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COURT OF APPEALS

STATE OF NEW YORK

COLESON,

Appellant,

-against-

CITY OF NEW YORK,

Respondent.

No. 191
Papers Sealed

20 Eagle Street
Albany, New York 12207
October 16, 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 ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 191, Coleson v. The
2 City of New York.

3 Counselor, you want any rebuttal time?

4 MR. SIM: I'd like two minutes, Your Honor.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
6 ahead.

7 MR. SIM: May it please the court, my
8 name's Sang Sim, and I represent the appellant, Jandy
9 Coleson and Rolfy Soto in this case. I think - - - I
10 think one of the central issues in this case is
11 whether there was a special duty that was owed - - -

12 CHIEF JUDGE LIPPMAN: Talk about Valdez,
13 counsel.

14 MR. SIM: Valdez, basically a case in which
15 the victim was told by a police officer that they're
16 going to arrest the boyfriend that made threats
17 against her. And the - - - this court basically said
18 that other - - - there were no other factors other
19 than the simple words that we're going to go arrest
20 him.

21 CHIEF JUDGE LIPPMAN: So what's the
22 difference between this case and Valdez?

23 MR. SIM: I - - - I think one of the
24 central issues in this case is that the - - - the man
25 was in custody. In Valdez the - - - the - - - the

1 mere - - - mere statement that we're going to go
2 arrest him was not enough to create justifiable
3 reliance.

4 JUDGE GRAFFEO: So what - - - what are the
5 specific statements by the police here that you're
6 hinging the special duty on?

7 MR. SIM: Specific - - - I mean, I - - - I
8 think we have to look at the cumulative, right. They
9 arrest - - - they arrest the husband, Mr. Coleson.
10 He's in custody. They bring her to the police
11 station. There, the police officer tells her don't
12 worry. We're going to give you protection. He's
13 going to be away for a very long time. They take her
14 to Safe Horizon where they tell - - - tell her, don't
15 worry, by the time he gets out we're going to place
16 you in a different apartment under Section 8. We're
17 going to give you that support so you don't have to
18 continue to be - - -

19 JUDGE GRAFFEO: The - - - the police told
20 her that or the - - -

21 MR. SIM: - - - under financial dependence.

22 JUDGE GRAFFEO: - - - or the Safe Horizon -
23 - -

24 MR. SIM: This is - - -

25 JUDGE GRAFFEO: - - - people?

1 MR. SIM: This is all cumulative of her
2 experience with the City of New York. Safe Horizon
3 told her that this was an apartment they're going to
4 furnish. That by the time they get - - - she - - -
5 he gets out, she's going to be in another apartment.

6 JUDGE SMITH: Is it - - - is it your
7 position that if the police tell a victim don't
8 worry, the guy's going to be away for a long time and
9 that doesn't happen the - - - the victim can sue the
10 police?

11 MR. SIM: Well, the question - - - the
12 question becomes just the mere words alone is not
13 enough - - -

14 CHIEF JUDGE LIPPMAN: Your position is that
15 if he's in custody and they say that then it has - -
16 -

17 MR. SIM: Well, now - - - now - - -

18 CHIEF JUDGE LIPPMAN: - - - greater
19 meaning?

20 MR. SIM: - - - he's in custody. There's a
21 certainty. There's a reasonable - - -

22 CHIEF JUDGE LIPPMAN: I know. But that - -
23 - but that's the main distinction - - -

24 MR. SIM: Yes.

25 CHIEF JUDGE LIPPMAN: - - - in - - - in - -

1 - your argument that he's in custody and they give
2 her the assurance. If he wasn't in custody and they
3 gave her the assurance, different, right?

4 MR. SIM: Yes, and let - - - let's keep in
5 mind that, you know, after she gets back from the
6 police station, this police officer calls her 11 p.m.
7 and doesn't - - - does not get off the phone until 1
8 a.m. Now keep in mind, what's the purpose of keeping
9 her on the phone for two hours? This wasn't a simple
10 phone call that lasted two minutes.

11 JUDGE SMITH: Well - - - well, I mean, yeah
12 - - - I mean there - - - there's no doubt that the
13 police were trying to reassure her and calm her down.
14 That's part of their job, isn't it - - -

15 MR. SIM: But - - -

16 JUDGE SMITH: - - - to try and make her
17 feel comfortable?

18 MR. SIM: Is it?

19 JUDGE SMITH: But - - -

20 MR. SIM: And if - - - if they do, doesn't
21 that create a justifiable reliance?

22 JUDGE SMITH: But well, are you - - - are
23 you really saying that every time the police do their
24 best to make a vic - - - victim to feel comfortable
25 and then something horrible happens, the victim can

1 sue the police?

2 MR. SIM: Well, I think - - - I think
3 there's a distinction to be made between making her
4 feel comfortable versus making her feel safe.

5 JUDGE SMITH: Well, I - - - I mean I - - -
6 I - - - I can see the - - - well, I'm not sure I see
7 that. I - - - I can see the point that there could
8 be very specific assurances that if they say don't
9 worry, I guarantee you we're going to give the DA all
10 the information and the DA will tell - - - so that
11 the DA can tell the judge, and then they fail to - -
12 - fail to give me information, I can see that as a
13 sort of a specific promise someone could rely on.
14 But here, don't worry, he's going to be away for a
15 long time, calm down, we're going to protect you, is
16 that really - - - is that special enough to make a
17 special relationship is really what I'm saying?

18 MR. SIM: I think - - - I think there were
19 other - - - other statements that he was in front of
20 sentencing. And, you know, this being a summary
21 judgment, maybe there's an issue of credibility or -
22 - - or - - -

23 JUDGE GRAFFEO: But how - - - how do - - -
24 how do the police know what's going to happen in the
25 judicial process?

1 MR. SIM: They didn't.

2 JUDGE GRAFFEO: So - - -

3 MR. SIM: But they made the - - - made the
4 promise.

5 JUDGE GRAFFEO: So my - - - my next
6 question is because when we write these decisions in
7 this area, you know - - -

8 MR. SIM: Yes.

9 JUDGE GRAFFEO: - - - they're difficult
10 cases.

11 MR. SIM: Yes.

12 JUDGE GRAFFEO: Because they're - - -
13 they're really very sympathetic fact patterns.

14 MR. SIM: Yes.

15 JUDGE GRAFFEO: What is it that the police
16 should say or shouldn't say to these victims who
17 they're trying to reassure?

18 MR. SIM: Well, I - - - I think that it's -
19 - - it's important to say - - -

20 JUDGE GRAFFEO: Should they not have these
21 conversations at - - - at all?

22 MR. SIM: No, I think - - - I think they
23 should have that conversation. If - - - if they - -
24 - if they basically find a victim like Jandy Coleson
25 and tell her we're going to give you police

1 protection; we're going to protect you; he's going to
2 be away for a long time, somebody should have
3 followed up at the arraignment if he was released,
4 one telephone call. At that point in time she's no
5 longer lulled into a false sense of security.

6 JUDGE SMITH: But - - -

7 JUDGE RIVERA: Had - - - had she been
8 disappointed in the past?

9 MR. SIM: Yes, she has. Yes, she has.

10 JUDGE RIVERA: So - - - so why should she,
11 this time around - - -

12 MR. SIM: Well, this circumstance - - -

13 JUDGE RIVERA: - - - have greater faith?

14 MR. SIM: Well, this circumstance was a
15 little different, right.

16 JUDGE RIVERA: What - - - what - - -

17 MR. SIM: The - - - the act of violence
18 increased. Prior to his arrest she had testified
19 that he started using drugs, right, running with drug
20 dealers. This time, you know what, the police found
21 him in front of the superintendent's office with - -
22 - with a screwdriver in his hand where the police
23 officer specifically testified he looks like he's
24 going to hurt someone.

25 CHIEF JUDGE LIPPMAN: Well, is it how

1 dangerous he is or is it the assurances that they
2 give that really determine whether you can succeed?
3 That he's dangerous, in and of itself, you know, it
4 is what it is. But if they lull her into a sense of
5 security and reliance, then it's different, right?

6 MR. SIM: Yes, yes. I think it's
7 different. Then the - - -

8 JUDGE PIGOTT: What would she have done, in
9 your view, differently had the police acted the way
10 you think they should have acted?

11 MR. SIM: Well, I mean, if the police - - -
12 let's say, for instance, the moment he got - - - he
13 got released, they telephoned, you know what, he's
14 released. You're on your own.

15 JUDGE SMITH: But they never - - - they - -
16 - did they - - - there's no testimony that they
17 promised - - - I think if they promised to do that I
18 could see it'd be a different case. If they had
19 said, don't worry, we - - - the minute he gets out
20 we're going to be on the phone and tell you. There's
21 - - - there's no evidence of that, is there?

22 MR. SIM: Police Officer Reyes (ph.) ended
23 that conversation with saying I'll be in touch. I'll
24 be in contact.

25 CHIEF JUDGE LIPPMAN: Is your - - -

1 MR. SIM: Right.

2 CHIEF JUDGE LIPPMAN: - - - your view is is
3 that it's the equivalent of what Judge Smith just
4 said?

5 MR. SIM: Yes, I think it is. I think - -
6 - I think there's a reasonable - - -

7 CHIEF JUDGE LIPPMAN: That he's basically
8 saying - - -

9 MR. SIM: - - - inference.

10 CHIEF JUDGE LIPPMAN: - - - when he's out,
11 you're going to know because you're safe once - - -
12 while he's in?

13 MR. SIM: Yes, Your Honor. I think - - - I
14 think it's saying that okay; I'm going to protect
15 you. I stay on the phone two hours with you, two
16 hours.

17 JUDGE GRAFFEO: So to - - - so to go back
18 to my question, the police shouldn't make these kinds
19 of representations?

20 MR. SIM: With respect to we're going to
21 protect you?

22 JUDGE GRAFFEO: I mean this is a very
23 difficult area - - -

24 MR. SIM: No, no, I understand that.

25 JUDGE GRAFFEO: - - - domestic violence

1 prevention and - - -

2 MR. SIM: I understand that.

3 JUDGE GRAFFEO: - - - and - - - and it's
4 horrible for the victims and it's not easy for the
5 police to try to - - - because there's many of these
6 victims they have to convince - - -

7 MR. SIM: Yes.

8 JUDGE GRAFFEO: - - - to bring these
9 prosecutions. We know that, too. So I'm trying to
10 figure out what do you think is appropriate for the
11 police to say to these victims but what should they
12 not say to them?

13 MR. SIM: Well, I - - - I think - - -

14 JUDGE GRAFFEO: Apparently they shouldn't
15 tell them they're going to guarantee them a
16 protection.

17 MR. SIM: I - - - I think - - - I think - -
18 -

19 JUDGE GRAFFEO: Because they don't have
20 control over the judicial proceedings.

21 MR. SIM: Yes, that's right. But if - - -
22 if you're going to tell them I'm going to give you
23 protection, right, they should follow through.

24 JUDGE SMITH: Isn't the - - -

25 MR. SIM: They - - -

1 JUDGE SMITH: Isn't the real failure in - -
2 - the system failed here, it looks like. But wasn't
3 the real failure letting the guy go and it's - - -
4 isn't it clear that you can't sue for that. No
5 matter how ill advised the judge was or how much the
6 DA may have failed to make the point, you can't sue
7 them for letting him go. Aren't you really trying to
8 end run around that ruling here?

9 MR. SIM: No, no, I don't think - - - I
10 don't think it is, Your Honor. I mean you're - - -
11 you're - - - you're correct. We can't sue - - - sue
12 the judge for releasing him. That's right. But
13 we're - - - we're talking about all the factors that
14 occurred prior to that release.

15 JUDGE PIGOTT: But the dilemma is this: if
16 - - - if the arresting officer's back on the road and
17 the - - - and the arraignment is at some different
18 time, place, and he doesn't have a clue, how do you -
19 - - how are we supposed to handle that?

20 MR. SIM: They should have told somebody at
21 the station.

22 JUDGE PIGOTT: Well, you see what you're
23 doing?

24 MR. SIM: Yes.

25 JUDGE PIGOTT: You're - - - you're

1 suggesting that - - - that half a precinct get lined
2 up for this case so that - - - so that your client is
3 properly protected. Maybe that's - - - maybe that's
4 the way it ought to be, but it seems like we're
5 putting an awful burden on the police where they
6 would in - - - in the alternative say, you know what,
7 we're not saying anything. We're just - - - we're
8 just going to arrest him. If she's got a problem
9 we'll tell her to go talk to - - - talk to her
10 relatives or something. And that's not what they
11 want to do. They want to try to be - - -

12 MR. SIM: I mean certainly, certainly I can
13 understand that there's a balancing - - - balancing
14 here between the resources that you're going to cause
15 a municipality or a city or police to use. But - - -
16 but let's also keep in mind this is a particular case
17 regarding a domestic violence victim.

18 CHIEF JUDGE LIPPMAN: Do you think there's
19 a higher standard for domestic violence?

20 MR. SIM: I'm not exactly sure.

21 CHIEF JUDGE LIPPMAN: Or these kinds of
22 cases?

23 MR. SIM: I think - - - I think - - -

24 CHIEF JUDGE LIPPMAN: Does it matter that
25 it's a domestic violence case?

1 MR. SIM: Well, if - - - if we keep in mind
2 that domestic violence victims, they're - - - they're
3 already - - - they're already at a disadvantage.
4 They're already at a disadvantage living with a - - -
5 a - - - an abusive husband that - - - that - - - con
6 - - - consistently, over years, causes - - - causes
7 abuse, whether it's physical, whether it's emotional,
8 what have you, right. They're - - - they're - - -
9 they're stuck there. They're victims.

10 CHIEF JUDGE LIPPMAN: Particularly
11 vulnerable, is your argument?

12 MR. SIM: Yes, yes.

13 CHIEF JUDGE LIPPMAN: Okay. Okay, counsel.
14 Let's - - - let's hear what your adversary - - - and
15 then you'll have rebuttal.

16 MS. PAULSON: Thank you, Your Honors. May
17 it please the court, Susan Paulson on behalf of the
18 city respondents.

19 CHIEF JUDGE LIPPMAN: Counsel, what about
20 domestic violence victims? As your adversary says,
21 they are so vulnerable and - - - and when the
22 authorities, in this case the police, give them
23 assurances you're going to be safe and the person is
24 in the custody of the police, why isn't that
25 something that a domestic violence victim who - - -

1 matters how you interpret those statements. I think
2 they're pretty strong.

3 MS. PAULSON: Your Honor, the statements
4 here were that you'll be provided protection. It
5 didn't - - - the police did not - - - certainly it
6 was not a guarantee of safety. And they didn't
7 describe - - -

8 CHIEF JUDGE LIPPMAN: But they - - - but
9 they have him - - -

10 MS. PAULSON: - - - what type of protection
11 they would - - -

12 CHIEF JUDGE LIPPMAN: - - - they have him
13 in their custody. And they're saying - - -

14 MS. PAULSON: He's in custody.

15 CHIEF JUDGE LIPPMAN: - - - you're all
16 right. What they're saying, in effect, is you're all
17 right, we have him.

18 MS. PAULSON: They - - -

19 CHIEF JUDGE LIPPMAN: You're going to be
20 okay.

21 MS. PAULSON: They actually then - - -

22 CHIEF JUDGE LIPPMAN: You'll know when
23 there's a problem.

24 MS. PAULSON: - - - update their statement.

25 CHIEF JUDGE LIPPMAN: No? Yes? Go ahead.

1 MS. PAULSON: In the phone call at 11
2 o'clock the desk officer had said he's in prison,
3 he'll be there for a while, according to the
4 plaintiff's statements which, for purposes of summary
5 judgment, we take to be correct.

6 CHIEF JUDGE LIPPMAN: But - - -

7 MS. PAULSON: And then according to the
8 plaintiff - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but in light of
10 those kinds of - - -

11 MS. PAULSON: - - - in Officer Reyes - - -
12 Officer - - -

13 CHIEF JUDGE LIPPMAN: In light of those
14 kinds of statements - - -

15 MS. PAULSON: Yes.

16 CHIEF JUDGE LIPPMAN: - - - why wouldn't we
17 need a further exploration of what went on here? Why
18 couldn't it be that, in this case, there really is a
19 special duty?

20 MS. PAULSON: Officer Reyes later updated
21 that statement when she called at 11 p.m. and said
22 he's going before a judge. He's going to be
23 sentenced. It was no longer a sen - - - a statement
24 that he was locked up and would be there for a while.

25 JUDGE RIVERA: Yeah, but that - - - but - -

1 - oh, but - - - but now it sounds - - -

2 MS. PAULSON: That - - -

3 JUDGE RIVERA: - - - like you've got a
4 conviction, whichever way, you've got this
5 conviction, plea, whatever it is; he's going to be
6 sentenced. And he's - - - what - - - what - - - what
7 is she supposed to think past that?

8 MS. PAULSON: Well, Your Honor - - -

9 JUDGE RIVERA: That he might get released?

10 MS. PAULSON: This - - -

11 JUDGE RIVERA: His sentence might include a
12 release?

13 MS. PAULSON: But this statement is not a
14 promise or assurance. It's a statement of the
15 process or the procedure. This statement is
16 analogous to the statement - - -

17 JUDGE RIVERA: Okay, but let me - - - let
18 me ask you this. Okay, so let - - - what - - - at
19 what point does a statement - - - what kind of
20 statement from an officer would result in the
21 creation of a special duty? I guess I'm concerned,
22 like, the concurrence that the - - - that there is -
23 - - now we've gotten to the point that it's almost a
24 per se immunity. There's almost nothing that an
25 officer can say. So what would an officer say - - -

1 MS. PAULSON: Yes, Your Honor.

2 JUDGE RIVERA: - - - that would be enough?

3 MS. PAULSON: In order to satisfy the first
4 Cuffy prong - - -

5 JUDGE RIVERA: Okay.

6 MS. PAULSON: - - - a promise or action, it
7 would have to be something more similar to the
8 statement made in Valnez - - - Valdez of a certain
9 action in a specified time period. In Valdez she was
10 told they would arrest immediately. It was a certain
11 action they were going to take in a specified time
12 period. In Valdez there's no justified - - -

13 JUDGE RIVERA: Here, this guy's already in
14 custody. He's about to be sentenced. What - - -

15 MS. PAULSON: Because - - -

16 JUDGE RIVERA: You're saying that's still
17 not enough?

18 MS. PAULSON: It's not enough here because
19 they didn't - - - the - - - the statements here, it
20 was that he was in front of a judge. He - - - they
21 were going to sentence him. There was no - - - there
22 was no promise of an action. Certainly, there was no
23 action after that. So the - - - the statement itself
24 is not - - -

25 CHIEF JUDGE LIPPMAN: So if they - - - if -

1 - - if - - - if the comment was - - -

2 MS. PAULSON: - - - is not specific.

3 CHIEF JUDGE LIPPMAN: - - - he's in front
4 of a judge. He's going to be sentenced. I guarantee
5 you he will remain in custody and you will be safe,
6 count on it. That's enough?

7 MS. PAULSON: That - - - that might be a
8 stronger - - -

9 CHIEF JUDGE LIPPMAN: That might be enough.

10 MS. PAULSON: - - - case.

11 CHIEF JUDGE LIPPMAN: If that only - - -

12 MS. PAULSON: A stronger case for the first
13 prong - - -

14 CHIEF JUDGE LIPPMAN: If that only might be
15 enough, boy, where are we in terms of the state of
16 the law and the protection - - -

17 MS. PAULSON: It would be a - - -

18 CHIEF JUDGE LIPPMAN: - - - of domestic
19 violence victims?

20 MS. PAULSON: It would be a stronger case
21 for the first prong.

22 CHIEF JUDGE LIPPMAN: A stronger case?

23 MS. PAULSON: Yes, Your Honor. It'd have -
24 - -

25 CHIEF JUDGE LIPPMAN: They can say I

1 guarantee you - - -

2 MS. PAULSON: - - - the police cannot

3 guarantee - - -

4 CHIEF JUDGE LIPPMAN: No, no let - - - let

5 me finish, counsel. I guarantee you - - - I

6 guarantee your safety, he is going to prison. You

7 have nothing to fear. Count on it. Rely on what we

8 say. Just a stronger case, right, a little bit more

9 of a stronger case?

10 MS. PAULSON: Your Honor, the police

11 department takes these cases very seriously. They

12 took her to the domestic violence - - -

13 CHIEF JUDGE LIPPMAN: Don't you agree that

14 would be enough?

15 MS. PAULSON: That would be enough for an

16 assumption of a duty. And then there would have to

17 be whether or not she could justifiably rely on - - -

18 JUDGE ABDUS-SALAAM: But would it require

19 some action?

20 MS. PAULSON: - - - the statement without -

21 - - pardon me?

22 JUDGE ABDUS-SALAAM: Would it require some

23 action in addition to the statement or - - -

24 MS. PAULSON: Yes, it would require some

25 action in addition.

1 JUDGE ABDUS-SALAAM: What action would be
2 required?

3 MS. PAULSON: I guess what action would be
4 required under those facts where they say that they -
5 - - he's in prison?

6 JUDGE SMITH: She - - - she - - - she was
7 just - - - if she relaxed her guard, that would do it
8 presumably?

9 MS. PAULSON: I guess, yes, Your Honor, if
10 she relaxed her guard than that would be enough to
11 satisfy the - - -

12 JUDGE RIVERA: What - - - what would be the
13 point of saying the - - - what's the point of saying
14 he's in custody, he's about to be sentenced, he's
15 going to prison, you don't have to worry, if not to -
16 - - to not just feel better about the world and our
17 legal system, but to feel I, tonight, do not have to
18 worry someone's going to come and stab me with an ice
19 pick?

20 MS. PAULSON: Your Honor, they were giving
21 her assurances that they were taking the case and
22 setting - - - they processed - - -

23 JUDGE RIVERA: Okay.

24 MS. PAULSON: - - - the arrest and sent it
25 before a judge.

1 JUDGE RIVERA: Okay.

2 MS. PAULSON: Where it was handed over to
3 the district attorney's office. They took her
4 complaint seriously. They put her in touch with the
5 domestic violence unit. They tried to allay her
6 fears. In the past when she had called, they had
7 arrived at her home. They had arrested him.

8 JUDGE RIVERA: Is it - - -

9 MS. PAULSON: They had processed his
10 arrest.

11 JUDGE RIVERA: Is it then - - - let me.
12 I'm sorry then.

13 MS. PAULSON: This is the protection that
14 they provide.

15 JUDGE RIVERA: Sorry to interrupt Judge
16 Smith.

17 JUDGE SMITH: That's okay, counsel.

18 JUDGE RIVERA: I guess I'll - - - that'll
19 be my other question. I just - - - I'm just trying
20 to get a sense of where, from the City's perspective,
21 it's - - - it's finally enough where you say okay,
22 you've meet the - - - the requirements of our
23 jurisprudence? If - - - it - - - if, in addition to
24 what she alleges they said, they said but I cannot
25 assure you of anything, I assume you then say there's

1 absolutely no guarantee.

2 MS. PAULSON: There's no justifiable
3 reliance, correct.

4 JUDGE RIVERA: But if they don't say that
5 can't she assume that if they're not saying anything
6 about what I can and can't believe and that they if
7 they're telling me that the man is about to be
8 sentenced, I don't have to worry? What's the point
9 of telling me that if not to make me feel that I
10 don't have to worry?

11 MS. PAULSON: The point is to allay her
12 fears in the moment, but it doesn't create
13 justifiable reliance that has no end. There are
14 various cases where the plaintiffs could rely, for a
15 period of time, and then relax their guards and it
16 was no longer reasonable to rely on.

17 JUDGE SMITH: If I could - - - if I could -
18 - -

19 JUDGE PIGOTT: Mr. Sim - - - Mr. Sim makes
20 the point that - - - that - - - that it's at least a
21 question of fact.

22 MS. PAULSON: That might be a question of
23 fact there. Here - - -

24 JUDGE SMITH: If I could - - - if I could
25 turn for a minute to the - - - the - - - you've been

1 asked a lot of questions about what would - - - what
2 is best for domestic violence victims - - -

3 MS. PAULSON: Yes, Your Honor.

4 JUDGE SMITH: - - - the underlying policy
5 question. Can you address for a minute the - - - the
6 - - - the - - - when - - - when police officers do
7 their best to reassure a domestic violence victim,
8 and sometimes they go - - - they - - - they might be
9 incaut - - - overstate the case. They forget to say
10 I'm not making any promises. And you can see why you
11 might not want to say to a very nervous domestic
12 violence victim well, I'm not making any promises.
13 You can't rely on a word I say. Isn't there a danger
14 that allowing the damage remedy, telling police
15 officers, in effect, you've got to be very careful
16 what you say or you'll get sued, isn't that going to
17 be bad for domestic violence victims? Isn't that
18 going to - - - going to im - - - impair the
19 efficiency of - - -

20 MS. PAULSON: Yes, Your Honor.

21 JUDGE SMITH: - - - of the police trying to
22 protect them?

23 MS. PAULSON: I believe that that is
24 absolutely the case. I think that it will, you know,
25 hamstring the police in their ability to do their job

1 and to address these very sensitive and difficult
2 situations where the plaintiff is, justifiably, very
3 afraid for her safety. And they have taken the steps
4 that they think are - - - that are within their
5 jurisdiction to take, in that moment, to address her
6 safety concerns.

7 JUDGE RIVERA: But counsel, is it - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but they have a
9 duty not to mislead if they - - -

10 MS. PAULSON: Yes, Your Honor.

11 CHIEF JUDGE LIPPMAN: In other words, I - -
12 -

13 MS. PAULSON: And I don't - - -

14 CHIEF JUDGE LIPPMAN: - - - this an area,
15 though, and they be very careful what they say and
16 don't say. And, yeah, it is true that if you - - -
17 if you hold them liable every time they say gee,
18 don't worry about it, you inhibit their ability to do
19 their job. But by the same token, I mean, you do
20 have to have some care of the words you say. You've
21 got - - - people's lives are at stake. And you're
22 saying to them, well, you know, listen, we've got
23 this guy. It's okay. You're not at risk. Don't
24 worry about it. If there's anything that's going to
25 happen, you'll know about it. That's pretty strong,

1 isn't it?

2 MS. PAULSON: Certainly the police have to
3 be very careful with their language. But as Justice
4 Rivera pointed out, in the past she was aware that he
5 had been arrested once previously. And unbeknownst
6 to her, two days later he was released and she only
7 learned of it - - -

8 JUDGE GRAFFEO: Does - - - does the - - -

9 MS. PAULSON: - - - when he appeared on her
10 doorstep.

11 JUDGE GRAFFEO: - - - record here tell us
12 why she wasn't notified in this instance?

13 MS. PAULSON: All - - - all that the record
14 says is Officer Reyes was asked if she knew what
15 happened - - - if she goes to arraignment. She said
16 it's not police procedure to attend an arraignment.
17 Did she - - - in this case and did she know what
18 happened? No. Did she contact the plaintiff? No.
19 So - - -

20 JUDGE GRAFFEO: So the record doesn't
21 indicate she was notified that he was released?

22 MS. PAULSON: Absolutely not. I - - - I
23 think the plaintiff's testimony is that she did not
24 know that he was released.

25 JUDGE ABDUS-SALAAM: Counsel, before you

1 sit down - - -

2 MS. PAULSON: Yes, Your Honor.

3 JUDGE ABDUS-SALAAM: - - - I think you have
4 another claim here, and I just want to ask a question
5 about it. Assume, for the sake of this argument,
6 that we disagree with your position, there is
7 justifiable reliance and there's a special
8 relationship and this case goes back down. Are you
9 now going to raise an immunity defense because this
10 is a discretionary versus a ministerial act?

11 MS. PAULSON: Yes, Your Honor. The City
12 absolutely would raise an immunity defense here. It
13 - - - the - - - it was a - - - I'm not sure which act
14 here the plaintiff is focusing on in the plaintiff's
15 argument about - - - but the governmental immunity
16 would attach because Officer Reyes' decision, she
17 said that it's not policy to attend an arraignment,
18 in certain circumstances it might happen. And
19 certainly that would have been a discretionary
20 judgment if, under the circumstances of this case,
21 she had decided - - -

22 JUDGE SMITH: On the other hand, if they
23 left - - - if they - - -

24 MS. PAULSON: - - - to do so.

25 JUDGE SMITH: If they, when they handed the

1 file to the DA, they left out the order of
2 protection, that would be a ministerial error,
3 wouldn't it?

4 MS. PAULSON: That would be a ministerial
5 error, yes, Your Honor.

6 JUDGE SMITH: Okay, so it would really
7 depend entirely on the facts as they develop?

8 MS. PAULSON: Absolutely, Your Honor, it
9 would.

10 CHIEF JUDGE LIPPMAN: Okay, counselor.
11 Thanks.

12 JUDGE RIVERA: Counsel - - - I'm sorry. I
13 just - - - I - - -

14 CHIEF JUDGE LIPPMAN: Judge Rivera.

15 JUDGE RIVERA: I know we've been talking
16 about domestic violence victims in particular, but
17 the point about putting at ease and - - - and giving
18 some sense of - - - not - - - not security but
19 otherwise a sense of, perhaps, some level of comfort,
20 does that not apply to the majority of victims of
21 crime?

22 MS. PAULSON: Absolutely, Your Honor.

23 JUDGE RIVERA: Then what is the uniqueness?
24 I think there's a sense from the bench, perhaps, that
25 there is. But from the City's perspective, what, if

1 any, uniqueness is there when it comes to victims of
2 domestic violence?

3 MS. PAULSON: From the City's perspective,
4 I don't think that domestic violence are necessarily
5 - - - have a special uniqueness in these
6 circumstances. All crime victims or victims of
7 threatened crime are an extremely vulnerable and
8 scared population. And for all of them the police
9 try to provide some measure of assurance in addition
10 to performing the - - -

11 JUDGE RIVERA: I - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but - - - but,
13 counsel, please.

14 MS. PAULSON: Yes, Your Honor.

15 CHIEF JUDGE LIPPMAN: We make so many
16 special accommodations for domestic violence victims
17 by the police, by the entire legal community because
18 they are different because they are particularly
19 vulnerable. And the police, above everybody, make a
20 totally different set of protocols when you deal with
21 domestic violence victims. We know that. We
22 understand - - -

23 MS. PAULSON: Yes.

24 CHIEF JUDGE LIPPMAN: - - - the science of
25 domestic violence has changed the view of the law

1 enforcement community and everybody else in the - - -
2 in the legal community as to how to treat domestic
3 violence vic - - - victims. They are different than
4 everybody else. And you can argue the rights and
5 wrongs of this - - -

6 MS. PAULSON: Yes.

7 CHIEF JUDGE LIPPMAN: - - - particular
8 case. But they're not the same - - -

9 MS. PAULSON: Well, and that was our - - -

10 CHIEF JUDGE LIPPMAN: - - - as every other
11 victim.

12 MS. PAULSON: That's why she was also
13 directed to the domestic violence unit.

14 CHIEF JUDGE LIPPMAN: Okay.

15 MS. PAULSON: To speak to the domestic
16 violence - - -

17 CHIEF JUDGE LIPPMAN: That - - - but that's
18 exactly what I'm saying. Your answer was, well all
19 victims are vulnerable.

20 MS. PAULSON: Perhaps I misunderstood the
21 question.

22 CHIEF JUDGE LIPPMAN: I don't - - - I don't
23 think - - - I don't think that's accurate that all -
24 - -

25 MS. PAULSON: Okay.

1 CHIEF JUDGE LIPPMAN: Based on what we know
2 about the science of crime, the science of domestic
3 violence, that all victims are the same, well, that's
4 not the case.

5 MS. PAULSON: Okay, I'm sorry, I perhaps -
6 - -

7 CHIEF JUDGE LIPPMAN: That's why we have a
8 lot of these - - -

9 MS. PAULSON: - - - misunderstood the
10 question.

11 CHIEF JUDGE LIPPMAN: That's why we have
12 specialized courts, that the court system is set up
13 for domestic violence victims. That's why the police
14 teach - - - treat them differently. So - - - so
15 there is a difference. Whether it fits into this
16 legal schematic is another issue in terms of special
17 duty, et cetera. But they are different. You would
18 acknowledge that, wouldn't you?

19 MS. PAULSON: I certainly would, Your
20 Honor. I - - - I understood the question to be asked
21 whether they were situated differently in their need
22 for assurance. And I guess in that regard I - - - I
23 thought the need for assurance - - - police
24 reassuring crime victims that they're trying to
25 address their security concerns is similar. But with

1 domestic violence, certainly, they take it another
2 step in - - -

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 JUDGE RIVERA: And I - - - and I - - - I
5 think, in part, my question was driven because,
6 although Chief Judge has certainly made - - - made an
7 excellent point to you, there is a different history
8 of police response in domestic violence cases that
9 perhaps adds another level of uncertainty to the - -
10 - with respect to a victim, whether or not the police
11 will indeed respond, how they will respond, how will
12 the judicial system respond. That history is
13 different than, perhaps, for some other victims of
14 violence.

15 MS. PAULSON: Sure, Your Honor. And here
16 the history or response, fortunately, was quite
17 responsive when she called - - -

18 JUDGE RIVERA: To her in her case?

19 MS. PAULSON: For her case. And they had
20 responded each time she had called and arrested
21 previously - - - and arrested where, you know,
22 appropriate to do so.

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

25 MS. PAULSON: Thank you. Thank you, Your

1 Honors.

2 CHIEF JUDGE LIPPMAN: Let's get to
3 rebuttal. Counselor, are domestic violence victims
4 different?

5 MR. SIM: Yes, they're very different.

6 CHIEF JUDGE LIPPMAN: Is our law different
7 or should it be different? You think it - - -

8 MR. SIM: I - - - I think it should be
9 different. When - - - when - - -

10 CHIEF JUDGE LIPPMAN: In what sense?

11 MR. SIM: - - - a woman - - - woman is - -
12 - is vulnerable to an abusive husband, she relies on
13 him for, not only emotional, right. There's - - -
14 there's financial, right. This - - - this woman - -
15 - Ms. Coleson, she had a son, a stepson of - - - of
16 Samuel Coleson and - - - and a child based on their
17 marriage. She had two children. She was earning
18 \$6.25 an hour.

19 JUDGE PIGOTT: What - - - what - - - I - -
20 - I - - - I asked you this before. I wasn't sure I
21 got an answer. What - - - what, in your view, should
22 have been done here?

23 MR. SIM: I - - - I think at a very basic
24 minimum, once - - - once the assurance was given,
25 once he was in custody, that if he was released they

1 should have called her and said listen, he's
2 released.

3 JUDGE PIGOTT: They being?

4 MR. SIM: The police off - - - the police.
5 If - - - if - - - you know, I mean, I was listening -
6 - - -

7 JUDGE SMITH: Regarding everything you said
8 about domestic violence victims and how - - - how - -
9 - how much - - - how much special treatment they
10 need, is it really a good idea to send the message to
11 the police: be very careful how you talk to a
12 domestic violence victim; if you're too reassuring
13 you'll get sued?

14 MR. SIM: Oh, reassuring - - - I mean the
15 whole point is - - -

16 JUDGE SMITH: If you - - - be sure you
17 don't make any promises you can't keep, which, of
18 cour - - - obviously, a good idea for everyone. But
19 is that the best message to be sending to - - - to
20 police who are trying to comfort very scared people?

21 MR. SIM: But - - - but is that also a best
22 message sent to the domestic violence victims that
23 you can't rely on anything the police tells you?
24 That if a police tells you we're going to protect you
25 - - -

1 JUDGE SMITH: Well, I - - - I - - - I mean
2 aren't you - - - aren't you - - - my problem is that
3 you're going to, in effect, send that message because
4 the police are going to get - - - get the memo - - -
5 there may be a literal memo. And every - - - every
6 interview with the domestic violence victim is going
7 to believe - - - is going to begin with now I can't
8 guarantee you anything. I don't make any promises.
9 You can't rely on a word I tell you. Is that the
10 right message to send?

11 MR. SIM: I think that's the right message
12 if that's the message of the court. If - - - if
13 that's the state of the law, then that has to be the
14 message.

15 CHIEF JUDGE LIPPMAN: Well, I think - - -

16 JUDGE RIVERA: Well, isn't that the message
17 of these cases?

18 MR. SIM: Yeah, well - - -

19 JUDGE RIVERA: The message of these cases
20 is I try - - - well, in her case she's arguing I
21 believed the officers. They let me down. I have a
22 serious - - - I - - - I suffered seriously as a
23 result, and I have no remedy for it.

24 MR. SIM: Well - - -

25 JUDGE RIVERA: That's the message unless we

1 hold otherwise, right?

2 MR. SIM: And - - - and I relied on that
3 statement, right. There were reasons, factors, why I
4 relied other than the words - - -

5 CHIEF JUDGE LIPPMAN: Counsel, is it - - -
6 isn't that why we have these domestic violence units
7 within the police department? So - - - so that we
8 train them as to what to say and what not to say and
9 how to reassure people without making assurances that
10 you shouldn't make?

11 MR. SIM: Yes.

12 CHIEF JUDGE LIPPMAN: I mean it's very
13 basic. This - - - this is not just an average, you
14 know, police officer and they're dealing with a
15 domestic violence victim who just says oh, gee, don't
16 worry, it's going to be all right. I would assume
17 these are people who should be trained in this area?

18 MR. SIM: Yes, and in this particular case,
19 there's - - - there's no evidence that she was turned
20 over to domestic violence. When - - - when they
21 testified to - - - to Officer Reyes whether domestic
22 violence was brought in, she didn't know. Asked her
23 if any history of Samuel Coleson was performed. She
24 didn't know. So the question becomes what did they
25 do for her? What did they do for this woman that - -

1 - that - - - that, yep, the City - - - the City
2 argues well, she had prior incidents in the past and
3 - - - and the City, the police, never came through
4 for her before. So why should she expect protection
5 now. Is that the message that - - - that we want to
6 send to any victim that - - - that relies on the
7 police for protection?

8 CHIEF JUDGE LIPPMAN: Okay, counsel.
9 Thanks.

10 MR. SIM: Thank you very much.

11 CHIEF JUDGE LIPPMAN: Thank - - - thank you
12 both. Appreciate it.

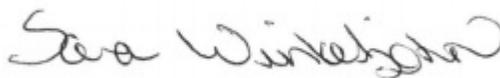
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Coleson v. City of New York, No. 191 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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