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COURT OF APPEALS

STATE OF NEW YORK

MANUEL DE LA CRUZ, ET AL.,

Appellants,

-against-

No. 134

CADDELL DRY DOCK & REPAIR CO.,
INC., ET AL.,

Respondents.

20 Eagle Street
Albany, New York 12207
May 30, 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.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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David Rutt
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 134.

2 Counsel, you want any rebuttal time?

3 MR. MURPHY: Yes. If I could reserve three
4 minutes for rebuttal, please.

5 CHIEF JUDGE LIPPMAN: Three minutes, sure. Hold
6 on one second. Let counsel get seated, and then you'll
7 start.

8 (Pause)

9 CHIEF JUDGE LIPPMAN: Okay, counselor, go ahead.

10 MR. MURPHY: May it please the court, James
11 Emmet Murphy for the plaintiffs/appellants.

12 Prior to the lower court's determination in this
13 case, every court ever to have addressed the issue of
14 whether vessel repair constituted public work held that it
15 did. That included courts in New York State, the United
16 States Supreme Court.

17 CHIEF JUDGE LIPPMAN: What does "fixed" mean?

18 MR. MURPHY: Well, "fixed" is a word that had
19 been used in dictionary definitions of public work in the
20 past. This court made reference to it in Matter of Erie
21 County. It was made reference to - - -

22 JUDGE SMITH: This court or the Appellate
23 Division?

24 MR. MURPHY: It was the Appellate Division that
25 was affirmed on the opinion below. It was also made

1 reference to it various other times in the past when
2 public works were being discussed. However, in all of
3 those instances, every single instance cited in the papers
4 with the exception of a 1980 opinion letter of the
5 Michigan Attorney General, where the word "fixed" was
6 used, it was of no moment to - - -

7 CHIEF JUDGE LIPPMAN: What does Brukhman stand
8 for in the case?

9 MR. MURPHY: Well, Brukhman stands for the
10 proposition that if you're not an employee you're not
11 entitled to receive prevailing wages; if you're not
12 working for a contractor, you're not entitled to perceive
13 - - - receive prevailing wages; and if you're not working
14 on a public works project, you're not entitled to receive
15 prevailing wages.

16 JUDGE GRAFFEO: So is the nature of the work
17 that's being undertaken on the vessel critical - - -

18 MR. MURPHY: That's absolutely critical.

19 JUDGE GRAFFEO: - - - or is it any work at all
20 that goes on on a boat?

21 MR. MURPHY: No, there - - - there could be work
22 that would go on on a boat. Somebody walking up and - - -
23 and putting down a pencil sharpener on a boat would not be
24 engaged in public work. Somebody using construction trade
25 skills, like the plaintiffs here, the plaintiffs have

1 submitted affidavits that they were doing structural
2 ironwork - - -

3 JUDGE GRAFFEO: So I guess my question was, if
4 somebody's painting a boat - - -

5 MR. MURPHY: Yes.

6 JUDGE GRAFFEO: - - - is that always going to
7 fall under the labor law?

8 MR. MURPHY: If they're painting structural - -
9 -

10 JUDGE GRAFFEO: I mean, it could be just
11 ordinary maintenance of the boat, not necessarily any kind
12 of new construction.

13 MR. MURPHY: Well, the - - - the test would be
14 whether the work that they're performing is something that
15 constitutes construction-like labor, and painting of a
16 building, if somebody came in and said, this room, and
17 painted the room, that would be subject to payment of
18 prevailing wages.

19 CHIEF JUDGE LIPPMAN: So where does this idea
20 come from that - - - that if you're - - - if you're not on
21 land it can't be - - -

22 MR. MURPHY: Well, as Justice Oliver Wendell
23 Holmes stated in Title Guaranty & Trust, it's an empirical
24 understanding that public works are normally fixed,
25 buildings, roads, bridges are normally fixed objects, but

1 there is no logical basis for that other than the fact
2 that that word has appeared in dictionaries from time to
3 time when defining the word "public works". There's no
4 reason why, as - - - as the workers here did, when they
5 performed the exact same work for different employers who
6 were not working on boats, they received prevailing wages.

7 CHIEF JUDGE LIPPMAN: So did the - - - the
8 Appellate Division misread this Brukhman case?

9 MR. MURPHY: Our contention is that they did.
10 The Brukhman case was mostly related to individuals who
11 were employed - - - who were not employed as a means of
12 continuing their benefits - - - continuation of their
13 benefits from welfare programs. That was the main thrust
14 of Brukhman. Brukhman very specifically stated that the
15 court need not parse the individual allegations of the
16 plaintiffs there to determine whether they constituted
17 public work since some of the work was performed by the
18 plaintiffs in Brukhman did constitute carpentry and
19 electrical work, similar to the work that was done by the
20 plaintiffs here on these vessels.

21 JUDGE READ: Is it - - - is it kind of - - - I
22 kind of got the impression that it was - - - it was
23 typical not to pay workers in public vessels prevailing
24 wages. Am I wrong about that or what - - - what's
25 customary?

1 MR. MURPHY: Well, the only determinations that
2 have ever been made to this effect are under the federal
3 Davis-Bacon Act where you have to pay workers performing
4 vessel repairs prevailing wages, and under New York State
5 Law, prior to the Appellate Division's holding here where,
6 under Falk v. Gerosa, 1964 - - -

7 JUDGE SMITH: Is - - - is there - - - in the
8 record, is there evidence of a custom of the industry? I
9 thought - - - I think the owner of this - - - of this
10 company said he never paid it before.

11 MR. MURPHY: Oh, that's correct. The - - -
12 during the several decades that the owner of Caddell has
13 been working for them, they've never paid prevailing
14 wages.

15 JUDGE SMITH: Is that - - - is that typical of
16 this industry or do you just not know?

17 MR. MURPHY: To be honest with you, it's - - - I
18 don't know; it's not in the record. I do know that as a
19 matter of law on federal projects prevailing wages are
20 paid. It doesn't appear that the controller has enforced
21 the mandate that was given to it by the Article 78
22 decision in Falk v. Gerosa.

23 CHIEF JUDGE LIPPMAN: So are the federal and the
24 state laws the same?

25 MR. MURPHY: The federal and the state laws are

1 substantially identical. The goal of both laws is to
2 ensure that workers are provided with a sufficient
3 standard of living to ensure that they are being treated
4 fairly and equally by the municipal subdivisions providing
5 these contracts.

6 JUDGE GRAFFEO: Do you know, under the federal
7 statute, if somebody's working on the boat engine, is that
8 considered construction?

9 MR. MURPHY: Well, the - - - the work of
10 machinists is work that is included within the prevailing
11 wage schedules of State of Washington, which is the only
12 other state that we were able to determine has made a
13 determination one way or the other as to whether these
14 prevailing wages have to be paid. So machinists' work in
15 that sense - - -

16 JUDGE GRAFFEO: Is there any question in this
17 case that these workers were engaged in construction? Is
18 that - - -

19 MR. MURPHY: The workers - - -

20 JUDGE GRAFFEO: - - - that the contention in
21 this case?

22 MR. MURPHY: No. The - - - the workers that we
23 have spoken to that the president of Caddell testified
24 about were engaged in carpentry, were engaged in
25 electrical work, pipe fitting, structural ironwork,

1 sandblasting, painting, all of which are traditional
2 construction trades with prevailing wage rates set forth
3 in the schedule.

4 JUDGE GRAFFEO: So the real issue in this case
5 is the "fixed".

6 MR. MURPHY: The - - - basically, the only issue
7 in this case is the use of the word "fixed".

8 JUDGE GRAFFEO: But then a vessel can be viewed
9 as a public work.

10 MR. MURPHY: Correct. And whether - - - whether
11 as a matter of fundamental justice it's fair that a worker
12 performing the exact same work in a public building across
13 the street is entitled to get paid prevailing wages, but
14 when he goes onto a vessel, just because the word "fixed"
15 has been included in dictionary definitions before - - -

16 JUDGE SMITH: Well, I mean - - -

17 MR. MURPHY: - - - he's not entitled to get - -
18 -

19 JUDGE SMITH: - - - is there - - - is there a
20 policy reason to - - - to be less ready to extend the
21 prevailing wage to vessels because if - - - if you - - -
22 if it gets too expensive you can sail your vessel into the
23 neighboring jurisdiction.

24 MR. MURPHY: Well, that - - - that very reason
25 is why prevailing wages need to be paid on these types of

1 projects. The purpose of most prevailing wage laws, as
2 Representative Bacon said in passing the Davis-Bacon Act,
3 is to prevent contractors from bringing in out-of-state
4 labor that's paid at a lower rate to perform work. Here,
5 it's the exact same thing except in this case the work is
6 being brought out of state to be performed. If the
7 controller is - - -

8 JUDGE SMITH: So this is - - - this is a way of
9 keeping all the jobs for New Yorkers? That sounds like
10 it's a problem.

11 MR. MURPHY: Well, no. If - - - every
12 contractor bidding on these contracts, whether they're a
13 New York contractor, a Maryland contractor or Virginia
14 contractor, has to pay the same exact wage rate, then all
15 contractors will be on a level playing field. There will
16 be no benefit to bringing the vessel out of the
17 jurisdiction to use labor that's paid at a lower rate.
18 That's the entire purpose that we have prevailing wage
19 laws in the first place.

20 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll have
21 your rebuttal time. Thank you.

22 MR. SINGLETON: May it please the court, I'm
23 Richard Singleton. With me is Tony Mingione. We're
24 counsel for Caddell.

25 CHIEF JUDGE LIPPMAN: Counsel, from a policy

1 perspective, what - - - what is the difference whether
2 it's on a vessel but the same kind of work; why - - -

3 MR. SINGLETON: It's - - -

4 CHIEF JUDGE LIPPMAN: Why shouldn't it be the
5 same pay? What's the difference?

6 MR. SINGLETON: The huge difference is that
7 we're dealing with a constitutional provision and a
8 statute that has history, and we're trying to interpret
9 what that statute means.

10 CHIEF JUDGE LIPPMAN: So you - - - you contend
11 that - - - that that precedent or that history mandates
12 anything on a vessel as not being prevailing wage?

13 MR. SINGLETON: That mandates anything that's a
14 commodity purchased by the City that then gets repaired is
15 not prevailing wage. Our position is, and I think the
16 court's position was, Your Honors' position was in
17 Brukhman, that if it's construction as indicated in the
18 statute, heavy, highway, industrial, buildings, things
19 that by their nature - - -

20 CHIEF JUDGE LIPPMAN: Your adversary says that's
21 a misreading of - - - of Brukhman.

22 MR. SINGLETON: Well, I would - - - I would - -
23 -

24 CHIEF JUDGE LIPPMAN: And what about the Holmes
25 case? What's that about?

1 MR. SINGLETON: Well, that's - - - that's Title
2 Guaranty, Your Honor. That's a federal case.

3 CHIEF JUDGE LIPPMAN: Why - - - why is that not
4 analogous to us if your - - -

5 MR. SINGLETON: Very important - - - that's very
6 important. The Holmes case was decided under a federal
7 procure - - - bond statute, essentially. And that statute
8 was enacted, at least that decision was made after New
9 York had already enacted its prevailing wage statute. New
10 York was first. After - - - in that particular case, the
11 U.S. Supreme Court held that prevailing wages should be
12 applied to workers who construct a vessel. Now, it makes
13 complete sense from the federal perspective, and if you
14 look at the federal test, now, of public work, it's
15 basically complete functionality. If it's a public
16 contract issued by the federal government - - -

17 CHIEF JUDGE LIPPMAN: But why doesn't it make
18 sense for the State?

19 MR. SINGLETON: Because the State can't export
20 its sovereign authority to foreign ship repair yards.
21 Here - - - here's the rub: this court has already held
22 that Section 220 of the Labor Act does not apply to
23 foreign workers building things in foreign - - - or in
24 foreign states.

25 JUDGE GRAFFEO: So what do you do - - -

1 JUDGE SMITH: By foreign, like Maryland?

2 MR. MURPHY: Yeah, like Maryland - - -

3 JUDGE GRAFFEO: What do you do - - -

4 MR. MURPHY: Yeah, like Maryland.

5 JUDGE READ: Or New Jersey.

6 JUDGE GRAFFEO: - - - is the ramification if we
7 agree with your adversary?

8 MR. SINGLETON: The ramification would be - - -
9 that if you agree with the adversary? First of all, that
10 that would probably be uncons - - - would be certainly a
11 violation of this court's prior decision.

12 CHIEF JUDGE LIPPMAN: Okay, but what's the
13 practical consequence?

14 JUDGE READ: Do you just sail off to New Jersey?

15 MR. SINGLETON: Yeah. What happens is, and
16 what's happening now is that the New York yards have to
17 compete with the yards in the other states because a
18 vessel is mobile; it can go anywhere it wants to go to be
19 repaired. New York purchases it; it purchased it from a
20 foreign seller, another state, a seller in another state.
21 It was made in another state; it was brought to New York.
22 The fundamental point is if they pur - - - if the City
23 purchases it, like it does fire trucks, like it does
24 whatever, any - - - anything that has wheels and rolls
25 around or goes on the water, it can send it back to

1 wherever it purchased it to be serviced, maintained,
2 repaired. There is no prohibition in the law that forbids
3 that from being done.

4 JUDGE PIGOTT: The constitution wants to pay - -
5 - it says, if you're going to use - - - and I'm
6 paraphrasing. If you're going to use tax dollars, we want
7 to make sure people are paid fairly, and we want them to
8 pay a prevailing wage. So if you take all of the stuff
9 away - - - you know, you can argue about Brukman and the
10 other cases. The fact of the matter is, as your opponent
11 argues, a guy picks up a wrench and he's working on a - -
12 - on a boiler in a building that's owned by Caddell, he -
13 - - prevail - - - prevailing wage, assuming he's not an
14 employee, but when he walks over on the wharf and gets on
15 the boat, his - - - the price of his - - - the value of
16 his work goes down.

17 MR. SINGLETON: No, no, Your Honor, no, because
18 the building owned by Caddell would not be a public works.

19 JUDGE PIGOTT: Well, pardon me. Put him in a
20 public work, but my point is - - -

21 MR. SINGLETON: Yeah, if he puts - - -
22 absolutely, you're right. If he puts a wrench on public
23 works - - -

24 JUDGE PIGOTT: And - - - and we - - - isn't the
25 purpose of our constitution to take care of our workers

1 and to make sure that people don't exploit their labor by
2 paying them less than a prevailing wage?

3 MR. SINGLETON: To take care of New York
4 workers, yes. And if - - -

5 JUDGE PIGOTT: All right. So - - - so you can
6 threaten to go to New Jersey, you can - - - you can say
7 we'll go to Canada, that's for the legislature to decide
8 or, I guess, the people of the state of New York if they
9 want to change their constitution. But it's been - - -
10 seems pretty clear that we're saying if you're going to -
11 - - if you're going to take taxpayer money, you gotta pay
12 a prevailing wage.

13 MR. SINGLETON: Well, no, only on public works,
14 Your Honor.

15 JUDGE PIGOTT: Right.

16 MR. SINGLETON: And that's the - - - the
17 municipality purchase world divides up into two broad
18 categories.

19 JUDGE READ: You're saying this is a commodity.

20 MR. SINGLETON: Yes, exactly right, it is a
21 commodity. It was purchased by the City; it wasn't built
22 here in New York.

23 JUDGE SMITH: What - - - what's a commodity?
24 The vessel?

25 MR. SINGLETON: Yes, the vessel was a commodity,

1 as a fire truck. We don't - - - we don't make our fire
2 trucks here; we buy them somewhere else and bring them
3 here. We don't make our subway cars here; we buy them
4 from Japan or someplace else and bring them here. The
5 Staten Island Ferry was made in Wisconsin; the ferries are
6 built in Wisconsin. I think the fireboats are made in
7 Florida. None of those are constructed in New York using
8 New York labor; they're built somewhere else. So the
9 City, under its procurement law, has the absolute right to
10 - - - when it wants to repair it, to send it anywhere it
11 wants. My point is repairing a commodity is not public
12 works. If you go repair an office building, public works.
13 You repair a boiler - - - you repair a boiler in an
14 office building, it's public works. If you plant a tree
15 to landscape an office, I submit that's public works. If
16 you put communications lines in an office building, that's
17 public works.

18 CHIEF JUDGE LIPPMAN: Is that - - - is that
19 fair, this distinction you're making - - -

20 MR. SINGLETON: Yes, it's fair, Your Honor.

21 CHIEF JUDGE LIPPMAN: - - - along the lines that
22 Judge Pigott was asking about the whole purpose of the
23 constitution?

24 MR. SINGLETON: Well, the purpose - - -

25 CHIEF JUDGE LIPPMAN: Why is that fair?

1 MR. SINGLETON: It's not the whole purpose of
2 the constitution. It's an - - -

3 JUDGE GRAFFEO: Well, the purpose is to ensure
4 that there's a prevailing wage for people who are working
5 in New York, no - - -

6 MR. SINGLETON: Yeah, because - - - because if
7 you're - - -

8 CHIEF JUDGE LIPPMAN: - - - on public works?

9 MR. SINGLETON: In public works, exactly. And
10 the reason why public works - - -

11 JUDGE GRAFFEO: But why is it fair that if you
12 step over onto the boat, you don't get prevailing wage,
13 and if you step back onto the land, you do?

14 MR. SINGLETON: Because it's a commodity, Your
15 Honor. That's - - - that's basically it; it's a
16 commodity.

17 JUDGE GRAFFEO: Why can't - - - why can't it be
18 transformed into a public work once the City buys it?

19 MR. SINGLETON: Well, because this court has
20 never held that anything like that is a public work, and -
21 - - and it's still been purchased as a commodity. And
22 public works, if you look at the history of it - - - I
23 mean, this court, in Brukman, went to great pains to look
24 at what constitutes a public work, and everything they
25 cited were things attached to the land, fixed to the land.

1 And the reason for that was that evil - - - that statute
2 was - - - that the prevailing wage statute was designed to
3 address wasn't commodities being purchased and repaired;
4 it was buildings and foreign labor, labor from out of
5 state coming into New York.

6 JUDGE RIVERA: But the comedies - - -
7 commodities, excuse me, that you're - - - "commodities"
8 you're referring to, all of your examples are commodities
9 that are used here. We don't send them to Florida to use
10 them there; they're used here.

11 MR. SINGLETON: It doesn't - - - but that - - -
12 it doesn't matter where it's used though, under the test.
13 What matters is - - - public work has been given a narrow
14 definition by this court and by the Appellate Division
15 courts in the state. And the constitutional convention -
16 - -

17 CHIEF JUDGE LIPPMAN: Yeah, but you're using
18 this term "commodity" and saying that's the reason that
19 it's fair. Put aside the term; why is it fair that when
20 you step onto the boat - - - I just don't get the - - -
21 the concept. I understand your legal parsing and saying
22 that if it's fixed it doesn't mean boat. I'm asking you
23 policy. Why is - - - is that right? If the purpose of
24 the constitutional provision is to protect people who work
25 in New York on public works in the broadest sense, put

1 aside technical definition, what's right about what you're
2 advocating?

3 MR. SINGLETON: It's - - - the statute was
4 designed to protect workers in New York from out-of-state
5 people coming in.

6 CHIEF JUDGE LIPPMAN: So it doesn't prote - - -
7 now - - - okay, now we're getting it finer. So - - - so
8 when you - - - when you work on the boat or even it's
9 right off the land, that doesn't protect New York workers
10 - - -

11 MR. SINGLETON: I'm sorry, Your Honor.

12 CHIEF JUDGE LIPPMAN: - - - even though you're
13 doing that work in New York?

14 MR. SINGLETON: If you're doing the work in New
15 York on the boat, the workers get their wage, but not
16 prevailing wage because it's not public works. If they go
17 work - - -

18 JUDGE SMITH: You're - - - you're saying that
19 you can't - - - that if the - - - if the item is mobile,
20 you can't really protect the New York worker because they
21 can move the item out of state?

22 MR. SINGLETON: That's right, and they will. If
23 prevailing wages are applied to New York's purchases of
24 commodities and the repairs of those commodities - - - by
25 the way, there's hundreds of contracts. You can go on the

1 New York Office of General Service sites and see these.

2 JUDGE GRAFFEO: Isn't - - - isn't that somewhat
3 their headache then because they may get their prevailing
4 wage on this job, but then these laborers may not have
5 nearly as much work in the future?

6 MR. SINGLETON: No, I think I - - -

7 JUDGE GRAFFEO: I guess they've made that
8 judgment call.

9 MR. SINGLETON: I think it's a public policy
10 against this court finding repair of mobile commodities
11 such as vessels to be public works.

12 JUDGE PIGOTT: Was that - - - was that the argu
13 - - - is that the grounds upon which the lower courts made
14 their decision? They said that these are not - - - that
15 these are commodities?

16 MR. SINGLETON: Yeah, that - - - they focused on
17 this court's decision in Brukhman. They focused on - - -

18 JUDGE PIGOTT: Right. I don't - - - I don't
19 remember them saying it's - - - you know, it's like a fire
20 truck.

21 MR. SINGLETON: I - - - I'm sure they mentioned
22 commod - - - whether they commodity or not, but I believe
23 - - - I believe they drew the distinction between things
24 that weren't fixed and things that were purchased. But
25 certainly, that's been argued in this case.

1 JUDGE SMITH: You - - - the reason for the
2 difference between fixed and mobile items becomes somewhat
3 clearer from your argument than it does from the Appellate
4 Division's decision. You agree with that?

5 MR. SINGLETON: Well, I - - - I don't want to
6 criticize the Appellate Division, Your Honor.

7 JUDGE SMITH: Take it as a compliment to your
8 argument.

9 MR. SINGLETON: I do see at least one of the
10 justices that sat on the Appellate Division has not
11 participated.

12 CHIEF JUDGE LIPPMAN: Take what you can get,
13 counselor.

14 MR. SINGLETON: But the fundamental point is
15 that the constitutional convention and the delegates and
16 the statute focused on people who come into New York and
17 build things in New York. If you're a contractor coming
18 in, you have to pay the same wage, the prevailing wage, as
19 our New York folks would get on the job. That's - - -
20 that's kind of important. But if you have a mobile
21 commodity and could take it anywhere, you - - - if you
22 define public works as including that mobile commodity,
23 you're going to have every boat in New York heading to
24 Virginia and other places than New York.

25 CHIEF JUDGE LIPPMAN: Okay, counsel, let's hear

1 what your adversary has to say about that.

2 Counsel, so your - - - your adversary says that
3 if you pay them on the boat you're not promoting - - -
4 protecting New York jobs.

5 MR. MURPHY: Well - - -

6 CHIEF JUDGE LIPPMAN: Why - - - why is - - - why
7 is that not right?

8 MR. MURPHY: I - - - I think it's very clear - -
9 -

10 CHIEF JUDGE LIPPMAN: If it's a commodity, you
11 don't protect New York jobs? Go ahead.

12 MR. MURPHY: I think it's very clear that you
13 are protecting New York jobs by - - -

14 CHIEF JUDGE LIPPMAN: How? Tell us exactly how.

15 MR. MURPHY: - - - requiring the payment of
16 prevailing wages. When the contracting agency puts out a
17 request for proposal, included in the bid package, if
18 there is a prevailing wage schedule as there were in most
19 of the contracts at issue here, if every contractor sees
20 the prevailing wage schedule, says I have to pay sixty
21 dollars an hour to electricians on this contract, if I
22 sign up to the contract, I have to pay that wage, whether
23 I do it in New York or in New Jersey or in Maryland, once
24 you sign the contract and take on that obligation - - -

25 JUDGE SMITH: Wait a minute. Are you - - - are

1 you saying that if they built - - - that if they did this
2 work in Maryland they would still be governed - - -
3 governed by New York's prevail - - - prevailing wage law?

4 MR. MURPHY: If it's part of the pre-bid package
5 - - - if the wages that are required under the contract
6 are included in the contract and the contractor signs the
7 contract saying, yes, I'm going to pay sixty dollars an
8 hour - - -

9 JUDGE SMITH: Even - - - even if the contract
10 contemplates that the work will be done in Maryland?

11 MR. MURPHY: Well, the contract doesn't
12 contemplate any particular location for the work based on
13 the nature of this - - -

14 JUDGE SMITH: Well, you - - - I'm - - - you're
15 talking about the - - - how - - - what particular contract
16 might exist. But in principle, if - - - on your theory,
17 is - - - what is to prevent a New York municipality from
18 saying, I'm sick of these very expensive contractors, I'm
19 going to go get my sh - - - my vessels repaired in
20 Maryland?

21 MR. MURPHY: Well, the exact same argument could
22 be made for a school in Oneida that has decided they don't
23 want to pay prevailing wages when having a build - - -

24 JUDGE SMITH: Yeah, but it's hard to send - - -
25 it's hard to send a school to Maryland.

1 MR. MURPHY: If you have modular buildings that
2 you decide to create in Pennsylvania and then ship them to
3 New York rather than building them in New York, if that's
4 the case - - -

5 JUDGE SMITH: You - - - you would agree that - -
6 - that a vessel is, on the whole, somewhat more mobile
7 than a building?

8 MR. MURPHY: That - - - that would be true, yes.
9 But the nature of a commodity isn't really described
10 anywhere. If this - - - if the unified court system
11 decides to go purchase that office building across the
12 street, they've purchased that in the flow of commerce; it
13 wasn't built for a public entity.

14 JUDGE PIGOTT: If Albany - - - if the City of
15 Albany wants to buy fire trucks - - -

16 MR. MURPHY: Yes.

17 JUDGE PIGOTT: - - - and there's a fire truck
18 company up in, I think, Utica or someplace, do they - - -
19 do that have to insist that the manufacturer of the fire
20 truck pay the prevailing wage?

21 MR. MURPHY: Well, the question there would be
22 whether it engages construction-like labor, as this court
23 said in *Twin States*. As a matter of law - - -

24 JUDGE SMITH: You're - - - you're saying if it's
25 construction, yes?

1 MR. MURPHY: No, I would say that a fire engine
2 does not constitute construction.

3 JUDGE SMITH: Okay.

4 MR. MURPHY: But as a matter of New York law,
5 shipbuilding does constitute construction as set forth in
6 Navigation Law. And as this court stated in Twin States,
7 when construction or construction-like labor is used in a
8 contract which is for the benefit of the public, led by a
9 public agency, that constitutes public work, which
10 requires the payment of prevailing wages. All of those
11 conditions are met here. So the - - - other than the fact
12 that the word "fixed" has appeared from time to time in
13 dictionary definitions, there's no basis for finding that
14 this work didn't require the payment of prevailing wages.

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

17 (Court is adjourned)

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

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Manuel de la Cruz, et al. v. Caddell Dry Dock & Repair Co., Inc., et al., No. 134 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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