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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF SOLLA,

Respondent,

-against-

No. 24

BERLIN,

Appellant.

20 Eagle Street
Albany, New York 12207
January 15, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Matter of Solla.
2 Counsel, would you like any rebuttal time?

3 MS. CHANG: Yes, please, two minutes.

4 CHIEF JUDGE LIPPMAN: Two minutes, go
5 ahead, counselor.

6 MS. CHANG: Good afternoon, may it please
7 the court, Cecilia Chang for the Commissioner of
8 OTDA.

9 The Appellate Division should be reversed
10 here. The issue in this case is whether catalyst
11 fees are available under the State EAJA. That - - -

12 CHIEF JUDGE LIPPMAN: Is your - - - is your
13 argument that at the time they passed this
14 legislation, these later cases had not taken place,
15 and therefore the legislative intent is that the
16 catalyst theory applies?

17 MS. CHANG: Our theory is that the
18 legislature failed to affirmatively authorize
19 catalyst fees. The general statement of intent in
20 8600, which Your Honor is referring to, doesn't say
21 that the legislature meant to follow federal law - -
22 - federal EAJA law on all issues. It doesn't - - -

23 CHIEF JUDGE LIPPMAN: Right. They - - -
24 they pick and - - - and choose, but they didn't say
25 it doesn't apply and your view is because those later

1 cases - - - the later federal cases were not in
2 place, therefore, their intent is that it doesn't
3 apply.

4 MS. CHANG: That's right. Even - - -

5 CHIEF JUDGE LIPPMAN: That's your basic
6 argument, isn't it?

7 MS. CHANG: Well, our argument is based on
8 the plain text. 8600 doesn't create an exception to
9 the operative fee provisions of the state act. Even
10 if you were to follow federal case law, federal
11 courts have uniformly rejected catalyst fees under
12 the federal EAJA.

13 JUDGE READ: By the way, what is the state
14 act here? The state act as opposed to the city act?

15 MS. CHANG: The state act is the State
16 EAJA. It's found in, I think, Article 81 of the
17 CPLR.

18 JUDGE PIGOTT: 86.

19 MS. CHANG: 86, I'm sorry.

20 JUDGE READ: No, no, what was this - - - in
21 this particular case, in the Solla case, what did the
22 State do that is - - - that's the basis for this
23 action to recover attorneys' fees? Because as I read
24 it, it was the City that delayed.

25 MS. CHANG: Your Honor is correct. The

1 State always agreed with petitioner that she was
2 entitled to these benefits. The ALJ decision issued
3 by the State ruled in her favor, and ordered the City
4 to immediately restore her benefits retroactively,
5 and that is the very decision that she is trying to
6 enforce. The State's legal position never changed.
7 The State said from the beginning that she should be
8 paid and that compliance should be immediate.

9 There was -- I think, months after the
10 administrative decision was issued, she submitted a
11 request for compliance form. It looks like it was
12 over the Internet. People can do that over the
13 Internet; they can mail in a form; they can call a 1-
14 800 number. When the State agency got that
15 notification from petitioner's attorney, they
16 immediately contacted the City. Two days later, they
17 sent a letter to her and her attorney saying the City
18 has reported that they've complied.

19 The State agency had no reason to doubt
20 that report of compliance and had no further
21 communication, it appears from the record, with
22 petitioner or her attorney until the Article 78 was
23 filed.

24 JUDGE READ: So what happened? What
25 happened with the City? I mean, was it just a - - -

1 just a mix - - - a bureaucratic mix-up of some - - -
2 why did - - - why didn't they?

3 MS. CHANG: I - - -

4 JUDGE READ: Or do we know? I guess or - -
5 -

6 MS. CHANG: We don't know. This is - - -
7 this is a motion to dismiss before the case was
8 answered, so the administrative record isn't here and
9 the City hasn't appeared to explain why. This is a
10 complicated situation, by the way. These are shelter
11 benefits. It appears that they were paid directly to
12 her landlord. So payment wasn't even made in a check
13 to her. So it wasn't clear - - - there might be many
14 reasons why the landlord could have not cashed the
15 check. We don't know.

16 So the fact that payment wasn't immediate
17 would not have been obvious to anyone that there
18 hadn't been full compliance by the City.

19 CHIEF JUDGE LIPPMAN: But you're saying the
20 State is not at fault.

21 MS. CHANG: There's been no allega - - -

22 CHIEF JUDGE LIPPMAN: But the - - - but the
23 catalyst theory exists in New York, according to the
24 leg - - - legislation?

25 MS. CHANG: No, the catalyst theory doesn't

1 exist in New York, but our fees wouldn't be
2 appropriate here, even if it did exist, because even
3 if the catalyst theory did exist, there was no - - -
4 there was no - - -

5 CHIEF JUDGE LIPPMAN: Why doesn't the
6 catalyst theory exist?

7 MS. CHANG: The catalyst theory doesn't
8 exist because the legislature - - -

9 CHIEF JUDGE LIPPMAN: At the time - - -
10 this was what I was asking about before. At the time
11 that the legislation was passed - - -

12 MS. CHANG: I'll answer it very simply.

13 CHIEF JUDGE LIPPMAN: Yes.

14 MS. CHANG: So even if we were to look at
15 federal case law in 1989 - - -

16 CHIEF JUDGE LIPPMAN: Yes.

17 MS. CHANG: - - - applying at the - - - pre
18 - - - before the state act was enacted, it didn't
19 clearly authorize fees under the facts of this case.
20 So we cited a decision, Omaha Tribe of - - -

21 CHIEF JUDGE LIPPMAN: So you think when
22 they passed the legislation, they did not intend to
23 adopt the - - - the catalyst theory?

24 MS. CHANG: Yes. And - - - but the
25 legislative history supports this. So it actually

1 speaks specifically to what the legislature thought
2 was the class of petitioners or plaintiffs eligible
3 for fees. In 1989, in the bill jacket for Chapter
4 770 at page 36, this is the explanation: "A
5 plaintiff or petitioner prevails within the meaning
6 of the bill, either by settlement substantially
7 favoring the plaintiff or by final judgment". That's
8 statement would exclude the catalyst - - -

9 CHIEF JUDGE LIPPMAN: But the - - - but the
10 legislation, they kind of picked and choose what they
11 wanted to put into it, didn't they? They didn't just
12 adopt exactly the federal provisions, right?

13 MS. CHANG: Correct, Your Honor, but they
14 didn't affirmatively include language that would
15 authorize catalyst fees. The legis - - -

16 CHIEF JUDGE LIPPMAN: And do they have to
17 for it to be effective?

18 MS. CHANG: Yes, they - - - I mean, the
19 state act is - - - it - - - it abrogates the American
20 rule which is the baseline rule for fees. It
21 abrogates state sovereign immunity and in that
22 context - - -

23 CHIEF JUDGE LIPPMAN: Are you saying, at
24 the time of the legislation, that in the federal
25 statute, that the catalyst theory did not exist there

1 either?

2 MS. CHANG: Well, 8600 does - - -

3 CHIEF JUDGE LIPPMAN: Or it was only later,
4 when you had those other federal cases that - - -
5 that - - -

6 MS. CHANG: Yeah.

7 CHIEF JUDGE LIPPMAN: - - - the - - - the
8 federal view changed?

9 MS. CHANG: Federal law under the federal
10 EAJA - - -

11 CHIEF JUDGE LIPPMAN: Yes.

12 MS. CHANG: - - - which is the only federal
13 law that was adopted in 8600, did not clearly
14 authorize catalyst fees. There was federal law under
15 other statutes and other facts - - -

16 CHIEF JUDGE LIPPMAN: But it - - - did - -
17 - but - - -

18 JUDGE RIVERA: Well, what was the case law?

19 CHIEF JUDGE LIPPMAN: - - - the point is,
20 do they have to adopt it, when - - - when the federal
21 provisions were widely interpreted as having the
22 catalyst doctrine?

23 MS. CHANG: Your Honor, in 8600, the
24 legislature referenced only one specific provision of
25 the federal EAJA. It was 2412(d). The federal EAJA

1 itself contains many fee provisions, but the
2 legislature excluded those. It also excluded federal
3 fee law generally and federal fee law under other
4 statutes.

5 CHIEF JUDGE LIPPMAN: But isn't that the
6 point that they excluded some kinds of fees, but
7 didn't specifically say - - -

8 MS. CHANG: If you look to federal case law
9 that existed at the time - - -

10 CHIEF JUDGE LIPPMAN: Yes.

11 MS. CHANG: - - - in 1989 - - -

12 CHIEF JUDGE LIPPMAN: Yes.

13 MS. CHANG: - - - under the specific
14 federal EAJA provision that they cited, it didn't
15 clearly authorize catalyst fees.

16 So in Omaha Tribe, a case that we cite in
17 our brief, which is an Eighth Circuit decision - - -
18 federal decision - - - from 1984, the federal circuit
19 said "Under the federal EAJA, it is necessary for a
20 party to actually prevail against the United States;
21 the term 'prevailing party' does not include those
22 who believe they 'would have' prevailed. In the
23 absence of a settlement of the issue or a trial on
24 the merits, plaintiff cannot obtain fees."

25 So that was the existing law or part of the

1 existing law the legislature would have known about.

2 JUDGE ABDUS-SALAAM: So your - - - your
3 position turns on the definition of "prevailing
4 party" - - -

5 MS. CHANG: That's right, Your Honor.

6 JUDGE ABDUS-SALAAM: - - - and your - - -
7 your position is that there's - - - "prevailing
8 party" is a term of art, and it includes only people
9 who have gone - - - been a part of a proceeding or an
10 action or some settlement, a judicial - - -
11 judicially ordered settlement under the federal law.

12 MS. CHANG: That's right. Prevail - - -

13 JUDGE ABDUS-SALAAM: But what about under -
14 - - what about under the state law? Does that carry
15 over into the state law as well?

16 MS. CHANG: Yes, prevailing party has that
17 meaning not only under federal law, but has for
18 decades under state law, including in many other
19 provisions of the CPLR, and the very - - - where the
20 state EAJA is codified. So under state law, it had
21 uniform meaning. And that uniform meaning is someone
22 who obtains a favorable ruling or judgment from a
23 state court who prevails on the merits of their claim
24 in state court. That's true for cost provisions.
25 It's true for many other - - -

1 CHIEF JUDGE LIPPMAN: Even if they
2 precipitate the result, it's - - - it's not good
3 enough if there's not a - - - some kind of final
4 order or judgment?

5 MS. CHANG: That's right. That's true
6 under multiple provisions of the CPLR. It's true for
7 cost and class action proceedings. So that's the
8 settled meaning throughout many different statutes.
9 That was true in state law when the state act was
10 enacted.

11 CHIEF JUDGE LIPPMAN: And that's what the
12 legislature intended in whatever year it was, 1989?

13 MS. CHANG: Yes, so if the - - -

14 CHIEF JUDGE LIPPMAN: They intended that
15 even if you precipitated the result, there's no - - -
16 there's no fee without a final judgment or whatever?

17 MS. CHANG: In the case - - -

18 CHIEF JUDGE LIPPMAN: Unless you're the
19 prevailing party in the sense that you - - -

20 MS. CHANG: That's right. That's what - -
21 -

22 CHIEF JUDGE LIPPMAN: - - - you interpret
23 it.

24 MS. CHANG: That's what they wrote in the
25 statute. And I want to go back to the legislative

1 history. The legislature - - - the bill jacket for
2 1989 supports that reading. More importantly, the
3 initial act had a two-year sunset provision.

4 In 1992, the legislature eliminated the
5 sunset provision and made the act permanent. But it
6 did so what - - - it described what it believed the
7 act was doing in 1992. And in that bill jacket, what
8 the court said is that "fees are available under the
9 act when the court decides in a party's favor". This
10 is 1992, Chapter 36, pages 7 and 8. That was the - -
11 - that was the legislature's own understanding of how
12 this statute worked, and it was the budget analysis
13 that - - -

14 JUDGE RIVERA: What - - -

15 CHIEF JUDGE LIPPMAN: Judge Rivera?

16 JUDGE RIVERA: So I was going to ask you,
17 prior to the Supreme Court's decision in Buckhannon,
18 what - - - what were our courts doing with respect to
19 this theory? Is no one applying the catalyst theory?

20 MS. CHANG: I - - -

21 JUDGE RIVERA: In our state courts?

22 MS. CHANG: In our state courts, courts
23 were split. We were able to find, I think, two
24 Appellate Division decisions from around the mid-
25 1990s. One, I think, appeared to authorize catalyst

1 fees; the other didn't. So there was no settled law
2 in New York that would have recognized catalyst fees,
3 and there was absolutely no law that we were able to
4 find before the state act was enacted that recognized
5 catalyst theory under state law.

6 JUDGE RIVERA: We - - - we can't say that -
7 - - that the law was settled, because obviously there
8 were courts, at the intermediate level, who had
9 already decided that the catalyst theory properly
10 applied under the state law.

11 MS. CHANG: There might have been - - -

12 JUDGE RIVERA: Well, you just said there
13 were.

14 JUDGE ABDUS-SALAAM: There's one.

15 MS. CHANG: Well, the law was settled
16 before 1980 when the legi - - - I'm sorry; before
17 1989. There was no - - - there was no law that we
18 could find that would have recognized catalyst fee
19 awards under state law before the state act was
20 enacted.

21 JUDGE RIVERA: But there were judicial
22 interpretations in intermediate appellate court - - -
23 inter - - - judicial interpretations - - -

24 MS. CHANG: After the state act was
25 enacted.

1 JUDGE RIVERA: That was what I was asking
2 you about, and then you - - -

3 MS. CHANG: Yeah, I'm sorry.

4 JUDGE RIVERA: Okay.

5 MS. CHANG: But you would have to have more
6 than unsettled state trial-level law or unsettled
7 state - - - federal trial-level law to overcome the
8 legislature's use of a term of art with hundreds of
9 years of meaning.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.
11 You'll have your rebuttal. Let's hear from your
12 adversary.

13 Counselor, did the catalyst theory prevail
14 in 1989 when the legislature passed this legislation?

15 MR. KEMPNER: Absolutely, Your Honor.

16 CHIEF JUDGE LIPPMAN: Why?

17 MR. KEMPNER: Every single federal circuit
18 court that had looked at the issue of the catalyst
19 theory and whether it existed under federal law at
20 the time the New York Statute was passed found that
21 the - - - that the catalyst theory existed. And so
22 this was the body of federal case law that the New
23 York State - - -

24 CHIEF JUDGE LIPPMAN: But what about your
25 adversary saying that they didn't - - - we didn't

1 specifically adopt it in this statute?

2 MR. KEMPNER: Well, but they did
3 specifically adopt it. If you look at the language
4 of 8600, they reference the body - - - the
5 substantial body of case law that has evolved under
6 the Federal Equal Access to Justice Act. This was a
7 highly unusual move by the New York State Legislature
8 to not only reference the federal statute, but to
9 also reference the case law that had developed
10 thereunder.

11 JUDGE READ: But they also said that they
12 intended this to be narrower, didn't they?

13 MR. KEMPNER: Well, they intended it to be
14 narrower in certain respects, but in other respects
15 they actually - - -

16 CHIEF JUDGE LIPPMAN: They acted in certain
17 respects to make it narrower - - -

18 MR. KEMPNER: And it's exactly what you
19 were talking about prior, Judge Lippman, where what
20 they did was they adopted the federal statute, and
21 then they took out their pens and they line-edited
22 where they thought it should be different.

23 CHIEF JUDGE LIPPMAN: Some of the things
24 having to do with fees, right?

25 MR. KEMPNER: They did not take out the

1 catalyst theory.

2 CHIEF JUDGE LIPPMAN: Right.

3 MR. KEMPNER: But they changed other
4 things.

5 CHIEF JUDGE LIPPMAN: But I'm saying there
6 were other things that had to do with - - -

7 MR. KEMPNER: Yes, absolutely. They
8 narrowed the class of petitioners that would be able
9 to seek fees. They eliminated defendants from being
10 able to get fees under the state statute - - -

11 JUDGE ABDUS-SALAAM: Counsel, under the
12 catalyst theory - - -

13 MR. KEMPNER: - - - which are available
14 under the federal law. Yes, sir.

15 JUDGE ABDUS-SALAAM: - - - do you have to
16 be a prevailing party in order to - - - even under
17 that theory to recover attorneys' fees?

18 MR. KEMPNER: There's a - - - yeah, you do
19 have to be a prevailing party, but there's a
20 difference between - - -

21 CHIEF JUDGE LIPPMAN: What does it mean?
22 What does it mean?

23 MR. KEMPNER: - - - and I think you look to
24 the language of the statute for what it means. The
25 appellants are looking at other statutes for the

1 meaning of "prevailing party" under the Equal Access
2 to Justice Act. But the Equal Access to Justice Act
3 itself defines "prevailing party" in 8602(f). And -
4 - - and it says where "a plaintiff or a petitioner in
5 a civil action against the state prevails in whole or
6 in significant part". And - - - and - - -

7 CHIEF JUDGE LIPPMAN: So if - - -

8 MR. KEMPNER: - - - and it does not talk
9 about final judgment.

10 CHIEF JUDGE LIPPMAN: - - - if you
11 precipitate the result, that's enough in your mind?

12 MR. KEMPNER: Absolutely, Your Honor. And
13 - - - and the final judgment language, the only place
14 that the final judgment language exists is that is
15 the trigger for when your thirty days runs to make
16 your application for fees. It - - - it - - - it's
17 mentioned in 8601. And then the only other place
18 that it's mentioned in the statute is 8603, where
19 it's defined as a final and nonappealable judgment -
20 - -

21 CHIEF JUDGE LIPPMAN: Counsel, assuming - -
22 -

23 MR. KEMPNER: - - - and settlement.

24 CHIEF JUDGE LIPPMAN: - - - assuming we
25 agree with you, in this particular case, why is the

1 State to blame for what happened?

2 MR. KEMPNER: Yes, and I - - - I think that
3 gets us to - - -

4 CHIEF JUDGE LIPPMAN: When - - - when the
5 State is for it, the City says they're going to do
6 it. Why are we - - - assume the catalyst theory
7 applies, why does this the State get - - -

8 MR. KEMPNER: And that gets to Judge Read's
9 question from before, and - - - and it's not that the
10 State didn't agree with us, that Ms. Solla was
11 entitled to her benefits. It was how they responded
12 to the complaint for compliance with the fair
13 hearing. And this is where this case is very
14 different - - -

15 JUDGE READ: How they responded to the
16 complaint?

17 JUDGE ABDUS-SALAAM: What did they do
18 wrong?

19 JUDGE READ: What did they do wrong?

20 MR. KEMPNER: The complaint that there was
21 noncompliance with the decision. So they - - -

22 JUDGE READ: Okay, so you're talking about
23 when she said, hey, I haven't gotten paid.

24 MR. KEMPNER: Exactly, Your Honor.

25 JUDGE READ: Okay.

1 MR. KEMPNER: And - - - and - - - and their
2 response, which you'll find on page 42 of the record,
3 was there has been compliance; there's absolutely
4 nothing for us to do. They inquired as to the City
5 respondents. The City respondents said we did it.
6 And they took them at their word, and they did not
7 lift a finger - - -

8 CHIEF JUDGE LIPPMAN: So their fault was
9 that - - - that they didn't pursue it with the City
10 and make sure that it - - - that it happened in your
11 view?

12 MR. KEMPNER: Correct, Your Honor. And - -
13 - and - - - and there's - - -

14 JUDGE READ: Because they didn't enforce
15 it?

16 JUDGE ABDUS-SALAAM: But what were they
17 supposed to do?

18 MR. KEMPNER: They have affirmative
19 obligation to enforce it, both under the New York
20 State Social Services Law and under their own
21 regulations.

22 JUDGE READ: So they didn't enforce it soon
23 enough?

24 MR. KEMPNER: It's not a matter of timing.
25 It's a matter of acting. And when you look - - -

1 JUDGE ABDUS-SALAAM: But what - - - what
2 were they supposed to do? That's what I'm trying to
3 ask.

4 MR. KEMPNER: They have access to the same
5 computer system that HRA does. And so they could
6 have simply brought up the screen and looked at - - -
7 into WMS systems whether or not this check had been
8 issued. Counselor - - -

9 JUDGE PIGOTT: Maybe they disagree with
10 that. I'm - - - I'm trying to figure this out. So
11 what - - - so then you sue the - - - you sue the
12 administrative agency and say you could have called
13 up the screen and you didn't, and therefore, we win?

14 MR. KEMPNER: It's not - - -

15 JUDGE PIGOTT: Then they put on their
16 witnesses to say whatever they're going to say, that
17 the computer was out or Jennifer was missing, or you
18 know, something happened, and we win. And then we
19 have - - - and then somebody comes in as an expert to
20 say I'm - - - I'm an expert in computers and actually
21 they could have turned on the - - - on the screen and
22 gotten the thing, therefore they win, and then we get
23 attorneys' fees.

24 MR. KEMPNER: That - - - that kind of
25 exchange, Your Honor, is exactly what is contemplated

1 by the statute when we're looking at the substantial
2 justification language or the special circumstances,
3 which would make an award of fees unjust.

4 JUDGE PIGOTT: Why wouldn't the
5 commissioner say, look, I'll give you 500 bucks; go
6 away. And we end up with a - - - with a substantial
7 budget for attorneys' fees every time one of these
8 things pops up, because nobody wants to go through
9 all that nonsense.

10 MR. KEMPNER: Because those protections are
11 in place in the statute. This is exactly what
12 Governor Cuomo, at the time, was concerned about.
13 This is exactly what the legislature was concerned
14 about. And so that's why they designed the statute
15 in such a way as to limit the class of petitioners,
16 only allow the awarded fees where there is no
17 substantial justification or where there's no special
18 circumstances, which would make their fees unjust - -
19 -

20 JUDGE PIGOTT: The guy's going to settle;
21 that's all.

22 MR. KEMPNER: The - - - the judgment or the
23 settlement doesn't speak to who's the prevailing
24 party.

25 CHIEF JUDGE LIPPMAN: It's the result, is

1 that your point?

2 MR. KEMPNER: It's the result. Exactly.

3 If you look at the statute - - -

4 JUDGE PIGOTT: But with a judgment, isn't
5 that - - - I mean, judgment, you win if you get the
6 judgment.

7 MR. KEMPNER: Well, you could win and have
8 a judgment that actually dismisses your case, and
9 that's exactly what happened here. We won. We got
10 the result that we were looking for.

11 JUDGE PIGOTT: "We" being - - - "we" being
12 whom?

13 MR. KEMPNER: Ms. Solla.

14 JUDGE PIGOTT: Okay, she won.

15 MR. KEMPNER: She won.

16 JUDGE RIVERA: Okay, so are you the
17 catalyst for any change in conduct by the state?
18 What did they do different as a result of your
19 lawsuit?

20 MR. KEMPNER: They actually lifted a finger
21 to seek compliance here, and this was what I was
22 getting at before. The - - - the regulations say
23 they have to take affirmative steps to seek
24 compliance. They took no affirmative steps here.
25 They actually have to look at the computer system - -

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JUDGE PIGOTT: Well, they say they did.

MR. KEMPNER: But they didn't. And - - -
and I think - - -

JUDGE RIVERA: So - - - so you sued - - -

MR. KEMPNER: - - - implicitly here is that
they didn't admit it.

JUDGE RIVERA: Okay, so you sued, and then
what?

MR. KEMPNER: And - - - and then they
actually lifted a finger, and - - - and - - - and the
results shows - - -

JUDGE ABDUS-SALAAM: What did they do; when
you say they lifted a finger - - - what did they do?

JUDGE RIVERA: What's the change in
conduct, yeah?

MR. KEMPNER: They inquired into whether or
not there was compliance. They - - - they looked
into the system - - -

JUDGE ABDUS-SALAAM: You said they could
pull up the same computer screen that the city has so
- - -

MR. KEMPNER: Yes.

JUDGE ABDUS-SALAAM: - - - what did they
do? Did they call the city again or - - -

1 MR. KEMPNER: I would imagine they did. I
2 would imagine that they called the city and they said
3 - - -

4 JUDGE ABDUS-SALAAM: So your position - - -

5 MR. KEMPNER: - - - did you guys actually
6 do this? Or - - -

7 JUDGE ABDUS-SALAAM: So your position would
8 be instead of doing that - - - because they could
9 have gotten another false or inaccurate answer,
10 right?

11 MR. KEMPNER: I would imagine they
12 confirmed this as well.

13 JUDGE ABDUS-SALAAM: And so they could have
14 initially just looked at the screen and then after
15 the second complaint they could have looked at the
16 screen to see if her benefits had been restored - - -

17 MR. KEMPNER: Correct, Your Honor.

18 JUDGE ABDUS-SALAAM: - - - and they didn't
19 do that. So that's the action you said they should
20 have taken.

21 MR. KEMPNER: Or - - - or the lack of
22 action. And - - - and - - -

23 JUDGE READ: There were - - - were there
24 two complaints? I thought there was one.

25 MR. KEMPNER: No, there was one complaint.

1 JUDGE READ: There was one complaint.

2 MR. KEMPNER: So there was the initial
3 decision - - -

4 JUDGE READ: And then she said I'm - - -
5 and they - - - and they said there's been compliance.
6 She said, wait a minute, wait a minute; I'm not - - -
7 no.

8 MR. KEMPNER: Right.

9 JUDGE READ: And then, there was what? Two
10 months or six weeks and you sued.

11 MR. KEMPNER: Yeah, and that was the period
12 of time in which we prepared the Article 78. And so
13 it's not the mere delay.

14 CHIEF JUDGE LIPPMAN: You can't just bring
15 the proceeding and - - - and immediately sue. In
16 other words, is there a - - - a temptation and you
17 get people bringing proceed - - - proceedings, even
18 though it's going to happen anyway, in order to get
19 the fee?

20 MR. KEMPNER: There is a time set out for
21 compliance in the - - - in both the social services
22 law - - -

23 CHIEF JUDGE LIPPMAN: Once you pass that,
24 then you're okay.

25 MR. KEMPNER: - - - and the regulations.

1 record shows that, because they have throughout said
2 that your - - - you and your client are correct; the
3 City owes them money. We checked; the City said they
4 paid. So how - - - how is it that you can show that
5 you're a catalyst for change on the City's - - -
6 excuse me - - -

7 JUDGE ABDUS-SALAAM: On the State.

8 JUDGE RIVERA: - - - on the State's
9 conduct, why isn't it that your petition results in
10 the City's conduct changing? I - - - I can see your
11 argument there if you could actually make the case,
12 but here I don't see that you've pointed to any
13 change in the - - - I'll ask the State, too, when
14 they get up - - - in the State's action or inaction?

15 MR. KEMPNER: Um-hum.

16 JUDGE RIVERA: I mean, do you even know?
17 Do you know?

18 MR. KEMPNER: In some respects we do know.
19 And - - - and the trial court actually drew that - -
20 - connected the dots there and said we were truly - -
21 - clearly the catalyst for the change here.

22 JUDGE RIVERA: Well, the - - - the catalyst
23 for the City to cut the check. I guess my question
24 is the catalyst for the State to do what?

25 MR. KEMPNER: Well, I think also when you

1 look at the statute and you - - - and you look at
2 case law under the statute with respect to fair
3 hearing and compliance, the State is the one that is
4 ultimately responsible to make sure that their fair
5 hearings are complied with. And so they cannot - - -

6 JUDGE ABDUS-SALAAM: I thought it was the
7 court - - -

8 MR. KEMPNER: - - - just do finger pointing
9 - - -

10 JUDGE ABDUS-SALAAM: The court is
11 responsible for making sure that its orders are
12 complied with too, but if we don't know - - - if the
13 court doesn't know that the order hasn't been
14 complied with, then there's nothing to do, right?

15 MR. KEMPNER: And - - - and - - -

16 JUDGE ABDUS-SALAAM: So I'm trying to
17 figure out - - - I'm going back to what you say
18 should have been done by the State.

19 MR. KEMPNER: And - - - and that's exactly
20 why we brought it to their attention. There's
21 thousands of fair hearings.

22 CHIEF JUDGE LIPPMAN: So your basic
23 argument is the State has a proactive duty beyond - -
24 - the reason to hold them is, even though they
25 supported you, even though the City told them that

1 can sue - - -

2 MR. KEMPNER: If - - -

3 JUDGE PIGOTT: Excuse me. You can sue this
4 office, saying you made a decision. It was wrong;
5 I'm entitled to attorneys' fees.

6 MR. KEMPNER: That's exactly what's
7 envisioned in the Equal Access to Justice Act. If a
8 decision - - - if a fair hearing decision is in
9 violation of the law, and the courts find that the
10 decision is in the violation of the law, and there
11 was no justification nor special circumstances, then
12 the - - -

13 JUDGE PIGOTT: Oh, I see. But then - - -
14 then you'd have a judgment, and you would - - -

15 MR. KEMPNER: Absolutely.

16 JUDGE PIGOTT: - - - would be entitled.
17 But at this catalyst thing - - -

18 MR. KEMPNER: But if we filed the case
19 where we lost the fair hearing, and immediately the
20 State and the City said - - - or more importantly the
21 State said, you know what, that decision was wrong;
22 our ALJ was wrong. Now that the higher-ups are
23 looking at it, it was incorrect. We're reversing it
24 without a court order, without a written settlement.
25 Then - - -

1 JUDGE PIGOTT: You get paid.

2 MR. KEMPNER: - - - the person who - - -
3 who brought is the prevailing party - - -

4 CHIEF JUDGE LIPPMAN: Okay - - - okay,
5 counsel.

6 JUDGE RIVERA: I'm so sorry. May I just
7 ask one - - -

8 CHIEF JUDGE LIPPMAN: Sure, Judge Rivera.

9 JUDGE RIVERA: - - - I - - - I understand
10 that argument, but I guess the point - - - my
11 question again is here, that the record appears not
12 to show whatever you say is implicit in the result
13 which is that the State changed. They did some
14 action, a different action, to ensure payment, as
15 opposed to the City, also seeing the lawsuit and
16 realizing they didn't cut the check or it went to the
17 wrong place or who knows - - - there's - - - there's
18 several possibilities of why the money didn't go
19 through. And I guess that's the - - - for me the
20 missing link.

21 MR. KEMPNER: The City is subservient to
22 the - - -

23 JUDGE RIVERA: Assuming you're - - -
24 assuming you're correct on the catalyst theory.

25 MR. KEMPNER: Correct.

1 JUDGE RIVERA: We're not talking about
2 that.

3 MR. KEMPNER: Right.

4 JUDGE RIVERA: We're just talking about
5 this part.

6 MR. KEMPNER: The - - - the City is
7 subservient to the State.

8 JUDGE RIVERA: So it's almost like
9 vicarious liability.

10 MR. KEMPNER: In some sense it is. The
11 Appellate Division First Department in 1999 in a case
12 under the Equal Access to Justice Act where - - -
13 where they appointed - - - they - - - they awarded
14 fees to the petitioner, said that the - - - that the
15 State can't just do finger pointing. That they're
16 ultimately on the hook for - - -

17 CHIEF JUDGE LIPPMAN: Okay, so we
18 understand your argument, and it's the State has to
19 make it happen.

20 MR. KEMPNER: Exactly, Your Honor.

21 CHIEF JUDGE LIPPMAN: Okay.
22 Counsel?

23 MR. KEMPNER: Thank you.

24 CHIEF JUDGE LIPPMAN: Rebuttal. Counsel,
25 what did you do when the Article 78 was brought?

1 MS. CHANG: The State agency didn't change
2 position at all.

3 CHIEF JUDGE LIPPMAN: Did you - - - did you
4 do anything? Did you - - - when this whole issue was
5 brought up - - - did you do something to make it
6 happen?

7 MS. CHANG: No, the City - - - I mean, this
8 is outside the record, but the State agency did not
9 do anything. The City told us that they complied.
10 Even - - -

11 CHIEF JUDGE LIPPMAN: It - - - it - - -
12 yeah, but - - -

13 MS. CHANG: Even at the time - - -

14 CHIEF JUDGE LIPPMAN: Is it - - - is it - -
15 - let me put it another way. Is it your duty as your
16 adversary says, to make it happen and not be passive?
17 That, in other words, do you have to do more than say
18 - - - and this isn't a rhetorical question - - - do
19 you have to do more than say, I think you're right?

20 MS. CHANG: We do have to ensure reasonable
21 compliance, but that's after receiving reasonable
22 information of noncompliance.

23 CHIEF JUDGE LIPPMAN: Yeah, but if - - -
24 but - - - but let's take it one step deeper. So you
25 have to do more than just say you're right. And the

1 City says, okay, we're going to do it; don't worry.
2 Do you have to do more than that at that point, where
3 the City says, we're complying; we're complying? Can
4 you just leave it, or do you have to follow it and -
5 - - and make it happen?

6 MS. CHANG: There's no - - - we are - - -

7 CHIEF JUDGE LIPPMAN: What's the
8 responsibility?

9 MS. CHANG: The agency is entitled to rely
10 on a representation from the City, another
11 governmental agency, that it has complied.

12 CHIEF JUDGE LIPPMAN: So that's my
13 question. Once they say, we're going to comply, end
14 of story, as far as the State's concerned?

15 MS. CHANG: That is - - -

16 JUDGE READ: Well, they told you at first
17 that they had complied, right?

18 MS. CHANG: They had complied. That's - -
19 - we checked. The City said they had complied. I
20 want to explain the compliance system for the court,
21 by the way.

22 So we have multiple ways, which are give -
23 - - which are transmitted to recipients after the
24 fair hearing in a form - - - with - - - a transmittal
25 form that goes after the hearing is adjourned. It

1 says these are the steps you can take if you don't
2 get compliance in your opinion.

3 CHIEF JUDGE LIPPMAN: But do you have to
4 take any steps? Do you have to follow - - - and
5 again, I'm - - - I don't know the answer. I'm - - -
6 I'm asking you - - -

7 MS. CHANG: No - - -

8 CHIEF JUDGE LIPPMAN: - - - when they say
9 to you, we complied or we're going to comply, do you
10 have to follow up and follow within the computer and
11 see, oh, yeah, they - - - they've complied or do you
12 wash your hands and say, we're finished?

13 MS. CHANG: We don't wash our hands.
14 There's nothing that prevents a petitioner or a
15 counsel from submitting another letter to us. The
16 letter gives them a 42 - - -

17 CHIEF JUDGE LIPPMAN: What about doing a
18 lawsuit because you have some affirmative obligation,
19 as you admit, to - - - to make sure this happens.
20 And they tell you they complied - - - the City tells
21 you they complied; they don't. And is the only thing
22 that - - - that they can do now is go and write you a
23 letter and say they didn't comply, or can they bring
24 a lawsuit, and then if they produce - - - are a
25 catalyst for the result, assuming the catalyst theory

1 applies - - - are they entitled to get a fee?

2 MS. CHANG: There are multiple ways for a -
3 - - a petitioner to contact us.

4 CHIEF JUDGE LIPPMAN: Yeah, but what about
5 Article 78 is one of them?

6 MS. CHANG: They can file an Article 78 if
7 they can show that we took unreasonable inaction and
8 got a judgment, they would be entitled to fees. But
9 in this case, we had no reason to doubt the City's
10 report. We had no other information. The difference
11 was that it wasn't a difference in legal position.
12 It was a difference in fact that could arise from all
13 kinds of means, because - - -

14 JUDGE RIVERA: So - - - so when they filed,
15 if the City looks and checks its records and say, oh,
16 they're right, didn't - - - didn't cut that check,
17 could the City have taken that action to resolve this
18 without seeking any approval from the State?

19 MS. CHANG: Yes, they could have, because
20 they were complying with our own decision and they do
21 all the time, Your Honor.

22 But I want to return to one important - - -

23 CHIEF JUDGE LIPPMAN: Last point, go ahead,
24 counselor.

25 MS. CHANG: Yes, last point about

1 legislative intent. The legislature has repeatedly
2 considered and specifically declined - - -

3 CHIEF JUDGE LIPPMAN: This is - - - you're
4 going into whether the catalyst theory applies?

5 MS. CHANG: Yes.

6 CHIEF JUDGE LIPPMAN: Go ahead.

7 MS. CHANG: The legislature has repeatedly
8 considered and declined to enact bills amending the
9 State EAJA.

10 CHIEF JUDGE LIPPMAN: What does that mean?
11 Does that mean acquiescence and that the - - - the
12 catalyst theory does not apply because a particular
13 house does or does not pass the bill?

14 MS. CHANG: The legislature has endorsed
15 and refused to overturn over a decade of state
16 decisions rejecting catalyst fees under the act.
17 That is the legislature's continued course of action.

18 CHIEF JUDGE LIPPMAN: Don't you think it's
19 more important to look at the intent at the time when
20 they passed it?

21 MS. CHANG: The language of the statute,
22 what they passed, doesn't authorize fees.

23 CHIEF JUDGE LIPPMAN: Yes, but we talked
24 about the adherence to the federal, you know,
25 standards, and that there certainly was a case law

1 along the lines that the catalyst theory was a part
2 of the - - - the - - -

3 MS. CHANG: Your Honor, I want to be very
4 clear about this in case I haven't expressed it
5 clearly.

6 CHIEF JUDGE LIPPMAN: Please do. Last
7 point. Go ahead.

8 MS. CHANG: 8600 doesn't adopt all federal
9 fee law. The uniform circuit decisions were about
10 other statutes not the specific federal EAJA provision
11 cited in 8600 by the legislature which they chose.
12 So the fact that there's other federal case law,
13 doesn't show the legislature had catalyst theory in
14 mind.

15 CHIEF JUDGE LIPPMAN: Okay, thanks,
16 counsel. Thank you both. Appreciate it.

17 (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 Matter of Solla v. Berlin, No. 24 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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