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COURT OF APPEALS

STATE OF NEW YORK

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JOSE A. SOTO,  
Appellant,

-against-

J. CREW, INC., et al.

Respondents.

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No. 162

20 Eagle Street  
Albany, New York 12207  
September 11, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 162, Soto v. J. Crew.

2 MR. PROFETA: Good afternoon, Your Honors.

3 CHIEF JUDGE LIPPMAN: Counselor, do you  
4 want any rebuttal time?

5 MR. PROFETA: Yes, one minute, Your Honor.

6 CHIEF JUDGE LIPPMAN: One minute, sure. Go  
7 ahead.

8 MR. PROFETA: This case is here because  
9 Justice Catterson in the First Department, was  
10 worried that your decision in Dahar created a sea  
11 change in Labor Law, Section 240 - - -

12 CHIEF JUDGE LIPPMAN: Did it create a sea  
13 change in the Labor Law?

14 MR. PROFETA: Did it?

15 CHIEF JUDGE LIPPMAN: Yeah, did it?

16 MR. PROFETA: It would, if his - - - if his  
17 interpretation were correct, but I don't think it was  
18 correct, and I think - - -

19 CHIEF JUDGE LIPPMAN: What do you think  
20 that case stands for, in terms of our precedent?

21 MR. PROFETA: The - - - what that case said  
22 was - - - just to take it a little bit sequentially,  
23 the only cleaning cases that have come before this  
24 court are cleaning of windows in buildings. Now, I  
25 think that language was deliberate, and I think the

1 important part about that part of the sentence was  
2 the second word "buildings", not "windows", because  
3 what the holding went on to say was, what was being  
4 cleaned, which was a product in the process of being  
5 manufactured, was not a structure. And of course  
6 this Section 240 - - -

7 CHIEF JUDGE LIPPMAN: Well, that's  
8 different when it's a - - -

9 MR. PROFETA: Yeah.

10 CHIEF JUDGE LIPPMAN: - - - when it's a - -  
11 -

12 MR. PROFETA: It only applies to - - -  
13 Section 240 only applies to buildings and structures.  
14 And what this court said was nothing - - - there's  
15 nothing to suggest that a product, in the process of  
16 being manufactured, is a structure.

17 CHIEF JUDGE LIPPMAN: What about Broggy?  
18 How does that fit in?

19 MR. PROFETA: Excuse me?

20 CHIEF JUDGE LIPPMAN: Broggy?

21 MR. PROFETA: Broggy. Well, Broggy and  
22 Swiderska - - - I mean, one was - - - they're like  
23 twins. They - - - they would be - - - they would  
24 effectively be overruled or severely changed by  
25 Justice Catterson's reading of Dahar. By the way,

1           there's nothing int - - -

2                   JUDGE SMITH: But it's not just - - - it's  
3           the Appellate Division's reading, isn't it? He says  
4           he's constrained by Dahar, but they all voted the - -  
5           - they all voted against you.

6                   MR. PROFETA: They - - - but the majority  
7           didn't even mention this business about windows. The  
8           majority - - - the majority had its ruling based upon  
9           another rationale, which I'll get to, which was that  
10          this was routine maintenance.

11                  JUDGE GRAFFEO: Well, that's what I was  
12          going to ask you. This dichotomy that a lot of the  
13          courts have looked at, whether or not it's routine  
14          maintenance, we've never really articulated what  
15          routine maintenance is, or if that's - - - if that's  
16          the point of delineation. What's your posture on  
17          that?

18                  MR. PROFETA: Yeah. I think the - - -  
19          there's nothing in - - - there's nothing in 240 which  
20          says - - - it just says cleaning, and cleaning is one  
21          of three activities - - - maintenance activities  
22          which are covered.

23                  JUDGE SMITH: Cleaning - - -

24                  JUDGE GRAFFEO: We've exempted domestic  
25          cleaning.

1 MR. PROFETA: And you have exempted  
2 specifically - - - every court has exempted what's  
3 called household - - -

4 JUDGE GRAFFEO: Household - - -

5 MR. PROFETA: - - - cleaning - - -

6 JUDGE GRAFFEO: - - - cleaning.

7 MR. PROFETA: - - - which is by domestics  
8 in private residences.

9 JUDGE SMITH: Is it your position,  
10 essentially, that almost all cleaning is routine  
11 maintenance, that the exception would swallow the  
12 statute, if you applied it to - - -

13 MR. PROFETA: No, I think what Broggy and  
14 Swiderska made clear was that what was not routine  
15 maintenance was commercial cleaning pursuant to a  
16 commercial contract.

17 JUDGE SMITH: Okay. I - - - maybe we're  
18 not disagreeing, but most people think of cleaning as  
19 part of maintenance. If you maintain your building,  
20 you clean the windows.

21 MR. PROFETA: It is maintenance - - -

22 JUDGE SMITH: And it is - - -

23 MR. PROFETA: - - - and it's - - -

24 JUDGE SMITH: And it is part of the  
25 routine.

1 MR. PROFETA: Judge - - -

2 JUDGE SMITH: It seems to me your argument  
3 is if you're going to apply the routine maintenance  
4 exception to cleaning, you're going to wipe the word  
5 out of the statute.

6 MR. PROFETA: Mai - - - cleaning is  
7 maintenance, and it's covered. And to say "routine"  
8 becomes very strange in this context.

9 JUDGE SMITH: Well, suppose you get the  
10 windows cleaned at 10 o'clock the first Thursday of  
11 every month, you say that - - - that doesn't take it  
12 out of the statute, does it?

13 MR. PROFETA: No. I mean, for example,  
14 let's look at the Swiderska case, which was a woman  
15 who was cleaning all of the windows in the NYU  
16 dormitories. She was doing it room after room after  
17 room, every day the same thing, repetitive, the same  
18 way, with a squeegee and a rag, wet, water - - -

19 JUDGE SMITH: Okay. But I guess - - - I  
20 mean, but talk - - - go back to Dahar for a minute.  
21 I mean, wasn't - - - I mean, don't you get from Dahar  
22 the concern that the statute is going to take - - -  
23 will take over the world if it applies to all  
24 manufacturing, to all retail establishments, that it  
25 has to be kept somewhere - - - somewhere near the

1 construction field, even though I realize there are  
2 cases that say it's not limited to construction.

3 MR. PROFETA: That's clearly not the case,  
4 the construction - - - I mean this court has clearly  
5 held it doesn't have to be related to construction.

6 CHIEF JUDGE LIPPMAN: Do you make a  
7 distinction between manu - - -

8 MR. PROFETA: I don't want to take over the  
9 world.

10 CHIEF JUDGE LIPPMAN: - - - manufacturing  
11 and retail? Those are two different things?

12 MR. PROFETA: No, I don't make that  
13 distinction between manufacturing - - -

14 JUDGE SMITH: So if they had - - -

15 MR. PROFETA: When we talk about - - - when  
16 we talk about structure - - -

17 CHIEF JUDGE LIPPMAN: Yeah.

18 MR. PROFETA: - - - what Dahar clearly said  
19 was a product, which is in the process of being  
20 manufactured, which may - - -

21 CHIEF JUDGE LIPPMAN: But that's different  
22 than the retail store, right?

23 MR. PROFETA: Than the retail st - - -  
24 yeah, well, that - - - okay, so that doesn't - - -  
25 that's not covered.

1 CHIEF JUDGE LIPPMAN: Okay.

2 MR. PROFETA: In a retail store, there are  
3 things that are covered and things that are not, I  
4 suppose, but - - - but - - -

5 JUDGE SMITH: How do you tell?

6 JUDGE GRAFFEO: I thought you said if  
7 there's an outside contract. If - - - you know, if a  
8 department store hires a window - - - if a department  
9 store hires a cleaning crew to come in - - -

10 MR. PROFETA: Yeah.

11 JUDGE GRAFFEO: - - - and clean the  
12 chandeliers - - -

13 MR. PROFETA: Right. That's - - -

14 JUDGE GRAFFEO: - - - I thought you were  
15 saying that's covered under 240.

16 MR. PROFETA: That is covered. But - - -

17 JUDGE GRAFFEO: But if they use their own  
18 people to clean the chandeliers every month, that's  
19 not covered?

20 MR. PROFETA: A store? Well, that would be  
21 workmen's compensation cases anyway because they'd be  
22 employees. But let's, for example, take - - -

23 JUDGE SMITH: But the employee could sue  
24 the landlord, right?

25 JUDGE GRAFFEO: The owner of the building



1           may not be the employer.

2                   MR. PROFETA:  Yes.  Yes.  But okay, so  
3           let's take a case - - -

4                   JUDGE GRAFFEO:  So are they out or they're  
5           in?

6                   MR. PROFETA:  Some of them are out; some of  
7           them are in.  In Dahar - - -

8                   CHIEF JUDGE LIPPMAN:  Counsel, what - - -

9                   JUDGE ABDUS-SALAAM:  What is this in - - -

10                  CHIEF JUDGE LIPPMAN:  - - - what's the rule  
11           here that you're interested in?

12                  MR. PROFETA:  Trying - - -

13                  CHIEF JUDGE LIPPMAN:  Cut through all of  
14           these nuance questions we're asking you; what's the  
15           rule that you want?  What counts, what doesn't count?  
16           What's in the statute and what's out?

17                  MR. PROFETA:  Okay.  Cleaning of windows is  
18           - - - is not the end of - - - of the scope of  
19           cleaning activities.

20                  CHIEF JUDGE LIPPMAN:  What is the end of  
21           the scope?

22                  MR. PROFETA:  Things like - - - it depends  
23           on the structure; the structure is very important.  
24           For example, in Dahar, where the opinion says it's  
25           not supposed to apply - - - this can't -- we can't

1 have this apply to employees who clean bookshelves in  
2 bookstores. Now, why did they say - - - why is that  
3 - - - why does it say that? Because bookshelves in  
4 bookstores are like furniture. Those are - - -  
5 that's what - - -

6 JUDGE ABDUS-SALAAM: Well, why aren't - - -

7 MR. PROFETA: - - - that's what I submit  
8 the - - -

9 JUDGE ABDUS-SALAAM: - - - the shelves in  
10 this retail store like furniture, because aren't they  
11 used to display the goods?

12 MR. PROFETA: That's what makes - - -

13 JUDGE ABDUS-SALAAM: Is it what - - -

14 MR. PROFETA: Not in this case. Very  
15 specifically not in this case.

16 JUDGE SMITH: I'm losing the distinction  
17 between bookshelves in bookstores and clothing  
18 shelves in clothing stores. Do you really say those  
19 come out differently?

20 MR. PROFETA: Yes, because let me sh - - -  
21 let me refer you to the record. If you look at pages  
22 411 and 412, you will see that what's going on here  
23 is that these are built-in modules in the wall.  
24 These - - - and employees, the defendants say  
25 specifically, "These bays were walls; we called them

1           bays or just walls." That's on page 386. They're  
2           not like freestanding bookshelves.

3                   CHIEF JUDGE LIPPMAN: So - - -

4                   JUDGE RIVERA: But you can have, in a  
5           bookstore, a built-in bookshelf.

6                   MR. PROFETA: You can have that; it is  
7           possible. But I mean - - -

8                   JUDGE GRAFFEO: Why - - -

9                   MR. PROFETA: - - - you have to draw a  
10          line.

11                   JUDGE GRAFFEO: Why is that the deciding  
12          factor? I'm really lost. Because it's part of the  
13          structure, is that what you're saying?

14                   MR. PROFETA: That - - - if it's part of  
15          the structure - - - well, look - - -

16                   JUDGE RIVERA: And it's carved out, as  
17          opposed to freestanding?

18                   MR. PROFETA: Yes.

19                   JUDGE RIVERA: Or potentially attached as  
20          freestanding?

21                   MR. PROFETA: Freestanding clearly doesn't  
22          apply, isn't covered. Just like that - - -

23                   JUDGE SMITH: So if these bookshel - - - if  
24          these shelves that we're looking at, at 411 of the  
25          record, were not built in, you'd lose the case?

1 MR. PROFETA: They are built in. I mean,  
2 they are - - - they are part of the wall.

3 JUDGE SMITH: What's the answer to my  
4 question; if they were not, you'd lose the case?

5 MR. PROFETA: They are different, yes, and  
6 they would then be free - - - they would be  
7 freestanding. If they were freestanding, we lose the  
8 case, yes. That would not be a structure.

9 JUDGE GRAFFEO: So are these - - - are  
10 lighting fixtures part of the structure, or they can  
11 be removed from the ceiling?

12 MR. PROFETA: Well, look - - -

13 JUDGE GRAFFEO: Because we've got lighting  
14 - - - we've got cleaning of lighting fixture cases.

15 MR. PROFETA: There are case - - - there  
16 are cases where - - - in the Appellate Division,  
17 plenty of them, which involve lighting fixtures, and  
18 they're all covered. None of those cases ever came  
19 here, but they're all cleaning. And clean - - -

20 JUDGE SMITH: But there are not - - - there  
21 are not a lot of cases involving - - - applying 240  
22 to retail stores. It seems to me there must be a lot  
23 of people falling - - - falling off ladders in retail  
24 stores. Why - - - why have we not had a significant  
25 number - - -

1 MR. PROFETA: You - - - you - - -

2 JUDGE SMITH: - - - of cases?

3 MR. PROFETA: That's the same - - - that's  
4 the same argument that was used in Dahar.

5 JUDGE SMITH: Successfully.

6 MR. PROFETA: In your - - - yes, Your  
7 Honor, I know, and you wrote about it. But I - - -  
8 my point is, it's not only the cases that reach here  
9 that make a difference. Sometimes they don't reach  
10 here. Sometimes they end in the Appellate Division.  
11 And there are plenty of cases in the Appellate  
12 Division which don't involve windows, which involve  
13 cleaning - - -

14 JUDGE GRAFFEO: So your - - -

15 MR. PROFETA: - - - and they're covered.

16 JUDGE GRAFFEO: So your rule is if the item  
17 being cleaned is part of the structure of the  
18 building?

19 MR. PROFETA: Yes, and it's not household  
20 maintenance.

21 CHIEF JUDGE LIPPMAN: It's not what?

22 MR. PROFETA: And it's - - - and it's not  
23 household maintenance, and it is commercial, pursuant  
24 to a commercial contract. It has to be a commercial  
25 contract, it can't be household cleaning, and it has

1 to be a - - -

2 JUDGE GRAFFEO: Is - - -

3 MR. PROFETA: - - - a part of the building.

4 JUDGE GRAFFEO: Is dusting a household  
5 cleaning?

6 MR. PROFETA: Excuse me?

7 JUDGE GRAFFEO: Is dusting a household  
8 cleaning?

9 MR. PROFETA: If it's done by a domestic in  
10 a private residence, it is. That's not covered.

11 JUDGE GRAFFEO: But not if it's under a  
12 commercial contract?

13 MR. PROFETA: Precisely. Thank you.

14 CHIEF JUDGE LIPPMAN: Okay, counselor,  
15 let's hear from your adversary.

16 MR. DESTEFANO: Good afternoon, Your  
17 Honors. Anthony DeStefano for the respondents.

18 CHIEF JUDGE LIPPMAN: Counselor, what's  
19 your rule?

20 MR. DESTEFANO: My rule is already laid out  
21 for us in Dahar.

22 CHIEF JUDGE LIPPMAN: Yeah.

23 MR. DESTEFANO: And in Dahar - - -

24 CHIEF JUDGE LIPPMAN: Tell us what we laid  
25 out in Dahar.

1                   MR. DESTEFANO: In Dahar, this court looked  
2 at the legislative history of the statute, and it  
3 determined that the - - - the statute was intended to  
4 protect construction workers who ply their  
5 livelihoods on scaffolds and those scaffolds - - -

6                   JUDGE SMITH: But we also know it's not  
7 limited to construction workers, right?

8                   MR. DESTEFANO: This court has said that  
9 it's not limited to construction workers, but then in  
10 Dahar, it does go back to the legislative history and  
11 it looks at it and it says, you know, reading the  
12 words out of isolation would not fulfill the  
13 legislative intent of the statute. If we took just  
14 the words "cleaning of a building or a structure",  
15 that ignores the fact that that particular language  
16 is included in a section that says "building  
17 construction and repair".

18                   JUDGE SMITH: Okay. I mean, so what's - -  
19 - what's the - - - I mean, what's the line? Is the  
20 line between cleaning windows and cleaning everything  
21 else?

22                   MR. DESTEFANO: Well, Your Honor, actually,  
23 I would take the line a step further. I would go  
24 back beyond Broggy, and I would say that Broggy  
25 represented an extension of the Labor Law that maybe

1 the legislature did not intend. And in Broggy - - -

2 JUDGE SMITH: You're asking us to overrule  
3 Broggy?

4 MR. DESTEFANO: I - - - I'm asking you to  
5 either overrule Broggy, in the sense that when you  
6 said in Broggy that you were not going to draw an  
7 arbitrary distinction between an interior window  
8 versus an exterior window, exterior windows  
9 specifically having their own section of the Labor  
10 Law that applies to them, Section 202, you would not  
11 draw an arbitrary line and say that interior window  
12 cleaning would not be included.

13 JUDGE GRAFFEO: So what's your rule? If  
14 you had to summarize, tell us how you would explain  
15 to someone what's covered and what's not covered in  
16 cleaning.

17 MR. DESTEFANO: Sure, Your Honor. Cleaning  
18 in the context of building construction, demolition,  
19 and repair is covered. And I understand that this  
20 Court has said that you don't necessarily have to  
21 have - - - "an integral and necessary test" was, I  
22 believe, the words that were used. But I believe  
23 that the legislature intended, back in 1885, when it  
24 enacted Section 18, that workers - - - construction  
25 workers who were masons and carpenters who were



1 working from defective and rickety scaffolds - - -  
2 and that's how the law - - -

3 JUDGE GRAFFEO: That's - - -

4 MR. DESTEFANO: - - - was written - - -

5 JUDGE GRAFFEO: That's quite a retreat for  
6 us, isn't it?

7 MR. DESTEFANO: It - - -

8 JUDGE GRAFFEO: Compared to a lot of the  
9 Appellate Division case law that's out there?

10 MR. DESTEFANO: It is a retreat, but it is  
11 a retreat back to what has consistently been the  
12 legislative intent over the course of time.

13 JUDGE GRAFFEO: So even the routine  
14 maintenance test that some of the lower courts have  
15 used, that's - - - that doesn't go far enough, in  
16 your mind?

17 MR. DESTEFANO: Yes, Your Honor. I would  
18 argue that only as an alternative. I would argue  
19 instead that - - -

20 CHIEF JUDGE LIPPMAN: Assuming that we  
21 don't want to go back to the 1800s, where do you  
22 think we are today?

23 MR. DESTEFANO: Then we look at - - - just  
24 like we look at what is routine maintenance versus a  
25 repair, we look at what types of cleaning would be

1 considered something that would allow the  
2 extraordinary protections of the Labor Law to apply.

3 JUDGE ABDUS-SALAAM: And under that theory,  
4 counsel, what would be the - - - what do you think  
5 about the rule that Mr. Profeta just proposed,  
6 commercial contract - - - commercial cleaning versus,  
7 you know, domestic cleaning and a structure?

8 MR. DESTEFANO: Sure. Well, we would have  
9 to look at what the type of commercial cleaning is  
10 that's involved, Your Honor, because if we looked at  
11 this gentleman's past - - -

12 JUDGE ABDUS-SALAAM: Is it dependent on  
13 whether the structure - - - it's a structure that's  
14 built into the building or - - -

15 MR. DESTEFANO: That's a little bit - - -

16 JUDGE ABDUS-SALAAM: - - - freestanding?

17 MR. DESTEFANO: That's a little bit  
18 different. I don't adopt the same definition of  
19 "structure", and I would, again, point this court  
20 back to what the legislature would have been looking  
21 at when it enacted the statute and what types of  
22 structures they were seeing at the time. And they  
23 were talking about - - - and this is kind of what I  
24 was saying before about how the law was originally  
25 intended to apply where there were already scaffolds

1           there.  They were not saying if you need a scaffold;  
2           they were saying, when you are on a scaffold, that  
3           scaffold must be so properly placed as to protect  
4           life and limb.

5                        CHIEF JUDGE LIPPMAN:  What's wrong with  
6           this type of commercial cleaning?  Why wouldn't you  
7           include it - - -

8                        MR. DESTEFANO:  Because - - -

9                        CHIEF JUDGE LIPPMAN:  From a policy  
10          perspective, what's wrong with it taking, I think as  
11          Judge Abdus-Salaam just did, your adversary's test.  
12          It's built-in, it's not household cleaning, it's a  
13          commercial store; why, from a policy perspective - -  
14          - and you know, the law is supposed to protect  
15          workers, the shelf is higher than he is.  What's  
16          wrong with this?

17                       MR. DESTEFANO:  It's - - -

18                       CHIEF JUDGE LIPPMAN:  What's wrong with  
19          having that covered?

20                       MR. DESTEFANO:  Sure.  Well, again, we look  
21          at the legislature and what they - - -

22                       CHIEF JUDGE LIPPMAN:  Tell me from a policy  
23          perspective.

24                       MR. DESTEFANO:  From a policy perspective,  
25          putting the onus on - - -

1 CHIEF JUDGE LIPPMAN: We don't want to  
2 protect these kind of people who are cleaning?

3 MR. DESTEFANO: The - - - this court has  
4 held - - - has held that you look at the general  
5 context of the work and how - - - and what is  
6 involved in the activities that the worker has to  
7 engage in. And 99.9 percent of this gentleman's work  
8 is ground based. He's vacuuming, he's mopping, he's  
9 scraping gum off the floor. He's - - -

10 CHIEF JUDGE LIPPMAN: But what about - - -

11 MR. DESTEFANO: - - - he's picking up the  
12 trash.

13 CHIEF JUDGE LIPPMAN: - - - when he cleans  
14 a shelf that's taller than he is?

15 MR. DESTEFANO: The shelf is two inches  
16 taller than he is, Your Honor, and for that he's  
17 given a - - - what you've seen on the commercials as  
18 a Swiffer, that you can wave and you can wipe - - -

19 JUDGE ABDUS-SALAAM: What if it were ten -  
20 - -

21 MR. DESTEFANO: - - - dust off of a shelf.

22 JUDGE ABDUS-SALAAM: What if it were ten  
23 feet high and he had to get a - - -

24 MR. DESTEFANO: Well - - -

25 JUDGE ABDUS-SALAAM: - - - ladder?

1 MR. DESTEFANO: But he's not. This  
2 particular - - -

3 JUDGE SMITH: Would that change the result?  
4 Would he win the case if it was a ten-foot shelf?

5 MR. DESTEFANO: No, we cannot look solely  
6 based on the fact that it's an elevation-related  
7 risk. And you know - - -

8 JUDGE GRAFFEO: Why - - -

9 MR. DESTEFANO: - - - we can only take the  
10 matter so far.

11 JUDGE GRAFFEO: Why aren't you saying that  
12 it's daily cleaning?

13 MR. DESTEFANO: It is routine cleaning in  
14 the sense that this is a - - -

15 JUDGE GRAFFEO: Or are you saying that?  
16 I'm trying to - - -

17 MR. DESTEFANO: I am saying - - -

18 JUDGE GRAFFEO: I'm trying to understand -  
19 - -

20 MR. DESTEFANO: Right. As an alternative  
21 to the argument that all commercial cleaning should  
22 be taken out of - - - of the ambit of 240, unless  
23 it's related to construction, I'm saying the  
24 alternative is that routine cleaning, the type that  
25 this gentleman was performing: sweeping, mopping,

1 dusting - - -

2 JUDGE SMITH: Wasn't the cleaning in Broggy  
3 routine?

4 MR. DESTEFANO: The Broggy cleaning, again,  
5 was a window. And I would give Your Honors the  
6 exception that the window is specifically included in  
7 - - -

8 JUDGE SMITH: So what - - -

9 MR. DESTEFANO: - - - Section 202.

10 JUDGE SMITH: - - - you're really saying is  
11 maybe it isn't the most beautiful, logical line in  
12 the world, but we've drawn a line around windows, and  
13 then we've taken domestic cleaning of windows out,  
14 and that's the line?

15 MR. DESTEFANO: Yes, Your Honor. And to  
16 try to argue back from Broggy, I understand, would be  
17 - - - would be taking a leap further back in time,  
18 and maybe that's not what this court is ready to do.  
19 So maybe this court is ready to take it to what is  
20 cleaning outside of windows, what is cleaning in - -  
21 - or what is cleaning in a routine sense of the word  
22 and this particular type of cleaning here.

23 And the example that I would like to give  
24 Your Honors is I, like thousands of other people in  
25 the state, own a large SUV. When I take my SUV to a

1 car wash to be cleaned, they actually have a three-  
2 step platform that they have to stand on to wash the  
3 top of my vehicle. If the worker is washing the top  
4 of my vehicle and he falls and he's injured, am I  
5 absolutely liable under the Labor Law? I'm an owner  
6 of what counsel would argue is a structure, and it's  
7 consistent with the definition that this court has  
8 used because this court has applied it to railway  
9 cars. So certainly a railway car, a large SUV,  
10 similar types, and he's - - - I've contracted with  
11 his employer to clean that car, and he falls from an  
12 elevation and he's injured. Aren't I absolutely  
13 liable under the statute for that? That cannot be  
14 what the legislature intended to protect against.  
15 And this is a similar type of work here. It's a  
16 gentleman, who ninety-nine percent of his work is  
17 done from the ground. And in fact, his employer  
18 didn't even give him a ladder to do his job. The  
19 ladder was for the store employees who - - -

20 CHIEF JUDGE LIPPMAN: So - - -

21 MR. DESTEFANO: - - - who had elevation-  
22 related work.

23 CHIEF JUDGE LIPPMAN: - - - is your basic  
24 argument that this is just routine cleaning? I mean,  
25 is that what that comes down to?

1 MR. DESTEFANO: I'm saying that - - -

2 CHIEF JUDGE LIPPMAN: We're asking you for  
3 a test, but - - -

4 MR. DESTEFANO: I'm asking you - - -

5 CHIEF JUDGE LIPPMAN: - - - but you're  
6 basically saying this is - - - this is routine  
7 cleaning, right?

8 MR. DESTEFANO: I'm saying to you, at a  
9 minimum, this is routine cleaning. At - - - what I  
10 would argue is - - -

11 JUDGE SMITH: Routine cleaning is something  
12 that is not a window?

13 MR. DESTEFANO: Routine cleaning of  
14 something that is not a window, and that if the  
15 legislature intended to protect commercial cleaners,  
16 they would have included, in the other hundreds of  
17 provisions of the Labor Law - - -

18 CHIEF JUDGE LIPPMAN: And if it wasn't - -  
19 -

20 MR. DESTEFANO: - - - a section to cover  
21 that.

22 CHIEF JUDGE LIPPMAN: If it wasn't routine,  
23 they're covered?

24 MR. DESTEFANO: If they're - - - if this  
25 court is not willing to adopt the test taking out of



1           it - - - taking it out of the construction context,  
2           if we're going to cover cleaning that's  
3           nonconstruction related, then it has to be something  
4           more extraordinary than dusting. It has to be - - -

5                   CHIEF JUDGE LIPPMAN: Well, nothing that  
6           says extraordinary, right? You're using that word.

7                   MR. DESTEFANO: I'm saying that this court  
8           has routinely said, in countless numbers of  
9           decisions, that - - -

10                   CHIEF JUDGE LIPPMAN: But what about - - -

11                   MR. DESTEFANO: - - - the Labor Law was  
12           intended to - - -

13                   CHIEF JUDGE LIPPMAN: What about - - -

14                   MR. DESTEFANO: - - - protect extraordinary  
15           risks.

16                   CHIEF JUDGE LIPPMAN: What about - - - I  
17           think it was Judge Abdus-Salaam said what about if  
18           it's - - - again, if it's higher? Let's say your  
19           argument is well, even if he has something that he  
20           could do this with, if it's higher, is that routine?  
21           If they're going to get up on a ladder or have a  
22           bigger Swiffer or whatever? Could that take it out  
23           of the routine that you're talking about?

24                   MR. DESTEFANO: What I'm saying is that you  
25           have to look at it two-fold. First of all, the

1           general context of this man's work does not involve  
2           cleaning at a height. So let's say once a month he  
3           has to clean that higher than six-foot-tall bookcase.

4                    CHIEF JUDGE LIPPMAN:   Wouldn't that go  
5           against your argument about routine - - -

6                    MR. DESTEFANO:   No, it doesn't because - -  
7           -

8                    CHIEF JUDGE LIPPMAN:   - - - if he doesn't  
9           do it all the time?

10                   MR. DESTEFANO:   - - - because we don't  
11           isolate the moment of - - - of work to determine  
12           whether or not the activity was a Labor Law protected  
13           activity. We look at the - - -

14                   CHIEF JUDGE LIPPMAN:   No, but what about if  
15           he's doing something - - -

16                   MR. DESTEFANO:   - - - general context of  
17           his work.

18                   CHIEF JUDGE LIPPMAN:   - - - very unusual,  
19           and like, in your words, extraordinary, that he's got  
20           to get something and clean it once - - - once - - -  
21           you know, not - - - in a blue moon.

22                   MR. DESTEFANO:   But because - - -

23                   CHIEF JUDGE LIPPMAN:   That's okay; then  
24           he's covered?

25                   MR. DESTEFANO:   But that's not

1 extraordinary.

2 CHIEF JUDGE LIPPMAN: We're just trying to  
3 get - - - what we're trying to get out is some  
4 standard that we judge these things on. You know,  
5 that's - - - that's why we're giving the  
6 hypothetical.

7 MR. DESTEFANO: Right, and I can appreciate  
8 that, Your Honor. But I think that the difficulty  
9 with Labor Law 240 is that it's oftentimes hard to  
10 enumerate what the standard should be.

11 CHIEF JUDGE LIPPMAN: Well, we know that.

12 MR. DESTEFANO: Right?

13 CHIEF JUDGE LIPPMAN: We've been going  
14 through that - - -

15 MR. DESTEFANO: Exactly.

16 CHIEF JUDGE LIPPMAN: - - - for the longest  
17 time.

18 MR. DESTEFANO: For years, and this court  
19 has said, time and again, that it needs to be a  
20 determination made on a case-by-case basis. And - -  
21 -

22 JUDGE ABDUS-SALAAM: Counselor, before you  
23 leave - - -

24 MR. DESTEFANO: Sure.

25 JUDGE ABDUS-SALAAM: - - - could you give

1 us the other part of your two-part - - -

2 MR. DESTEFANO: Oh, the structure, why this  
3 isn't a structure; because again, as I was starting  
4 to say, that the scaffolds - - - it was initially  
5 intended to - - -

6 JUDGE ABDUS-SALAAM: You look at the  
7 cleaning, you said; you look at the general nature of  
8 this plaintiff's work, and what was the other part?

9 MR. DESTEFANO: That - - -

10 JUDGE ABDUS-SALAAM: You didn't get to the  
11 second part.

12 MR. DESTEFANO: That if - - - if we're  
13 talking about commercial cleaning that that's - - -  
14 that it - - - something more than sweeping, mopping,  
15 dusting. The cases from the Appellate Division  
16 there, there are one or two that involve cleaning  
17 grease from a restaurant duct, the vent from a  
18 restaurant duct that required the use of chemicals  
19 and other extraordinary methods to clean the duct.  
20 It wasn't a simple type of routine base cleaning.

21 CHIEF JUDGE LIPPMAN: What if there was a  
22 bad stain on the top of the shelf that required  
23 extraordinary compounds to get it off? Not routine  
24 anymore? Same height, above his head, and he's got  
25 to get that off and - - -

1                   MR. DESTEFANO: And arguably, it would not  
2 be this worker who is doing it. They would have to  
3 bring somebody in, because this would be outside of  
4 this worker's ability to be able to - - -

5                   CHIEF JUDGE LIPPMAN: And if it was this  
6 guy, it would - - - it would be covered?

7                   MR. DESTEFANO: And there's the difficulty  
8 in drawing a bright line - - -

9                   CHIEF JUDGE LIPPMAN: Okay.

10                  MR. DESTEFANO: - - - you see, Your Honor.

11                  CHIEF JUDGE LIPPMAN: Thank you, counselor.  
12 Okay.

13                  MR. DESTEFANO: Thank you, Your Honor.

14                  CHIEF JUDGE LIPPMAN: Thank you.

15                  Counselor, rebuttal?

16                  MR. PROFETA: Yes, Your Honor. Okay. Now  
17 it's clear. My adversary says, all right, windows,  
18 that's it, nothing more than windows. Well, let me  
19 tell you that it's my opinion if you - - - if you do  
20 that, you are going to get what - - - if you don't  
21 overrule Broggy and Swiderska, you will get  
22 ridiculous results, because, for example, in  
23 Swiderska, the woman was standing on a bed cleaning a  
24 window. What if she decided - - - and what if part  
25 of her job was cleaning the venetian blinds on the

1 windows? What if it were cleaning the drapes also,  
2 besides the windows, or the wall next to the windows,  
3 or the ceiling above? Where we - - - you want to  
4 draw the line at just the glass? Well, then I - - -  
5 then I submit to you that, as a policy matter,  
6 there's no rational difference. If she falls, she  
7 falls. She's elevation - - -

8 JUDGE SMITH: Okay, but - - -

9 MR. PROFETA: - - - an elevator-related - -  
10 -

11 JUDGE SMITH: But we did - - -

12 MR. PROFETA: - - - risk.

13 JUDGE SMITH: - - - say - - - I mean, is  
14 there any way to avoid this kind of arbitrariness  
15 without doing what we rejected in Dahar, which  
16 they're claiming is cleaning; everybody who cleans,  
17 come on in.

18 MR. PROFETA: No, I have given you my  
19 restrictions on the cleaning.

20 JUDGE SMITH: One more time, tell me the  
21 line.

22 MR. PROFETA: It's not domestic cleaning,  
23 not domestic household cleaning that's in private  
24 residences. It has to be pursuant to a commercial  
25 contract, and these are commercial workers. And it

1 has to be a structure, and that doesn't include - - -

2 JUDGE SMITH: Can it be in a manufacturing  
3 plant?

4 MR. PROFETA: And it can't be a  
5 manufacturing - - -

6 JUDGE SMITH: And so far - - - yeah, so  
7 far, Dahar - - -

8 MR. PROFETA: Dahar - - -

9 JUDGE SMITH: - - - would have been  
10 covered.

11 MR. PROFETA: Dahar finished that. I mean,  
12 there used to be- - - I used to have a case by the  
13 name of Gordon where cleaning a railroad car was  
14 okay, but Dahar overruled Gordon.

15 CHIEF JUDGE LIPPMAN: Does it have to be  
16 elevated - - - elevation risk?

17 MR. PROFETA: Yes, and it has to be  
18 elevated risk - - - elevated risk.

19 CHIEF JUDGE LIPPMAN: Okay. Thank you  
20 both. Appreciate it.

21 (Court is adjourned)

22

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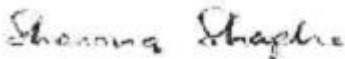
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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Jose A. Soto v. J. Crew, et al. No. 162 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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