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COURT OF APPEALS

STATE OF NEW YORK

DORA HOWELL,

Appellant,

-against-

NO. 91

CITY OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York
October 20, 2022

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 number 91, Howell v. City of New York.

3 MS. VANIER: Good afternoon, Judges. May it
4 please the Court, Beverly Vanier with law firm Gary Rawlins
5 for the appellant Dora Howell.

6 We are here in the matter wherein we believe that
7 the court must reverse this matter and remand it to Supreme
8 Court.

9 ACTING CHIEF JUDGE CANNATARO: Ms. Vanier, did
10 you want to reserve any time for rebuttal in this case?

11 MS. VANIER: Five minutes, please? I apologize.

12 ACTING CHIEF JUDGE CANNATARO: Five?

13 MS. VANIER: Is that too long?

14 ACTING CHIEF JUDGE CANNATARO: It's your choice.
15 Five it is.

16 MS. VANIER: Is three good? I don't know. I'm
17 just - - - whatever is the standard, I'm fine with that.
18 Three minutes.

19 ACTING CHIEF JUDGE CANNATARO: You have three
20 minutes.

21 MS. VANIER: I apologize.

22 Yes, we believe the case must be remanded as
23 there are issues of facts in the matter. We can address
24 the first which would be the - - - under the Domestic
25 Violence Intervention Act authorized, we believe that



1 authorizes a private right of action here, because in this
2 matter - - -

3 JUDGE SINGAS: Did you preserve that argument
4 below?

5 MS. VANIER: Yes, in the complaint we did, and in
6 the Appellate Division response and decision that was
7 addressed it was acknowledged, but it was dismissed. And
8 that was with oral argument only by the City of New York.
9 Dora Howell was not permitted to and was not - - - did not
10 have any notice that the matter was on for oral argument.
11 It was only to be acknowledged or to be decided on the
12 actual motion.

13 So the fact that the City alone was able to argue
14 oral arguments in front of the Appellate Division, that's
15 obviously another matter. But yes, in the lower - - - in
16 the Supreme Court case the city brought an action to - - -
17 for summary judgment. And at that time, the court said
18 it's too premature. You don't have enough evidence,
19 because at that time we didn't have any other discovery
20 except for the deposition of the plaintiff and, of course,
21 the record which is the eight orders of protection that the
22 plaintiff sought, and the fact that there were - - - and
23 these were not contested facts, and the fact that there was
24 - - - the police officers within a week responded four
25 times to the residence. And not - - - and none of those



1 three times prior to the actual incident did they arrest -
2 - -

3 JUDGE SINGAS: Right, but how about the statute
4 itself?

5 MS. VANIER: The statute itself - - - the statute
6 itself mandates that when - - -

7 JUDGE SINGAS: Does the statute itself establish
8 the private right of action? Did you argue that below?

9 MS. VANIER: Well, in terms of the complaint, the
10 first with the supreme court?

11 JUDGE SINGAS: Um-hum.

12 MS. VANIER: Well, at that time, the supreme
13 court we wanted more information. They wanted information
14 regarding the negligence of the police officer, the
15 municipality, and in terms of whether or not they had
16 proper training. We didn't know that. They did not
17 provide that. We were wanting to depose all four of the
18 police officers. We did not have that opportunity. So
19 that's why at that time the lower court said it's
20 premature. You have no - - - you have to go back, and you
21 have to now complete discovery, and that was not done.

22 So instead the city ran to the Appellate Division
23 and asked the Appellate Division to reverse saying based on
24 Ms. Howell's testimony, that was sufficient to not show
25 that there was a special duty and/or negligence in terms of



1 violating the DVIA, the intervention. I'm sorry. Did I
2 answer your question or do you want - - -

3 JUDGE SINGAS: You can proceed.

4 MS. VANIER: All right.

5 So yes, we do claim because of the orders of
6 protection and the fact that the City with the police
7 officers had a relationship with her, knew her, knew of the
8 existing harm that could threaten her that that Domestic
9 Violence Intervention Act authorizes a private right of
10 action. And in that act, it states that the police must
11 arrest. There's no discretion that they have no choice.
12 And in this case, it did not arrest. They never arrested
13 him.

14 The first time she called, they came when he's
15 banging her door with an iron pipe, they came and they
16 escorted him to walk around the block.

17 The second time, they called - - - I'm getting it
18 mixed up - - - one time they called his uncle or relative
19 that allegedly had some relationship with either the police
20 officer that responded or/and the police department.

21 ACTING CHIEF JUDGE CANNATARO: Is your argument
22 here that a cause of action arises out of the failure of
23 the police to arrest Mr. - - - what's his name - - -
24 Garvin?

25 MS. VANIER: Yes. Gaskin.



1 ACTING CHIEF JUDGE CANNATARO: Gaskin, excuse me.

2 MS. VANIER: That's all right.

3 ACTING CHIEF JUDGE CANNATARO: That's a - - -
4 that's a - - -

5 MS. VANIER: That's one of the arguments, yes.

6 ACTING CHIEF JUDGE CANNATARO: - - - that's the
7 complaint here?

8 MS. VANIER: That's one of the arguments, yes.
9 And the - - -

10 ACTIN CHIEF JUDGE CANNATARO: Wouldn't that be
11 sort of the ultimate discretionary governmental function
12 whether to arrest somebody - - -

13 MS. VANIER: Well, no, but because it's a
14 domestic violence situation, that statute, the 1994, says
15 that the - - -

16 ACTING CHIEF JUDGE CANNATARO: So this is
17 statutory?

18 MS. VANIER: This is statutory and it's a case
19 law.

20 ACTING CHIEF JUDGE CANNATARO: All right.

21 MS. VANIER: I think that's Curry talks about
22 that - - - I mean Cuffy, I apologize.

23 ACTING CHIEF JUDGE CANNATARO: At the risk of
24 repeating a question you already answered, do you believe
25 that the statute that would - - -



1 MS. VANIER: Requires - - -

2 ACTING CHIEF JUDGE CANNATARO: - - - that
3 requires the arrest gives a private right of action to a
4 plaintiff such as your client?

5 MS. VANIER: It's not only my claim, not just the
6 fact that they have to arrest, it's because of the orders
7 of protection and the fact that there's a relationship that
8 is detailed in Ferreira that the court just decided on that
9 that is - - -

10 ACTING CHIEF JUDGE CANNATARO: Private right of
11 action there?

12 MS. VANIER: Yes.

13 ACTING CHIEF JUDGE CANNATARO: Can you explain
14 how that arises?

15 MS. VANIER: That arises, as I - - - maybe I'm
16 not making myself clear - - - that arises because we have
17 the plaintiff having a direct relationship with the police
18 officers. The two police officers here responded at least
19 two times to this - - - to Ms. Howell home. She had a - -
20 - I mean, in Ferreira it talks about the prongs that are
21 set up for the right of action, and the reliance is not
22 necessarily - - - it's not necessary to be met as one of
23 the three prongs. It's or, it's either/or, it's not and.

24 So yes, we submit that even - - - even if you
25 want to argue all, then yes there is a reliance based on



1 the history that she's had with the police officers, with
2 the fact that she sought and received from the judge eight
3 orders of protection, and the fact that they are aware of
4 the actions of the police officers. The municipality are
5 aware of his violent behavior, because they've had proof of
6 that finding.

7 ACTING CHIEF JUDGE CANNATARO: There were some
8 other things that happened in this case, on the record,
9 that I read such as the police came to her and told her she
10 should move somewhere else.

11 MS. VANIER: Well, that's not really feasible in
12 Brooklyn, New York.

13 ACTING CHIEF JUDGE CANNATARO: I - - -

14 MS. VANIER: It's just not.

15 ACTING CHIEF JUDGE CANNATARO: I get it.

16 MS. VANIER: Yeah, it's - - -

17 ACTING CHIEF JUDGE CANNATARO: I don't live that
18 far away from it.

19 MS. VANIER: It's not feasible. That was not
20 very - - -

21 ACTING CHIEF JUDGE CANNATARO: They also told her
22 if they call us again - - -

23 MS. VANIER: They're going to arrest her.

24 ACTING CHIEF JUDGE CANNATARO: - - - we're going
25 to arrest you.



1 MS. VANIER: Yeah. They threatened her, and she
2 was terrified.

3 ACTING CHIEF JUDGE CANNATARO: Yes.

4 MS. VANIER: She was petrified of what happens,
5 because she knows, she's aware of the fact of what happens
6 - - -

7 ACTING CHIEF JUDGE CANNATARO: If a cop said
8 something like that - - -

9 MS. VANIER: - - - to women in Rikers Island.

10 ACTING CHIEF JUDGE CANNATARO: - - - you know,
11 that - - - that would be the kind of thing that you would
12 take to mean - - - or one could take to mean - - - I mean,
13 I can't rely on the police to offer me any help here.
14 They're not going to offer me any help. I'm completely on
15 my own.

16 MS. VANIER: But she has no other recourse except
17 if you wanted to have vigilante justice, I think - - -

18 JUDGE GARCIA: I think, counsel - - -

19 MS. VANIER: Yes.

20 JUDGE GARCIA: - - - if I may rephrase it? A
21 traditional case like this with terrible fact patterns all
22 we see police come and they say don't worry, we're going to
23 arrest your significant other here.

24 MS. VANIER: Right.

25 JUDGE GARCIA: Like, they'll be in jail, don't



1 worry. The person stays. There's a horrific event. In
2 this case, it seems, I think what Judge Cannataro is
3 getting at, almost the opposite. They tell her they're not
4 doing anything. They tell her they're not going to take
5 any action. In fact, the allegations are as you said of
6 their behavior. So what could be the reliance on that
7 that's comparable to the reliance on we're going to arrest
8 your - - -

9 MS. VANIER: And my argument is that that
10 reliance prong is - - - does not have to be met if the
11 first prong is met which is that the law mandates and the
12 police officers must arrest when it's a domestic violence
13 case.

14 JUDGE GARCIA: So that would be the private right
15 of action?

16 MS. VANIER: Correct.

17 JUDGE GARCIA: Okay.

18 MS. VANIER: There's a private right of action
19 established when you can show that the - - - there's a
20 special relationship between the defendants and the
21 plaintiff, which in this case they've been established that
22 there's a special relationship.

23 JUDGE GARCIA: But just correct me if I'm not
24 understanding you, is your argument also that that special
25 relationship pleaded by the statute gets your out of the



1 Cuffy factor of justifiable reliance, or is it a separate
2 argument that that creates a private right of action - - -

3 MS. VANIER: Well - - -

4 JUDGE GARCIA: - - - or both?

5 MS. VANIER: - - - it's both and some. Okay, I'm
6 going to clarify.

7 In Cuffy, which is more clarified in the Ferreira
8 matter, wherein this court said that the plaintiff must
9 show either of the prongs, must show the relationship or
10 the detrimental reliance. It's not all of the prongs that
11 must be met in order for this matter to be - - - in order
12 for the private right of action to be met, that
13 requirement, or that right to now bring a lawsuit against
14 the municipality.

15 ACTING CHIEF JUDGE CANNATARO: Thank you,
16 Counsel.

17 MR. SLACK: May it please the court, Devin Slack
18 on behalf of the City defendants.

19 So plaintiff presented neither of her merits'
20 arguments to supreme court. Under Hecker v. State, that's
21 the end of this case.

22 Now, in the Appellate Division, plaintiff did
23 present a Cuffy-like argument, but it's different than the
24 one presented in her opening brief. Sounds like more like
25 the one we heard today. The one in her opening brief is -



1 - -

2 ACTING CHIEF JUDGE CANNATARO: She did allege - -
3 - plaintiff did allege a special duty in the complaint
4 through, right?

5 MR. SLACK: She - - - she alleged that she was
6 given assurances of continuous police protection.

7 ACTING CHIEF JUDGE CANNATARO: Never said that
8 she was owed a special duty as an allegation in the
9 complaint?

10 MR. SLACK: Well, I think that was part of it.
11 It was a Cuff - - - it was Cuff - - - a traditional Cuffy-
12 like allegation.

13 ACTING CHIEF JUDGE CANNATARO: I think that's my
14 point. It sounds like a Cuffy cause of action is being
15 pled - - -

16 MR. SLACK: Correct.

17 ACTING CHIEF JUDGE CANNATARO: - - - in the
18 complaint.

19 MR. SLACK: Correct. And then in the opening
20 brief to this court, we get the opposite where the
21 plaintiff claims that she felt she had to protect herself.

22 JUDGE WILSON: Well, there is another argument, I
23 think, in the brief in our court which goes to the question
24 of Judges Garcia and Cannataro were asking for is the end,
25 which is that if the trier of fact could conclude that when



1 the police said if you call us again to complain about
2 this, we're going to arrest you, that was their way of
3 saying the reason you're calling us and making us come in
4 is provoking this, and if you don't call, then we've got
5 the situation under control. Is that a triable issue?

6 MR. SLACK: I think that might have been the
7 argument that the appellant presented to the Appellate
8 Division, but not supreme court where she - - - she argues
9 that she was told to follow their directives, but it's
10 definitely not a directive - - -

11 JUDGE WILSON: It's a directive, but don't call
12 us - - - don't call us again is a directive.

13 MR. SLACK: Yeah. No, I agree, then the
14 Appellate Division I think there might be an argument that
15 that was what she was saying. Here, she says quite clearly
16 she felt she had to protect herself. It's the opposite of
17 reliance. She says she was not relying on police.

18 ACTING CHIEF JUDGE CANNATARO: That was the
19 argument - - - what was the argument in supreme - - - what
20 is the preserved argument? There is no - - -

21 MR. SLACK: There is no preserved argument. The
22 only argument that was made in the supreme court was that
23 she needed more discovery. That argument does not appear
24 in the opening brief in this court, didn't appear in the
25 lead motion as far as I recall, but it definitely isn't the



1 opening brief to this court.

2 No merits argument whatsoever has been preserved
3 under Hecker. Even if you look only to the Appellate
4 Division, there was no argument on the statutory duty
5 question. The key issue, there was absolutely no argument
6 that the DVIA authorizes a private right of action, zero.
7 And her Cuffy argument was not the one presented in the
8 opening brief where she - - - now, she says she had to
9 protect herself. It's - - -

10 JUDGE RIVERA: Well, what do you take to be,
11 under our liberal pleading standard, the appropriate
12 reading of the complaint?

13 MR. SLACK: I think the reading of the complaint
14 - - -

15 JUDGE RIVERA: Yeah.

16 MR. SLACK: - - - is that a traditional Cuffy
17 claim, that she was granted assurances of continuous police
18 protection --

19 JUDGE RIVERA: Um-hum.

20 MR. SLACK: - - - which she disclaims to this
21 court where she says she was told I didn't - - - I couldn't
22 rely on them basically. I had to protect myself.

23 JUDGE RIVERA: Um-hum.

24 MR. SLACK: And again, no - - -

25 JUDGE RIVERA: Need protection because she had an



1 order of protection?

2 MR. SLACK: I think that's probably the most that
3 we get out of the complaint. There are - - -

4 JUDGE RIVERA: Yeah, but why isn't that about the
5 statute? The statute mandates particular conduct if one
6 presents an order of protection, or has an order of
7 protection or at least - - -

8 MR. SLACK: Sure.

9 JUDGE RIVERA: - - - discern that you have an
10 order of protection.

11 MR. SLACK: Sure. I mean, it has a vague
12 connection to the statute.

13 JUDGE RIVERA: Well, but we have - - -

14 MR. SLACK: The statute doesn't mention - - -

15 JUDGE RIVERA: - - - liberal pleading standards
16 so - - -

17 MR. SLACK: Sure.

18 JUDGE RIVERA: - - - and we have to give all of
19 the best inferences - - -

20 MR. SLACK: Right.

21 JUDGE RIVERA: - - - to - - -

22 MR. SLACK: And we're not just talking about just
23 pleading standards. We're talking about preservation.

24 JUDGE RIVERA: Yes, but - - -

25 MR. SLACK: No argument made - - -



1 JUDGE RIVERA: - - - but to preserve, you got to
2 plead, right? I mean, that's the best - - -

3 MR. SLACK: That's a starting point.

4 JUDGE RIVERA: That's the point.

5 MR. SLACK: No argument on the statutory duty in
6 supreme court.

7 JUDGE RIVERA: Um-hum.

8 MR. SLACK: And the Appellate Division, no
9 argument on whether the DVIA authorizes a private right of
10 action. Let me just turn to that for a second.

11 You know, there's abundant evidence on the - - -
12 just turning to the merits - - - abundant evidence that the
13 legislature did not intend to create a private right of
14 action under subsection 4 of 1410 which is the relevant
15 part of the DVIA here, including statements from the senate
16 sponsor that I wish we flagged in our brief because they're
17 extremely illuminating and they speak directly to this
18 question, and I just think the court should be aware of
19 them - - - asks specifically whether this provision would
20 make officers liable for failing to make mandatory arrests.
21 The senate sponsor said - - - this is starting - - - an
22 exchange that starts on page 5631 of the debate transcripts
23 - - - that "There's nothing in this bill that deals with in
24 any way, shape, or form any effort to expand municipal
25 liability".

1 Another quote, "We are not adding any liability".
2 That's about a clear a statement of legislate intent as
3 you're going to get. There are several other indications
4 that keep me just to the same place. It goes - - -

5 JUDGE RIVERA: Then why doesn't it end up in the
6 statute itself? If it's that clear, if it's that - - - if
7 that position is one that the elected officials have voted
8 on this felt strongly about, would we not anticipate that
9 it would be in the statute?

10 MR. SLACK: As far as I'm aware this court - - -

11 JUDGE RIVERA: I mean, if they're that concerned,
12 of course, that's - - - as I'm sure they would be about the
13 potential price tag, if you want to put it that way - - -

14 MR. SLACK: Right.

15 JUDGE RIVERA: - - - the cost of this, the
16 potential liability, one would think they would have been
17 very clear about - - - as clear as they are in those
18 statements that you are saying show that.

19 MR. SLACK: As far as I know, the legislature's
20 not in the habit of specifying that there is no private
21 right of action. Because sometimes - - -

22 JUDGE RIVERA: Well, they do say no cause of
23 action for damages shall arise in favor of any person by
24 reason of any - - -

25 MR. SLACK: Right.



1 JUDGE RIVERA: - - - of any arrest, et cetera, et
2 cetera. So actually, for this statute, they were aware of
3 the potential for some type of litigation.

4 MR. SLACK: Exactly.

5 JUDGE RIVERA: Why not say you can't sue anybody
6 for anything?

7 MR. SLACK: So that's -- that's actually a - - -
8 I mean, this is - - - actually, if anything, that cuts in
9 our favor, because it shows the legislature did bring its
10 judgment to bear of the question of civil liability. And
11 rather than authorize private rights of actions for failing
12 to make mandatory arrests, it immunized officers for making
13 - - -

14 JUDGE RIVERA: But doesn't that - - -

15 MR. SLACK: - - - good-faith arrests.

16 JUDGE RIVERA: - - - doesn't the fact that they
17 have to say that assume that there's otherwise a private
18 right of action?

19 MR. SLACK: No. And that - - -

20 JUDGE RIVERA: That's why they have to make his
21 carve out?

22 MR. SLACK: Not at all. In fact, this court has
23 rejected that kind of negative implication on three
24 different occasions. And if you look at that exchange I'm
25 talking about on 5630, it's actually about there was



1 occasions by this provision, and it was very clear we're
2 not adding liability, we're also not taking any away.

3 JUDGE RIVERA: But you can't - - - the provision
4 - - - I'm just responding to what you're saying and asking
5 about that - - - but the provision you're in some way can't
6 really be taken in isolation given the rest of the statute,
7 right? The rest of the statute is very clear would have a
8 tremendous impact of interpersonal violence on families,
9 but of all the members of our diverse communities both on
10 the civil and criminal side.

11 I mean, civil is mentioned many times throughout
12 the statute. So it's hard for me to really fully
13 appreciate, let me put it that way, your argument that
14 somehow the legislature, given the history you're pointing
15 to, really didn't want to get sued, didn't think that was a
16 good thing, carved out the particular class of suits, but
17 didn't say anything else, even though it's recognizing the
18 tremendous adverse consequences of its approval of
19 violence, not only on individuals, but on the community at
20 large.

21 MR. SLACK: Well, I'm just going to set to one
22 side that the senate sponsor expressly spoke to this and
23 said that there was no municipal liability. Very clear
24 about that.

25 JUDGE RIVERA: Okay.



1 MR. SLACK: I'm also going to set aside that this
2 kind of negative implication from an immunity argument has
3 been rejected by this court on three occasions.

4 ACTING CHIEF JUDGE CANNATARO: Are you talking
5 about Mark G. or something else?

6 MR. SLACK: I think it's - - - there were three.
7 I think it was in Cruz, Mark G, it also might have been Uhr
8 v. East Greenbush. But repeatedly, that kind of negative
9 implication. And that was in situations where we didn't
10 have express statements from legislatures saying that this
11 provision was not meant to create municipal liability.

12 So I just go to all those - - - all those other
13 avenues just goes to show that the legislature in this
14 integrated bill that covers fifty-plus subsupervisions
15 contemplated a range of enforcement mechanisms to achieve
16 its goal to ensure that domestic violence was reduced by
17 holding offenders accountable.

18 Even if you look only to subsection (4) - - -

19 JUDGE RIVERA: Well, but this is about holding
20 law enforcement accountable, which very clear in the
21 statute, and very clear in the advocacy up to the passage
22 of the statute was of significant concern, right. That
23 unfortunately is hard to believe that the years we're in
24 that officers, assuming as we must factual truth, that
25 officers said and did what happened here that the



1 legislature was concerned. That's why you've got the
2 mandatory - - -

3 MR. SLACK: Absolutely.

4 JUDGE RIVERA: - - - arrest, right. But that is
5 what - - -

6 MR. SLACK: Absolutely.

7 JUDGE RIVERA: - - - the concern was.

8 MR. SLACK: Subsection (4) is itself a mechanism
9 for ensuring that offenders are arrested and housed
10 accountable.

11 JUDGE RIVERA: If abusers - - -

12 MR. SLACK: Not - - -

13 JUDGE RIVERA: - - - or batterers are taken care
14 of, but the point is the mandatory arrest is also because
15 of the well documented failure of law enforcement - - -

16 MR. SLACK: Right. Right.

17 JUDGE RIVERA: - - - to arrest.

18 MR. SLACK: And the point of it, I mean, just
19 give you some legislative history, in the sponsor's
20 memorandum and in the debates was to - - - it's not to
21 impose liability to officers, it's to remove their
22 reluctance, and to make it clear that they have no duty to
23 mediate in the context of a domestic violence. But even as
24 to subsection (4), the legislature could not have been
25 clearer about what its enforcement mechanism was. It was



1 political oversight.

2 JUDGE SINGAS: Can I just ask you, moving away
3 from that for a minute, because that might - - - this
4 mandatory arrest might go under governmental function
5 immunity as well, right? I mean, I think that analysis is
6 better suited for that. But regardless, if we adopt your
7 position under the assumption of duty, aren't we
8 incentivizing police not to answer calls of women who are
9 in need?

10 MR. SLACK: No, not at all. I mean, the officer
11 still had a mandatory duty to arrest. That's subject to
12 police - - -

13 JUDGE SINGAS: But we're saying you can't
14 justifiably rely on them, because they're not going to do
15 anything to help you.

16 MR. SLACK: No, not at all. There could still be
17 a Cuffy claim if we're turning to that, but if it's a
18 statutory duty question, it's a question whether the
19 legislature intended to authorize it. The legislature was
20 very clear there was a pilot program covered with a - - -

21 JUDGE SINGAS: Yeah, I'm not talking about a
22 statutory. I'm talking about another way to prove special
23 duty, right. There's an assumption of duty by the
24 governmental entity.

25 MR. SLACK: Sure. Like a Cuffy context.



1 JUDGE SINGAS: Yes. So now, I'm saying to you if
2 we're going to argue here, which I think you did argue,
3 that there was - - - Ms. Howell shouldn't have been able -
4 - - shouldn't have relied on those police officers, because
5 they basically told her we're not making an arrest, there's
6 nothing here for us, go move. So if she can't rely on
7 them, right, what are we saying as a society if we say are
8 we incentivizing police not to answer those calls?

9 MR. SLACK: No, I don't think so. I think is,
10 like, a very particular part about this very unusual case.
11 I think - - - I think in one part it's about plaintiff's
12 disclaimer in her opening brief to this court that she was
13 relying on police protection, that she felt she had to
14 protect herself. Even if you - - - if you back up and go
15 to either the complaint or her testimony at her deposition,
16 you know, she still wouldn't even satisfy the traditional
17 test under Cuffy. She said repeatedly - - -

18 JUDGE SINGAS: But how do you distinguish
19 Mastroianni?

20 MR. SLACK: Mastroianni in a few - - - in a few
21 ways. I mean, one, I think the first - - - the most
22 important thing to take away from Mastroianni is that this
23 court said that an order of protection - - - and this is
24 while - - - after 1440(4) had been enacted - - - is not
25 sufficient by itself to establish justifiable reliance.



1 The other thing, Mastroianni, the officers were
2 on the scene, they parked across the street and stayed
3 there.

4 JUDGE SINGAS: Correct. That's what I'm saying.
5 So when the officers do something which would have someone
6 rely on them, when they're taking some affirmative action,
7 we're saying okay, you've relied on that, and now you could
8 - - - you know, you satisfy that prong.

9 In this case, we're saying if you do nothing,
10 right, if you do nothing, then there's no reason for you to
11 justifiably rely. So I'm just saying that intuitively,
12 that really makes no sense.

13 MR. SLACK: I think it's the unusual situation
14 where the plaintiff has - - - has made contrary allegations
15 as to whether she was relying on police or not, and it's
16 difficult for me really wrap my head around that.

17 JUDGE TROUTMAN: If the statute mandates an
18 arrest, shouldn't it be inferred that one would rely that
19 the police are going to protect you? The statute says
20 arrest. It's not discretionary anymore.

21 MR. SLACK: I mean, this court's rejected that on
22 two occasions: in Mastroianni and in Sorichetti, and the
23 courts put two most recent cases, especially in the cases
24 involving order of protection. The order of protection
25 played essentially no role, and it didn't play any role in



1 - - -

2 JUDGE RIVERA: Can she hold that the next time
3 she calls it'll be different officers who don't have this -

4 - -

5 MR. SLACK: I'm sorry.

6 JUDGE RIVERA: - - - I'm not going to arrest
7 state of mind?

8 MR. SLACK: I'm sorry?

9 JUDGE RIVERA: Could she have hoped, or someone
10 in her position have hoped that different officers might
11 answer her call the next time?

12 MR. SLACK: Possibly. I mean - - - I mean, there
13 were eight different occasions, allegedly, and Mr. Gaskin
14 was number three.

15 JUDGE SINGAS: So the statute was enacted for
16 nothing. It doesn't mean anything.

17 MR. SLACK: Well, I think it's absolutely true -
18 - - well, let's have - - - I guess one thing that I could
19 say that's not in this case because of the statute, it
20 creates a mandatory - - - at least in the order of
21 protection context, a fair - - - a mandatory duty that
22 would not be subject to discretionary governmental
23 immunity. The professional judgment rule. We're not
24 talking about the professional judgment rule. We never
25 have relied on it in this case. We're talking about a



1 special duty. And plaintiff has identified two avenues.

2 There's the statutory one. It is incredibly
3 clear for seven or eight reasons including direct
4 statements by the senate sponsor, the legislature had no
5 intention of creating that right of private action under
6 that. And plaintiff's allegations, whatever theory you
7 want to take, neither of them are preserved. It's a - - -

8 JUDGE RIVERA: So given that the legislature was
9 so concerned about law enforcement's failure in this
10 context, what else is set up to ensure that law enforcement
11 does its job?

12 MR. SLACK: So it started with the pilot program.

13 JUDGE RIVERA: Yeah.

14 MR. SLACK: Couple that with training, and
15 require two state agencies to report to the legislature and
16 the governor on an annual basis.

17 JUDGE RIVERA: Okay.

18 MR. SLACK: It's political oversight. And ever
19 since, subsection (4) has been subject to the sunset
20 provision.

21 JUDGE RIVERA: And it didn't work here. So what
22 are - - - if we go down to this micro level, what - - - is
23 it the CCRB, is it - - - what is there in place to address
24 the problem that happened here, because obviously those
25 things are in place and we didn't do a thing. So what



1 happened here?

2 MR. SLACK: I think that question is one that
3 should be directed to the legislature, not this court,
4 because the legislature has continuously decided to make a
5 subject - - - subsection (4) subject to a sunset revision,
6 it's rejected proposals to make it permanent, so it had to
7 reup the provision every one to two years or it comes off
8 the books. And it would be incredibly strange to think
9 that the legislature authorized a private right of action
10 for one or two year periods.

11 ACTING CHIEF JUDGE CANNATARO: Thank you,
12 Counsel.

13 MR. SLACK: Thank you.

14 MS. VANIER: Now, I want to first address the - -
15 - I apologize - - - the interview. I believe you mentioned
16 a transcript that was not in - - - on the record, and that
17 is regarding the senators back-and-forth regarding what the
18 private act - - - what the - - - I apologize - - - what - -
19 - whether or not a person has a private right to have a
20 lawsuit against the government. In that interview, if I'm
21 correct, because he literally just emailed that to us
22 yesterday, it indicates the senators, I believe, did not
23 want to answer the question directly. They essentially
24 said we're not changing anything. However, we are saying
25 that if there is an arrest which is mandated, then you have



1 no private right of action. But they don't speak about
2 whether or not - - - in this case where there was not an
3 arrest, they're trying to gauge the senators - - -

4 JUDGE RIVERA: You mean the references to what
5 already exists in the statute?

6 MS. VANIER: Correct. Now, they're - - - what
7 the senators - - - what the - - - what the city is relying
8 on is that the senators did not discuss directly whether or
9 not if there is no arrest as mandated, whether or not
10 there's a right of private action. And one of the
11 senators, I believe, Boland or Saland, I believe, if I'm
12 correct, indicates one is if there is no arrest - - - and
13 I'm paraphrasing - - - then it is a gross negligence on the
14 part and/or gross wanton negligence.

15 This is in the - - - let me look into the record.
16 This is the dialogue between Senator Dollinger and Senator
17 Saland, okay. And this is what I believe the adversary is
18 speaking about, which is on page 5632.

19 On that, it's - - - the Senator Saland, they are
20 - - - this is what he says they are basically intending to
21 make it clear that their obligation or requirement of
22 mandatory arrest also close the officer with immunity which
23 is under CPL 140 that they're acting according to the
24 responsibility of the office. Acting in good faith and not
25 falsely or willfully negligent, and that, in essence, in

1 those several sections, we are not taking away.

2 So they're saying they're not taking away any
3 liability, but they're saying that you have to make the
4 arrest. And if you don't make the arrest, there is an open
5 case for a person, a private party, to bring up right of -
6 - - bring a case against the city or the municipality.

7 I just want to reiterate that Ms. Howell was
8 mortified about going to jail. She did exhaust all her
9 remedies in terms of calling the police officers, getting
10 the eight orders of protection on different occasions. And
11 yes, she relied on them - - - on the police officers, but
12 she - - - but she also understood that they told her
13 directly not to call us or else we will arrest you. They
14 actually threatened her that they'll arrest her the third
15 time. They never arrested Mr. Gaskin.

16 So I don't know - - -

17 JUDGE RIVERA: And - - - and at a minimum, she
18 relied up till that moment, right? Up until - - - at a
19 minimum.

20 MS. VANIER: And then - - -

21 JUDGE RIVERA: Let's put aside - - - let's put
22 aside at the moment that the officers say just don't call
23 us or we're going to arrest you. Before that, she
24 completely relied on them?

25 MS. VANIER: Of course.



1 JUDGE RIVERA: Because she kept calling.

2 MS. VANIER: She kept calling them. And - - -
3 but again, I'm - - - the adversary is misrepresenting the
4 facts here. It's - - - it's not contested - - - it's
5 totally uncontested that they did tell her not to call.
6 They did tell her that they will arrest her. It was - - -
7 there was no ambiguity about it. There is the reliance
8 based on her - - - on the factors that they knew and had a
9 relationship with Gaskin's relative. Every time they told
10 her they would arrest him, she would - - - no, and again,
11 this is not contested - - - she would see that they were
12 have him walk around the corner, and the second time that
13 the uncle picked him up and drove him away.

14 So therefore, Mr. Gaskin had no reason to believe
15 there were any consequences or repercussions for him going
16 back there again. So him going there and dragging her off
17 the third floor and hurling her outside - - -

18 JUDGE TROUTMAN: So you're saying even their
19 coming and taking him away from the premises, that wasn't
20 enough, because they didn't - - -

21 MS. VANIER: Correct.

22 JUDGE TROUTMAN: - - - do that, which the statute
23 required, which was arrest?

24 MS. VANIER: Correct. They never arrested him,
25 and they're the least communications prior to this incident



1 to do that.

2 And then in the third occasion is when they told
3 her don't call. Don't you call us, we will arrest you.
4 That is again, not contested. That's unconscionable.

5 ACTING CHIEF JUDGE CANNATARO: Thank you,
6 Counsel.

7 (Court is adjourned)

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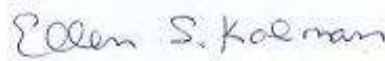
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C E R T I F I C A T I O N

I, Ellen S. Kolman, certify that the foregoing transcript of proceedings in the Court of Appeals of Dora Howell v. City of New York, No. 91 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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