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COURT OF APPEALS
STATE OF NEW YORK

GURBANOVA,

Appellant,

-against-

CITY OF ITHACA,

Respondent.

NO. 102

20 Eagle Street
Albany, New York
November 18, 2025

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 case on the calendar is
2 Gurbanova v. City of Ithaca.

3 (Pause)

4 MR. BOUMAN: Good afternoon, Your Honors. My
5 name is Tom Bouman of the law firm of Coughlin & Gerhart.
6 With me is my colleague, Craig Specht. We represent the
7 plaintiff/appellant, Lazifa Gurbanova, individually and as
8 the parent and natural guardian of Z.M., a minor in this
9 case. This case involves a - - -

10 CHIEF JUDGE WILSON: Do you wish to reserve time
11 for rebuttal?

12 MR. BOUMAN: Thank you for the reminder, Your
13 Honor. Yes. I wish to reserve three minutes. This case
14 involves a heavy metal bollard or parking barrier that was
15 negligently installed by the City of Ithaca on City of
16 Ithaca property onto a - - - a patch of asphalt. The - - -
17 this happened in 2016. In 2019, this barrier fell. And
18 when it fell, it struck my client, injuring her - - -

19 JUDGE TROUTMAN: So the question here is the
20 prior written notice statute, correct?

21 MR. BOUMAN: Correct. And the City has asserted
22 a prior written notice defense. The defense was successful
23 at summary judgment at the trial level and at the appellate
24 level.

25 JUDGE GARCIA: Counsel, I'm curious about an



1 argument that this is not the type of defective condition
2 that would require notice. And it appears that's touched
3 on in the supreme court decision. But did you make that
4 argument at the trial court?

5 MR. BOUMAN: Yes, indeed, Your Honor. At issue
6 throughout this has been, is a parking barrier a street?
7 And - - - and - - -

8 JUDGE GARCIA: No, no, no. I understand that - -
9 -

10 MR. BOUMAN: Yeah.

11 JUDGE GARCIA: - - - it's not a highway. But
12 this is a slightly different issue. This is - - - assume
13 it is a highway. Is this a defective condition such that
14 it would require notice?

15 MR. BOUMAN: Your Honor, I argue no for multiple
16 reasons.

17 JUDGE GARCIA: No. But did you raise that
18 argument?

19 MR. BOUMAN: Oh, yes.

20 JUDGE GARCIA: Okay.

21 MR. BOUMAN: Yes.

22 JUDGE CANNATARO: Did the court address that
23 argument? Did supreme court address that argument?

24 MR. BOUMAN: Judge, it's been quite a while. I'm
25 not sure that they did, but I have routinely argued that

1 this type of defect is not the type which falls under the
2 protections of a prior written notice statute.

3 JUDGE GARCIA: And why wouldn't it?

4 MR. BOUMAN: Well, firstly, the precedents of
5 Doremus and Anderson, which - - - those courts are engaged
6 in a strict construction of the statute which is required
7 as these are in derogation of the common law. And those
8 cases both recognized that the type of defects that these
9 statutes cover are defects within the surface of a street
10 or a sidewalk.

11 JUDGE SINGAS: Well, we've said that appurtenance
12 is - - - so things sticking out of the pavement, right,
13 apply. But here, I mean, the bollard is just a bigger
14 appurtenance. So why should there be a different rule?

15 MR. BOUMAN: So Judge, that's a good question.
16 And - - -

17 JUDGE SINGAS: Thank you.

18 MR. BOUMAN: - - - you know, I - - - you know, I
19 have my point, one, which is that I believe the Court of
20 Appeals needs to return to this issue and restore a little
21 bit of order as to how these statutes are interpreted and
22 applied. And I believe a return to Doremus and defects
23 within the surface is appropriate, but I'll move on from
24 that and address subsequent law. So Hughes added a layer
25 of analysis to this issue by stating, firstly, where a

1 municipality installs an object, they have actual notice of
2 it and don't require prior written notice. So that's one
3 reason why, if Hughes is applied, the prior written notice
4 should not apply here. No - - -

5 JUDGE SINGAS: Wait. You're saying that from the
6 minute it was installed, it was defective; is that the
7 argument?

8 MR. BOUMAN: That's the argument that we've made.
9 And that's the argument that my expert opinion has put out
10 there.

11 JUDGE SINGAS: And when - - - this was installed
12 in what year?

13 MR. BOUMAN: 2006.

14 JUDGE SINGAS: Okay.

15 MR. BOUMAN: And then - - -

16 JUDGE SINGAS: And this accident happened?

17 MR. BOUMAN: 2019.

18 JUDGE SINGAS: Okay. And - - -

19 MR. BOUMAN: And then the - - - sorry, Judge.

20 JUDGE SINGAS: - - - isn't there a requirement
21 that you have to show that from the initial installation it
22 was defective?

23 MR. BOUMAN: There is if the prior written notice
24 statute applies, but we argue that it does not. So the
25 other aspect that Hughes adds to the analysis is that the

1 defect, Hughes states, and I'm paraphrasing, needs to be of
2 the type that does not immediately come to the attention of
3 city officials unless they have prior written notice. Now,
4 again, the City installed these barriers, and two or three
5 years after installation, annually, the city forester, Mr.
6 Hillman - - -

7 JUDGE TROUTMAN: So does it have to be
8 immediately dangerous or immediately apparent that it's
9 dangerous or both?

10 MR. BOUMAN: I don't think it's either if we're
11 looking at Hughes. I don't think Hughes is - - -

12 JUDGE TROUTMAN: If the written notice statute
13 applies - - -

14 MR. BOUMAN: Okay.

15 JUDGE TROUTMAN: - - - what's the rule?

16 MR. BOUMAN: If the written notice statute
17 applies, then there is a - - - there are a couple
18 exceptions to the requirement. One is the affirmative
19 creation of a hazard which is immediately dangerous.

20 JUDGE CANNATARO: But that's the one that we're
21 saying - - - assume for a second that it was not defective
22 upon installation. What else is there to avoid prior
23 written notice?

24 MR. BOUMAN: Well, if we're assuming that it's
25 not defective from the moment of installation, then - - -

1 JUDGE CANNATARO: Because this is the sort of
2 defect that's not immediately apparent to a municipality in
3 the absence of notice, right?

4 MR. BOUMAN: I don't agree, Judge. I'm sorry.

5 JUDGE CANNATARO: You could see that that was
6 defective and dangerous without notice of that?

7 MR. BOUMAN: Judge, you know, much as in Hughes
8 where the defect was a utility pole, you know, a series of
9 engineering decisions were made to place that pole where it
10 was and - - - and to install it how it was. And the same
11 thing is true here.

12 JUDGE CANNATARO: But you don't have - - - you
13 don't have a negligent design claim here. You're saying
14 that this was a defective condition.

15 MR. BOUMAN: Judge, we've been saying all along
16 that this was negligently installed, and that's what our
17 expert opinion says. And it was dangerous from the moment
18 of installation.

19 JUDGE CANNATARO: Well, what about the evidence
20 that it had been inspected periodically up to some number
21 of years before the accident happened, and it wasn't
22 showing any sign of defect?

23 MR. BOUMAN: Well, you know, what do we really,
24 truly know about the nature of those inspections? And by
25 the way, this is self-serving testimony from somebody who

1 was employed by the city at the time. I mean, tugging on
2 these - - - tugging on these barriers, how much force was
3 used, you know. How - - - we don't really know what that
4 actually tells.

5 JUDGE RIVERA: Yeah. But at some - - -

6 JUDGE TROUTMAN: What - - -

7 JUDGE RIVERA: - - - point, they had to take a
8 chain attached to a truck to remove some of them.

9 MR. BOUMAN: Well, some of them, yes. Not the
10 one in question for sure.

11 JUDGE CANNATARO: But doesn't that undercut the
12 argument that it was defective upon installation? There
13 seem to be this consensus among some of the judges below
14 that this has to be the kind of thing that develops over
15 time. It gets loose over time. And I take it in order for
16 your cause and create theory to survive, you have to reject
17 that theory, right? Because, basically, you're saying this
18 thing was a hazard from the day it was put in.

19 MR. BOUMAN: Our - - - Judge, our expert has
20 opined that - - -

21 JUDGE TROUTMAN: But what supports that besides
22 the - - - the expert asserting it? What evidence shows
23 that immediately, when it was put in, it was dangerous?

24 MR. BOUMAN: So the - - - our expert's opinion is
25 based on his lengthy experience in the engineering field.

1 His asserted opinion is that asphalt is simply not a dense
2 enough material to support a bollard that was installed in
3 the way that it was.

4 JUDGE CANNATARO: But that's equally consistent
5 with the theory that, over time, it will loosen and could
6 do exactly what it did when your client was swinging on it.
7 But it - - - I don't think it fully answers the question of
8 whether that was the probable result from the very day it
9 was installed.

10 MR. BOUMAN: Judge, I have to go on what my
11 expert has opined.

12 JUDGE SINGAS: Yeah. But that - - - and that's
13 the - - - it was just a statement. I mean, he didn't point
14 to any data or any scientific evidence that the asphalt
15 couldn't withstand this cement bollard. It was - - - he
16 just made a statement. And why should that be sufficient?

17 MR. BOUMAN: Sure. The statement is based on his
18 experience through years in the profession.

19 JUDGE CANNATARO: So what was - - -

20 MR. BOUMAN: And this is some - - - sorry.

21 JUDGE CANNATARO: By the way, what was that in
22 terms of the expert - - - what was his statement with
23 respect to his experience that would give him the necessary
24 expertise to opine on that?

25 MR. BOUMAN: Judge, that's in the record. I



1 believe the whole affirmation is in the record. I'm not
2 sure exactly where it is in the record, but his experience
3 is laid out in there, and it's decades of experience with -
4 - -

5 JUDGE CANNATARO: I took a look at the affidavit.
6 He says he has experience in the construction industry, but
7 there really isn't a lot of detail that would give me
8 confidence that par - - - I don't mean to be coarse, but
9 that he knows what he's talking about.

10 MR. BOUMAN: So Judge, the Appellate Division
11 recognized that he's eminently qualified to make this
12 decision. And the City of Ithaca didn't - - -

13 JUDGE CANNATARO: Sorry. The Appellate Division
14 recognized?

15 MR. BOUMAN: That he is qualified to make this -
16 - - make this opinion. It's right there in their decision.
17 And that was not challenged by the City of Ithaca. So the
18 - - - I would argue that's honestly not really before the
19 court. The lower courts decided that this was a qualified
20 expert.

21 JUDGE RIVERA: Yeah. But again, the opinion is
22 that you wouldn't use this - - - this is not a proper
23 foundation because the bolts aren't going to stay, which,
24 again, means, over time, this is going to get loose and
25 potentially hurt someone. And anyone who wants to install

1 this would think twice about installing it in that kind of
2 a foundation. That strikes me as what the - - - the thrust
3 of the expert opinion is.

4 MR. BOUMAN: Yes. And I think we should look at
5 what the expert affirmation actually is and says. And
6 again, this is a reason to return to whether this is or is
7 not a defect that falls within the statute. I think one
8 thing that the - - - the dissent got very right was to
9 bring in Groninger. And - - -

10 JUDGE TROUTMAN: How much time went past before
11 this happened?

12 MR. BOUMAN: Between installation and the
13 accident, thirteen years.

14 JUDGE TROUTMAN: So that there was a passage of
15 time, which is arguably consistent with, this is a
16 condition that developed over time as opposed to
17 immediately dangerous.

18 MR. BOUMAN: And again, I return to what my
19 expert says. And this is the only competent expert opinion
20 in the record.

21 JUDGE HALLIGAN: But I - - - it seems to me that
22 the entirety of that statement is at paragraph 8 of the
23 affidavit. And he says, bollards such as these should
24 never be installed directly into an asphalt surface.
25 Asphalt, either porous or traditional, is not dense enough

1 to keep the bolts in place and not designed for that
2 purpose. Then he goes on and says it should be in concrete
3 instead. So that alone is sufficient in - - - in your
4 view, that - - - those couple of sentences?

5 MR. BOUMAN: Absolutely, Judge.

6 JUDGE HALLIGAN: And why isn't the Appellate
7 Division correct instead to say that - - - that there are
8 key pieces that are missing from that? For example, you
9 know, some showing more than that bare assertion that there
10 was a immediately apparent dangerous condition and that it
11 was not secure upon its installation?

12 MR. BOUMAN: So Your Honor, opposing counsel in
13 the lower courts have sought to impose requirements on the
14 expert that - - -

15 JUDGE HALLIGAN: I'm just - - - I'm reading from
16 the Appellate Division's - - -

17 MR. BOUMAN: Sure. So - - -

18 JUDGE HALLIGAN: - - - opinion, though.

19 MR. BOUMAN: The Appellate Division focuses on,
20 well, why weren't there codes or, you know, regulations or
21 studies referenced.

22 JUDGE HALLIGAN: Well, the Appellate Division
23 just says, I think, that fatally missing was any showing
24 that the alleged negligent installation led to an
25 immediately apparent dangerous condition.

1 MR. BOUMAN: Well, I think the clear import of
2 the expert's affirmation is that with the proper force,
3 these ballards are - - - bollards are going to fall over,
4 and you - - - you know, it's not necessarily reliant on the
5 passage of time for it to happen.

6 JUDGE RIVERA: Were they supposed to be
7 permanent? Were they supposed to be permanent?

8 MR. BOUMAN: No, Judge. That's the other thing.
9 They - - - they weren't supposed to be permanent. They
10 were supposed to be in place until the trees that they were
11 supposed to protect grew to a sufficient height. And the
12 City just - - -

13 JUDGE RIVERA: So - - -

14 MR. BOUMAN: - - - never got rid of them.

15 JUDGE RIVERA: Well, maybe it's not dangerous if
16 the foundation would have held for that period of time.

17 MR. BOUMAN: Judge, I don't know. I only know
18 what my expert affirmation says.

19 JUDGE RIVERA: That's what I'm saying. The
20 expert didn't necessarily opine on that.

21 MR. BOUMAN: No.

22 JUDGE RIVERA: Right.

23 MR. BOUMAN: I can tell that the court is very
24 interested in the quality of my expert's affirmation, but I
25 would love to address whether or not this is a defect that

1 falls within the statute. Now, we've looked at the - - -
2 the dissent looks at what is the function of a road. And
3 the road is to allow vehicular traffic, right? And we've
4 always said a road - - - that this bollard is not a road.
5 And we've always said it was put in place to stop traffic.
6 That is contrary to the purpose of a road, which is why I
7 believe the dissent says, you know, not only was this
8 placed outside of the parking lot that's arguable, but that
9 it was placed outside of the purpose of the parking lot and
10 outside of the purpose of a road.

11 CHIEF JUDGE WILSON: Well, you could have things
12 inside a parking lot that are to route traffic certain
13 ways, right?

14 MR. BOUMAN: Right.

15 CHIEF JUDGE WILSON: Dividers, that sort of
16 thing. The - - - would those be part of the road?

17 MR. BOUMAN: Well, no, I don't - - - don't
18 believe those would be because their purpose is to stop
19 traffic and redirect it. And the legal definition as
20 defined in Groninger is - - - and the purpose as defined in
21 Groninger is access, you know, for vehicular traffic.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. BOUMAN: Thank you.

24 MR. TWICHELL: If it please the court. I'm David
25 Twichell. I'm here on behalf of the City of Ithaca.

1 JUDGE TROUTMAN: I have a question for you.

2 MR. TWICHELL: I would like to address - - -

3 JUDGE TROUTMAN: Counsel, I have a question for
4 you over here.

5 MR. TWICHELL: Sure.

6 JUDGE TROUTMAN: With respect to the bollard, did
7 it have to be both immediately dangerous and apparent, or
8 is it just that it had to be immediately dangerous?

9 MR. TWICHELL: The - - - the immediate danger is
10 the standard.

11 JUDGE TROUTMAN: So you would agree that the
12 Appellate Division adding the - - - the apparent portion
13 was not necessarily accurate?

14 MR. TWICHELL: Well, that's very interesting
15 question, Your Honor, because very recently in the
16 Calabrese case, this court used those terms.

17 JUDGE TROUTMAN: But weren't those terms used
18 based on the nature of the work that was performed? There
19 there was a problem with the road, and you could see it,
20 and it's just stating what the facts were.

21 MR. TWICHELL: Right. If this defect in the - -
22 - the alleged defect in this bollard was immediately
23 apparent, then counsel would have an argument that - - -
24 that it was immediately dangerous.

25 CHIEF JUDGE WILSON: So what if the bollard had

1 been - - - sorry, right in front of you. What if the
2 bollard had been installed into sand? Would that be
3 immediately apparent - - - an immediately apparent defect?

4 MR. TWICHELL: It's - - - it's hard for me to
5 say, but sand is not going to support a bollard, I wouldn't
6 think.

7 CHIEF JUDGE WILSON: Yeah.

8 MR. TWICHELL: You'd have this - - -

9 CHIEF JUDGE WILSON: And what if so - - - what if
10 no child swung on it for ten years, would you have needed
11 notice somewhere or not?

12 MR. TWICHELL: Well, that would have been
13 discovered, though, when Mr. Hillman went out and - - - and
14 tugged on it with his hands and arms.

15 JUDGE TROUTMAN: Is it clear that he tested all
16 of the bollards?

17 MR. TWICHELL: Yes. That's the - - -

18 JUDGE TROUTMAN: Each and every last one?

19 MR. TWICHELL: Every - - - all of them, yes. And
20 - - -

21 JUDGE TROUTMAN: Putting his full weight on them?

22 MR. TWICHELL: He said his - - -

23 JUDGE TROUTMAN: Is it clear from the record?

24 MR. TWICHELL: He said that he pulled on it with
25 his hands and arms.

1 CHIEF JUDGE WILSON: I appreciate the fact that
2 you're trying to answer questions based on real facts
3 instead of my hypothetical, but I would like to try you
4 again on the hypothetical. Let's suppose nobody tested it,
5 right? It's installed in sand, right?

6 MR. TWICHELL: Okay.

7 CHIEF JUDGE WILSON: From the beginning, but no
8 child swings on it for ten years. And the first time a
9 child swings on it, it goes boom, and the child is hurt, as
10 here. Is that a defect that you would say was apparent,
11 the installation of the bollard into sand from the
12 beginning, that would not then require prior notice or not?

13 MR. TWICHELL: Well, I suppose it would be a
14 function of how deeply it was installed? Was it - - - was
15 it firmly installed? That's what Mr. Hillman went out to -
16 - - to - - -

17 CHIEF JUDGE WILSON: Well, suppose there's an
18 internal memo from the town saying, we know we shouldn't
19 install bollards in sand, but it's too expensive to put
20 concrete in, so we're going to put it in the sand.

21 MR. TWICHELL: Well, I think that situation would
22 have been discovered when someone went out and actually - -
23 -

24 CHIEF JUDGE WILSON: Yeah. It's not, again, my
25 hypothetical.

1 JUDGE CANNATARO: Counsel, don't you think it's
2 possible that there would be a judge out there who would
3 say, I don't even need an expert affidavit. If you install
4 a bollard in sand, that is a dangerous condition. And you
5 know, I don't - - -

6 MR. TWICHELL: I think - - -

7 JUDGE CANNATARO: It's within the ken of the
8 layperson that that isn't something you should do. Don't
9 you - - -

10 MR. TWICHELL: I agree.

11 JUDGE CANNATARO: Don't you think that's
12 possible?

13 MR. TWICHELL: I agree. That's not something
14 that you should do. And I think a lay - - -

15 JUDGE CANNATARO: Which - - - which is why it's
16 good that the city didn't do it here.

17 MR. TWICHELL: A lay person would know that.

18 JUDGE CANNATARO: Can I ask you a question about
19 - - - can we go back to - - - well, we might be talking
20 about prior written notice, but I want to go back to
21 something that I think Judge Garcia started all the
22 questioning with, which is, this defect, even assuming that
23 it was okay when it was installed and it became loose over
24 time, it's not the sort of defect that one normally
25 associates with prior written notice in the sense that it's

1 not appreciable to anyone who's not taking the time to test
2 it. In other words, you know, you do - - - you don't
3 really know that this thing's going to fall over until a
4 five-year-old girl comes and swings on it and it falls
5 over. So I'm wondering, you know - - - I guess my question
6 is, how would you even get prior written notice of this?
7 And if it's impossible to get prior written notice or
8 practically impossible to get prior written notice, maybe
9 the prior written notice law shouldn't apply in this
10 situation.

11 MR. TWICHELL: The municipality has a prior
12 written notice in law if there is no immediate dangerous
13 condition supported by some facts that show that.

14 JUDGE CANNATARO: I don't know if it's immediate,
15 but it's dangerous. I know that on the day of the
16 accident, it was loose. Loose enough that the weight of a
17 five-year-old girl could knock it over. So I know - - - I
18 have a strong suspicion that something dangerous was there
19 on the day of the accident, but it's not appreciable.
20 That's my problem. And I don't understand how the
21 municipality would have gotten prior written notice of it
22 because it's not appreciable.

23 MR. TWICHELL: Maybe I don't understand what you
24 mean by apprecia - - -

25 JUDGE GARCIA: Let's say - - - let's say it was a

1 bridge, highway - - - it's a bridge. There's this similar
2 type of defect that Judge Cannataro described that when the
3 bridge is installed, it's fine, but over time, something is
4 happening. Car goes over the bridge. Bridge falls. The -
5 - - the car falls into the Hudson River because of this
6 defect. Would you say that - - - let's say it's a town
7 owns that bridge - - - they would have required prior
8 written notice of the defect underneath the bridge?

9 MR. TWICHELL: I would think that in that
10 situation that you described that a - - - if the
11 municipality had a prior written notice - - -

12 JUDGE GARCIA: Right.

13 MR. TWICHELL: - - - provision, that - - - that -
14 - -

15 JUDGE GARCIA: And what would they get - - -

16 MR. TWICHELL: - - - prior written notice would
17 be required.

18 JUDGE GARCIA: What would somebody give them
19 notice of? I - - - I was flying my drone under the bridge
20 and it's - - - like, I don't see how that's a defect
21 subject to somebody seeing it and saying, you know, you get
22 notices. So it seems like there's something of a gap to me
23 between obvious pothole, something you can see and you get
24 notice of, and a condition that is immediately dangerous
25 that the municipality creates, which gets you an exception

1 out of there and this other type of defect which develops
2 over time but isn't noticeable.

3 JUDGE HALLIGAN: What purpose does the
4 requirement serve in that circumstance? In other words,
5 whether it's under the bridge or whether it's a bollard
6 that you won't know is loose unless you pull on it, the - -
7 - the condition is not going to be apparent to the - - - to
8 the eye. So I'm not sure what would give rise to prior
9 notice because I'm not sure anybody would notice it. So
10 what - - - what purpose is the requirement serving there,
11 other than to protect the City from liability?

12 MR. TWICHELL: That is certainly one of the
13 factors.

14 JUDGE HALLIGAN: It - - - it is. But I thought
15 that one of the - - - the reasons for the requirement was
16 to put the City on notice so that it can repair, and if it
17 doesn't repair, then it may face liability. And in a
18 circumstance where nobody is going to see the defect
19 because it's not appreciable to - - - you know, to the eye,
20 and I'm not sure how it's serving that function of giving
21 the city the choice to repair or face liability.

22 JUDGE CANNATARO: Let me suggest an answer to
23 you, and let's see if you adopt it because I'm not sure I
24 buy it myself. But if - - - if you come from the - - -
25 come from the place that we're talking about a law that's

1 in derogation essentially of sovereign immunity, and it has
2 to be strictly construed, that there are going to be some
3 classes of defects for which notice is practically
4 impossible to give, but that's just the way it goes
5 because, you know, we're coming from a place of a baseline
6 approach of you - - - immunity - - - the - - - the
7 municipality's immune from suit.

8 MR. TWICHELL: Or is that the - - - that has to
9 be a function of what the actual defect is - - -

10 JUDGE RIVERA: Let me try it another way. Let -
11 - - let's say that what the rule - - - this rule would boil
12 down to is - - - it's almost like the dog bite rule that we
13 had - - - there has to be an injury. Some kind of injury
14 occurs or some - - - or the defect or the piece of material
15 falls off or whatever it is, and that would have otherwise
16 given the municipality notice to have acted. And as a
17 society, we're willing to accept perhaps some of that
18 danger to be fair.

19 JUDGE GARCIA: It's like a one-bollard rule.

20 JUDGE RIVERA: Yeah. The one-injury rule.
21 Although someone need not be injured. It could be the
22 bollard had fallen. Someone sees it fall, but no one ever
23 reports it, and no one's ever looking at it.

24 MR. TWICHELL: Right. I understand. I think the
25 - - - the question - - - but the - - - the whole purpose,

1 as I understand it, of a prior written notice law is that a
2 municipality cannot be expected to know what's going on
3 with all of these things like highways and streets. Cities
4 have miles - - -

5 JUDGE RIVERA: True. That's - - - that's why it
6 was - - - the reason I said this was one would have to then
7 say - - - one - - - one would have to then say that society
8 is willing to accept the potential harm because the
9 municipality cannot otherwise actually appreciate this.
10 And nevertheless, we want bridges built. We want roads
11 built. We want bollards put up to help these trees grow,
12 to protect the trees, you know.

13 JUDGE TROUTMAN: I have a question for you. With
14 respect to the - - - what needs to be in an expert
15 affidavit, can an expert simply rely on their experience
16 without citing a code or a regulation that was violated or
17 a statute?

18 MR. TWICHELL: My understanding, and I have cited
19 a number of cases in our brief, is that an expert opinion
20 must have an evidentiary foundation. In other words, there
21 must be some facts.

22 JUDGE TROUTMAN: So I'm going back to the
23 hypothetical. I've been building things, and I know that
24 you don't put bollards on sand. I know this because I know
25 they're not going to withstand the pressure, and that it's



1 immediately dangerous to do so. It's contrary to all
2 standards. Even if they're not written, practical, I know
3 by experience this is not the proper place to put it. I
4 can't rely upon that?

5 MR. TWICHELL: That's the - - - the statement in
6 this case, which is similar, you shouldn't install bollards
7 into asphalt because they're not dense enough. You need
8 more than that. That's an opinion. That's not a fact.

9 JUDGE TROUTMAN: So it can't be an opinion based
10 on my experience in this type of work?

11 MR. TWICHELL: It - - - it - - -

12 JUDGE RIVERA: So if he had said - - - so the
13 density of the asphalt is X. The density of concrete is Y.
14 In my opinion, you can't install that bollard in the
15 asphalt because it's density X. You need to install it in
16 the concrete because it's density Y. And that would ensure
17 that it wouldn't topple over.

18 MR. TWICHELL: That would be a more appropriate
19 way to - - - for an expert to express an opinion that - - -
20 that he or she would expect the court to - - -

21 JUDGE RIVERA: But that's still just based on
22 their opinion, right, there's nothing to suggest that
23 perhaps X is fine as a minimum.

24 JUDGE CANNATARO: You don't need a code, right?
25 You don't have to have a code that says bollards shall or

1 shall not be installed this way. That's not a sine qua non
2 for an adequate expert affidavit, is it?

3 MR. TWICHELL: No. But if you're going to say
4 bollards should not be installed in asphalt because it's
5 not dense enough - - -

6 JUDGE CANNATARO: Yes.

7 MR. TWICHELL: - - - that's an opinion, and it
8 needs some facts. The facts being, what is the density?

9 JUDGE RIVERA: Yeah. But even if you said that
10 without something that explains that, I guess some
11 objective view is that that density is insufficient, we're
12 back where we started.

13 MR. TWICHELL: Well, not really if we credit the
14 expert with experience with bollards - - - with the
15 knowledge of - - -

16 JUDGE RIVERA: Well, that's what I'm saying. Why
17 does it matter that they give the actual number, in my
18 hypothetical, of the density if they're saying, this is my
19 experience. I know this area really, really well. Here's
20 my years of experience. They're recognized as an expert.
21 And I say what appears to me in some ways so self-evident.
22 Once an expert says, it's not dense enough, you're
23 understanding their point. The foundation cannot withstand
24 the pressure with this bolt.

25 MR. TWICHELL: But it's not dense enough is an

1 opinion. And it seems to me - - -

2 JUDGE RIVERA: But all I'm saying is that would
3 be an opinion even if - - - in my hypothetical, which I
4 thought you were agreeing, that might have been enough, if
5 they say asphalt is, I don't know, make up a number, two,
6 concrete is four, we still don't have anything that gives
7 us the baseline of why two is not enough and four would be
8 enough other than that expert's very opinion.

9 MR. TWICHELL: And the expert may have to go
10 farther than that and say why two is insufficient and why
11 four is sufficient.

12 JUDGE RIVERA: So can that ever be based on - - -
13 even if he didn't say this - - - let's say he said, I have
14 installed bollards for five years, and I would never put an
15 asphalt because it's not dense enough. Is that good
16 enough?

17 MR. TWICHELL: He's installed bollards for years.

18 JUDGE RIVERA: My hypothetical, yes.

19 MR. TWICHELL: And when he has - - -

20 JUDGE RIVERA: Yes.

21 MR. TWICHELL: - - - when he installs them in a
22 material that has a density of two, they're not stable.
23 That would be the kind of fact that would - - -

24 CHIEF JUDGE WILSON: He has - - - from his
25 experience, he has to have said he did it the wrong way,

1 and that's how he knows?

2 MR. TWICHELL: Well - - -

3 CHIEF JUDGE WILSON: That's not the expert I'd
4 want.

5 MR. TWICHELL: Study them - - - study them the
6 right way. But then, as a practical matter, businesses
7 would be interested in why do I have to buy more expensive
8 concrete? Can I do it with less dense concrete?

9 JUDGE CANNATARO: But a sufficiently qualified
10 expert, someone who has the requisite degrees - - - and as
11 Judge Rivera was saying, I've installed bollards. I worked
12 for DOT for twenty years. I've been involved in roadway
13 construction in multiple areas. And I can tell you, based
14 on my expert experience, that you do not install bollards
15 in asphalt. Now, you know, I'm not saying that's the
16 expert we have here, but that expert has to be sufficient
17 without even talking about relative densities and things
18 like that. Is that not so?

19 MR. TWICHELL: Well, I know the - - - that - - -
20 from my experience that you do not install bollards into
21 asphalt because there's a - - -

22 JUDGE CANNATARO: There has to be an explanation
23 of the physical forces at play?

24 MR. TWICHELL: There has to be an evidentiary
25 foundation, factual support for what the expert says. I -

1 - - I think you'll find that in the Diaz and other cases
2 that - - -

3 JUDGE CANNATARO: So a conclusory opinion that
4 this just isn't done wouldn't be sufficient?

5 MR. TWICHELL: That would be my view of what the
6 law says, yes.

7 CHIEF JUDGE WILSON: Thank you.

8 MR. BOUMAN: Your Honors, I'm conscious of having
9 gone over my time already. I'd just like to make a quick
10 point. And this goes, again, to Hughes, which is, you
11 know, opposing counsel has said, well, the city is not
12 expected to go out and know every little thing that happens
13 in all of their streets, but that is not true of the object
14 here. This is a heavy, brightly yellow painted object that
15 was installed by the City and inspected several years after
16 it was installed. This is clearly an admission that this
17 is an object that requires the attention of the city. This
18 is not an object that escapes notice. And with that,
19 unless Your Honors have other questions, I'll leave it.

20 CHIEF JUDGE WILSON: Thank you.

21 (Court is adjourned)

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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Gurbanova v. City of Ithaca, No. 102 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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