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COURT OF APPEALS

STATE OF NEW YORK

FABRIZI,

Respondent,

-against-

No. 15

1095 AVENUE OF THE AMERICAS, LLC,

Appellant.

20 Eagle Street
Albany, New York 12207
January 9, 2014

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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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 15, Fabrizi.
2 Counsel, do you want any rebuttal time?

3 MR. ZEMANN: Yes, I would, Your Honor. Two
4 minutes.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
6 ahead.

7 MR. ZEMANN: Thank you, Your Honor. May it
8 please the court, Dan Zemann for the appellants, the
9 defendant contractors.

10 The electrical assembly, including the
11 conduit that fell on the plaintiff, was a complete
12 structure before the plaintiff worked on it. It
13 contained components, one of which is claimed to have
14 been a device of the kind under 240 that affords
15 protection to workers from elevated risks. That is
16 not the case.

17 A coupling that holds a conduit in place
18 that has been there a week at least before the
19 plaintiff works on it, is not one of the devices of
20 the kind that is either within the statute or
21 contemplated by it.

22 JUDGE PIGOTT: Where is it on that exhibit?
23 The coupling we're talking about.

24 MR. ZEMANN: It's not in there, Your Honor.
25 It's up at the top of the ceiling.

1 JUDGE PIGOTT: Oh, far - - - farther?

2 MR. ZEMANN: Yes, you cannot see it. But
3 there is another example of the compression-type
4 coupling below the pencil box. You can see it there.
5 That's - - - that's what is affixed to the ceiling.

6 The reason that it is not part of one of
7 the protected devices is simply, if we, by analogy,
8 look at the Wilinski case, which had to do with pipes
9 that were running up from the floor to the ceiling,
10 and it was a case involving the - - - the height
11 differential. But one of the points of that case was
12 that it went and it fell on the plaintiff, because he
13 was working next to it.

14 If you believe this plaintiff's argument,
15 the couplings or devices that held that pipe to the
16 wall would be safety devices under the statute.

17 CHIEF JUDGE LIPPMAN: Why wouldn't they be
18 safety devices?

19 MR. ZEMANN: Because they were installed
20 yesterday, a month ago, ten years ago, twenty years
21 ago. How could it - - - and this leads into the
22 foreseeability argument - - - how could a contractor
23 on this site foresee that that pipe would fall
24 because of the failed coupling? This is not a
25 situation like in Wilinski, where the plaintiff said,

1 I think that there should have been ropes that held
2 that pipe to the wall. And - - -

3 CHIEF JUDGE LIPPMAN: Yeah, but wouldn't
4 common sense tell you that - - - that - - - that gee,
5 this could lead to something falling and somebody
6 being hurt?

7 JUDGE SMITH: What's unforeseeable, in
8 other words?

9 MR. ZEMANN: Was it foreseeable when the
10 electricians were putting in these conduits
11 throughout the entire multi-story structure that it
12 was going to create an elevation-related risk, such
13 that one of the enumerated safety devices in the
14 statute, like a rope, a hoist, or something - - -

15 JUDGE SMITH: That - - - yeah.

16 MR. ZEMANN: - - - was going to have to be
17 used weeks later.

18 JUDGE SMITH: If - - - if you assume that
19 they used a low-grade kind of - - - of coupling,
20 compression instead of setscrew coupling that they
21 shouldn't have used, isn't it foreseeable that maybe
22 that's going to fall on someone and hurt him?

23 MR. ZEMANN: There's no - - - there's no
24 proof of that, Your Honor.

25 JUDGE SMITH: But I guess - - - well, let -

1 - - let me ask you this. Do - - - assume it is
2 foreseeable, isn't your other - - - doesn't your
3 argument still stand independently that if - - -
4 whether it's foreseeable or not, you say you've got
5 to have a - - - that a structural element doesn't
6 count; you've got to have a safety device for - - -
7 that's intended for purposes of this - - - this
8 endeavor.

9 MR. ZEMANN: Exactly. Exactly my point.
10 This was part of the electrical assembly of this
11 unit. The - - - the coupling that was used, for ill
12 or not, was a decision made relative to that. It was
13 not something that was taken from somewhere else,
14 like the statute - - - the safety device, taken to it
15 to protect the worker.

16 JUDGE PIGOTT: Do we know when this thing -
17 - - this coupling was installed?

18 MR. ZEMANN: It was at least a week before,
19 but exactly when, no.

20 The - - - the - - -

21 CHIEF JUDGE LIPPMAN: Is your position,
22 counsel, consistent with the statutory purpose here?
23 In other words, where - - - what's the dividing line
24 between where someone could get hurt and you should
25 have realized it, and what happened here?

1 MR. ZEMANN: It's a - - - it's a temporal
2 analysis and it also has to do with the completed
3 structure aspect of the case. This is a completed
4 structure.

5 A much more extreme example of this was in
6 a First Department case of Marin, where the plaintiff
7 was installing drain pipes on the outside of the
8 building, and complained to his foreman that some of
9 the fasteners that he, in fact, was using, that had
10 been used by his same company earlier above him, were
11 falling, and one did fall him and struck him, and the
12 First Department said that it was a completed
13 structure even though that construction was still
14 going on.

15 In our case, we have this device - - - this
16 apparatus that's in place for at least a week,
17 probably longer, but we - - - we have to stay within
18 the week.

19 CHIEF JUDGE LIPPMAN: It's in place for a
20 week, no protection.

21 MR. ZEMANN: That's one of the aspects.
22 Another is that it's a completed structure. If - - -
23 it's part of the building. It is complete; it is not
24 something that we - - - like I said before - - -
25 we're going to take - - -

1 CHIEF JUDGE LIPPMAN: What about the work
2 that this guy was doing? What - - - how does it
3 relate to the work that was being done, if it's
4 totally completed?

5 MR. ZEMANN: Well, he was doing a change
6 order. They came in later to - - - to - - - to do
7 something else to it.

8 JUDGE SMITH: It - - - it could be in place
9 for a week, and still be a safety device, couldn't
10 it? I mean, you could safe - - - you could have - -
11 - I - - - I assume, you could be doing a job for
12 three weeks, and has the same safety device in place.

13 MR. ZEMANN: Sure, you could have a
14 scaffold up there for a falling worker case, or you
15 could have - - -

16 JUDGE SMITH: So you're - - - so you're - -
17 - you're - - -

18 MR. ZEMANN: - - - a sling - - -

19 JUDGE SMITH: You're point really is, this
20 - - - this isn't - - - these - - - these couplings
21 weren't there to protect workers working on the
22 building. They were there just as - - - as - - - as
23 part of the building, as part of the pipe.

24 MR. ZEMANN: Exactly, Your Honor. Exactly.

25 JUDGE GRAFFEO: Are you arguing that this

1 was not a gravity-related risk - - -

2 MR. ZEMANN: No.

3 JUDGE GRAFFEO: - - - or - - -

4 MR. ZEMANN: No.

5 JUDGE GRAFFEO: Okay.

6 MR. ZEMANN: No. It is - - - I think Your
7 Honor has said it succinctly for me, so I'll sit down
8 now. Thank you very much.

9 CHIEF JUDGE LIPPMAN: Okay. Thanks,
10 counselor.

11 Counselor, rebuttal. Not rebuttal - - -
12 counsel, you're on.

13 MR. ISAAC: Good morning, Your Honors.

14 JUDGE GRAFFEO: What's the missing safety
15 device when you're in the process of removing pipe?

16 MR. ISAAC: It was a defective coupling,
17 which I consider a brace. And let me first - - - I'm
18 - - - I should introduce myself; I'm sorry. I'm
19 Brian Isaac; I represent the plaintiff-respondent.

20 JUDGE SMITH: Now, suppose - - - suppose
21 one of those chandeliers up there is badly - - - is -
22 - - is insecurely tied to the wall, and a worker is
23 working in here doing - - - doing one of the acts
24 protected by - - - by 240, and the thing falls on
25 him. That's not a - - - that's not a safety device,

1 is it, what - - - what attaches the chandelier to the
2 ceiling?

3 MR. ISAAC: I need to ask you one question,
4 and I'll give you a yes or no answer; I promise,
5 Judge Smith.

6 JUDGE SMITH: Okay.

7 MR. ISAAC: Is the worker working on the
8 chandelier or not?

9 JUDGE SMITH: Okay, say he is.

10 MR. ISAAC: Yes.

11 JUDGE SMITH: You - - - so you say it's a
12 safe - - - if you're - - - and if, yeah - - - and if
13 he's working on the ceiling and what holds the
14 ceiling - - - and the - - - what - - - it turns out
15 that whatever has been there for a hundred years,
16 turns out to be one year too long, and the ceiling
17 falls in, then that's - - - then a safety device has
18 failed?

19 MR. ISAAC: If you're working on an
20 instrumentality, because the Labor Law 240,
21 especially under this court's decision in Runner,
22 there's an absolute liability statute. And let me
23 say it very clearly: it's not designed to be fair.
24 It's designed to be unfair. That's why owners who
25 have nothing to do with the work are liable - - -

1 JUDGE SMITH: Yeah, but - - - yeah, but - -
2 - yeah, but - - - but - - - but that doesn't mean the
3 plaintiff wins every case.

4 MR. ISAAC: It - - - and you have - - -

5 JUDGE SMITH: I mean, once in a while you
6 might get rational or something.

7 MR. ISAAC: And you have certainly made
8 that clear. That's not what I'm saying. When you
9 work on that instrumentality, you have to make it
10 safe. Let me give you an example that will make it
11 very - - -

12 JUDGE RIVERA: So your - - - your point is
13 regardless of what other purpose it serves, once the
14 worker is somehow either close to it, working on it,
15 it's got to serve the purpose of making sure they are
16 not injured, regardless of whatever else it does.

17 MR. ISAAC: Judge Rivera, I say that, and
18 I'll tell you something else, my adversary says it.
19 Page 23 of his brief.

20 JUDGE RIVERA: How convenient.

21 MR. ISAAC: "An object needs to be secured
22 if the nature of the work performed at the time of
23 the accident posed a significant risk that the object
24 would fall". That's his statement from a case, a
25 Second Department case, the claim against 405

1 Webster.

2 JUDGE GRAFFEO: Was - - - was it
3 contemplated that in repositioning these pencil
4 boxes, that this coupling was going to have to be
5 removed, or that these pipes were going to have to be
6 removed?

7 MR. ISAAC: The answer to that question is
8 yes. It was, and as a matter of fact, if you look at
9 the testimony - - -

10 JUDGE GRAFFEO: Would it be different if,
11 you know, the worker had decided to remove something
12 that nobody had told him to remove?

13 MR. ISAAC: It might be.

14 JUDGE GRAFFEO: Or that wasn't being - - -
15 that wasn't necessary for him to remove?

16 MR. ISAAC: Sure. If a worker acts in - -
17 - in - - - in a reckless fashion, sure, under Blake,
18 he could - - - he could lose the protection that he
19 has under the Labor Law.

20 But if you look at page 11 through 12 of my
21 brief, the - - - the - - - the witness who testified
22 for the general contractor said that these holes and
23 these conduits were so screwed up, that they did
24 extra walkthroughs, and they did it from the
25 beginning of the job in 2007. They knew this was a

1 problem, because the conduit pipes were banging into
2 the pencil box, and you can't run a - - - a
3 communication system if your - - - your wires and
4 your pipes are running into each other. And they did
5 more walkthroughs.

6 Now, I'm not suggesting to you that they
7 actually knew the methodology that was going on.
8 They - - - the witness who testified was very general
9 about that, and he said he really wasn't sure what
10 was going on. But - - -

11 JUDGE PIGOTT: But doesn't that cause a
12 problem, though? I mean, if you look at - - - I - -
13 - I used Exhibit M, and apparently got the wrong one,
14 because that coupling isn't there, but you've got all
15 these wires all over the place. It seems to me that
16 you're suggesting that if any of these wires had
17 fallen on his head, that there would be a 240.

18 MR. ISAAC: If you - - - my position is
19 that if you're working on an object, and under your
20 decision in Gordon, the protections that are there do
21 not - - - do not conform with the core protection of
22 the statute, which is to prevent workers from falling
23 or objects at an elevation height to strike the
24 worker, you are liable. That's my position.

25 JUDGE SMITH: So - - -

1 MR. ISAAC: I think that's law.

2 JUDGE SMITH: So - - - so if a - - - if a
3 building is just a death trap to begin with, and - -
4 - and - - - and work - - - there's work that has to
5 be done in there, and workers go in there, anything
6 that falls on them because of any defect in the
7 building, is a - - - is a 240 problem?

8 MR. ISAAC: The rule from the intermediate
9 Appellant Divisions has always been, and I'll - - -
10 you're talking about a foreseeability argument.
11 There are several components to it.

12 JUDGE SMITH: Not really, no.

13 MR. ISAAC: But - - -

14 JUDGE SMITH: No. It could be totally
15 foreseeable.

16 MR. ISAAC: Okay, well, if - - - if the
17 question is whether or not an unrelated structure
18 falls, the plaintiff wins, the answer is no. You - -
19 - you resolved that - - -

20 JUDGE SMITH: Well, yeah - - - well, but -
21 - -

22 MR. ISAAC: - - - you resolved that in
23 Narducci.

24 JUDGE SMITH: Well, suppose you're - - -
25 you're remodeling the whole building.

1 MR. ISAAC: Right, but it's - - - I think
2 the Narducci decision might support an argument - - -
3 it's not our case - - - but might support an argument
4 that if I'm working on instrumentality A and
5 instrumentality B falls, and I'm not working on it,
6 it's not the object of my work, I might not have a
7 Labor Law case.

8 CHIEF JUDGE LIPPMAN: So it's got to be
9 related and what exactly does "related" mean?

10 MR. ISAAC: Related is working on this
11 structure in this area. And - - -

12 JUDGE SMITH: Well, was - - - was - - - was
13 he working on the conduit as distinct from the pencil
14 box - - -

15 MR. ISAAC: Absolutely.

16 JUDGE SMITH: And how can you tell?

17 MR. ISAAC: He was. Here's the testimony,
18 very simple. If you look at 515 as - - - as Judge
19 Pigott did, it's a - - - actually a pretty good
20 photo. It doesn't really show the coupling, but I
21 think it's a good photo. The two conduits that go up
22 and down intersect; the pencil box is the square in
23 the middle. And the kindorf support is the square,
24 upside-down L that solidifies the pencil box.

25 The plaintiff testified that the kindorf

1 support was used to solidify the pencil box. He was
2 moving the kindorf support; he had to take out the
3 bottom portion of the conduit, and he was drilling
4 holes so that the kindorf could be resupported, so
5 that the pencil box could be moved, so that the
6 conduits wouldn't strike each other. That's just one
7 area. This isn't even a large area. It ha - - -

8 JUDGE SMITH: Okay, you haven't - - - if -
9 - - if - - - if I were really, really picky, I would
10 say you didn't tell me he was working on the conduit.
11 You said he was working on the kindorf, so that the
12 conduit wouldn't run into another conduit. That's
13 not the same as working on the conduit.

14 MR. ISAAC: Yep, but he had worked on - - -
15 it was all part of the same process. He needed to
16 disconnect the bottom of the - - - of the conduit
17 pole in order to reposition the pencil box. So it's
18 not like you can define it out. It's kind of like a
19 Pratt (ph.) situation. You can't isolate one moment
20 of the work in disregard of the other context of it.
21 And this is all on this one instrumentality. It's
22 not like - - - it's not like I'm asking - - -

23 JUDGE GRAFFEO: And he had to take all - -
24 - he had to disassemble all of that, in order to
25 reposition the - - -

1 MR. ISAAC: Yes.

2 JUDGE GRAFFEO: - - - the pencil box?

3 MR. ISAAC: Yes.

4 CHIEF JUDGE LIPPMAN: So it's all

5 interconnected - - -

6 MR. ISAAC: It is.

7 CHIEF JUDGE LIPPMAN: - - - is that what
8 you're saying?

9 MR. ISAAC: Yes, it is - - -

10 JUDGE PIGOTT: But it's a completed
11 structure?

12 MR. ISAAC: Excuse me?

13 JUDGE PIGOTT: It's a completed structure?

14 MR. ISAAC: It was a completed structure
15 until they decided to have him reposition it. So my
16 adversary is a hundred percent right. It was, at one
17 point, a completed structure, but on the day that he
18 was working, it was no longer a completed structure.
19 It was an incomplete structure that has to be - - -

20 CHIEF JUDGE LIPPMAN: Because of the - - -

21 MR. ISAAC: - - - moved.

22 CHIEF JUDGE LIPPMAN: Because of necessity,
23 it had to be - - -

24 MR. ISAAC: Of necessity and because he was
25 told that he had to do it.

1 And I'd like to just say one other thing.
2 If you look at this record, I don't even think
3 there's any evidence of comparative negligence here.
4 Because the testimony was that this was the way that
5 he did it. This was the way he had done it four to
6 five times before. And remember, he had a coworker,
7 a guy named Thomas, who had thirty years of
8 experience who was working with him. There is no
9 claim here that he was told not to do it this way,
10 that is was a reckless act, that it was improper.
11 And in fact - - -

12 JUDGE SMITH: Let - - - let - - - let me go
13 back to whether there's a safety device; let me go
14 back to the statute. The statute says, "Scaffolding,
15 hoists, stays, ladders, slings, hangers, blocks,
16 pulleys, braces, irons, ropes, and other devices".
17 Is the - - - is - - - is the coupling that - - - that
18 holds pieces of pipe together really the same sort of
19 thing?

20 MR. ISAAC: Absolutely. It's - - - it
21 would either be a brace; it could be an iron - - -

22 JUDGE SMITH: But isn't - - - isn't - - -

23 MR. ISAAC: - - - or it - - -

24 JUDGE SMITH: - - - everything - - - I
25 mean, of course, I have - - - I don't understand what

1 it is, but isn't the general idea of those safety
2 devices that are things that people use on
3 construction sites to protect the workers?

4 MR. ISAAC: Yes, and this was used - - -

5 JUDGE SMITH: You don't - - - you don't use
6 - - - you - - - you - - - when you're putting two
7 pieces of pipe together, the idea of the coupling
8 isn't to protect people who might be working; it's to
9 keep the pipe together.

10 MR. ISAAC: I don't disagree with you in
11 the general sense. My point is, I have to litigate
12 my case. And once they decided to cut this down,
13 that coupling became a safety device, because you had
14 an object that was hanging, that was ten feet, sixty
15 to eighty pounds, right above where he was working,
16 that fell absolutely because of the effects of
17 gravity.

18 JUDGE SMITH: So you're - - - you're
19 basically saying, when you're working on something,
20 everything that - - - everything that keeps it from
21 falling on you becomes a safety device.

22 MR. ISAAC: That's right. And - - -

23 JUDGE SMITH: Have we - - - have we - - -
24 have we held that?

25 MR. ISAAC: No one has held it; no one had

1 JUDGE SMITH: A pulley devised for the
2 purpose of - - - of - - - of a - - - devised,
3 unsuccessfully, for the purpose of - - - of - - - of
4 helping - - - helping people who were doing the
5 construction work.

6 MR. ISAAC: Correct. And the Runner court
7 that the sole issue, irrespective of how it was
8 classified by lawyers or how it was classified by
9 other judges, was whether or not there was a risk,
10 and this is a site risk, because you can see - - -

11 JUDGE SMITH: Well, it was the sole issue,
12 because - - - no, because there wasn't any question
13 that there was a - - -

14 MR. ISAAC: Right.

15 JUDGE SMITH: - - - kind of device
16 enumerated in the statute. I mean, pulleys are right
17 in there, aren't they? Yeah.

18 MR. ISAAC: But this is clearly - - - a
19 coupling - - - I mean, if you look at our brief, we
20 found three cases, which my adversary has not
21 contested, which said that clamps - - - and this is
22 just a clamp - - - are safety devices when it's fall
23 - - - when they fall and when they use it.

24 Again, I don't want to overstate my
25 position. I'm not suggesting to you that the Labor

1 Law should be applied in a way that any time
2 something falls, we should win. What I am saying is,
3 if you're doing work in an area and there's an
4 elevation-related device - - -

5 JUDGE SMITH: You are - - - you are saying
6 any time the thing you're working on falls - - -

7 MR. ISAAC: Yes. That's - - - that's the
8 commandment. It's not designed to be fair. And the
9 plaintiff should win. Thanks, Judge Smith.

10 CHIEF JUDGE LIPPMAN: Okay, thank you,
11 counsel.

12 Counselor, rebuttal.

13 What ab - - - what about the argument that
14 your adversary is making that the coupling here
15 becomes a safety device because you're working on it?
16 What's wrong with that approach?

17 MR. ZEMANN: Because it's not of the kind
18 that's contemplated - - - stated or contemplated in
19 the statute.

20 CHIEF JUDGE LIPPMAN: Why wouldn't - - - I
21 - - - I guess his argument is, but by its nature,
22 when you're working on it, and unless that thing is
23 right, it's going to fall, it's a safety device. Why
24 isn't that a perfectly logical, appropriate way - - -

25 MR. ZEMANN: Well, for one - - -

1 CHIEF JUDGE LIPPMAN: - - - to look at
2 this?

3 MR. ZEMANN: For one reason, there's no
4 proof of that in the record to support it - - - that
5 - - -

6 CHIEF JUDGE LIPPMAN: No proof of what?

7 MR. ZEMANN: That had the screw - - - the
8 screw-type coupling rather than the compression
9 coupling been used, it would have supported the
10 device.

11 JUDGE READ: So you're saying you would - -
12 -

13 MR. ZEMANN: It was just a general - - - by
14 a - - - by a journeyman electrician saying, I prefer
15 these to other div - - - to - - -

16 JUDGE SMITH: No, he says - - - he says, I
17 think they're safer.

18 MR. ZEMANN: Yeah, and he also said that
19 when he disconnected it from the kindorf, and it was
20 hanging there, he - - - and he touched it and it went
21 back and forth, and it was fine. And he also
22 testified that when he went down and started to drill
23 the holes for the new kindorf support, he didn't
24 think that that was going to affect it at all.

25 The point here is that the thing itself

1 isn't - - -

2 JUDGE SMITH: Well, what was he - - - what
3 was he supposed to do according to you, get out from
4 under it? Well - - - what - - - what way - - - in
5 what way was his - - - his error the sole proximate
6 cause? What was the error?

7 MR. ZEMANN: I think the error was in not
8 alleging that there should have been some other
9 safety device used in this case.

10 JUDGE SMITH: No, no, I understand that
11 issue. I'm talking about your pro - - -

12 MR. ZEMANN: But - - -

13 JUDGE SMITH: - - - your sole proximate
14 cause issue.

15 MR. ZEMANN: Oh, the sole proximate cause
16 issue?

17 JUDGE SMITH: Well, what was he supposed to
18 do that he didn't do?

19 MR. ZEMANN: He was - - - as Justice Tom
20 said in the dissent, there were two ways he could
21 have done this. One is that he could have
22 disconnected the - - - the conduit from the coupling
23 in the ceiling, done his drilling, then reconnected
24 everything else. Or he could have done it in such a
25 way that that - - - the conduit coming down from the

1 ceiling was still connected to the - - - to the box
2 and the conduit underneath it, done his drilling and
3 then re - - - disconnected everything and just redid
4 it.

5 The point is that in this case, the - - -

6 JUDGE RIVERA: So you're saying, he looks
7 at it. He says that's not safe. What they're asking
8 me to do, that's not safe. I have another way I
9 could do it that's safer, and so he should have done
10 that? Is that what you're saying? He should have
11 realized, because he - - - he's saying you should
12 have used the other screws, right, the setscrews.
13 That he should have realized that's not safe, so I
14 should just do it another way that's safer, despite
15 that they told me to do something in particular at
16 the job site?

17 MR. ZEMANN: No, no, he - - - no, he - - -

18 JUDGE RIVERA: I'm misunderstanding your
19 argument?

20 MR. ZEMANN: Yes.

21 JUDGE RIVERA: Okay.

22 MR. ZEMANN: I'm sorry, maybe I'm being
23 opaque. That - - -

24 JUDGE SMITH: Did - - - did anyone tell him
25 to do it the way that he did it?

1 MR. ZEMANN: He said it was common
2 practice.

3 JUDGE RIVERA: To do it the way he did it?

4 MR. ZEMANN: Yes.

5 JUDGE RIVERA: Even - - - even knowing that
6 it wasn't safe?

7 MR. ZEMANN: But there was no testimony
8 that it wasn't safe. That - - - and that goes to
9 foreseeability. It was - - - nobody expected this to
10 fall, including the plaintiff. It was not
11 foreseeable. There was no - - - no risk - - -

12 JUDGE SMITH: We - - - we - - - we - - -

13 MR. ZEMANN: - - - for anyone to guard
14 against here.

15 JUDGE SMITH: We've never yet had a 240
16 case in which the plaintiff expected what happened to
17 him to happen.

18 MR. ZEMANN: I'm sorry?

19 JUDGE SMITH: The plaintiff never expects
20 the accident.

21 MR. ZEMANN: Oh.

22 JUDGE SMITH: And that's not unusual.

23 MR. ZEMANN: No. The point - - - one final
24 point.

25 CHIEF JUDGE LIPPMAN: Go ahead, finish your

1 thought.

2 MR. ZEMANN: They did not - - -

3 CHIEF JUDGE LIPPMAN: Yeah.

4 MR. ZEMANN: The whole focus of the
5 plaintiff's case here is on the coupling as being a
6 safety device when it's part of the thing that they
7 were working on. They have not alleged ever that
8 there should have been a sling, or a rope or some
9 other device used to support this conduit, if that's
10 the way they were going to take it apart by itself.
11 That may have been a protective device under 240, but
12 that's not what they've alleged and the coupling is
13 not such a device.

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

16 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Fabrizi v. 1095 Avenue of the Americas, LLC, No. 15 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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