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COURT OF APPEALS  
STATE OF NEW YORK

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BRANCH,

Appellant,

-against-

No. 93

COUNTY OF SULLIVAN,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
May 7, 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  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start  
2 with number 93, Branch v. County of Sullivan.

3 Counsel?

4 MR. SUSSMAN: May it please the court, my  
5 name is Michael Sussman from Goshen, New York. I  
6 represent the appellants, may it please the court.

7 This case arises from the death - - -

8 CHIEF JUDGE LIPPMAN: Counsel, what's the -  
9 - - what's the County's role here? Why - - - why are  
10 they in this lawsuit?

11 MR. SUSSMAN: The County is the sponsoring  
12 organization under New York State Law - - - Education  
13 Law 63 - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but what about  
15 the practical aspects? Let's take - - - before we  
16 get into the statutory aspect - - - do they run this  
17 school?

18 MR. SUSSMAN: Yes, practically they - - -  
19 they support and they appoint - - -

20 CHIEF JUDGE LIPPMAN: The daily operations,  
21 they run?

22 MR. SUSSMAN: We - - - we believe they do,  
23 Your Honor. We believe that the County appoints a  
24 majority of the board of trustees. The County passes  
25 a budget and passes upon every major contract of the

1 institution. A county - - -

2 JUDGE RIVERA: If the County wanted - - -

3 MR. SUSSMAN: I'm sorry.

4 JUDGE RIVERA: If the County wanted to put  
5 in place an AED, but the trustees did not, who gets  
6 the final word?

7 MR. SUSSMAN: County. It's the County's  
8 property. The County has the final word. The County  
9 would say - - -

10 JUDGE RIVERA: I thought they had  
11 transferred the property.

12 MR. SUSSMAN: I'm sorry?

13 JUDGE RIVERA: I thought they had  
14 transferred the property.

15 MR. SUSSMAN: It - - - they transferred the  
16 dorms improvidently, as we've argued, in 1999  
17 illegally, because under New York State Law, they  
18 must maintain control of all property for the  
19 dormitory system. They did not - - -

20 JUDGE RIVERA: So although you say the - -  
21 - the transfer is not valid, as far as they're  
22 concerned, it is valid, so at - - - if at the time  
23 they had wanted to put in place an AED, how could  
24 they have done so?

25 MR. SUSSMAN: The rest of the property,

1 Your Honor - - - it's an integrated campus. The rest  
2 of the property is County owned. Had they required  
3 it, and - - - and used their common law duty to  
4 ensure proper habitability here and proper  
5 maintenance of the facility, they would have simply  
6 indicated that it was County policy to have an AED in  
7 public places - - - this being a public place under  
8 their control.

9 So I don't believe there would have been  
10 any issue whatsoever in their asserting that  
11 authority.

12 CHIEF JUDGE LIPPMAN: You say under their  
13 control. What does it mean? I mean, the - - -

14 MR. SUSSMAN: Well, control - - -

15 CHIEF JUDGE LIPPMAN: - - - is the County  
16 literally taking the time to oversee the school each  
17 and every day?

18 MR. SUSSMAN: Well, the - - -

19 CHIEF JUDGE LIPPMAN: You're saying they're  
20 ultimately - - -

21 MR. SUSSMAN: The County - - - the County,  
22 Your Honor, our position is that the majority of the  
23 board, and in fact the entire board from the  
24 perspective of indemnification, the - - - the entire  
25 board with regard to being officers under County Law

1 53, are in fact County officers. That's how we  
2 understand the law in New York.

3 JUDGE ABDUS-SALAAM: Aren't they really - -  
4 -

5 MR. SUSSMAN: Therefore - - - I'm sorry.

6 JUDGE ABDUS-SALAAM: Aren't they trustees  
7 of the college?

8 MR. SUSSMAN: Well, the question - - - it's  
9 assert - - -

10 JUDGE ABDUS-SALAAM: Are you saying - - -  
11 are they both or are they just - - - are they  
12 trustees of the college? Even though the County, as  
13 you say, appoints the majority of the board, because  
14 it's a ten-member board - - -

15 MR. SUSSMAN: One nonvoting member.

16 JUDGE ABDUS-SALAAM: - - - and the County  
17 appoints five of those members.

18 MR. SUSSMAN: Right.

19 JUDGE ABDUS-SALAAM: But the County doesn't  
20 appoint five other members. So how is it that the  
21 County is in charge of this school, when there are  
22 five members - - -

23 MR. SUSSMAN: No - - -

24 JUDGE ABDUS-SALAAM: - - - that aren't  
25 appointed by the County.

1 MR. SUSSMAN: And I understand your  
2 question. No - - - no other entity, other than the  
3 County, has responsibility for reviewing contracts,  
4 owns the property, and has a responsibility for the  
5 strict kind of oversight, which it, the County, as  
6 local sponsor, has. And again, while I understand  
7 the Chief Judge's desire not to look at the statutory  
8 language, I think - - - I think 6301(2) has to be  
9 looked at.

10 CHIEF JUDGE LIPPMAN: Go ahead.

11 MR. SUSSMAN: It says explicitly - - -

12 CHIEF JUDGE LIPPMAN: Tell us.

13 MR. SUSSMAN: - - - that the County as  
14 sponsor, does establish and operate a community  
15 college. That's what it says. That's what the  
16 language says. Now what does it mean to say operate  
17 a community college? It says - - - when you combine  
18 this with County Law 53 - - - that its officers, its  
19 County officers, are in control of that school. It  
20 is required to indemnify for any lawsuit that's filed  
21 under 6308.

22 So it - - - it seems to me that if one is  
23 arguing that there's juridical independence, that  
24 could easily be established under state law, but it's  
25 not. There are other entities that are established

1 for educational purposes, which are deemed municipal  
2 corporations.

3 JUDGE RIVERA: So - - - so then what - - -  
4 what - - - what does 6306(5) mean? "The board of  
5 trustees shall have the care, custody, control and  
6 management of the lands, grounds, buildings,  
7 facilities, equipment used for the purposes of such  
8 college and for all other property belonging to such  
9 college."

10 MR. SUSSMAN: It's entirely consistent with  
11 our interpretation. This is the point. There's no  
12 inconsistency between saying that the way the County  
13 operationally functions is through a board of  
14 trustees. It's like saying in any other - - -  
15 there's a police agency. The police agency - - -

16 JUDGE RIVERA: No, I understand, but as  
17 Judge Abdus-Salaam has already pointed out, the board  
18 is not solely - - - it doesn't consist solely of  
19 County appointees.

20 MR. SUSSMAN: But even if it doesn't - - -

21 JUDGE RIVERA: It's not their board.

22 MR. SUSSMAN: It is their board, because  
23 it's responsible for indemnifying a suit brought  
24 against any of them for an omission. There's no  
25 distinction made in the law between those who were

1 appointed by the County, five of the nine voting  
2 members, and the other four.

3 JUDGE RIVERA: For purposes of  
4 indemnification, but for purposes of control, it  
5 looks like (5) - - - otherwise, wouldn't (5) say the  
6 County?

7 MR. SUSSMAN: The - - - the point is  
8 there's no distinction drawn in the provision you're  
9 talking about, and every agency and unit of  
10 government - - - of the County government - - - is  
11 operationalized through individuals who have the  
12 authority - - -

13 JUDGE RIVERA: Okay.

14 MR. SUSSMAN: - - - to proceed.

15 JUDGE RIVERA: So then how about 6306(2)  
16 that talks about the board of trustees adopting the  
17 curricula, preparing a budget that they submit - - -

18 MR. SUSSMAN: They do that as County  
19 officers.

20 JUDGE RIVERA: - - - granted to the County,  
21 that they discharge such other duties may be  
22 appropriate or necessary for the effective operation  
23 of the college.

24 MR. SUSSMAN: There's no question - - - no  
25 one is - - - I'm not arguing that this - - - the

1 board of trustees has no duties. I'm arguing that  
2 when they transact their duties juridically, the  
3 board of trustees do so as agents of the County. And  
4 that - - -

5 JUDGE PIGOTT: How do you - - - how do you  
6 address the dormitory issue for the fact that the  
7 dorm wasn't owned by the - - - by the school?

8 MR. SUSSMAN: Well, it's fairly obvious to  
9 us that a transfer of property vested in the County,  
10 as - - - as the court is aware from reading the  
11 papers, all property of the community college is to  
12 be not merely initially deeded to the sponsor. The  
13 sponsor is to maintain control of that property.  
14 That can only be altered in New York by a resolution  
15 passed not only by the board of trustees, but by the  
16 state university system, indicating that the  
17 particular property is not necessary for a purpose  
18 relating to the community college.

19 JUDGE READ: Why didn't you sue - - -

20 MR. SUSSMAN: First of all - - -

21 JUDGE READ: Why didn't you sue the  
22 community college?

23 MR. SUSSMAN: Because we didn't believe it  
24 necessary. We believe the County is the juridical  
25 body responsible for its operations.

1 CHIEF JUDGE LIPPMAN: Yeah, but in  
2 practical - - - in practical terms, why didn't you  
3 sue them?

4 MR. SUSSMAN: That's prac - - - that's the  
5 practical terms. We believe the County's  
6 responsible.

7 JUDGE FAHEY: Well, the prob - - - the prob  
8 - - -

9 MR. SUSSMAN: We believe the notice require  
10 - - - I'm sorry.

11 JUDGE FAHEY: The problem with that is, is  
12 that the County or SCC even itself and a number of  
13 other community colleges have brought suit in their  
14 own name and no one's ever challenged before that the  
15 concept of - - - that they didn't have a separate  
16 juridical existence. They - - -

17 MR. SUSSMAN: It - - -

18 JUDGE FAHEY: You see the problem.

19 MR. SUSSMAN: I see - - - I see conflicts  
20 in the jurisprudence in our state. I cited, Your  
21 Honor, respectfully, to a number of cases in which  
22 where an individual who's employed by a County  
23 community college gave notice to the community  
24 college; they were told they needed to give notice to  
25 the County, because the County, in fact, is the

1 responsible agency - - -

2 JUDGE FAHEY: Well - - -

3 JUDGE PIGOTT: Can - - - can I go back to  
4 my - - -

5 MR. SUSSMAN: The Wendel case. Excuse me,  
6 I'm sorry.

7 JUDGE PIGOTT: No, please finish.

8 MR. SUSSMAN: No, go right ahead.

9 JUDGE PIGOTT: Can I - - - can - - - I want  
10 to go back to this dorm. If - - - if the dormitory  
11 burned down, who collects the insurance?

12 MR. SUSSMAN: The County.

13 JUDGE PIGOTT: Really?

14 MR. SUSSMAN: Absolutely.

15 JUDGE PIGOTT: The - - - the corporation  
16 that owns it doesn't get it?

17 MR. SUSSMAN: No. The - - - the - - - I  
18 mean, I don't know - - - first, we don't have any  
19 information about what insurance they have. But the  
20 County, as the agency which is responsible for the  
21 operation of the community college, ought to be the  
22 one collecting the - - - there should be insurance in  
23 its name.

24 JUDGE PIGOTT: If there's a - - - if  
25 there's - - - SCCC Dormitory Authority takes out

1 insurance because they own the building and it burns  
2 down, you're saying that they don't get the money, it  
3 goes to - - -

4 MR. SUSSMAN: I'm saying - - -

5 JUDGE PIGOTT: - - - it goes to the County?

6 MR. SUSSMAN: I'm - - - to be precise, I'm  
7 saying they're not allowed to own the building.

8 JUDGE PIGOTT: Well, I guess - - -

9 MR. SUSSMAN: The struct - - - the struct -  
10 - - but it does matter, because the structure is - -  
11 -

12 JUDGE PIGOTT: Well, let me ask you this.  
13 Suppose you get a matrimonial - - - somebody gets the  
14 house; somebody doesn't get the house. Well, I  
15 should have gotten the house, and therefore you sue  
16 him saying even though he doesn't own it, he should  
17 have gotten the house and therefore he's responsible  
18 for the slip and fall on the sidewalk.

19 MR. SUSSMAN: Assuming that the should've  
20 gotten the house - - -

21 JUDGE PIGOTT: Yeah.

22 MR. SUSSMAN: - - - in your example, Your  
23 Honor, was by judicial decree, I have no problem  
24 acknowledging - - -

25 JUDGE PIGOTT: Okay.

1 MR. SUSSMAN: - - - what you're saying.  
2 Here, there was no contemporaneous challenge to the  
3 illegal transfer. The first challenge that transfers  
4 by my client to recognizing and apprehending the  
5 structure of the state's system, which is not really  
6 challenged - - - it's very clear. And she's the  
7 first person who's raised that. As the court may  
8 say, why is she raising it? She's raising it because  
9 in fact, it affects significantly her rights. That  
10 transfer should never have occurred and it's void ab  
11 initio under the law of New York State.

12 JUDGE PIGOTT: Would you have been safer -  
13 - - I guess this is another way of asking what was  
14 said before - - - if you'd sued the dormitory  
15 corporation, sued the community college, sued the  
16 County, and then throw them out later, at least you  
17 got them all in and you can figure out what's going  
18 on.

19 MR. SUSSMAN: Well, you could always say  
20 you'd be safer, but sometimes you - - - you decide  
21 strategically who has the responsibility. And here  
22 it's my view the County has a responsibility and  
23 these other entities are not actually - - - the court  
24 says they can sue and be sued. I don't see that in -  
25 - - I don't see that in the 6301 statute.

1 JUDGE FAHEY: Well - - -

2 MR. SUSSMAN: I don't see any provision  
3 which - - - it does exist in other statutes.

4 JUDGE FAHEY: I say this. I think that - -  
5 - I've got a list of about eight cites in front of  
6 me, and one of them - - - including this community  
7 college - - - where they brought suit in their own  
8 name. So they do have a separate juridical  
9 existence, at least it's - - - it's - - -

10 MR. SUSSMAN: Yeah, but - - -

11 JUDGE FAHEY: They've been out there using  
12 the courts, you know.

13 MR. SUSSMAN: But a juridical existence,  
14 respectfully, doesn't derive from a party's  
15 arrogation of that status and their claim that they  
16 have it, notwithstanding the structure of law, and  
17 that's what I'm focused on. I'm focused on what is  
18 the legal structure here, and how do they defend, if  
19 challenged, their juridical claim.

20 Orange County just sold the building by a -  
21 - - a majority - - - not a super majority - - - and  
22 claimed, no - - - no court ever said we couldn't do  
23 it, when County Law 215 exactly states you need a  
24 super majority to sell county property. So they cite  
25 the eight cases in which no one challenged it. It

1 doesn't matter. When they did it, it was wrong. And  
2 we have a similar situation here.

3 JUDGE RIVERA: So your argument regarding -  
4 - - let me get back to the transfer - - -

5 MR. SUSSMAN: Sure.

6 JUDGE RIVERA: - - - of the property. Was  
7 that presented below?

8 MR. SUSSMAN: Yeah, absolutely presented  
9 below. It's in - - -

10 JUDGE RIVERA: How - - - how is it  
11 preserved?

12 MR. SUSSMAN: It was pre - - - it's in - -  
13 - as we pointed out in the brief, it's preserved in  
14 the brief. It was set forth below. We - - - we  
15 cited to that in our reply brief exactly where it was  
16 set forth.

17 JUDGE RIVERA: The argument that the  
18 transfer itself is void ab initio?

19 MR. SUSSMAN: Absolutely. At the point - -  
20 - at the point that the lawsuit was filed, there was  
21 no knowledge that - - - because there was no  
22 resolution as I pointed out to the court earlier - -  
23 - there was no resolution. If one searches for  
24 resolution about a property transfer, there was no  
25 such resolution. There's no indication that it was

1 ever legally transferred from one to the other.

2 If you look at the 8 New York Code Rules  
3 and Regulations 603.5, there's a requirement that  
4 there be those resolutions. They don't exist. So  
5 when I say - - -

6 CHIEF JUDGE LIPPMAN: Okay.

7 MR. SUSSMAN: Sorry.

8 CHIEF JUDGE LIPPMAN: You'll have your  
9 rebuttal time.

10 MR. SUSSMAN: Thank you, Your Honor.

11 CHIEF JUDGE LIPPMAN: Thanks, counselor.  
12 Counselor?

13 MR. KAPLAN: Thank you, Your Honor.

14 CHIEF JUDGE LIPPMAN: Counsel, isn't the  
15 County really the - - - the party-in-interest here?

16 MR. KAPLAN: No, clearly from a practical  
17 aspect, number one, as you had mentioned, we are not.  
18 We don't run the - - -

19 CHIEF JUDGE LIPPMAN: Let's talk about the  
20 practical aspect.

21 MR. KAPLAN: Okay.

22 CHIEF JUDGE LIPPMAN: Forget the statute  
23 for a second.

24 MR. KAPLAN: The only evidence - - -

25 CHIEF JUDGE LIPPMAN: Aren't you ultimately

1 responsible for what happens there?

2 MR. KAPLAN: No, we are not responsible.  
3 We don't have any input into the day-to-day  
4 operations. And in fact, this very court within the  
5 last ten years has issued an order stating that  
6 community colleges are now entitled to more  
7 independence from their local sponsor, especially  
8 with matters regarding financial - - -

9 CHIEF JUDGE LIPPMAN: And what's the import  
10 of being the local sponsor?

11 MR. KAPLAN: The import is basically that  
12 we sponsor oper - - - or sponsor and create a  
13 community college, and provide budgetary resources.  
14 Interestingly in this case, my client - - - the  
15 witness I produced, the former County attorney and  
16 former treasurer of Sullivan County, Mr. Ira Cohen,  
17 testified that every time the County attempts to get  
18 involved in the day-to-day operations, or even asks  
19 the community college here to con - - - to consult  
20 with the County about contracts, the community  
21 college says you can't tell us what to do.

22 JUDGE PIGOTT: You can get that from the  
23 highway department, trust me.

24 MR. KAPLAN: And - - -

25 JUDGE ABDUS-SALAAM: Is that - - - is that

1 the test that we should apply that you don't involve  
2 yourselves, as the County, in the day-to-day  
3 operations, even though you may be the dominant party  
4 with regard to fiscal and other financial  
5 obligations?

6 MR. KAPLAN: Well, Your Honor, I think even  
7 before you apply that test, there's several other  
8 layers, both statutory, as Your Honor pointed out,  
9 which state specifically and explicitly, not that the  
10 County or the sponsor, but the community college  
11 board of trustees, and the community college itself,  
12 shall have the care, custody and control of all of  
13 the buildings and equipment.

14 So if this case is about AEDs, the  
15 responsibility of the community college board of  
16 trustees is even higher with regard to personal  
17 property than real property. That's in the statute  
18 6308 - - - or, I'm sorry - - - 6306(5). 6306(2) also  
19 says that the community college board of trustees  
20 shall be the party who is allowed to discharge any  
21 other duties that will basically allow them to run a  
22 community college. And that's exactly - - -

23 JUDGE PIGOTT: But - - - but couldn't - - -

24 MR. KAPLAN: - - - what they do here.

25 JUDGE PIGOTT: - - - couldn't the argument

1           be - - - I mean, Mr. Sussman's suggesting that it's  
2           the Sullivan County Community College for a reason.  
3           It's Sullivan County's, delegated to the board of  
4           trustees are all the duties and functions that you  
5           outline. If you really have a complaint with respect  
6           to them, you can bring them in. I mean, you - - -  
7           you're ultimately responsible.

8                         But if you then want to pass on the  
9           liability to the community college saying, we're  
10          responsible, but they're the ones that are primarily  
11          responsible be - - - for all the reasons you - - -  
12          wouldn't we then have everybody in the lawsuit that  
13          we need?

14                        MR. KAPLAN: Well, at that point - - - and  
15          again, I think your question was right on point. Why  
16          wasn't the easy route taken? Why not sue the party  
17          that actually owns the building? So, no, I would say  
18          no. And on top of which, if that was the case here,  
19          we would have moved for summary judgment under the  
20          same arguments, and the lower court and the Appellate  
21          Division both noted that no, it's the community  
22          college.

23                        But even before you reach that issue, our  
24          main argument here is the land, the property where  
25          the incident actually occurred, is not held in trust.

1                   JUDGE RIVERA: He says - - - he says the  
2 transfer was void.

3                   MR. KAPLAN: Yeah, and our position - - -  
4 two positions. One, that was not preserved. It was  
5 never mentioned anything about a statute being  
6 violated, that the property was transferred in the  
7 lower court. Only that the County of Sullivan owns  
8 the property where this incident occurred. In fact,  
9 there's no mention of the Dormitory Corp. in the  
10 opposition papers at all, just that the County and  
11 the community college are one in the same alter egos.  
12 So our position is that issue was not preserved.

13                   Number two, our position is that the  
14 plaintiffs here don't have standing to challenge  
15 that. A case I cited is exactly on point out of the  
16 Third Department, has never been overruled,  
17 Adamkiewicz. I hope I'm saying that correctly. But  
18 that case says, in a similar situation, you sued the  
19 wrong party, a party you thought still owned the  
20 property, when in fact, they had transferred deed to  
21 the property before the accident. Well, guess what?  
22 You can't say the party that has the deed now,  
23 obtained it illegally or improperly, unless you have  
24 a property interest. And here the plaintiffs have no  
25 property interest.

1                   And getting back again to the practical  
2 aspects of it, as Your Honor asked, this property is  
3 owned by a not-for-profit corporation. If any  
4 entity's juridical existence is important here, it's  
5 that entity, and not-for-profit corps have been  
6 juridically defined many times - - -

7                   JUDGE FAHEY: These are a little unusual  
8 though, because they're - - - really they fall under  
9 the category of quasi-independent public  
10 corporations. They're kind of unique creatures of  
11 the state. They're a little bit different than your  
12 standard 501(c)(3) type of corporations.

13                   MR. KAPLAN: Correct, Your Honor, but  
14 again, it's also very different than a public  
15 corporation or a municipality.

16                   JUDGE FAHEY: Well, it may be different  
17 from the thruway authority, say, but I - - - each  
18 one's usually - - - you got to look - - - you got to  
19 go back to the statute. I do think that they're  
20 right about that. But still to - - - to call - - -  
21 we're talking about a question of whether or not  
22 there was a duty and whether or not - - - and it's  
23 got to be created by control, so - - - so we're back  
24 into that no matter how you approach it.

25                   MR. KAPLAN: Correct. And I think it

1 always go back to the fact that we have no control  
2 over this property. After this incident, AEDs were  
3 installed in the Sullivan County - - - Sullivan  
4 County Community College, not by the County of  
5 Sullivan, but by Sullivan County Community College.

6 And what do we think from a practical - - -  
7 practical aspect would happen if we tell the college  
8 you have to do this, or you can take it another level  
9 where the incident occurred, we tell the Dormitory  
10 Corp., a not-for-profit corporation, that you have to  
11 run your building this way. We don't have that  
12 authority. We've never exercised that authority.

13 On top of which, if we dig deeper, aside  
14 from the practical implementation of how the college  
15 is run in the statutory set - - -

16 JUDGE RIVERA: Well, the fact you - - - you  
17 hold the purse strings, does that in any way affect  
18 this relationship as to what the - - - the community  
19 college can and cannot choose to do, or this  
20 dormitory authority can and cannot choose to do?

21 MR. KAPLAN: No - - -

22 JUDGE RIVERA: I mean, you can't function  
23 without the funds.

24 MR. KAPLAN: In fact, we don't have a line-  
25 item veto over the community college. This court has

1           stated you could approve the budget total but not the  
2           total budget, and basically eliminated any arguments  
3           because there was a pushback from a lot of counties  
4           as to having no control over the community college,  
5           and this very court said, that's okay; that community  
6           college independence is okay.

7                         And this court has leaned more - - - on top  
8           of which, there are several Appellate Division cases  
9           - - - no cases that I found out of this court - - -  
10          that say specifically what I'm saying. The party  
11          that controls is in the custody, care and control - -  
12          - you can't get much stronger of a legal meaning than  
13          that - - - is the party responsible here.

14                         A lot of the cases cited where there's  
15          confusion, deal with jurisdictional issues and  
16          service of a notice of claim or a summons and  
17          complaint against a party. Not one of those cases  
18          cited say the county is responsible for an injury  
19          that occurs on land or arising out of the use - - -

20                         JUDGE RIVERA: Let me go back to that  
21          preservation question. Let's say we disagree with  
22          you. Is then your fallback position that they don't  
23          have standing to raise the question? Is that the  
24          only argument then in response to his - - -

25                         MR. KAPLAN: No, the - - -

1 JUDGE RIVERA: - - - argument?

2 MR. KAPLAN: The third argument I would  
3 have is that the County actually did one of the  
4 prescribed methods. They did the first prescribed  
5 method and deeded the property back to the sponsor,  
6 the County of Sullivan Industrial Development Agency,  
7 in 2002, which then immediately turned around, and  
8 for consideration, deeded the property over to the  
9 Sullivan County Community College Dormitory Corp.

10 So that is not our only position on that.  
11 We actually think there are several layers, on top of  
12 which I interpret - - -

13 JUDGE RIVERA: Hold on, I'm sorry. I'm a  
14 little confused, if I can just go back. So 6306(4)  
15 says you hold it in trust. I'm sorry, where - - -  
16 where is the authority to transfer in whichever  
17 manner you want to transfer?

18 MR. KAPLAN: That's 603.5 of the Real  
19 Property Law.

20 JUDGE RIVERA: Oh, okay.

21 MR. KAPLAN: And under Section d it talks  
22 about disposal of the property, which the plaintiffs  
23 have argued we did - - - there's no resolution.  
24 First of all, I would argue that that only deals with  
25 pieces of the property or buildings that were used by

1 the community college. Why would the statute require  
2 the state board of trustees or the community college  
3 to say that it's okay to dispose of a piece of  
4 property - - -

5 JUDGE ABDUS-SALAAM: Are there regulations  
6 or - - -

7 MR. KAPLAN: - - - that they don't use? I  
8 - - - I'm sorry.

9 JUDGE ABDUS-SALAAM: Are there regulations  
10 that govern the transfer of the property and are you  
11 saying that you followed those regulations?

12 MR. KAPLAN: Absolutely. There's no  
13 evidence in the record anywhere that we did not,  
14 whether there's a resolution in the record or not.  
15 On top of which, again - - -

16 JUDGE RIVERA: So - - - so on a summary  
17 judgment motion, whose burden was it to show that?

18 MR. KAPLAN: It was our burden - - -

19 JUDGE RIVERA: Show that it's not or to - -  
20 - and you think you did that through the deed and so  
21 forth?

22 MR. KAPLAN: Correct, yes. And again, that  
23 on our summary judgment motion, that issue was never  
24 challenged in the lower court.

25 JUDGE READ: So you never had an

1 opportunity to put in evidence?

2 MR. KAPLAN: We're, again - - - we're not  
3 arguing that, because, again, we feel there's several  
4 layers before you would even get - - - reach that  
5 issue. There's nothing here - - - proof other than  
6 some arguments by the plaintiffs that it wasn't done  
7 properly.

8 CHIEF JUDGE LIPPMAN: Okay, counsel.

9 MR. KAPLAN: Thank you, Your Honors.

10 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

11 MR. SUSSMAN: Just to focus on this last  
12 issue, Your Honor, 6306(4) provides the authority for  
13 the vesting and holding of properties by the County  
14 as the sponsor for the community college. To answer  
15 Your Honor's question, Section 603.5 are the Rules of  
16 the State University, which are reported at 8 New  
17 York Code Rules and Regulations 603.5, provide the  
18 means of transfer and explain those means. There is  
19 no evidence - - - not only in this record but in any  
20 public record - - - that those - - - any of those  
21 means were followed.

22 Most significantly, that the property was  
23 not needed for a purpose of the community college.  
24 In fact, it was transferred for a purpose of the  
25 community college, which was to house students of the

1 community college. So I don't - - -

2 JUDGE PIGOTT: You see, the post - - - the  
3 post-accident repair that your counsel refers to that  
4 you - - - that the community college put in the AEDs  
5 and not the County, doesn't that add significant  
6 weight? I mean, I know post-accident repair can't be  
7 admitted for purposes of the repair, but it can be  
8 for purposes of ownership and - - - and control.

9 MR. SUSSMAN: What - - - there's no - - -  
10 again, we're in a circular argument. I know I have  
11 to - - - I have to - - - I have limited time.

12 JUDGE PIGOTT: You can add that, right?

13 MR. SUSSMAN: We're - - - the - - - the  
14 board of trust - - - we're not arguing the board of  
15 trustees doesn't have authority to do things. The -  
16 - - the principal argument is the board of trustees  
17 juridically is representative of the County, which  
18 exercises significant control, has indemnification  
19 responsibility. Under County Law 53, these people  
20 are all agents of the County.

21 CHIEF JUDGE LIPPMAN: Okay.

22 MR. SUSSMAN: Thank you for your time.

23 CHIEF JUDGE LIPPMAN: Thank you both.

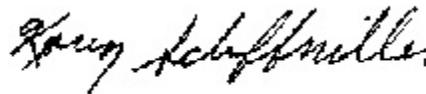
24 Appreciate it.

25 (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 Branch v. County of Sullivan, No. 93, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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