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COURT OF APPEALS

STATE OF NEW YORK

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GREGORY MORRISON,

Appellant,

-against-

NO. 36

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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20 Eagle Street  
Albany, New York  
March 13, 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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Cynthia R. Piett  
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 Morrison v. NYCHA.

3 MR. AYDINER: Thank you, Your Honor. Si Aydiner  
4 for the appellant. And with the court's permission, may I  
5 have three minutes for rebuttal?

6 CHIEF JUDGE WILSON: Yes.

7 MR. AYDINER: Thank you, Your Honor. The first  
8 issue on appeal implicates all motions for summary judgment  
9 if Winegrad continues to hold that the movement needs to -  
10 - - needs to eliminate all material issues of fact. NYCHA  
11 did not do that here in their motion for summary judgment.  
12 They moved for summary judgment saying that they had no  
13 notice over any type of defective condition in their  
14 stairwell, both actual and constructive, and voluntarily  
15 attached to their motion, building inspection reports that  
16 indicated as early as fourteen days before this accident  
17 that it determined on its own that the treads were  
18 unsatisfactory.

19 JUDGE TROUTMAN: Did it indicate the specific  
20 stairwell that was indicated here?

21 MR. AYDINER: It did not, Your Honor, but that  
22 was NYCHA's responsibility given that they attached those  
23 records. They - -

24 JUDGE TROUTMAN: So why does it matter if it's  
25 not clear that it even applied to the stairwell that was

1 involved?

2 MR. AYDINER: Because once NYCHA attaches that  
3 document and ignores it, you violate a subsidiary rule of  
4 waiting until reply to address a document that the  
5 permissible inference, at least, that Mr. Morrison's  
6 entitled to, as the nonmovant is, that it negates  
7 constructive notice.

8 JUDGE TROUTMAN: Are you saying that that  
9 document establishes notice, and if so notice of what?

10 MR. AYDINER: Well, that's the underlying issue.  
11 It was for NYCHA to affirmatively reconcile that notation,  
12 that its treads were unsatisfactory before the burden  
13 switched to Mr. Morrison to rebut that.

14 JUDGE HALLIGAN: Is there any - -

15 JUDGE SINGAS: Can I ask you if the - - - that  
16 your theory of this friction - - - coefficient friction  
17 theory is that dependent on there being liquid, that the  
18 steps being wet? Or are you saying just the fact that  
19 they're painted would satisfy it?

20 MR. AYDINER: You - - -

21 JUDGE SINGAS: I'm just confused about what your  
22 theory is on that.

23 MR. AYDINER: Yeah. You - - you need them both,  
24 Your Honor. But the - - - the theory in terms of notice is  
25 cause and create because it is the paint - - -

1 JUDGE SINGAS: It's causing what? I'm sorry.

2 MR. AYDINER: - - - that provide - - - it's cause  
3 and create because it is the paint that provides the  
4 platform for the water to be dangerous. I mean, just  
5 because you have water on the floor doesn't necessarily  
6 make it dangerous, at least in violation of engineering  
7 codes that were cited by the engineer. But once you put  
8 that paint down, that battleship gray every three years,  
9 and the test comes back that it is below an accepted  
10 standard of care, you have a cause and create angle. Even  
11 if we can never explain where the water came from, it's the  
12 fact that that paint provides that avenue for the water.

13 JUDGE SINGAS: So is it the paint plus the water,  
14 or is it just the paint alone?

15 MR. AYDINER: It's the paint plus the water, but  
16 it is the paint that's caused by NYCHA, which is  
17 essentially why that floor is in the dangerous and  
18 defective condition.

19 JUDGE SINGAS: And so are you - -

20 JUDGE CANNATARO: Does the notice of claim  
21 mention the paint or the friction coefficient?

22 MR. AYDINER: It does mention inadequate friction  
23 as the Appellate Division noted. It's in the notice of  
24 claim.

25 JUDGE HALLIGAN: Is there anything in the record

1 that shows that NYCHA knew or should have known that this -  
2 - - that it was wet?

3 MR. AYDINER: There isn't, Your Honor.

4 JUDGE HALLIGAN: Okay.

5 MR. AYDINER: There isn't.

6 JUDGE HALLIGAN: And so if it - - - if it takes  
7 both, as I think you just said in response to Judge Singas  
8 - - -

9 MR. AYDINER: Correct.

10 JUDGE HALLIGAN: - - why is notice alone to the  
11 extent there is notice of the paint alone sufficient?

12 MR. AYDINER: Because it is the paint that  
13 violates the engineering standards cited by the engineer.  
14 Like I said, it goes back to the issue of you can have  
15 water - -

16 JUDGE HALLIGAN: Okay. You said it was - - - it  
17 was dangerous only when wet.

18 MR. AYDINER: Correct.

19 JUDGE HALLIGAN: And so - - - so why - - - why  
20 don't - - - I - - - I'm grappling with why you don't need  
21 notice of both.

22 MR. AYDINER: Because the real defect is the  
23 paint that NYCHA voluntarily decided to apply to those  
24 treads.

25 JUDGE HALLIGAN: So when you have something that

1 is dangerous only under a particular circumstance, you only  
2 need notice of, you know, whatever that first component is,  
3 not the second component, even though the second component  
4 might never materialize?

5 MR. AYDINER: I think so, Your Honor.

6 JUDGE HALLIGAN: And where in the case law, would  
7 you - - -

8 MR. AYDINER: Well, I - - -

9 JUDGE HALLIGAN: - - - suggest - - -

10 MR. AYDINER: - - - I - - - I found - - -

11 JUDGE HALLIGAN: - - - or the statute supports  
12 that?

13 MR. AYDINER: I found no case where you have dual  
14 issues with a particular item, and you need notice on both.  
15 The - - - the engineer's position in the case is that once  
16 you apply that paint, you invite - - - once any type of  
17 moisture is on there, you invite a situation where the  
18 friction is irrelevant.

19 JUDGE TROUTMAN: But then why don't you have to  
20 establish that there was moisture in order for that  
21 condition to be - - - to happen?

22 MR. AYDINER: Because - - - because the paint is  
23 perpetually there, and they didn't have to - - -

24 JUDGE TROUTMAN: So it doesn't matter - - - so  
25 you have no burden whatsoever to establish that there was,

1 in fact, water in that area? And - - - and they have no  
2 right to notice that there was a condition - - - the  
3 addition of the water?

4 MR. AYDINER: When the underlying theory is that  
5 they voluntarily applied paint when wet became dangerous.

6 JUDGE TROUTMAN: Right. You keep saying when  
7 wet, but you're saying that you don't have to establish  
8 that it was, in fact, wet, or are you saying that?

9 MR. AYDINER: Well, I'm sorry. I missed that,  
10 Your Honor. If I may.

11 JUDGE TROUTMAN: You said just the mere  
12 application, unless I heard you wrong - - -

13 MR. AYDINER: Correct.

14 JUDGE TROUTMAN: - - - was the problem that you  
15 don't have to establish that it was wet, even though you  
16 also indicated that it is the - - - the friction is created  
17 with the application of water or wetness.

18 MR. AYDINER: I - - all the - - - what I can say,  
19 Your Honor, is I - - - I think the answer to that question  
20 is yes. I mean, let me work backwards. We - - - we do not  
21 know in this record, and we'll never know where that water  
22 or that substance came from, but we do know that it was  
23 dangerous under those circumstances that NYCHA created by  
24 virtue of the paint.

25 JUDGE TROUTMAN: And NYCHA doesn't have the right

1 to know where the water came from or have noticed that  
2 there was water, is that what you're saying, yes or no?

3 MR. AYDINER: Yes, when you apply paint under  
4 these circumstances. But - -

5 JUDGE GARCIA: But if you had steps that were  
6 wet, that's a dangerous condition, right?

7 MR. AYDINER: Not necessary - - -

8 JUDGE GARCIA: You could argue that, right? I  
9 mean, I slipped on wet stairs. That's a dangerous  
10 condition. But you're saying would you have to show they  
11 had notice that they were wet in that situation, or no?  
12 Because everybody knows steps are dangerous when they're  
13 wet.

14 MR. AYDINER: But not necessarily to give rise to  
15 tort liability. Right. Once you inspect - - -

16 JUDGE GARCIA: But you have to show they knew it  
17 was there and they didn't do anything about it.

18 MR. AYDINER: Not when the theory is that they  
19 made them dangerous and reduced that friction by virtue of  
20 the application of paint.

21 JUDGE CANNATARO: They made them - -

22 JUDGE GARCIA: But you still need to - -

23 JUDGE CANNATARO: I'm sorry.

24 JUDGE GARCIA: I'm sorry. Go ahead.

25 JUDGE CANNATARO: Your allegation really is that



1 they made them dangerous by application of a paint that  
2 becomes slippery when wet. And I think this goes back to a  
3 question you might have been asked by several of the  
4 judges. How does that relieve the - - - the plaintiff of  
5 establishing that the defendant had notice of the wetness?  
6 Because it takes those two to tango, in this - - - in this  
7 case.

8 MR. AYDINER: I understand. Because there's no  
9 authority I'm aware of that requires the plaintiff to prove  
10 the duality of two, in what initially is disjunctive, but  
11 now becomes conjunctively dangerous. Without the paint,  
12 you have no case against NYCHA.

13 JUDGE CANNATARO: But you - - - you - - - I mean,  
14 it's possible, wouldn't you agree, that those stairs are  
15 perfectly reasonable and safe when they're dry? People can  
16 walk up and down them and not have a slipping accident, at  
17 least according to your expert's affidavit. What - - -  
18 what unreasonably reduces the coefficient of friction is  
19 wetness. So I think what you're getting up here is a sense  
20 that then if it's wetness that really triggers the danger,  
21 where's the notice of the wetness?

22 MR. AYDINER: We don't have notice of wetness,  
23 but our trigger is that - - -

24 JUDGE CANNATARO: And you don't need it?

25 MR. AYDINER: Our - - - our trigger is that it's

1 the paint that they knowingly applied.

2 CHIEF JUDGE WILSON: Thank you.

3 MS. NEYMAN: Good afternoon, Your Honors. May it  
4 please the court. Diana Neyman, on behalf of the  
5 respondent, New York City Housing Authority. The appellate  
6 - - -

7 JUDGE TROUTMAN: What are you entitled to notice  
8 of if anything?

9 MS. NEYMAN: We are entitled either to actual  
10 notice or to the constructive notice of the condition.

11 JUDGE SINGAS: Of what condition?

12 JUDGE CANNATARO: What is the condition?

13 JUDGE SINGAS: The paint or of the paint plus the  
14 water?

15 MS. NEYMAN: Good point, Your Honor. In this  
16 case, the allegations are, is there - - - is that there was  
17 some sort of a slippery, unknown substance on the steps.  
18 And the allegations are, is that - - - is that that  
19 substance what made the steps slippery. And that is what  
20 NYCHA has shown it did not have notice of.

21 JUDGE TROUTMAN: So what he said was it's just  
22 the application of the paint itself is enough. But are you  
23 saying, even if not necessarily conceding that the paint  
24 was a problem, you are also entitled to notice of actual  
25 wetness at the area affected?

1 MS. NEYMAN: Correct, Your Honor, yes.

2 CHIEF JUDGE WILSON: So what if NYCHA had used a  
3 high gloss enamel on the stairs, which is extremely  
4 slippery. It's very glossy. It has a nice shine. People  
5 use it on wood trim, oil-based paint, which is - - -  
6 everybody says you cannot use this on floors of any kind  
7 because it is a slipping hazard. And the plaintiff slipped  
8 on that when it was wet. Do you need in that circumstance  
9 to have notice of the water?

10 MS. NEYMAN: Yes, Your Honor. At all times NYCHA  
11 would have to have notice of the transitory condition that  
12 made or contributed to the surface becoming slippery.

13 CHIEF JUDGE WILSON: Well, if the paint  
14 contributed to the surface becoming slippery, is that  
15 sufficient? So now I've got two people walking down the  
16 stairs simultaneously. They're painted with this high  
17 gloss paint. One side has got some water on it, the other  
18 side doesn't, and both of them fall down the stairs. In  
19 that case, you've got sufficient notice. Let's assume for  
20 the paint, but not for the wetness. And so one plaintiff  
21 wins and the other loses.

22 MS. NEYMAN: Your Honor, that - - - that is a  
23 hypothetical that is - - -

24 CHIEF JUDGE WILSON: Difficult.

25 MS. NEYMAN: - - - difficult, yes, under these

1 circumstances - - -

2 CHIEF JUDGE WILSON: That's why I asked.

3 MS. NEYMAN: - - - because in these  
4 circumstances, other than the fact that the paint was gray  
5 plaintiff's or appellant's expert does not present any kind  
6 of evidence as to what the - - - the steps were actually  
7 painted with and does not present - - -

8 CHIEF JUDGE WILSON: That's a different - - -  
9 that's a different question from notice. That seems to me  
10 like you might win on summary judgment or something to that  
11 effect.

12 MS. NEYMAN: I'm sorry. What is the question?

13 CHIEF JUDGE WILSON: Well, that doesn't really -  
14 - - we're asking about notice, really, I think isn't that  
15 the appeal here is really about notice?

16 MS. NEYMAN: Yes.

17 CHIEF JUDGE WILSON: And I'm not sure that the  
18 expert saying that it's gray paint but not saying more than  
19 that really goes to notice. I do think that he says it's -  
20 - - it's inappropriate to use on stairs because it's - - -  
21 doesn't have a sufficient coefficient of friction - - -  
22 coefficient of friction; is that right?

23 MS. NEYMAN: Your Honor, I don't know what he - -  
24 - exactly he's saying. He's saying that the steps were  
25 gray - - - painted gray, and that the wet condition that he

1 created at the time of his inspection somehow reduced the  
2 coefficient of friction of the steps.

3 JUDGE TROUTMAN: So are you suggesting he didn't  
4 actually recreate the condition that is claimed - - -  
5 that's claimed to have caused plaintiff's alleged injury?

6 MS. NEYMAN: Correct, Your Honor. And in fact,  
7 the plaintiff himself was not - - - did not know what  
8 exactly was the substance, the slippery substance that was  
9 involved in his accident. So by the expert creating some  
10 sort of unknown wet condition, does not replicate the exact  
11 conditions that existed at the time of the incident.

12 JUDGE HALLIGAN: If you did have notice - - - you  
13 - - - you - - - you had notice of the paint, I think,  
14 right? If you also had notice that it was wet, would you  
15 then have any defense at this stage? If you knew both that  
16 it was wet and - - - and the - - - the paint.

17 MS. NEYMAN: If both factors were in place that  
18 the paint was not just gray, but somehow reduced the  
19 coefficient of friction of the area plus the water, then it  
20 would be both an argument of notice and cause and create.

21 JUDGE HALLIGAN: But if you did have notice of  
22 both, then - - - then you wouldn't have the same argument  
23 that you have now, I take it, that you didn't know about  
24 the slippery substance, whatever was making it wet?

25 MS. NEYMAN: Under that hypothetical, possibly,

1 Your Honor, but that is not what is happening here.

2 JUDGE CANNATARO: I just - - if I could just ask  
3 the question in a slightly different way because I don't  
4 think it's a very remarkable proposition. If plaintiff  
5 could establish, at this stage, that you had actual or  
6 constructive notice of a wet condition on those steps as  
7 they existed with that paint on it, on that day, would you  
8 have made a - - - a motion to dismiss for lack of notice?

9 MS. NEYMAN: If there was evidence of actual or  
10 constructive notice of the wetness on those steps, then - -  
11 -

12 JUDGE CANNATARO: Yeah.

13 MS. NEYMAN: - - - no, Your Honor.

14 JUDGE CANNATARO: Okay.

15 MS. NEYMAN: But that is not the situation here.  
16 The situation is that - - -

17 JUDGE CANNATARO: I get it.

18 MS. NEYMAN: - - - there was no notice of either  
19 of the conditions.

20 JUDGE CANNATARO: Your - - - your adversary has  
21 actually conceded the point that there was no notice of a  
22 wet condition, but he says he doesn't need it. Do you want  
23 to address that part of his argument?

24 MS. NEYMAN: I think he absolutely does need  
25 notice of both, the transitory, slippery, or wet condition,

1 and of the fact that it made that surface slippery when  
2 being walked on. So I think notice of both situations is  
3 required.

4 If there are no further questions, Your Honors, I  
5 will rest on the papers and say that the Appellate  
6 Division's decision and the lower court's decision must be  
7 upheld.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. AYDINER: Just a couple of brief points.  
10 Thank you so much. The - - - the adequacy of the  
11 engineer's test really is one that goes to weight and not  
12 to its admissibility, at least based on this record. And  
13 one thing given that this court has said that this case is  
14 about notice, the most important thing is, at least in my  
15 view, you know, under Winegrad, is did NYCHA really meet  
16 their burden in light of the fact that they did not  
17 establish their last inspection, that they used an improper  
18 affidavit, that there was evidence, actually, that - - -  
19 that porter didn't actually work that day, on page 454 of  
20 the record. And ultimately, if the court finds that the  
21 burden is not met, it never transferred to Morrison to  
22 demonstrate his prima facie case.

23 If the Court has no further questions, may Mr.  
24 Morrison rest on his briefs.

25 CHIEF JUDGE WILSON: Thank you.



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MR. AYDINER: All right. Thank you so much.

(Court is adjourned)





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

I, Cynthia R. Piett, certify that the foregoing transcript of proceedings in the Court of Appeals of Gregory Morrison v. New York City Housing Authority, No. 36 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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