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COURT OF APPEALS

STATE OF NEW YORK

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MARGERUM, ET AL.,

Appellant,

-against-

No. 7

CITY OF BUFFALO,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
January 06, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: And we'll go to  
2 Margerum v. City of Buffalo.

3 Counsel, proceed. Do you want rebuttal  
4 time, counsel?

5 MR. FLEMING: Yes, sir. May I please have  
6 five minutes?

7 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

8 MR. FLEMING: There's three major issues  
9 before the court today. One is our appeal as it  
10 relates to damages and then essentially the cross-  
11 appeals of the respondents claiming that the issue of  
12 liability wasn't established and also raising a  
13 notice of claim issue. In my first ten minutes, I'd  
14 like to address the damages issue first, then the  
15 liability issue, and then reserve.

16 On the damages question, a careful review  
17 of the Appellate Division's determination will - - -  
18 will cause one to conclude that there was much  
19 discussion about what they're called, the injured-on-  
20 duty defendants or - - - claimants - - -

21 CHIEF JUDGE LIPPMAN: Right.

22 MR. FLEMING: - - - complainants. And then  
23 there is no discussion of the issues of overtime or  
24 promotion. And you can tell by the papers that have  
25 been sub - - - submitted by the respective parties

1 here that the issue of overtime and promotions was a  
2 major part of the lawsuit and a major part of the  
3 discussion by the two experts. It's our - - - my  
4 view and our view that the Appellate Division missed  
5 on that, that the - - - Judge Michalek, in a non-jury  
6 trial basis in a lengthy decision after a lengthy  
7 trial, that Judge Michalek made careful factual  
8 determination - - -

9 CHIEF JUDGE LIPPMAN: You're saying the - -  
10 - the AD didn't have the power to make the - - - the  
11 rulings that they did on damages?

12 MR. FLEMING: I'm not saying that, Your  
13 Honor. I'm saying that they - - - by not mentioning  
14 the words overtime and not mentioning the words  
15 promotion, and also focusing solely on the injured-  
16 on-duty status as opposed to the other eleven or ten  
17 claimants here, that they did not get it right as it  
18 relates to those other plaintiffs.

19 JUDGE PIGOTT: But wouldn't that - - -  
20 wouldn't that inspire a motion to reargue in front of  
21 the Appellate Division, because we don't have any  
22 fact-finding ability?

23 MR. FLEMING: Con - - - conceivably, Your  
24 Honor. But the - - - the issue here, though, is  
25 going all the way back to the determination by the

1 Appellate Division to overturn, essentially, what the  
2 find - - - findings were that this court has spoken  
3 on the issue of in a non-jury setting how much  
4 recognition of the fact-finder's findings have to be  
5 held. And so I - - - I - - - I think it's the  
6 Thoreson decision. It was a discrimination claim  
7 years ago.

8 CHIEF JUDGE LIPPMAN: You're saying the  
9 findings weren't supported?

10 MR. FLEMING: I think the findings by Judge  
11 Michalek were entirely supported, Your Honor.

12 CHIEF JUDGE LIPPMAN: No, no, no, the AD?

13 MR. FLEMING: I think they were  
14 unsupported. I do, Your Honor.

15 CHIEF JUDGE LIPPMAN: By evidence?

16 MR. FLEMING: Say again?

17 CHIEF JUDGE LIPPMAN: Unsupported by  
18 evidence?

19 MR. FLEMING: Unsupp - - - and also not  
20 commented on by evidence, Your Honor, if you look - -  
21 - if you look there. In other words the - - -

22 CHIEF JUDGE LIPPMAN: So they in their  
23 conclusory fashion did it without giving the backup  
24 as to why they get to where they go?

25 MR. FLEMING: I think that happened, Your

1 Honor. I think that the - - - the focus of the trial  
2 and the lengthy decision by Judge Michalek talked  
3 about overtime decisions, and he made a factual  
4 determination as it related to what overtime period  
5 the - - - I mean it was - - - there were days of  
6 testimony about do we apply the 2000 to 2005 time  
7 frame or the 2006 to 2000- and - - -

8 JUDGE READ: So if we agree to you - - - if  
9 we agree with you, what do we do, remit it to them?  
10 Remit it to the Appellate Division for them to make a  
11 determination?

12 MR. FLEMING: No, I think that the - - -  
13 the Appellate Division, the application to the  
14 Appellate Division - - - I - - - I don't think it is  
15 a remitter. I think it's a - - - a determination  
16 that the original facts as - - - as by the fact  
17 finder in this case just as - - -

18 CHIEF JUDGE LIPPMAN: You want us to go  
19 back to that?

20 MR. FLEMING: - - - just as if the jury had  
21 rendered a determination for 1.5 million and the  
22 Appellate Division set it aside and said we don't - -  
23 - you know, it's - - - it's - - - go back to the - -  
24 - the original determination. That's - - - we're  
25 asking it to be restored to what the - - -

1 CHIEF JUDGE LIPPMAN: Let's - - - let's - -  
2 - let's say we agree with you. Let - - - go back to  
3 liability - - -

4 MR. FLEMING: On the lia - - -

5 CHIEF JUDGE LIPPMAN: - - - and the - - -  
6 and the Ricci standard and - - - and whether it was  
7 met or not met in this situation.

8 MR. FLEMING: All right. We have to go all  
9 the way back to Judge Michalek in this case, pre-  
10 discovery in our case, pre-suit, observing the  
11 witness who made the decision.

12 CHIEF JUDGE LIPPMAN: The commissioner?

13 MR. FLEMING: The commissioner, Matarese.  
14 He observed him and made factual observations about  
15 what he observed. He also had somewhat of a record.  
16 The respondents here want to say well, why isn't this  
17 - - - they had expert opinion. Go all the way back  
18 to the testimony and as cited by Judge Michalek. And  
19 the records reflects that an attorney on behalf of  
20 the respondent City, even says in the record, "It's  
21 not our position that Commissioner Matarese ever saw  
22 the transcripts or relied on them to include the  
23 Murphy transcript, which, all of a sudden, the City,  
24 years after the fact, is saying, oh, he was relying  
25 on that.

1                   Their own attorney said that he wasn't all  
2                   the way back in October of 2006. Keep in mind that  
3                   for fifteen years the City argued - - - for fifteen  
4                   years - - - in front of Judge Curtin, who had  
5                   originally imposed the remedial decree. For fifteen  
6                   years they argued these tests are perfect valid.

7                   JUDGE ABDUS-SALAAM: Even if that's true,  
8                   counsel, based on the Ric - - - Ricci - - - Ricci  
9                   standard, isn't the City allowed to argue essentially  
10                  that this is a perfectly valid test but still be  
11                  concerned because their own expert tells them that  
12                  it's not? They're arguing that it is, but their own  
13                  expert says we have some real concerns about this  
14                  test.

15                  JUDGE READ: No, an expert says don't call  
16                  me.

17                  JUDGE ABDUS-SALAAM: Right.

18                  MR. FLEMING: Keep in mind that the - - -  
19                  that before Judge Curtin and before these  
20                  determinations were made, Your Honor, in March of  
21                  2005, their own expert submitted, an opposition - - -  
22                  along with two depositions of the - - - the city or  
23                  the state drafters of the exam, they submitted an  
24                  opposition to a motion for summary judgment by the  
25                  MOCHA people. They submitted an opposition and - - -

1 and - - - and Abrams was one of them. This is way  
2 after the fact that Abrams comes into the picture.  
3 Keep in mind that same expert was their expert in  
4 2001. Yet they published the same exact exam in 2002  
5 and certified the list.

6 CHIEF JUDGE LIPPMAN: But you're saying  
7 that what he did was not based on the experts or on  
8 the opinions?

9 MR. FLEMING: I think that the record is  
10 clear that it isn't. He used the expression - - -

11 CHIEF JUDGE LIPPMAN: Just the fear - - -  
12 what was the fear of the litigation or the liability  
13 or - - -

14 MR. FLEMING: He sa - - - he sai - - - his  
15 words, "It's about trying to solve this, what I  
16 considered to be serious racial imbalance." That's  
17 what he testified to.

18 JUDGE ABDUS-SALAAM: But he - - - he might  
19 have testified to that but it was based on a decree  
20 that said there was a serious racial imbalance in the  
21 actual statistics of the fire department itself. So  
22 he didn't just pick that notion out of the air.  
23 There was evidence showing that there was a racial  
24 imbalance; was there not?

25 MR. FLEMING: There was a prima facie case

1 made. I mean it's - - - it's clearly - - -

2 JUDGE ABDUS-SALAAM: Yeah, because they  
3 were still litigating it for - - -

4 MR. FLEMING: Still litigating it, right.

5 JUDGE ABDUS-SALAAM: - - - for, as you  
6 said, for fifteen years they were litigating it.

7 MR. FLEMING: And the Ricci decision makes  
8 clear a prima facie, that's - - - that's not - - -  
9 that's not the standard.

10 CHIEF JUDGE LIPPMAN: What's the stand - - -  
11 - what's the standard - - -

12 MR. FLEMING: The standard is - - -

13 CHIEF JUDGE LIPPMAN: - - - in your own  
14 words as to what Ricci - - - Ricci you're talking  
15 about - - - Ricci we're talking - - -

16 MR. FLEMING: Strong basis in evidence.

17 JUDGE ABDUS-SALAAM: A substantial basis in  
18 evidence.

19 MR. FLEMING: Right.

20 JUDGE ABDUS-SALAAM: Strong - - - or a  
21 substantial basis in evidence. And you're - - -  
22 you're saying that - - -

23 MR. FLEMING: Of - - - of disparate impact  
24 liability.

25 JUDGE ABDUS-SALAAM: Yes.

1 MR. FLEMING: Okay. That's not the - - -  
2 in Ricci and in all the cases, especially Ricci,  
3 there was a prima facie case made.

4 JUDGE RIVERA: So, counsel, let me ask you  
5 a different question. Why - - - why do we have to  
6 apply the Ricci standard?

7 MR. FLEMING: Well, if we apply the  
8 standard that was in place at the time - - -

9 JUDGE RIVERA: Yeah.

10 MR. FLEMING: - - - the strict scrutiny  
11 standard, Judge Michalek appropriately commented on  
12 that in the strict scrutiny sense to say it has to be  
13 a narrow, narrow tailoring. Keep in mind it wasn't  
14 just a lieutenant's list. He killed all the lists.

15 JUDGE READ: Yeah. Is - - - I was going to  
16 ask you about that. Eh--do you - - - you - - - you -  
17 - - you think he shouldn't have killed any of them.  
18 But do you recogni - - - one of them there certainly  
19 was, wouldn't you acknowledge, a stronger basis in  
20 evidence - - -

21 MR. FLEMING: I - - - I - - -

22 JUDGE READ: - - - at least.

23 MR. FLEMING: Not as - - - the - - -  
24 there's a stronger base in that there was a prima  
25 facie case made.

1 JUDGE READ: Right. Right.

2 MR. FLEMING: There was a prima facie case  
3 made.

4 JUDGE READ: For the lieutenants, was it?

5 MR. FLEMING: But a strong basis in  
6 evidence of liability and it goes on. Ricci is - - -

7 JUDGE PIGOTT: Why do you - - - why do you  
8 emphasize on liability? I mean - - -

9 MR. FLEMING: Because - - -

10 JUDGE PIGOTT: - - - he's a - - - he's a  
11 commissioner. And - - - and he says if I do what I'm  
12 supposed to do with these tests, I'm going to appoint  
13 nothing but white guys, and I'm going to be in  
14 trouble.

15 MR. FLEMING: Right. And if - - - and if  
16 it - - -

17 JUDGE PIGOTT: So can he - - - can he do  
18 something about that?

19 MR. FLEMING: He's therefore addressing the  
20 issue of damages as opposed to liability.

21 JUDGE PIGOTT: Or can - - -

22 MR. FLEMING: Keep, in fact, our record  
23 here, though, Judge.

24 JUDGE PIGOTT: Well, what - - - I mean wait  
25 a minute. Wait a minute. Liability means I'm going

1 to get sued. And he says is if I do - - - if I  
2 follow - - - oh, it doesn't mean that? Okay. Go  
3 ahead.

4 MR. FLEMING: I - - - I think Ricci's - - -  
5 I think Ricci addresses that and says that's not  
6 enough. In Ricci, keep in mind that there were two -  
7 - - two potential litigants here. There was the - -  
8 - the - - - the white guys who were protesting and  
9 the - - - and the African Americans who were saying  
10 we didn't score that well on the list. So that's  
11 always - - - that's always a - - -

12 JUDGE PIGOTT: This is my point. What I'm  
13 saying is you got a commissioner who says I can see  
14 the iceberg I'm going to hit. It's a list that's  
15 going to tell me I got to appoint nothing but white  
16 guys. I can't do Hispanics. I can't do Blacks. And  
17 I know that that's the wrong thing to do, because  
18 I've stayed up on the law in this area. What should  
19 he do?

20 MR. FLEMING: First of all, what should  
21 have happened - - -

22 JUDGE PIGOTT: No, what should he do?

23 MR. FLEMING: What he should do is do what  
24 Judge Curtin had already ordered was permissible was  
25 promote for the safet - - - safety and - - - and

1 public necessity.

2 JUDGE PIGOTT: Well, what does that mean in  
3 terms of how - - - of the numbers in this particular  
4 case?

5 MR. FLEMING: In this particular case there  
6 wa - - - for instance, Greg Pratchett was the third  
7 person on the lieutenant's list who had scored higher  
8 than four of the plaintiffs in this case, an African  
9 American who would have been promoted.

10 JUDGE PIGOTT: That's one.

11 MR. FLEMING: That - - - that is one, Your  
12 Honor. But the - - - but the - - - the test that  
13 Ricci points out is not what are you going to do way  
14 after the fact. The test is not what do I want to do  
15 because I smell a racial imbalance.

16 JUDGE RIVERA: But the underlying - - -

17 MR. FLEMING: The test is did I - - -

18 JUDGE RIVERA: But the underlying point is  
19 that whether or not the City believes that it may  
20 liable because the tests are unsustainable under the  
21 law. Is there something wrong with the tests, right?  
22 What - - - what did he believe in the moment? They  
23 believed that he was open to liability and he's got  
24 his own people telling him we think there's something  
25 wrong with the test.

1 MR. FLEMING: Interestingly - - -

2 JUDGE RIVERA: It's not what the list looks  
3 like. It's about what the test is about that that is  
4 what leads to the names on the list, right? That's  
5 the underlying problem.

6 MR. FLEMING: Well, the - - - the - - - the  
7 City, by all of its admissions here, by all of its  
8 contentions in front of Judge Curtin who had entered  
9 the original remedial decree - - -

10 JUDGE RIVERA: Um-hum.

11 MR. FLEMING: - - - by 2006, at that point  
12 in time for eight years, and then even at Matarese's  
13 testimony on October of 2006, he says we have been  
14 defending the test as valid.

15 JUDGE RIVERA: Um-hum.

16 MR. FLEMING: We've been depending on the  
17 test is valid. There's a fork in the road.

18 JUDGE PIGOTT: Take it. I'm - - - I'm  
19 being facetious but that's what I'm - - - what - - -  
20 what - - - what do you thi - - - what should Matarese  
21 have done in your view?

22 MR. FLEMING: Matarese at - - - at that  
23 point in time should have promoted the people that  
24 needed to be promoted through the time periods that  
25 had always been honored. If he had - - -

1                   JUDGE PIGOTT: They would have all been - -  
2                   - they would have all been - - - except one been  
3                   white, right?

4                   MR. FLEMING: I think there was an African-  
5                   American captain as well, but I can't recall the  
6                   record, Your Honor.

7                   JUDGE PIGOTT: Okay. But - - - but you're  
8                   saying appoint all of - - - all of them even though  
9                   you believe that this is going to create a further  
10                  racial imbalance in the department?

11                  MR. FLEMING: They had already been  
12                  selected, Your Honor.

13                  JUDGE PIGOTT: I - - - I understand, but  
14                  you're saying yes.

15                  MR. FLEMING: I'm saying yes.

16                  JUDGE PIGOTT: The point, even though - - -

17                  MR. FLEMING: I'm saying the law required  
18                  it.

19                  JUDGE PIGOTT: - - - even though there's  
20                  going to be a further racial imbalance in the  
21                  department, I'm going to appoint these people?

22                  MR. FLEMING: I think that's - - -

23                  JUDGE PIGOTT: Do you think that might have  
24                  exposed him to liability?

25                  MR. FLEMING: I do not under the

1 circumstances that he and his - - -

2 JUDGE PIGOTT: Okay.

3 MR. FLEMING: - - - attorney staff for  
4 eight years have been lobbying - - -

5 CHIEF JUDGE LIPPMAN: Okay, counsel.  
6 You'll have your rebuttal time. Let's hear from the  
7 other side.

8 JUDGE PIGOTT: Is he right, Mr. Markel?

9 MR. MARKEL: He's not, on either score. I  
10 think the court's questions have it exactly right.  
11 The time to look at the action, number one, is at the  
12 time it was taken. Not what happened at some other -  
13 - -

14 CHIEF JUDGE LIPPMAN: What did he see at  
15 the time it was taken, the commissioner?

16 MR. MARKEL: What the commissioner said at  
17 the time - - -

18 CHIEF JUDGE LIPPMAN: What did he see?

19 MR. MARKEL: What did he see?

20 CHIEF JUDGE LIPPMAN: What - - - what was  
21 the situation - - -

22 MR. MARKEL: Certainly, I can go through  
23 that.

24 CHIEF JUDGE LIPPMAN: - - - at the very  
25 time when he made the decision?

1                   MR. MARKEL: Well, at the very time he made  
2                   the decision, you have to start with the sequence of  
3                   events. In 2001, he had determined that - - - and  
4                   the experts supported this, that there was a prima  
5                   facie supportable of disparate impact. Subsequently  
6                   to that, of course this is a civil service exam,  
7                   statistics alone aren't enough reason to act based  
8                   just on the fact they show a disparate impact.  
9                   During the course of the MOCHA litigation, evidence  
10                  came out through depositions of the Civil Service  
11                  people, again, validity evidence that wasn't  
12                  available to the City, it's not something that the  
13                  Civil Service routinely publishes when they publish a  
14                  test and say here, here's the validity evidence. So  
15                  - - -

16                 JUDGE PIGOTT: You're saying you weren't  
17                 aware of what was going on in federal court?

18                 MR. MARKEL: That's not what I'm saying.  
19                 We're not in - - - well, that's part of what's in  
20                 federal court is exactly what I'm saying. What I'm  
21                 saying is the validity tests, when the tests were  
22                 promulgated back in the 1990s, the Civil Service  
23                 promulgates the test and says here's the test. They  
24                 don't also issue a report saying here's why it's  
25                 valid. So what you have is the City using a test,

1 deciding in 2001 that there's a statistically - - - a  
2 statistical concern, and then moving on forward  
3 through the MOCHA litigation, which, in fact, is a  
4 litigation, not a fear of litigation under Ricci.  
5 But moves forward in the context not only of that,  
6 but moves forward in the context of an ongoing - - -

7 CHIEF JUDGE LIPPMAN: What - - - what - - -

8 MR. MARKEL: - - - remedial decree from the  
9 federal court.

10 CHIEF JUDGE LIPPMAN: - - - what under  
11 Ricci does he do? And I think this is another way of  
12 asking what Judge Pigott asked your adversary. What  
13 does he do if he knows there are issues about the  
14 test, he knows he's - - - even - - - even though, you  
15 know, his people have said, you know, whatever, that  
16 it's a - - - it's a good test. But he knows there -  
17 - - there are issues, and he knows he's walking into  
18 a buzz saw of litigation. What does he do and what's  
19 - - - what's passable to do under Ricci?

20 MR. MARKEL: He did exac - - -

21 CHIEF JUDGE LIPPMAN: He just says I don't  
22 want to take any chances. It's going to be a  
23 disaster. I'm just going to can the list. Is that  
24 okay?

25 MR. MARKEL: Well, he didn't just can the

1 list. He did exactly what he should have done.

2 CHIEF JUDGE LIPPMAN: Which is--.

3 MR. MARKEL: Which is evaluated the  
4 evidence that would for him - - - that was available  
5 to him at the time, which included, as Judge Pigott  
6 referenced, the MOCHA information. Not only about  
7 the testimony given by the Civil Service people but  
8 the criticisms.

9 CHIEF JUDGE LIPPMAN: Yeah, but let's say  
10 it wasn't in - - - in practical common sense terms,  
11 let's say it wasn't crystal clear to him what would  
12 happen in the future. He understands the MOCHA case,  
13 as he just said, I'm getting the City out of this  
14 thing. I'm - - - I'm - - - I'm canning the list.

15 MR. MARKEL: That's a reasonable - - -

16 CHIEF JUDGE LIPPMAN: Does that meet the  
17 Ricci standard or whatever standard you think what he  
18 should be judged by?

19 MR. MARKEL: Absolutely, it meets that  
20 standard.

21 CHIEF JUDGE LIPPMAN: How do - - - tell me  
22 precisely how that meets the Ricci standard.

23 MR. MARKEL: The Ricci - - -

24 CHIEF JUDGE LIPPMAN: What does the  
25 standard mean to - - - to you? And in this



1 context of are you going to win a disparate impact  
2 case moving forward in the MOCHA trial, you could say  
3 okay, I may not be able to win. I don't have a  
4 strong base - - - I don't have a preponderance of the  
5 evidence to prove that my test is valid. But that  
6 doesn't necessarily mean I'm not entitled to defend  
7 that test.

8 JUDGE PIGOTT: Yeah, but look what they did  
9 in Ricci. I mean how - - - how does - - - how does  
10 your proof in this case match - - - compare with, I  
11 should say, the - - - New Haven's proof in - - - in  
12 Ricci?

13 MR. MARKEL: Ricci is all about statistics,  
14 really.

15 JUDGE PIGOTT: Well, it's about a lot - - -  
16 it's - - - it's about somebody who certified the  
17 test, tested the test. I mean, it - - - it went on  
18 ad infinitum, it seemed to me, on how the test was  
19 drawn and - - - and - - - and the reasons for it, et  
20 cetera. Was it a five-day hearing, I think?

21 MR. MARKEL: There were hearings but the  
22 context of the hearings, if you read both the dissent  
23 as well as the - - - the majority opinions and even  
24 the concurrences, the overtone is political. And  
25 once you really look at the history here - - -

1                   JUDGE PIGOTT: The overtone is political,  
2                   where?

3                   MR. MARKEL: Political decision-making as  
4                   part of that process.

5                   CHIEF JUDGE LIPPMAN: In New Haven or at  
6                   the Supreme Court?

7                   MR. MARKEL: In New Haven.

8                   JUDGE PIGOTT: Oh.

9                   MR. MARKEL: In New Haven, which we don't  
10                  have here. This was a straight-up decision for the  
11                  benefit of the City and for the benefit of being in  
12                  compliance with Title VII. But in the - - -

13                  JUDGE PIGOTT: Well, there's a - - - it was  
14                  a minor part of Ricci where they said, you know, the  
15                  - - - the mayor's people, you know, are going to pick  
16                  and that's why we - - - we don't want to do this.

17                  MR. MARKEL: Right, that's part of it, but  
18                  that's not - - -

19                  JUDGE PIGOTT: But - - - but there was an  
20                  awful lot of testimony on how the test was  
21                  constructed, tested, that they even had people not  
22                  from New Haven to - - - to look at making sure that  
23                  the - - - that the - - - the tests were correct. And  
24                  did any of that happen here?

25                  MR. MARKEL: Actually, more than what



1 different experts who actually did a thorough review  
2 of what the Civil Service did in preparing and  
3 constructing those tests. You have the first expert,  
4 which is the plaintiff's expert in the MOCHA case,  
5 who puts out a report that says this test has all  
6 kinds of deficiencies and there's no credible  
7 evidence, none, to support the validity of this test.  
8 That expert then goes on to testify in a deposition  
9 the same way. Our expert - - -

10 JUDGE PIGOTT: That testimony was in front  
11 of Judge Michalek?

12 MR. MARKEL: That expert was in front of  
13 Judge Curtin in the federal court.

14 JUDGE PIGOTT: I'm talking about Michalek's  
15 decision where he granted them summary judgment on  
16 liability, right?

17 MR. MARKEL: What they were relying on  
18 there is a statement that was made in a case called  
19 Heinz (ph.), which is a completely out-of-context  
20 statement.

21 JUDGE PIGOTT: I don't mean to be unclear.  
22 I really apologize. But Michalek makes a decision on  
23 liability in favor of the plaintiffs.

24 MR. MARKEL: Right.

25 JUDGE PIGOTT: In front of him he had

1 Matarese's testimony, right?

2 MR. MARKEL: From a different proceeding.

3 JUDGE PIGOTT: What else?

4 MR. MARKEL: In this case, he would have  
5 had the same - - - same group of - - - of paperwork.

6 JUDGE PIGOTT: So he had no - - - no - - -  
7 no live testimony whatsoever?

8 JUDGE READ: Did he have the record from  
9 the federal proceeding?

10 MR. MARKEL: Not the record, but what was  
11 put in in this record and is in there is the  
12 testimony from the Civil Service people, the report  
13 from the plaintiff's expert in MOCHA. And mind you,  
14 it's not the testimony from the MOCHA case in the  
15 sense of the trial. It's the testimony that was in  
16 existence from depositions prior to the date when  
17 Matarese made his decision. You had the testimony of  
18 Kevin Murphy, the MOCHA plaintiff's expert, and you  
19 also have affidavits from our expert, who at the time  
20 did not put anything in because the MOCHA trial was  
21 pending. But the affidavit says things like this  
22 test has problems.

23 JUDGE PIGOTT: When you said didn't put  
24 anything, didn't put anything in where?

25 MR. MARKEL: In the Heinz proceeding we're

1 talking about, because that's the proceeding - - -  
2 it's a different proceeding. Counsel's - - -

3 JUDGE PIGOTT: So Margerum in - - - in this  
4 proceeding - - -

5 MR. MARKEL: In this proceeding, the - - -  
6 there's an affidavit from our expert and a  
7 corroborating affidavit from Matarese, both of which  
8 essentially explain the whole situation with these  
9 tests as being incapable of being validated. And Dr.  
10 Murphy's report - - -

11 JUDGE PIGOTT: And that's your strong basis  
12 in evidence?

13 MR. MARKEL: That is our strong basis in  
14 evidence.

15 JUDGE PIGOTT: Those two?

16 MR. MARKEL: Because - - - well, not only  
17 that; it's the consent - - - not the consent, the  
18 remedial decree, because all of this is in the  
19 context of forthcoming compliance with Title VII,  
20 because that's what our statutory and legal  
21 obligation is. It's the fact that Matarese knows  
22 that there's some statistical imbalance on top of  
23 that where in 2005 you have a situation where five  
24 percent of African Americans are in promotional  
25 positions, but your composition of the workforce is

1           forty percent. And you have testimony of two experts  
2           telling you this test is - - - you're likely to lose,  
3           essentially. And - - - and you have your own expert  
4           telling you it's not in your best interest - - -

5                   JUDGE RIVERA: Let me - - - let me ask a -  
6           - -

7                   MR. MARKEL: - - - to call me at trial.

8                   JUDGE RIVERA: Let me ask a question I  
9           asked your opponent. Why - - - why does the Ricci  
10          standard, the majority's Ricci standard apply?

11                  MR. MARKEL: The majority's Ricci standard  
12          applies - - - well, supreme law of the land, I  
13          suppose, in that sense.

14                  JUDGE RIVERA: Explain where they were  
15          analyzed in Title VII.

16                  MR. MARKEL: I - - - I would think the - -  
17          -

18                  JUDGE RIVERA: We're talking about the  
19          state's human rights law.

20                  MR. MARKEL: Second - - - or the New York  
21          State Court of Appeals has repeatedly adopted and  
22          followed what happens in Title VII jurisprudence for  
23          consistency between what happens under the human  
24          rights law and what happens under Title VII cases.

25                  JUDGE READ: So you're saying we should

1 make a conscience decision to do that here? We  
2 should follow Ricci?

3 MR. MARKEL: I think if you follow the  
4 precedent that exists in this court, then following  
5 Ricci is mandated.

6 JUDGE READ: By the way, nobody's mentioned  
7 the notice of claim provision yet.

8 MR. MARKEL: Correct.

9 JUDGE READ: Do you have an argument about  
10 that?

11 MR. MARKEL: We do have an argument.

12 JUDGE READ: Hasn't - - - hasn't the  
13 Appellate Division, at least, consistently held that  
14 notice of claim to a municipality is not required for  
15 human rights law allegations?

16 MR. MARKEL: Well, there are several  
17 Appellate Division cases that talk about a human  
18 rights law case not being a tort and therefore not  
19 subject to notice of claim. What our argument is is  
20 that the issue is - - - doesn't turn upon on whether  
21 it's exactly a tort or not a tort. What the language  
22 of the statute says is that there are certain types  
23 of injuries - - - personal injury, there are wrongful  
24 - - -

25 JUDGE READ: This is 50-i we're talking

1           about? 50(i)?

2                   MR. MARKEL: 50-i, correct.

3                   JUDGE READ: 50-i?

4                   MR. MARKEL: 50-i. 50-i says no claim, no  
5 proceeding - - - dot, dot, dot - - - arising out of  
6 negligence or a wrongful act. It doesn't  
7 specifically limit it to tort cases. A wrongful act  
8 is a very broad standard. Wrong - - -

9                   JUDGE PIGOTT: Yeah, but I think - - - I  
10 think what they were doing, if I could read at least  
11 one Appellate Division, is that - - - that you can't  
12 pinpoint things like discrimination. Usually they're  
13 a continuum and - - - and - - - and plaintiffs would  
14 have a problem if the - - - if - - - if they - - - if  
15 they file a notice of claim and somebody says well,  
16 the first - - - the first discriminatory act was - -  
17 - was such-and-such a date, and therefore, the - - -  
18 the statute of limitations is gone.

19                   Or if he says it's a continuing wrong, then  
20 - - - then there's another problem with the notice of  
21 claim in that you can't go - - - you - - - you - - -  
22 you didn't notice us for all the future stuff and  
23 therefore, that doesn't count. And it - - - and so -  
24 - - it - - - it - - - these cases don't fit easily  
25 within the notice of claim statute.

1 MR. MARKEL: Well - - -

2 JUDGE PIGOTT: I think. I think that's  
3 what they meant.

4 MR. MARKEL: But other courts in - - -  
5 under the county law, under the town law - - -

6 JUDGE PIGOTT: Yeah, but they have a  
7 statute. They have a statute.

8 MR. MARKEL: They have a statute, yes, but  
9 the statute isn't markedly different. The difference  
10 in those statutes is at the beginning they have some  
11 language that says no claim of any kind.

12 JUDGE PIGOTT: That's - - -

13 MR. MARKEL: But again, they're describing  
14 damages. They're describing the - - - the - - - the  
15 injury to the person. But even the county law, which  
16 was at issue in Mills, has a passage in there. It  
17 says arising out of negligence, wrongful death - - -  
18 I forget the exact passage, but they're specific  
19 types of things that still include unlawful acts.

20 JUDGE RIVERA: Well - - -

21 MR. MARKEL: Unlawful acts can be a  
22 constitutional tort. It can be a statutory  
23 violation. And there are cases throughout the  
24 Appellate Division where notice of claim has been  
25 implemented and applied in cases - - -

1 JUDGE RIVERA: Could you - - -

2 MR. MARKEL: - - - where constitutional  
3 wrongs have been at issue or where there's been a  
4 statutory violation or - - -

5 JUDGE RIVERA: Do - - - is - - - is filing  
6 of a notice of claim a condition pursuant to fighting  
7 - - - filing a Title VII employment discrimination  
8 action?

9 MR. MARKEL: In Mills, this court  
10 essentially held that but on supremacy grounds - - -

11 JUDGE RIVERA: It's not is the answer.

12 MR. MARKEL: It's not.

13 JUDGE RIVERA: It's not. So - - - but in  
14 response to my other question about applying the  
15 Ricci standard, your argument appeared to me to be  
16 that's what the Supreme Court has said and therefore  
17 we should follow it because we usually follow the  
18 federal cases on their interpretation of Title VII  
19 when we - - - when we interpret the state human  
20 rights law. So why is that not the case for the  
21 notice of claim issue?

22 MR. MARKEL: The notice of claim issue,  
23 this is a uniquely state case. There is no federal  
24 ca - - - federal claim at issue in this case. So  
25 this court's - - -

1                   JUDGE RIVERA: But that's - - - but, no.  
2                   But that's my point. That's always true if you're  
3                   making a employee discrim - - - a discrimination  
4                   claim on the state human rights law and we have in  
5                   the past looked to Title VII for guidance as to how  
6                   we might interpret provisions of the state human  
7                   rights law. And under the federal approach, there is  
8                   no requirement that you file a notice of claim in  
9                   advance of filing a Title VII. Why would not - - -  
10                  why wouldn't we, again, follow the guidance of the  
11                  federal courts and the U.S. Supreme Court in doing  
12                  that?

13                  MR. MARKEL: Because I don't think it's  
14                  guidance that's relevant to that issue. The notice  
15                  of claim issue, as it comes up in the federal context  
16                  in these kinds of cases, is it relates to the  
17                  borrowing of a statute of limitations and what the  
18                  statute of limitations is in federal court.

19                  So you could borrow a state statute of  
20                  limitations that may be shorter or longer, but if you  
21                  impose a notice of claim issue specifically on that  
22                  claim, you end up with a different analysis in the  
23                  federal system. Here when you have a notice of claim  
24                  being imposed upon a state-based - - - state-based  
25                  claim, state-based constitutional claim, or state-

1 based statutory claim, even in Mills it recognizes  
2 that civil rights, there - - - there's nothing  
3 improper about using a notice of claim where a civil  
4 right is at issue.

5 JUDGE RIVERA: But if you impose a notice  
6 of claim requirement, aren't you then imposing an  
7 obstacle to filing discrimination claims that doesn't  
8 exist under the statute? It seems to me to be at  
9 odds with the legislative purpose and the statutory  
10 language.

11 MR. MARKEL: Well, notice of claim is an  
12 obstacle in the sense in the sense in any kind of  
13 case in which a notice of claim applies. But the  
14 fact that it is applied in - - - in this particular  
15 circumstance where someone still - - - you know, as  
16 long as the person, you know, files that notice of  
17 claim, they're still protected. They have the  
18 opportunity to go to the - - - the State Division of  
19 Human Rights and file a claim there or they can  
20 commence a private action.

21 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam.

22 JUDGE ABDUS-SALAAM: So my - - - my  
23 question was could you - - - could you require a  
24 notice of claim as to some claims but not as to  
25 others, maybe under the Constitution but not under

1 the statue? Is there some way of splitting that  
2 baby?

3 MR. MARKEL: It's a good question. There  
4 are cases where both have occurred. I - - - I don't  
5 - - - from my own review of the case law, I'm not  
6 sure I found a dividing line as to why a statutory -  
7 - - you know, a - - - a failure to follow a statutory  
8 obligation by a municipality in one case versus a  
9 constitutional in another doesn't generate the same  
10 kind of notice of claim issue. My position is it  
11 shouldn't matter, because they are, in essence, a  
12 tort-like claim, to use words that even in the - - -  
13 the Melia and Kalis cases on which Judge Pigott  
14 presided, that they sound in tort.

15 You're asking for people to give you  
16 certain types of monetary personal injury damages,  
17 mental suffering was at issue. There's an award  
18 here. You have people claiming lost wages. There's  
19 a property aspect to this. So notwithstanding the  
20 fact that it may be called constitutional or it may  
21 be called a statutorily based claim, the fundamental  
22 essence of those claims in many instances is still,  
23 as 50-i points out, personal injury, property damage,  
24 arising out of a wrongful act.

25 CHIEF JUDGE LIPPMAN: Okay, thank you,

1 counsel.

2 MR. MARKEL: Thank you.

3 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

4 MR. FLEMING: Your Honor asked about Ricci  
5 and does it apply. They have to have Ricci apply  
6 because there has been a decision made about race and  
7 about my clients' race, period.

8 JUDGE ABDUS-SALAAM: Counsel, on - - - on  
9 that issue on the - - - on the Ricci issue, I'm - - -  
10 I'm trying to find what would be a - - - a case that  
11 would meet the Ricci standard for the safe harbor.  
12 What case with facts similar or different to these  
13 would you say would meet the Ricci standard?

14 MR. FLEMING: Well, so far as we know, no  
15 case has ever been found post-Ricci find - - -  
16 finding a safe - - - safe harbor because the court  
17 did describe it as being certain, comma, narrow  
18 circumstances. So the - - - the situation would be,  
19 for instance, in Ricci post-determination or post-  
20 evaluation and it's certified under the circumstances  
21 in Ricci.

22 It was not certified. I - - - I wanted to  
23 get back to that with Judge Pigott. It was - - - it  
24 was not certified. But here with - - - in - - - in  
25 other words is there another alternative that could

1 be proposed and the City being able to prove that  
2 there was another alternative that would be more  
3 viable or the plaintiffs proving that the City could  
4 and the City making a deliberate decision we're not  
5 adopting that. We're sticking with the same test  
6 over and over again. So I - - - I don't - - - I  
7 think there is a circumstance.

8 JUDGE ABDUS-SALAAM: Do - - - do you think  
9 that there are no questions of fact about whether  
10 there are circumstances here?

11 MR. FLEMING: I think - - - I think the  
12 record is entirely clear on that, Your Honor. I  
13 really do.

14 JUDGE PIGOTT: But let me - - - you know,  
15 Ricc - - - Ricci, you know, was involved - - -as I  
16 was picking on Mr. Markel about. Just because they  
17 went through all of that doesn't mean that every - -  
18 - every municipality has to go through all of that,  
19 right? In other words - - -

20 MR. FLEMING: I'm in agreement with that.

21 JUDGE PIGOTT: Pardon me?

22 MR. FLEMING: I'm in agreement with you.

23 JUDGE PIGOTT: Yeah. So - - - so if in  
24 this case the City of Buffalo said all right, we see  
25 what we did in - - - in - - - in - - - in Ricci.

1 We've got that same information. We don't have to  
2 have the - - - you know, the - - - the Civil Service  
3 board. We don't have to have the - - - the people  
4 who do the - - - the test. We now know, and we also  
5 know what the results going to be if we - - - if we  
6 follow the test that we have been given. And it's -  
7 - - and it's a disaster. And in the interests of the  
8 City - - - forget, you know, strong evidence of  
9 liability, in - - - strong evidence to believe that  
10 they'd be subjected to disparate impact. And they  
11 say we've got it. Is that - - - is that all right?

12 MR. FLEMING: It's not enough, Your Honor.

13 JUDGE PIGOTT: What would you do? What - -  
14 - what should they have done more?

15 MR. FLEMING: Well, keep in mind that the -  
16 - - the - - - both Judge - - - Judge Michalek cites  
17 Ricci for the proposition. You can't turn blind - -  
18 - a blind eye.

19 JUDGE PIGOTT: I know. But - - - but in  
20 that case they did one, two, three, four, and five.  
21 And - - - and if the City of Buffalo said we don't  
22 have to do all that. We know - - - we know what five  
23 is. We know what the result is going to be, because  
24 we're here. We - - - we had - - - we've had this  
25 test for all this time, et cetera. And we know we're

1 going to have a disparate impact.

2 Do we have to call all these people, ask  
3 their counsel? Do we have to call all these people  
4 in and - - - and put them through this - - - these  
5 hoops to prove what we now know is true and then say  
6 now we've got the information so the Supreme Court  
7 doesn't flip us on - - - on disparate impact.

8 MR. FLEMING: In your hypothetical, per - -  
9 - perhaps, Your Honor.

10 JUDGE PIGOTT: That's why I asked you.  
11 What - - - what could they have done? What should  
12 they have done?

13 MR. FLEMING: What they should have done in  
14 this case is keep in mind that there were - - -  
15 there's other precedent and other case law out there.

16 JUDGE PIGOTT: I want you to forget - - - I  
17 - - - I want you - - - make yourself the  
18 commissioner. What's the commissioner supp - - - he  
19 doesn't say well, I've got to go look at the case  
20 law. He says I've got this test that's going to give  
21 - - - give me nothing but headaches in - - - in terms  
22 of disparate impact. So I got to come up with  
23 something to fix that. You've sued them and you - -  
24 - and you proved that they had to do something. What  
25 is that something that they had to do that they

1 didn't do?

2 MR. FLEMING: In this case what he had to  
3 do was promote the people that were there. The City  
4 had already talked about the fact that it was going  
5 to be working on some sort of a new test. The City  
6 should not have been defending the test, especially  
7 the 2002 test that it recertified and it defended in  
8 court successfully even before Judge - - - all right.  
9 So what they should have done if they had this  
10 concern - - - that we still contend that they didn't,  
11 they didn't use Abrams. The record is clear on that.

12 JUDGE PIGOTT: You're saying they should  
13 have fallen on their sword in MOCHA?

14 MR. FLEMING: No, they - - - they were  
15 right in MOCHA. They continued to defend it.

16 JUDGE PIGOTT: But you're saying they that  
17 they shouldn't have defended that test.

18 MR. FLEMING: They con - - - they continued  
19 to defend it. And - - - and - - - and even in a  
20 post-hearing brief, which we can assume that they - -  
21 - if you look at - - -

22 JUDGE PIGOTT: Didn't you just say that  
23 they shouldn't have done that? They shouldn't have  
24 defended that test?

25 MR. FLEMING: No, I - - - if I did, I - - -

1 I misspoke.

2 JUDGE PIGOTT: I misunderstood.

3 MR. FLEMING: If I did, I misspoke. No.

4 What they shouldn't have done is - - - is - - - you -  
5 - - I lost my train of thought here. But in MOCHA,  
6 the City was correct based on the facts that it had,  
7 based on its experts. If - - - at post-trial and  
8 that, Mr. Feinstein's submission on that used words  
9 like false, absurd, red herrings, and everything to  
10 talk about the proof that they're now relying on as  
11 they stand before you. We can assume that the City  
12 had that same sort of proof in 2001, certainly in  
13 2002.

14 JUDGE ABDUS-SALAAM: You know, counsel, it  
15 seems to me though that your arguments suggest that  
16 the City has to have a sure winner in the federal  
17 court on a disparate impact case before they can even  
18 invoke the Ricci safe harbor standard. I - - - I - -  
19 - you know - - -

20 MR. FLEMING: Right.

21 JUDGE ABDUS-SALAAM: I'm trying to find out  
22 what case - - -

23 MR. FLEMING: I'm - - - I'm - - - I'm - - -

24 JUDGE ABDUS-SALAAM: It seems to me it'd be  
25 a very strong case of strong evidence. And - - - and

1 I'm trying to find out what - - - what case is better  
2 than that this one, and you haven't really - - - you  
3 haven't really told me.

4 MR. FLEMING: The Brennan case in the  
5 Second Circuit post-Ricci talks about the fact that a  
6 mere good faith fear of dis - - - disparate impact  
7 liability is inadequate.

8 JUDGE PIGOTT: So - - -

9 MR. FLEMING: That's all they had here, at  
10 the most.

11 JUDGE PIGOTT: So you're - - - I guess the  
12 bottom line on your point is if they had - - - if  
13 they had followed the test, appointed your people,  
14 there would not have been a disparate impact?

15 MR. FLEMING: They, based on all of the  
16 arguments they were making in MOCHA and based on the  
17 fact that Judge Curtin had already said years before  
18 you can go ahead and continue to apply it. There was  
19 - - - promoting our guys was not going to have any  
20 effect on the MOCHA litigation.

21 JUDGE PIGOTT: That - - - but that was  
22 years ago. I'm saying that on the - - - I forget  
23 what year this, '05. If they - - - if they had  
24 followed the - - - the list, there would not have  
25 been a disparate impact on the - - - on the fire

1 department in Buffalo?

2 MR. FLEMING: Not - - - not for which the  
3 City would have been held liable.

4 JUDGE PIGOTT: Okay.

5 CHIEF JUDGE LIPPMAN: Okay. Thank you  
6 both. Appreciate it.

7 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Margerum et al v. City of Buffalo, No. 7 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: January 11, 2015