESSY: No, but - - - and as
4 far as getting a contractual provision, we have to
5 ask for it, and they have to agree to it. We don't
6 have the power to have them - - -

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 JUDGE ABDUS-SALAAM: But if you have - - -

9 CHIEF JUDGE LIPPMAN: I'm sorry.

10 JUDGE ABDUS-SALAAM: - - - an indemnity
11 clause, you would be protected no matter what,
12 whether - - -

13 MR. O'SHAUGHNESSY: If - - - excuse me, if
14 we did - - -

15 JUDGE ABDUS-SALAAM: If you had an
16 indemnity clause in a contract, you would be
17 protected under IRCA or any other provision of any
18 state or federal law, wouldn't you?

19 MR. O'SHAUGHNESSY: Right, we wouldn't be
20 here - - -

21 JUDGE ABDUS-SALAAM: Okay.

22 MR. O'SHAUGHNESSY: - - - if we'd - - -

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 MR. O'SHAUGHNESSY: Thank you.

25 CHIEF JUDGE LIPPMAN: Thank you both.

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MR. WADE: Thank you.

CHIEF JUDGE LIPPMAN: Appreciate it.

(Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of New York Hospital Medical Center of Queens v. Microtech Contracting Corp., No. 1 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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