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COURT OF APPEALS

STATE OF NEW YORK

YANIVETH R., et al.,

Appellant,

-against-

No. 35

LTD REALTY CO.,

Respondent.

20 Eagle Street
Albany, New York 12207
February 16, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL L. GARCIA

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar,
2 number 35, Yaniveth v. Limited Realty co.

3 MR. KONIGSBERG: Good afternoon, Your
4 Honors, my name is Alan Konigsberg, I represent the
5 appellant, Ms. R. in this case, and I would
6 respectfully request four minutes of rebuttal time.

7 CHIEF JUDGE DIFIORE: You have four
8 minutes, sir.

9 MR. KONIGSBERG: It's well known that
10 infant lead poisoning is now very much in the news by
11 virtue of what happened in Flint, Michigan over the
12 past two years.

13 JUDGE GARCIA: Counsel, what would your
14 test for resides be, and what - - - what test would
15 you have this court - - - what definition?

16 MR. KONIGSBERG: My test - - - my test is
17 what this court has decided as - - - means reside,
18 and the failure of the city council to limit the word
19 reside, both in terms of time - - - duration, having
20 no mention of hours a week, hours a month, hours a
21 year - - - the way, for example, as we pointed out in
22 our brief, New Jersey does, or the federal law does,
23 which does specifically talk about residence in terms
24 of hours a week, hours a month, hours a year.

25 JUDGE GARCIA: So absent that - - -

1 MR. KONIGSBERG: Absent that - - -

2 JUDGE GARCIA: - - - what's our test?

3 MR. KONIGSBERG: - - - and the court - - -
4 this court used, in considering Chapman, the word
5 "presence"; and to my knowledge, the word - - -

6 JUDGE GARCIA: Wasn't Chapman living in,
7 rather than a presence standard?

8 MR. KONIGSBERG: Well, I - - - I believe
9 the answer is, yes, but - - -

10 JUDGE GARCIA: So is living in - - - what's
11 the difference between living in and resides?

12 MR. KONIGSBERG: I don't think there is a
13 difference; I think - - - I think there is a - - - I
14 don't think there is a difference, and consider
15 whether or not - - -

16 JUDGE ABDUS-SALAAM: So if there is not a
17 difference - - - in deposition, why did your client
18 say that the child lives with her family elsewhere,
19 not at the grandmother's apartment?

20 MR. KONIGSBERG: Well, I know - - - I think
21 she wasn't - - -

22 JUDGE ABDUS-SALAAM: The grandmother said
23 the same thing, right?

24 MR. KONIGSBERG: I believe that's true, but
25 the common parlance of this is not the same as the

1 statutory construction that this court is supposed to
2 apply in considering what Local Law 1 meant.

3 The City Council, when it passed Local Law
4 1 in 1982, could have, but failed to, define in terms
5 of time and duration - - -

6 JUDGE ABDUS-SALAAM: Well, maybe - - -

7 MR. KONIGSBERG: - - - let alone - - -

8 JUDGE ABDUS-SALAAM: - - - the City Council
9 thought common parlance was enough; that people know
10 what you mean when you say you live somewhere, as
11 opposed to, you visit someplace.

12 MR. KONIGSBERG: Well, if - - - if the
13 tenant in this case had been a parent rather than a
14 grandmother, would the result be any different? I
15 mean, in the 21st century, children live not always
16 with two parents; this happened to be a situation
17 where the parents work and - - -

18 JUDGE GARCIA: On these facts, would you
19 say she was living - - - the child was living in the
20 apartment?

21 MR. KONIGSBERG: Yes, yes.

22 JUDGE FAHEY: So - - -

23 CHIEF JUDGE DIFIIORE: Counsel, suppose the
24 child spent three to four hours a day with the
25 grandmother, every day in day care there, is that - -

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MR. KONIGSBERG: Let me give you the answer to that. The answer is in this court's decision in Basso (ph.), which did away with the distinctions of who the plaintiff was in terms of a landowner, what is available to the defendant is still the jury question of notice and negligence and failure to exercise due care. So just being a resident is not the key to the castle to establish liability; the defendant still has plenty of defenses available to it at the trial, which is, it didn't have notice and it didn't - - -

JUDGE RIVERA: So let's - - - let's go back to your argument that - - - that reside is - - -

MR. KONIGSBERG: Presence.

JUDGE RIVERA: Coequal to presidents (sic)

- - -

MR. KONIGSBERG: Yes, ma'am.

JUDGE RIVERA: - - - to presence, excuse me. So presence, meaning what? Do you have to have some property relationship to the location? Do you have to have some right to be present? What do you mean by presence?

MR. KONIGSBERG: Basso did - - - Basso did away with those common old English common law

1 distinctions, which at least I learned in law school,
2 about the distance - - - the difference between a
3 business invitee, and a social invitee, and a
4 trespasser, and all; Basso did away with all that,
5 this court did away with all that, and so the answer
6 is, what the defendant would still have available to
7 it is defenses based upon notice, and defendants - -
8 - and defense based upon its ability to exercise the
9 -

10 JUDGE RIVERA: But if the legislature made
11 presence, why not presence? I mean, obviously, if
12 the concern is the public policy of ensuring that
13 children are not subject to this terrible toxic
14 material - - -

15 MR. KONIGSBERG: Which is - - - which is
16 the case.

17 JUDGE RIVERA: - - - why - - - why would
18 you say reside? Doesn't reside have some meaning
19 beyond presence? It's not domicile; domicile and
20 residence are two different things.

21 MR. KONIGSBERG: Well, then maybe we can
22 agree that when the courts below used the words
23 "intent" - - -

24 JUDGE RIVERA: Uh-huh.

25 MR. KONIGSBERG: - - - which does apply to

1 domicile, the courts below were wrong as to that,
2 okay. Because I think it - - - it conflicted or
3 confused - - -

4 JUDGE RIVERA: But does that - - - that
5 doesn't mean they're wrong about this not being a
6 residency, correct?

7 MR. KONIGSBERG: Well, then, it - - - it
8 does - - -

9 JUDGE RIVERA: The child is not residing
10 with the grandparents.

11 MR. KONIGSBERG: Where is the basis - - -
12 where is the basis for saying that the word reside
13 has - - -

14 JUDGE RIVERA: All right, so counsel, if I
15 go sit in a library from 6 a.m. to 11 p.m. reading
16 briefs, do I reside in the library?

17 MR. KONIGSBERG: I think it's going to be a
18 - - - it's a question - - - and then you sue the
19 landlord for some particular defect - - -

20 JUDGE RIVERA: No, no, do I reside in the
21 library? I'm reading your briefs from 6 a.m. to 11
22 p.m. at night, am I residing in the library?

23 MR. KONIGSBERG: A regular basis?

24 JUDGE RIVERA: I do it every day, seven
25 days a week; I'll make it easier.

1 MR. KONIGSBERG: I don't know of any
2 language that says differently. And when you're
3 construing a statute, in terms of the purpose for
4 which the statute was designed, which was to protect
5 children from being lead poisoned, I think it would
6 be up to the legislature, with all due respect, not
7 to this court to decide what the legislature meant.
8 It had - - -

9 JUDGE STEIN: What if - - - what if the
10 child came to visit her grandmother once a year for a
11 week, does that fit in with the - - - with the
12 definition of reside for the purpose of the statute?

13 MR. KONIGSBERG: It - - - it leaves - - -
14 it leaves open to the defendant to argue the - - -
15 its complaint about notice, and its exercise to due
16 care. It is not without the defenses; establishing
17 residence does not establish liability.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.
19 Counselor.

20 MS. DARLINGTON: Good afternoon, Your
21 Honors. May it please the court. My name is Susan
22 Darlington; I represent LTD Realty.

23 Your Honors - - -

24 JUDGE FAHEY: Counsel, let me ask a
25 question - - -

1 MS. DARLINGTON: Sure.

2 JUDGE FAHEY: - - - to begin with the - - -
3 is there any limit to the number of residences a
4 person may have in the law?

5 MS. DARLINGTON: Your Honor, we have never
6 argued that a person cannot have more than one
7 residence.

8 JUDGE FAHEY: So assuming that to be true,
9 that you could have two residences and that there is
10 a legal term of art distinction between residence and
11 domicile - - -

12 MS. DARLINGTON: Yes.

13 JUDGE FAHEY: - - - how is this not - - -
14 how does she not reside?

15 MS. DARLINGTON: Implicit, I believe, in
16 the term reside is some degree of permanence and an
17 intent to remain.

18 JUDGE FAHEY: I thought that domicile
19 required an intent to be permanent, under Newcomb and
20 the cases that came out a while - - -

21 MS. DARLINGTON: Your Honor, under Newcomb,
22 I think we need to look at residence in the - - - in
23 the context in which Newcomb was - - - was presented
24 to the court, and other - - -

25 JUDGE FAHEY: Well, I knew it was a venue

1 case.

2 MS. DARLINGTON: Right, so then - - -

3 JUDGE FAHEY: I understand the facts are
4 not the same, but - - -

5 MS. DARLINGTON: Well, in the Newcomb case,
6 Your Honor, there was - - - Mrs. Newcomb had multiple
7 residences and she chose in her will, her holographic
8 will, to designate New Orleans as her domicile. You
9 can only have one domicile, you can have multiple
10 residences; and that's what the court held in that
11 case, and it didn't - - - the year before Mrs.
12 Newcomb passed away, she spent much more time in New
13 York - - -

14 JUDGE RIVERA: Do you have to live in a
15 residence? Do you have to stay overnight, live
16 there, eat there?

17 MS. DARLINGTON: It depends.

18 JUDGE RIVERA: Can I own a property and
19 just show up on occasion, and yet it's my residence?

20 MS. DARLINGTON: Well, Your Honor, that was
21 actually an - - - an issue that was raised by the
22 plaintiff in the Dean case, which was before this
23 court, and it - - - it really does go to intent, and,
24 you know, counsel has - - - has - - - my adversary
25 has repeated over and over and over - - -

1 JUDGE RIVERA: But is that a yes or a no?

2 MS. DARLINGTON: Is - - -

3 JUDGE RIVERA: Do you need to stay
4 overnight? Do you need to live in the spot - - - is
5 that what you mean by residence, I need to stay
6 overnight?

7 MS. DARLINGTON: You need to intend to re -
8 - - you need to intend to remain, and I think that - -
9 -

10 JUDGE RIVERA: How long and for what
11 purpose?

12 MS. DARLINGTON: How - - - you could intend
13 to remain with some degree of permanence, and
14 certainly in this case, Your Honor - - -

15 JUDGE FAHEY: And that - - - that's what I
16 thought that domicile was. I thought domicile is
17 permanent, as in some intent for permanence, and
18 that's why it's a legal term of art where you are
19 required to designate an area - - - for voting
20 purposes, for, you know, statute - - - will purposes
21 - - -

22 MS. DARLINGTON: Right, right.

23 JUDGE FAHEY: - - - things like that. But
24 in this situation, we're talking about resides, and I
25 can visualize a policy reason why the legislature

1 would say, we want to say resides because if a child
2 is four years old and exposed to elevated levels of
3 blood or - - - lead to her blood, that person, that
4 child then, we want to protect that child from
5 various residences - - - or whoever the injured
6 person is, but from various residences where this
7 injury could occur. So it seems to be almost that it
8 was conscious to use the language residence and not
9 domicile.

10 MS. DARLINGTON: Well, Your Honor, I don't
11 believe - - - I don't think that we are arguing over
12 residence and domicile; you could only have one
13 domicile, you could have multiple residences. But
14 this court in Dean said that, "For the purposes of",
15 in that case involved insurance coverage, "you
16 require something more than temporary or physical
17 presence" - - - residence does - - - "and requires at
18 least some degree of permanence and intention to
19 remain." We're not saying that it needs to be - - -

20 JUDGE FAHEY: So it's - - - so - - -

21 MS. DARLINGTON: - - - the exclusive or
22 primary residence; it just needs to be a residence in
23 the common parlance.

24 JUDGE FAHEY: Going back to Judge Rivera's
25 hypothetical, that hypothetical assumes a series of

1 residences in the - - - a series of staying at the
2 same location for a period of time.

3 MS. DARLINGTON: Yes.

4 JUDGE FAHEY: That would amount to a
5 residence then, right?

6 MS. DARLINGTON: Yes, yes.

7 JUDGE FAHEY: Okay.

8 MS. DARLINGTON: And I would - - - I would
9 - - - I would state in this case, Your Honor, that,
10 you know, counsel for the appellant said, well, if
11 they don't technically reside then - - - if they set
12 - - - spent a substantial - - - substantial period of
13 time there; those are two separate and distinct
14 concepts there. In this case, Yaniveth came to her
15 grandmother's apartment, and it didn't matter if it
16 was her grandmother or the - - - the lady down the
17 street who put up an ad and said, I can watch - - -
18 watch your child.

19 JUDGE RIVERA: But why not - - - why not?
20 Doesn't the child have a particular familial
21 connection to this individual that's different from
22 just going to the daycare center?

23 MS. DARLINGTON: It may, Your Honor, but
24 not in the context - - -

25 JUDGE RIVERA: Suggest that perhaps there's

1 more than just merely showing up a few hours every
2 day?

3 MS. DARLINGTON: No, Your Honor, I don't
4 think that in the context of Local Law 1 it does.
5 The - - - the duty of a landlord is triggered under
6 Local Law 1 by having a child under the - - - or six
7 years of age or under - - - under seven years of age
8 reside at the subject premises.

9 JUDGE RIVERA: Uh-huh.

10 MS. DARLINGTON: Reside at the subject
11 premises.

12 JUDGE STEIN: Would it make a difference if
13 the grandmother had joint custody of the child?

14 MS. DARLINGTON: Well, Your Honor, it - - -

15 JUDGE STEIN: Are we in the exact same
16 provision - - - situation as here?

17 MS. DARLINGTON: In that situation, Your
18 Honor, it would again go to intent, and the
19 grandmother in this case testified that the child did
20 not live with her; the mother in this case testified
21 that there are no children live there.

22 JUDGE RIVERA: Okay. But, so that's what I
23 - - - perhaps I wasn't clear at the beginning of my
24 questions. What - - - what is it that you say is
25 that essential character of residence that's about

1 living somewhere? Is it being there overnight? Is
2 it having your - - - your belongings there? Is it
3 that that's the place I go to every night? What is
4 it that makes that unique, that's separate and apart
5 from a domicile, and not - - - and more than mere
6 presence?

7 MS. DARLINGTON: It's your intention to
8 remain there. It's your intention to remain.

9 JUDGE RIVERA: But for what purpose, again,
10 I ask you.

11 MS. DARLINGTON: Well, Your Honor, it's - -
12 - it's - - -

13 JUDGE RIVERA: The purpose here was to
14 remain there for several hours a day to be taken care
15 of.

16 MS. DARLINGTON: For several hours a day, I
17 mean, that - - - that's if - - - if I am in my office
18 for twelve hours a day, I don't intend to - - -

19 JUDGE RIVERA: That's a commercial
20 establishment, so let's talk about the noncommercial
21 establishment.

22 MS. DARLINGTON: If - - - if I'm in a
23 library for twelve hours a day and I don't - - - I
24 don't intend to make that my residence; in this case,
25 there was no intention on the part of the

1 grandmother, who is the babysitter, and the mother -
2 - -

3 JUDGE PIGOTT: Let's - - - let's split this
4 for a minute.

5 MS. DARLINGTON: - - - for this child to
6 remain.

7 JUDGE PIGOTT: What - - - what in your view
8 would - - - would make it her residence?

9 MS. DARLINGTON: The intent that the child
10 would remain there.

11 JUDGE PIGOTT: Well, kids don't have
12 intent.

13 MS. DARLINGTON: Well, then on behalf of
14 the parent; I mean, first of all, there is - - -
15 there is a presumption in the law that the residence
16 is with the parent. And - - -

17 JUDGE PIGOTT: I understand but, as Mr.
18 Konigsberg raised, he said, if this had been the
19 father - - -

20 MS. DARLINGTON: Okay.

21 JUDGE PIGOTT: - - - you know, then it
22 would have been her residence, right?

23 MS. DARLINGTON: Well, not necessarily.

24 JUDGE PIGOTT: Uh-huh.

25 MS. DARLINGTON: That would depend, well -

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JUDGE PIGOTT: Okay.

MS. DARLINGTON: If - - - if it was the father and they intended the child to remain there - - - Your Honor, the only time this - - - this issue of residence has ever been raised in the context of Local Law 1 was in the Michaud v. Lefferts case, in the Second Department in 2011, and that case was directly on point, and you know, it's just - - - it's just the common usage of the term.

JUDGE RIVERA: Did the - - - did the child ever stay there overnight?

MS. DARLINGTON: The child stayed there overnight two to three times a week, and the Michaud court still felt - - - still - - -

JUDGE RIVERA: Why wouldn't that be the line that we could draw, where you're staying overnight, which is - - - which is more representative of a living situation. But even if - - - even if there is another actual intent, that is, to have the child being taken care of, as the grandmother serving as the babysitter during the week, why doesn't that address the residency issue?

MS. DARLINGTON: Well, Your Honor, in the Michaud case, the court determined that did - - -

1 that was not enough; that the child did not reside
2 there. But that - - -

3 JUDGE FAHEY: I think you're right - - - I
4 think you're right that Michaud - - - but we would be
5 rejecting Michaud if we went the petitioner's way; I
6 think that's clear. I think you're right about that;
7 that doesn't justify what we should do, however.

8 JUDGE RIVERA: And considering the public
9 policy of Local Law 1, why - - - why doesn't the
10 overnights, perhaps, let us draw that line?

11 MS. DARLINGTON: Your Honor, I believe that
12 the - - - the common sense and the common parlance of
13 reside is where someone lives, where someone - - -
14 the common understanding that everyone has and my
15 client had the right, I believe - - -

16 JUDGE RIVERA: And that - - - and that is
17 different from a domicile because - - - finish the
18 sentence.

19 MS. DARLINGTON: That's it - - - because
20 you could have more than one residence.

21 JUDGE RIVERA: You - - - you didn't help
22 yourself with that answer.

23 MS. DARLINGTON: I'm - - - I'm sorry, I
24 didn't - - -

25 JUDGE RIVERA: Let's try it again; if the

1 intent - - - if the residence is an intent to stay
2 there permanently, that's different from a domicile
3 because with the domicile the intent is what?

4 MS. DARLINGTON: Is some degree - - -

5 JUDGE RIVERA: To just call it a domicile?
6 What's - - - what's the difference?

7 MS. DARLINGTON: Well, domicile is your
8 permanent exclusive residence. A domicile is your
9 permanent exclusive residence.

10 JUDGE RIVERA: So now you've used
11 permanence twice, so please explain to me the
12 difference.

13 MS. DARLINGTON: Well, Your Honor, this - -
14 - this court held that there had to be a degree of
15 permanence. A domicile is your exclusive - - - you
16 could only have one domicile; you have - - - can have
17 multiple residences.

18 Your Honors, I believe this case really
19 does rise and fall on - - - on statutory
20 construction, and the cardinal rule of statutory
21 construction is the legislative intent has to be
22 sought and ascertained from the words and language
23 used in the act, and should not be extended by
24 construction beyond its expressed terms.

25 Here we have an expressed term, reside; an

1 owner or landlord who has to comply with Local Law 1
2 should be permitted, in good faith, to rely on the
3 plain language of the statute in determining the
4 scope of his or her duty under Local Law 1 and to - -
5 - the appellant wishes this court to engraft onto
6 Local Law 1 an additional duty.

7 JUDGE RIVERA: So - - - so your
8 interpretation of the term in Local Law 1 is the
9 landlord's liability only attaches when the child
10 lives there.

11 MS. DARLINGTON: Well, under the common law
12 - - -

13 JUDGE RIVERA: Doesn't have to stay there
14 every night, but lives there, whichever way you've
15 now defined that.

16 MS. DARLINGTON: Well, lives - - - lives
17 under the common law or resides under Local Law 1.

18 JUDGE RIVERA: Which doesn't mean they have
19 to sleep there every night.

20 MS. DARLINGTON: Well, not - - - they don't
21 necessarily have to sleep there every night to - - -
22 to - - -

23 JUDGE RIVERA: Do they have to sleep there
24 at all? Let me get back to that question.

25 MS. DARLINGTON: To - - - to reside there?

1 JUDGE RIVERA: Yes.

2 MS. DARLINGTON: I would - - - I would
3 think that in the common interpretation of the word
4 reside, you would assume that there was some element
5 of permanence with - - - which would include hanging
6 your hat there and sleeping there.

7 JUDGE RIVERA: So now let me go back to the
8 other question. So let's say I own an apartment - -
9 - I wish I did, on the Upper East Side, but I don't
10 sleep there at night; I go there during the day, I
11 hang out, maybe watch a little TV, watch the Court of
12 Appeals on the Internet - - - online, the archives,
13 but I don't sleep there; is it residence?

14 MS. DARLINGTON: It depends on your
15 intention. It depends on your intention; I believe
16 that the court has said that in - - - in the Dean
17 case, I think the courts have been consistent with
18 saying it depends on your intention, and in this
19 case, the child was dropped off at 9:30 in the
20 morning and picked up at 7 o'clock at night, and the
21 parents said, we bring her home every night, and the
22 grandmother said, the girl doesn't live with me, she
23 lives with - - - with - - -

24 JUDGE RIVERA: Well, it sounds - - - it - -
25 - and you can correct me if I'm wrong; it sounds like

1 you're arguing, in part, that - - - that if you
2 eliminate everything else, this can't be a residence,
3 because it's - - -

4 MS. DARLINGTON: It's just - - -

5 JUDGE RIVERA: - - - it's about eliminating
6 all the other possibilities - - -

7 MS. DARLINGTON: It's - - - it's - - -

8 JUDGE RIVERA: - - - and this gets
9 eliminated too because she doesn't "live there",
10 whatever that means to you.

11 MS. DARLINGTON: It's - - - it's just - - -
12 it's just not a residence, Your Honor, and there has
13 to be some kind of ability by the - - - by the
14 landowner or the - - - or the - - - the owner of the
15 premises, the landlord, to be able to read the plain
16 language of the statute. This is really, as Justice
17 Kaye pointed out in the Juarez case, now there were
18 two million units built before 1960, and, you know,
19 this involves a real weighing of - - - of public
20 policy, and that kind of weighing has to be left to
21 the federal, state and local legislature, and the
22 Chapman case - - - in the Chapman case, the court
23 repeated that admonition by Justice Kaye, that
24 really, it is up to the legislature to the change, if
25 they wish - - - over the thirty-four years that Local

1 Law 1 and it's progeny or - - has been on the books,
2 it has never been a substantial period of time,
3 because where would that leave the landlords? Every
4 time - - - would there need to be video cameras?
5 Would there need to be somebody sitting at the front
6 gate and saying, how old are you?

7 And you know, there - - - there has to be a
8 bright line; we could be asking the same question if
9 a child moved in there the day of their seventh
10 birthday and became exposed to lead three months
11 later. Well, you weren't under the age of seven, so
12 the law does not apply to you. You don't reside
13 there; the law does not apply to you. There's needs
14 to be a bright line.

15 And Local Law 1 is a good law. It - - - it
16 was enacted after there was a lot of debate and
17 hearings, and a lot of consideration by the
18 legislature, and it was the local legislature that
19 dealt with the members of the community.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 Mr. Konigsberg.

22 MR. KONIGSBERG: Just a couple of things
23 about if grandma had had her own child in that
24 apartment, under six years of age, could it possibly
25 have been the intent of the legislature to permit

1 that child to recover, and Yaniveth not?

2 JUDGE ABDUS-SALAAM: Well, maybe it - - -
3 it is the intent, counsel, I ask you about this
4 hypothetical; what if the mother and the child were
5 spending twelve hours a day taking care of Grandma
6 and then going home after they spent that twelve
7 hours a day - - - not leaving the child there with
8 Grandma, but they were both there taking care of
9 Grandma because Grandma had some condition.

10 MS. DARLINGTON: There's no evidence - - -

11 JUDGE ABDUS-SALAAM: Would they be living
12 with grandma?

13 MR. KONIGSBERG: There's no evidence that
14 when this law was passed - - - by the way, I can
15 remember 1982, this law being bitterly, bitterly
16 fought by the real estate lobby who didn't want
17 anything like this at all, and believe me, they got
18 most of what they wanted because there was originally
19 a proposal that would require them to make all these
20 apartments lead-free, not just patch little areas of
21 lead, when they came - - -

22 JUDGE STEIN: But isn't that all the more
23 reason for us to assume that the legislature balanced
24 all of these considerations, and when it used the
25 word reside or residence, it didn't mean just

1 spending time?

2 MR. KONIGSBERG: If you look at the
3 language, there is no - - - there is no limiting
4 language in the word residence, and I think it would
5 be improper, frankly, for the court to try to claim
6 that it knows what's not written in the statute.

7 JUDGE STEIN: Well, do you --

8 MR. KONIGSBERG: The statute should be
9 construed broadly to prepare - - - to protect lead-
10 poisoned children, not to restrict access to the
11 court. If this case is remanded for trial, which I
12 hope it is, and what we're arguing for that it is,
13 the defendant will still have an opportunity to argue
14 lack of notice and that it exercised due care.

15 JUDGE PIGOTT: Yeah, but the question is
16 duty, and - - - and what struck me was, suppose on
17 January 1st, a couple moves in with a child that's,
18 let's say, four years old, and the child, you know,
19 gets lead poisoning and they sue; they've only been
20 there two weeks. Is - - - is the child a resident?

21 MR. KONIGSBERG: The - - - the answer is
22 yes, but the availability of the defense of notice
23 and due care are still available to the defendant.

24 JUDGE PIGOTT: The - - - the duty is there
25 and then all of those defenses are still there.

1 MR. KONIGSBERG: That's right.

2 JUDGE PIGOTT: What we're arguing is the
3 other side; in other words, where is - - - when does
4 the duty begin, and the line was drawn saying, if
5 you're a not a resident, you don't - - - you don't
6 get - - -

7 MR. KONIGSBERG: Yeah, the - - - the word
8 residence doesn't have any limitation in it as it
9 does - - - if the statute had - - - if the City
10 Council had wanted to put in a definition section in
11 the statute, it could have said, for purposes of this
12 statute, residence means, or resides means, the
13 following.

14 JUDGE RIVERA: So Grandma has another
15 grandchild who's visiting from Florida for one week;
16 are they residing during the one week? For vacation,
17 just a school break.

18 MR. KONIGSBERG: There is no indication in
19 the statute for Local Law 1, nor, to my knowledge,
20 has this court ever defined the word residence in any
21 limiting language, or let alone any language that
22 reside - - -

23 JUDGE RIVERA: So when is - - - when is a
24 child, who is present in that apartment - - - that's
25 your word, present - - - not - - - not covered by

1 this statute? When - - - what would not, when I come
2 and I'm trying to sell you chocolates and you asked
3 me to come in while you pay me, that's not good
4 enough? What - - - when is it not residing?

5 MR. KONIGSBERG: Your Honor, my - - - my
6 pay grade only allows me to represent this child in
7 this case; and I'm not trying to - - -

8 JUDGE RIVERA: Yes, but we have to set up a
9 rule about what Local Law 1 means - - -

10 MR. KONIGSBERG: No, you don't; you can
11 just leave the language as it is, and assume that the
12 court - - - that the legislature meant what it said.

13 JUDGE GARCIA: Well, let me ask you a
14 different way, Judge Rivera's question; do you think
15 presence and residence mean the same thing?

16 MR. KONIGSBERG: I do think it means the
17 same thing.

18 JUDGE GARCIA: So, as Judge Rivera was
19 saying, a child that's present in the apartment, then
20 you get to Judge Pigott's - - - you get to duty, you
21 get to Judge Pigott's notice issues, for presence.

22 MR. KONIGSBERG: For presence, yes, but not
23 - - - it doesn't establish liability.

24 JUDGE GARCIA: No, understood, but presence
25 gets you by the duty.

1 MR. KONIGSBERG: Until the court or the
2 legislature defines a term that has yet to be
3 defined.

4 JUDGE RIVERA: You mean presence - - - in
5 your - - - I'm sorry, in the way you've defined this
6 law, you mean presence with - - -

7 MR. KONIGSBERG: Well, that's the word - -
8 -

9 JUDGE RIVERA: Excuse me, you mean presence
10 that is authorized; you don't mean - - - do you mean
11 a trespasser?

12 MR. KONIGSBERG: Well, under Basso, all of
13 those distinctions, as I read Basso, were eliminated,
14 and the issue is notice and whether or not the
15 landowner exercised due care; that's what the quote
16 says, "While" - - - it says, "while status is no
17 longer determinative, considerations of who plaintiff
18 is and what his purpose is upon the land are factors
19 which, if known, may be included in arriving at what
20 have" - - - "would have been reasonable care under
21 the circumstances."

22 All we're saying is that our view of
23 residence is congruent with this court's so far
24 expressed views about residence and the court's
25 holding in Basso. And I think, frankly speaking, you

1 should leave it alone like that; not give the
2 landlord a defense to a case where it's obviously
3 negligent and we have an obviously lead-poisoned
4 child in its building.

5 Would the care that it exercised be any
6 different if grandma was the parent, or if both
7 parents rented that apartment; are they really saying
8 that it would have maintained the apartment
9 differently under those circumstances? I think not.

10 JUDGE RIVERA: You mean, if they're on the
11 lease?

12 MR. KONIGSBERG: If they're on the lease.

13 JUDGE RIVERA: The children on the lease -
14 - -

15 MR. KONIGSBERG: Where is the evidence?

16 JUDGE RIVERA: Well, they're not residing
17 there - - -

18 MR. KONIGSBERG: Where is the ev - - - yes
19 - - -

20 JUDGE RIVERA: They're the tenants, she's
21 not on the lease, right, the little girl is not on
22 the lease.

23 MR. KONIGSBERG: She's not on the lease,
24 but where is the evidence that the defendant, in this
25 case, relied upon the relationship of this child to

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this grandmother in the way it maintained this
apartment? I think there is none.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of matter of Yaniveth R. v. LTD Realty Co., No. 35 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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