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COURT OF APPEALS

STATE OF NEW YORK

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JOSE MONTAS,

Appellant,

-against-

No. 2

JJC CONSTRUCTION CORPORATION, ET AL.,

Respondents.

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20 Eagle Street  
Albany, New York 12207  
January 2, 2013

Before:

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

Appearances:

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Sharona Shapiro  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 2, Montas v.  
2 JJC Construction Corp.

3 (Pause)

4 CHIEF JUDGE LIPPMAN: Go ahead, counselor.  
5 I think you'd - - - you want rebuttal time,  
6 counselor?

7 MR. ZHU: Yes, two minutes.

8 CHIEF JUDGE LIPPMAN: Two minutes.

9 MR. ZHU: I'm sorry, three minutes, Your  
10 Honor.

11 CHIEF JUDGE LIPPMAN: Three minutes. Go  
12 ahead.

13 MR. ZHU: May it please the Court. Michael  
14 Zhu for the plaintiff appellant, Jose Montas.

15 The trial court here erred in granting the  
16 defendant's motion for a directed verdict at the  
17 close of the testimony here because there was  
18 sufficient evidence to establish a prima facie case  
19 of negligence against JJC and the City of New York.

20 JUDGE READ: What evidence do you cite to  
21 or rely on, in particular?

22 MR. ZHU: Well, there's direct evidence  
23 from Mr. Zanfardino, the principal of JJC, who  
24 testified that in the days leading up to the  
25 plaintiff's accident, there was a series of

1 construction work that was going on in the vicinity  
2 of the Jersey barrier, including the removal, the  
3 breakup, the removal, the chopping of over sixty tons  
4 of - - -

5 JUDGE PIGOTT: That raises an interesting  
6 question. He testified for the defense.

7 MR. ZHU: Correct.

8 JUDGE PIGOTT: This was a motion to dismiss  
9 at the end of the plaintiff's case, and - - -

10 MR. ZHU: Well, no, that - - - well, the  
11 defendant had moved at the end of the plaintiff's - -  
12 -

13 JUDGE PIGOTT: Isn't that the - - -

14 MR. ZHU: - - - case - - -

15 JUDGE PIGOTT: Is that the decision - - -

16 MR. ZHU: - - - and then he reserved the  
17 decision.

18 JUDGE PIGOTT: But when you reserve  
19 decision on it, aren't you still going to make a  
20 determination as to the sufficiency of the evidence  
21 at the end of the plaintiff's case - - -

22 MR. ZHU: Yes.

23 JUDGE PIGOTT: - - - or you take the whole  
24 thing into consideration?

25 MR. ZHU: You're supposed to take the whole

1 thing into consideration.

2 JUDGE PIGOTT: Okay.

3 MR. ZHU: So a motion was remade or the  
4 issue was revisited again at the end of Mr.  
5 Zanfardino's testimony. So his testimony going in,  
6 going back to Judge Read's question, is that in the  
7 days leading up to the accident, at one point, Mr.  
8 Zanfardino testifies that there were over sixty tons  
9 of concrete that was broken up and hauled away - - -

10 CHIEF JUDGE LIPPMAN: Well, that in itself  
11 is not dispositive, is it?

12 MR. ZHU: Well, it's - - - well, it raises  
13 the issue as to when you break up and chop up  
14 concrete - - -

15 CHIEF JUDGE LIPPMAN: You're saying it's at  
16 least enough - - -

17 MR. ZHU: - - - the stuff goes up in the  
18 air.

19 CHIEF JUDGE LIPPMAN: - - - enough to get  
20 you there, right?

21 JUDGE GRAFFEO: There was some testimony  
22 about the different colors of the sand versus the - -  
23 -

24 MR. ZHU: That's the substrate.

25 JUDGE GRAFFEO: - - - the brick - - -

1 MR. ZHU: That's the subbase.

2 JUDGE GRAFFEO: - - - pointing versus the  
3 breaking up the concrete.

4 MR. ZHU: Well, no, the different colors  
5 had to do with the subbase, the color of the subbase  
6 material.

7 JUDGE SMITH: Well, there's sand - - -  
8 there's both sand and sub - - - there are pictures of  
9 both sand and substrate in the record.

10 MR. ZHU: Yes, there is. Now - - -

11 JUDGE SMITH: And none of them looked like  
12 what's in - - - looks like what your client  
13 identified as the stuff he slipped on.

14 MR. ZHU: But the plaintiff never argued  
15 that he slipped on the subbase, though. The theory  
16 of the case is that the sandy residue was caused by  
17 the breaking of the concrete. Now, I'll concede that  
18 the subbase material that you see the photos of in  
19 the record, that's what's applied after the concrete  
20 has already been removed, and on top of which the  
21 plastic sheet, the polyurethane sheet is covered, and  
22 then new cement is poured. We're not talking about  
23 the subbase here; that's not what the plaintiff  
24 claimed.

25 CHIEF JUDGE LIPPMAN: So there are

1 alternative theories here as to what happened; is  
2 that your point?

3 MR. ZHU: Yes. Well, not that - - -

4 CHIEF JUDGE LIPPMAN: You have one theory  
5 and the defense has another, but you have enough?

6 MR. ZHU: But I have enough to go to the  
7 jury on this to - - -

8 JUDGE SMITH: But where - - -

9 MR. ZHU: - - - for the jury to assess - -  
10 -

11 JUDGE SMITH: - - - where is that you find  
12 your concrete, the broken up concrete? Where in the  
13 - - -

14 MR. ZHU: If you look at - - -

15 JUDGE SMITH: Where in the record does it  
16 show that?

17 MR. ZHU: If you look at Mr. Duodu's  
18 testimony - - - that's at page 339 and 340 of the  
19 record, and he's pointing to photographs that are in  
20 the record and he talks about - - -

21 JUDGE PIGOTT: Yeah, well, now, he was for  
22 the plaintiff's case. You were saying before that  
23 somebody said sixty million or - - -

24 MR. ZHU: Sixty tons.

25 JUDGE PIGOTT: - - - sixty tons, and that

1 was not - - -

2 MR. ZHU: That's from the defendant; that's  
3 from Zanfardino's testimony.

4 JUDGE PIGOTT: And where is the six - - -

5 MR. ZHU: Now, on a plaintiff's - - - on a  
6 plaintiff's - - -

7 JUDGE PIGOTT: Where is the sixty tons  
8 found?

9 MR. ZHU: I'm sorry, where is the - - -

10 JUDGE PIGOTT: Where in the record is the  
11 sixty tons that - - -

12 MR. ZHU: Oh, that's at page 759.

13 JUDGE PIGOTT: Okay.

14 MR. ZHU: No, I apologize; 813 to 814 of  
15 the record.

16 JUDGE SMITH: I just looked at 339 and 340;  
17 they're talking about concrete where the green rebar  
18 is. The green rebar isn't in any of these pictures,  
19 is it?

20 MR. ZHU: Yes, it is. If you look at page  
21 901, 902, and 903 of the record, you see photos - - -  
22 actually, it's actually clear - - -

23 JUDGE SMITH: I looked at them; I couldn't  
24 find any green rebar. I mean - - -

25 MR. ZHU: In 903, if you look at - - - and

1 also 904. Let's go to 904. There's, on the upper  
2 portion of the photograph, there's a slight curve.  
3 Really, you can't really - - - I mean, you can see  
4 that it's green, and that's where the rebar is.

5 JUDGE READ: But none of these - - -

6 MR. ZHU: And if you look at page 903 on  
7 the - - - I guess that would be the upper left  
8 quadrant of that photo, there's a delineation there  
9 and that's where the green rebar is. That's where  
10 the city engineer testified that in this entire area  
11 that was where the - - -

12 JUDGE SMITH: Okay. But I mean, I'm not -  
13 - - the upper left-hand portion of the photo is  
14 pretty far away from where your client slipped. In  
15 fact, the - - -

16 MR. ZHU: That's twenty feet, the testimony  
17 was.

18 JUDGE SMITH: Sorry?

19 MR. ZHU: The testimony was that's twenty  
20 feet.

21 JUDGE SMITH: But I'm looking at 903, and I  
22 see a lot of white stuff right around where your  
23 client slipped, and where you're telling me the green  
24 rebar was, I don't see any of that.

25 MR. ZHU: But Judge, this stuff doesn't



1 just settle neatly into a pile and get swept away. I  
2 mean, we're talking about dust that's created by  
3 sixty tons of concrete that's removed.

4 JUDGE GRAFFEO: But let me ask you about  
5 the law here.

6 MR. ZHU: Sure.

7 JUDGE GRAFFEO: Are you relying on the Vega  
8 case?

9 MR. ZHU: Yes, partially.

10 JUDGE GRAFFEO: Because, well, besides the  
11 fact that was a summary judgment case, there was only  
12 one contractor doing work in the park in that case.

13 MR. ZHU: Correct.

14 JUDGE GRAFFEO: Here you've got two  
15 separate construction projects going on. Doesn't  
16 that bring us into a different legal arena than what  
17 we dealt with - - -

18 MR. ZHU: But the prob - - -

19 JUDGE GRAFFEO: - - - in Vega?

20 MR. ZHU: The problem with the phantom  
21 contractor is you have no documents that were  
22 submitted showing that there was work going on. You  
23 have - - -

24 JUDGE SMITH: We have a picture of  
25 scaffolding.

1 MR. ZHU: I'm sorry?

2 JUDGE SMITH: We have a picture of  
3 scaffolding. People don't usually put up scaffolding  
4 when there's no work going on.

5 MR. ZHU: But the permits were issued two  
6 months after the plaintiff's accident.

7 JUDGE GRAFFEO: I thought you called one of  
8 the city employees to testify in your case.

9 MR. ZHU: That was - - - a city engineer  
10 was called as - - -

11 JUDGE GRAFFEO: And the city engineer - - -

12 MR. ZHU: - - - as the plaintiff's witness,  
13 yes.

14 JUDGE GRAFFEO: And the city engineer gave  
15 some testimony about the brick repointing, didn't he?

16 MR. ZHU: I'm glad you pointed that out,  
17 because if you look at his testimony, though, at 541  
18 to 543, he doesn't say that there was brick-pointing  
19 work. And I'm going to read very briefly from that,  
20 541 to 543. Actually, I'll start at page -- bottom  
21 of page 542. The witness answers, "There was another  
22 project in the vicinity in a nearness (ph.) of our  
23 project." And then there was an objection: "Move to  
24 strike." The court said, "I'll allow that and no  
25 more."

1 JUDGE SMITH: But Zanfardino - - -

2 MR. ZHU: There was no testimony - - -

3 JUDGE SMITH: But Zanfardino did say there  
4 was brick-pointing work.

5 MR. ZHU: I'm sorry?

6 JUDGE SMITH: But Zanfardino did say there  
7 was brick-pointing work.

8 MR. ZHU: Yes, he did.

9 JUDGE SMITH: I mean, can we determine, as  
10 a matter of law, from this record, that that's not  
11 true, that there wasn't any?

12 MR. ZHU: Well, can you determine as a  
13 matter of law - - -

14 JUDGE SMITH: It's the wrong question.  
15 It's the wrong question. The question is, is there  
16 any evidence that there was no brick - - - is there  
17 evidence from which we can determine that there was  
18 no brick pointing?

19 MR. ZHU: Other than he said/she said, no,  
20 because - - -

21 JUDGE SMITH: Well, who - - -

22 MR. ZHU: - - - because the plaintiff and  
23 the nonparty witness both testified that there was no  
24 brick-pointing work.

25 JUDGE SMITH: Well, they testified they

1 never saw any, but they weren't there much of the  
2 time.

3 MR. ZHU: Well, he was there up until 10 -  
4 - - the nonparty testified that he is at that corner  
5 every day up until 10 o'clock where he gets picked up  
6 for work, and you would think that a normal  
7 construction project starts at 7 in the morning. So  
8 in all those months that he's there up until 10  
9 o'clock in the morning, if he says he doesn't see any  
10 work there, and there is a permit that's discussed in  
11 the testimony where it shows that the permit was  
12 issued in November of 1999; this accident happened in  
13 September - - -

14 CHIEF JUDGE LIPPMAN: Okay, counselor.

15 MR. ZHU: - - - of 1999.

16 CHIEF JUDGE LIPPMAN: Okay, counselor,  
17 you'll have rebuttal time. Thanks.

18 MR. ZHU: Thank you.

19 MS. WACHTLER: May it please the Court.

20 I'm Lauren Wachtler. I represent the respondent, JJC  
21 Construction.

22 This is a case, Your Honors, where there  
23 was simply no evidence to be submitted to the jury.  
24 The plaintiff's case was based on nothing more than  
25 speculation, surmise. He said he slipped on some

1 sand.

2 JUDGE SMITH: Well, if you didn't have  
3 Zanfardino - - - suppose all you had was the pictures  
4 that are in the record showing debris on both sides  
5 of that wire fence, and you have the plaintiff saying  
6 that's what it looked like on the day of my accident  
7 and I slipped on that; wouldn't that be enough for a  
8 prima facie case?

9 MS. WACHTLER: No, Your Honor, it wouldn't,  
10 because in order to show a prima facie case he has to  
11 establish that there was some reasonable basis to  
12 draw an inference that it was more probable that that  
13 came from something that JJC was doing - - -

14 CHIEF JUDGE LIPPMAN: What about - - -

15 MS. WACHTLER: - - - and they - - -

16 CHIEF JUDGE LIPPMAN: - - - sixty tons of  
17 concrete and all of this; why isn't that - - -

18 MS. WACHTLER: Well - - -

19 CHIEF JUDGE LIPPMAN: - - - pretty  
20 impressive in terms of the amount of work that was  
21 going on?

22 MS. WACHTLER: Well, Judge Lippman, if you  
23 take a look at the testimony of Mr. Zanfardino and  
24 all the documentary evidence, it clearly establishes,  
25 and as Judge Smith was trying to find in those

1 photographs, that what work was taking place, with  
2 the rebar, especially, was 150 feet behind the  
3 bodega. The sixty tons of concrete was brought in  
4 over a period - - - this construction went on from  
5 1996 to 1999.

6 JUDGE PIGOTT: Well, how did he get it in  
7 the same picture if it was 150 feet away?

8 MS. WACHTLER: If you look behind the  
9 bodega in Exhibit - - -

10 JUDGE PIGOTT: No, no, no, I mean, where he  
11 fell was by that barrier, I assume.

12 MS. WACHTLER: Right beside the barrier.

13 JUDGE PIGOTT: He said if you look, it's  
14 twenty feet to the rebar, and you can see the rebar  
15 there.

16 MS. WACHTLER: The testimony says it was 20  
17 feet to the side and 150 feet behind, which is what  
18 Mr. Zan - - -

19 JUDGE SMITH: Let me just - - - maybe I  
20 shouldn't even say this, but is there somewhere in  
21 this picture where you see - - - in these pictures  
22 where you see green?

23 MS. WACHTLER: There is no green in that  
24 picture, Judge Smith.

25 JUDGE SMITH: Or any of the others?

1 MS. WACHTLER: I'm glad you brought that  
2 up. There's no green in any of these pictures.

3 JUDGE PIGOTT: Well, wait a minute. I  
4 mean, I get the hole-poking that you're doing here,  
5 but isn't he entitled to every favorable inference at  
6 the end of his case? And the fact that you can say,  
7 well, there was other construction in the City of New  
8 York, that there was rebar 150 feet away, that the  
9 sixty tons was something else - - - all he has to do  
10 is establish a prima facie case, getting every  
11 favorable inference.

12 MS. WACHTLER: Well - - -

13 JUDGE PIGOTT: So - - -

14 MS. WACHTLER: - - - yes, Judge - - -

15 JUDGE PIGOTT: - - - what was missing from  
16 his case, at the time that you made that motion, at  
17 the end of the plaintiff's - - -

18 MS. WACHTLER: What was missing from the  
19 case, Judge Pigott, is that there was nothing to  
20 connect JJC with anything that was going on here and  
21 - - -

22 JUDGE PIGOTT: The dust that he fell on or  
23 the sand that he fell on is on both sides of that  
24 barrier which is your job site.

25 MS. WACHTLER: But there was no evidence to

1 suggest that there was anything that was a reasonable  
2 inference that could be drawn from the work that was  
3 being done.

4 JUDGE PIGOTT: But there was - - -

5 MS. WACHTLER: The standard which - - -

6 JUDGE PIGOTT: It was on both - - - I guess  
7 you're missing my point. He's walking along. He has  
8 nothing to do with who's doing what to where.

9 MS. WACHTLER: Um-hum.

10 JUDGE PIGOTT: All right? There's this  
11 sand, and it's - - - there's a JJC construction site  
12 and there's this sand over here and there's JJ - - -  
13 and then on the other side of the barrier it's the  
14 same sand. I think it's a reasonable inference to  
15 say that the sand came from the work site; it didn't  
16 come from any place else.

17 MS. WACHTLER: Well, I think, Judge Pigott,  
18 I disagree, because the standard which this court has  
19 long reiterated, is where there are several possible  
20 causes of an injury - - -

21 JUDGE PIGOTT: Where's the other  
22 possibility? That's my point; I don't see it.

23 MS. WACHTLER: There was a pointing project  
24 that was ten feet - - - well - - -

25 JUDGE PIGOTT: All right, that's true - - -



1 MS. WACHTLER: - - - we have - - -

2 JUDGE PIGOTT: - - - and a jury could find  
3 that. My point is this, that he says I put this  
4 proof in, they haven't put any case on yet, and  
5 they're telling me I haven't put in a sufficient  
6 case, and all they can point to is well, there was  
7 other work in the area. Well, that doesn't prove  
8 anything.

9 MS. WACHTLER: Well, there was - - - but he  
10 has the burden of showing that the reasonable  
11 inference must be drawn from something that we were  
12 doing. And we had evidence - - -

13 JUDGE SMITH: Suppose - - -

14 MS. WACHTLER: - - - that went in there  
15 before, Judge Smith, where there was a pointing  
16 project ongoing and we - - -

17 JUDGE PIGOTT: Where's that proof?

18 MS. WACHTLER: The proof is from the  
19 testimony, not only of my guy, of Mr. Zanfardino - -  
20 -

21 JUDGE PIGOTT: Which was after the  
22 plaintiff's proof had gone in.

23 MS. WACHTLER: - - - which was after the  
24 plaintiff's case. But again, he has the burden to  
25 prove something. He can't just suggest or speculate

1 - - -

2 JUDGE PIGOTT: No, I get that - - -

3 MS. WACHTLER: - - - I slipped on sand.

4 JUDGE PIGOTT: I get that, and I don't mean  
5 to fence with you, but - - -

6 MS. WACHTLER: No, I know.

7 JUDGE PIGOTT: - - - the issue is, we're  
8 done, the plaintiff is done; here's the proof. And  
9 you say, Judge, give him every single inference, that  
10 he walked where he said he walked, that he slipped on  
11 what he said he slipped on, that he did it at the JJC  
12 site, he's got these pictures; that doesn't prove a  
13 case.

14 MS. WACHTLER: I - - -

15 JUDGE PIGOTT: It might.

16 MS. WACHTLER: I don't - - - well, it might  
17 is another speculation.

18 JUDGE PIGOTT: No.

19 MS. WACHTLER: It might - - -

20 JUDGE PIGOTT: That means it goes to a  
21 jury.

22 MS. WACHTLER: - - - but I disagree, Judge  
23 Pigott, respectfully, because I think that he has the  
24 burden to show that that was the proximate cause of  
25 whatever injuries he sustained.

1                   JUDGE SMITH: So suppose we disagree with  
2 you about the prima facie case, are you entitled to  
3 the benefit - - - are we entitled to consider  
4 Zanfardino's testimony, too? I mean, suppose the  
5 facts are that on the plaintiff's case alone there  
6 was a fair inference that it was your fault and that  
7 Zanfardino's testimony pretty much wiped that out.  
8 Who wins?

9                   MS. WACHTLER: I think I win on both  
10 scores, Your Honor.

11                   JUDGE SMITH: And why are we entitled to  
12 consider the Zanfardino testimony? Why are we not  
13 limited to the plaintiff's case here?

14                   MS. WACHTLER: Well, I think if you  
15 consider Zanfardino's testimony then I think you're  
16 right. But if you don't even get that far - - -

17                   JUDGE SMITH: Okay. So but I'm saying - -  
18 - I'm saying - - -

19                   MS. WACHTLER: If you do - - -

20                   JUDGE SMITH: - - - can we get that far?

21                   MS. WACHTLER: Well, I think that you can  
22 get that far because the motion that was made, there  
23 was a reserved decision on that, and then he said I  
24 will take it under advisement and he let the rest of  
25 the case go in. The judge - - - trial judge let the

1 rest of the case go in. There was cross-examination  
2 of Mr. Zanfardino. There was documentary evidence  
3 that was put in through Mr. Zanfardino which showed  
4 that the construction work - - - which they said,  
5 Judge Lippman, with the sixty tons of concrete - - -  
6 that was brought in to places so far beyond the  
7 bodega where this individual fell that it wasn't even  
8 in the photographs. There was nothing to suggest  
9 that there was anything other than the speculation of  
10 the plaintiff that he slipped on some sand, which he  
11 did not identify as anything other than what was most  
12 probably and most likely and what you could most  
13 reasonably draw an inference from, the pointing  
14 project, which was across the street.

15 JUDGE PIGOTT: Well, you say that, but at  
16 one point, I think, in his testimony, he said he  
17 tripped over some nuts and bolts or something, right?

18 MS. WACHTLER: Okay. He did say that.

19 JUDGE PIGOTT: Okay.

20 MS. WACHTLER: He didn't know what he - - -  
21 and that just strengthens my point - - -

22 JUDGE PIGOTT: Stick with me. Stick with  
23 me.

24 MS. WACHTLER: - - - Judge Pigott.

25 JUDGE PIGOTT: I'm getting there. So - - -

1 MS. WACHTLER: I'm with you.

2 JUDGE PIGOTT: So he says I - - - and  
3 that's all of his testimony. Now, you say, well, you  
4 didn't tie it to the construction site. He said the  
5 only reason there'd be nuts and bolts here is we've  
6 got this construction site there; isn't he entitled  
7 to that inference?

8 MS. WACHTLER: Well, no, I don't think he  
9 is. And there are nuts and bolts - - - there was  
10 also candy wrappers. Are you going to say - - -

11 JUDGE PIGOTT: Now you're making up more -  
12 - - I was just trying to give you an example of, you  
13 construe it in favor of the plaintiff and say then  
14 let it go forward, and you reserve decision on these  
15 things; not to say let's see if there's more proof  
16 before I can decide whether the plaintiff has  
17 established his case as a matter of law.

18 MS. WACHTLER: But if there's nothing to go  
19 to the jury other than - - - and I'm going to have -  
20 - -

21 JUDGE PIGOTT: Well, you don't have to  
22 reserve decision - - -

23 MS. WACHTLER: - - - to reiterate that - -  
24 -

25 JUDGE PIGOTT: - - - you grant it.

1 MS. WACHTLER: - - - that - - - I'm sorry?

2 JUDGE PIGOTT: Then you don't reserve  
3 decision; you grant it.

4 MS. WACHTLER: Well, I think that he didn't  
5 actually reserve decision. I think what he was doing  
6 is saying all right, let's let everybody put on the  
7 rest of their case. There was a ton of cross-  
8 examination - - -

9 JUDGE SMITH: But in his opinion - - - I  
10 mean, in Judge - - - Justice Wright's opinion, he  
11 relies on the Zanfardino testimony.

12 MS. WACHTLER: He does, but there are other  
13 things that he also mentions.

14 JUDGE SMITH: Well, I guess, I mean, I - -  
15 - maybe we're at cross-purposes here, what's the  
16 problem with relying on the Zanfardino testimony. If  
17 on the whole record the defendant should win as a  
18 matter of law, why shouldn't Justice Wright grant a  
19 directed verdict?

20 MS. WACHTLER: I agree that he should have.  
21 I'm not arguing with you about that. I think that -  
22 - -

23 CHIEF JUDGE LIPPMAN: Okay.

24 MS. WACHTLER: - - - based on everything -  
25 - -

1 CHIEF JUDGE LIPPMAN: Thank you, counsel.

2 MS. WACHTLER: - - - that he definitely had  
3 a right to direct a verdict.

4 CHIEF JUDGE LIPPMAN: Thank you, counselor.

5 Rebuttal, counselor?

6 Oh, I'm sorry. You represent the City  
7 respondent.

8 MR. NASAR: Yes - - -

9 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

10 MR. NASAR: - - - that's correct, Your  
11 Honor. Good afternoon. My name is Omar Nasar. Ms.  
12 Wachtler, JJC's counselor, went over several reasons  
13 why the case was properly dismissed, including that  
14 the verdict would have been impermissibly based on  
15 speculation. I won't go into that.

16 I think there are three additional reasons why the  
17 case should have been dismissed against the City of New  
18 York. First, the City of - - -

19 CHIEF JUDGE LIPPMAN: Don't you have a  
20 nondelegable duty - - -

21 MR. NASAR: That is - - -

22 CHIEF JUDGE LIPPMAN: - - - that they're  
23 performing you?

24 MR. NASAR: - - - absolutely correct, Your  
25 Honor. The City has a nondelegable duty to maintain

1 its roadways and sidewalks in reasonably safe  
2 condition. However, that duty does not arise unless  
3 the City has prior notice.

4 JUDGE SMITH: So you have a pothole law  
5 defense, is what you're saying?

6 MR. NASAR: That's correct; that's part of  
7 it, Your Honor.

8 JUDGE GRAFFEO: Does the record tell us if  
9 there is a city inspector that was regularly at this  
10 job site?

11 MR. NASAR: The record does tell us. The  
12 record tells us that there's a city inspector - - -  
13 well, what the City did is, in addition to having an  
14 independent contractor to do this project, they hired  
15 an independent consulting firm to be at the job site  
16 to make sure that the project was done properly and  
17 to ensure safety. So now we have two independent  
18 contractors running the operation. The City had its  
19 own project engineer, but he went there maybe about  
20 once a week to see what was going on. So that's the  
21 City's involvement, and he was not directing the day-  
22 to-day work of what the independent contractor was  
23 doing.

24 So my second point would be that there is  
25 no proof or no allegation, even, that the City did



1 anything affirmatively here to create the sand that  
2 plaintiff fell on. And third, City can't be  
3 vicariously liable, to the extent the court  
4 determines that maybe there's a possibility that this  
5 speculative sand came from JJC's construction  
6 project.

7 JUDGE SMITH: So you're saying that even if  
8 the contractor loses, you still win?

9 MR. NASAR: That's correct, Your Honor.

10 CHIEF JUDGE LIPPMAN: Okay, counsel,  
11 anything else?

12 MR. NASAR: I think, in addition, and this  
13 is not legally sufficient to establish a case against  
14 the City, but I think I want to be clear that there  
15 was no indication in the record that the City had  
16 either actual or constructive notice of this  
17 condition.

18 CHIEF JUDGE LIPPMAN: Well, if you created  
19 it, it doesn't matter if there's - - -

20 MR. NASAR: To the extent we create - - -

21 CHIEF JUDGE LIPPMAN: - - - constructive  
22 notice, right?

23 MR. NASAR: To the extent we created it;  
24 but we didn't create it. They're using - - - they're  
25 imputing the cause-and-create exception through an

1 independent contractor, and that's not proper.

2 I do want to mention that plaintiff stated  
3 in their brief that the City had somehow waived the  
4 prior notice defense because we did not bring it up  
5 at the Appellate Court at the First Department.  
6 That's incorrect. We did not - - - plaintiff's  
7 correct; we did not bring it up at the First  
8 Department, but we did bring it up at the trial  
9 court, and that's why it's preserved. And I cited to  
10 this court's Tolaro (ph.) case which said,  
11 essentially, that we will consider an issue that's  
12 raised in the tribunal over regional jurisdiction,  
13 even though it may not have been argued at the  
14 Appellate Division. Once the trial here was done,  
15 plaintiff could not have added additional evidence on  
16 that point, on the notice point, because here  
17 plaintiff essentially conceded that the City did not  
18 have notice of this - - - prior notice of this  
19 condition. What they tried to do is they tried to  
20 impute the cause-and-create through independent  
21 contractor. So there wasn't even any allegation that  
22 the City affirmatively created this condition.

23 So once the trial is over, the record is  
24 closed, and there's no testimony that they can offer  
25 to rebut that at this point. Thank you, Your Honors.

1 CHIEF JUDGE LIPPMAN: Thanks, counselor.

2 Counselor, rebuttal?

3 MR. ZHU: Just very briefly, getting back  
4 to Judge Smith's discussion about Zanfardino's  
5 testimony and whether the court can actually look at  
6 that portion of the record.

7 I would submit that even if the court did,  
8 it proves my point; it's an issue of fact where you  
9 have Zanfardino saying that there was brick-pointing  
10 work being done, the plaintiff's testimony that - - -

11 CHIEF JUDGE LIPPMAN: But can we consider  
12 it, though, before you get to that?

13 MR. ZHU: I'm sorry?

14 CHIEF JUDGE LIPPMAN: But can we consider  
15 it?

16 MR. ZHU: I don't think you should, because  
17 as Judge Pigott raised - - -

18 JUDGE PIGOTT: But you argued it. You  
19 started your argument saying Zanfardino proves my  
20 case.

21 MR. ZHU: If we had gotten to that.

22 JUDGE SMITH: Did you tell Judge Wright - -  
23 - did the plaintiff's counsel at trial tell Judge  
24 Wright he couldn't look at it?

25 MR. ZHU: I don't recall that. I don't

1 recall that.

2 JUDGE SMITH: Because he did look at it.

3 It's right in his opinion.

4 MR. ZHU: Because he did - - - because he  
5 did, you're right, because in reading Judge Wright's  
6 decision, he cites to Zanfardino's testimony. But  
7 again, even if we overlook that and we get to that  
8 point, then it becomes an issue of fact, an issue of  
9 credibility, and an improper assessment of the weight  
10 of the evidence - - -

11 JUDGE PIGOTT: Well, if - - -

12 MR. ZHU: - - - by the trial court - - -

13 JUDGE PIGOTT: If the testimony - - -

14 MR. ZHU: - - - in preferring - - -

15 JUDGE PIGOTT: If the testimony of that  
16 witness was that any sand that we left out there was  
17 yellow, and as you can see, there is no yellow sand,  
18 and there's nothing to rebut that, what's a jury  
19 supposed to do?

20 MR. ZHU: Well, because the claim wasn't  
21 that the subbase is what caused me to slip. He  
22 brought in subbase to show, as an exemplar of this is  
23 the type of color - - - this is the color of the  
24 subbase material that we used. But that wasn't the  
25 claim. If you look at Judge Tom's dissenting

1 opinion, he specifically talks about that.

2 JUDGE PIGOTT: Where - - -

3 JUDGE SMITH: Is there any evidence that in  
4 the week or two before the accident some concrete was  
5 being broken up in that area?

6 MR. ZHU: Yes; September 1st - - - I'm  
7 sorry, September 2nd. That's when the ninety - - -  
8 the sixty tons of concrete was being broken up. My  
9 adversary here talks about hauling in the concrete  
10 and stuff like that. That's not Zanfardino's  
11 testimony.

12 JUDGE SMITH: But where was it - - -

13 MR. ZHU: Zanfardino says - - -

14 JUDGE SMITH: - - - broken up on the 2nd?

15 MR. ZHU: I'm sorry?

16 JUDGE SMITH: Where was it being broken up  
17 on the 2nd?

18 MR. ZHU: The area where the green rebar  
19 appears. Now, I'll submit that the color isn't  
20 great. The photograph, because it's a laser copy,  
21 doesn't really show up the color.

22 JUDGE PIGOTT: It's pretty good, but I  
23 don't get your point. In other words, I guess that's  
24 Ms. Wachtler's point of sixty tons. I mean,  
25 obviously, there weren't sixty tons in that area.

1 It's - - -

2 MR. ZHU: Yes, there was.

3 JUDGE PIGOTT: It's over the course of 150  
4 feet or however many feet it - - -

5 MR. ZHU: Well, of course, it wasn't. I'm  
6 not saying that within two square feet of where you  
7 see that photograph or the twenty square feet where  
8 that photograph shows, but the testimony is the  
9 concrete was broken up in the area where the green  
10 rebar appears. That's from the city engineer; he  
11 says that. Pointing to that photograph and the  
12 series of photographs that follow that - - -

13 JUDGE SMITH: Actually, I thought he was  
14 pointing to Exhibit 1, which confuses me, because  
15 it's obviously not in Exhibit 1.

16 MR. ZHU: Exhibit 1 is 901; that's page  
17 901.

18 JUDGE SMITH: Yep, okay. Do you want to  
19 show me where the green rebar is in that?

20 MR. ZHU: Yeah. If you look on the right-  
21 hand side, there's a black, I guess, pole, a  
22 stanchion, and right to the right of that, that's  
23 where the rebar - - - towards the middle of the  
24 photograph you see a black pole on the right-hand  
25 side of the - - -

1                   JUDGE SMITH: The very right-hand side of  
2 the picture?

3                   MR. ZHU: Yes.

4                   JUDGE SMITH: Well, to the right of that  
5 we're out of the picture.

6                   MR. ZHU: No, no, well, there's a - - - the  
7 pole is at an angle to where the edge of the photo  
8 is, so it creates a sort of, like, a triangle, small  
9 little triangle.

10                  JUDGE SMITH: Yeah.

11                  MR. ZHU: And there's an area between the  
12 edge of the photo and the black pole where you see a  
13 curved part - - -

14                  JUDGE SMITH: Yeah.

15                  MR. ZHU: - - - of the green rebar.

16                  JUDGE SMITH: Oh, that's the green rebar?

17                  MR. ZHU: That's where the green rebar is.  
18 And if you look - - - it's not in 902, but if you  
19 look at 903, again, in the upper left-hand quarter,  
20 you'll see there's a line that demarcates where the  
21 green rebar begins. And the same thing at page 904.  
22 And it's actually very clear in 904. In the upper  
23 portion above the Jersey barrier, you'll see a line  
24 that sort of curves through the upper part of that  
25 photograph. That's where the green rebar is. And in

1 pointing to these photographs, that's where Mr.  
2 Duodu, the city engineer, said that's where JCC broke  
3 up the concrete.

4 CHIEF JUDGE LIPPMAN: Okay, counselor.

5 MR. ZHU: Not in that specific spot, Judge  
6 Pigott. I mean, I understand; sixty tons of concrete  
7 is a lot of concrete.

8 CHIEF JUDGE LIPPMAN: Okay, counselor,  
9 thanks.

10 MR. ZHU: Thank you.

11 CHIEF JUDGE LIPPMAN: Appreciate it. Thank  
12 you both.

13 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Jose Montas v. JJC Construction Corporation, et al, No. 2 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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