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COURT OF APPEALS

STATE OF NEW YORK

JOSEPH AND SHEILA SAINT,

Appellant,

-against-

No. 35

SYRACUSE SUPPLY COMPANY,

Respondent.

20 Eagle Street
Albany, New York 12207
February 12, 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
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 35, Saint v.
2 Syracuse Supply.

3 Counsel, would you like any rebuttal time?

4 MR. HUDSON: Yes, Your Honor. May I have
5 two minutes, please? Timothy Hud - - -

6 CHIEF JUDGE LIPPMAN: Two minutes. Sure,
7 go ahead, counsel.

8 MR. HUDSON: Timothy Hudson on behalf of
9 Joseph and Sheila Saint. Your Honors, there were a
10 number of issues raised in - - -

11 CHIEF JUDGE LIPPMAN: Counsel, tell us
12 about the sign, the - - - the particular job here
13 that - - - that was being performed. And the
14 difference is, is it - - - is it new, is it an
15 expansion, is it just putting a new sign over it?
16 What - - - what's going on here? What exactly is the
17 nature of this work that's being done, which
18 obviously informs to a significant degree what the
19 result - - - the outcome of this case is.

20 MR. HUDSON: Yes, Your Honor. It's an
21 existing billboard structure, a V-shaped - - - shaped
22 structure, onto which billboard extensions or
23 alterations were to be erected.

24 CHIEF JUDGE LIPPMAN: What does that mean?
25 It's just making it a little larger or - - -

1 MR. HUDSON: No, Your Honor. It's changing
2 the - - - the composition and configuration of the
3 structure.

4 JUDGE PIGOTT: Like if you put the head of
5 a lawyer up above the whole rest of the - - -

6 MR. HUDSON: That's exactly, right, Judge.
7 And a picture's worth a thousand words. It's at page
8 948 of the record.

9 CHIEF JUDGE LIPPMAN: So it's like - - - in
10 your mind, it's like a new construction?

11 MR. HUDSON: It - - - it's - - - it's a - -
12 - it's an alteration and expansion.

13 CHIEF JUDGE LIPPMAN: Or certainly greatly
14 modified.

15 MR. HUDSON: That's correct, Your Honor.
16 It is.

17 CHIEF JUDGE LIPPMAN: And how does that
18 impact on what we have to decide?

19 MR. HUDSON: Well, Your Honor, because part
20 of the overall project involved not just swapping the
21 vinyl from the west face to the east face or the east
22 face to the west face, but the erection of these,
23 which were already on the structure. Under Prats
24 this is an altering. And, accordingly, it should
25 fall within the framework of 240 of the Labor Law.

1 Independent - - -

2 CHIEF JUDGE LIPPMAN: What about Munoz - - -
3 Munoz?

4 MR. HUDSON: Munoz didn't deal with a facts
5 - - - the facts of this case, which were the erection
6 of an extension or an alteration.

7 CHIEF JUDGE LIPPMAN: So Munoz was what,
8 was just cosmetic?

9 MR. HUDSON: Well, Your Honor, it - - - the
10 court found it to be cosmetic because it was the
11 installation of pre-pasted vinyls by one - - - or
12 pre-pasted, excuse me, paper by one worker.

13 CHIEF JUDGE LIPPMAN: But what - - - what's
14 the test, then, whether it's cosmetic or an
15 alternation?

16 MR. HUDSON: Well, Your Honor, the - - -
17 the test is the Joblon test, the - - - the
18 significant physical change. But - - - and I would
19 sugg - - -

20 JUDGE READ: That's the extensions here?

21 MR. HUDSON: Well, the extension - - - the
22 - - - those are the extensions here, Your Honor. And
23 it - - - it - - - it's a significant change. These
24 are bolted on and the testimony in the record is that
25 this is - - - this is particularized work. The weld

1 - - - the workers have welding equipment with them,
2 because sometimes they have to cut the stringer and
3 extensions to length in order to install them.

4 They're - - -

5 JUDGE ABDUS-SALAAM: How do they get the
6 bolts up, counsel?

7 MR. HUDSON: I'm sorry, Your Honor?

8 JUDGE ABDUS-SALAAM: How do they get the
9 bolts up? Are the bolts big enough for them to carry
10 up on a ladder or however they get up there, or do
11 they have to use another piece of equipment to get
12 the bolts up?

13 MR. HUDSON: Yes, Your Honor. To - - - to
14 get the - - - the vinyls and the extensions, they
15 need a crane, and they utilized a crane to get them
16 onto the structure in this case.

17 JUDGE ABDUS-SALAAM: So that makes it more
18 like a construction site of some sort?

19 MR. HUDSON: Correct, Your Honor, and
20 there's a - - - a theme permeating all of the court's
21 altering cases is the nature of the work and the - -
22 - the hazards to which these workers are involved.

23 CHIEF JUDGE LIPPMAN: Do they - - - do
24 they, on a - - - on a normal - - - you know, where
25 you're changing the sign, do they use a crane or

1 different processes to - - - to use the - - - to
2 paste something over as opposed to doing what was
3 going on here?

4 MR. HUDSON: The process at - - - at work
5 here is very different from the process described in
6 Munoz.

7 JUDGE FAHEY: Can I just ask, the
8 dimensions of the sign before the work started, what
9 were they, if you remember?

10 MR. HUDSON: The - - - the regular face of
11 the billboard, Judge, is forty-eight by fourteen.

12 JUDGE FAHEY: And - - - and was it going to
13 be bigger after the work was completed?

14 MR. HUDSON: It was. It was no longer
15 going to be rectangular.

16 JUDGE FAHEY: What were the dimensions
17 going to be after the work was completed?

18 MR. HUDSON: It - - - it would be
19 irregular, Judge. It would - - - I believe that the
20 record is that it would still be forty-eight feet
21 long - - - long.

22 JUDGE FAHEY: Um-hum.

23 MR. HUDSON: But far wider because there
24 would be these four extensions of the - - -

25 JUDGE FAHEY: So that's the core of your

1 alteration argument then?

2 MR. HUDSON: That is the - - - the core of
3 the altering argument, Judge.

4 JUDGE FAHEY: Okay.

5 MR. HUDSON: But independent from that, the
6 court below tossed out plaintiff's 241(6) argument,
7 which is a completely different standard and - - -
8 and should not be overlooked by this court regardless
9 of what the court does with the altering argument.

10 JUDGE FAHEY: Address 240(2), would you,
11 240(2)? I - - - I know you brought it up in - - -

12 MR. HUDSON: Yes, Your Honor.

13 JUDGE FAHEY: I thought he fell from ten
14 feet and this - - - that's a twenty-foot statute, I
15 thought, so - - -

16 MR. HUDSON: Oh, he was exposed to a fall
17 of fifty-nine feet, and around - - -

18 JUDGE FAHEY: Yeah, but when he fell, I
19 thought the record showed he fell from about ten
20 feet.

21 MR. HUDSON: No he ---

22 JUDGE FAHEY: I - - - I could be wrong, but
23 that's what I thought.

24 MR. HUDSON: He fell a distance of
25 approximately ten to fifteen feet, Judge, from the

1 upper interior catwalk to the lower - - - to a piece
2 of the crossbar of the structure that was about ten
3 feet below.

4 JUDGE FAHEY: I see. So he was more than
5 twenty feet from the ground, then. So that's how you
6 think 240(2) applies?

7 MR. HUDSON: Correct, Your Honor. He was
8 fifty-nine feet from the ground at around page 310 of
9 the record.

10 JUDGE FAHEY: Okay. No, I got it. That's
11 good. Thank you.

12 CHIEF JUDGE LIPPMAN: What about 241(6)?
13 Go ahead.

14 MR. HUDSON: 241(6) applies to
15 construction, Judge. It - - - and it's broader than
16 240(1).

17 CHIEF JUDGE LIPPMAN: So you think it's
18 clearly within the - - - the parameters of 241(6)?

19 MR. HUDSON: Yes, Your Honor. And the - -
20 - the Commissioner of Labor indicated that it should
21 be. Under this court's precedent in Joblon and in
22 Nagel, the court is to look to the definitions of
23 construction work within the Industrial Code, which
24 includes broad language including, but not limited
25 to, the structural installation of any building

1 materials of any kind for any purpose. It says, you
2 know, wood, metal, plastic, or any other building
3 materials of any kind for any purpose.

4 And I would submit to the court that - - -
5 that this falls squarely within the illustration
6 contained within the illustration of the Industrial
7 Code's definition of construction work, which, as
8 this court set forth in Joblon and in Nagel, is the
9 test to apply. So regardless of what the court does
10 with - - - with the 240 altering case, this is
11 definitely a construction case within the meaning of
12 241(6).

13 JUDGE RIVERA: Does the labor take much
14 longer?

15 MR. HUDSON: I'm sorry, Judge?

16 JUDGE RIVERA: Does the labor take much
17 longer for - - - in - - - in the case of what the
18 plaintiff did here than, say, what the employer was
19 doing in Munoz?

20 MR. HUDSON: In Munoz, it - - - it can,
21 Your Honor. That - - - that's the short answer. The
22 - - - this is custom work and around page 170 to
23 about 190 of the record there - - - there's a
24 discussion of what's involved on each of these
25 projects. The installation of the vinyls themselves,

1 which are part of this project, they - - - they're -
2 - - they're the rectangular components of the
3 advertising copy, that is different from the - - -
4 the customized part which, again, are these
5 extensions that are already elevated by crane on the
6 structure and then are physically bolted to the
7 structure. And it can take more time.

8 CHIEF JUDGE LIPPMAN: Okay, counsel.
9 Thanks. You want - - - you want anything added? You
10 still have about a half a minute.

11 MR. HUDSON: No, Your Honor, unless there
12 are any questions.

13 CHIEF JUDGE LIPPMAN: Okay. You'll have
14 your rebuttal.

15 MR. HUDSON: Thank you.

16 CHIEF JUDGE LIPPMAN: Okay, counselor?

17 MR. CROSBY: May it please the court, Brian
18 Crosby for Syracuse Supply.

19 CHIEF JUDGE LIPPMAN: Counsel, let's deal
20 with the alteration issue first.

21 MR. CROSBY: Sure.

22 CHIEF JUDGE LIPPMAN: Why isn't this very
23 different than the Munoz kind of situation where it's
24 described as just a paste-over? Here, you're
25 changing the configuration of the sign. Why isn't

1 that an alteration or whatever you want to call it,
2 construction or modification?

3 MR. CROSBY: For a number of reasons, Your
4 Honor.

5 CHIEF JUDGE LIPPMAN: Go ahead.

6 MR. CROSBY: Number one, this is,
7 essentially, a decorative modification. In other
8 words, what they're - - -

9 CHIEF JUDGE LIPPMAN: But is it structural?

10 MR. CROSBY: It is not structural. It is
11 not structural. It doesn't - - - it does not - - -

12 CHIEF JUDGE LIPPMAN: Explain - - - explain
13 the difference.

14 MR. CROSBY: It does not change the
15 structure at all.

16 JUDGE READ: Doesn't it change the shape?

17 MR. CROSBY: It changes the shape on a
18 temporary basis. No question about that. All it's -
19 - -

20 JUDGE READ: That's not enough?

21 MR. CROSBY: That's not enough.

22 JUDGE STEIN: What would you need - - -
23 what would you need to be changing the structure?

24 MR. CROSBY: Well, if you look at - - -

25 JUDGE STEIN: You have a pole, you have a

1 big thing up there. What - - - what would change the
2 structure of that?

3 MR. CROSBY: Something that would change
4 the structure is something that's permanent in
5 nature, such as you have in Joblon where they went
6 through a wall, where they pulled wires through and
7 connected them and they were - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but isn't - - -
9 isn't Joblon minor compared to what - - - what went
10 on here?

11 MR. CROSBY: Oh, absolutely not, absolutely
12 not.

13 CHIEF JUDGE LIPPMAN: You're putting wires
14 through the - - - through the - - - the - - - the
15 hole is not minor compared to changing the whole
16 configuration of a big sign?

17 MR. CROSBY: Chiseling through a wall is
18 what they did in Joblon. They've got a - - -

19 CHIEF JUDGE LIPPMAN: Okay, chiseling
20 through a wall. Where do you draw the line? How are
21 we able to say that changing the shape is not - - -
22 is not - - - I don't - - - I don't quite get why it's
23 not an alteration.

24 MR. CROSBY: You're not changing the shape
25 of the structure itself. These - - -

1 JUDGE PIGOTT: Suppose - - - and I'll make
2 you an expert in billboards. When you're - - - when
3 you're driving down the 190 and you look up at a
4 billboard and it's for gasoline and you look down to
5 check your gua - - and then you look up again and now
6 it's for pills, because somehow these - - - these
7 boards have changed so that they change every thirty
8 seconds or so.

9 MR. CROSBY: Electronic, yes.

10 JUDGE PIGOTT: When that went in, would
11 that have been a change in the structure?

12 MR. CROSBY: Yes, it would have, in the
13 sense that they would have had to wire it. They
14 would have had to change the face. They would have
15 had to make structural differences to the - - - the
16 billboard itself.

17 JUDGE PIGOTT: Even though the - - - the
18 out - - - the exterior structure would have remained
19 the same?

20 MR. CROSBY: That's correct. But here,
21 there is no structural change - - -

22 JUDGE ABDUS-SALAAM: Wouldn't that be
23 temporary, counsel, because couldn't they just make
24 it a single billboard at some point?

25 MR. CROSBY: They could stop using it, but

1 they would have changed the face of it. They'd have
2 to go back and change to a flat billboard again.

3 Here what - - -

4 JUDGE ABDUS-SALAAM: Well, in this - - - in
5 this case, if the shape changes because you're
6 putting - - - you're adding on some other kind of
7 platform so that you can put a different kind of sign
8 up, wouldn't that be changing the shape?

9 MR. CROSBY: The change is - - -

10 JUDGE ABDUS-SALAAM: And wouldn't that be
11 altering?

12 MR. CROSBY: On a temporary basis, it
13 changes the shape but does not change the structure.
14 There is nothing that is done to the structure. The
15 way this is put on - - -

16 JUDGE ABDUS-SALAAM: You're bolting iron
17 that has to come up with a crane. That's not
18 changing the structure?

19 MR. CROSBY: Well, first of all, there's no
20 crane being used. There was a manlift that was being
21 used, which is much different. Secondly, there was
22 no welding being done. There was no welding
23 equipment on the premises at the time. What they
24 were doing initially was changing the vinyl, which
25 requires no tools.

1 JUDGE ABDUS-SALAAM: Well, where they
2 planning to use welding equipment?

3 MR. CROSBY: I'm sorry?

4 JUDGE ABDUS-SALAAM: Were they planning to
5 use welding equipment?

6 MR. CROSBY: No, the testimony is that
7 welding equipment had nothing to do with this job.
8 With regard to the first part, the changing of the
9 vinyl from one side to the other, which is what they
10 did, that requires no tools at all, not even the
11 brush that you had in Munoz. They were then going to
12 do the Marineland on the other side, which was a
13 vinyl that they would stretch, required no tools, had
14 ratchet straps, and a pre-pasted addition that would
15 go on the top that was prepared at the shop, not at
16 the site.

17 The way it was put on was it was lifted up,
18 it was put on top of the - - - the billboard, it was
19 nailed with a couple of nails, and clamped with a
20 clamp onto the structure with one bolt. That's all
21 that was done. It would stay there for the period of
22 time that that ad was - - - was paid for. When it
23 was done, they would unbolt it - - -

24 CHIEF JUDGE LIPPMAN: For that period of
25 time, it was alter - - - they altered the structure

1 of the sign, right? For that period of time?

2 MR. CROSBY: They altered - - - Judge, they
3 alt - - - altered the shape.

4 CHIEF JUDGE LIPPMAN: You're getting pretty
5 - - - pretty - - -

6 MR. CROSBY: They did not - - - they did
7 not - - - there was - - -

8 CHIEF JUDGE LIPPMAN: Counsel, aren't we
9 getting pretty fine here that we're supposed to
10 determine that they altered the shape but not the
11 structure?

12 MR. CROSBY: No, the difference, Your
13 Honor, is that when they take it off, the structure
14 is exactly as it was before.

15 CHIEF JUDGE LIPPMAN: Oh, I see. So your
16 argument is the integrity of the structure remains
17 the same.

18 MR. CROSBY: That's correct.

19 CHIEF JUDGE LIPPMAN: And this is
20 temporarily altering or superimposing on the - - -
21 your argument is they're superimposing on the
22 structure a different shape? Is that what you're
23 saying?

24 MR. CROSBY: It is - - - it is - - - as I
25 think Munoz stated it, a decorative modification.

1 JUDGE STEIN: But when - - -

2 MR. CROSBY: All it is is - - -

3 JUDGE PIGOTT: It's a - - -

4 MR. CROSBY: - - - a change in the
5 advertising face, but the structure itself, the
6 billboard itself - - -

7 JUDGE RIVERA: So - - - so every time
8 another billboard goes up - - -

9 JUDGE PIGOTT: A tree goes - - -

10 JUDGE RIVERA: - - - they have to do a
11 different shape? Is it - - - is - - - is it - - - if
12 I'm understanding your argument it's that the
13 skeleton remains but it can't be used without
14 constantly being changed to fit - - -

15 MR. CROSBY: Well, it - - -

16 JUDGE RIVERA: - - - whatever this ad is?

17 MR. CROSBY: No, an ad - - - the ad, for
18 example, in this case for Don Davis Car Dealership
19 that went from one side to the other, just went from
20 one side to the other. That's a standard size
21 decoration or advertisement.

22 JUDGE STEIN: So - - - so what - - - what
23 if you remove the wiring that had been put in that
24 was an alteration and - - - and, you know - - - and -
25 - - and you decide to take that wiring out. Then - -

1 - then wouldn't you say that's only temporary - - -

2 MR. CROSBY: No.

3 JUDGE STEIN: - - - and it didn't change
4 the structure? Why?

5 MR. CROSBY: Because when you do that, you
6 would have put holes in it, you would have changed
7 what was in there before. You may have welded
8 something onto it to hold a box. There's - - -
9 there's many changes that would have been made to the
10 structure itself. That's not what is here - - -

11 CHIEF JUDGE LIPPMAN: There going to be no
12 holes in this thing?

13 MR. CROSBY: No.

14 CHIEF JUDGE LIPPMAN: No nothing? Say it
15 again? You're saying it's - - - it's one bolt and
16 that's not enough. Is that your point?

17 MR. CROSBY: It's - - - it's - - - exactly.
18 It's put at the top.

19 CHIEF JUDGE LIPPMAN: That's the only - - -

20 MR. CROSBY: There are nail - - - there are
21 nails through the plywood - - -

22 CHIEF JUDGE LIPPMAN: Yeah.

23 MR. CROSBY: - - - that are removed when
24 they take it down. And there's an angle iron on the
25 back - - -

1 CHIEF JUDGE LIPPMAN: What - - -

2 MR. CROSBY: - - - that sits on top - - -

3 CHIEF JUDGE LIPPMAN: Yeah, but I don't - -

4 -

5 MR. CROSBY: - - - with a - - -

6 CHIEF JUDGE LIPPMAN: Yeah, but what I

7 don't - - -

8 MR. CROSBY: - - - clamp, and that clamp is
9 one bolt.

10 CHIEF JUDGE LIPPMAN: What I don't get, and
11 maybe it's because I don't understand technically how
12 these things are done, I don't understand the
13 difference between a lot of these cases that seem
14 really minor work that - - - that we say is
15 sufficient. And here, whether it's putting a bolt
16 in, whether it's putting nails in, I - - - I don't
17 know, really, why it's any different than Joblon or
18 Weininger.

19 It seems to me that they seem minor to at
20 least the layperson, and maybe you have to be an
21 expert on these signs to understand what you're
22 talking about. But, certainly from a visceral
23 perspective, those seem rather minor, the other
24 cases. And this seems not so minor that you - - -
25 you're putting in this new enlarged shape or

1 whatever, you know, you want to call it. And you got
2 to nail it in and you got to bolt it in. I don't
3 know what the difference is from a - - - a legal case
4 law perspective. I - - - I don't - - - I don't see
5 the sharp distinction from this case. So explain to
6 me, from someone with much more knowledge, what is it
7 that - - - that - - - what's the defining thing?
8 It's the number of bolts, the number of nails, it's a
9 wire, it's a - - - what is it?

10 MR. CROSBY: Well, the court seems to have
11 said that if there is a substantial modification,
12 which they found in Joblon, for example - - -

13 CHIEF JUDGE LIPPMAN: Right, go ahead.

14 MR. CROSBY: - - - where they went through
15 a wall and made a permanent change and brought wires
16 through, that that was considered - - - marginally,
17 according to the court, but - - -

18 CHIEF JUDGE LIPPMAN: Right, but couldn't
19 those wires come back out and they take them away?

20 MR. CROSBY: Yeah, but you still have the
21 hole in the wall. You've changed the structure and -
22 - -

23 CHIEF JUDGE LIPPMAN: Well, we'll plaster
24 over the hole in the wall. Well - - - I'm serious.
25 What would happen then? So if we plaster it over,

1 cases, Your Honor, that we've cited that say nail
2 holes do not const - - -

3 JUDGE STEIN: Wait, wait. Which is the
4 substantial modification in the wiring case? Is it
5 the wiring or is it the hole that it leaves when you
6 take out the wiring?

7 MR. CROSBY: It - - - I believe that it is
8 a permanent change to the structure.

9 JUDGE STEIN: So - - - so then what about
10 the word substantial? That - - - that's irrelevant?

11 MR. CROSBY: Oh, no, no, no.

12 JUDGE STEIN: So you're saying it's - - -
13 it's - - -

14 MR. CROSBY: Absolutely not.

15 JUDGE STEIN: - - - a question of whether
16 it's permanent, not a question of whether it's
17 substantial?

18 MR. CROSBY: Both. It's got - - - I
19 believe it has to be - - -

20 JUDGE STEIN: Well, is one hole that's put
21 in so that the wiring can be put in, and maybe
22 there's a couple of little brackets or something, is
23 that substantial? Or - - - I mean, we've held that -
24 - - that - - - that wiring is substantial. But is it
25 the fact that all this wiring went into it, or is it

1 the fact that there's this one hole there?

2 MR. CROSBY: No, I think it's that there is
3 a permanent change to the building that - - - in that
4 case you've chiseled through, you've required a
5 number of different things to have been done - - - an
6 electrician to tie it off, to put wires through, and
7 to tie it on, as opposed to here where you - - - all
8 you're doing is bolting something on and then
9 ultimately taking it off.

10 JUDGE STEIN: So then is it the amount of
11 work that goes into doing whatever they're doing? Or
12 is it - - - I - - - I'm - - - it seems to be changing
13 every time you answer the question.

14 MR. CROSBY: Well, the cases that I've
15 seen, Your Honor, and that we cited and that counsel
16 has cited, all seem to turn on the fact that there
17 has been a permanent change to the structure in some
18 fashion. That is not true when you have a temporary
19 addition that you can put on top and take off a month
20 later and the - - - the - - -

21 CHIEF JUDGE LIPPMAN: Okay, counsel.
22 Thanks.

23 MR. CROSBY: Thank you.

24 JUDGE RIVERA: I just - - - I just want to
25 - - -

1 CHIEF JUDGE LIPPMAN: Oh, sure. Judge
2 Rivera, go ahead.

3 JUDGE RIVERA: One - - - sorry. So just to
4 clarify this last point you're making. So it is
5 irrelevant that you might actually be able, taking
6 the example of drilling the hole, to - - - to
7 reinstate the structure to its original condition.
8 It's irrelevant to this?

9 MR. CROSBY: It is irrelevant. Because - -
10 -

11 JUDGE RIVERA: So - - - so it's still
12 permanent in your mind - - -

13 MR. CROSBY: Because you have made - - -

14 JUDGE RIVERA: In your - - - under your
15 argument, it is still permanent even though one
16 could, in fact - - - in some of these cases, very
17 easily - - - reinstate the structure to its original
18 condition? Because I'm not sure, then, how anything
19 is permanent - - -

20 MR. CROSBY: Certainly, you can renovate -
21 - -

22 JUDGE RIVERA: What's the permanency?

23 MR. CROSBY: You can renovate any building,
24 Your Honor.

25 JUDGE RIVERA: Well, then, where's the

1 permanency? Isn't the point really the - - -

2 MR. CROSBY: Well, the point is - - -

3 JUDGE RIVERA: - - - significant change,
4 not the permanency? I guess that's what I'm asking.

5 MR. CROSBY: Well, I guess there - - - is
6 there anything that is truly permanent that could
7 never become - - -

8 JUDGE FAHEY: That's a pretty - - -

9 MR. CROSBY: - - - revised - - -

10 JUDGE FAHEY: - - - existential question
11 for us.

12 MR. CROSBY: That's right.

13 CHIEF JUDGE LIPPMAN: I - - - I think we're
14 going beyond our job - - -

15 JUDGE RIVERA: And perhaps that's why the
16 word's not in the statute. Thank you.

17 MR. CROSBY: Well - - -

18 CHIEF JUDGE LIPPMAN: Okay, counsel.
19 Thanks, counsel.

20 Counsel, where do - - - where do we draw
21 the line in this - - - this kind of stuff? You know,
22 you're - - - we're getting an education, so you
23 educate us now.

24 MR. HUDSON: Thank you, Judge.

25 CHIEF JUDGE LIPPMAN: Where - - - where do

1 we draw the line?

2 MR. HUDSON: Well, you - - - the court has
3 already drove - - - drawn the line that permanency
4 doesn't matter. And I would direct the court to
5 Izrailev and to Panek. When both of those cases,
6 there has been no suggestion that the duration of a
7 change or the diva - - - duration of a structure
8 itself has any determination as to whether or not
9 there is an altering.

10 CHIEF JUDGE LIPPMAN: How many - - - let me
11 ask you a question.

12 MR. HUDSON: Yes, sir.

13 CHIEF JUDGE LIPPMAN: How many - - - how
14 many people were scheduled to work on this thing?
15 Were there - - -

16 MR. HUDSON: Five originally, Judge. And
17 the reason - - -

18 CHIEF JUDGE LIPPMAN: Who are - - -

19 MR. HUDSON: Yeah.

20 CHIEF JUDGE LIPPMAN: Someone mentioned
21 welders before. Were they in and out?

22 MR. HUDSON: No - - -

23 CHIEF JUDGE LIPPMAN: What - - - what - - -
24 what types of people were going to work on this
25 thing?

1 MR. HUDSON: Construction workers. This is
2 the construction crew.

3 CHIEF JUDGE LIPPMAN: What's their
4 specialties or just a whole bunch of specialties?

5 MR. HUDSON: Well, they have construction
6 train - - - training, including the use of a crane.
7 And whether you call it a crane or a bucket truck, it
8 was there. It needed to be done to get these workers
9 up fifty-nine feet. This is a major - - - major
10 change and major construction work. And the - - -
11 you know, the theme that - - - that permeates all of
12 this court's Labor Law 240 type of analysis is, you
13 know, what's going on here? Are these the workers
14 the legislature meant to protect while working at
15 these great heights? This isn't people working and -
16 - - and falling at a short distance. These are guys
17 who have to get up onto - - - onto a structure that's
18 fifty-nine feet in the air by a high lift.

19 There's also been a - - - a lot made by
20 defense counsel and by the amicus to try to minimize
21 the work that these workers were doing. It's not a
22 bolt. It's multiple bolts. That appears at Mr.
23 Saint's testimony at page 192 of the record and also
24 in Mr. Dellapenta's testimony in the record. And - -
25 - and further - - -

1 JUDGE ABDUS-SALAAM: Counsel, could you
2 just - - -

3 MR. HUDSON: Yes.

4 JUDGE ABDUS-SALAAM: - - - again tell me
5 how the bolts are attached?

6 MR. HUDSON: Yes, Judge. So there are
7 these - - -

8 CHIEF JUDGE LIPPMAN: You're continuing our
9 education. Go ahead.

10 MR. HUDSON: So there - - - part of these
11 alterations, these alterings, these extensions and
12 additions, part of them - - - they're partly made in
13 a fabrication center on the ground. And they're made
14 from wood and vinyl and other building materials and
15 metal. There's a piece of angle iron on them.
16 They're then lifted by bucket truck or crane onto the
17 structure, as they were that day. The crew has
18 welders available to them, such as at page 176 of the
19 record; that's the testimony in this case. And they
20 are installed with the use of bolts onto a structure
21 - - - the V part of the structure's there - - - using
22 other angle iron, they're situated in shoes and they
23 are then bolted on. Typically, there's one bolt per
24 shoes and two shoes per extension.

25 JUDGE ABDUS-SALAAM: And what do - - - what

1 do the workers use to bolt them? That's what I'm
2 trying to - - -

3 MR. HUDSON: They use crescent wrenches or
4 ratchets. They have a - - - a welder if it doesn't
5 match right and they've got to adjust the height, but
6 all of this done fifty-nine feet in the air by the
7 construction crew. And, you know, regardless of how
8 long the extension or the copy remains on the
9 structure, this is a significant change to the
10 structure under this court's precedent.

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

13 MR. HUDSON: Thank you.

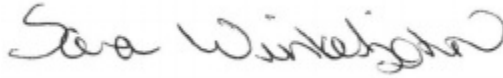
14 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Joseph and Sheila Saint v. Syracuse Supply Company, No. 35 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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