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COURT OF APPEALS

STATE OF NEW YORK

MORRIS,

Respondent,

-against-

No. 30

PAVARINI CONSTRUCTION,

Appellant.

20 Eagle Street
Albany, New York 12207
January 9, 2014

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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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 30, Morris v.
2 Pavarini?

3 Counsel, do you want any rebuttal time?

4 MR. FRANKLIN: I'd like to reserve two
5 minutes, Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
7 ahead.

8 MR. FRANKLIN: Thank you, Your Honor. And
9 may it please the court, my name is David Franklin
10 and I represent the appellants, Pavarini Construction
11 and Vornado Realty Trust.

12 This is now the second time that this case
13 has been before the court, and after the remand, we
14 now have a more complete record, and now that we have
15 the more complete record - - -

16 CHIEF JUDGE LIPPMAN: What do the experts'
17 testimony tell us about your position about where we
18 should go at this point?

19 MR. FRANKLIN: Well, it shows that this
20 Code provision, the language of the Code provision,
21 can only be sensibly applied to completed forms that
22 are serving as a mold for concrete, and can't be
23 sensibly applied - - -

24 JUDGE SMITH: It - - - it - - - it does
25 show that it's possible to brace uncompleted forms,

1 doesn't it?

2 MR. FRANKLIN: Sure, it does, but - - -

3 JUDGE SMITH: Why wasn't that the question
4 we were asking? I mean, wasn't that the point of the
5 hearing? I mean, when - - - when you or whoever it
6 was was here last time, you were saying you can't
7 brace uncompleted - - - you can't brace and tie
8 uncompleted forms. It's like one-hand clapping. You
9 can't do it. And that's - - - that's not the case.

10 MR. FRANKLIN: No, the argument was
11 different. It's that they can't be - - - we've
12 always said it's been braced. It just can't be tied,
13 because of - - - the object that struck him is only
14 one wall, but the difference is that it can't be
15 braced or tied together so as to maintain position
16 and shape, because maintaining position and shape - -
17 -

18 JUDGE SMITH: Didn't - - - didn't your
19 experts say, talking about an uncompleted form, that
20 is has to stay in position?

21 MR. FRANKLIN: Sure, but that's true of any
22 object, no matter what it is, when you - - -

23 JUDGE SMITH: And - - - and you need a
24 brace to do that?

25 JUDGE GRAFFEO: I have - - - I have a - - -

1 I have a record question for you - - -

2 MR. FRANKLIN: Sure.

3 JUDGE GRAFFEO: - - - on this point. Do we
4 have any photograph of what this particular wall
5 looked like, because all I could find was A-156,
6 which looks like some kind of a marketing piece.

7 MR. FRANKLIN: No, we do not have a
8 photograph of it.

9 JUDGE GRAFFEO: You have no photograph to
10 show what this wall looked like at the time of the
11 accident?

12 MR. FRANKLIN: We don't have a photograph,
13 but we do have testimony - - -

14 JUDGE GRAFFEO: So - - -

15 MR. FRANKLIN: - - - that explains the
16 nature of the object.

17 JUDGE GRAFFEO: Were these braces on it, or
18 there are - - - these braces weren't on it at the
19 time?

20 MR. FRANKLIN: There were some braces
21 apparently on it, some were not. But what we do know
22 is that only one side of it was built - - -

23 CHIEF JUDGE LIPPMAN: Yeah, but why
24 wouldn't it - - -

25 MR. FRANKLIN: - - - and that it could not

1 have held concrete.

2 CHIEF JUDGE LIPPMAN: Why wouldn't an - - -
3 an answer to the original question, why isn't it
4 clear now that - - - that the - - - the one side
5 needs to be braced in order to be held into place?
6 Why isn't that exactly what the original - - -

7 MR. FRANKLIN: Because that's not - - -

8 CHIEF JUDGE LIPPMAN: - - - request was,
9 and - - - and the outcome of - - - of these - - -
10 these further proceedings?

11 MR. FRANKLIN: Because that wasn't the
12 issue on remand. The issue in - - -

13 CHIEF JUDGE LIPPMAN: What's the issue?
14 How do you see the issue and - - - go ahead.

15 MR. FRANKLIN: The issue is not so much
16 whether it needed to be braced, but whether this
17 particular provision required it to be braced.

18 CHIEF JUDGE LIPPMAN: Yes. Was it - - -
19 but why - - -

20 MR. FRANKLIN: And the difference - - -

21 CHIEF JUDGE LIPPMAN: Why would it not be
22 required to - - - if it needs to be braced in order
23 to be held in place - - -

24 MR. FRANKLIN: Because the difference is,
25 this court had already said in construing it, that

1 basic structural safety is different - - - is not
2 actionable under 241(6). To be actionable - - -

3 JUDGE SMITH: But why - - - why - - - why
4 couldn't - - -

5 MR. FRANKLIN: - - - it's position and
6 shape.

7 JUDGE SMITH: Why couldn't the argument
8 that you're making now have been made and decided
9 last time? What did you need - - - - - what did you
10 need a hearing with experts to - - - to say, oh,
11 well, this - - - this statute on its face
12 contemplates only completed forms?

13 MR. FRANKLIN: Because at the time, there
14 had only been one expert affidavit that was very
15 vague as to what a form is, so this court asked for
16 more testimony regarding specifically, it said,
17 regarding the nature of the object. And the nature
18 of the object is, this is not something that can hold
19 concrete. And this statute - - - this Code
20 provision, it's in a section entitled "concrete
21 work". It deals with the unique dangers of concrete.

22 JUDGE RIVERA: Well, but what about - - -
23 but - - - but - - - yes, okay. But the uncomplete
24 form is in the process of - - - it's part of the
25 concrete work, is it not? You're in the process of

1 shaping up the concrete, getting the next side of the
2 wall, whatever it's called, together.

3 MR. FRANKLIN: Right, because the issue
4 here is about a form blowing out under the pressure
5 of liquid concrete, because concrete is a completely
6 different construction element than anything else.
7 It starts off as a liquid and becomes a solid. You
8 pour it into the form and it takes on the shape. And
9 while the liquid concrete is hardening inside, the
10 form needs to maintain its position and shape.

11 JUDGE ABDUS-SALAAM: Counsel, is there
12 another - - -

13 MR. FRANKLIN: And that's what this Code
14 provision's about.

15 JUDGE ABDUS-SALAAM: - - - provision of the
16 Industrial Code that deals specifically with just the
17 form in - - - an incomplete form?

18 MR. FRANKLIN: No, it doesn't. That's - -
19 -

20 JUDGE ABDUS-SALAAM: This is - - - this is
21 the only provision that deals with forms of any shape
22 or manner of completion?

23 MR. FRANKLIN: Right. It only deals - - -
24 because they only come up in the context of concrete
25 work.

1 JUDGE SMITH: Does - - - does the
2 Department of Labor still - - - still send out
3 inspectors, or just leave things to OSHA now?

4 MR. FRANKLIN: I - - - it's generally just
5 OSHA.

6 JUDGE SMITH: Assume hypothetically the
7 Department - - - of back in the old days, the
8 Department of Labor sends out an inspector, and he
9 sees an uncompleted form that's not properly braced.
10 Is he going to say, oh, well, that's not within the
11 regulation; that's not my problem?

12 MR. FRANKLIN: Well, the - - - OSHA is
13 separate. There may be an OSHA regulation out there
14 - - -

15 JUDGE SMITH: Forget about OSHA.

16 MR. FRANKLIN: But for this, I mean, as we
17 said, this court said last time, properly braced is
18 not the issue. The - - -

19 JUDGE SMITH: So I'm asking - - -

20 MR. FRANKLIN: They may have - - -

21 JUDGE SMITH: - - - are you really saying
22 that uncomplete - - - that the Department of Labor
23 has not - - - doesn't regulate uncompleted forms;
24 that this only applies to completed forms.

25 MR. FRANKLIN: That's correct. It only

1 applies, because every other piece of this - - -

2 JUDGE SMITH: So what - - - what is - - -
3 wouldn't it be more likely the Department of Labor
4 would - - - would - - - could reasonably take a more
5 protective view and say we want to protect people
6 from getting crushed by uncompleted as well as
7 completed forms?

8 MR. FRANKLIN: They could have, but they
9 didn't. And there's no language - - -

10 JUDGE RIVERA: But what's - - - what's the
11 duty on the uncompleted form, then?

12 MR. FRANKLIN: I'm sorry?

13 JUDGE RIVERA: What's the duty on the
14 uncompleted form?

15 MR. FRANKLIN: There's an ordinary common
16 law for duty of care to make sure that any structure,
17 whether it's an uncompleted form or anything else, is
18 structurally safe. But there's no language here - -
19 -

20 JUDGE READ: But it does - - - it does - -
21 -

22 JUDGE GRAFFEO: Am I - - - am I
23 understanding you, so to summarize what your posture
24 is, while they're in the process of constructing the
25 walls, that's not covered by the Code, but once the

1 wall is completed, before the pouring of concrete,
2 that's when the Code kicks in?

3 MR. FRANKLIN: It kicks in when - - -

4 JUDGE GRAFFEO: Does that make a lot of
5 sense?

6 MR. FRANKLIN: Yes, it does.

7 JUDGE GRAFFEO: In terms of protection of
8 the workers?

9 MR. FRANKLIN: In terms of what - - - what
10 was done here, yes, it does, because this is about
11 concrete work and protecting workers from the force
12 of concrete.

13 CHIEF JUDGE LIPPMAN: Yeah, but it doesn't
14 make sense in terms of what this - - - this whole
15 statutory framework is supposed to do, I think is the
16 question that we're asking.

17 MR. FRANKLIN: Su - - - sure, but this
18 whole statute - - -

19 CHIEF JUDGE LIPPMAN: Why does it - - - why
20 does it make sense?

21 MR. FRANKLIN: Because - - -

22 CHIEF JUDGE LIPPMAN: That workers can be
23 crushed by the incomplete form, but later on, once we
24 start pouring the concrete, then we won't allow them
25 to be crushed?

1 MR. FRANKLIN: Because under the statutory
2 scheme, it doesn't protect workers from all risks.
3 It only protects workers from risks which are
4 specifically enunciated in the Code.

5 CHIEF JUDGE LIPPMAN: This is one process,
6 though, right?

7 MR. FRANKLIN: This is what?

8 CHIEF JUDGE LIPPMAN: This is one process
9 to complete - - -

10 MR. FRANKLIN: Which was - - -

11 CHIEF JUDGE LIPPMAN: - - - the form?

12 MR. FRANKLIN: - - - they were still in the
13 process of it, but the risk - - -

14 CHIEF JUDGE LIPPMAN: Yes, but that's - - -
15 that's my question.

16 MR. FRANKLIN: And there's nothing about
17 that process. They don't say how they're supposed to
18 be lifted, how they're supposed to be put in place,
19 what equipment is going to be used. They don't have
20 any of that. And in other areas, such as the next
21 section, structural steel assembly, they have all of
22 that. They say exactly how you're supposed to do it.
23 Here they didn't.

24 JUDGE READ: But they do talk about what
25 you're supposed to do after the concrete's been

1 poured, right?

2 MR. FRANKLIN: Sure.

3 JUDGE READ: It talks about stripping.

4 MR. FRANKLIN: Sure, because at that point,
5 the force of the concrete has already acted on it.

6 This provision is all about concrete. And there may
7 be an ordinary core duty of care beforehand - - -

8 JUDGE ABDUS-SALAAM: So if - - - if this
9 worker had been - - -

10 MR. FRANKLIN: - - - but that's not the
11 issue.

12 JUDGE ABDUS-SALAAM: If this worker had
13 been injured after the co - - - concrete had been
14 poured and the form was being stripped, this Code
15 provision might protect him, is what you're saying.

16 MR. FRANKLIN: It might - - - under Section
17 D it might. Not Section A, but under Section D, it
18 might, because at that point, it might - - - if it
19 was not stripped properly in accordance with that.

20 JUDGE ABDUS-SALAAM: Until the form is
21 complete with two walls under your - - - I guess,
22 under your theory, then he has to look to something
23 else, maybe Labor Law 200 or common law to protect
24 him?

25 MR. FRANKLIN: Yes, which in this case,

1 that's been dismissed. It's already been determined
2 as a matter of law that the owner and GC (ph.) were
3 not negligent. The issue is whether we can impose
4 statutory liability on them, and the only way you can
5 do that under 241(6) is if it's covered under the
6 provision, and this provision doesn't cover that. It
7 deals with the force of concrete and a completed form
8 - - -

9 CHIEF JUDGE LIPPMAN: It seems - - -

10 MR. FRANKLIN: - - -blowing out.

11 CHIEF JUDGE LIPPMAN: It seems a very
12 narrow or really subtle distinction that you're
13 making here, when the whole purpose behind the
14 provision is obviously to protect the person working
15 on this, right?

16 MR. FRANKLIN: Well, it's to protect him -
17 - -

18 CHIEF JUDGE LIPPMAN: Or persons?

19 MR. FRANKLIN: It's to protect them from
20 the force of the concrete, not from, you know, an
21 object not being structurally safe, but from the
22 force of the concrete. It's - - - the section is
23 called "concrete work". That's what it applies to -
24 - -

25 CHIEF JUDGE LIPPMAN: This is concrete

1 work.

2 MR. FRANKLIN: - - - that's how the Third
3 Department applies it.

4 CHIEF JUDGE LIPPMAN: The whole process is
5 concrete work.

6 MR. FRANKLIN: Not until the concrete - - -

7 JUDGE ABDUS-SALAAM: Is this - - -

8 MR. FRANKLIN: - - - is present.

9 JUDGE ABDUS-SALAAM: Is this any different
10 than a worker who maybe invokes a provision that's
11 not specific enough under the - - - under this Code
12 to protect them from some hazard?

13 MR. FRANKLIN: Yes, Your Honor. And I
14 believe my time's up, but just to answer your
15 question.

16 CHIEF JUDGE LIPPMAN: Answer the question.

17 MR. FRANKLIN: Yes, it is. It's - - - when
18 - - - that's almost exactly what they've done. This
19 court's already said that part of this provision,
20 which says structurally safe, is not specific enough,
21 and that's exactly what we're talking about here.
22 This just wasn't structurally safe. It had nothing
23 to do with concrete work.

24 CHIEF JUDGE LIPPMAN: Okay, let's hear from
25 your adversary, and then you'll have your rebuttal.

1 Thanks, counsel.

2 Counsel?

3 MS. MOIN: May it please the court, my name
4 is Cheryl Eisberg Moin, and I represent the
5 plaintiff-respondent, Glenford Morris.

6 Your Honors - - -

7 CHIEF JUDGE LIPPMAN: Why - - - why do we
8 not have to wait till the concrete is poured?

9 MS. MOIN: The - - -

10 CHIEF JUDGE LIPPMAN: Why, if it says - - -
11 your adversary says it's a - - -

12 MS. MOIN: There's been - - -

13 CHIEF JUDGE LIPPMAN: - - - it's a concrete
14 provision or concrete work, why is it that we don't -
15 - - in order to protect the worker under this
16 provision, we don't wait until the concrete is
17 poured?

18 MS. MOIN: Well, when this case was before
19 this court in 2007, the crux of the court's
20 exploration at that time was the sensibility of
21 applying the Industrial Code regulation to forms that
22 were not yet complete - - - were not yet concrete-
23 ready, ready for the pour.

24 CHIEF JUDGE LIPPMAN: Right.

25 MS. MOIN: This court at that time already

1 knew this was not a completed form, yet this court
2 sought a further description, by way of a framed
3 hearing, in order to determine whether it makes sense
4 to require safety break - - - break - - - safety
5 bracing at the - - - for this object which fell here.
6 Now, the defendant - - -

7 CHIEF JUDGE LIPPMAN: What did the hearing
8 show as to why it makes sense?

9 MS. MOIN: Okay, well, if we look at the
10 testimony of the experts at the framed issue hearing,
11 and the First Department read it very carefully, and
12 noted that there was an unanimity of the expert
13 testimony here.

14 JUDGE READ: But isn't the question not
15 whether it makes sense, but whether this regulation
16 requires it?

17 MS. MOIN: Yes, this regulation - - - the
18 defendant is trying to inject a time restriction
19 because subdivision (b) talks about when the concrete
20 is being poured, that it necessitates continuous
21 inspection at that time. But subdivision (a) does
22 not have that time con - - - constraint.

23 JUDGE PIGOTT: Well, that's because it's a
24 general requirement.

25 MS. MOIN: And that's - - - no, the first -

1 - - this court in 2007 said that having bracing or
2 ties is a specific safety requirement.

3 JUDGE PIGOTT: I'm reading - - -

4 MS. MOIN: If you look in the court's
5 opinion - - -

6 JUDGE PIGOTT: I'm ready 23-2.2 Concrete
7 Work, (a), General Requirements.

8 MS. MOIN: Right.

9 JUDGE PIGOTT: And it says forms and - - -

10 MS. MOIN: But this court and if we look at
11 the court's opinion in - - - at page 2000 - - - I'm
12 sorry; at page 609, it says it specifically, but the
13 words "braced or tied together as to maintain
14 position and shape imposed more specific
15 requirements". And that - - - then this court - - -

16 JUDGE PIGOTT: I'm not disagreeing - - -

17 MS. MOIN: - - - wanted to send it back - -
18 -

19 JUDGE PIGOTT: - - - or you can just keep
20 going.

21 MS. MOIN: - - - for the framed issue
22 hearing to find out what the terms mean. What does -
23 - - what was the size of the - - -

24 JUDGE GRAFFEO: But - - - but the question
25 is also, though, what's the scope of this regulation?

1 And I could see where perhaps the drafters of this
2 Code provision felt that until the wall was completed
3 - - -

4 MS. MOIN: Had you - - -

5 JUDGE GRAFFEO: - - - we weren't really
6 involved with - - - with a concrete project. I mean,
7 what - - - what if - - -

8 MS. MOIN: The whole process of concrete -
9 - -

10 JUDGE GRAFFEO: What if these workers were
11 in the process of attaching the braces to the wall -
12 - -

13 MS. MOIN: Well, actually this is the most
14 - - -

15 JUDGE GRAFFEO: - - - which usually - - -
16 and - - - and the wall collapsed - - -

17 MS. MOIN: That's the most - - -

18 JUDGE GRAFFEO: - - - so they were trying
19 to do - - - they were trying to - - - if you'd let me
20 finish my question. They're trying to complete the
21 wall, and the wall collapses. I take it your
22 position is still that this provision would cover
23 them?

24 MS. MOIN: Yes, this - - -

25 JUDGE GRAFFEO: Why should there be strict

1 liability in that case when the - - - when the
2 contractor is attempting to comply with the reg?

3 MS. MOIN: Well, first of all, subdivision
4 (a), if the legislature had wanted to put in a time
5 restriction, they could have. The legislature could
6 have done it, but did not, and only injected it in
7 the second. It's a giant leap.

8 JUDGE PIGOTT: That's because the first one
9 says, general requirements, and the subject is
10 "forms, shores, and reshores". That's what we're
11 talking about, not - - -

12 MS. MOIN: Forms, in this - - -

13 JUDGE PIGOTT: I'm almost done. Not - - -
14 not putting a form together, it's "forms, shores and
15 reshores". Reshores. And as you point out, (b) then
16 says, "Designated persons shall continuously inspect
17 the stability of all forms, shores and reshores,
18 including all braces and other supports during the
19 placing of concrete. Any safe - - - any unsafe
20 condition shall be remedied immediately."

21 So they're talking about forms, not
22 building forms. They're talking about forms that are
23 done, and that they have to be properly done. That's
24 the general requirement, (a). And then (b) says you
25 got to continually check to make sure they are so

1 that the concrete doesn't pour out.

2 MS. MOIN: But with respect to subdivision
3 (a), this court wanted to explore, what was the
4 object that fell? What's the expert testimony? What
5 does it mean? What is a form? We found at the
6 framed issue hearing that both the defense expert and
7 the plaintiff's experts all said - - - use the word
8 "wall form" "wall back form" "part of the wall", all
9 refer to it interchangeably as forms.

10 In the industry, that's the custom and
11 practice to use the words "form". What did the
12 testimony - - - they said that "step 1 is bracing".
13 That's when the back form is put up. That's step 1.
14 Safety bracing, because the - - - the worker, the
15 laborer at that time is in the most vulnerable
16 position.

17 JUDGE PIGOTT: It doesn't talk about safety
18 bracing, though. It says "forms, shores and
19 reshores". Those are the three things they're
20 talking about.

21 MS. MOIN: Forms, and it talks about
22 bracing. The actual language is - - - talks about
23 the bracing, and that's why - - -

24 JUDGE PIGOTT: No, no, no. In (b), it then
25 says, "Designated persons shall continuously inspect

1 the stability of all forms, shores and reshores,
2 including all braces and other supports during the
3 placing of concrete." So they make a distinction
4 between bracing and between forms, shores and
5 reshores, it seems.

6 MS. MOIN: But this court knew and it said
7 here, but the words, braced or tied together, this -
8 - - there was no bracing whatsoever here. And if
9 we'll remember, in the original summary judgment
10 motion, the defense didn't even put in - - -

11 JUDGE ABDUS-SALAAM: Well, if - - -

12 MS. MOIN: - - - an expert - - -

13 JUDGE ABDUS-SALAAM: Counsel, counsel - - -

14 MS. MOIN: - - - testimony, affidavit - - -

15 JUDGE ABDUS-SALAAM: Counsel, if the wall
16 were being formed and the bracing had yet to be
17 placed, which could have happened here, then how
18 would this provision apply to that? They're in the
19 process of putting the form up, and they haven't
20 gotten to the bracing yet. So you're saying bracing
21 or ties, and the bracing - - - I - - - it just
22 doesn't - - -

23 MS. MOIN: I will answer that question.

24 JUDGE ABDUS-SALAAM: I'm trying to
25 understand how this - - - code provision would apply.

1 MS. MOIN: In this case, the back form had
2 been hoisted and was in a vertical upright position.
3 It was no longer on the ground. It was not
4 horizontal on the ground. So now it's standing in
5 erect position here, and we have to remember that
6 there may not be concrete poured for many days - - -

7 JUDGE ABDUS-SALAAM: Exactly.

8 MS. MOIN: - - - because the enormous
9 footprint of the building - - -

10 JUDGE ABDUS-SALAAM: So what if this
11 accident had happened the minute after the wall was
12 hoisted and placed up - - -

13 MS. MOIN: Right.

14 JUDGE ABDUS-SALAAM: - - - and the bracing
15 hadn't been on yet.

16 MS. MOIN: Right, and the First Department
17 was very interested at the oral argument as to how
18 long do these vertical forms stand upright before
19 concrete is poured.

20 CHIEF JUDGE LIPPMAN: So is that the
21 distinction?

22 MS. MOIN: And the testimony was - - -

23 CHIEF JUDGE LIPPMAN: Once it's - - - once
24 it's upright, then it applies, in your - - -

25 MS. MOIN: Yes, once - - -

1 CHIEF JUDGE LIPPMAN: - - - argument.

2 MS. MOIN: - - - it's been hoisted upright

3 - - -

4 CHIEF JUDGE LIPPMAN: Once it's standing.

5 MS. MOIN: Once it's standing, it needs
6 safety bracing. The testimony at the framed issue
7 hearing was that safety bracing, that's the first
8 step. Step 1. And - - -

9 JUDGE SMITH: Step 1 - - - step 1 once it's
10 up. You can't brace it before you put it up.

11 MS. MOIN: Once it - - - once the back form
12 is up one side, it's up - - -

13 CHIEF JUDGE LIPPMAN: Then you must brace
14 it.

15 MS. MOIN: Then you must brace it at that
16 time, because it can be many days until - - - until
17 the whole mosaic of forms is set up.

18 CHIEF JUDGE LIPPMAN: Otherwise people are
19 going to get hurt in - - - in - - - from your
20 perspective.

21 MS. MOIN: Absolutely, Your Honor.

22 JUDGE ABDUS-SALAAM: And I don't think
23 you've answered my question. The wall goes up, but
24 they're in the process of putting the bracing on. It
25 could be minutes; it could be an hour. Does this

1 provision cover it - - -

2 MS. MOIN: Once - - -

3 JUDGE ABDUS-SALAAM: - - - that injury?

4 MS. MOIN: Once the form is up and is in a
5 vertical position, it needs to have bracing.

6 JUDGE ABDUS-SALAAM: So they have to - - -

7 MS. MOIN: Now, I'm not sure how the - - -

8 JUDGE ABDUS-SALAAM: So they have to do the
9 minute the wall goes up, or otherwise they're covered
10 under this provision? I'm not clear what you're - -
11 - you were talking about timing, and I'm trying to
12 understand what you mean by that.

13 MS. MOIN: Well, in this case, the wall had
14 been up, it hadn't just been put up at that moment.

15 JUDGE SMITH: But you - - - you could - - -

16 JUDGE ABDUS-SALAAM: But if it had been - -

17 -

18 JUDGE SMITH: I guess - - -

19 MS. MOIN: This is a very fact-driven case.

20 JUDGE SMITH: I think what maybe Judge - -
21 - Judge Abdus-Salaam is asking, you could imagine a
22 case, certainly, in which the wall - - - the thing is
23 put up and immediately falls, and it wouldn't have
24 been possible to brace it, and then I guess, you
25 would admit that - - - that the - - - that section of

1 the regulation wasn't violated.

2 MS. MOIN: Well, I be - - - I - - - I'm not
3 exactly sure of the mechanics of how the bracing is
4 attached - - -

5 JUDGE GRAFFEO: But when I asked you that
6 question, if they were in the process of attaching
7 that bracing, you said yes.

8 MS. MOIN: No, I said they were in the
9 process - - -

10 JUDGE GRAFFEO: It was covered by the Code.

11 MS. MOIN: - - - of putting up - - - they
12 were - - -

13 JUDGE GRAFFEO: No, when I asked you my
14 question - - -

15 MS. MOIN: I'm sorry, Your Honor.

16 JUDGE GRAFFEO: - - - and I said, during
17 the process - - - if the workers were in the process
18 of attaching the braces and the wall fell - - -

19 MS. MOIN: Oh, there are different time - -
20 -

21 JUDGE GRAFFEO: - - - was it within the
22 scope of this Code provision and you said yes.

23 MS. MOIN: So we're talking - - - no, we're
24 talking about the deadman's brace that would be put
25 behind the one-sided wall.

1 Well, that's an interesting question as to
2 when exactly - - -

3 JUDGE GRAFFEO: I'm trying to determine
4 when the strict liability begins.

5 MS. MOIN: The responsibility - - -

6 JUDGE GRAFFEO: I think you're saying as
7 soon as the wall goes up, regardless of whether
8 they're in the process of putting bracing on it.

9 MS. MOIN: I would say as soon as the wall
10 is vertical, as soon as it's hoisted up and put in a
11 vertical position, at that point in time - - -

12 CHIEF JUDGE LIPPMAN: Is it - - -

13 MS. MOIN: - - - there needs to be safety -
14 - -

15 CHIEF JUDGE LIPPMAN: Is it braced at all
16 at that point? When they put it in and they stand
17 it, if they don't do it right away, the bracing - - -

18 MS. MOIN: I believe it - - -

19 CHIEF JUDGE LIPPMAN: - - - is there
20 anything that holds it at the beginning?

21 MS. MOIN: Well, there was no testimony as
22 to when it - - - I would believe that it's done
23 simultaneously, even looking at the photograph in the
24 brochure - - -

25 CHIEF JUDGE LIPPMAN: So what you're saying

1 is, when you - - - when - - - because I think this is
2 important, that when you put it up, then you brace
3 it.

4 MS. MOIN: When you put it up, it has to be
5 braced.

6 CHIEF JUDGE LIPPMAN: And I think - - -

7 MS. MOIN: It's simultaneous, Your Honor.

8 CHIEF JUDGE LIPPMAN: And an answer to
9 Judge Graffeo's question, while you're bracing it, if
10 someone gets hurt, covered?

11 MS. MOIN: While we - - - but my - - - my -
12 - -

13 JUDGE SMITH: Wouldn't you - - -

14 MS. MOIN: - - - let me just say my
15 plaintiff was a laborer working on unrelated work - -
16 -

17 JUDGE SMITH: But if - - - but how - - -

18 MS. MOIN: - - - on an adjacent wall - - -

19 JUDGE SMITH: But hypothetically - - -

20 MS. MOIN: He was not involved with
21 bracing.

22 JUDGE SMITH: But hypothetically, if the -
23 - - isn't the question whether - - - whether the stat
24 - - - whether the regulation was violated or not?
25 The regulation says the "forms shall be properly

1 braced". Either it was or it wasn't. If it wasn't
2 proper - - - if they did - - - if they didn't do
3 anything wrong, then maybe you could say, well - - -
4 well, there was no violation.

5 MS. MOIN: Well, as long - - - it - - - as
6 - - - if the wall toppled, it wasn't braced. It
7 wasn't properly braced if it fell - - -

8 JUDGE SMITH: Well, you - - -

9 MS. MOIN: - - - because it toppled over.

10 JUDGE SMITH: Well, okay, but that's - - -
11 that's really a different - - - a different question,
12 isn't it? You're - - - you're saying that if - - -
13 that - - - that all you got to show is the form fell,
14 and you win - - - won the case. You don't have to -
15 - - you don't have to show any defect in the bracing?

16 MS. MOIN: Well, the First Department
17 searched the record here and granted summary judgment
18 to the plaintiff.

19 JUDGE SMITH: Okay, yeah, yeah. But would
20 be - - - but he's appealing from that.

21 MS. MOIN: Right.

22 JUDGE SMITH: Yeah, but - - - but - - - I
23 don't - - - I can understand the argument if that
24 isn't presented here, but you can imagine that there
25 is a case, where - - - where there was no defect in

1 the bracing, and no negligence in - - - in bracing it
2 and no delay in bracing it, and there was an
3 unforeseeable accident. I would think that on the
4 face of this regulation, it just wouldn't apply.

5 MS. MOIN: Well, I would say if the brace -
6 - - a brace - - - a deadman's brace - - - if it's not
7 working, then there's something that was done wrong.

8 JUDGE PIGOTT: But that's - - - isn't it -
9 - -

10 MS. MOIN: It was not - - - I mean, a - - -
11 a wall - - -

12 JUDGE PIGOTT: Counsel - - -

13 MS. MOIN: - - - of that mag - - -
14 magnitude - - -

15 JUDGE PIGOTT: - - - even if you asked the
16 question. If it - - - if it's - - - if the whole
17 section is addressed to concrete work, is there any
18 concrete involved in this thing?

19 MS. MOIN: Excuse me?

20 JUDGE PIGOTT: The section that we're
21 talking about says "concrete work". And I think what
22 we were looking at is that they're talking about the
23 forms that you pour the concrete in. You want to go
24 before that. You want to say - - -

25 MS. MOIN: Well - - - it's our position

1 that subdivision (a) does not have a time constraint.
2 That both - - - that both walls need to be erect at
3 that time. The - - - that's why we had a framed
4 issue hearing.

5 The testimony, both defense and plaintiff's
6 experts talked about the - - - specifically this
7 issue, that the safety bracing was needed as soon as
8 it went up. They talked about - - - in fact, Mr.
9 Bellizzi said that this case falls directly within
10 the ambit of the Industrial Code provision that's - -
11 - that we're speaking about here. The - - - even the
12 defense expert termed - - - used those terms, wall
13 form, back form, interchangeably.

14 CHIEF JUDGE LIPPMAN: So let me - - - let's
15 just - - - this is - - - let's wrap this up. You're
16 saying, vertical needs to be braced immediately. If
17 it falls before it's braced immediately, if it falls
18 while it's being braced, if it falls after the brace
19 is on, then it's covered.

20 MS. MOIN: Yes, to protect - - -

21 CHIEF JUDGE LIPPMAN: That's your argument.
22 Okay, let's - - -

23 MS. MOIN: For the protection of workers,
24 because that's - - - that's what - - -

25 CHIEF JUDGE LIPPMAN: Okay.

1 MS. MOIN: - - - the 241(6) looks at is the
2 safety and - - - providing safety for the workers.

3 And this is a specific safety requirement - - -

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 MS. MOIN: - - - in the Industrial Code so
6 that the - - -

7 CHIEF JUDGE LIPPMAN: And your argument
8 with the concrete is, the concrete may have not been
9 poured yet, but it's all part of the process.

10 MS. MOIN: That's right, Your Honor, right.

11 CHIEF JUDGE LIPPMAN: Okay. Let's hear
12 from your adversary.

13 Rebuttal, counsel.

14 Counsel, what about those specific
15 situations? Once vertical, before the brace they - -
16 - they have to do it immediately, it either falls
17 before they've done it, while they're doing it, or
18 after they're doing it. All covered or all not
19 covered?

20 MR. FRANKLIN: All not covered. It's only
21 - - -

22 CHIEF JUDGE LIPPMAN: Why?

23 MR. FRANKLIN: It's only covered once
24 concrete enters the picture.

25 CHIEF JUDGE LIPPMAN: So unless you've

1 started to pour the concrete, no coverage.

2 MR. FRANKLIN: Right, and that's the posi -
3 - -

4 JUDGE SMITH: Suppose - - - suppose you
5 have a hundred percent completed form, absolutely
6 done, and you say, okay, I'm going to pour the
7 concrete tomorrow. First thing, I come in - - -
8 going to come in tomorrow and pour the concrete. And
9 the thing - - - and - - - and the - - - the thing is
10 not braced. There's a defect in the bracing, and it
11 falls on a worker in the interim. You're saying
12 there's no - - - even a totally completed form,
13 you're saying there's no liability?

14 MR. FRANKLIN: That's correct, because in
15 that situation, concrete hasn't been poured yet.

16 JUDGE SMITH: How - - - how can this - - -

17 JUDGE READ: No liability or no liability
18 under this provision?

19 MR. FRANKLIN: Under this provision. There
20 could be - - - there could be negligent - - - but not
21 - - -

22 JUDGE SMITH: You're - - - you're - - -

23 MR. FRANKLIN: - - - not 241(6).

24 JUDGE SMITH: You're saying - - - you're
25 saying that you have not violated a rule that says

1 "forms shall be properly braced to maintain position
2 and shape" even though you have a completed form that
3 is not properly braced.

4 MR. FRANKLIN: That's correct, because - -
5 -

6 CHIEF JUDGE LIPPMAN: Where does it say
7 that? That you must pour the concrete for it to be
8 covered?

9 MR. FRANKLIN: It's two - - - well first of
10 all the section is called concrete work.

11 CHIEF JUDGE LIPPMAN: I get that.

12 MR. FRANKLIN: But the other part of it is
13 - - -

14 CHIEF JUDGE LIPPMAN: Where does it say - -
15 -

16 MR. FRANKLIN: When it says it has to - - -

17 CHIEF JUDGE LIPPMAN: - - - you have to - -
18 - it's obviously one process.

19 MR. FRANKLIN: - - - because it has to
20 maintain position and shape.

21 CHIEF JUDGE LIPPMAN: Where does it say you
22 have to pour the concrete for it to be covered?

23 MR. FRANKLIN: It doesn't say that, but it
24 does say it has to maintain position and shape and
25 that's what it has to do in concrete - - -

1 JUDGE PIGOTT: Well, if it doesn't - - -

2 MR. FRANKLIN: I'm sorry, Judge.

3 JUDGE PIGOTT: If it doesn't - - - if it
4 falls, as Judge Smith is suggesting, it didn't
5 maintain its position.

6 MR. FRANKLIN: But it says "position and
7 shape", and the only time that that phrase appears
8 anywhere in the Code is here, because that's what
9 happens when - - -

10 CHIEF JUDGE LIPPMAN: So you're saying no
11 shape unless the concrete's poured? Is that what
12 you're saying?

13 MR. FRANKLIN: Right, because the form is a
14 shape. And - - -

15 CHIEF JUDGE LIPPMAN: Yeah, yeah, but
16 that's - - - that's our question. If the - - - if
17 the form is a shape, and it's up, and the concrete
18 hasn't been poured yet, why is that not within the
19 statute?

20 MR. FRANKLIN: Because it's really - - -
21 because the statute's directed at the force of
22 concrete and making sure it maintains its shape under
23 the force of concrete - - -

24 JUDGE READ: The statute's - - -

25 MR. FRANKLIN: - - - while it's forming the

1 concrete.

2 JUDGE READ: - - - only concerned with
3 blowouts is your position, basically.

4 MR. FRANKLIN: That's correct.

5 CHIEF JUDGE LIPPMAN: Where does it say
6 that?

7 MR. FRANKLIN: What's that?

8 CHIEF JUDGE LIPPMAN: Where does it say
9 that?

10 MR. FRANKLIN: It doesn't say that exactly,
11 but based on the language that's - - -

12 CHIEF JUDGE LIPPMAN: So how do you infer
13 that? From the name, that if a concrete process - -
14 -

15 MR. FRANKLIN: That's part of it, also.
16 Maintaining position and shape is uniquely what
17 completed forms do when they're shaping concrete.
18 There's nothing else like that where you actually
19 have to form the shape beyond - - -

20 CHIEF JUDGE LIPPMAN: The shape is a term
21 of art then?

22 MR. FRANKLIN: Yes.

23 JUDGE SMITH: In our - - - in our - - - in
24 our previous decision, we said the gist of
25 defendant's argument is that the "regulation is

1 inapplicable because it cannot apply to anything but
2 a completed form. It does not make sense, defendants
3 say, to require one side of a form to be braced or
4 tied together so as to maintain position and shape."

5 That argument was wrong, wasn't it? I
6 mean, that - - - that - - - it does make sense.
7 You're saying it's not what this - - - this
8 regulation says, but it - - - but it's certainly
9 possible to say an incompleated form can be braced to
10 maintain position.

11 MR. FRANKLIN: Sure, but you can say that
12 about any object, anywhere, whatever you're building,
13 that it should be braced to maintain position.
14 That's basic structural safety; for maintaining
15 position and shape, that's only for forms.

16 JUDGE SMITH: But this doesn't sound like
17 the argument you made in 2007.

18 MR. FRANKLIN: Well, now we have a more
19 complete record. I think the argument is similar to
20 the one we made then, but now that we have a complete
21 record, I think it's even more clear now.

22 CHIEF JUDGE LIPPMAN: Well, the complete
23 record is supposed to answer the questions from the
24 first time, right?

25 MR. FRANKLIN: Yeah.

1 CHIEF JUDGE LIPPMAN: So - - -

2 JUDGE SMITH: What - - - what year was this
3 accident?

4 MR. FRANKLIN: I believe it was 2001.

5 JUDGE SMITH: It's been a while.

6 JUDGE GRAFFEO: 2002, I think.

7 MR. FRANKLIN: 2000 - - - it may have been
8 2002, excuse me.

9 JUDGE READ: Well, it's been a while - - -
10 it's been a while since 2007 when we last heard this.

11 CHIEF JUDGE LIPPMAN: And in all this time,
12 no one has figured out what a form or a shape is, and
13 how this applies.

14 MR. FRANKLIN: Well, we believe that they
15 have - - -

16 CHIEF JUDGE LIPPMAN: Well, we'll try and
17 figure it out. Okay.

18 MR. FRANKLIN: Thank you, Your Honor.

19 (Court is adjourned)
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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Morris v. Pavarini Construction, No. 30 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: January 17, 2014