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COURT OF APPEALS

STATE OF NEW YORK

DIBRINO,

Respondent,

-against-

NO. 103

ROCKEFELLER CENTER NORTH,

Appellant.

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: The next case on the
2 calendar is Dibrino v. Rockefeller Center North.

3 MS. UVAYDOV: Good afternoon. May it please the
4 court. Sofya Uvaydov from Kahana Feld, for appellants,
5 Rockefeller and JRM Construction. May I please reserve
6 three minutes for rebuttal?

7 CHIEF JUDGE WILSON: Three.

8 MS. UVAYDOV: Yes.

9 CHIEF JUDGE WILSON: Yes.

10 MS. UVAYDOV: Can you hear me with the
11 microphone?

12 CHIEF JUDGE WILSON: Yeah.

13 MS. UVAYDOV: Okay. I would like to first
14 address the contractual indemnity point as it relates to
15 Section 10.1, and then I'll move on to 12.2.1, because if
16 the court finds indemnity under the former, it need not
17 address the ladder and the dissent. Under - - -

18 JUDGE RIVERA: Before you do that is then 6.10
19 irrelevant? We should only focus on 10 and 12?

20 MS. UVAYDOV: 6 has relevance, but I believe if
21 you read 6 and 10, 10 is the broader indemnity language.
22 So anything encompassed under 6 would also be encompassed
23 under 10.

24 JUDGE RIVERA: Thank you.

25 MS. UVAYDOV: But as you pointed out, Your Honor,

1 the parties were very clear that they wanted
2 indemnification. They didn't include it once, twice. They
3 included it three different times. So that's why we're - -
4 - we're looking at multiple indemnity provisions. Under
5 10.1, respondent, DAL, agreed to indemnify the owners and
6 the general contractor for any losses caused or alleged to
7 be caused in whole or in part by a violation of any law,
8 ordinance, or regulation, or any claim of strict liability
9 arising out of the law. I think for purposes of
10 interpretation, I will break that up into two different
11 elements. The first is - - -

12 JUDGE HALLIGAN: Can I just ask you before you
13 parse it, what limits are there to your reading of that
14 clause?

15 MS. UVAYDOV: Sure. So there is the obvious to
16 the full extent permitted by law that you see at the
17 beginning.

18 JUDGE HALLIGAN: Right.

19 MS. UVAYDOV: So it makes it DAL compliant. The
20 second part is going to be that it needs to arise or to be
21 caused or alleged to be caused - - -

22 JUDGE HALLIGAN: What does that mean? Any limits
23 on that?

24 MS. UVAYDOV: There are some.

25 JUDGE HALLIGAN: Is there anything that happens

1 at the work site arising out of?

2 MS. UVAYDOV: Absolutely. So the - - - that part
3 - - - the first element of - - -

4 JUDGE CANNATARO: Absolutely, yes, anything that
5 happens at the work site arises out of?

6 MS. UVAYDOV: No. There are absolutely limits,
7 right? The - - - while this was written very, very
8 broadly, and it clearly - - -

9 JUDGE HALLIGAN: So for example, what would some
10 limitations be? What would be outside the scope?

11 MS. UVAYDOV: Something that is completely
12 unrelated. This wouldn't cover - - -

13 JUDGE HALLIGAN: So a storm happens and it's hit
14 by lightning and something, you know, unfortunate happens.

15 MS. UVAYDOV: Right. So any kind of maybe in the
16 form - - -

17 JUDGE HALLIGAN: A third party comes in, for
18 example. What about that? If someone comes in off the
19 street and engages in some violent act, is that covered or
20 not covered?

21 MS. UVAYDOV: So presumably with the way it is
22 written, and again, it's going to depend in, was this a - -
23 - somebody who comes in and violently and starts hitting
24 everybody on the site because they had a grudge against DAL
25 because they're a former employee, maybe that would be

1 covered, but - - -

2 CHIEF JUDGE WILSON: Well, let me try something a
3 little bit different. Somebody just wanders - - -
4 interested in construction, wanders - - - a third party
5 wanders onto the job site, sees the ladder, nobody is
6 around, unfolds ladder that is - - - with a blue tape on
7 it, starts to climb up to look at what's going on, falls
8 off and injures himself just the way that it happened here.
9 Is that related to the work? Is that covered by the
10 indemnity?

11 MS. UVAYDOV: I believe it would be, not because
12 he comes off the street, but because he has this ladder
13 that is owned by DAL accessible to it, out and open, not
14 locked up, not being minded. And it is a ladder that they
15 own that they brought to our site. Really, at the end of
16 the day, the law in New York makes the owner strictly
17 liable for a whole host of events that occur.

18 JUDGE HALLIGAN: But - - -

19 JUDGE CANNATARO: And is - - - is arising out of
20 a euphemism for causation, is - - - is that the same
21 inquiry, or is it different?

22 MS. UVAYDOV: Well, this court has differentiated
23 between the arising out of language and the cause by an act
24 or omission language versus something that requires full
25 stru - - - proximate causation.

1 JUDGE CANNATARO: And how would you articulate
2 the distinction between a - - - is it broader, narrower,
3 and how so?

4 MS. UVAYDOV: So this court in Burlington, I
5 believe, said, caused by an act or omission requires some
6 version of proximate causation but not negligence, whereas
7 in Burlington it said, arising out of is broader than
8 caused by an act or omission. And in Wirth, you defined it
9 as originating from incident to or having a relationship
10 with. So out of - - -

11 JUDGE RIVERA: But isn't that still bounded by
12 the actual performance of that contract or subcontractor
13 and their employees work - - -

14 MS. UVAYDOV: Yes.

15 JUDGE RIVERA: - - - as opposed to, I left the
16 equipment somewhere?

17 MS. UVAYDOV: I think - - - and again, this is
18 why I suggested breaking it into the two elements. The
19 first as, did the work include allegations that DAL - - -
20 or did the loss include allegations that DAL violated the
21 law or that there was a strict liability claim, which we've
22 met.

23 JUDGE HALLIGAN: What if - - - what if DAL had
24 put a big sign on the ladder saying, don't use? Would that
25 still be subject to the clause in your view?

1 MS. UVAYDOV: The question becomes, it might have
2 changed the analysis on the sole proximate cause question
3 that was decided by the supreme court and the First - - -
4 the First Division.

5 JUDGE HALLIGAN: But your view is - - - is that
6 if DAL or any company is very clear - - - crystal clear
7 that something should not be used and someone nonetheless
8 comes and uses it, that that's fair game for
9 indemnification? I mean, what could DAL do or - - - or any
10 entity to guard against liability in that circumstance if
11 it - - - if it puts a sign up and says, don't use? Because
12 perhaps it's going to take them a couple of hours to get it
13 off the floor.

14 MS. UVAYDOV: Well, that kind of goes back to the
15 actual underlying liability, which is the Labor Law 240,
16 right? Here, the issue was, and the parties briefed below,
17 should the plaintiff, Mr. DiBrino, have ever used this
18 ladder? And the party - - -

19 JUDGE HALLIGAN: But that goes to the negligence
20 question, right?

21 MS. UVAYDOV: Right.

22 JUDGE HALLIGAN: I thought you were addressing
23 the indemnification question.

24 MS. UVAYDOV: I completely understand. But put
25 yourself or the - - - the party in the shoes of a premises

1 owner. If the premises owner cannot escape Labor Law 240
2 liability by putting a giant sign on a ladder that says, do
3 not use, and even if they put that sign, they can still be
4 liable for strict liability in 240, then they should be
5 able to pass that loss down.

6 CHIEF JUDGE WILSON: Well, you might think that
7 the other way around. You might think the legislature
8 meant to make the owner liable strictly and not anybody
9 else. And you shouldn't be able to pass that liability
10 down.

11 MS. UVAYDOV: Well, that is somewhat contrary to
12 the jurisprudence of this court saying that we're making
13 the owners liable, but we're giving them the option to then
14 pass down the loss to the parties below, right? That has
15 been the way that a nonnegligent owner who has no
16 involvement, who has no presence on that construction site,
17 who doesn't know if there's ladders being put up, who has -
18 - - doesn't know if there's a sign put up, who then still
19 has to pay an award of millions and millions of dollars.

20 JUDGE CANNATARO: I - - - but I guess the
21 question is, does this type of indemnification agreement
22 with these specific types of words capture the totality of
23 240 liability, or are there some limits to it? I mean, if
24 your position is the former, then it's a pretty easy
25 argument, right? You're just saying, we contracted for any

1 240 liability to be indemnified, period.

2 MS. UVAYDOV: Well, I think in the first part of
3 any loss from strict liability would encompass any 240
4 liability. And then that is modified slightly by saying
5 it's arising out of the work just like the two elements.

6 JUDGE RIVERA: Okay. So let's get back to that
7 because that's what I'm trying to get straight with you, if
8 you would, please, because I know your time is going to run
9 short.

10 MS. UVAYDOV: Right.

11 JUDGE RIVERA: Why doesn't arising out of the
12 work, performance of the work means the act of the work as
13 opposed to, I left a piece of equipment, or my employee
14 left a piece of equipment on the floor?

15 MS. UVAYDOV: So the court has interpreted
16 "arising out of" more broadly.

17 JUDGE RIVERA: Okay.

18 MS. UVAYDOV: What the First Department said and
19 what the respondents are arguing for is it should be
20 limited to scope of the work. And realistically, that is
21 not going to work. And practically, it is not something
22 that's originating from or incident to. And here is the
23 hypotheticals that the First Department in an earlier case
24 called Urbina, looked at, and I urge the court to consider.
25 If DAL merely folded up the ladder and left it leaning

1 against the wall, and plaintiff walked by, and because it
2 wasn't properly secured, it fell on him, plaintiff - - -
3 respondent's position would be the same, right? He's not
4 our employee. We weren't actively participating. There's
5 just a ladder. Maybe you bumped into it. That means it's
6 not our fault. But it's their ladder on their site that
7 wasn't properly secured that fell and injured somebody else
8 that will create Labor Law 240 liability.

9 CHIEF JUDGE WILSON: Well, I think what you might
10 say, though, that distinguishes it, is that, here, the work
11 that was being performed when DiBrino got injured was the
12 work of some other subcontractor, which is not the case
13 when the ladder that's on the wall falls on him, right?

14 MS. UVAYDOV: But in the - - -

15 CHIEF JUDGE WILSON: And the scope of somebody's
16 work presumably is exclusive of the scope of somebody
17 else's work.

18 MS. UVAYDOV: Absolutely. But the ladder was
19 there for the scope of DAL's work.

20 CHIEF JUDGE WILSON: I understand that. But
21 there is a difference between your example and what
22 happened here.

23 MS. UVAYDOV: So the - - -

24 CHIEF JUDGE WILSON: Because he took the ladder
25 to use it for the scope of his work, not DAL's work.

1 MS. UVAYDOV: In my hypothetical, DiBrino would
2 still be doing the scope of his work, which is working
3 around the area. There were two trades working around the
4 same time. Just because he is continuing to go on the
5 scope of his work does not exclude that or preclude - - -

6 CHIEF JUDGE WILSON: He's not using the ladder
7 for the scope of his work is - - - is - - -

8 MS. UVAYDOV: Huh?

9 CHIEF JUDGE WILSON: He's not using the ladder
10 for the scope of his work is the difference.

11 MS. UVAYDOV: Correct.

12 JUDGE RIVERA: And the other point, of course, is
13 when you leave it up on the wall and DiBrino - - - I think
14 that was your hypothetical - - - just walks by, the ladder
15 falls on him. So it seems natural that there's some
16 liability to DAL. But when all you've done is leave it in
17 the middle of the floor, and it's only once DiBrino
18 actually takes it and - - - and does something with it that
19 they're injured, another way of thinking about the scope of
20 the work that then DAL should not be liable under those
21 circumstances, or at least 10.1 is not intended to cover
22 that particular scenario.

23 MS. UVAYDOV: Well, in that particular scenario,
24 however, there's nothing that changes from it not being
25 related to the work because what they are proposing is,

1 unless I am - - -

2 JUDGE RIVERA: But did you use related to the
3 work?

4 MS. UVAYDOV: Huh? I'm sorry.

5 JUDGE RIVERA: Did you use related to the work?

6 MS. UVAYDOV: The - - -

7 JUDGE RIVERA: You're just saying we've
8 interpreted it that way. Is that your argument?

9 MS. UVAYDOV: No. It - - - you have interpreted
10 arising from the work as having incident to or a
11 relationship with. And - - -

12 JUDGE GARCIA: What case is - - -

13 JUDGE RIVERA: Again, but to the work. We're
14 back to, to the work.

15 MS. UVAYDOV: Right.

16 JUDGE RIVERA: But your white light is on. I'd
17 like to hear about 12.2 because that strikes me as much
18 broader than 10.1.

19 MS. UVAYDOV: 12.2 has two subsections. The
20 first is arising out of, resulting from, or in any way
21 related to an act or omission, which the court below didn't
22 really focus on. But we do support in our briefing because
23 it is a broad indemnity for act or omission - - -

24 JUDGE RIVERA: You mean the directly or
25 indirectly - - - related directly - - -

1 MS. UVAYDOV: Yes.

2 JUDGE RIVERA: - - - or indirectly?

3 MS. UVAYDOV: Related directly or indirectly to
4 an act or omission.

5 JUDGE RIVERA: Any acts or omissions, uh-huh.

6 MS. UVAYDOV: So again, this brings us into the
7 issue of this is a ladder that they've provided in order to
8 complete the electrical work. They brought it to our site.
9 And I apologize. Let me finish the question. And we are
10 seeking indemnity for that. The other aspect of 12.2.1(g)
11 related to the negligence, and that is where the dissent in
12 the First Department would have found a question of fact
13 and would not have granted their motion to dismiss. And
14 that goes into whether they owed us a duty and whether they
15 owed plaintiff a duty whether they were negligent. And it
16 goes to the negligence and the foreseeability discussion
17 that we saw in the First Department, which I'm happy to
18 address.

19 JUDGE RIVERA: Well, foreseeability is about the
20 scope, not about the - - - you first have to have the duty.

21 MS. UVAYDOV: Well, yes and no. And I will
22 absolutely - - -

23 JUDGE RIVERA: No. There's no no in that. We've
24 been very clear.

25 MS. UVAYDOV: The court has recognized

1 implicitly, in going back to Palsgraf and a different
2 decision that we cite from 1928, that when you're
3 considering whether something is an unreasonable risk of
4 harm, you have to look at the surrounding circumstances.
5 What is reasonable in one circumstance is going to look
6 unreasonable in a different circumstance. And in that
7 respect, the dissent called it the foreseeability. I can
8 call it circumstances. But you will recognize that there
9 is an implicit understanding of the circumstances
10 surrounding it.

11 And I'd like to give another hypothetical, if I
12 may. We're in an OCA building. Let's say OCA has a third-
13 party contract with a custodian. And that custodian puts a
14 trash chute right there at the entrance, and they put a
15 second trash chute right here. If somebody walks by and
16 trips on the walkway in an open court session, you would
17 say that they have - - - the custodian has launched a force
18 or instrument of harm by leaving a trash container right in
19 the pathway of an active hallway, whereas you might not
20 reach that if it was in the corner. And you would say the
21 distinguishing characteristic is that it is foreseeable
22 that people walk here. It is also foreseeable that people
23 might not spot it, and therefore, their placement of that
24 trash container created an unreasonable risk of harm. It's
25 the same act of placing the trash container, but the

1 surrounding circumstances have suddenly changed, where the
2 custodian noncontracting party now creates an unreasonable
3 risk of harm.

4 And that's all the dissent, I believe, was trying
5 to show. And that's all we're proposing, that when you
6 know that there is a pattern at this job site of other
7 trades borrowing each other's or taking without permission
8 each other's equipment - - - and there is evidence in the
9 record that the blue tape means that that is a defective,
10 and there is an issue with a rung being bent out of shape,
11 then, knowing all of that, was it, under the circumstances,
12 an unreasonable risk to leave that ladder out there? But
13 again, I don't believe the court has to reach that if you
14 agree with us on the much broader indemnity provisions
15 under 10.2 and 12.2.1.

16 JUDGE RIVERA: Can I just ask you in the 12, does
17 that apply to both JRM and Rockefeller, the indemnities?

18 MS. UVAYDOV: Yes. I believe the language of
19 that - - - and let me just confirm. I apologize. It
20 covers both the owner and the contractor. But I do want to
21 confirm that because it has been a while since I looked at
22 the beginning. Yes, to defend all indemnities, and the
23 indemnities were previously defined as both owner and
24 general contractor.

25 JUDGE RIVERA: Thank you.



1 CHIEF JUDGE WILSON: Thank you.

2 MR. SIMONE: Good afternoon, Your Honors.

3 Christopher Simone, for the respondent, DAL electrical.
4 With me today is my colleague, Gerard Rath. I think there
5 are two key facts or even misconception in - - - in this
6 case that really undermine JRM's appeal, and I think,
7 simplify this case. The first is, the work here is not
8 work in some anomalous form. It is - - - it is a defined
9 term under the contract. It's Article 2 at page 852. It
10 specifically says what our work is. DAL's work is - - -
11 includes only the scope of work to be performed on a
12 project by DAL in accordance with the terms of this
13 agreement and contract documents. All DAL work is set
14 forth in fourteen pages at 877 - - -

15 JUDGE RIVERA: Sure. But 12.2.1 has this
16 breathtakingly broad phrase, or in any way related directly
17 or indirectly to the following, and that includes any acts
18 or omissions.

19 MR. SIMONE: And 12.1 incorporates the agreements
20 and the contracts. And this is the agreement. We have for
21 - - - we have pages and pages of the responsibility.

22 JUDGE RIVERA: But if you meant the work, as in
23 the scope of the work, given that otherwise you use the
24 work in other provisions, why didn't you do that there?

25 MR. SIMONE: Because they incorporated 6 and 10

1 into that. They said - - - the beginning of it says - - -

2 JUDGE RIVERA: There has to be some reason you -

3 - -

4 MR. SIMONE: All capitalized terms - - -

5 JUDGE RIVERA: - - - have under this agreement

6 for - - -

7 MR. SIMONE: Well, 12 says all capitalized terms
8 defined in the agreement and use herein shall have the same
9 meanings in this agreement. So they incorporated the work.
10 Work is capitalized. It's not just work in the general
11 sense. It's our work and our work is set forth - - -

12 JUDGE RIVERA: No. But I'm saying under this
13 agreement.

14 MR. SIMONE: Yeah. But they - - -

15 JUDGE RIVERA: Isn't the agreement just this
16 construction, what you've agreed, right? There - - -
17 there's work being done on this fifth floor in this pantry,
18 this particular - - -

19 MR. SIMONE: No. No. Work - - - our work - - -
20 DAL's electrical work. Now - - -

21 JUDGE RIVERA: I know. But it says under this
22 agreement.

23 MR. SIMONE: Right. But this agreement
24 incorporates - - -

25 JUDGE RIVERA: Yes. But it must be broader than

1 that, right? Or else you would have just said work - - -

2 MR. SIMONE: But they did say - - -

3 JUDGE RIVERA: - - - you know.

4 MR. SIMONE: - - - work by incorporating the
5 definitions from 6 and - - -

6 JUDGE RIVERA: Okay. You and I are going round
7 and round in circles.

8 MR. SIMONE: Maybe.

9 JUDGE RIVERA: Let's assume for one moment it
10 means something more than that.

11 MR. SIMONE: Okay.

12 JUDGE RIVERA: What are the implications?

13 MR. SIMONE: I don't think there are any
14 implications because our work does not involve, in any
15 scenario, providing ladders to another trade.

16 JUDGE RIVERA: Well, let's say it's just our
17 work. Why isn't any way related directly or indirectly,
18 why isn't this, at a minimum, indirectly related?

19 MR. SIMONE: Because it's not even indirectly
20 electrical work. Somebody took our equipment.

21 JUDGE RIVERA: No. No. Why - - - yes. But you
22 can't - - -

23 MR. SIMONE: Right.

24 JUDGE RIVERA: - - - do the work without the
25 equipment. So why isn't it indirectly related to the

1 treatment of your equipment?

2 MR. SIMONE: I would think indirectly still has
3 to have some relation to the work, where it's not - - -
4 where we do something that indirectly affects something
5 else.

6 JUDGE RIVERA: But you can't do the work without
7 the equipment.

8 MR. SIMONE: That's true.

9 JUDGE RIVERA: It's not that kind of work.

10 MR. SIMONE: That's true.

11 JUDGE RIVERA: Right? You need equipment.

12 MR. SIMONE: Right.

13 JUDGE RIVERA: Huh?

14 MR. SIMONE: But it's our equipment.

15 JUDGE RIVERA: Correct.

16 MR. SIMONE: And somebody commandeered - - -

17 JUDGE RIVERA: That's why they're trying to hold
18 you liable.

19 MR. SIMONE: Right.

20 JUDGE RIVERA: Yes.

21 MR. SIMONE: And somebody commandeered our
22 equipment.

23 JUDGE RIVERA: Yeah. Well, that's a different
24 story.

25 MR. SIMONE: Well, that's - - -



1 JUDGE RIVERA: No. But that's a different story.
2 We're just talking about - - -

3 MR. SIMONE: The - - - the other - - -

4 JUDGE RIVERA: - - - what this caused.

5 JUDGE CANNATARO: But it is indirectly related -
6 - - I mean, indirectly related to the work covers a whole
7 mess of sins. And as you've been asked repeatedly, the
8 ladder is integral to the work; is it not?

9 MR. SIMONE: It would be, yes. Yes.

10 JUDGE CANNATARO: So that's a relationship. And
11 it might be direct. It might be indirect, but it's
12 related.

13 MR. SIMONE: Well, then, as we said in our brief,
14 then that would make us - - - that would make us
15 responsible for just showing up at the job site or anybody
16 taking anybody's equipment. And if that's - - - that's - -
17 -

18 JUDGE CANNATARO: Maybe.

19 MR. SIMONE: - - - the - - - we've defined in
20 this - - - we still have defined what the work is. So what
21 - - - whatever the plaintiff was doing was not our work.
22 So anything that happens in that, direct or indirect, is
23 still not related to our work.

24 JUDGE HALLIGAN: And you get to the work by the
25 words under this agreement?

1 MR. SIMONE: Yeah. Because it says - - - well -
2 - -

3 JUDGE HALLIGAN: In 12 - - - in 12.2.1?

4 MR. SIMONE: Yeah. It incorporates the terms of
5 the other agreements, which is 6 and - - - 6 and 10.

6 JUDGE RIVERA: So if he didn't take the ladder
7 but merely walked by the ladder, not put up, but it's just
8 there, and it falls on him, no liability?

9 MR. SIMONE: It's a good question.

10 JUDGE RIVERA: As was said by my colleague
11 before, thank you. But - - -

12 MR. SIMONE: Could be. But that didn't happen
13 here.

14 JUDGE RIVERA: Okay. But I - - - that's - - -
15 that's why it's a hypothetical.

16 MR. SIMONE: Right.

17 JUDGE RIVERA: Yes.

18 MR. SIMONE: And the other - - - I said there
19 were two - - -

20 JUDGE RIVERA: Again, I'm saying, isn't that the
21 logical consequence of the way you are suggesting we
22 interpret these provisions? That no matter what you do
23 with this ladder, you never have to contribute. You never
24 have to indemnify.

25 MR. SIMONE: No.

1 JUDGE RIVERA: No matter how negligent, it
2 doesn't matter.

3 MR. SIMONE: No. That's not what I'm saying.
4 But I'm saying under your - - -

5 JUDGE RIVERA: Okay.

6 MR. SIMONE: - - - under your hypothetical, I
7 mean, I think we need more context, why did it fall? I
8 mean, it - - -

9 JUDGE RIVERA: Well, that might be another story,
10 but - - -

11 MR. SIMONE: Right. But I mean - - - I think
12 that's important. I think that's part of the analysis.

13 JUDGE RIVERA: It fell because the rung is
14 defective.

15 MR. SIMONE: Right. I think that would be part
16 of the analysis. But I said in the beginning there were
17 two things.

18 JUDGE RIVERA: What - - - okay. Well, then you
19 say - - -

20 MR. SIMONE: There were two.

21 JUDGE RIVERA: Let - - - I'll go with this
22 hypothetical. The rung is defective.

23 MR. SIMONE: The rung - - - the - - - the - - -

24 JUDGE RIVERA: The - - - no. It's my
25 hypothetical.

1 MR. SIMONE: Oh, your hypothetical. Sorry.

2 JUDGE RIVERA: The rung is defective. That's
3 what you asked me.

4 MR. SIMONE: I thought you - - - I thought you
5 meant this one.

6 JUDGE RIVERA: No.

7 MR. SIMONE: And what did - - - and the rung
8 causes it to fall by itself?

9 JUDGE RIVERA: Yes.

10 MR. SIMONE: It's possible. But again, that's -
11 - -

12 JUDGE RIVERA: Equipment happens to fall at
13 worksites all the time.

14 MR. SIMONE: It - - - it - - - that's possible.
15 That's possible.

16 JUDGE RIVERA: Okay.

17 MR. SIMONE: But that's not what happened here.
18 That's - - - that's the difference - - -

19 JUDGE RIVERA: Again, it's a hypothetical - - -

20 MR. SIMONE: Something - - - there's something
21 controlling it.

22 JUDGE RIVERA: It's a hypothetical under your - -
23 -

24 MR. SIMONE: Right.

25 JUDGE RIVERA: - - - interpretation, what you're

1 advocating for us to interpret here - - - for how we should
2 interpret these provisions - - -

3 MR. SIMONE: I - - - I think it's possible - - -

4 JUDGE RIVERA: - - - you have to indemnify.

5 MR. SIMONE: I think it's possible. I'll concede
6 it's possible that something indirectly can - - -

7 JUDGE RIVERA: Why? What makes that different
8 from what happened here? Now we'll get to what you want to
9 say.

10 MR. SIMONE: Because we - - - we didn't have
11 control over what was happening here. It wasn't part of
12 our work.

13 JUDGE RIVERA: Well, you didn't in my
14 hypothetical.

15 MR. SIMONE: Someone else was having - - -
16 someone else took control.

17 JUDGE RIVERA: But you didn't in my hypothetical.

18 MR. SIMONE: Well, we did. We put it someplace
19 and maybe in a way that did - - - that's why I say you need
20 context here.

21 JUDGE RIVERA: No, no, no. It's the same
22 scenario, except in my hypothetical, you walk by and fell
23 on him before he acted. Maybe he was going to go grab it
24 and he didn't, but it fell on him first.

25 MR. SIMONE: Well, I don't think that the

1 hypothetical can be - - - is complete enough because you
2 still - - - I think you - - - still you need to know why it
3 fell.

4 JUDGE HALLIGAN: Is your - - -

5 JUDGE SINGAS: So is it the affirmative action of
6 plaintiff going over and taking your ladder and then
7 utilizing it that you're saying that causes it not to arise
8 from your work?

9 MR. SIMONE: Right.

10 JUDGE SINGAS: If it was just there and - - - or
11 lying there and someone tripped over it, then that would -
12 - -

13 MR. SIMONE: We - - - we were going to - - -

14 JUDGE SINGAS: - - - could arise from the work
15 because you were using the ladder. But is that the - - -

16 MR. SIMONE: But we weren't using it yet.

17 JUDGE SINGAS: - - - affirmative action?

18 MR. SIMONE: Yeah.

19 JUDGE SINGAS: Is that your argument?

20 MR. SIMONE: We were going to use it, I guess,
21 but he did - - -

22 JUDGE SINGAS: Right.

23 MR. SIMONE: He was - - - had moved - - - removed
24 his stuff, went to lunch - - -

25 JUDGE HALLIGAN: If he had asked someone from DAL

1 for permission to use the ladder and they had said yes,
2 would there be a different result here in terms of
3 indemnification? Better argument that it's at least
4 indirectly?

5 MR. SIMONE: I think that would be a better
6 position for the plaintiff in this case, yeah. And we - -
7 -

8 JUDGE HALLIGAN: And what is it about that that
9 makes the difference?

10 MR. SIMONE: Because we took - - - we allowed it.
11 We authorized it. We took control of that.

12 JUDGE RIVERA: What if the person had no
13 authority to give them permission?

14 MR. SIMONE: What if the person - - - I'm sorry?

15 JUDGE RIVERA: The person had no authority to
16 give them permission. It's contrary to your policy.

17 MR. SIMONE: Again, that's context.

18 JUDGE RIVERA: Which I understand your policy to
19 be no unless you get a particular type of authorization.

20 MR. SIMONE: Again - - - again that's context.
21 You need context. Who is that person?

22 JUDGE RIVERA: Well, in that context, do you have
23 to indemnify?

24 MR. SIMONE: Then I think you're in the same - -
25 - well, you might be in the same situation in that case.

1 If the person gave authority didn't - - - the person
2 authorized it and didn't have authority, then that
3 authority was a nullity.

4 JUDGE RIVERA: How does DiBrino know that?

5 MR. SIMONE: DiBrino didn't ask. I don't know.

6 JUDGE RIVERA: Well, he asked someone who was an
7 agent of the subcontractor.

8 MR. SIMONE: But I think the - - - you also have
9 to look at who the person was. And it's not DiBrino
10 seeking recovery here. He's already settled. It's JRM
11 seeking indemnity.

12 JUDGE RIVERA: No. I understand that.

13 MR. SIMONE: Yeah.

14 JUDGE RIVERA: But he's the person who's going to
15 use the ladder. He's the one who's injured.

16 MR. SIMONE: Right.

17 JUDGE SINGAS: And what about the instrument of
18 harm or their Espinal argument? Was that preserved below?
19 Did they raise that in their summary judgment?

20 MR. SIMONE: We pointed it out. Nobody talked
21 about it at all. They didn't raise it at all. They raised
22 the first time in their motion for leave to appeal because
23 the dissent had raised it, but that was not raised at all
24 until this.

25 And the other - - - I never got to the second

1 factor I said was a misconception, I think, simplifies this
2 case. The ladder wasn't defective. There's no issue with
3 this ladder. They talk about this blue tape. The story
4 with the blue tape is, if the ladder was - - - was
5 defective and wasn't going to be used, they wrap it with
6 blue tape - - - close it, wrap it, right? Do not use and
7 put it in their chanty. The blue tape on this ladder was
8 not that blue tape. Presumably, it was to say, don't step
9 above these rungs because that's what the label on the side
10 says. But this ladder was not defective. Nine ways that
11 this has been confirmed, three of those ways are by JRM.
12 They confirm no defect in this ladder. The Department of
13 Buildings, which is like the IRS, they can find anything
14 wrong, right? They found nothing wrong here. OSHA didn't
15 issue any violations.

16 JUDGE RIVERA: And can that be determined on
17 summary judgment?

18 MR. SIMONE: Yes. Absolutely. These were
19 objective inspections. These were not exemplars. They
20 inspected these ladders. Our expert inspected it too.
21 There was no countervailing expert.

22 JUDGE RIVERA: Well, the - - - the person who was
23 injured said it wobbled.

24 MR. SIMONE: Well, but that's not a defective
25 ladder. He wobbled because he overreached, and it was in a

1 - - -

2 JUDGE RIVERA: But again, can that all be decided
3 on summary judgement?

4 MR. SIMONE: Yeah. It was decided on summary
5 judgment because he got 240 because he - - - because the
6 Appellate Divisions allow an unsecured ladder because it
7 wasn't secured by somebody to - - - that falls over, but
8 the - - - he didn't - - - the ladder didn't collapse under
9 him. He overreached. It fell, and he got his foot caught
10 in it. But they inspected the ladder. There was nothing
11 wrong with it. Even he - - - even he used it three or four
12 times. And even his foreman inspected and said it was
13 fine.

14 JUDGE CANNATARO: But a nondefective - - -

15 MR. SIMONE: So there was no issue with the
16 ladder. It's fine.

17 JUDGE CANNATARO: A nondefective ladder wouldn't
18 disqualify a plaintiff from getting 241 liability, would
19 it?

20 MR. SIMONE: No. He got it because he fell over,
21 and it wasn't - - - nobody was holding it.

22 JUDGE CANNATARO: Right.

23 MR. SIMONE: But he had a foreman in there, but
24 he wasn't holding it - - -

25 JUDGE CANNATARO: Right.



1 MR. SIMONE: - - - because he didn't maintain
2 three points. But the ladder itself was not defective.

3 JUDGE CANNATARO: I'm just saying that's - - -

4 MR. SIMONE: Yeah.

5 JUDGE CANNATARO: - - - an interesting fact, but
6 it doesn't inform a lot about 241 - - - 240(1) liability.

7 MR. SIMONE: I'm not sure I understand the
8 question.

9 JUDGE CANNATARO: I'm just saying, whether the
10 ladder is defective or not isn't going to really factor
11 into the question of whether that form of strict liability
12 is present in the case.

13 MR. SIMONE: But it does - - - it does - - -
14 whether the ladder is defective does go into their claim
15 that - - - of Espinal and that we were negligent.

16 JUDGE CANNATARO: Oh, okay.

17 MR. SIMONE: That - - - that's the - - -

18 JUDGE CANNATARO: So you're talking about
19 launching a force of harm?

20 MR. SIMONE: Right. Right.

21 JUDGE CANNATARO: Okay. Okay.

22 MR. SIMONE: That's the key here. There - - -
23 there is a negligence trigger also in 12.1 they're relying
24 on. But there's no negligence here. There was nothing
25 wrong with the ladder.

1 JUDGE CANNATARO: Well, I think the argument was
2 just the placement of the ladder. Having the ladder be
3 there - - -

4 MR. SIMONE: I don't believe that's their - - -

5 JUDGE CANNATARO: - - - launches a force of harm.

6 MR. SIMONE: Judge, that's not their argument.
7 Their argument has shifted. It's kind of a little bit of a
8 shift. Originally, they said plaintiff was the sole
9 proximate cause, and now they're saying the ladder was
10 defective. And as the majority of the First Department
11 pointed out - - - even the dissent started to say there was
12 - - - it may have been, and then shifted to it was
13 defective. There - - - I want to make clear, there was no
14 defect in this ladder. It's not supposition. It has been
15 confirmed nine different ways in this record.

16 JUDGE CANNATARO: Is that a summary judgment fact
17 finding that the ladder was not defective?

18 MR. SIMONE: It's supported by the record. I
19 mean, it's - - -

20 JUDGE CANNATARO: That wasn't my question. Was
21 that a finding of the court on the motion for summary
22 judgment that there was no defect in the ladder?

23 MR. SIMONE: It was a finding by the lower court,
24 yes. And it was not disturbed by the Appellate Division -
25 - -

1 JUDGE CANNATARO: Okay.

2 MR. SIMONE: - - - because it's supported by the
3 record. There is no countervailing evidence to show that
4 anything was wrong with this ladder. There wasn't. I
5 mean, that's just the - - - so there's no negligence issue
6 here. So even if you want to say there was negligence
7 triggered, there's no negligence. So if there are no
8 further questions, I'll rest on my brief.

9 CHIEF JUDGE WILSON: Thank you.

10 MR. SIMONE: Thank you.

11 MS. UVAYDOV: If I may just address the points in
12 reverse order just on the preservation. The parties below
13 - - - both sets of defendants below argued that plaintiff
14 was a sole proximate cause of his injuries, and that was
15 denied at the trial court level and the appellate level.
16 That is no longer an issue here.

17 We know, as a matter of law that the plaintiff
18 was not a hundred percent at fault for his accident. It is
19 not because he only overreached. It is not because he
20 improperly took somebody else's ladder when he had a
21 perfectly good Baker scaffold that he had used that
22 morning. Two sets of courts have now rejected that, and
23 DAL never took up that appeal. So he cannot say it's only
24 because DiBrino overreached. It's only because you took
25 our ladder without our permission.

1 As a matter of law, Mr. DiBrino has been found
2 not to be a hundred percent at fault for the accident. I
3 have a nonnegligent owner in GC, which means,
4 mathematically, Mr. DiBrino can only be ninety-nine percent
5 at fault or less. Somebody else has to be at fault for
6 this accident. That leaves the owner of the ladder that
7 has been found, as a matter of law, to fail - - - in
8 failing to provide proper safety equipment and proper
9 protection, or maybe potentially his employer. But there's
10 only two possible negligent parties aside from Mr. DiBrino.
11 So that is just looking at what was preserved and what was
12 argued.

13 And actually, contrary to my learned colleagues'
14 representation below, the trial court absolutely found that
15 there was a question of fact as to defect because they
16 refused to dismiss their common law negligence claim,
17 finding that there is a question of fact as to whether
18 there was a defective ladder owned by DAL left at the site.
19 So that is why they had to take up their common law
20 negligence claim to the First Department.

21 That remains an open question. We're not saying
22 we're entitled, as a matter of law, for a finding that it
23 is defective. It just remains a question of fact. But for
24 purposes of contractual indemnity, since our indemnity
25 agreement does not really have a negligence trigger except

1 for 12.2.1(g), we don't need to show negligence. We don't
2 need to show that this is a defective ladder that
3 proximately caused the injury. We just need to show that
4 there is a claim of strict liability that this arises out
5 of or somehow relates to the work.

6 And as these various judges have said, bringing
7 the ladder was integral to their work, and it is in their
8 contract that they must provide all materials and
9 equipment, and that materials and equipment must be an
10 appropriate and safe equipment for their workers. They're
11 saying, well, because he wasn't our worker, it does not
12 arise out of our work.

13 JUDGE CANNATARO: Well, it's a little more than
14 that. He's not - - - they're not just saying he wasn't our
15 worker. They're saying, he wasn't doing our work. And we
16 weren't even doing our work at the time.

17 MS. UVAYDOV: Absolutely. And there are - - -
18 not from this court, but the First Department in Urbina, we
19 cite Second Department case law, and I believe, Third
20 Department case law that have all found open questions of
21 fact on negligence and have, more importantly, granted
22 contractual indemnification when the construction worker
23 took the equipment without permission. This is not a new
24 concept. It happens frequently in construction sites where
25 people will see a ladder or a scaffold and then just take

1 it and use it.

2 JUDGE RIVERA: And the deposition testimony was
3 this was well known to have happened here.

4 MS. UVAYDOV: Absolutely.

5 JUDGE RIVERA: Can I ask you to respond to his
6 argument about under this agreement in 12.2.1(a)?

7 MS. UVAYDOV: So under this agreement, again,
8 would encompass not just the scope of work, but the entire
9 agreement. It would also encompass the idea that they have
10 to provide equipment for the site. They have to provide
11 appropriate equipment that necessarily included ladders
12 because a lot of the electrical work involved reaching up.
13 That is the issue. They're going to tell you this is not a
14 defective ladder. It is actually undisputed that there was
15 a bent rung in the ladder. You can look at the pictures.
16 I think we have it on record cite 800.

17 JUDGE RIVERA: So let me go back to this. They
18 have to - - - the agreement includes that they have to
19 provide equipment for their work. Is that what you're
20 saying? Okay. And then that the - - - in any way related,
21 directly or indirectly, the fact that it says indirectly -
22 - -

23 MS. UVAYDOV: Yes.

24 JUDGE RIVERA: - - - then gets you to the - - -
25 the - - - the equipment was not being used by DAL's

1 employee at - - -

2 MS. UVAYDOV: Yes.

3 JUDGE RIVERA: - - - the time, but by someone
4 else.

5 MS. UVAYDOV: Correct. And I think the - - - the
6 two indemnity provisions are absolutely broad enough to
7 cover the fact that they brought this equipment onto our
8 site. They left it on a site, where they acknowledge in
9 their own policies - - - acknowledge that people take each
10 other's equipment all the time. That there is a policy to
11 lock up the equipment when it's not in use so that other
12 trades don't take it. There is also testimony here - - -

13 JUDGE RIVERA: Would that have been how they
14 would have been able to avoid potential liability, this
15 indemnification contribution claim to have either locked it
16 up or otherwise made it inaccessible to someone from
17 another trade?

18 MS. UVAYDOV: I strongly believe it would have
19 also changed the underlying analysis. So again - - -

20 JUDGE RIVERA: I'm just saying how they would
21 protect themselves. It's very broad. Like I said, it's
22 breathtakingly broad. So if they want to protect
23 themselves, is that their only recourse?

24 MS. UVAYDOV: I think - - -

25 JUDGE RIVERA: Given - - - given how - - -



1 MS. UVAYDOV: Right.

2 JUDGE RIVERA: - - - it's written.

3 MS. UVAYDOV: If they locked it up, it would have
4 also changed the underlying analysis, where now plaintiff,
5 Mr. DiBrino, goes and breaks into somebody's locked closet
6 and takes somebody else's equipment when it is locked
7 instead of going to get his own. And that now changes the
8 sole proximate cause analysis.

9 JUDGE RIVERA: Sure.

10 MS. UVAYDOV: So we don't have to pay under 240,
11 and then they don't have to be indemnified.

12 JUDGE CANNATARO: So it really wouldn't be a
13 question of 240 liability per se. It would have affected
14 the sole proximate cause motion?

15 MS. UVAYDOV: Right.

16 JUDGE CANNATARO: You never get to 240 because if
17 he went out of his way to take the - - - to jailbreak the
18 ladder, he would have been the sole proximate cause of his
19 own accident?

20 MS. UVAYDOV: It would have saved them money, and
21 it would have saved us money.

22 JUDGE GARCIA: Counsel, I see your light is up.
23 But with the Chief Judge's permission, I - - - on 12.2,
24 which has this broad language resulting in any way related
25 directly or indirectly to any of the following, and A is

1 any acts or omissions, right, by the subcontractor. That's
2 how you would read that?

3 MS. UVAYDOV: Yes.

4 JUDGE GARCIA: Then why do you need G, the
5 negligence or willful misconduct or negligent acts or
6 omissions of the subcontractor? Because I would assume
7 negligent acts or omissions were subsumed under general
8 acts or omissions.

9 MS. UVAYDOV: Right. Here, like I said, there
10 are three different indemnity provisions. And a lot of
11 them are encompassed within each other. There is a
12 conflict - - -

13 JUDGE GARCIA: But this is the same - - -

14 MS. UVAYDOV: Yes.

15 JUDGE GARCIA: - - - provision. It's 12.2 - - -
16 it's 12.2.1. One is A, one is G, right?

17 MS. UVAYDOV: Absolutely. But the conflict of -
18 - - the interpretation provision says that you must
19 interpret it in the broadest sense possible?

20 JUDGE GARCIA: But why would you ever need G if
21 your reading of A is correct?

22 MS. UVAYDOV: I understand the court's point that
23 the same section is being interpreted in potentially
24 superfluous ways, but there is a possibility where
25 something is not an act or omission, but would be

1 negligence. And in between that there's also failure to
2 secure insurance coverage. That wouldn't necessarily be
3 negligent - - -

4 JUDGE GARCIA: But it seems like in context, A
5 would be something like that, which is why you would need
6 G, otherwise, you wouldn't need G, and G is only
7 negligence.

8 MS. UVAYDOV: Right. I completely understand
9 that. But if you look at the entire list, it's not just A
10 and G, there's an entire, you know, A, B, C, D. Within
11 them, they can actually consume each other because I
12 believe B and C talks about employment actions. Well, then
13 necessarily employment would be encompassed as an act or
14 omission under this agreement.

15 JUDGE GARCIA: Which also just would, to me, lead
16 you to read A more narrowly if you need all of those
17 separate things spelled out?

18 MS. UVAYDOV: I would urge this court to find
19 that, in totality, looking at this contract and the fact
20 that they seem to pile on every conceivable way they can to
21 show that we really, really, really want you to indemnify
22 us in anything - - -

23 JUDGE GARCIA: Then just use A.

24 MS. UVAYDOV: You could also argue then you
25 didn't even need 12.2. You could have just used 10.2.

1 They still - - -

2 JUDGE GARCIA: But it's harder to make that
3 argument where it's the same provision, right? I mean, and
4 you have a - - - what you're arguing is all encompassing A,
5 and then you have - - - now you're telling me on the brief,
6 but B, C, D, and E, which are all redundant of A?

7 MS. UVAYDOV: They deal with particular issues.
8 Like B dealt with, I believe, employment. I apologize; I'm
9 past my - - -

10 JUDGE GARCIA: But you were asking us to read A
11 in a way that would cover as an - - -

12 MS. UVAYDOV: I'm asking you - - -

13 JUDGE GARCIA: - - - umbrella all of those - - -

14 MS. UVAYDOV: - - - to - - -

15 JUDGE GARCIA: - - - specified B through G's.

16 MS. UVAYDOV: Yes. I'm asking you to read the
17 plain text of the parties' agreement along with the
18 totality of the agreement to show intent of the parties to
19 indemnify. And even if - - -

20 CHIEF JUDGE WILSON: Can you - - - can you give
21 me an example of something that would be covered by
22 12.2.1(a) and not by 10.1?

23 MS. UVAYDOV: You mean between the original
24 indemnity agreement and the supplemental agreement?

25 CHIEF JUDGE WILSON: I mean between those two

1 provisions of the indemnity - - - two different
 2 indemnification provisions. Because we talked about 10.1
 3 which has related to the work in it and 12.1 which doesn't
 4 have that, says the agreement. Counsel's argument is that
 5 that incorporates the other. So I'm asking if you're
 6 interpreting 12.1 as broader than 10 - - - 12.2.1 as - - -
 7 A as broader than 10.1 because it omits a specific
 8 reference to the work. Can you give me an example of
 9 something that would be covered by the broader indemnity
 10 and not the narrower one?

11 MS. UVAYDOV: I think the easier example would
 12 be, if you read the totality of 12 - - - 12.2.1, it also
 13 talks about remedies. If, for instance, they fail to
 14 obtain insurance coverage in that same subsection, that
 15 wouldn't necessarily be covered by 10.2. It also - - -
 16 12.2 also talks about any kind of employment related suits
 17 that might not be covered by 10.2, so as a whole versus as
 18 just that applying to this particular construction
 19 accident.

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 DiBrino v. Rockefeller Center North, No. 103 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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