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COURT OF APPEALS

STATE OF NEW YORK

O'BRIEN,

Respondent,

-against-

No. 27

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Appellant.

20 Eagle Street
Albany, New York
February 14, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on today's
2 calendar is appeal number 27, O'Brien v. The Port Authority
3 of New York and New Jersey.

4 Counsel.

5 MR. SIMONE: Good afternoon, Your Honors;
6 Christopher Simone for the defendants-appellants. I'd like
7 to reserve three minutes for rebuttal, if I can.

8 CHIEF JUDGE DIFIORE: Three, sir?

9 MR. SIMONE: Yes.

10 CHIEF JUDGE DIFIORE: You may.

11 MR. SIMONE: This appeal calls upon this court to
12 decide how to treat staircases under Labor Law 240(1). As
13 you know, a staircase is not an enumerated safety device,
14 and the courts have been less than consistent about how to
15 apply them. We propose that a workable rule should examine
16 the staircase's function at the time of the accident.

17 JUDGE GARCIA: So is that really whether or not
18 it falls under those enumerated devices or what the hazard
19 is?

20 MR. SIMONE: I'm not sure I understand the
21 question.

22 JUDGE GARCIA: Because if the staircase collapses

23 - - -

24 MR. SIMONE: Right.

25 JUDGE GARCIA: - - - what would your result be?

1 MR. SIMONE: Well - - -

2 JUDGE GARCIA: Same facts you have here except no
3 rain, no slip - - -

4 MR. SIMONE: Well, I - - -

5 JUDGE GARCIA: - - - plaintiff falls through the
6 planking of the staircase. It collapses and he falls to
7 the ground.

8 MR. SIMONE: I think the proposed rule that we're
9 suggesting that - - - you - - - you - - - accidents on
10 staircases can give rise to a 240 claim when the worker is
11 performing work from it encompasses that. We're not saying
12 that the worker doesn't have a cause of action for a fall.

13 JUDGE STEIN: Well, didn't we reject that
14 argument in Nicometi? Didn't - - - didn't we say it didn't
15 matter what they were actually engaged in doing at the
16 moment of the accident?

17 MR. SIMONE: Well, we're not speaking about the
18 moment of the accident. We're taking - - - we're not
19 talking about the hammer stroke type of thing. We're
20 talking about the general context of what's going on. For
21 example, if I'm installing sheetrock on the side walls of a
22 staircase and I should - - - and I'm working from the
23 staircase but I should have been given a scaffold platform
24 over it, then I wasn't provided with proper protection.
25 But there may be situations where the - - - where the

1 staircase, if I'm not working from it, is the - - - is the
2 appropriate place.

3 JUDGE RIVERA: But if in Nicometi you get off the
4 - - - you get off to go get a tool that you need to
5 continue the work, Nicometi says that's covered. So why is
6 this different? He went to get his raincoat to continue
7 his work. What's the difference?

8 MR. SIMONE: Well, because he wasn't working from
9 - - - we're - - - we're proposing that you have to be
10 working from it as if it was a safety device. If - - - if
11 another device should have been given, then it's just a
12 staircase. They're using it as a passageway, not for work.

13 JUDGE GARCIA: What if it's a staircase to get to
14 a scaffold?

15 MR. SIMONE: If it's connect - - - if it's part
16 of the scaffold, I think that's a different situation
17 because there are scaffolds that have built-in stairs that
18 aren't the same as this, but this is a - - - this is a
19 significant staircase. And this was not - - - you know,
20 it's not an enumerated device, and it certainly could have
21 been. It's not like staircases were - - - were - - -

22 JUDGE RIVERA: So without the staircase, how is
23 he going from one elevation to the lower elevation?

24 MR. SIMONE: Well, in this case, there were - - -

25 JUDGE RIVERA: What's he going to do?

1 MR. SIMONE: In this case, there were other
2 staircases provided. There were internal staircases.

3 JUDGE RIVERA: But there's still staircases,
4 right?

5 MR. SIMONE: Yes.

6 JUDGE RIVERA: Let's say there are no staircases.
7 How is he going to get from one to another? Isn't the
8 point that he's got to have a device to get him from one
9 elevation to a lower elevation? Isn't that the point?

10 MR. SIMONE: Well, but he's - - - it's - - -
11 you're just going from - - - you're using it as a
12 passageway. You're going from - - - that's the reality of
13 the jobsite, just like in Nicometi. You got to apply it
14 logically. He - - - he had - - -

15 JUDGE GARCIA: But Nicometi was - - -

16 JUDGE RIVERA: What if he's on the thirtieth
17 floor and he's got to get down to the twenty-eighth? You'd
18 say that's still not a safety device? That has nothing to
19 do with the construction site?

20 MR. SIMONE: No. And we're not saying - - -

21 JUDGE RIVERA: It's not about his safety moving
22 from one elevation lower?

23 MR. SIMONE: We're not suggesting that he
24 shouldn't be safe, and we're not suggesting he doesn't have
25 a cause of action. But the narrow issue is whether it

1 applies as strict liability under 240(1). That's the - - -
2 that's the narrow issue here.

3 JUDGE GARCIA: Nicometi was not a case where we
4 said the stilts, I believe, right, in the case - - -

5 MR. SIMONE: Yeah, stilts in - - -

6 JUDGE GARCIA: - - - were not a safety device,
7 right? We didn't find it was a 240(1) case, but we didn't
8 say they weren't a safety device. But it seems like you
9 want, in this case, for us to say staircase isn't - - -
10 isn't a safety device.

11 MR. SIMONE: What we - - - what we propose is
12 that you examine if the stair - - - to determine if the
13 staircase is a safety device is what it was being used for
14 at the time.

15 JUDGE GARCIA: But the - - -

16 MR. SIMONE: And whether a different device
17 should have been provided.

18 JUDGE GARCIA: But the stilts were being used to
19 work on ceiling insulation, I believe.

20 MR. SIMONE: Right. And they didn't fail.

21 JUDGE GARCIA: So how would that fit with your
22 rule?

23 MR. SIMONE: Well, the - - - in Nicometi, the
24 stilts never fail. He slipped on a - - - it was a
25 different hazard that was at issue here.

1 JUDGE GARCIA: Right.

2 MR. SIMONE: And in that case.

3 JUDGE GARCIA: It was the hazard - - -

4 MR. SIMONE: Right.

5 JUDGE GARCIA: - - - which is, I think, where we
6 started. So is it really that this isn't a safety device
7 but that it's the hazard that's encountered?

8 MR. SIMONE: No. I mean there could be different
9 hazards on the stairs. I - - - in this case, it was the -
10 - - it was the - - - allegedly water.

11 JUDGE GARCIA: Right. Like there could be
12 different hazards on stilts, it seems to me. So it was
13 ice, I believe, in Nicometi, but it wasn't because he was
14 using stilts not for work or for work or what he was doing
15 on the stilts and they're a safety device. It was the
16 hazard he encountered - - -

17 MR. SIMONE: But the - - - but the stilts itself
18 were - - - were the safety device, and nothing about them
19 inherently was - - - anything was wrong with it. In this
20 case, the issue is whether if - - - if there's water or
21 some substance on the staircase and you just slip on it,
22 whether it's a 240 case, 240(1).

23 JUDGE FAHEY: Well, let me ask this. If there -
24 - - if there was water on a ladder and he was moving from
25 one level to another, would you argue that 240(1) wouldn't

1 apply?

2 MR. SIMONE: No. I think because - - -

3 JUDGE FAHEY: How about - - - how about a
4 scaffold?

5 MR. SIMONE: Well, those are enumerated devices.
6 The issue here is - - -

7 JUDGE FAHEY: No. Let me finish. Let me finish.

8 MR. SIMONE: Okay.

9 JUDGE FAHEY: But you would admit in those
10 circumstances that - - - that 240(1) would apply?

11 MR. SIMONE: If it - - -

12 JUDGE FAHEY: That's pretty much what the case
13 law says, right?

14 MR. SIMONE: Yeah. I - - -

15 JUDGE FAHEY: There - - - there's no question on
16 that.

17 MR. SIMONE: If it - - - if it fits into the case
18 law and the - - -

19 JUDGE FAHEY: Right. So really, for us then,
20 it's a question of whether or not - - - and it goes back, I
21 think, to your cross-motion whether or not this staircase,
22 this temporary staircase, is the functional equivalent of -
23 - - of a ladder or a scaffold, right?

24 MR. SIMONE: Yeah. And I - - - and as we said in
25 our brief, I don't think there's really a - - - a necessary

1 distinction between temporary and permanent. In fact, this
2 staircase was here for a long time.

3 JUDGE FAHEY: You're going - - - you're going far
4 afield here on this case. If you want to go - - - if you
5 want to say that temporary staircases don't - - - don't
6 apply now, either?

7 MR. SIMONE: Well, no. I - - - I think
8 staircases. I think it - - - I don't think it matters
9 whether it's temporary or permanent.

10 JUDGE FAHEY: I see. Because the rule is
11 permanent staircases, not 240(1).

12 MR. SIMONE: But not consistently. But not - - -
13 not consistently.

14 JUDGE RIVERA: So - - - so if they had a ladder
15 instead - - -

16 MR. SIMONE: That's enum - - -

17 JUDGE RIVERA: - - - is it covered?

18 MR. SIMONE: That's enumerated device. I think
19 that if there's something wrong with it and it fits into
20 240, then, yes. Then it would be.

21 JUDGE RIVERA: But you're not explaining, I
22 think, the - - - apropos of what Judge Fahey is suggesting
23 here, you're not - - - you're not explaining how, other
24 than it's not listed, and, of course, the list is not
25 exhaustive, is it? You're not arguing the list is

1 exhaustive?

2 MR. SIMONE: No.

3 JUDGE RIVERA: No. So if it functions just like
4 a ladder, and you've now conceded that a ladder would have
5 been a safety device, why isn't this staircase a safety
6 device?

7 MR. SIMONE: Because it isn't - - -

8 JUDGE RIVERA: In fact, isn't more safe than a
9 ladder given the circumstances - - -

10 MR. SIMONE: Well - - -

11 JUDGE RIVERA: - - - of this case?

12 MR. SIMONE: - - - I think staircases are safer
13 than ladders, and I think that's the - - - that's the
14 appropriate device. So I think you need to examine it - -
15 -

16 JUDGE FAHEY: Yeah. But that's why they draw the
17 temporary and permanent distinction. And it's funny
18 because when you look at this, the steps themselves, in
19 many ways, look closer to a ladder than a staircase, aren't
20 they?

21 MR. SIMONE: Well, they're made of steel, but
22 they're deep like a staircase.

23 JUDGE FAHEY: And - - -

24 MR. SIMONE: And - - - and this, and temporary -
25 - -

1 JUDGE FAHEY: All right.

2 MR. SIMONE: - - - I'm not sure how - - - you
3 know, how do you apply that.

4 JUDGE STEIN: Are you making an argument, a
5 Nicometi-type argument that the water isn't the risk that -
6 - - that a safety device is - - - is being used for?

7 MR. SIMONE: That - - - that was not raised in
8 the motion at all.

9 JUDGE STEIN: Okay.

10 MR. SIMONE: It certainly - - -

11 JUDGE STEIN: So that's not your argument?

12 MR. SIMONE: No. That's not an argument we
13 raised. That wasn't raised below, and we didn't change the
14 argument on appeal.

15 JUDGE FAHEY: I - - - how about on the 241(6)
16 argument? I thought that there - - - of course that
17 wouldn't really affect you, would it, at this point?

18 MR. SIMONE: Well, 241(6) is still a viable issue
19 here. -

20 JUDGE FAHEY: Yeah.

21 MR. SIMONE: It's still - - - it's still at issue
22 and we - - - and even though we had moved to dismiss
23 plaintiff's argument on that, we propose that there are
24 certainly issues of fact on that, numerous issues of fact.

25 JUDGE FAHEY: Am I - - - am I correct that - - -

1 that you would argue that the water on the staircase was
2 not rain but simply a foreign - - - it was rain which is
3 simply a foreign substance and not covered under 241(6)?

4 MR. SIMONE: Well, I think 241(6) I think the
5 code says water.

6 JUDGE FAHEY: Right.

7 MR. SIMONE: I believe it says water. So - - -
8 and again - - -

9 JUDGE FAHEY: So - - - so - - -

10 MR. SIMONE: - - - plaintiff - - -

11 JUDGE FAHEY: So I got it right, just so I got it
12 right, so your argument is that rain isn't water?

13 MR. SIMONE: Rain isn't water?

14 JUDGE FAHEY: Yeah. Tell me - - - tell - - -
15 explain your argument to me on this because maybe I'm
16 misunderstanding it.

17 MR. SIMONE: Under 241(6)?

18 JUDGE FAHEY: Yeah. Yeah. Water - - -

19 MR. SIMONE: We're saying there's issues of fact
20 on that.

21 JUDGE FAHEY: Right.

22 MR. SIMONE: That's our - - - that's our - - -

23 JUDGE FAHEY: Rain is simply a foreign substance.
24 It's not - - - it's not water, that's your 241(6) argument?

25 MR. SIMONE: No. I don't - - - I don't - - - our

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- - -

JUDGE FAHEY: Okay.

MR. SIMONE: Our argument is that there's issues of fact that preclude it, whether there was even a violation because it had rained for four hours, and he could have deposited it himself. There's certainly issues of comparative fault. He's fond of saying that everybody knew it - - - it was wet but then use the other staircase or be more careful. So I think that the - - - the Appellate Division got that right.

JUDGE FAHEY: Well, those are straightforward comparative arguments. So - - -

MR. SIMONE: Yeah. Well, there's - - - and also whether it was a lack of reasonable care. There's three parts to a 241(6) claim, not - - - not just two, not just a violation. You have to show notice. You have to show that the violation was a lack of reasonable care because a violation of a code is just some evidence of negligence.

JUDGE FAHEY: Sure.

CHIEF JUDGE DIFIORE: Thank you, sir.

MR. SIMONE: Thank you very much.

CHIEF JUDGE DIFIORE: Counsel.

MR. PERECMAN: Good afternoon, Your Honors.

CHIEF JUDGE DIFIORE: Good afternoon.

MR. PERECMAN: My name is David Perecman, and I

1 represent the plaintiff. This is my associate, Peter
2 Rigelhaupt. I hope if I need him you'll allow him to pass
3 me something if I need it. I think there are three
4 questions here. I don't really think they're questions,
5 but there's three issues. Number one, is it a 240 device.
6 I think all the questions that you just asked sort of
7 answered that. Clearly, it's a 240 device. It's a
8 functional equivalent of a ladder, can't get up and down
9 without it. The second issue that they brought up was
10 whether the activity that he was doing at the time, which
11 was going to get his raincoat, is covered, and, Judge
12 Stein, you covered that adequately in Nicometi. You said
13 it would be illogical if that - - - if doing - - - if one
14 second, you're doing this and another second you're doing
15 that, we turn off the Labor Law. The third issue is only
16 the question of whether there's a question of fact, and for
17 that, we get into a more fact-intensive approach.

18 JUDGE RIVERA: Well, why - - - why isn't there a
19 question of fact? You've got one expert who says the - - -
20 the staircase doesn't meet industry standards. It's - - -
21 the steps are slippery, the nubs are worn. And the other
22 expert says it meets industry standards. There's nothing
23 worn - - - wrong with the - - - the nubs that you can tell
24 from the - - - the photos, and that's all you have
25 available. Why doesn't that then boil down to one expert

1 against the other and that - - - that - - -

2 MR. PERECMAN: Well - - -

3 JUDGE RIVERA: - - - can't be resolved - - -

4 MR. PERECMAN: - - - two reasons - - -

5 JUDGE RIVERA: - - - on summary judgment?

6 MR. PERECMAN: Several reasons. First of all, if
7 you look closely at what the expert says for the defendant,
8 all he keeps saying is it meets industry standards, it
9 meets industry standards. And this court was very clear in
10 Zimmer when they said the industry does not get to set the
11 standards. We set the standards. Secondly, if it violates
12 NYCRR 23-1.7, which it clearly violates, it's either a
13 foreign substance or it's water, and it was on the stairs.
14 They permitted them to use it. It violates OSHA, which
15 doesn't allow the - - -

16 JUDGE RIVERA: This thing on the 240(1), the
17 absolutely liability issue, if one expert is saying the
18 anti-slip measure is the nubs and those aren't enough under
19 these circumstances and they're worn, and the other expert
20 says they're enough and they're not worn, why isn't that a
21 question that - - -

22 MR. PERECMAN: Number one - - -

23 JUDGE RIVERA: - - - cannot be resolved on
24 summary judgment?

25 MR. PERECMAN: Number one is the water. Mr.

1 Glabe never addresses the question of water, and there's no
2 question from the records. Every record said it was
3 raining that day. Even the defendant, DCM - - - DCM, one
4 of the subcontractors, my client's employer, said in their
5 report that - - -

6 JUDGE RIVERA: Well, how is that in his - - - I'm
7 a little confused by - - - what you mean by that. The
8 defendant's expert is saying there are these holes for the
9 water to drain, and then you've got these raised metal nubs
10 that provide traction. How is he not addressing the
11 question of whether or not these steps are slippery?

12 MR. PERECMAN: Well, he may say they provide
13 traction, but the question is were they adequate.

14 JUDGE GARCIA: And it seems to me - - -

15 MR. PERECMAN: And - - - and apparently, they
16 proved inadequate.

17 JUDGE GARCIA: It seems to me that proved
18 inadequate, though, at the Appellate Division is he fell.
19 And we've said, pretty clearly, that that's not the
20 standard.

21 MR. PERECMAN: I don't think - - - if my client
22 just tripped and fell down a perfectly good set of stairs
23 that are neither narrow and steep, and they are narrow and
24 steep, neither worn, nor wet. Steel and wet - - -

25 JUDGE GARCIA: I think - - -

1 MR. PERECMAN: - - - that would be another
2 question. Mr. - - -

3 JUDGE GARCIA: I think other than steel and wet,
4 I think Judge Rivera's getting to is those initial issues
5 are - - - are questions of fact. But to go back to an
6 issue that your adversary may have conceded, what about the
7 idea that if this is a safety device the hazard, this was
8 in Nicometi where it clearly was a safety device, is not
9 one contemplated by the statute, that this is a slip and
10 fall?

11 MR. PERECMAN: Every single department, including
12 cases from this court, have acknowledged that slippery
13 surfaces can be what causes a 240 case. I think in
14 Nicometi there was a reference to Striegel, and in
15 Striegel, they spoke about ice on the roof when he slipped
16 down the roof, and ice on a scaffold.

17 JUDGE GARCIA: But Nicometi, the plaintiff is - -
18 - clearly is what is on - - - is what is categorized as a
19 safety device. He's on stilts, and as I understand the
20 case, slips on ice while on stilts. And we say in that
21 case - - - and while he's working to install, I think,
22 insulation, and we say in that case this is not the type of
23 hazard contemplated by this very different type of
24 scaffolding statute. So how is this different than ice on
25 the floor, water on the stairs?

1 MR. PERECMAN: Because in Nicometi the ice was a
2 wholly separate hazard. The ice was over here. The stilts
3 were there. Here - - -

4 JUDGE GARCIA: But then the stilts go on the ice.

5 MR. PERECMAN: Well, that's why I - - -

6 JUDGE GARCIA: But the rain goes on the stairs.

7 MR. PERECMAN: That's why I thought Nicometi was
8 a placement case. But aside from that, the court held it's
9 a wholly separate hazard, and I believe that was the
10 rationale for the holding. This is not ice somewhere else
11 this - - -

12 JUDGE STEIN: The court said this was an ordinary
13 workplace hazard. So the question is is ice - - - is water
14 sim - - - more similar to ice.

15 MR. PERECMAN: It's - - -

16 JUDGE STEIN: Than - - -

17 MR. PERECMAN: But in - - - but in this case, the
18 water's on the stairs.

19 JUDGE RIVERA: So - - - so - - -

20 MR. PERECMAN: And those stairs become slippery,
21 and they know they become slippery. And the reason we know
22 - - -

23 JUDGE RIVERA: So you're saying this is - - - are
24 you saying that this is like metal scaffolds that - - -
25 that when it's raining are slippery and if you're working

1 on the scaffold you're going to slip?

2 MR. PERECMAN: Absolutely.

3 JUDGE RIVERA: Because they're just slippery so
4 you need something other than just the metal.

5 MR. PERECMAN: And we have acknowledgement of it
6 in the record. We have the regulation - - -

7 JUDGE RIVERA: Okay. But that - - - my point
8 then is that you have one expert who says what these steps
9 have to address with the slippery aspect of metal and wet
10 metal, in this particular case, are these raised nubs, and
11 of course, the holes for the water to go through. And the
12 other expert says yes, and that's enough. Isn't that then,
13 again, a question that you - - -

14 MR. PERECMAN: No.

15 JUDGE RIVERA: - - - cannot resolve on summary
16 jur - - - on summary judgment?

17 MR. PERECMAN: I don't - - - I think if you read
18 his affidavit closely - - -

19 JUDGE RIVERA: He - - - he being who in that?
20 I'm sorry.

21 MR. PERECMAN: Glabe.

22 JUDGE RIVERA: All right.

23 MR. PERECMAN: Their expert. He never says
24 they're enough. What he says is they meet industry
25 standards. In other words, this is what they provide on

1 sites.

2 JUDGE ABDUS-SALAAM: Counsel, wouldn't your
3 argument also be the same no matter what the device would
4 be if there is an accident? Because you said it was
5 obviously inadequate, the stairs was - - - the steel and
6 stairs were obviously inadequate because Mr. O'Brien fell.

7 MR. PERECMAN: Well, he slipped and fell, and
8 there's no question that it was raining that day. In fact,
9 the defendant in their accident report - - -

10 JUDGE ABDUS-SALAAM: So you're saying if it had
11 been a trip and fall we wouldn't be here? Is that what
12 you're saying?

13 MR. PERECMAN: If he had tripped on his own two
14 feet on an otherwise adequate stair, we would not be here.

15 JUDGE STEIN: What if the soles of his - - -
16 somehow the - - - the soles of his shoes were - - - were
17 worn or - - - or maybe somebody had just walked down those
18 stairs with a glass of water and - - - and there was a
19 little bit of water on the stair and they slipped on that?
20 I mean how - - - would we be saying that no matter what
21 happens, if you're going down stairs and you slip - - -

22 MR. PERECMAN: I'm not asking - - - I'm not
23 asking the court to say no matter what happens. But when
24 it's raining all day long and you have defendants, as they
25 did here, who admit we work in the rain. We have no

1 procedures from stopping people from working in the rain.
2 And the very people who supplied the scaffold testified
3 that they do become worn, they do get - - - when they get
4 wet they're out - - - outdoors - - -

5 JUDGE STEIN: But isn't there - - -

6 MR. PERECMAN: - - - and they do get slippery
7 when they're wet.

8 JUDGE STEIN: Isn't it a question of fact as to
9 whether these were worn? One expert says you can't tell
10 that from the photos, and the other one says - - -

11 MR. PERECMAN: Well - - -

12 JUDGE STEIN: - - - never saw the stairs but - -
13 - but they seem fine.

14 MR. PERECMAN: He - - - he actually went a little
15 further. What their expert actually said is they can't get
16 worn from people's boots.

17 JUDGE STEIN: Where did he say that?

18 MR. PERECMAN: However, the person who supplied
19 the scaffold, who's a defendant in this case, said the
20 exact opposite. And it - - -

21 JUDGE STEIN: But why isn't that a question of
22 fact?

23 MR. PERECMAN: Because you - - - you can't just
24 say something in an affidavit and it gets accepted because
25 you said it. Because there's not a single staircase that

1 you're going to walk down - - -

2 JUDGE ABDUS-SALAAM: But isn't that what happened
3 with the plaintiff's expert if - - - with the majority in
4 the First Department? Didn't they accept what the
5 plaintiff's expert said?

6 MR. PERECMAN: They - - - I think what they did
7 was look at the defendant's expert's affidavit and realized
8 that he didn't say anything. All he kept saying is it
9 meets industry standards. He never once said I took a
10 scaffold, when they're wet, they're not slippery. It's not
11 in his affidavit. Neither did he say they weren't worn.
12 He said they're designed not to wear down. On the other
13 hand, we have the exp - - - we have the supplier of the
14 scaffold who says they do.

15 JUDGE RIVERA: So - - -

16 MR. PERECMAN: And may - - - just a - - -

17 JUDGE RIVERA: Is your - - - is your position,
18 though, that they're - - - this is defective or it
19 malfunctions because it's wet? In other words, if it had
20 not been raining that day, totally sunny and hadn't rained
21 for three days, right, hadn't rained for three days, on its
22 face there's nothing wrong with this staircase. Is that
23 your position?

24 MR. PERECMAN: I think it would be a tougher
25 case. I do.

1 JUDGE RIVERA: Why so?

2 MR. PERECMAN: Because then it - - - it's hard to
3 tell from the photographs the degree to which they're wet.

4 JUDGE FAHEY: Well, wouldn't it be harder - - -
5 wouldn't - - -

6 MR. PERECMAN: However, in the First - - -

7 JUDGE RIVERA: But I - - - my hypothetical is
8 they're not wet.

9 MR. PERECMAN: I'm - - - I'm sorry.

10 JUDGE RIVERA: Not wet at all.

11 MR. PERECMAN: The degree to which they're worn.
12 It's hard to tell from the photographs. But here we don't
13 have that circumstance. We know they're narrow. We know
14 they're steep. They're tiny, little stairs. The whole
15 thing is thirty inches wide. It's metal. They have no
16 procedures from keeping you out of the rain. And there are
17 three different places that talk about not using stairs.
18 OSHA, in fact, says, "Slippery conditions on stairways
19 shall be eliminated before the stairways are used to reach
20 other levels." Period, end of sentence. It's 29 CFR - - -

21 JUDGE RIVERA: So - - - so why, then, does the
22 majority say, "Plaintiff is entitled to summary judgment
23 whatever the weather conditions might have been"?

24 MR. PERECMAN: Because I think they're going
25 based on a prior decision that they held in a case called

1 Crimi, C-R-I-M-I, where they said that the mere narrow and
2 steep nature of the stairs was enough. And I would - - -

3 JUDGE RIVERA: They - - - they don't cite that
4 case, and they don't refer to that anywhere.

5 MR. PERECMAN: That's - - -

6 JUDGE RIVERA: This is in the context of talking
7 about the plaintiff's expert's opinion in - - - in his
8 affidavit.

9 MR. PERECMAN: They - - - they don't cite Crimi,
10 but I believe that's the basis of it. It was argued at the
11 oral argument. I know that. And it doesn't matter here.
12 This is unquestionably wet, and there's no question that
13 weather, water, and elevation devices are a problem. If
14 this was a ladder that was wet, no one - - - no one would
15 be asking me, I don't think, these questions.

16 JUDGE FAHEY: So your position - - -

17 JUDGE RIVERA: Does it - - - does it - - -

18 JUDGE FAHEY: So your position is the real
19 question is is this a covered device because if the
20 conditions were the same in an inarguably covered device,
21 one that was listed, then we wouldn't be discussing this at
22 all?

23 MR. PERECMAN: Correct.

24 JUDGE RIVERA: Does - - -

25 MR. PERECMAN: That's what - - - that's what I

1 think. And - - -

2 JUDGE RIVERA: Does it - - - does it matter that
3 he says that when he - - - the plaintiff, that when he
4 takes the first step his foot is landing on the tread and
5 this is where the plaintiff's expert is talking about the
6 treads also being worn? Does that matter?

7 MR. PERECMAN: I - - - I don't - - -

8 JUDGE RIVERA: It's on the tread where one - - -
9 right on the nose, I'm sorry, on the nose.

10 MR. PERECMAN: I don't think it does, but what
11 the defendant's expert said was that the depth of these
12 stairs, which are nine-and-three-quarters inches, are
13 sufficient to tread upon the stairs - - -

14 JUDGE RIVERA: Right.

15 MR. PERECMAN: - - - without putting your foot on
16 the edge. First of all - - -

17 JUDGE RIVERA: That's - - - he didn't say he did
18 that. He said - - - he said - - -

19 MR. PERECMAN: No. He put his foot - - -

20 JUDGE RIVERA: He put his foot on the edge.

21 MR. PERECMAN: Where everybody else puts their
22 foot, and that's why - - -

23 JUDGE RIVERA: But that's my point. Isn't - - -
24 does that make it somehow - - -

25 MR. PERECMAN: No.

1 JUDGE RIVERA: - - - different that he's doing
2 that - - -

3 MR. PERECMAN: No.

4 JUDGE RIVERA: - - - and that he says that's worn
5 and the expert is saying that's worn?

6 MR. PERECMAN: That - - - that's the way every
7 human being goes down stairs, especially if you're a big
8 guy like - - - like my client and you've - - - my foot is a
9 foot long, and I'm not big. I'm sure we could take
10 judicial notice of that.

11 JUDGE RIVERA: I guess my point is if - - - if
12 the anti-slip property is worn at the tread where he puts
13 his foot, regardless of whether or not the anti-slip
14 property isn't worn elsewhere on the step, that he's got a
15 claim?

16 MR. PERECMAN: Inadequate. If - - -

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 Mr. Simone.

19 MR. SIMONE: Thank you. Sorry. A couple of
20 quick points. It wasn't raining at the time of this
21 accident. In fact, it had stopped raining more than four
22 hours ago, and there has never been a concession that there
23 was rain. In fact, in our opposition to 241(6) one of the
24 issues we said is he could have deposited the water himself
25 on his own feet. So - - - and even the Appellate Division

1 - - -

2 JUDGE RIVERA: Are you saying the steps weren't
3 wet?

4 MR. SIMONE: I'm saying that - - -

5 JUDGE RIVERA: That there is a factual issue
6 about whether or not the steps were wet?

7 MR. SIMONE: Well, yes. I think there is a
8 factual issue, and that the Appellate Division itself found
9 itself found there was an issue of notice. Notice of what?
10 What condition? For purposes of the 240 issue, we're - - -

11 JUDGE RIVERA: If the steps are wet, is it
12 defective? Does he have a claim?

13 MR. SIMONE: Not necessarily. I mean things get
14 wet. You know, we're not the insurers of safety, and
15 that's - - - that's well-settled proposition. And
16 accidents can happen under the - - - you know, even the
17 safest of conditions.

18 JUDGE RIVERA: But - - - but isn't his point that
19 if you've got wet steps and don't have effective friction
20 or - - - or traction measures that that is not a safety
21 device? Maybe you could have had something else. Maybe
22 you could have blocked off the staircases so no one uses
23 it.

24 MR. SIMONE: I think that - - -

25 JUDGE RIVERA: But that in and of itself is the

1 violation?

2 MR. SIMONE: It's - - - it's difficult to
3 envision a - - - a greater battle of the experts than here
4 about that on that issue. I mean plaintiff's expert didn't
5 give any specifics. Our expert measured the steps, said
6 what was on them. I mean that's - - - the - - -

7 JUDGE RIVERA: But he is correct that - - - that
8 the expert's affidavit from the defendant's side, both of
9 those affidavits, are relying on industry standards?

10 MR. SIMONE: Well - - -

11 JUDGE RIVERA: He talked - - - I mean the
12 plaintiff does, too, don't get me wrong. But on the
13 defendant's expert's - - -

14 MR. SIMONE: Well, I think that's - - -

15 JUDGE RIVERA: - - - affidavits it's always about
16 these steps and this staircase meets industry standards.

17 MR. SIMONE: I think that's part of the issue, as
18 well. It's also a 241(6) case.

19 JUDGE RIVERA: But we've rejected industry
20 standards, right?

21 MR. SIMONE: That's true. But it's still - - -
22 it's still relevant to show that.

23 JUDGE RIVERA: So that - - - that's not going to
24 be a basis.

25 MR. SIMONE: I think it's still relevant to show

1 that this is - - - this is a state-of-the-art staircase.

2 JUDGE RIVERA: Well, if the - - - if the whole
3 industry is using something that's not appropriate under
4 the law, it's not going to matter, right? That's the point
5 he was - - -

6 MR. SIMONE: I - - - I don't think there's any -
7 - -

8 JUDGE RIVERA: No. Other than that - - -

9 MR. SIMONE: - - - cases based on these.

10 JUDGE RIVERA: - - - what else - - - what else
11 does that - - - where else is that factual dispute? Is it
12 about the nubs? Is that where this - - - what this boils
13 down to?

14 MR. SIMONE: The issue is whether it was proper
15 protection, and I think there's a big dispute on that,
16 whether it's proper protection. And - - - and the
17 Appellate Division - - -

18 JUDGE ABDUS-SALAAM: Whether the staircase is
19 proper protection or whether there is proper protection
20 that is available otherwise?

21 MR. SIMONE: Well, that could be part of it. I -
22 - - I think the jury can dec - - - decide whether there was
23 proper protection under these circumstances. If - - - if
24 it is a 240 device. If it's not, then you're - - - he's
25 relegated to a 241(6), which we're saying he - - -

1 JUDGE RIVERA: But aren't you arguing that even
2 if there isn't a better safety device, tough luck, this is
3 what they get at the worksite?

4 MR. SIMONE: No. No. He - - -

5 JUDGE RIVERA: I mean if there isn't and this is
6 not a proper safety device, you just can't use it. Isn't
7 that the answer under the Labor Law?

8 MR. SIMONE: I don't think that's this case,
9 Judge. There are other - - - there were other staircases
10 available - - -

11 JUDGE RIVERA: But is - - - would that be the
12 appropriate interpretation of the statute?

13 MR. SIMONE: I'm not sure I understand what - - -

14 JUDGE RIVERA: But even if you're arguing there's
15 not a better safety device, that's not what matters. What
16 matters is whether this is a safety device.

17 MR. SIMONE: Well, that's the first issue is
18 whether it's a 240 device. It's still a staircase and he
19 still - - -

20 JUDGE ABDUS-SALAAM: Well, every judge who looked
21 at it - - -

22 MR. SIMONE: - - - has the right to be safe.

23 JUDGE ABDUS-SALAAM: You said that in your
24 opening argument, counsel, and every judge who's looked at
25 this said it was a safety device, yes?

1 MR. SIMONE: Well, even the dissent said that.

2 JUDGE ABDUS-SALAAM: Right.

3 MR. SIMONE: We're saying - - - we're saying that
4 if you look at the case law, it - - - there was a time when
5 - - - it's been inconsistent. There was a time when, no,
6 it wasn't considered an enumerated device based on whether
7 it was being used as a passageway. We're saying you got to
8 look at what it was - - - what it was being used for at the
9 time to decide if there was - - - if it was a device under
10 240, a structure - - -

11 JUDGE ABDUS-SALAAM: Well, even - - - even under
12 the dissent's view that it was a safety device, the dissent
13 found there was an issue of fact - - -

14 MR. SIMONE: Correct.

15 JUDGE ABDUS-SALAAM: - - - about whether it was
16 adequate.

17 MR. SIMONE: What we're saying wasn't a safety
18 device because it wasn't being worked from, and that's what
19 we believe the statewide test should be to give some
20 consistency. And the Appellate Division decision clearly -
21 - -

22 JUDGE FAHEY: Well, you're saying it was a
23 passageway, right?

24 MR. SIMONE: He was using it as a passageway.
25 There are circumstances that they - - -

1 JUDGE FAHEY: Well, I'm just quoting from your
2 brief. You said a passageway from one place to work to
3 another. That - - - that's the core of your argument,
4 right?

5 MR. SIMONE: Well, his work was on a different
6 level. He was just getting a jacket.

7 JUDGE FAHEY: No. I just - - - is that the core
8 of your argument?

9 MR. SIMONE: Yes.

10 JUDGE FAHEY: Okay.

11 MR. SIMONE: He was using it as a passageway.
12 But our - - - our - - -

13 JUDGE FAHEY: Okay.

14 MR. SIMONE: Our position is the test should be
15 examine its function at the time. There may be certain
16 times when working from the stairs may be the right thing.
17 A person who's installing carpet is not going to be working
18 from a scaffold. But someone who's installing sheetrock
19 above a stairs may - - - should have been - - - maybe they
20 should be given a scaffold, in which case they weren't
21 given proper protection.

22 JUDGE STEIN: But we don't - - - we don't apply -
23 - -

24 MR. SIMONE: Because staircases are tricky.

25 JUDGE STEIN: - - - analysis to a ladder, though,

1 do we?

2 MR. SIMONE: A ladder is an enumerated device. I
3 think it's a different - - -

4 JUDGE STEIN: Well, I know, but if - - - if we
5 say stairs are - - - are a safety device, then - - - then
6 we're including that - - - we're analogizing that to
7 ladders, aren't we?

8 MR. SIMONE: But stairs - - - but stairs, I
9 think, are excluded for a reason because stairs are nothing
10 - - - they're - - - they're commonplace. They're in homes.
11 They're in buildings. You don't normally picture them as a
12 safety device.

13 JUDGE FAHEY: Of course, that's why we draw the
14 temporary-permanent distinction, right?

15 MR. SIMONE: Right. But I think - - - but that's
16 even a misnomer in some respects because this staircase was
17 there for years. Is that temporary? I mean it was - - -
18 you know, I think - - - I think it should be safe under the
19 circumstances regardless of how long it's there.

20 JUDGE RIVERA: The construction site is there for
21 years. The - - - the risk is there for years. I mean that
22 - - - I don't know that that's - - -

23 MR. SIMONE: Well, this staircase was there for a
24 year after.

25 JUDGE RIVERA: - - - making your point, right?

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MR. SIMONE: Is was there for a year after.

JUDGE RIVERA: It's not necessarily making your
point.

MR. SIMONE: Yeah.

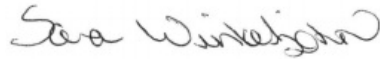
CHIEF JUDGE DIFIORE: Thank you, counsel.

(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 People v. The Port Authority of New York and New Jersey, No. 27 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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