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COURT OF APPEALS  
STATE OF NEW YORK

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MATTER OF COMPAGNONE,

Appellant,

-against-

NO. 106

DINAPOLI,

Respondent.

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20 Eagle Street  
Albany, New York  
November 19, 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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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next matter on the calendar  
2 is matter of Compagnone v. DiNapoli.

3 MR. ROTH: Good afternoon, Your Honors. I would  
4 be remiss if I didn't take a second to say that this is the  
5 highlight of thirty-four years of practice and thirty-two  
6 years of representing uniformed members of the service  
7 handling appeals. If you go through the decisions from the  
8 Appellate Division, Third Department on a regular basis, my  
9 casework is cited - - - whether I've won or lost - - - for  
10 decades. It is truly an honor to get to appear in front of  
11 you. More than you can humanly imagine. Thank you for  
12 this opportunity.

13 Your Honors, I am here today on Compagnone - - -

14 CHIEF JUDGE WILSON: Do you wish to save any time  
15 for rebuttal?

16 MR. ROTH: Three minutes, please.

17 CHIEF JUDGE WILSON: Yep.

18 MR. ROTH: Your Honors, Potter Stewart said he  
19 knew what it was essentially when he saw it in the Supreme  
20 Court in 1964. And I think we can all agree here with my  
21 having spent over three decades doing it, an accident  
22 really turns on the facts and practitioners do not always  
23 have a black and white framework to work with.

24 JUDGE SINGAS: Well, haven't we said, though,  
25 that if the risk is inherent in the job, then the case is



1 over?

2 MR. ROTH: It depends on what happened and what  
3 the risk is. Because, Your Honors, members of the  
4 uniformed services risk their lives, whether we believe it  
5 or not, on a frequent basis. It happens. At my table are  
6 two police officers that work within my Department of  
7 Labor. They are both active duty police officers. They  
8 both have children. They both have people that they want  
9 to go home to at night. I don't think being a police  
10 officer, a corrections officer, or a firefighter means when  
11 we deal with the term "accident" that everything is an  
12 inherent risk.

13 JUDGE GARCIA: No certainly, counsel. And - - -  
14 and no one's disputing the risks that the service members  
15 face. The question, though, here, is under our legal  
16 standards - - - to go to Judge Singas' question - - - there  
17 are certain risks inherent - - - serious risks - - -  
18 inherent in those duties. And when that risk comes about  
19 and causes an injury, we have said that's inherent and  
20 that's a line-of-duty injury rather than an accidental.

21 MR. ROTH: Correct.

22 JUDGE GARCIA: So how is this injury not fit into  
23 what we have said is one of the very real risks that are  
24 ordinarily faced by this type of service?

25 MR. ROTH: Well, the first injury occurred here



1 with Ofc. Compagnone was out on patrol. There was a house  
2 that was known to him to be empty. He knew there was work  
3 being done in the house, and he saw a second-floor light  
4 on. He called the headquarters, requested a backup unit,  
5 got out of his vehicle, took out a flashlight, started to  
6 do from the front of the house to check to see if he could  
7 see people or activity in the house.

8 When he made his way around to the back of the  
9 house - - - the facts and circumstances actually fit in  
10 with what Mr. Brodie was saying a minute ago on the prior  
11 case about encountering a wet floor. When Mr. Compagnone  
12 went around to the rear of the house - - - police officers  
13 are trained to turn the flashlight off if you're in a  
14 position where the light's going to give away your position  
15 and you're going to get hurt. When he went around the  
16 corner, he fell into a hole up to his waist. There was no  
17 way on the planet Earth that he was - - -

18 JUDGE TROUTMAN: With respect to - - -

19 MR. ROTH: - - - going to know there was a hole  
20 there.

21 JUDGE TROUTMAN: - - - what he was doing,  
22 investigating, that was a normal part of the duties,  
23 correct?

24 MR. ROTH: Absolutely. But this is a latent risk  
25 that he would not expect.

1 JUDGE CANNATARO: Well, you know, as you said,  
2 these cases are all so very fact dependent. But you also  
3 did state that he was aware when he approached the home  
4 that there was construction going on in the home. And I'm  
5 wondering, doesn't that somewhat change the analysis in  
6 terms of whether or not a hole might be inherent in going -  
7 - - in executing your duties on that premises?

8 MR. ROTH: I agree with you, if there was obvious  
9 signs of construction at the exterior of the house.

10 JUDGE CANNATARO: Well, you said he knew. He  
11 knew that.

12 MR. ROTH: He knew that there was work inside the  
13 house, not outside of the house. There was no obvious  
14 signs of construction outside of the house. And, in fact,  
15 the homeowner was cited by OSHA for creating a hazard. It  
16 was like a beartrap. There's a hole in the ground, and  
17 there's no sawhorses, lighting, or any protective barriers.  
18 It was impossible for him to have anticipated that.

19 JUDGE SINGAS: So is it your argument that the  
20 depth of the hole or the width of the hole was so  
21 extraordinary? If it was a smaller hole, it would have  
22 been okay?

23 MR. ROTH: Well - - -

24 JUDGE SINGAS: Or is it just the fact that  
25 there's this hole in a - - -

1 MR. ROTH: - - - I think that he could have - - -

2 JUDGE SINGAS: - - - outside the perimeter that  
3 he wasn't expecting?

4 MR. ROTH: The hole was up to his waist. We're  
5 not talking that he tripped on a small indentation in the  
6 pavement. Somebody dug a deep hole, didn't cover the hole,  
7 and didn't mark the hole.

8 I recently had a case where the Attorney  
9 General's Office conceded on a hole and remanded it back  
10 before the Appellate Division decided it. In that case, it  
11 was a police officer that went to get gas in his police car  
12 for the City of Mount Vernon, and they left a manhole cover  
13 off, and they put a garbage barrel over it. He leaned on  
14 the garbage barrel, it moved, and he fell into the hole.  
15 He had no way of knowing there was a hole there. He had no  
16 way of knowing there was a defect. He was performing his  
17 normal duties, bringing the - - -

18 JUDGE TROUTMAN: But isn't that - - -

19 MR. ROTH: - - - emergency services truck there.

20 JUDGE TROUTMAN: - - - different from this case  
21 where you're going to an active construction site?

22 MR. ROTH: It's not an outdoor active  
23 construction site. He's there on a burglar alarm - - -  
24 excuse me. Not a burglar alarm. My apologies. He's there  
25 for suspicious activity on the second floor. He sees a

1 light on. He's trying to be - - -

2 JUDGE TROUTMAN: So - - - so - - -

3 MR. ROTH: - - - diligent.

4 JUDGE TROUTMAN: - - - are you saying that  
5 knowledge that there was construction going inside of the  
6 house, one can assume that there wasn't anything going on  
7 outside?

8 MR. ROTH: There was nothing visible to the naked  
9 eye at the time that he turned to the back of the house.  
10 There was no signs of outdoor exterior construction, and  
11 the law was not filed - - - followed. The hole was there.  
12 It's a latent defect. There's no way he's going to know  
13 the hole is there. There's no way for him to avoid it.

14 And I think where the court went with it is, they  
15 said on this first event, well, if he had his flashlight on  
16 and he had it aimed at the ground at that location, he  
17 might have seen the hole. But he couldn't turn his  
18 flashlight on, he'd be putting himself in grave danger  
19 based on his training.

20 JUDGE CANNATARO: But isn't that what makes it a  
21 risk inherent in the job? The - - - if - - - any other  
22 person would have had a flashlight, probably would have  
23 been pointing it at the ground, not up into the house, and  
24 would likely, as the court said, have appreciated the  
25 hazard.

1 MR. ROTH: But that would have gone against his  
2 training. Police officers are trained - - -

3 JUDGE CANNATARO: That's his job. To take that  
4 risk.

5 MR. ROTH: No. But then, Your Honor, everything  
6 would not be an accident. In Castellano v. DiNapoli, we  
7 had a police officer who slipped on black ice when he went  
8 out to go break up a bunch of youths. It's his job to go  
9 out and break up a bunch of youths. It's not his job to  
10 know that there was black ice in that spot.

11 In Bucci v. DiNapoli, a police officer went to  
12 the restroom, and she did not know that there was a spot of  
13 water on the floor. And she went down on the water and  
14 broke her hip, and that was her career. There are  
15 countless cases I've seen in my career where you start to  
16 do something and there's a risk, but it doesn't go to that  
17 level.

18 Certainly from the earlier case, a firefighter  
19 where the roof is leaking and goes up on the ceiling and  
20 he's attempting to patch the ceiling, is not assuming the  
21 risk that he is going to get struck by lightning. There  
22 are limits. There has to be limits here for what goes on.

23 I did a case with the Appellate Division over a  
24 decade ago, where it was a police sergeant who went in a  
25 home - - - and it was a family dispute. There were sons in

1 their late teens, early twenties sitting there, and the  
2 mother wanted the husband arrested. The two officers were  
3 effecting the arrest of the husband who had beaten up his  
4 wife. And as the sergeant was standing there, one of the  
5 kids that was sitting in the background, yelled, you can't  
6 do this to my father, and jumped on top of the sergeant.  
7 And he was gravely injured. He hurt his neck. He impacted  
8 on a bookcase. His career was over. It was ruled an  
9 accident. Because he didn't know that the other people in  
10 the room were going to react that way.

11 Compagnone had no way of knowing that that defect  
12 was there. This would be a completely different case if  
13 there were any type of barriers put up, a warning sign,  
14 lighting, anything.

15 And I wanted to just briefly mention the second  
16 event that he had when he was checking for people that he  
17 thought were breaking into cars. And he was there with  
18 other officers. He went down some stairs, which is similar  
19 to one of my other cases, Stancarone v, DiNapoli. And he  
20 went down. But I think the hearing officer here was wrong,  
21 because he said because it's misting out, he should have  
22 assumed that the steps were going to be wet and slippery.  
23 The problem with that is the hearing officer did not take  
24 into account the fact that these rail ties were unsafe and  
25 that they were covered in algae and/or mold. And the

1 officer didn't see that, wasn't anticipating it. He  
2 thought in a public place the stairs would be safe, and he  
3 went down.

4 If nothing else from today, Your Honors, I want  
5 you to take away, that as practitioners it is difficult for  
6 us in looking at these cases we try to see from our  
7 perspective, is something here going so far askew that the  
8 fireman or the officer involved or the corrections officer  
9 - - -

10 JUDGE RIVERA: Let me - - - let me ask you  
11 something.

12 MR. ROTH: - - - would know the risk?

13 JUDGE RIVERA: I think most people would say that  
14 if one is stumbling in the dark and can't put a light onto  
15 the ground at all times, that they may possibly get  
16 injured. Right? They may fall on something. They may  
17 trip over something. Is your point about the construction  
18 inside versus outside, that an officer would assume that  
19 the outside perimeter of the house has no barriers, has no  
20 uneven ground, has nothing that they might trip over, not  
21 even a flower pot?

22 MR. ROTH: He had turned the flashlight on and  
23 off a second or two before he fell in.

24 JUDGE RIVERA: Yes.

25 MR. ROTH: He had take - - -

1 JUDGE RIVERA: Well, he was walking a particular  
2 way also, was he not?

3 MR. ROTH: Yes. And - - -

4 JUDGE RIVERA: He wasn't walking the way one  
5 usually would walk - - -

6 MR. ROTH: No.

7 JUDGE RIVERA: - - - around the perimeter as it  
8 stands?

9 MR. ROTH: No. He's walking around. He's trying  
10 to protect his position.

11 JUDGE RIVERA: Yes.

12 MR. ROTH: He's trying to be careful.

13 JUDGE RIVERA: Yes.

14 MR. ROTH: He did look at the ground, but you  
15 couldn't see the hole in the ground. This is not his own  
16 fault that it's the opening of the Dick Van Dyke Show from  
17 the 1960s and Dick Van Dyke trips over the ottoman in the  
18 living room. There was no way that he could have  
19 anticipated a hole. It goes against the local town  
20 ordinances, the city ordinances that would have required  
21 the proper barrial markings that there's a hole there.

22 JUDGE RIVERA: Was the house vacant?

23 MR. ROTH: Yes. Somebody owned the house and  
24 apparently they were doing work inside the house. And I do  
25 think - - -

1 JUDGE RIVERA: Apparently outside the house?

2 MR. ROTH: Huh?

3 JUDGE RIVERA: And apparently outside the house?

4 MR. ROTH: They had something there. But it  
5 wasn't the whole place was ripped up. They had a specific  
6 hole in the ground at one spot. We're not talking about  
7 the entire backyard was torn up.

8 JUDGE SINGAS: For a sewer line? Wasn't that for  
9 a sewer line?

10 MR. ROTH: Yes. He had no way to know it was  
11 there. All I'm saying is, for the people that serve and -  
12 - - and my father was the chief surgeon of the State of New  
13 York for the National Guard. And he did twenty-some-odd  
14 years as a New York City Police Department trauma surgeon.  
15 I have a soft spot in my heart for the people that do what  
16 they do to protect us all. I'm simply saying there has to  
17 be some availability, some window where the case facts  
18 deserve it. And the facts are all different.

19 JUDGE RIVERA: Well, the real issue is with the  
20 legislature in that sense; is it not? Because there is a -  
21 - - there are benefits available to your client. I mean,  
22 right? I mean, in - - -

23 MR. ROTH: Yes.

24 JUDGE RIVERA: - - - the performance of duty. So  
25 the question is whether or not there's more money with - -

1 -

2 MR. ROTH: But it may - - -

3 JUDGE RIVERA: - - - with the other one. But  
4 that is for the legislature eventually to decide as a  
5 policy matter.

6 MR. ROTH: But for now, it is up to the courts to  
7 police this and give us some guidelines as to what will and  
8 won't be an accident. And it's up to the court to step in  
9 for the little guy - - -

10 JUDGE RIVERA: Or gal.

11 MR. ROTH: - - - when it's obvious that they  
12 should have received the benefit. The guy or the gal  
13 that's involved - - -

14 JUDGE RIVERA: Well, they're receiving a benefit.

15 MR. ROTH: But it's completely - - -

16 JUDGE RIVERA: It's a different category of  
17 benefit.

18 MR. ROTH: But it makes - - -

19 JUDGE RIVERA: Just to be clear - - -

20 MR. ROTH: Yes.

21 JUDGE RIVERA: - - - they're not left with no  
22 benefits?

23 MR. ROTH: No. But - - - but again - - -

24 JUDGE RIVERA: Yes.

25 MR. ROTH: - - - it's about fairness. The people

1 sitting with me, the detective on the right has three  
2 children. It makes a life-changing difference to her if  
3 she gets hurt at work.

4 JUDGE TROUTMAN: Counsel, as Judge Rivera said,  
5 it is the legislature, for whatever reason, making these  
6 distinctions. Instead of saying the recovery is X because  
7 it occurred in the line of duty, and that everybody gets it  
8 because they are doing something and putting their lives at  
9 risk. It would be simpler for us all. Would you not  
10 agree?

11 MR. ROTH: I agree with you, Your Honor. But  
12 however, everything can't be in the line of duty. In Chun  
13 v. DiNapoli, we had a Yonkers firefighter.

14 JUDGE RIVERA: That may be a very powerful  
15 argument to the legislators.

16 MR. ROTH: But in the meantime, it's up to the  
17 judges. The judges are the true - - -

18 JUDGE RIVERA: But we have particular standards.  
19 The question is whether or not, as you're arguing, this is  
20 not something that the - - - this is not - - - this is an  
21 accident because the officer could not have in - - -

22 MR. ROTH: Correct.

23 JUDGE RIVERA: - - - any way have thought that he  
24 would end up falling - - -

25 MR. ROTH: Absolutely.

1 JUDGE RIVERA: - - - up to his hips in a grave  
2 site.

3 MR. ROTH: It is up to the judges here. Judges  
4 hold the highest standard of all the branches of  
5 government.

6 My great-grandmother, Jeanette Brill, was the  
7 first female assistant attorney general in New York, and  
8 she was the second state magistrate in New York State.  
9 Jeanette Brill founded the Brooklyn Women's Bar  
10 Association. So believe me, my life is about service. My  
11 middle name is Jeffrey for Jeannette, and my daughter  
12 Jennifer, who's going to be a lawyer, is named for  
13 Jeannette. So I understand, and I implore you before I sit  
14 down, please look at these cases and give us some light.  
15 Give us some road markings, because what you do here is so  
16 incredibly important.

17 Thank you, Your Honors. This has been honor of  
18 my lifetime.

19 CHIEF JUDGE WILSON: Thank you.

20 JUDGE SINGAS: Counsel, do you agree that if  
21 there was barriers or some kind of markings, that this  
22 would be a different case?

23 MR. BROCKNER: In the sense that it would still -  
24 - - no, I don't, Your Honor. And Dustin Brockner, on  
25 behalf of the Comptroller.

1           Here, this was an inherent risk of the job. And  
2 I actually just want to start with some factual points that  
3 there was no - - - there is evidence that he knew it was a  
4 construction site. This is page 94 of the record, 106,  
5 107. Other buildings in the area are under construction.  
6 He says it only has three sides. All the windows are  
7 empty. He said the foundation is in the process of being  
8 lifted because it's a flood zone. And so he is fully aware  
9 that it is an open construction site.

10           And again, a contemporaneous report - - - this is  
11 147 of the record - - - actually talks about the day of the  
12 incident. Says "Officer states that while checking an open  
13 construction site in the dark, he twisted his right knee  
14 and fell, injuring the same." It doesn't mention any hole,  
15 much less one of the proportions that petitioner says, but  
16 it does make clear that it was an open construction site.  
17 And the Comptroller can reasonably find that petitioner was  
18 well aware of that fact, especially given his testimony  
19 about the very significant construction that was being done  
20 on this - - - on this project.

21           And then - - - and one risk of searching for  
22 intruders in a vacant house that you know is under  
23 construction in the middle of the night, is there will be  
24 conditions underfoot that will be hard to perceive, and  
25 that will be ordinarily present at a construction site,

1 such as holes and debris. And that's what happened here.  
2 He was injured by just an ordinary condition of a  
3 construction site.

4 This is not, like the hypotheticals that he cites  
5 in his brief, a beartrap. That is not an ordinary  
6 condition of a construction site. An inherent risk of  
7 conducting an investigation on a construction site is not,  
8 typically, one will encounter bear traps. So there are  
9 limits. I think his hypotheticals, certainly - - - you  
10 know - - - you make that clear.

11 And if I could actually just take a step back and  
12 talk about policework being dangerous. Fully appreciated.  
13 And that is also appreciated by the legislature.  
14 Accidental disability benefits are not supposed to  
15 compensate you for the dangers of your job. Accidental  
16 benefits are available for all kinds of public workers:  
17 custodians, librarians, teachers. So that's not what  
18 accidental - - - is the purpose of those benefits. Rather,  
19 we have performance of duty benefits specifically. Created  
20 specifically for the first responders that we have here,  
21 police officers, firefighters. So that is how the  
22 legislature has chosen to - - - you know, provide the  
23 benefits for these kind of first responders who are injured  
24 as a result of inherent risks of the job.

25 JUDGE GARCIA: And those benefits in the line of

1 duty recovery, that would be regardless of whether the  
2 person could anticipate or could see the hazard? You know,  
3 in this case, he - - - running and it's a construction site  
4 and you're checking something out. Your flashlight's off.  
5 That would still be - - - that would still qualify as a  
6 line of duty recovery?

7 MR. BROCKNER: Correct. In terms of inherent  
8 risk? Yes. Yes, Your Honor. I think that - - - that is  
9 true, and that's the first inquiry whether this was sort of  
10 a inherent risk of the policework.

11 JUDGE GARCIA: If you know this. Before they  
12 passed the line of duty recovery statute - - - which, I  
13 think, is '84 - - - if it didn't qualify as an accident,  
14 right, under this standard we've been discussing today,  
15 what was it? Was it some type of ordinary disability?

16 MR. BROCKNER: Oh, the - - - what - - - what was  
17 a disability back then? Maybe ordinary disability? I - -  
18 - unfortunately, I do not know the answer to that. I do  
19 know that in - - - the year before they passed that statute  
20 in '84. And '83 Third Department says, we've consistently  
21 upheld the denial where the incident - - - denial of  
22 accidental benefits when it's been an incident that could  
23 be reasonably expected in the performance of the duty.

24 So that's what the court, the Third Department's  
25 making clear. If it's reasonably expected in the

1 performance of duty - - -

2 JUDGE HALLIGAN: Do you know what - - -

3 MR. BROCKNER: - - - and the legislature responds  
4 by passing these - - - the performance of duty benefits.

5 Yes?

6 JUDGE HALLIGAN: And - - - and tell me if you  
7 would, what types of positions are eligible for performance  
8 of duty benefits? I'm not looking for - - - you know - - -

9 MR. BROCKNER: Right.

10 JUDGE HALLIGAN: - - - if you don't happen to  
11 know every single one. But I take it from what you said  
12 that it's limited to certain particularly risky  
13 occupations; is that right? As opposed to - - - you know,  
14 state employees, broadly speaking?

15 MR. BROCKNER: That's my understanding. In this  
16 statute - - - it's 363, and I don't know the letter  
17 subsection - - - and it's for - - - it's a police and  
18 firefighter system.

19 JUDGE HALLIGAN: Right.

20 MR. BROCKNER: So it's for those people.

21 JUDGE HALLIGAN: Okay.

22 MR. BROCKNER: Maybe the state police have  
23 something similar. I shouldn't be - - -

24 JUDGE GARCIA: Corrections officers maybe?

25 MR. BROCKNER: Do they have a - - - I - - - I'm -

1           - - I - - - I do not know. But there might be something  
2 similar, at least, tailored to their specific job.

3           JUDGE SINGAS: Well, not all unseen hazards,  
4 right, are you're arguing, would be inherent to the job,  
5 right? You're not saying that everything that happens when  
6 an officer is on patrol is inherent?

7           MR. BROCKNER: That's correct, Your Honor. But -  
8 - -

9           JUDGE SINGAS: So what kind of parameters would  
10 you put on that? Like, what kind of guidance are you  
11 asking for, how to set those boundaries of what's inherent  
12 and what's not?

13           MR. BROCKNER: Okay. So I think, first, the  
14 court would consider - - - you know, you don't look to the  
15 job duties in the abstract. You look to the circumstances  
16 of the work that the petitioner has to perform. That's  
17 what we see in Kelly when they have to run - - - the person  
18 has to run into a building that's been hurricane damaged.  
19 So you look to the circumstances. And I think whether it's  
20 up to the comptroller, whether this is a normal hazard, a  
21 normal incident of that site. You know, if this is, for  
22 example, a condition that's ordinarily found by operation  
23 of a construction site, that would be - - -

24           JUDGE CANNATARO: And is there - - -

25           MR. BROCKNER: And here, that's what we have



1 here.

2 JUDGE CANNATARO: - - - is there any deference  
3 owed to the hearing officer with respect to that  
4 determination? Or is this purely a question of law,  
5 whether this type of hazard is one that is inherent in the  
6 duties?

7 MR. BROCKNER: I think it is a factual question  
8 and that there is some substantial evidence. The standard  
9 does - - - does show - - - give deference to the  
10 Comptroller's determination. We even see that in Kelly,  
11 where it says, ultimately, well, it could go - - - there's  
12 evidence on both sides, but we are defer - - - you know,  
13 upholding the Comptroller's decision because it's supported  
14 by substantial evidence.

15 So unless the court has any questions, we ask  
16 that you affirm.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. BROCKNER: Thank you.

19 MR. ROTH: I just wish to, respectfully, note.  
20 On the record on appeal on page 171, the employer's report  
21 to the New York State Workers' Compensation Board, did  
22 indicate under item 11 on page 171, "Employee stepped into  
23 a large hole and twisted his right knee." There's no  
24 question that he went into the hole.

25 Having said everything, I think that this bench

1 has a really firm grasp of the issues based on your talking  
2 about the two cases. And I think this really, in the end,  
3 comes in line with - - - there are risks that police  
4 officers have in their job on a daily basis. And there are  
5 exceptions if there is a defect that they can't reasonably  
6 anticipate and they're injured by it, unless there's some  
7 type of negligence. There's no question here that this  
8 veteran police officer was following his training, and he  
9 was acting cautiously, but unfortunately, he didn't know  
10 there was a hole there and he went in it.

11 JUDGE RIVERA: What - - - what if he had tripped  
12 over a flower - - - a large plant? Right?

13 MR. ROTH: That's a incident. That's a  
14 performance of duty. That's the normal risk of his job.  
15 He could be on the lookout for a flower pot. It's  
16 reasonable to anticipate when you go to somebody's yard,  
17 they could have a flower pot. Not a - - - not the hole.

18 JUDGE RIVERA: What about the point that there's  
19 - - - there are some statements in the record - - - let me  
20 put it that way - - - that indicate that he was aware that  
21 there was some external construction - - -

22 MR. ROTH: Well, he was - - -

23 JUDGE RIVERA: - - - as cited? Some of the other  
24 facts or statements that he pointed to?

25 MR. ROTH: There was nothing to put him on the

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lookout for a hole in the ground in the backyard.

JUDGE RIVERA: No. But that - - - that wasn't the question. Whether or not there's - - - in the record - - - some material that one could infer from that he was aware that the construction was not limited to the interior of the house? That's my point.

MR. ROTH: My understanding, from speaking with him and having known him for over twenty years, he was not aware that there was construction in the area where he fell, and he was hurt. And again, there was nothing there to warn him. It's - - - you would not expect this when you go to somebody's house, that there's going to be this type of a hole in the backyard. And there was no signs. There were no warnings. There's nothing there for him. This is truly - - - you know, the hidden defect.

Again, I can't tell you what an honor this was. Thank you for hearing me.

CHIEF JUDGE WILSON: Thank you, Counsel.

(Court is adjourned)



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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Compagnone v. DiNapoli, No. 106 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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