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COURT OF APPEALS
STATE OF NEW YORK

BAZDARIC,

Appellant,

-against-

ALMAH PARTNERS,

Respondent.

NO. 11

20 Eagle Street
Albany, New York
January 11, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Christy Wright
Official Court Transcriber

1 CHIEF JUDGE WILSON: Good afternoon, everyone.
2 The first case on the calendar is Bazdaric v. Almah
3 Partners. Counsel?

4 MR. ISAAC: Good afternoon, Your Honors. Judge
5 Wilson, I'd like to reserve five minutes for rebuttal if I
6 may?

7 CHIEF JUDGE WILSON: Yes.

8 MR. ISAAC: My name is Brian Isaac. As you know,
9 I represent the plaintiff appellant. Before I begin, just
10 let me introduce to you my co-counsel, Ms. Kaplan, who
11 wrote the brief, and Devon Reiff, who's the attorney of
12 record.

13 The issue I'd like to address with you first, if
14 I can, is the issue of the integral to the work finding of
15 the Appellate Division. As you know from reading our
16 brief, we believe that the Appellate Division's decision
17 went way beyond what the case law suggests, and we also
18 submit that it goes way beyond what's actually fair. There
19 is no question that there are some risks which construction
20 workers have to take, and there are some risks which can't
21 be guarded against. Your decision in the Salazar case is a
22 perfect example. The plaintiff was charged with the
23 responsibility of filling in a trench with concrete. He
24 backed into it, and he fell in.

25 The plaintiff's claim was that it was a violation

1 of the regulations requiring guarding. And as you pointed
2 out, that was not a decision that made sense logically,
3 practically, or in terms of construction practice, based
4 upon the fact that the very purpose of the work was to fill
5 in the trench.

6 JUDGE RIVERA: So just a little bit on the word,
7 work. So is it integral to the work as in the specific
8 task the worker is engaged in at the time of the accident?
9 Or is it more general as to - - -

10 MR. ISAAC: I think - - -

11 JUDGE RIVERA: What they may have been doing
12 overall in the area?

13 MR. ISAAC: Right. I think that the best way to
14 look at it is - - - is first, what's integral with respect
15 to the overall but it's really the task. And what I wanted
16 to do, what I wanted to try to articulate to you today is
17 the example that all of the lawyers, all of the judges,
18 both on the plaintiff and defense bar, use when talking
19 about integral to the work and give you some examples to
20 try to show you what my point is. The example we all use
21 is someone cutting plywood at a construction site, because
22 it happens all the time. The residue of plywood, right,
23 when you cut it is you're going to have sawdust on the
24 floor. So very often it's said that encountering sawdust
25 on the floor is integral to the work.

1 And as a generic matter, that's correct. But as
2 you know, we're in the Court of Appeals, and the devil is
3 always in the details. If there is a practice and a
4 procedure at a work site in which the owners, the general
5 contractors, the people in charge have a procedure where
6 they cordon off the area after the sawdust is cut, after
7 the sawdust is there, and after the plywood is cut, that's
8 not necessarily integral to the work.

9 The problem with the Appellate Division's
10 decision, from the plaintiff's point of view, is that it
11 talks about intentionality and purposeful use. That's not
12 what I think integral to the work is. Integral to the work
13 is intrinsic to the work. It's something that has to be
14 done so that it's a risk that the plaintiff has to take.

15 JUDGE TROUTMAN: So in this particular instance,
16 there was a placement of plastic to prevent paint from
17 getting underneath?

18 MR. ISAAC: Correct.

19 JUDGE TROUTMAN: And you would argue that that
20 particular plastic wasn't integral to the work that the
21 plaintiff was performing.

22 MR. ISAAC: Correct. Judge - - -

23 JUDGE TROUTMAN: And why would you say that?

24 MR. ISAAC: Not only would I say that, Judge
25 Troutman, let me go even further. Not only am I saying

1 it's not integral to the work, I'm saying it's antithetical
2 to the work. And it's not Brian Isaac who's saying it.
3 It's not Ms. Kaplan. It's not Mr. Reiff. It's everyone.
4 And when I say everyone, I mean everyone.

5 JUDGE TROUTMAN: Does that also go to the fact
6 that there is some suggestion by one of the supervisors, if
7 he'd seen it there, he would have said, remove that?

8 MR. ISAAC: That's correct. Mr. - - - you're
9 talking about Mr. Calamari's testimony. He's the
10 superintendent for JT Magen. And what he said was that
11 this wasn't appropriate. It was wrong. And when he saw
12 it, he ordered it removed immediately.

13 JUDGE RIVERA: So let's just clarify something
14 about this integral to the work with what we're talking
15 about here. Is it your position that it could have been
16 appropriate to request your client to paint the sides of
17 the escalator and have nothing down? In other words, is a
18 covering integral to that paint job anyway. Put aside what
19 kind of covering.

20 MR. ISAAC: It's possible that that could have
21 occurred. We know, as you know, Judge Rivera, from this
22 record, that there were alternatives. In fact, Mr. Cetin -
23 - - Mr. Cetin, who's my - - -

24 JUDGE RIVERA: Yes, but that's a dispute over
25 what would have been an appropriate covering. My question

1 is, is a covering integral to this task, in any event?

2 MR. ISAAC: I - - - the record doesn't - - -

3 JUDGE RIVERA: He could paint the sides?

4 MR. ISAAC: Right.

5 JUDGE RIVERA: Right?

6 MR. ISAAC: The record doesn't make clear. It
7 suggests that you should have some type of covering.
8 There's no question about that. But this is the wrong
9 cover.

10 JUDGE TROUTMAN: Can you paint without it?

11 JUDGE CANNATARO: If it had been something less
12 slippery like canvas instead of plastic, would your
13 argument be the same, that it's not integral to the work
14 because it's the covering that's not integral? Or is it
15 the material out of which the covering is made?

16 MR. ISAAC: So my answer to your question, Judge
17 Cannataro, is no. If they put on a proper substance and
18 the procedure at the site was to have that substance
19 covering it, it could very well be integral to the work.

20 JUDGE TROUTMAN: But going back with - - - to
21 what Judge Rivera was saying, painting, although it would
22 protect the floor, was it necessary to cover it to actually
23 do the painting?

24 MR. ISAAC: It wasn't necessary to do the
25 painting to have the cover. It was a protective device

1 that they wanted to do - - -

2 JUDGE TROUTMAN: Right.

3 MR. ISAAC: - - - but it certainly wasn't
4 integral to that work. My point is, if you look at the
5 work or you look at the work that the plaintiff's doing,
6 fortunately, we claim as the plaintiff in this case - - -

7 CHIEF JUDGE WILSON: For violations of the
8 Industrial Code, which this is alleged to be, you do have
9 to still show negligence, right?

10 MR. ISAAC: Correct.

11 CHIEF JUDGE WILSON: Okay. So I worry that we're
12 conflating integral to the work and the reasonableness of
13 what's been chosen is what I think some of my colleagues
14 have been getting at. I do think there was testimony in
15 the record that an appropriate covering for this would have
16 been wood.

17 MR. ISAAC: Correct.

18 CHIEF JUDGE WILSON: Right? So your position, I
19 - - - well, is it - - - we don't know, I suppose, whether
20 it's okay to let paint drip onto an escalator, right?
21 There's nothing on the record about that.

22 MR. ISAAC: That's correct.

23 CHIEF JUDGE WILSON: Maybe that destroys the
24 escalator, maybe it doesn't. But for my hypothetical,
25 let's assume you don't want paint falling to the escalator

1 because it's a pretty hard thing to clean. It gums up the
2 machinery and so on. And there is testimony that says wood
3 on the planks is an acceptable substance. So I guess I'm
4 wondering if the right way to look at this isn't, some kind
5 of covering when you're painting a mechanical thing like an
6 escalator is integral to the work. And what we're really
7 talking about is, was this appropriate which goes to the
8 negligence piece of it.

9 MR. ISAAC: I think that's right. I think that's
10 the way to look at it. The gravamen of this case isn't
11 that some covering could never be integral to the work.
12 It's that this covering was not integral to the work, and
13 it was antithetical to the work. And there's one case I'd
14 love you to focus on, if I just could. It's a Second
15 Department case, but if you read the briefs on it, it's
16 almost the same arguments my distinguished adversary here
17 is making. It's Lopez against New York City Department of
18 Environmental Protection. It happens to be my case, the
19 Second Department. It's a little old, but let me give you
20 the facts in the case. It's a gruesome injury case.

21 The plaintiff was working at a construction site.
22 Unfortunately, he lost his balance and there was an
23 uncapped rebar, and it impaled him through his rectum. The
24 defendant's position was precisely the claim made by my
25 adversaries here. The rebar was integral to the work, and

1 it was. You couldn't remove the rebar because it was going
2 to be part of the superstructure. But the plaintiff's
3 position was there was a rule, just like here in testimony
4 from the defendants, that rebar, sharp rebar, was supposed
5 to be capped on placement. So the dichotomy was the rebar
6 was integral. It had to be there, but the uncapped rebar
7 was defective. That's our situation here. And in the
8 Lopez case, plaintiff won below, it was affirmed on appeal,
9 never got to the Court of Appeals. The case was settled
10 afterward. But that's the distinction I want to make.

11 I don't need to go past the fact that there are
12 things that can be integral and things that might not be
13 integral. This isn't integral as a matter of fact. Not
14 only do I say so but if you read Mr. Cetin's affidavit,
15 he's blaming the plaintiff for using the wrong
16 instrumentality. And if you look at the defendant's brief,
17 they say in the brief that it might not be the best choice.
18 Well, if it's not the best choice - - -

19 JUDGE HALLIGAN: Counsel?

20 MR. ISAAC: - - - it could - - -

21 CHIEF JUDGE WILSON: On the screen there.

22 MR. ISAAC: Oh, I'm sorry.

23 JUDGE HALLIGAN: Over here. Thank you. Didn't
24 mean to interrupt. Can I ask you to change gears for a
25 minute and address the foreign substance question? What is

1 your reading of foreign substance? Does it include
2 anything at all that is not part of the floor itself?

3 MR. ISAAC: So Your Honor, let me deal that in
4 two parts if I can. You're talking about 23-1.7(d)(1),
5 obviously.

6 JUDGE HALLIGAN: Yeah, I am.

7 MR. ISAAC: Let's talk about the first sentence,
8 and then I'm going to read something to you of your
9 decision in Rizzuto. First sentence says - - -

10 JUDGE HALLIGAN: Well, I'm happy - - - I'm happy
11 to hear that, but maybe you could just tell me, do you
12 think that foreign substance excludes anything? Or is it
13 anything that we find on the floor at all?

14 MR. ISAAC: No, it's anything that's on the floor
15 that's not supposed to be there. That's the definition I
16 would ask you to have. You can have something on the
17 floor. There are tons of Appellate Division cases where
18 there are things on the floor. One of it's Masonite, one
19 of it's drop rags, because that was integral to the work.
20 But if something isn't supposed to be there - - -

21 JUDGE HALLIGAN: So if - - -

22 MR. ISAAC: - - - it is a foreign substance.

23 JUDGE HALLIGAN: So if taking the Chief Judge's
24 exchange with you, if we assume for purposes of argument
25 that it was appropriate to have some covering on the

1 escalator, then I guess it depends a little bit on the
2 level of specificity, right? I guess we'd have to conclude
3 that this particular covering was not necessary, even if
4 some other covering might be? I'm trying to - - -

5 MR. ISAAC: That's correct. This covering wasn't
6 necessary. The fact that this covering wasn't necessary
7 doesn't mean that a decision from this court will have the
8 precedential effect of saying that no covering can ever be
9 necessary.

10 JUDGE HALLIGAN: And so if the provision is read
11 as broadly as you propose, why do you think the code has
12 the more specific list first, ice, snow, water, and grease?

13 MR. ISAAC: Well, I think that the - - - you're
14 talking about the ejusdem generis argument. I think the
15 reason that they - - -

16 JUDGE HALLIGAN: Yes.

17 MR. ISAAC: - - - have that first is, quite
18 frankly, that those are the probably the most common areas
19 in which construction workers can get hurt. And I think
20 the other term, and other foreign substance, would refer to
21 anything else that wasn't supposed to be there. I would
22 also point out to the court as the trial - - - Judge
23 Wilson, I'm sorry, my light's on.

24 CHIEF JUDGE WILSON: Please go - - - no, please
25 go ahead. Go ahead.

1 MR. ISAAC: Okay, I always ask permission before
2 I go over. The first sentence of the regulation says,
3 "Employers shall not suffer or permit any employee to use a
4 floor passageway, walkway, scaffold, platform or other
5 elevated working surface which is in a slippery condition".
6 It's a standalone provision which - - -

7 JUDGE GARCIA: Counsel, on that point, don't you
8 have a Ross problem if you're saying that's a standalone
9 provision? How is that any different than ordinary common
10 law negligence? Don't let your hallway be slippery. It
11 seems to me the only thing you could violate is the second
12 sentence, right?

13 MR. ISAAC: Well, you're the judge. I'm just a
14 lawyer. But let me read to you what you said in Rizzuto,
15 because I think that that would be too narrow a reading.
16 And then I'll promise I'll sit down. This is Rizzuto, 91
17 New York Second at 34 - - - I think - - - 7. The - - -
18 now, you're talking about the regulation specificity
19 requirement. That regulation in pertinent part
20 unequivocally directs employers not to, and then in quotes,
21 and you highlighted this, "Suffer or permit any employee",
22 close quote - - - close the italics, "to use a slippery
23 floor or walkway, and also imposes an affirmative duty on
24 employers to provide safe footing by requiring that any
25 foreign substance which may cause slippery footing", and

1 then again in italics, you say, "shall be removed to
2 provide safe footing". The use of the conjunctive, and,
3 makes me read that to say that it deals with both.

4 JUDGE RIVERA: What was the last part of that
5 sentence?

6 MR. ISAAC: The use of the conjunctive, and,
7 makes me believe that you were talking about both and
8 they're not integrated into one.

9 JUDGE RIVERA: Okay, but before you sit down - -
10 -

11 MR. ISAAC: I'm sorry?

12 JUDGE RIVERA: I don't know if Judge Garcia had a
13 follow up.

14 JUDGE GARCIA: Both separately?

15 MR. ISAAC: Yes.

16 JUDGE GARCIA: That's how you - - -

17 MR. ISAAC: I - - - I - - - I think it's - - - I
18 think the easiest way to use foreign substance in
19 connection with the 241(6) claim here is something that's
20 not supposed to be there. That's foreign.

21 JUDGE RIVERA: Here - - - here - - - I'm sorry.
22 Did you - - -

23 JUDGE GARCIA: No, no.

24 JUDGE RIVERA: My apologies. Here is what I'm
25 not clear about in the definition you gave. When you say

1 thing, I don't think of substance as thing, because thing,
2 I think, can be broader. So I want a little clarity on
3 what you view the definition of substance is supposed to
4 be.

5 MR. ISAAC: I think it's a matter that is there
6 that isn't intrinsic to the flooring itself. So if you
7 have flooring, that's the flooring. Anything that's on the
8 flooring could be a foreign substance, depending on the
9 context and depending on the factual predicate in each
10 case.

11 JUDGE RIVERA: Even if it's a hard object, you
12 would still say that is a substance?

13 MR. ISAAC: It - - - it - - - it could be a
14 substance. It wouldn't be a foreign substance. It would -
15 - - anything that's not intrinsic would be a substance that
16 would be external to what - - -

17 JUDGE RIVERA: Then why doesn't it say foreign
18 object or substance?

19 MR. ISAAC: Sorry?

20 JUDGE RIVERA: Why doesn't it say foreign object
21 or substance?

22 MR. ISAAC: It just says foreign substance.

23 JUDGE RIVERA: I understand that. That's my
24 question.

25 MR. ISAAC: So I think - - - I think when they

1 use the term, foreign, they're trying to equate - - - and
2 again we're dealing with Industrial Code that's what from
3 1967 hasn't been updated because of OSHA - - -

4 JUDGE RIVERA: Yeah.

5 MR. ISAAC: - - - which you know.

6 JUDGE RIVERA: Yeah, yeah.

7 MR. ISAAC: I think that what they mean is
8 something that's not supposed to be there. To me, that's a
9 sensible read.

10 JUDGE CANNATARO: So something like floor wax?
11 You're supposed to wax certain types of floors. That would
12 not count as a foreign substance?

13 MR. ISAAC: If - - - no, if you're supposed to -
14 - - - certainly supposed to floor wax a floor, but you're
15 not supposed to leave it in a condition where somebody can
16 get hurt.

17 JUDGE CANNATARO: No, so that's obvious.

18 MR. ISAAC: So if somebody waxes the floor, they
19 take the appropriate steps, and somebody says it's slippery
20 under the common law rules from this court that go back 200
21 years just saying - - -

22 JUDGE CANNATARO: No, I'm not talking about
23 negligence. So I'm talking about the reg.

24 MR. ISAAC: Right.

25 JUDGE CANNATARO: Floor wax would fall under the

1 foreign substance definition in the reg.

2 MR. ISAAC: Absolutely, 100 percent if it was
3 slippery and you fell on it.

4 JUDGE GARCIA: But counsel, do you - - - under
5 your reading of this provision, do you even need it to be a
6 foreign substance if it makes the passageway slippery?

7 MR. ISAAC: Well, it - - -

8 JUDGE GARCIA: Because you're saying it's not a
9 conjunct - - - you're saying it's - - - you could do
10 either. You could violate the first part, which just says
11 you can't make it slippery, let it be slippery, or you
12 haven't removed ice, snow, water, grease, or a foreign
13 substance.

14 MR. ISAAC: Right, if we had our druthers, we
15 would like you to hold that if there's a slippery substance
16 in an area where construction - - -

17 JUDGE GARCIA: But it doesn't even say substance.
18 The first part - - -

19 MR. ISAAC: That's right.

20 JUDGE GARCIA: - - - it just says slippery.

21 MR. ISAAC: A slippery condition.

22 JUDGE GARCIA: Right.

23 MR. ISAAC: If you don't do that and you're not
24 willing to go that far, then our position is that under the
25 facts of this case, this is definitionally a, quote,

1 foreign substance, because everyone says that this device
2 wasn't - - - the plastic wasn't supposed to be used.

3 JUDGE GARCIA: But your position is that they're
4 separate things - - - you can violate either?

5 MR. ISAAC: That would be - - - that's how I - -
6 - that's how I read that section of the Rizzuto decision.

7 JUDGE RIVERA: Yeah. Well, again, before you sit
8 down.

9 MR. ISAAC: Oh, I'm sorry.

10 JUDGE RIVERA: No, just to follow this up. So if
11 I'm understanding you, the first sentence of 23-1.7(d) is
12 that an employer cannot allow someone to work - - -

13 MR. ISAAC: Correct.

14 JUDGE RIVERA: In the - - - the listed
15 passageways, floors that are in a slippery condition. So
16 the floor wax is actually a very good example. You put
17 down the floor wax. They can't work on that. They
18 wouldn't, right? They'd destroy the - - - the - - - but
19 let's just go with it for one moment. You have to block it
20 off. You have to tell people, whatever you have to do so
21 no one goes on that. But once it is dry, that was the
22 point. You wax the floor, now it's usable, so you're fine.
23 The second sentence, though, is about removing something
24 that may cause slippery footing.

25 MR. ISAAC: Correct.

1 JUDGE RIVERA: Right? So I guess you want to
2 remove snow. Perhaps there's not enough to make you slip,
3 but you want to be careful about that. I think most people
4 can understand grease and ice. These are obviously
5 substances, I'll stay with that, that would make the - - -
6 the flooring underneath - - - let's just put that - - - the
7 ground underneath slippery. So both are affirmative
8 commands. But the second one is a different kind of
9 affirmative command, right? Because it requires - - -

10 MR. ISAAC: Right. And the way - - -

11 JUDGE RIVERA: - - - the removal.

12 MR. ISAAC: Correct. And the way - - -

13 JUDGE RIVERA: So let me ask you this then. So
14 is your position then that the plastic could have - - -
15 could have been under either? You put down the plastic and
16 you tell them, well, don't walk on the plastic, don't use
17 the plastic. Although then they can't do their job right,
18 so a little bit nonsensical. But the second one is it has
19 to then be removed. And I have a little bit of difficulty
20 on this second sentence. With this, the removal seems very
21 obvious to me. I'm still caught up on why a hard plastic
22 covering is a substance, but let's put that to the side for
23 one moment. Does seem ice, snow, water, and grease, a
24 human being could put it on, but it does seem that one
25 would not put that on a flooring or a pathway, because it

1 would create something that slips. It sounds to me like
2 it's an accidental or it snows, and it gets on the
3 property, and that's why you have to remove it, because
4 it's not something you would otherwise have had there.

5 MR. ISAAC: That's - - -

6 JUDGE RIVERA: Am I kind of getting that right?

7 MR. ISAAC: Yes, I - - - I - - - I understand
8 what you're saying. That's correct. And the way I phrased
9 what you were phrasing, Judge Rivera, was I and we also
10 went into this in the reply, the general textual content,
11 the way that the - - -

12 JUDGE RIVERA: Yeah.

13 MR. ISAAC: - - - the regulation is phrased, not
14 just with respect to these regulations but with other ones,
15 is the first portion, those first sentences in each of
16 those is prohibitory. Don't do X. The second one is
17 directory. This is what you do in situation B. I'm sorry
18 for going over.

19 CHIEF JUDGE WILSON: Thank you very much.

20 MR. KORENBAUM: Good afternoon, and may it please
21 the court. And with the court's permission, I'd like to
22 address the arguments in the following order. Either
23 (1) (e) or (d) - - - (1) (d) and then the what the - - - the
24 integral to the work argument which has gathered the - - -
25 garnered the lion's share of the argument.

1 JUDGE RIVERA: Can I just ask you, since we were
2 just talking about (d) - - -

3 MR. KORENBAUM: Let's talk about (d) first.

4 JUDGE RIVERA: Yes. Just to kind of keep the
5 flow of it.

6 MR. KORENBAUM: Sure.

7 JUDGE RIVERA: Excuse that phrase. Do you agree
8 with this reading? I assume you don't. But could you help
9 me understand what is your reading? I've read your briefs,
10 of course.

11 MR. KORENBAUM: Sure. First and foremost, the
12 primary difficulty with the appellant's argument is that it
13 reads Section 2 out of it. It renders it superfluous.
14 Okay. And of course, one of the primary canons of
15 statutory construction is this court should strive to avoid
16 that result. So first and foremost, that is a problem with
17 the appellant's read of the argument. Second, I'd like to
18 draw to the court's attention, they don't cite a single
19 case - - -

20 JUDGE RIVERA: I'm - - - I'm - - - I'm a little
21 confused, though, on what why you think they're reading the
22 second sentence out of it if you read it the way he
23 suggested.

24 MR. KORENBAUM: Because as we just heard from Mr.
25 Isaacs, anything's a foreign substance.

1 JUDGE RIVERA: Okay.

2 MR. KORENBAUM: But under the canon of
3 construction of ejusdem generis, we have specific examples
4 followed by the general. So they all - - - all those
5 specific objects have what I refer to as a viscous quality.
6 And I thought the wax floor question was an interesting one
7 because that by definition, wax - - - people slip on wax.
8 And if you look at the second sentence, wax is something
9 that can be sanded right to - - - to be removed. So again
10 we're talking about this viscous quality. There is nothing
11 inherently - - -

12 JUDGE CANNATARO: But Counsel, they're also
13 slippery as well. Well, first of all, I would maybe spend
14 a little time arguing with you whether water is viscous,
15 but the common - - -

16 MR. KORENBAUM: It's slippery.

17 JUDGE CANNATARO: Yeah, but they're all slippery,
18 right?

19 MR. KORENBAUM: Yeah, absolutely.

20 JUDGE CANNATARO: And so is plastic or plastic
21 sheeting. I - - - maybe I should be recusing myself, but
22 I've stood on plastic sheeting. It can be slippery. So -
23 - - what - - - what's - - - what limitation are you
24 suggesting?

25 MR. KORENBAUM: So first, there's nothing

1 inherently slippery about plastic. And the description was
2 and I got called to - - -

3 JUDGE CANNATARO: There's nothing inherently - -

4 MR. KORENBAUM: - - - it was hard - - - whether
5 it's a hard plastic shield, hard plastic covering, it was
6 hard plastic.

7 JUDGE CANNATARO: Oh, it wasn't sheeting, it
8 wasn't that filmy plastic?

9 MR. KORENBAUM: There's - - - the record - - - I
10 don't think the record actually amplifies what it was, but
11 judge - - - Justice Edmead specifically referred to it as
12 hard plastic.

13 JUDGE CANNATARO: Okay.

14 MR. KORENBAUM: Okay. And - - -

15 JUDGE TROUTMAN: Does that somehow make it safer?

16 MR. KORENBAUM: No, but it certainly doesn't
17 necessarily - - - it's not necessarily inherently slippery.
18 That's the sole point I'm making, Your Honor.

19 CHIEF JUDGE WILSON: Well, what about those
20 saucer shaped sleds that kids go down snow on? Those are
21 pretty slippery, and they're made out of hard plastic. And
22 I can think of lots of things, air hockey pucks. There's
23 all kinds of things that are hard plastic that are kind of
24 slippery.

25 MR. KORENBAUM: Sure, they're - - - hard plastic

1 can be. It might - - - remember what I said, Judge. It's
2 just that it's not inherently slippery. That's all I said.

3 CHIEF JUDGE WILSON: You mean you could make some
4 type of hard plastic that was not slippery?

5 MR. KORENBAUM: I think so. That's not my area
6 of expertise. So I don't want to represent one way or the
7 other, but I do want to get back. You know, it reminds me.

8 JUDGE CANNATARO: I'm sorry. Could you just
9 finish the question? What is the - - - the rational
10 limitation? Since we I think even you would agree that
11 ice, snow, water, grease is not an exclusive list of
12 foreign substances which may cause a slippery condition.
13 So what is the rational limitation with respect to the rest
14 of that list, whatever it may be?

15 MR. KORENBAUM: That which is inherently
16 slippery, such as water, grease, oil, that which has a
17 viscous-like quality, but hard objects - - - I think a
18 natural read, somebody looking at this provision would say,
19 and employing the doctrine of ejusdem generis, which I
20 understand is not dispositive, but it is a very well
21 honored canon, would say, really hard plastic, that's just
22 not it. So we're looking, as we said in our brief to
23 viscous quality, something that is inherently slippery, I
24 think is a better way of looking at it. Again, look what
25 they talk about. Grease, ice, snow, water, grease. They

1 could add oil, wax, things that one would expect to slip on
2 necessarily.

3 CHIEF JUDGE WILSON: Banana peels?

4 JUDGE HALLIGAN: Since we're - - -

5 MR. KORENBAUM: I'm sorry? I didn't hear.

6 CHIEF JUDGE WILSON: Banana peels?

7 MR. KORENBAUM: Well, that's, you know, I was
8 thinking about that. I don't know the answer to that. I
9 know people - - - I - - - certainly we see in the cartoons
10 and in the movies with the Keystone Cops, people slipping
11 on banana peels.

12 JUDGE RIVERA: Well, that's what pushes the
13 envelope - - -

14 JUDGE HALLIGAN: Counsel, since we're - - -

15 JUDGE RIVERA: - - - whether substance means
16 something other than an item.

17 MR. KORENBAUM: Oh, I think it has to mean - - -
18 mean some form of item just from an ordinary - - -

19 JUDGE RIVERA: Must be an item?

20 MR. KORENBAUM: I believe so. Yes, Judge?

21 CHIEF JUDGE WILSON: Judge Halligan.

22 JUDGE HALLIGAN: But could - - - couldn't - - -
23 couldn't it be this? It seems like we're struggling a bit.
24 You know, I think with this canon, what you're looking to
25 do is to identify a characteristic that each of the more

1 specific words shares. And then you argue that the more
2 general word is cabined by whatever that characteristic is.
3 And it seems like we're struggling a little bit. You know,
4 maybe hard plastic is inherently slippery. Maybe it's not.
5 They're not all viscous. Couldn't it be that these are all
6 substances that - - - that one happens to perhaps see in a
7 construction site, just given the nature of it, and it's
8 not actually an effort to cabin the meaning of foreign
9 substance?

10 MR. KORENBAUM: I don't think that's correct,
11 Judge.

12 JUDGE HALLIGAN: Okay. So why not?

13 MR. KORENBAUM: Again, when one is looking at the
14 plain language of the statute, you're looking at what
15 constitutes a slippery condition. You know, these items
16 all modify slippery condition. Otherwise we get back to
17 the point I made - - - I'm sorry, we get back to the point
18 made earlier - - -

19 JUDGE HALLIGAN: But then - - - but then if the
20 plastic - - -

21 MR. KORENBAUM: This second sentence gets read
22 out of the analysis.

23 JUDGE HALLIGAN: Assuming that - - - that they
24 each have separate application, but - - -

25 MR. KORENBAUM: Well, I think - - - I'm sorry,

1 Judge.

2 JUDGE HALLIGAN: No. Go ahead.

3 MR. KORENBAUM: No, I think again, this is what
4 they mean by foreign substances. It's the foreign
5 substance that has to cause the slippery condition, right?
6 And one thing I'm reminded of my brother once said to me,
7 you know, Scott, you know, if Mom and Dad agree, it's got
8 to be right. And what he meant by - - - and what that
9 means here is each of these courts that have interpreted
10 slippery condition or foreign substance, and again, they
11 don't point - - - appellants don't point - - - have all
12 looked at these types of materials.

13 JUDGE SINGAS: Well, wouldn't they have changed
14 the language then? And first I would love to have a kid
15 like your brother, Scott.

16 MR. KORENBAUM: I'm Scott, Judge. Right. Well,
17 but - -I'm - - - okay, okay.

18 JUDGE SINGAS: But in any event, wouldn't they
19 have said something like in any other such substance? We
20 use that and there are other statutes that say there are
21 similar to.

22 MR. KORENBAUM: No, I don't think that's right,
23 Your Honor. Because why would they have to do that?
24 Again, I fall back onto the doctrine of the canon of
25 construction ejusdem generis. That's what this means. The

1 general - - - when the general is followed by the specific,
2 it's referring to the specific items or akin to it, its
3 similarities. What was the - - - we cite in our brief, but
4 it's paraphrasing the doctrine, you know, people,
5 neighbors, you know, keep the same company. And so why
6 that adding language runs afoul, you know, if they wanted
7 to do that, why would they? And again, they don't point to
8 any cases that support their arguments. Okay. If I - - -
9 I wanted to turn - - -

10 JUDGE CANNATARO: Can I just ask you quickly
11 before you leave on this, this - - - there's this word
12 foreign, which we haven't talked a lot about.

13 MR. KORENBAUM: One second. Could I have some
14 water, please? Sorry. Yes, Judge?

15 JUDGE CANNATARO: And Judge Halligan posited that
16 maybe what the list includes are things that one typically
17 encounters on a work site, and foreign would seem to
18 suggest possibly the very opposite of that. Some - - - it
19 might suggest that the kinds of substances that this second
20 sentence is talking about are things like ice, snow, water,
21 and grease that one normally wouldn't expect to see on a -
22 - - on a work site.

23 MR. KORENBAUM: But I think that supports our
24 argument.

25 JUDGE CANNATARO: Well - - -

1 MR. KORENBAUM: Because their definition of
2 foreign means literally anything. They literally say - - -
3 and foreign in a dictionary sense, in a definitional sense,
4 foreign means anything which one does not naturally find,
5 that which should not be where it is. That's what they say
6 in their brief, in their opening brief. And when we point
7 out that that could mean the drop cloth, that could mean
8 paint cans, that could mean the paint roller, it could be
9 anything.

10 JUDGE CANNATARO: But not a piece of plastic?

11 MR. KORENBAUM: No. Plastic shields, you know,
12 you need - - - and I'm going to get to this in the integral
13 - - -

14 JUDGE CANNATARO: It sounds like integral to the
15 work now, yeah.

16 MR. KORENBAUM: Right. It's something. But can
17 I just very quickly go to the passageway argument.

18 JUDGE CANNATARO: Yeah.

19 MR. KORENBAUM: Again they don't cite any case
20 law to support this proposition. This is clearly a work
21 area and not a passageway. They don't put up any - - -
22 other than a footnote - - - in their footnote, which is
23 page 20, footnote 9, where again, they raised this argument
24 for the first time in their reply brief. So the court can
25 also find a waiver. Again, I get it was raised below, but

1 they don't even - - - we didn't have a chance to respond.
2 This argument of passageway versus work area is raised for
3 the first time. It's in a footnote. They cite no case
4 law. And there's a case that Mr. Isaacs is well aware of -
5 - -

6 JUDGE RIVERA: So why isn't it an elevated
7 working surface? It's an escalator.

8 MR. KORENBAUM: But it's out of - - - it's out of
9 - - - it's out of operation.

10 JUDGE RIVERA: Yes, but it's - - - it's on an
11 angle, sir. It's not - - - right? I mean.

12 MR. KORENBAUM: But this is where he's working.
13 It is a - - - I direct the court's attention to *Dyszkiewicz*
14 *v. the City of New York*, which is 218 A.D.3d 546, in which
15 the Second Department found that this was a passageway and
16 not a work area. And here's the description. "At the time
17 of the incident, the plaintiff was moving various items
18 from a third-floor classroom to the basement. After having
19 made five to ten trips traversing the same stairway while
20 carrying half of a metal doorframe down the stairway, the
21 plaintiff allegedly slipped on clear, sticky liquid", which
22 of course would be a foreign substance with the meaning of
23 (1) (d), "on the top step, going from the second floor to
24 the first floor, and fell down approximately thirteen
25 steps".

1 That is a passageway. When you are stationed
2 here, where at the top of the stairs painting, and not
3 moving, and the escalator is not moving. A passageway
4 denotes going from point A to point B. There's no point A
5 to point B. So now let me get to the integral to the work.
6 There's a few - - - unless there's questions. I'm sorry.

7 JUDGE RIVERA: And it cannot be used from point A
8 to point B?

9 MR. KORENBAUM: I'm sorry?

10 JUDGE RIVERA: It cannot be used in that way?

11 MR. KORENBAUM: No when - - -

12 JUDGE RIVERA: Even when it's not in service?

13 MR. KORENBAUM: No, because - - -

14 JUDGE RIVERA: Walking up and down an escalator?

15 MR. KORENBAUM: But he's not - - - he's - - -
16 he's there. Again, this is not open to the public. This
17 is not another - - - this is not multiple people using it.

18 JUDGE RIVERA: He is painting the sides, right?

19 MR. KORENBAUM: I'm sorry?

20 JUDGE RIVERA: He is painting the sides or that
21 was his task?

22 MR. KORENBAUM: I believe, that's right, Judge.

23 JUDGE RIVERA: One would have to move up and down
24 that escalator to do that, would one not?

25 MR. KORENBAUM: Sure. But it's his work. He - -

1 - he slips in his work area while he's working.

2 JUDGE RIVERA: Okay.

3 MR. KORENBAUM: So the integral to the work
4 doctrine. I want to ask the court to make - - - regardless
5 of where the court comes out, I think the bar and more
6 important, employer - - - or general contractors and
7 employees would serve - - - would do well if the court made
8 a few points. First, the court should hold that it applies
9 to all provisions of the - - - of the Labor Law. And what
10 I mean by that in O'Sullivan, this court held that - - - is
11 to 23-1.7(e) (1) and (e) (2). In Salazar, the court held it
12 applied to 240, 246.1, 23-17.1(b).

13 I think because in the dissent, if I recall
14 correctly, of the Appellate Division, they made the point
15 that it doesn't apply to one or the - - - either (e) (1) or
16 (e) (2). And I just think that's just incorrect. And when
17 you think about the purpose underlying the - - - underlying
18 the integral to the work defense. And I'm not sure
19 appellants disagree with that. They don't raise that in
20 their briefs.

21 To answer, I believe it was your question,
22 Justice Rivera, is it necessary - - - you asked the
23 question, is it necessary - - - unique to the work being
24 done, or is it just something larger. In the specific
25 case, it doesn't matter because it's the work being done.

1 But one of the things that struck me is that, and I think
2 the court should hold that it applies to both the work
3 being done and the larger picture. But here, there's a
4 good definition from - - - by the First Department in Sinai
5 v. Luna Park Housing Corp. interpreting this court's
6 decision in Salazar, that said, "The test is whether
7 eliminating the alleged defective condition would be,
8 quote, impractical and contrary to the very work at hand,
9 end quote, and inconsistent with accomplishing a task that
10 was, quote, an integral part of the job".

11 Here, one could only imagine what the argument
12 would be if there was no shield - - - plastic shield.
13 Again, there's a separate argument that the device used the
14 hard plastic, whether you want to call it a shield
15 covering, but hard plastic as Justice Edmead said, was
16 improper. If there was nothing and the paint was dripping,
17 we'd be in 23-1.7(d) because paint, as an example, Justice
18 Halligan, paint would fall under this definition of - - -
19 of a slip - - - of a foreign substance causing a slippery
20 condition, and we could only hear then, you had to have
21 done something. So as the majority decision, the Appellate
22 Division held true - - - held using something as a staging
23 - - - utilize - - - in a staging area where the work needs
24 to be done to protect is integral to the work.

25 Again, I get they're raising an additional

1 argument that what was used was improper. But - - - and I
2 think as the majority decision mentioned, they cite two
3 First Amendment cases, Johnson, and if I pronounce this
4 correct, Rajkumar. In Johnson, there was plywood that was
5 purposely laid to - - - to protect the sidewalk. That
6 strikes me as integral to the work. Something needs to be
7 laid. And again, we'll get to the point of can it be any -
8 - - I see my time is up. May I continue?

9 CHIEF JUDGE WILSON: Please finish. Yeah, yeah.

10 MR. KORENBAUM: And then in Rajkumar, it was
11 construction paper that was purposely laid over newly
12 installed floors to protect them. That is integral to the
13 work, to the task, right? And so I think, properly
14 understood, the appellant's argument needs to be, is or
15 should be that the protective plastic shield was the wrong
16 object. And certainly Mr. Isaacs made that argument. But
17 the court needs to balance, right, who are the experts.
18 And what I mean by that is that the court shouldn't assume
19 the role of OSHA inspectors, right? There needs to be some
20 leeway provided to general contractors.

21 And here in the record, I think one other point
22 that gets lost, and I think if the court disagrees on the
23 issue of integral to the work, there's an issue of fact
24 that needs to be decided by the jury, because in the
25 accident report, Mr. Calamari indicated, and Justice Edmead

1 notes this in her decision, that it was placed - - - the
2 plastic shield was placed by Kara, which is the employer,
3 right? And then there's - - - again, there's the decla - -
4 - or the affirmation or affidavit from the foreperson, Mr.
5 Cestin, I believe is his name, who Mr. Bazdaric refers to
6 as Jimmy, right?

7 And he submitted an affirmation - - - I'm sorry,
8 affidavit in which he suggested that it was plaintiff
9 himself who chose that. Obviously, the plaintiff denies
10 that. But I think if the court disagrees with the First
11 Department's decision on the integral to the work argument
12 there should be a remand for trial because there are
13 disputed issues of fact. But while obviously, the court
14 should address the integral to the work argument, because
15 that's one of the reasons why we're here, but the court,
16 regardless if it - - - if it affirms or agrees with the
17 First Department, an affirmance is necessary.

18 But the court can also rule in favor of the
19 appellant on the integral to work, but affirm if it agrees
20 with us, meaning the respondents, on the (d)(1) and the
21 (e)(1) arguments, than an affirmance is necessary. And
22 thank you very much, everybody.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. ISAAC: Your Honors, my adversary is correct.
25 I did lose the Dyszkiewicz case in the Second Department,

1 but they did find it was a passageway. My adversary keeps
2 talking about leeway, and that you shouldn't be determining
3 what's good or what's bad. That's not my claim. I never
4 made that claim. This is what Mr. Calamari said. It's not
5 me. This is Mr. Calamari, the T.J. Magen foreman. This is
6 on 243, carrying to 244, on page 25 and 243.

7 "Question, when you went and observed the
8 escalator after this accident occurred, did you observe the
9 plastic", and there's no hard plastic. It's just plastic.
10 "that was covering the steps of the escalator. Answer, I
11 believe so. Question, in your opinion, was that the wrong
12 type of covering for the escalator steps? Answer, yes.
13 Question, had you seen that before Srecko", that's the
14 nickname for the plaintiff, "had his accident, would you
15 direct Cem", that's Mr. Cetin, his supervisor, "or
16 Mustafa", who's the owner of Kara, "to take the plastic off
17 and put more safer covering on those steps? Answer, yes".

18 This isn't a matter of discretion. This is a
19 matter of undisputed fact. And I think the problem with my
20 adversary's argument is one that, Judge Wilson, you and I
21 alluded to just before I stopped talking when I spoke too
22 much anyway, it's the nature of the Industrial Code. This
23 is a code that isn't being updated. I don't think it's
24 been updated since 1967. And the reason is because we have
25 OSHA, which is exceptionally detailed. Now, I know every

1 single court that has considered the issue has said OSHA
2 does not give you a predicate basis for establishing a
3 241.6 claim. But why? Why would a court construe Labor
4 Law sections that deal with strict liability or vicarious
5 liability under 240 and 241, narrowly, when this court has
6 held for over 150 years that construction workers, like the
7 plaintiff are, quote, scarcely in a position to protect
8 themselves from accident, though danger looms large.
9 That's Quigley against Thatcher, 150 years ago. Using the
10 wrong material on a site should not be exculpated under an
11 integral to the work defense.

12 CHIEF JUDGE WILSON: Let me - - - let me ask you
13 about counsel's definition of integral to the work, which
14 I'm not going to be able to restate very accurately, but it
15 was something to the effect of, if there is something that
16 is needed for the work you are doing, and avoiding that
17 would be a sort of an unreasonable cost, that thing is
18 integral to the work. Does that sound right?

19 MR. ISAAC: That may well be right. This is not
20 that situation.

21 CHIEF JUDGE WILSON: So no, no. I'm just asking
22 about the definition.

23 MR. ISAAC: And I get it. That's the Salazar
24 case. I think Salazar was completely correctly decided.
25 You can't apply an Industrial Code section dealing with

1 barricading when the very purpose of your work is to cover
2 up the whole. But here every single person says this is
3 the wrong device. It's integral to the work when it's
4 antithetical to it at the same time. And we're going to
5 construe Labor Law provisions with respect to an industrial
6 - - -

7 JUDGE RIVERA: Well, it really sounds like what I
8 think you're arguing is that a covering could be integral
9 to the work, but not this covering.

10 MR. ISAAC: That's 100 - - -

11 JUDGE RIVERA: Now, we're full circle on this
12 particular argument, on this appeal.

13 MR. ISAAC: Judge Rivera, that's 100 - - -

14 JUDGE RIVERA: And he says, courts don't get to
15 decide that. Experts will decide what would have been the
16 best covering. What's your response to that?

17 MR. ISAAC: Not here. Here, everybody, every
18 single fact witness who testified, including his client,
19 Mr. Cetin, who blames the plaintiff for using the wrong
20 thing, says this is wrong. I shouldn't lose this case
21 summarily. Thanks for listening to me.

22 (Court is adjourned)

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

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Bazdaric v. Almah Partners, No. 11 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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