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COURT OF APPEALS

STATE OF NEW YORK

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GALETTA,

Appellant,

-against-

No. 94

GALETTA,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
April 23, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Galetta v. Galetta,  
2 number 94. Counsel, do you want any rebuttal time?

3 MR. AFFRONTI: Yes, Your Honor. Two hours  
4 - - - two hours. Two minutes, please.

5 CHIEF JUDGE LIPPMAN: Two minutes, you got  
6 it.

7 MR. AFFRONTI: Thank you. Good afternoon,  
8 may it please the court, Francis Affronti, appearing  
9 on behalf of Michelle Galetta. The motion for  
10 summary judgment - - -

11 CHIEF JUDGE LIPPMAN: Why should you,  
12 counsel - - - why should your client get a windfall  
13 here?

14 MR. AFFRONTI: Judge, she's not getting a  
15 windfall here, Judge.

16 CHIEF JUDGE LIPPMAN: Why not?

17 MR. AFFRONTI: Because the - - -

18 CHIEF JUDGE LIPPMAN: I mean, the intent of  
19 this agreement is clear, right? Why - - - isn't this  
20 a technical objection you're making?

21 MR. AFFRONTI: No, Your Honor.

22 CHIEF JUDGE LIPPMAN: I'm talking policy,  
23 fairness, putting aside whether your technical  
24 objection is right or wrong.

25 MR. AFFRONTI: Your Honor, there's a

1 substantive requirement of the statute that was not  
2 complied with.

3 CHIEF JUDGE LIPPMAN: Yeah, but I'm asking  
4 you a different question. It would appear that - - -  
5 that both parties agreed to whatever's in this - - -

6 JUDGE READ: Pre-nup.

7 CHIEF JUDGE LIPPMAN: - - - prenuptial.  
8 Why isn't it right that both parties abide by the  
9 prenuptial? Putting aside whether or not you are  
10 technically correct that it's just unenforceable.

11 MR. AFFRONTI: Your Honor, the parties'  
12 actions, conduct, what have you, that have occurred  
13 afterwards has no relevance whatsoever as part of  
14 this matter. The agreement was void from the  
15 beginning, and that's it.

16 JUDGE PIGOTT: Separate and apart from  
17 that, let's assume you lose, is this agreement  
18 enforceable? I mean, it says, I keep this bank  
19 account; I keep this federal credit union account; I  
20 keep this life insurance, but it's - - - at no point,  
21 spells out the amount in the bank account, the amount  
22 in the federal credit union, the amount of life  
23 insurance.

24 And then it says, you know, that he's  
25 represented by counsel, and she's elected not to, and

1 that's the end of it. It seems to me, I thought  
2 lawyers had a fiduciary duty in these matters, to  
3 make sure that everything is balanced.

4 MR. AFFRONTI: One would think so, Your  
5 Honor. I mean, this prenuptial is a mess. You can  
6 see there's different fonts throughout it, you can  
7 see - - -

8 JUDGE PIGOTT: But so even if - - -

9 MR. AFFRONTI: - - - there's copy and  
10 paste.

11 JUDGE GRAFFEO: There's no allegations of  
12 fraud here?

13 MR. AFFRONTI: Not - - - no, Your Honor.  
14 That's exactly correct; we did not bring it.

15 JUDGE GRAFFEO: And this case is - - - this  
16 case is different than the Matisoff case, in that  
17 there is an acknowledgement. It's not that there  
18 isn't an acknowledgement. It just happens to be  
19 somewhat incomplete from what would have been the  
20 usual language.

21 MR. AFFRONTI: Well, that's where I  
22 disagree with you, Your Honor. I mean, it's not  
23 about 309(a) and the language. If it was just  
24 missing the language, Judge, then that would be  
25 309(a). This is missing the whole requirement of to

1 me known personally, known by the notary, as well as  
2 providing the satisfactory - - -

3 JUDGE READ: You don't think that's - - -  
4 you don't think that's - - -

5 JUDGE GRAFFEO: And the notary affidavit  
6 doesn't cure that?

7 MR. AFFRONTI: No, Your Honor, because the  
8 notary's affidavit doesn't address - - - it doesn't  
9 say I knew Gary Galetta. It doesn't say Gary Galetta  
10 provided to me. There's no mention of that  
11 whatsoever. That's why I submit there's no question  
12 of fact.

13 CHIEF JUDGE LIPPMAN: Why isn't this  
14 substantial compliance?

15 MR. AFFRONTI: Just substantial compliance  
16 applies to 309(a). Go all the way back to Matisoff  
17 and you said, no agreement, there's no exception to  
18 the acknowledgement requirement, if it's part and  
19 parcel of a matrimonial case.

20 JUDGE READ: But that was an unacknowledged  
21 agreement in that case.

22 MR. AFFRONTI: Judge, that's correct, but  
23 whether it's an unacknowledged agreement, or it's an  
24 agreement that is missing a piece. I mean, the  
25 Appellate Division tried to distinguish to say

1 unacknowledged agreement versus - - - I forget the  
2 exact words that they were using - - -

3 CHIEF JUDGE LIPPMAN: If it's not done  
4 right - - -

5 MR. AFFRONTI: - - - attempt - - - attempt  
6 to cure it - - - it's still unacknowledged.

7 CHIEF JUDGE LIPPMAN: If it's not done  
8 right contemporaneously, finished, end of story?

9 MR. AFFRONTI: That would be my position,  
10 Your Honor.

11 JUDGE SMITH: Is there no difference  
12 between a defect in the acknowledgement and a defect  
13 in the certificate? I mean, as far as we know this  
14 was acknowledged, in the sense that it was brought to  
15 a notary, and they said, will you please notarize us.  
16 The same way every document is acknowledged. It's  
17 just that the certificate is defective, or may be  
18 defective.

19 MR. AFFRONTI: The certificate is certainly  
20 defective, Your Honor, because - - - and again, there  
21 you have to add substantial compliance, but separate  
22 and apart from that, Judge - - - again, the  
23 certificate is supposed to establish all things done,  
24 known, or approved has occurred - - -

25 JUDGE SMITH: Okay, well - - -

1 MR. AFFRONTI: - - - that's what the  
2 acknowledgement requires, so I would again disagree  
3 with you and say this is not acknowledged, because  
4 that requirement did not occur.

5 JUDGE READ: Well, isn't that something  
6 that the notary by law - - - he's not supposed to  
7 notarize something if he doesn't know that the  
8 identity of the person in front of him is the person  
9 that's making the signature.

10 MR. AFFRONTI: Except, Your Honor, the  
11 notary never said that - - -

12 JUDGE READ: Yeah, but I'm saying, don't we  
13 - - -

14 MR. AFFRONTI: - - - and neither did Mr.  
15 Galetta.

16 JUDGE READ: - - - don't we assume that the  
17 notary follows the law - - -

18 MR. AFFRONTI: Well, Judge - - -

19 JUDGE READ: - - - and doesn't notarize  
20 something unless he has that knowledge?

21 MR. AFFRONTI: Judge, certainly in this  
22 case, I would say - - - say no, because he didn't say  
23 it in the certificate and he didn't say it - - -

24 CHIEF JUDGE LIPPMAN: Counsel, but I think  
25 the Judge is saying he - - - why can't you just infer

1           it? He's a - - - you have to follow the law, and why  
2           wouldn't we assume, since they signed the piece of  
3           paper, that that means that they did follow the law?

4                   MR. AFFRONTI: Your Honor, I would take you  
5           back to an old case of - - - of - - - decided by this  
6           court, Fryer v. Rockefeller, where the same argument  
7           was made to say that it's implied, and what the court  
8           said was the statute leaves no room for so large an  
9           implication. They wanted compliance with the  
10          statute's - - -

11                   JUDGE READ: So they're magic words.  
12          They're magic words. If it's missing magic words,  
13          "known to me", and whatever those magic words are - -  
14          - before - - - coming - - - known to me and before me  
15          - - - if it's missing those magic words, it can't be  
16          in substantial compliance; it's defective; that's all  
17          there is to it.

18                   MR. AFFRONTI: Judge, there's at least one  
19          case that a body case where - - -

20                   JUDGE READ: Is that right? Is that your  
21          position? If it doesn't have those particular words,  
22          it's defective?

23                   MR. AFFRONTI: If it doesn't have that  
24          words and it didn't occur, there's no proof it  
25          occurred, then it's defective. That's my position on

1 - - -

2 JUDGE GRAFFEO: What's the effect of the  
3 new statute?

4 MR. AFFRONTI: None, Your Honor, because,  
5 again, it's really primarily a language change - - -  
6 you're referring to 309(a), I'm assuming.

7 JUDGE GRAFFEO: Right.

8 MR. AFFRONTI: That's - - - so - - -

9 JUDGE GRAFFEO: Well, they've added some  
10 additional words.

11 MR. AFFRONTI: They've added language.  
12 It's that personally known to me, or known to me, and  
13 that it's - - - then it's said satisfactory evidence  
14 is the way that I think about it. It's still relates  
15 back to 303 - - -

16 JUDGE PIGOTT: Let's assume - - - let's  
17 assume you're right for - - -

18 MR. AFFRONTI: - - - Real Property Law  
19 Section 303, personally known or known to me.

20 JUDGE SMITH: Let's assume you're - - -  
21 let's assume you're right for a minute. Now the  
22 husband has got a defective pre-nup. And he - - -  
23 doesn't he have all the cards now, because if he  
24 wants to enforce it, he will enforce it. If he  
25 doesn't, he can say, oh, it was defective, you know,

1 it doesn't count.

2 I mean, I'm wondering why you would allow  
3 one party or another to have in his or her hip pocket  
4 an ability to attack a pre-nup that everybody agrees  
5 that there's no dispute or that they both signed it,  
6 and that they both signed it before the wedding.

7 And to say that we're going to honor these  
8 defects come hell or high water seems to me to be  
9 saying one of these parties has an advantage. Do we  
10 want to do that?

11 MR. AFFRONTI: Well, Your Honor, I think if  
12 you declare the prenuptial to be invalid from the  
13 beginning, then neither party will have the advantage  
14 - - -

15 JUDGE SMITH: And even if your client  
16 wanted to enforce it, he couldn't, you say?

17 MR. AFFRONTI: That's - - - it would still  
18 - - -

19 JUDGE SMITH: Even though it's - - - his  
20 signature is defectively acknowledged, but you say  
21 the agreement is just void, no matter who's enforcing  
22 it.

23 MR. AFFRONTI: Your Honor, actually I  
24 represent the wife, so it's not my client who has - -  
25 - who had the defective acknowledgement.

1 JUDGE PIGOTT: Well, let's assume - - - I  
2 mean, take it the other way.

3 MR. AFFRONTI: Sure, sure.

4 JUDGE PIGOTT: And, you know, she finds  
5 out, you know, well, I, you know, I don't want to  
6 enforce this agreement and I'm making this argument,  
7 but now I do want to enforce this agreement, and so -  
8 - -

9 MR. AFFRONTI: She can't either, Judge.

10 JUDGE PIGOTT: - - - I can point it out.

11 MR. AFFRONTI: It certainly - - - it  
12 certainly cuts both ways. There is no doubt about  
13 it. And I - - - again, I would submit to you that it  
14 would be void from the beginning. It's just - - -  
15 it's not subject to cure. Certainly can't get cured  
16 after the commencement - - -

17 JUDGE SMITH: You said a minute ago that if  
18 the words aren't there and there's no proof it  
19 happened - - - well, suppose there is proof it  
20 happened. Suppose there's a videotape of these  
21 people going before the notary and doing everything  
22 you could imagine them want - - - doing, but there's  
23 a defect in the certificate.

24 MR. AFFRONTI: That's - - -

25 JUDGE SMITH: Does the videotape cure the

1 defect?

2 MR. AFFRONTI: Probably does, Your Honor.  
3 That's a question of fact and that's certainly not  
4 what we have here, because that's not - - - that's  
5 not provided.

6 JUDGE SMITH: Okay, but if a videotape can  
7 do it, why not an affidavit?

8 MR. AFFRONTI: We don't have that here.

9 JUDGE SMITH: Because you say the notary's  
10 affidavit is inadequate.

11 MR. AFFRONTI: Correct. The notary's  
12 affidavit shows the things that were done, but not  
13 the things known or proved.

14 CHIEF JUDGE LIPPMAN: Okay, counsel.

15 MR. AFFRONTI: Thank you very much.

16 CHIEF JUDGE LIPPMAN: Let's hear your  
17 adversary.

18 MS. REARDON: Yes, excuse me, good  
19 afternoon, Your Honors, Kathleen Reardon for Gary  
20 Galetta.

21 CHIEF JUDGE LIPPMAN: Counsel, apropos what  
22 Judge Pigott was asking, you know, can you have it  
23 both ways? In other words, could someone hedge? If  
24 you - - - if there's no finality to this thing, and  
25 it could be cured later, don't you leave it really

1 open to, well, is it a good thing; do I want to cure  
2 it; do I not want to cure it? I mean, is that a - -  
3 - is that a - - - make any sense - - -

4 MS. REARDON: But - - -

5 CHIEF JUDGE LIPPMAN: - - - if you don't  
6 have a real rule and later on you can come in and  
7 say, oh, yeah, it was really okay.

8 MS. REARDON: Judge, I think two - - -

9 CHIEF JUDGE LIPPMAN: You follow the  
10 question?

11 MS. REARDON: I think I do. First of all,  
12 in terms of the windfall that was - - -

13 CHIEF JUDGE LIPPMAN: How can that be  
14 right?

15 MS. REARDON: - - - that was raised here,  
16 and the point being that it can't be right. And that  
17 there are rules of law to follow and you do need to  
18 follow 303 - - -

19 CHIEF JUDGE LIPPMAN: Yeah, but that's what  
20 I'm asking, that - - - so you're - - - so you're  
21 saying that you can cure it, right?

22 MS. REARDON: It can be cured.

23 CHIEF JUDGE LIPPMAN: Yeah.

24 MS. REARDON: And it was in fact cured here  
25 with the notary's affidavit.

1 JUDGE PIGOTT: Then what's the issue of  
2 fact? What - - - why is it going back for any  
3 testimony? I - - -

4 MS. REARDON: I think the question in - - -  
5 that has been raised by counsel is the notary's  
6 affidavit - - - excuse me - - - sets forth the custom  
7 and practice, and what he did, and all the things he  
8 was supposed to do.

9 JUDGE PIGOTT: Right.

10 MS. REARDON: I think the only question may  
11 specifically have been, how did you know it was him?  
12 Did he hand you a license?

13 JUDGE PIGOTT: Well, why didn't he put that  
14 in the affidavit? I would assume if he said, I know  
15 Gary Galetta; he's - - - you know, we've played  
16 softball together. He came down to my bank; he's got  
17 a million bucks in there, and - - - there's no doubt  
18 about it; this guy signed it. And he can't do that.  
19 All he can say is "it was then and always has been my  
20 custom and practice" and so, if that's - - - here - -  
21 - clear this up for me.

22 MS. REARDON: Right.

23 JUDGE PIGOTT: If that's sufficient, then  
24 there's no question of fact.

25 MS. REARDON: Which is our argument. Which

1 is there - - -

2 JUDGE PIGOTT: Well, the Appellate Division  
3 said it was a question of fact. I'm trying to figure  
4 out where you're going on this trial.

5 MS. REARDON: Okay.

6 JUDGE PIGOTT: I mean, where the question  
7 of fact is.

8 MS. REARDON: Our argument, number one, is  
9 that there is no issue of fact, because that  
10 affidavit, along with Mr. Galetta's affidavit, cures  
11 - - -

12 CHIEF JUDGE LIPPMAN: Counsel, if he - - -  
13 if the notary knew who it was, why didn't he just say  
14 it in the affidavit? Doesn't it - - -

15 JUDGE GRAFFEO: Or he could have said, I  
16 always ask for a driver's license.

17 MS. REARDON: He could have said that.

18 JUDGE GRAFFEO: So I know I looked at the  
19 driver's license or I asked for two forms of I - - -  
20 picture ID. He didn't say that either.

21 MS. REARDON: You're right. He could have  
22 said that, and the only reason why I think this would  
23 go back for that determination for the issue of fact  
24 is what did you use to show known to me - - -

25 CHIEF JUDGE LIPPMAN: Yeah, but this is - -

1 - but this is - - -

2 MS. REARDON: - - - or to me known, a  
3 license.

4 CHIEF JUDGE LIPPMAN: But this is even more  
5 equivocal. I mean, it almost seems like the notary  
6 is saying, I don't know, this is what I ordinarily  
7 do. And there isn't some lynchpin that you could go,  
8 you know, go on to just - - - I usually make sure  
9 that it's the person and I'm sure that I did what I  
10 usually do. Doesn't that almost say, I don't  
11 remember what happened or didn't happen?

12 MS. REARDON: Judge, I think he - - - I  
13 think that's - - - actually that is what he said in  
14 that affidavit. These are the things - - -

15 CHIEF JUDGE LIPPMAN: That I don't know  
16 what happened or didn't happen?

17 MS. REARDON: No, no, no. These are the  
18 things that I do when I go - - - anytime over my  
19 fourteen years as a notary - - -

20 JUDGE SMITH: And it's fairly obvious,  
21 isn't it, that he has no specific recollection of  
22 this notarization?

23 MS. REARDON: I can't disagree with that,  
24 and I think that's why he said - - -

25 JUDGE SMITH: I mean, and you wouldn't

1 expect him to.

2 MS. REARDON: Right, he's - - -

3 JUDGE SMITH: It's almost impossible.

4 MS. REARDON: He's a bank manager. I think  
5 they do this as a matter of course throughout the  
6 day.

7 CHIEF JUDGE LIPPMAN: Well, he might have -  
8 - - he might have - - - no, but it could have been  
9 that he knew this person.

10 MS. REARDON: It - - -

11 CHIEF JUDGE LIPPMAN: They say, I'm a  
12 regular customer there.

13 MS. REARDON: It could have been.

14 CHIEF JUDGE LIPPMAN: Could be, hey, I know  
15 Joe Schmo, and I would know Joe Schmo when I saw him.

16 MS. REARDON: It could have been, Judge,  
17 and I - - -

18 CHIEF JUDGE LIPPMAN: But in this case,  
19 that's what we're talking - - -

20 MS. REARDON: Yeah, I think the issue was  
21 he went into the bank, and this was the bank manager,  
22 and so this is where he would go, and this is what  
23 the bank manager would do.

24 JUDGE READ: You are - - - you are arguing  
25 substantial compliance, too, aren't you?

1 MS. REARDON: We are - - - we are - - - I  
2 am arguing substantial compliance. I think it does  
3 comply with the statute. I know that "to me known,  
4 known to me" is not in there, but by virtue of saying  
5 before me came Gary Galetta, who described in, has,  
6 you know, signed - - -

7 JUDGE SMITH: You're saying that in saying  
8 that it's true, he's implicitly saying that he knew -  
9 - - he knew it to be true or had reason to - - - or  
10 had good reason to think it was true.

11 MS. REARDON: That's correct, Judge.

12 CHIEF JUDGE LIPPMAN: By accepting your  
13 position, doesn't it undermine our case law in  
14 Matisoff?

15 MS. REARDON: No, because Matisoff was  
16 unacknowledged. I know counsel has argued that by  
17 virtue of the fact that that one phrase isn't in  
18 here, then there is no acknowledgement. I think  
19 that's incorrect. They clearly - - -

20 JUDGE PIGOTT: Let's assume you're right.  
21 Let's assume you win on this. What happens to this  
22 agreement? Is it subject to attack?

23 MS. REARDON: I believe it's enforceable at  
24 this point - - -

25 JUDGE PIGOTT: Well, the reason I ask that

1 is because she didn't have a lawyer, he did. And it  
2 says "the following shall constitute remain separate  
3 property of the respective parties. Property whether  
4 real or personal, all property acquired by a party at  
5 anytime by bequest, salary, wages and compensation,  
6 compensation for personal injury, proceeds of  
7 insurance policies, increase in value of the  
8 property, federal credit union" - - - a specific bank  
9 - - - "rents, issues, profits, dividends, other  
10 income."

11 And none of them are spelled out. You  
12 know, none - - - it doesn't say, in this bank account  
13 I've got eight million dollars; in this federal  
14 credit union, I've got something else, and - - -

15 MS. REARDON: But then - - -

16 JUDGE PIGOTT: Well, I'm almost done.

17 MS. REARDON: I'm sorry.

18 JUDGE PIGOTT: And so at some point, don't  
19 the lawyers or don't the people representing them  
20 have to make sure that this was entered into fairly?  
21 And she was not represented and he was.

22 And one of my concerns here is - - - and I  
23 don't know what the age difference was; I don't know  
24 if it was substantial or not - - - he owned the house  
25 where they're going to live. He was working. He had

1 a pension. He had all of this stuff, and the  
2 question then becomes whether or not she, you know,  
3 blinded by love, signed this thing a week before the  
4 wedding, and now ten years later with a kid, you  
5 know, we've - - - things are getting whacked up, but  
6 he's going to say, she gets a hearty handshake, and I  
7 wish her the best with our child, I'm taking  
8 everything.

9 MS. REARDON: Judge, I think you hit the  
10 nail on the head, because there was a question before  
11 about the windfall. One of the big issues here is,  
12 in fact, the pension. He's a police officer in  
13 Rochester.

14 But the question as to the amounts in the  
15 bank account or whatever's in the insurance, I think  
16 those are things that are - - - they're not - - -  
17 it's not something that - - - there may have been a  
18 certain amount in the account at a certain period of  
19 time, but if they are separating their accounts,  
20 their insurances, whatever they are, that's kind of  
21 something that's going to change over a period of  
22 time.

23 So for him to put in there, well, in my  
24 bank account is, you know, \$10.50 at this point, that  
25 doesn't mean that that's what's going to happen in

1 the future.

2 JUDGE PIGOTT: No, but income earned during  
3 the marriage is going to be marital property, right?  
4 And the fact that he then puts it into his federal  
5 credit union and says it's all mine, that shouldn't  
6 be, right?

7 MS. REARDON: But - - - and that's true,  
8 but these people both entered into that agreement. I  
9 understand that the wife didn't have an attorney at  
10 this point, but the fact that they both signed that  
11 agreement - - - the agreement was executed by the  
12 wife. In fact, the wife signed this agreement and  
13 went forward, and there's no question - - - there's  
14 no question of fraud.

15 JUDGE PIGOTT: Who drafted it?

16 MS. REARDON: That seems to be a question  
17 that I don't know that either one of us have an  
18 answer to.

19 JUDGE PIGOTT: He had a lawyer. She  
20 didn't. Can we assume, therefore, that he - - - that  
21 it was his lawyer that drafted it?

22 MS. REARDON: It would be my understanding.  
23 We had - - - well, I think we had both done some  
24 research and there was some questions as to how that  
25 came about. But I think ultimately the fact that

1 this thing, in fact, exists - - - and if you go and  
2 you look at the EPTL cases as well, it indicates that  
3 this is something that can, in fact, be cured. And I  
4 think that there was a cure made to this  
5 acknowledgement, and I think that it makes it - - -

6 JUDGE PIGOTT: Well, the EPTL case you're  
7 referring to talks about a waiver of a right of  
8 election, right?

9 MS. REARDON: Correct, in Maul.

10 JUDGE PIGOTT: Okay. And in that case, it  
11 seems to me that we were being favorable to people  
12 who waive their right of election than, you know - -  
13 - this case, I mean, what we're saying is that if we  
14 find substantial compliance here, we're then going to  
15 say to this wife, you're out, right?

16 MS. REARDON: That's correct.

17 JUDGE PIGOTT: Right, now.

18 MS. REARDON: Yeah.

19 JUDGE PIGOTT: The other way we could do  
20 it, and - - - I mean if it was flipped - - - I can  
21 see another judge saying, well, I don't think she's  
22 out, because I want substantial compliance, and we  
23 would then - - - in other words, in terms of giving  
24 direction to lawyers or - - - excuse me - - - to  
25 judges - - -

1 MS. REARDON: Sure.

2 JUDGE PIGOTT: - - - that are involved in  
3 matrimonial, if we simply say substantial compliance,  
4 what we're saying is, it's up to you, Judge. Aren't  
5 we?

6 MS. REARDON: Well, that's true to the  
7 point, Judge, but we're talking - - - we're not  
8 talking about the actual execution of the agreement;  
9 we're talking about the acknowledgement. And there's  
10 no question that both of these people executed this  
11 agreement.

12 JUDGE PIGOTT: Right.

13 MS. REARDON: Okay.

14 JUDGE PIGOTT: What I mean is, that - - -  
15 if this thing is not subject to collateral attack,  
16 what we're saying is, once there's substantial  
17 compliance, and I - - - you know, the nisi prius  
18 court says it, then that agreement is done. And - -  
19 -

20 MS. REARDON: Correct, yeah.

21 JUDGE PIGOTT: And it seems to me that that  
22 would - - - there are law - - - there are judges who  
23 may say I don't think this is fair, so I'm not going  
24 to find substantial compliance on the very same set  
25 of facts that someone else would find substantial

1 compliance.

2 MS. REARDON: Well, Judge, but then I think  
3 at that point, you know, you're taking away from the  
4 agreement that these people had entered into, and  
5 you're trying to delve into what was going on behind  
6 the agreement.

7 JUDGE PIGOTT: Well, we're saying - - -  
8 well, the clear line would be if we have strict  
9 compliance, then we're saying, you know, this - - -  
10 that not strictly complied, that one does, and  
11 therefore, we go forward from there.

12 MS. REARDON: But again, and even if we  
13 were to say substantial compliance isn't enough, but  
14 you can cure that acknowledgement, which we  
15 wholeheartedly believe that you can cure, then I  
16 think that addresses that question. And again, we're  
17 talking about the acknowledgement here. We're not  
18 talking about the actual execution of the document  
19 itself that she signed and she had acknowledged.

20 So I would submit to the court that, in  
21 fact, it is cured; the acknowledgment is good. At  
22 the very least, the only issue that I think would be  
23 raised that the court raised was, how did you know?  
24 I handed him a license. But the fact that custom and  
25 practice was over that fourteen-year period to do

1 this, I think that's sufficient.

2 CHIEF JUDGE LIPPMAN: Okay, counsel, thank  
3 you.

4 MS. REARDON: Thank you.

5 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

6 MR. AFFRONTI: Yes, Your Honor. Just to  
7 answer Judge Pigott's question, husband's attorney at  
8 the time prepared this agreement. I think what we're  
9 looking for is for the court to establish a bright  
10 line rule to let everybody try to apply.

11 JUDGE SMITH: If you - - - if you - - - if  
12 we affirm here, do you agree with your adversary that  
13 the agreement is immune from attack?

14 MR. AFFRONTI: There's been no application  
15 made to attack it, Judge. There's no - - - there's -  
16 - -

17 JUDGE SMITH: Yeah - - -

18 JUDGE GRAFFEO: There's been no claim of  
19 unconscionability?

20 MR. AFFRONTI: Yes. That's not pending.  
21 This is a pure legal issue, a pure - - -

22 JUDGE SMITH: Okay, have you waived the  
23 right to do it? I mean, yeah - - - I guess what I'm  
24 asking is if you should lose this appeal, is - - - do  
25 you reserve the right to challenge the agreement on

1 other grounds?

2 MR. AFFRONTI: As long as the statute of  
3 limitations hasn't run, I'm assuming that's still a  
4 viable - - - a viable claim.

5 JUDGE SMITH: You'll reserve any - - -  
6 you'll reserve any rights you might think you've got.

7 MR. AFFRONTI: That's - - -

8 JUDGE PIGOTT: Well, this came out very  
9 early, right? I think that you brought the DJ even  
10 before you answered the - - -

11 MR. AFFRONTI: Well, there's actually - - -  
12 procedurally what happened was husband filed his  
13 action in September of 2010, or something like that,  
14 and only served with a summons of notice.

15 JUDGE PIGOTT: Right.

16 MR. AFFRONTI: I served a notice of  
17 appearance. He just never got around to serving a  
18 complaint, and at that time, it was right after the  
19 law had changed, so we were still at the point in  
20 time - - - and I think there's a 170(1) claim in  
21 there to begin with, meaning cruel and inhuman. So,  
22 I just took the next step, and I said, look it, I'm  
23 not going to wait, I'm going to go ahead and do a DJ  
24 action altogether and move to consolidate.

25 JUDGE PIGOTT: But the issues, for example,

1 I think they were married in Illinois? The - - -

2 MR. AFFRONTI: They were - - - yes,  
3 Chicago, yes, sir.

4 JUDGE PIGOTT: The agreement was executed  
5 in New York. I - - - it's hard to tell who was  
6 living where and what was going on. And I didn't  
7 know if there were facts that would make this  
8 agreement challengeable.

9 MR. AFFRONTI: Yeah, both parties were  
10 residing in Rochester at the time. Wife was from  
11 Illinois.

12 JUDGE RIVERA: So, counsel - - -

13 MR. AFFRONTI: Yes, Your Honor?

14 JUDGE RIVERA: - - - given that there's not  
15 or at least no allegation of fraud or it seems  
16 there's no fraud, and it strikes me that the husband  
17 did what one would expect him to do. He went to  
18 where he believed there was a notary, the bank that  
19 he was familiar with. They knew him. He went in, he  
20 got it notarized. Why should he pay the price if the  
21 notary has failed to have the magic words that you  
22 want included?

23 MR. AFFRONTI: Your Honor, perhaps the  
24 notary didn't do it right, and perhaps Mr. Galetta  
25 didn't do it right. Again, I think that's where we

1 disagree in terms of I think you're implying - - -  
2 you're implying something - - -

3 JUDGE RIVERA: But what didn't he - - - he  
4 didn't do right? He went in and he asked for a  
5 notary, but what - - -

6 MR. AFFRONTI: Well, Your Honor, again, Mr.  
7 Galetta had the agreement apparently prepared. I'm  
8 going to assume, because it doesn't say in there, and  
9 it doesn't say in his affidavit, the notary didn't  
10 know him. I'm going to assume there is no compliance  
11 there. I mean, if you can't imply - - -

12 JUDGE SMITH: Does - - - can't - - -  
13 doesn't it sort of look like whoever typed the  
14 acknowledgment left out some words?

15 MR. AFFRONTI: I don't know, Your Honor. I  
16 didn't prepare it. How do I know it wasn't  
17 intentional?

18 JUDGE SMITH: I understand you don't know,  
19 but isn't - - - you might - - - you - - - if you were  
20 trying to figure out what happened, isn't that a  
21 pretty good guess?

22 MR. AFFRONTI: Judge, that's certainly a  
23 possibility, but it was never fixed - - -

24 JUDGE PIGOTT: Well, it's hard to - - -

25 MR. AFFRONTI: - - - and the notary never

1           said that he did it.

2                   JUDGE PIGOTT: Well, if - - -

3                   JUDGE RIVERA: If it - - - but if it's just  
4 a matter of the magic words, and it's an error by the  
5 notary, why should Mr. Galetta pay that price, when  
6 he can cure it?

7                   MR. AFFRONTI: I don't think he can cure  
8 it, Your Honor. And he had that chance, and he  
9 didn't. He doesn't get three bites at the apple.  
10 He's had two already. It was signed. The  
11 certification was wrong for - - - and I would say it  
12 wasn't done at the time.

13                   JUDGE SMITH: Well, suppose - - - suppose -  
14 - - suppose hypothetically - - -

15                   MR. AFFRONTI: And the notary's affidavit  
16 didn't say I fixed it.

17                   JUDGE SMITH: Suppose hypothetically that  
18 this is a case where the husband pre - - - had his  
19 lawyer prepare it, and his lawyer, or his lawyer's  
20 secretary, or whoever typed it, left out words. And  
21 then, now suppose ten years later, it's the wife who  
22 wants to enforce it, and the husband is saying, no,  
23 no, no, the magic words aren't in there. Is that  
24 okay?

25                   MR. AFFRONTI: Judge, it would have to

1 apply both ways. Again, going back to Matisoff - - -

2 JUDGE SMITH: That sound fair?

3 MR. AFFRONTI: - - - it was the wife's - -  
4 - Judge, I don't think it's a question of fairness,  
5 with all due respect, it's a question where it lies.

6 CHIEF JUDGE LIPPMAN: Counsel, is your  
7 argument it always has to be contemporaneous, period,  
8 end of story?

9 MR. AFFRONTI: That's what I'm asking this  
10 court to rule, yes.

11 CHIEF JUDGE LIPPMAN: Unless it's on its  
12 face, clear? No good.

13 MR. AFFRONTI: Acknowledgement should be  
14 contemporaneously made - - -

15 CHIEF JUDGE LIPPMAN: Okay.

16 MR. AFFRONTI: - - - not subject to cure.

17 CHIEF JUDGE LIPPMAN: All right.

18 MR. AFFRONTI: Thank you.

19 CHIEF JUDGE LIPPMAN: Thank you both,  
20 appreciate it.

21 (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 Galetta v. Galetta, No. 94 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: May 2, 2013