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COURT OF APPEALS
STATE OF NEW YORK

DONOHUE,

Appellant,

-against-

NO. 6

CUOMO,

Respondent.

20 Eagle Street
Albany, New York
January 5, 2022

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

ERIC E. WILKE, ESQ.
CSEA
Attorney for Appellant
143 Washington Avenue
P.O. Box 7125
Albany, NY 12224

FREDERICK BRODIE, ESQ.
NEW YORK SOLICITOR GENERAL
Attorney for Respondent
110 State Street
Albany, NY 12244

Amanda M. Oliver
Official Court Transcriber

1 JUDGE GARCIA: Number 6, Donohue v. Cuomo.
2 Counsel?

3 MR. WILKE: Good afternoon, Your Honors. May it
4 please the court, Eric Wilke on behalf of the Appellants.
5 Your Honors, this case is concerning - - -

6 JUDGE GARCIA: Counsel, before you start, would
7 you like to reserve rebuttal?

8 MR. WILKE: Yes, thank you, Your Honor. May I
9 reserve two minutes for rebuttal, please?

10 JUDGE GARCIA: You have it.

11 MR. WILKE: Thank you.

12 This case concerns two certified questions from
13 the Second Circuit. With respect to the first certified
14 question, this case is in the context of public sector
15 labor law, and that in public sector labor law, the retire
16 - - - retirement negotiations for health insurance for
17 current employees is considered deferred compensation and
18 is a mandatory subject of negotiations.

19 The Second Circuit in - - - in certifying its
20 question of five different sections of the collective
21 bargaining agreement of the 2007 to 2011 negotiations, it
22 is the Appellants' position that it creates sufficient
23 ambiguity in the language that extrinsic evidence should be
24 considered.

25 JUDGE GARCIA: Counsel, if - - - if we decline to

1 adopt the Yard-Man inferences, how does that affect your
2 argument? Do you lose?

3 MR. WILKE: No, we don't lose, Your Honor.

4 If the court declines to adopt Yard-Man, then if
5 you look at specifically even Section 9.24(a), this - - -
6 what - - - it's employees covered by the state health
7 insurance plan have the right to retain health insurance
8 after retirement upon completion of ten years of service.

9 The Respondents haven't challenged that, that it
10 is - - - that there's a vested right to that. And that
11 also doesn't have durational language.

12 But if you look also at 9.24(b), this deals with
13 employees' eligibility or their dependents - - -

14 JUDGE GARCIA: So - - - so to my question, it
15 would be under our traditional contract interpretation
16 rules, you would argue there's an ambiguity?

17 MR. WILKE: Correct, Your Honor. Yes, there
18 would be an ambiguity. And then you would look to the
19 extrinsic evidence surrounding the negotiations that the
20 parties had.

21 JUDGE SINGAS: Well, Counsel, leaving aside any
22 extrinsic evidence, and leaving aside silence, where is it
23 in the text of the CBA do you find actual ambiguity?

24 MR. WILKE: The - - - so for example, Your Honor,
25 in 9.24(b), which deals with the right for an employee or

1 their dependent to defray costs of health insurance using
2 their sick leave credits, the first sentence, for example,
3 says, an employee who's eligible to continue health
4 insurance coverage upon retirement is entitled to a sick
5 leave credit to be used to defray any employee contribution
6 toward the cost.

7 That - - - it - - - it's not clear as to whether
8 or not it means the ninety percent for individual coverage
9 would be still covered by the State, twenty - - - seventy-
10 five percent of the dependent coverage would be covered by
11 the State, or if it's some other amount. If it would be,
12 as what has happened here, the State has increased retiree
13 health insurance premiums by two percent. So that is not
14 clear on its face.

15 What we would also say is that there's other
16 language concerning that the employees - - - if you look
17 further down, in 9.24(b), employees retiring on or after
18 January 1st, 1989, may elect an alternative method of
19 applying basic monthly value of sick leave credit.
20 Employees selecting basic sick leave credit may elect to
21 apply up to 100 percent of calculated basic monthly value
22 of the credit toward defraying the required contribution to
23 the monthly premium. And during - - -

24 JUDGE SINGAS: All right, Counsel, I'm going to -
25 - - I'm going to stop you there because it seems to me that

1 those are pretty clear about sick leave, and really don't
2 create an ambiguity about a fixed contribution rate for
3 coverage.

4 MR. WILKE: So again, Your Honor, and how - - -
5 what - - - what the next language is, during their
6 lifetime, so I agree that is specific language, but it does
7 relate back to what it talks about defraying the employee
8 contribution. And it's not clear what the employee
9 contribution would necessarily be based on 9.24(b).

10 Also, further in that particular - - - and again,
11 it - - - I agree with you, Your Honor, that it is talking
12 about using health insurance - - - excuse me, sick leave
13 credits toward premium contributions, but it doesn't
14 specify what those contributions would be. It doesn't say
15 that it would be a hundred percent - - - it doesn't say
16 that the employee would pay a hundred percent, that is. It
17 doesn't say that the ninety and seventy-five percent that's
18 paid for by the State in 9.13(a) is - - - is not something
19 that would continue on.

20 Further, in that paragraph it also indicates that
21 employees using the alternative method would be able to use
22 that credit during their own lifetime. So clearly, that's
23 something that, again, would also continue on.

24 So I - - - I - - - again, you - - - the
25 Appellants' position is reading these clauses together, is

1 where there creates ambiguity, or at least two different
2 alternatives of the way of interpreting the language which
3 would then require to look to extrinsic evidence.

4 JUDGE WILSON: What are the two different
5 alternatives?

6 MR. WILKE: So I would say that, again, with
7 respect to the defraying the employee's cost of
8 contribution, it's the Appellants' position that it would
9 be that the - - - it would be ten percent for individual
10 coverage, and twenty-five percent for a dependent coverage.
11 And it's the State's position that it would - - - that
12 there is no vested right, so it could be whatever it is
13 that civil service law would state or some - - - if that's
14 changed, something else.

15 So again, it's - - -

16 JUDGE WILSON: It could be zero?

17 MR. WILKE: It could be zero, but the - - - the
18 statute would have to be changed in order for that to be
19 zero.

20 JUDGE WILSON: But the legislature could do that
21 next year if it wanted to?

22 MR. WILKE: Correct. Right, they could - - -

23 JUDGE WILSON: So those - - - those are, as you
24 see it, are the two - - - or - - -

25 MR. WILKE: Those - - -

1 JUDGE WILSON: - - - the ambiguity is, it's
2 either fixed at whatever it was when you retire, or it's
3 whatever the State wants it to be?

4 MR. WILKE: Correct. And we're saying that
5 that's what that language in the first sentence of 9.24(a)
6 - - - or excuse me, 9.24(b) indicates. So - - - and again,
7 you know, in 9.24(a), there's no specific durational
8 language there either. And the - - - the - - - the State
9 has not - - -

10 JUDGE WILSON: Is a third option possible, that
11 it's whatever the current CBA provides?

12 MR. WILKE: I'm sorry, could you - - -

13 JUDGE WILSON: Is there a third possibility, that
14 - - - which would be whatever the current CBA provides?

15 MR. WILKE: So my understanding from Colby is
16 basically that if - - - if - - - it's the - - - the - - -
17 whatever the language is in the contract that a person
18 retired under, is what that would be.

19 JUDGE WILSON: No, no, I understand. But you
20 said - - - you said it - - - your argument is there's
21 ambiguity. I mean, I understand you're also arguing
22 there's not. But one of your arguments is there's
23 ambiguity.

24 MR. WILKE: Right.

25 JUDGE WILSON: And you said there are two

1 possible ways - - - ambiguity means a couple different ways
2 to interpret something, right?

3 MR. WILKE: Right, absolutely. So - - -

4 JUDGE WILSON: And - - - and one way you're
5 saying - - - just let me finish for a second.

6 MR. WILKE: Yes.

7 JUDGE WILSON: One way you're saying is, it could
8 be the rate at which you retire, whatever that was.

9 MR. WILKE: Correct.

10 JUDGE WILSON: Another is it could be whatever
11 the State decides, anything from zero to a hundred - - -

12 MR. WILKE: Correct.

13 JUDGE WILSON: - - - by statute.

14 And I'm asking is there a third option, which is
15 that you might resolve the ambiguity by saying, the way - -
16 - you know, it would depend on extrinsic evidence, I
17 suppose. But the way you resolve it is there was a clear
18 intent of the parties that it be whatever the rate was that
19 was being provided to active employees?

20 MR. WILKE: Yes, Your Honor. That is correct.
21 That could be - - -

22 JUDGE WILSON: So there's - - - so there's three
23 different possibilities?

24 MR. WILKE: At - - - at least three different
25 options that could be - - -

1 JUDGE GARCIA: But wouldn't that be worse - - -

2 MR. WILKE: - - - played out here - - -

3 JUDGE GARCIA: I'm sorry. Wouldn't that be worse
4 for you here? Because isn't what they did by statute not
5 staggered, so you get the lower comp regardless of - - - of
6 level of pay, so to speak?

7 MR. WILKE: So - - -

8 JUDGE GARCIA: Like, this isn't the same deal by
9 statute that they get under the CBA, right?

10 MR. WILKE: So the - - - the CBA - - - the
11 current CBA is something different, it's not the language
12 that is actually before even the Second Circuit.

13 JUDGE GARCIA: Right. But if the Second Circuit
14 - - - let's just use it as the hypothetical. So it could
15 be that they get a two-tiered system where a certain level
16 of employee pay, you pay more as a contribution rate, which
17 is what I understand they did, right?

18 MR. WILKE: Right. That is what they did for
19 active employees, correct.

20 JUDGE GARCIA: So under Judge Wilson's third
21 scenario, that deal would be worse for you than what you
22 have right now under the statute? Because as I understand
23 the statute, it's the lower of those contribution levels.

24 MR. WILKE: It is the lower of the two, right.
25 But my point in answering Your Honor's question is that it

1 - - - there could be multiple - - - you could - - - again,
2 interpretations of what - - -

3 JUDGE GARCIA: I understand.

4 MR. WILKE: - - - this language means.

5 JUDGE GARCIA: I understand. I just wanted to
6 clarify what was going on here.

7 MR. WILKE: Right.

8 JUDGE GARCIA: But Counsel, let me ask you more
9 of a policy question.

10 So let's say we either say there is a vested
11 right to a certain contribution level, or ultimately it
12 comes out in ambiguity that there is a - - - was an
13 intention to create that vested right. The next time,
14 unfortunately, there's an economic crisis, right?

15 MR. WILKE: Right.

16 JUDGE GARCIA: Would the State be able to bargain
17 a reduction in contribution rates for retired employees?

18 MR. WILKE: So if - - - just so I understand Your
19 Honor's question correctly. So if this court finds that
20 there's an ambiguity to look at extrinsic evidence - - -

21 JUDGE GARCIA: Yeah, but let's say we do that,
22 but ultimately there's a vested interest found using
23 extrinsic evidence. And now we have a vested right to a
24 certain contribution level established through this case -
25 - -

1 MR. WILKE: Right.

2 JUDGE GARCIA: - - - for contracts. The next
3 time there's an economic crisis, State comes in, the
4 representative unions come in, and they want to reduce the
5 need for active dismissals, right, civil active work force,
6 by increasing contributions. One thing that will not be on
7 the table is increasing contributions for retirees?

8 MR. WILKE: That is correct. So the union does
9 not have the ability to negotiate for retirees, we don't
10 represent them, we don't have a duty of - - -

11 JUDGE GARCIA: Right.

12 MR. WILKE: - - - representation towards them.

13 JUDGE GARCIA: And that's why they had to do it
14 by statute here with the other unrepresented individuals,
15 right?

16 MR. WILKE: Well, again, the statute, what it
17 says is that - - - or retirees not subject to an agreement
18 - - -

19 JUDGE GARCIA: Okay.

20 MR. WILKE: - - - and what our position is, is
21 that these retirees are subject to agreements from 1983 to
22 2011 where the language has essentially, you know, remained
23 the same.

24 And it - - - because of the timeframe, as - - -
25 as well that we're talking about, I realize that the Second

1 Circuit certified questions specifically for 2007 to 2011,
2 but if - - - if in the record, Your Honors look to even the
3 1991 to 1995 collective bargaining agreement, which on the
4 appendix 286, it's not extrinsic evidence for that
5 particular CBA where it specifically talks about that CSEA
6 and the State understand that there's a need to address
7 inequity of employees that serve the minimum amount
8 necessary for health insurance and retirement with the same
9 benefits as career employees. And that prior to the
10 expiration of that CBA, throughout the joint committee
11 process that was created between CSEA and the State of New
12 York, that they're going to develop a proposal to modify
13 the manner in which employer contributions to retiree
14 premiums are calculated.

15 So - - - and again, that's so - - - if someone
16 has ten years of state service, they have the same premium
17 rates as somebody who works for the state for forty years.
18 And so - - -

19 JUDGE SINGAS: But it doesn't say that.

20 MR. WILKE: Pardon?

21 JUDGE SINGAS: But the CBA doesn't say that. So
22 if they wanted to be that explicit about it, why weren't
23 you?

24 MR. WILKE: Well, Your Honor, what I was
25 suggesting here is actually it is a CBA, because again this

1 - - - I understand that this particular question that was
2 certified is the 2007 to 2011. But the - - - the case
3 before the Second Circuit concerns retirees from 1983 to
4 2011, and in the actual CBA, for the 1991 to 1995 period of
5 time, that's the language it says, what I had just read to
6 the court.

7 JUDGE RIVERA: Counsel, I want to ask you a
8 different question. I'm on the screen. Hello, happy New
9 Year.

10 MR. WILKE: Hello.

11 JUDGE RIVERA: I just want to clarify, do you
12 agree with this bifurcated approach of the - - - the State
13 that they accept or, at least, are not challenging that
14 coverage is vested, but they argue, because they bifurcated
15 this, that the - - - the cost of the premiums, that that is
16 what indeed - - - the contributions, excuse me - - - that
17 that is what's not vested; do you agree with that
18 bifurcation, or do you see the - - - do you - - - do you
19 argue the CBA's representing something else?

20 MR. WILKE: Your Honor, what the Appellants'
21 position is, is that - - - that the - - - the Respondent's
22 position on that issue is - - - is further evidence that
23 the - - - the parties that have been negotiating these
24 contracts for decades intended for specific contribution
25 levels to continue, unless it was negotiated for current

1 employees and then be prospectively for those employees in
2 retirement.

3 JUDGE RIVERA: But I'm asking about the - - -
4 maybe I'm not being clear, or maybe I've misunderstood you.

5 I - - - I understood this argument from the State
6 to be con - - - I'm sorry. Coverage is different from
7 contributions. Coverage is vested. Even though you
8 retired, you can always come within what is otherwise an
9 employee health benefits plan. But the amount of
10 contributions, that's a different story. We're not - - -
11 we're not going to commit to what that amount should be
12 year in and year out in this CBA.

13 MR. WILKE: Right. And I think - - - maybe I
14 didn't - - -

15 JUDGE RIVERA: So I guess - - - all right.

16 So my question then is, do you agree with that
17 bifurcation? But your point is the second point, no, no,
18 no, you did actually agree to what the contributions should
19 be full stop, they don't - - - they don't change over time,
20 or have the opportunity to potentially change over time,
21 versus, no, we see this as unitary, what we negotiated was
22 a vested interest in coverage at this rate.

23 MR. WILKE: So - - -

24 JUDGE RIVERA: I hope I'm being clear.

25 MR. WILKE: Yeah, I think so, Your Honor.

1 So what we're saying is that when you look at all
2 of these provisions, so it would include 9.24(a) and (b),
3 so the coverage and the contribution rates, that that's all
4 evidence that it was intended for not only coverage to be
5 vested, but also for a fixed contribution level.

6 JUDGE GARCIA: Thank you, Counsel.

7 Counsel?

8 MR. WILKE: Thank you.

9 MR. BRODIE: May it please the court, Frederick
10 Brodie for Respondents.

11 In an integrated contract, that contains the
12 parties' entire agreement, what you see is what you get.
13 CSA's - - - CSEA's labor contract resulted from hard
14 bargaining between sophisticated counseled repeat players.
15 When the CSEA and the State agreed on a benefit, they wrote
16 it down. The vested right CSEA now seeks was not included
17 in the contract - - -

18 JUDGE GARCIA: Counsel, do you concede that
19 there's a vested right to the benefit itself, just - - -
20 the question is over the contribution rates?

21 MR. BRODIE: For the purpose of argument, we have
22 assumed that. And when - - - and the reason for assuming
23 that is the clause that gives you that right says the - - -
24 the people have - - - the employees have the right to
25 retain health insurance in retirement.

1 Now the right to retain in retirement, arguably,
 2 that takes you past the duration clause of the CBA. And
 3 therefore that's arguably vesting language. Now con - - -
 4 contrast that with the clause that specifically sets the
 5 ninety and seventy-five rates, to which Counsel alluded.
 6 That clause - - -

7 JUDGE RIVERA: Counsel, if I can interrupt you
 8 there because I think you've pretty much answered Judge
 9 Garcia's question.

10 The - - - once you decouple in this way, doesn't
 11 that just inherently load the question with ambiguity about
 12 what the contract means? Once you've done that, once
 13 you've agreed, no, no, that kind of language means that - -
 14 - that - - - that this exceeds the duration of the CBA,
 15 it's really now only about these contributions, don't - - -
 16 doesn't that lend to this argument about ambiguity in what
 17 you meant by the contributions?

18 MR. BRODIE: Well, Your Honor, with respect, I
 19 didn't decouple those two clauses, the parties did. They
 20 are five pages and eleven clauses apart. So these are
 21 different parts of the health insurance clause, and they -
 22 - -

23 JUDGE RIVERA: No, no, no. I got - - - I got
 24 your argument about the decoupling, that's not my point.

25 My point is, once you have decoupled, given the

1 rest of the language, aren't we left with the fact that it
2 is not as obvious as you argue the first - - - the - - -
3 the paragraph on - - - on coverage is, and as a
4 consequence, you're left with the ambiguity?

5 MR. BRODIE: Not at all, Your Honor.

6 Vested contribution rates are not necessary for
7 the five clauses cited by the Second Circuit to operate.

8 JUDGE RIVERA: Well, let me ask you this. In a
9 negotiation, would not the contribution be of primary
10 importance? I mean, if your contribution was zero, that
11 would be very meaningful in that negotiation, correct?

12 MR. BRODIE: For active employees, yes. But
13 retirees' premium contribution rates were set by statute,
14 not by contract. In 1982, the parties - - -

15 JUDGE RIVERA: Oh, so then is your - - - is your
16 point that you never negotiated the retiree contribution at
17 all, that - - - that's nowhere to be found anywhere?

18 MR. BRODIE: It's never been - - - it's never
19 been bargained into the contract.

20 When you look at that ninety and seventy-five
21 clause, 9.13, it simply doesn't mention retirees. CBAs
22 deal primarily with day to day - - -

23 JUDGE RIVERA: But there are - - - there are
24 mentions of retiree with respect to - - - to the coverage
25 at some point in - - - in this - - - in these CBAs; is

1 there not?

2 MR. BRODIE: Exactly. That's my point, Your
3 Honor.

4 When the - - - when the parties wanted to put a
5 right in retirees, they knew how to do it. But in this
6 clause, 9.13 - - -

7 JUDGE RIVERA: But isn't - - - isn't it also
8 possible that they did that because that would diverge from
9 otherwise the retirees getting the contribution amounts
10 that they claim they had negotiated?

11 MR. BRODIE: No. Because - - - because again,
12 retiree contribution amounts weren't negotiated. And I'll
13 - - - I'll tell you why historically that's true.

14 In 1982, the State and CSEA entered a memorandum
15 of understanding, MOU, and it reduced the State's premium
16 contributions to ninety percent. The MOU covered only
17 employees. You can look at it, it's at 1051 to 1061 at the
18 record, it does not mention retirees.

19 Now as Appellants note in their brief, the
20 legislator - - - legislature implemented the MOU in 1983 by
21 changing the active employees' contributions in CSL 167
22 paren 1. But the legislature went further than the MOU.
23 It also set contribution rates for - - - well, it set
24 contribution rates for all employees, including management
25 confidential, and it also set for retirees.

1 Now neither management confidential nor retirees
2 are represented by unions. So retiree contributions were
3 thus voluntary on the State's part, and not negotiated.
4 The State's decision to include retiree contributions in
5 the statute, 167 paren 1, was consistent with its support
6 of retirees since the 1950s.

7 And in 2011, the State operated the same way.
8 First, it reached an agreement with CSEA - - -

9 JUDGE RIVERA: Well, then why - - - why would you
10 seek their buy-in or their agreement to reduce the amount?

11 MR. BRODIE: Well, we got their agreement in 20 -
12 - -

13 JUDGE RIVERA: If you have unilateral power to do
14 that?

15 MR. BRODIE: I'm sorry, Your Honor, say again?

16 JUDGE RIVERA: If you have unilateral power to do
17 that, why - - - why seek their agreement on it?

18 MR. BRODIE: Well, it's politically wise.
19 Retirees and unions are a big constituency. Because those
20 rates were written into 167 paren 1 in - - - in 1983, in
21 order to get them out of the statute, you have to have
22 legislation. And legislators are very concerned about what
23 - - - what retirees and what unions think. So - - -

24 JUDGE WILSON: But it's one thing to say that the
25 legislature set rates for non-unionized employees, and

1 another to say - - - it kinds of begs the question of
2 whether the contract, collective bargaining agreement,
3 prohibits the legislature from doing that.

4 So let me - - - let me ask you this. Trying to
5 think about this in terms of - - - of ordinary contract
6 principles. If - - - if the collective bargaining
7 agreement provides a vested right to coverage which I take
8 - - - you keep saying arguably. I think it might be
9 important for retirees to know what the State's position on
10 - - - is as to whether they're entitled at all to coverage,
11 and to say arguably for the purpose of this case is
12 probably not a great public message, but put that aside.
13 Let's - - - let's take your - - - your - - - let's take
14 that arguably, assume from my hypothetical - - -

15 MR. BRODIE: Well, it says they get coverage in
16 retirement. So - - - so that's - - -

17 JUDGE WILSON: Okay.

18 MR. BRODIE: - - - that's what it says.

19 JUDGE WILSON: And that's provided - - -

20 MR. BRODIE: We'll go with what the contract
21 says.

22 JUDGE WILSON: And that's provided for in the
23 CBA? That's - - - that's vested - - -

24 MR. BRODIE: And we - - - we haven't removed
25 their coverage.

1 JUDGE WILSON: - - - and enforceable - - - vested
2 and enforceable, right?

3 MR. BRODIE: Okay.

4 JUDGE WILSON: Okay. So then the question is, it
5 seems to me, what is - - - that coverage requires a price
6 term. So there's really only, thinking about it in terms
7 of regular contract principles, it's either void because
8 there is no price term, and that's a material term, or you
9 have to be able to infer a price term from something. The
10 agreement itself doesn't have that price term in it, which
11 is what you've been saying.

12 So the question is, where do we get the price
13 term unless this is to be totally unenforceable? And you
14 say it's not totally unenforceable, it's enforceable. That
15 seems to me to go right to the question of extrinsic
16 evidence. And it may be you win there because of all the
17 things you've been saying, that this is clearly, purely in
18 the discretion of the legislature to set at whatever level
19 it wants. But I don't know how on ordinary contract
20 principles, we can resolve that here.

21 MR. BRODIE: Well, Your Honor, the price term is
22 the premium. So there's a raw cost of premiums in the
23 contracts that the State makes with insurers. The State
24 isn't an insurer. The State contracts out with insurers.

25 So there's a premium in those contracts. Now,

1 the - - - your question really should be how much of that
2 premium do retirees and active employees pay. Active
3 employees, it says it in the contract, ninety percent and
4 seventy-five percent - - - I'm sorry, it's eighty-eight
5 percent and seventy-three percent since we - - - no - - -
6 yeah, it's eighty-eight and seventy-three; it used to be in
7 this contract that we're examining ninety and seventy-five
8 for the actives, right - - -

9 JUDGE WILSON: But you were - - -

10 MR. BRODIE: Where do we get the retirees - - -

11 JUDGE WILSON: - - - you were contracting - - -
12 you were contracting with the retirees when they were - - -
13 when they were, really, active employees, but for their
14 retirement, to provide them something, right?

15 MR. BRODIE: Right. Coverage. Right.

16 JUDGE WILSON: And an essential element of a
17 contract is price, at what price were you selling that
18 coverage to them.

19 MR. BRODIE: Well that - - - that element is
20 supplied by the statute, which says we look - - - well,
21 it's either - - - it's - - - it's either supplied by the
22 insurance contracts which have a premium, or by the statute
23 which says we the State - - -

24 JUDGE WILSON: Where - - - where on the - - -

25 MR. BRODIE: - - - will subsidize.

1 JUDGE WILSON: - - - where in the face of the
2 collective bargaining agreement does it say the price is
3 supplied by the statute?

4 MR. BRODIE: Well - - -

5 JUDGE WILSON: You're pointing to history, which
6 is - - - they would like to point to history too. That all
7 sounds extrinsic to me.

8 MR. BRODIE: Well, it's - - - it's - - - it's
9 legislative history we're pointing to, where it says we're
10 - - - we are enacting the 1982 MOU, and the 1982 MOU
11 doesn't deal with retirees.

12 Now, you're asking where is the price term.
13 Well, there's a price term in the contract. It says - - -
14 the - - - the CBAs don't tell you what the premium is,
15 right, you have to look at the contract. The CBAs tell you
16 how much of the premium for actives the State will
17 subsidize. And then the statute tells you how much of the
18 premium for retirees - - -

19 JUDGE GARCIA: Counsel?

20 MR. BRODIE: - - - and for matching - - -

21 JUDGE GARCIA: - - - Counsel? I see - - -
22 Counsel, here. Your - - - your light's on, but before you
23 sit down, could you give me your unambiguous interpretation
24 of 9.23(a), the surviving spouse provision?

25 MR. BRODIE: 9.23(a) it - - - it applied a

1 floating rate for contributions under which survivors would
2 pay the same contribution rates as required of active
3 employees. It didn't specify a particular rate, it just
4 said you get what the actives get. So when the actives go
5 down, the - - - the - - -

6 JUDGE GARCIA: So how would that - - -

7 MR. BRODIE: - - - apply to survivors also.

8 JUDGE GARCIA: - - - how would that work in a
9 system where you have two-tiered contribution rates, right?
10 So you are the surviving spouse of someone who under a
11 current CBA agreement was in the higher tier of
12 contribution. What do you pay?

13 MR. BRODIE: I - - - I would think that you would
14 continue to pay because remember, you know, before the
15 person passed away, they were participating. So you would
16 continue to pay what they were paying.

17 JUDGE GARCIA: But it doesn't say that. It says
18 active members. It doesn't - - - it could have said,
19 you're going to pay whatever the deceased spouse paid. But
20 it doesn't say that. It says you're going to pay whatever
21 an active member is paying.

22 MR. BRODIE: Right. So you would - - -

23 JUDGE GARCIA: So how do you figure that out if
24 you're the deceased spouse of someone who retired under the
25 old system. Now what happens to your retirement benefits

1 when this changes?

2 MR. BRODIE: Well, the change to the - - - the
3 two-tiered system was forward-looking.

4 JUDGE GARCIA: But - - - but under the statute,
5 retirees now pay what - - - let's call level one, level
6 two, right? So under the statute, they got a break because
7 they're all paying the lesser amount regardless of income
8 at the time they were active.

9 MR. BRODIE: Right, they're all paying - - -

10 JUDGE GARCIA: But now you're tying a deceased
11 spouse's contribution to an active member. So what do they
12 pay? Do they pay the amount in the statute, or do they pay
13 what an active because they're different now?

14 MR. BRODIE: Well, if the active employee retired
15 under the CBA that took effect in 2011, after the new two-
16 tiered system became effective, then they would pay what
17 the retiree was paying under the two-tiered system.

18 But if the retiree retired before the two-tiered
19 system took effect, then they would be paying what - - -
20 what the - - - you know, presumably what - - - what the
21 retiree paid as an active employee. Well, no, I'm sorry.
22 I take - - - if Your Honor will allow me to take that back
23 because it's somewhat confusing.

24 I think you would - - - you would look at the CBA
25 under which the decedent retired, and you would ask, well,

1 what are the active employees - - -

2 JUDGE GARCIA: But - - - but let me get - - - let
3 me maybe make it clearer. So somebody retires and they're
4 paying, let's say, let's just use a number, ninety percent,
5 they're paying ten. They die. The spouse now starts to -
6 - - and - - - and the contract is still the same, and the
7 current contract's still the same. They die, and then this
8 change comes into the place. So retirees now are paying
9 whatever the lower tier rate is, right, let's say just for
10 my hypothetical that's, you know, eleven percent. But an
11 active employee in the same level as the deceased spouse is
12 paying fourteen percent. What does the deceased spouse
13 have to pay?

14 MR. BRODIE: Well, I would think as a - - - as a
15 technical matter, they would have to pay fourteen percent.
16 That's just eyeballing it. Now, we've got a civil service
17 department, they've issued regulations. I haven't checked
18 the regulations on what they're going to be paying. And
19 you know, that's the sort of thing that's not really a
20 contractual ambiguity, but it's one that's easily clarified
21 in regulations.

22 In addition, I - - - I understand from the briefs
23 of the other side which - - - which we haven't contested
24 this point, that the State has not actually changed the
25 contributions for dependent survivors in 2011. And it did

1 that as matter of administrative discretion in order to
2 protect widows and orphans, which is a - - - a traditional
3 matter on which one may exercise administrative discretion.

4 JUDGE GARCIA: Thank you, Counsel.

5 Counsel, your rebuttal.

6 MR. WILKE: Yes, thank you, Your Honor. If I
7 bring - - - may briefly on that point with respect to the
8 un-remarried spouse. So under the scenario, if the - - -
9 if the legislature were to change the statute, retiree
10 health - - - retirees, the actual retirees, could
11 potentially have no contribution level. Where under the
12 contract here, a - - - a spouse of a deceased retiree would
13 still end up getting the same exact premium coverage, their
14 responsibility as an active employee. It's just an
15 unreasonable interpretation that the surviving spouse would
16 actually have a better benefit than the actual retiree.

17 And the - - - the second point that I wanted to
18 touch upon is that the - - - CSEA and the State of New
19 York, they negotiate their collective bargaining
20 agreements, and then they are ratified both by the CSEA
21 membership and by the state legislature. And that's when
22 the statutes are enacted to effectuate the collective
23 bargaining agreements.

24 So - - - and if the court has any further
25 questions, I'm happy to answer them or - - -

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JUDGE GARCIA: Thank you, Counsel.

MR. WILKE: Thank you.

(Court is adjourned)

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

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Donahue v. Cuomo, No. 6 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Amanda M. Oliver

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: January 13, 2022