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COURT OF APPEALS  
STATE OF NEW YORK

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MATTER OF DIEGELMAN,

Appellant,

-against-

No. 168

CITY OF BUFFALO,

Respondent.

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Appellate Division, Fourth Department  
The Hon. Samuel L. Green Courtroom  
50 East Avenue  
Rochester, New York 14604  
October 14, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
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  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next matter on the calendar  
2 is appeal number 168 in the Matter of Diegelman v. the City  
3 of Buffalo.

4 Good morning, counsel.

5 MR. COLLINS: Good morning, Your Honors; John A.  
6 Collins for claimant-appellant James Diegelman. And I  
7 would like to reserve five minutes of my fifteen minutes  
8 allotted time, please.

9 CHIEF JUDGE DIFIORE: You may have five minutes,  
10 sir.

11 MR. COLLINS: Thank you.

12 CHIEF JUDGE DIFIORE: You're welcome.

13 MR. COLLINS: The resolution of this appeal in  
14 which the Fourth Department held that the claimant's late  
15 notice of claim application should be denied because his  
16 claim was patently without merit turns on one critical  
17 fact, respondent City of Buffalo does not provide Workers'  
18 Compensation to its police officers.

19 JUDGE PIGOTT: That gets us to an interesting  
20 point. Let's assume you prevail so you're going to sue the  
21 city - - - you're going to sue your employers. I mean it's  
22 kind of unheard of but let's - - - let's assume for the  
23 sake of this argument that it's going to happen. Would  
24 they have a lien?

25 MR. COLLINS: I - - - I think one way or another

1           there would not be any double recovery.

2                   JUDGE PIGOTT: Well, that's - - - that was kind  
3 of my question because to - - - to read it the way you're  
4 reading it and there's - - - it's a - - - it's a good  
5 argument, but you're reading it literally - - - and  
6 literally, there's no lien. So he's going to get all of  
7 his medical, all of his full pay as opposed to comp. where  
8 you - - - you know, you get the lesser amounts. And he  
9 gets to sue for that so he gets double recovery plus, gosh,  
10 pain and suffering and everything else, right?

11                  MR. COLLINS: Well, I think the trial court would  
12 have to take into account the collateral source rule under  
13 C.P.L.R. 4545. He would not get paid twice for - - - and  
14 here, he's a retiree, so they're really not talking about  
15 lost wages.

16                  JUDGE PIGOTT: Well, but the next one won't be.

17                  MR. COLLINS: The next one won't be, but there  
18 will be no double recoveries, I would submit, in any case  
19 because of the workings of the collateral source rule.

20                  JUDGE GARCIA: What would the reason be for a  
21 municipality to have Workers' Comp. other than to avoid  
22 these suits?

23                  MR. COLLINS: I don't know. Certainly, avoiding  
24 these suits is a strong incentive, I would say, and it  
25 allows - - -

1 JUDGE GARCIA: To have that whole system of  
2 Workers' Comp. where a municipality is paying all these  
3 premiums just to avoid this rule?

4 MR. COLLINS: Well, they may not pay premiums.  
5 They may well be self-insured.

6 JUDGE PIGOTT: But even then, doesn't that hurt  
7 the police officers, pardon me, because the comp. is not  
8 going to pay the full pay.

9 MR. COLLINS: No. I think officers, in the  
10 general scheme of things, would rely upon if they are  
11 police officers, CP - - - or rather, General Municipal Law  
12 207-c, if they're firefighters 207-a, get the benefits  
13 under that. But if they did rely upon the Workers'  
14 Compensation system - - - and certainly, some cities, some  
15 towns, some municipalities, other than these major ones  
16 that were, you know, at issue in this case, including the  
17 City of Buffalo, some do provide Workers' Comp.

18 JUDGE PIGOTT: Well, what's better for - - -  
19 pardon. What's better for the police officer, 207 or  
20 Workers' Comp.?

21 MR. COLLINS: I would say 207.

22 JUDGE PIGOTT: Without question. And - - - and  
23 what you're arguing is we have this great benefit, better  
24 than the comp., but we want to sue our employer because  
25 it's not mentioned - - - it's mentioned in 205, in - - - in

1           205 but not in 207. And because of that, as Judge Garcia  
2           is suggesting, the - - - the City's going to say this is  
3           crazy. I mean we're getting sued by our - - - by our  
4           police officers for what happened, we've got to go to comp.  
5           and we've got to compromise all of our other officers and  
6           those in - - - in the future because of this. Does that  
7           make sense to you? I realize you're not a mayor but - - -

8                       MR. COLLINS: I don't think there would be any  
9           compromise involved in - - -

10                      JUDGE PIGOTT: I thought you said the comp. was  
11           not as good as 207.

12                      MR. COLLINS: But the officers would get the  
13           benefits under 207.

14                      JUDGE GARCIA: Right. And - - -

15                      MR. COLLINS: In other words, they would not be  
16           collecting comp. benefits. And if they did - - -

17                      JUDGE GARCIA: The comp. policy is just an  
18           insurance policy against getting sued. It really has no  
19           effect whatsoever because you're still getting the 207  
20           benefits. So the only reason I can see that you would get  
21           a comp. policy is to ensure yourself against these  
22           lawsuits.

23                      MR. COLLINS: Well, that may well be the case but  
24           the legislature recognized that in 1996, and there is a  
25           very extensive, I think unusually extensive, legislative

1 history here.

2 JUDGE GARCIA: I've seen it. But if we get away  
3 from the statute and just think in the way Judge Pigott is  
4 saying this, what could be the possibly justification for  
5 allowing these suits where the plaintiff has better  
6 benefits than Workers' Comp.? What would be the reason for  
7 doing that?

8 MR. COLLINS: I think what the legislature  
9 implicitly, obviously, had in mind has recovery for pain  
10 and suffering which is what you don't get under the  
11 Workers' Compensation system, which is what you don't get  
12 under G.M.L. 207-a or 207-c. And essentially, these suits  
13 turn into suits where you can recover pain and suffering  
14 because - - -

15 JUDGE FAHEY: Well, isn't - - - don't we have  
16 that situation in the First Department?

17 MR. COLLINS: We certainly have it in every First  
18 and Second Department dealing in cases - - -

19 JUDGE FAHEY: Right.

20 MR. COLLINS: - - - where we're talking about New  
21 York City police officers and fire - - -

22 JUDGE FAHEY: Right. It's kind of a strange  
23 situation because in New York City, we have an  
24 administrative rule which is the equivalent of - - - of  
25 207, right?

1 MR. COLLINS: Correct.

2 JUDGE FAHEY: And - - - and that equivalent rule  
3 means that this is, in effect, in the largest city in the -  
4 - - in the country that - - - that you're talking about  
5 right now. What's the experience there? I'd looked at a  
6 few cases, Gammons, there are a few cases I looked it. It  
7 seemed to be what - - - what the judge was just saying,  
8 that, in essence, that you're - - - you're suing for pain  
9 and suffering here and that you would insure against that.

10 MR. COLLINS: Yes.

11 JUDGE FAHEY: Is that what happens in the City,  
12 Mr. Collins?

13 MR. COLLINS: That's my understanding from  
14 reading the - - - the Gonzales case, the Weiner case, the  
15 Gammons case is that, yes, the injury - - -

16 JUDGE FAHEY: So - - - so we have basically two  
17 systems in the state right now. One, in the largest - - -  
18 the police and the firefighters in the - - - in the largest  
19 city in the state have one rule and everybody else in the  
20 smaller municipalities have a different rule.

21 MR. COLLINS: They do. And the only distinction  
22 between the two is that in New York City, as Your Honor  
23 pointed out, they're dealing with several provisions of the  
24 Administrative Code that provide materially the same relief  
25 and benefits that are provided outside of the city under

1 207.

2 JUDGE FAHEY: I didn't think any - - - either  
3 side distinguished - - - they - - - both sides seemed to  
4 treat those as equivalent. Your - - - your opponent can  
5 address that but it seemed to be that they treated them as  
6 equivalent.

7 MR. COLLINS: Yes. They're getting medical - - -  
8 full medical coverage - - -

9 JUDGE FAHEY: Salary.

10 MR. COLLINS: - - - and they're getting lost wage  
11 coverage.

12 JUDGE FAHEY: Right.

13 MR. COLLINS: A benefit that exceeds Workers'  
14 Compensation. But - - - and it's been that way,  
15 apparently, in New York City with special administrative  
16 provision since at least 1920 when this court - - -

17 JUDGE PIGOTT: But that's always been the case.  
18 They - - - I mean they always say, you know, cities of more  
19 than a million or cities not fully contained within a  
20 county in order to treat New York City differently.

21 MR. COLLINS: Yes.

22 JUDGE PIGOTT: We're - - - we're up here and - -  
23 - and I get the firefighters' rule where, you know, if, as  
24 a result of someone else's negligence a firefighter or a  
25 police officer is injured, they could pursue a case against

1 that - - - that tort, but it's never been an employer, has  
2 it?

3 MR. COLLINS: It - - - it has in New York City,  
4 certainly.

5 JUDGE PIGOTT: Well, I understand that.

6 MR. COLLINS: And it - - - it should be here  
7 because there is no arguable legal distinction between how  
8 New York City - - -

9 JUDGE PIGOTT: Well, is that what the statute  
10 says? It says, you know, in cities less than a million  
11 this is - - - this is the rule. And - - -

12 MR. COLLINS: Well - - -

13 JUDGE PIGOTT: And there - - -

14 MR. COLLINS: Well, the statute is 207-a and c  
15 and they are the provisions that deal with cities less than  
16 a million, and what they do in those statutes is give  
17 police officers and firefighters in Buffalo, Poughkeepsie,  
18 whatever, the same benefits, essentially, that police and  
19 fire personnel are getting in New York City under the  
20 Administrative Code. But neither of those provisions  
21 states and these payments shall be deemed the equivalent of  
22 Workers' Compensation.

23 JUDGE PIGOTT: Which gets back to my main  
24 question, and you say that - - - that it's not a lien  
25 except that it can be - - - it can be used under 4545 of

1 the C.P.L.R. to offset a verdict.

2 MR. COLLINS: Right. I mean I have not seen in  
3 the statutes any language that says it's a lien but again,  
4 yes. There would be no double recovery. And to get back  
5 to the 1996 legislative history, the senate sponsor in his  
6 message urging pass - - - passage of the 1996 amendments  
7 said that "Subject to the limitations of the Workers'  
8 Compensation law, employers and co-employees will remain  
9 liable to injured police officers under Section 205-e."

10 The bill opponents vigorously opposed that,  
11 pointing out that it would result in liability for the  
12 municipalities that don't provide Workers' Comp., including  
13 not only New York City but - - - and acknowledging that  
14 they're essentially treated the same although the benefits  
15 are paid under either the Administrative Code or 207,  
16 Buffalo, Syracuse, Rochester, this was twenty years ago.  
17 Governor Pataki said essentially, so be it.

18 JUDGE STEIN: And in fact, every time we've tried  
19 to limit the impact of - - - of the statute, the  
20 legislature has gone back and clarified it to - - -

21 MR. COLLINS: Yes.

22 JUDGE STEIN: - - - contradict what - - - what  
23 this court has done.

24 MR. COLLINS: Yeah. This court has, you know,  
25 come to acknowledge that we get it; the legislature wants

1 this provision applied expansively as possible. And in the  
2 city of New York, suits against the City for, you know,  
3 sidewalks defects that an officer trips on, a firefighter  
4 trips on, a broken railing, whatever, the City is a  
5 defendant. What will they end up paying for that they  
6 wouldn't pay for under the Administrative Code? Pain and  
7 suffering and the same result should obtain under Section  
8 205-e for, you know - - - which applies in New York City,  
9 applies here, and it - - - it should obtain under 207, as  
10 well.

11 JUDGE ABDUS-SALAAM: Counsel, I see your light is  
12 on, but I - - - I just have one, you know, very small  
13 question and just to clarify, you're suing the Board of  
14 Ed., as well, but this police officer seemed to work in  
15 police precincts. Does the Board of Ed. own some of these  
16 precinct buildings? Is that it?

17 MR. COLLINS: That was what our initial  
18 investigation determined is that there might have been some  
19 ownership connection. I'm not sure how that's going to pan  
20 out.

21 JUDGE ABDUS-SALAAM: Okay.

22 MR. COLLINS: The critical issue, I think, on  
23 appeal is really the municipal liability. But assuming  
24 that the Board of Ed. did own some of these properties, I  
25 submit that the Fourth Department erred in saying that the

1 claim against it would be patently without merit because as  
2 a nonemployer it wouldn't be entitled to the so-called  
3 comp. defense - - -

4 JUDGE STEIN: Well, was that - - -

5 MR. COLLINS: - - - even if that defense were  
6 applicable.

7 JUDGE STEIN: Was that argument preserved? Did  
8 you argue that?

9 MR. COLLINS: It didn't get argued as such,  
10 really, because in both of our briefs before the Appellate  
11 Division, it - - - the argument really focused on the City  
12 of Buffalo and the defense. The City at that point was the  
13 appellant, and in their brief they argued that the claim  
14 against the City of Buffalo should have been, you know,  
15 denied outright as patently meritless based upon the  
16 arguments we've discussed here. And so that was the focus  
17 of it and they didn't really make a distinction between the  
18 - - - the City and the Board of Education. And our brief,  
19 again, focused upon, you know, the argument that they had  
20 raised on appeal.

21 CHIEF JUDGE DIFIORE: Thank you, Mr. Collins.  
22 Counsel.

23 MR. LEE: Good morning, Your Honors. My name is  
24 David Lee, and I represent the respondents, City of Buffalo  
25 and Board of Education on this appeal.

1 JUDGE STEIN: How could the legislature be any  
2 clearer about what they expect - - - how they expect this  
3 statute to be interpreted?

4 MR. LEE: I think, Your Honor, that - - - that  
5 perhaps the legislative history regarding the 1996  
6 amendments to Section 205-e is completely misleading. I  
7 think what you have to do is you have to - - -

8 JUDGE STEIN: Well, it's not just the 1996  
9 amendments. There - - - there have been three or four  
10 amendments along the way. Every time this court has tried  
11 to restrict the application of the statute, the legislature  
12 has come back and changed it and made it clear that that  
13 was not its intention. And so even if - - - even if you  
14 could read the legislative history of the 1996 amendment  
15 another way, isn't it consistent to read it the way that -  
16 - - that - - -

17 MR. LEE: Well, I - - - I think that - - -

18 JUDGE STEIN: - - - the claimant is arguing?

19 MR. COLLINS: I think that the legislature - - -  
20 and I'd have to - - - I think I'd have to concede that  
21 point that the legislature has taught this court to read  
22 statutes - - - however, I'm not sure that the legislature  
23 perhaps in - - - in the new amendments ever really looked  
24 back to the original enactment of the statute back in 1989.

25 JUDGE PIGOTT: But we can't - - - you're then

1           arguing saying, well, they made a mistake. If they had it  
2           to do over again they would have done it the way you would  
3           prefer it to be done. But isn't Mr. Collins right? I mean  
4           if you read the thing, they can sue their employer.

5                       MR. LEE: No. I - - - I don't think they can. I  
6           mean I think that - - - I mean I'm trying to deal with this  
7           legislative history the very best that I can. And the - -  
8           - the way that I - - - the best way to do it, I think, is  
9           to go back to that 1989 enactment where municipalities were  
10          absolutely concerned about the legal relationship between  
11          an employer and an employee. Therefore, that Workers'  
12          Compensation language was added. In fact, what it - - - my  
13          understanding of the legislative history is that without  
14          that provision in there, the bill never even passed. So -  
15          - -

16                       JUDGE FAHEY: That - - - the '96 amendment seems  
17          to undermine that argument. It's '96, right, isn't it?  
18          Yeah. I think it's '96. The '96 amendment seems to really  
19          undermine that amendment. In the legislative history, it  
20          seems that they actually discussed this. I mean Mayor  
21          Giuliani wrote a specific - - - particular letter about the  
22          impacts and that there were a number of things included in  
23          the record that seemed to undermine it, I think.

24                       MR. LEE: That's - - - that's correct, Judge.  
25          And Mayor Giuliani was absolutely wrong in his analysis of

1 the law. When he said that this would expand the liability  
2 for municipalities that don't provide Workers' Compensation  
3 insurance, such as the City of Buffalo, that absolutely was  
4 not the state of the law in the Fourth Department. The  
5 Fourth Department was clear that it was viewed as basically  
6 the legal equivalent. 207-c benefits were viewed as the  
7 legal equivalent of Workers' Compensation benefits for  
8 police officers. And I think the court was hitting on this  
9 in the beginning that what is the - - - the rational basis  
10 for distinguishing between those municipalities that label  
11 their payments to police officers Workers' Compensation  
12 versus ones who don't.

13 JUDGE STEIN: So your argument depends on our  
14 assuming that 207 is essentially a Workers' Compensation  
15 provision?

16 MR. LEE: It - - - and I think that that's - - -  
17 that is spelled out in - - - even in the case law, Your  
18 Honor, that it's basically - - - it's Workers' Compensation  
19 for police officers but there needs to be something extra  
20 for police officers. The legislature decided when they  
21 enacted 207-a and 207-c with respect to firefighters for  
22 207-a, because their jobs are - - - are really tough. And  
23 they're more - - -

24 JUDGE ABDUS-SALAAM: But, counsel, if we decide  
25 in your favor, what happens, then, to the police officers

1 and firefighters in New York City?

2 MR. LEE: It continues on the exact same way  
3 because New York City is exempt from 207-c. So that's - -  
4 - I think that's - - - that's the critical difference.

5 JUDGE STEIN: Why does that make sense?

6 MR. LEE: It makes sense because New York City is  
7 - - - is treated differently. They - - - they have decided  
8 to enact their own Administrative Code and do this their -  
9 - - their own way. And as the court knows, New York City  
10 is treated differently with the - - - I don't know if I can  
11 name it off the top of my head but it seems like - - -

12 JUDGE STEIN: But usually you would think there  
13 would be a rationale for that and I haven't heard a  
14 rationale, in this particular instance, why it makes a  
15 difference if you're a police officer in New York City or  
16 in Buffalo.

17 JUDGE FAHEY: Well, you know, normally, the kind  
18 of rationale we're talking about is it would be affected by  
19 size or economic costs. For instance, differences in  
20 salaries within a salary structure throughout the state or  
21 the size of the city demands certain things. But there  
22 doesn't seem to be that kind of rationale here, I guess, is  
23 - - - is what I'm looking for. I can think of many reasons  
24 how you could distinguish between the cities and from  
25 policy point of view it would make sense. But here, I

1 don't really understand the distinction.

2 MR. LEE: Well, I think - - - I think the  
3 distinction is that New York City does - - - does it their  
4 own way and they're specifically exempt from what I would  
5 call the Workers' Compensation statute for police officers  
6 in New York State which is - - - which is 207-c. So I mean  
7 they're - - - they're - - -

8 JUDGE FAHEY: Well, that's - - - that's if we  
9 accept your argument that they're equivalent. Most  
10 beneficiaries don't want Workers' Comp. benefits. They  
11 want 207-c benefits, right, because they're worth more?

12 MR. LEE: Yeah. I mean they - - - they are. And  
13 that's - - - and that's - - -

14 JUDGE FAHEY: I think that's the bottom line  
15 here.

16 MR. LEE: Right. And I mean I guess - - - I  
17 would guess what I would do is just get back to my - - - my  
18 original point. I think - - - I think my strongest  
19 argument is, and what I really want to convey to this  
20 court, is that when 205-e was originally enacted in 1989,  
21 municipalities were absolutely concerned about the employer  
22 being allowed - - - the employee being allowed to sue their  
23 municipal employer, and that concern was absolutely  
24 addressed with that last provision in 205-e which preserves  
25 the exclusivity provisions of the Workers' Compensation

1 law. And I think the intent behind that wasn't to say oh,  
2 well, some municipalities don't actually provide Workers'  
3 Compensation benefits to their employees so we're going to  
4 treat them completely different. It was really just to  
5 ensure that an employee couldn't sue their municipal  
6 employer. And I think the legislative history attached to  
7 my brief for the 1989 enactment spells that out.

8 JUDGE RIVERA: Why not just say that? Why not  
9 just say that?

10 MR. LEE: I think the way the - - -

11 JUDGE RIVERA: You don't get to sue your  
12 municipal employer, period. Done. Why have all the rest  
13 of the language?

14 MR. LEE: And interestingly enough, they did say  
15 that in 1996 when they - - - when they enacted the General  
16 Obligations Law section which basically completely  
17 abolished the firefighters' rule. They did it more clearly  
18 in 1996. But the intent was always the same. Employees  
19 should not be allowed to sue their employers in tort when  
20 they are receiving Workers' Compensation benefits. That  
21 they're labeled 207-c benefits, I mean, what is - - - what  
22 is the difference?

23 JUDGE STEIN: Well - - -

24 JUDGE PIGOTT: Well, the difference is in that in  
25 205-e it says: "Provided, however, that nothing in this

1 section shall be deemed to expand or restrict any right  
2 afforded to or limitation imposed upon an employer for an  
3 employee by virtue of the provisions of the Workers'  
4 Compensation Law." That's not in 207.

5 MR. LEE: That's - - - that's true, Your Honor.  
6 In 20 - - - that 205-e doesn't say 207-c, you mean?

7 JUDGE PIGOTT: Right. 205 says it and 207 does  
8 not.

9 MR. LEE: Yeah. Well, and 205 is enacted after  
10 207. That - - - I mean that could have something to do  
11 with it.

12 CHIEF JUDGE DIFIORE: Thank you, sir.

13 MR. LEE: Okay. Thank you.

14 MR. COLLINS: Just very briefly, Your Honors.  
15 The General Municipal Law is distinct from and is not part  
16 of the Workers' Compensation law. And the only exemption  
17 granted to the municipalities under 205-e and for  
18 firefighters the analogous 205-a, as this court determined,  
19 was if you're covered by Workers' Compensation as an  
20 employee, you can't sue your employer. If you are not  
21 covered by Workers' Compensation, you can sue under 205-a  
22 or e.

23 And the distinction between Workers' Compensation  
24 and benefits payable under 207-a - - - or rather, yeah, a  
25 and c was made manifest in Workers' Compensation Law

1 Section 30, which I cite in my reply, brief, which states  
2 that: "No benefits independent of the provisions of this  
3 chapter shall be considered except" - - - and it goes on to  
4 state that "an award of compensation paid under 207-a or  
5 207-a shall be deemed a credit against Workers'  
6 Compensation." Now whether that will ever have any  
7 practical effect, because the benefits under 207-a and c  
8 are greater than the Workers' Comp., is questionable. But  
9 the statute is significant because it does note that - - -  
10 and identify those payments as benefits independent of the  
11 provisions of this chapter, meaning chapter 67 of the  
12 Workers' Compensation - - -

13 JUDGE RIVERA: So if I - - - if I could just  
14 clarify. So is your first position that statutory scheme  
15 is clear on its face, don't even need to look at the  
16 legislative history, but if we don't agree with that the  
17 legislative history establishes your position that this is  
18 exactly what the legislature wanted?

19 MR. COLLINS: The legislative history - - -

20 JUDGE RIVERA: And everyone understands that?

21 MR. COLLINS: The legislative history just nails  
22 it now. Yes, Your Honor.

23 JUDGE RIVERA: But - - - but is your first  
24 position that the language is plain? We don't even need to  
25 look at the history?

1                   MR. COLLINS: Yes. It is. I know the court  
2 generally will look at the plain language and not look at  
3 legislative history if it doesn't have to. Here, I think  
4 it is plain. But if you do look at it, it just, you know,  
5 solidly supports that. Thank you.

6                   CHIEF JUDGE DIFIORE: Thank you, counsel.

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 People v. City of Buffalo, No. 168 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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

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