

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MICHAEL SOMEREVE, ET AL.,

Respondents,

-against-

NO. 33

PLAZA CONSTRUCTION CORP.,

Appellant.

20 Eagle Street
Albany, New York
February 14, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

HOWARD K. FISHMAN, ESQ.
RAFTER & ASSOCIATES, PLLC
Attorney for Appellant
29 Broadway, 14th Floor
New York, NY 10006

BRIAN J. ISAAC, ESQ.
POLLACK POLLACK ISAAC & DE CICCIO, LLP
Attorney for Respondents
225 Broadway, Suite 307
New York, NY 10007

Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on the
2 calendar is number 33, Somereve v. Plaza Construction.

3 Good afternoon, Counsel.

4 MR. FISHMAN: Good afternoon, Your Honors. My
5 name is Howard Fishman. I'm with Rafter & Associates, on
6 behalf of the Appellant Plaza Construction Corporation.
7 I'd like to reserve two minutes for rebuttal, if I may?

8 CHIEF JUDGE DIFIORE: Of course.

9 MR. FISHMAN: Thank you.

10 Plaza submits that the placement - - -
11 plaintiff's motion for summary judgment was premature
12 because Plaza demonstrated that further discovery regarding
13 the accident could establish that the plaintiff's negligent
14 operation of the prime mover was the sole proximate cause
15 of his injuries.

16 JUDGE GARCIA: Counsel - - - Counsel, in your
17 papers, did you argue that this wasn't a 240 case, you
18 know, opposing summary judgment? That this case didn't
19 fall within that Labor Law provision?

20 MR. FISHMAN: The initial papers before the
21 Supreme Court?

22 JUDGE GARCIA: Yeah.

23 MR. FISHMAN: I believe it was argued that the
24 accident could have occurred due of - - - to his own
25 negligence, not necessarily sole proximate cause. So if it



1 wasn't a 240 case, then, you know, it's - - - it was just a
2 standard negligence case, and yes, I believe we did argue
3 that.

4 JUDGE GARCIA: You did?

5 MR. FISHMAN: Yes.

6 JUDGE RIVERA: But you didn't argue that it's not
7 an elevated risk?

8 MR. FISHMAN: I mean - - - excuse me?

9 JUDGE RIVERA: You didn't argue that it's not an
10 elevated risk. Your - - - your position, I thought - - -

11 MR. FISHMAN: No, it's not.

12 JUDGE RIVERA: - - - was he's the sole proximate
13 cause.

14 MR. FISHMAN: Right, it's - - - the argument is
15 that it's not an elevated risk, because he didn't fall from
16 an elevated height. He fell possibly from an eight-inch
17 platform and basically fell off the prime mover. That's
18 what his testimony was to Mr. Kramer.

19 JUDGE RIVERA: But is that the argument that you
20 made? I thought your argument was limited to the sole
21 proximate cause.

22 MR. FISHMAN: No, the argument was - - -

23 JUDGE FAHEY: Which of course, is a - - - a Labor
24 Law defense. That's why I - - - I'm sorry; I thought that
25 in response to Judge Garcia's question, I - - - I thought



1 this was - - - this was a Labor Law action and I - - -

2 MR. FISHMAN: It is a Labor Law action.

3 JUDGE FAHEY: I - - - I didn't think that you
4 were arguing that it wasn't a Labor Law case. I just
5 thought you were arguing that - - -

6 MR. FISHMAN: Well - - -

7 JUDGE FAHEY: - - - he had certain defenses to
8 it.

9 MR. FISHMAN: Yes, but we're arguing that the
10 motion was premature in that there was additional discovery
11 that was necessary - - -

12 JUDGE FAHEY: Well, I understand that. I just
13 want to be clear about what - - - you weren't arguing that
14 this is a comparative negligence case.

15 MR. FISHMAN: No, we're not arguing it's
16 comparative negligence. We're arguing that there was a
17 possibility that the plaintiff's admitted negligent
18 operation of the prime mover was the sole proximate cause
19 of his injuries and that we needed discovery to explore
20 that.

21 JUDGE FAHEY: Right.

22 MR. FISHMAN: That discovery may also reveal that
23 this is not even a Labor Law case, but we're not there yet,
24 because we didn't get that discovery. For example, there
25 could be other reasons for the accident to have occurred



1 other than the implication of Section 240.

2 JUDGE FEINMAN: So - - - so on that, let's get a
3 couple of facts clear. Had you actually served subpoenas
4 on any of these other eyewitnesses?

5 MR. FISHMAN: Yes, two - - - well, two subpoenas
6 were served - - -

7 JUDGE FEINMAN: It's a yes or a no.

8 MR. FISHMAN: Yes.

9 JUDGE FEINMAN: Either you served them or you
10 didn't.

11 MR. FISHMAN: Two subpoenas were served on Mr.
12 Catalano and Mr. Caratini. There are additional
13 eyewitnesses which we had yet to identify by full name.
14 There was, at least, two individuals known as Mike. One
15 was Mr. Caratini's partner. There was an individual in the
16 scaffold known as Mike. I don't know if they're talking
17 about the same person or somebody else. There's also,
18 plaintiff had testified, that there was an individual who
19 gave him hand motions, who was also in the scaffold. We
20 don't know who that person is yet either.

21 We had approximately three weeks from the time
22 that we conducted our deposition - - - the claimant's
23 deposition - - -

24 JUDGE FEINMAN: All right. And so they make
25 their motion. That results in an automatic stay of



1 discovery.

2 MR. FISHMAN: Correct.

3 JUDGE FEINMAN: Did anybody go to the trial judge
4 and say, can you lift the stay?

5 MR. FISHMAN: Yes, because we had already served
6 the subpoenas and also had already noticed the depositions
7 of Mr. Catalano and Mr. Caratini. The plaintiff then
8 rejected to taking those depositions. We had a conference
9 before Justice Singh's law secretary. And it was - - -
10 came back that those depositions or any discovery couldn't
11 proceed because of the stay of discovery, pending the
12 motion for summary judgment.

13 So we were precluded from taking those
14 depositions, which were noticed, I believe, for some time
15 in July or August, based upon the filing of the motion for
16 summary judgment in June of 2013, just six or eight weeks
17 after our depositions in May of - - - May of 2013.

18 JUDGE STEIN: What is your - - -

19 JUDGE RIVERA: So in your opposition to summary
20 judgment, did you argue that - - - that he had been
21 provided with a safety device or some kind of safety
22 instructions?

23 MR. FISHMAN: Well, we argued that the whole - -
24 - the prime mover itself is a safety device; in that, it's
25 a machine that's used to hoist the materials and it was



1 regularly used at the site to hoist pallets of bricks from
2 the ground and place it on the scaffold.

3 JUDGE FAHEY: Well, let's stay with that. Let's
4 - - - let's say that you're correct, logically. Aren't you
5 required to provide a safety device that operates so as to
6 protect the worker, right?

7 MR. FISHMAN: Yeah, when we - - -

8 JUDGE FAHEY: You would agree with that
9 proposition?

10 MR. FISHMAN: And - - - and - - -

11 JUDGE FAHEY: So let me finish.

12 MR. FISHMAN: Yes.

13 JUDGE FAHEY: You agree with that, though, right?

14 MR. FISHMAN: Yes.

15 JUDGE FAHEY: All right. That's your obligation.
16 So if that's the case, can you say that this safety device,
17 this prime mover, operated so as to protect the worker?

18 MR. FISHMAN: Well, the - - - the safety device
19 that's provided for something that hoists is to protect the
20 worker from being struck by the item that's being hoisted.
21 When you - - - when you're standing on a platform that's
22 eight inches off the ground, there's not a reasonable
23 explanation - - -

24 JUDGE FAHEY: You know, the funny thing is, is
25 these cases - - - there's a lot of these cases of - - - of



1 forklifts - - - people being thrown up in the air in the
2 forklifts. That's why they were redesigned and changed - -
3 - the design was changed on them. Also, bobcats tipping
4 over, and these aren't really - - - particularly unusual
5 cases. These accidents do happen. In other words, that
6 they're misoperated, and - - - and somebody gets hurt as a
7 result of the misoperation.

8 MR. FISHMAN: Right.

9 JUDGE FAHEY: So I think in a case like this, we
10 would assume that the plaintiff might not have operated
11 correctly, probably hit the fork somewhere on the scaffold,
12 and then caused the thing to tilt. So it didn't protect
13 him then when it threw him up in the air, right?

14 MR. FISHMAN: Well, that's the question. Did it
15 throw him up and off the air or not? I mean, it's a
16 question of fact whether he was thrown off in the air,
17 because he taped - - - told Mr. Krammer, "I fell off the
18 machine; I simply fell off the machine." That's what Mr.
19 Krammer - - -

20 JUDGE FAHEY: Right.

21 MR. FISHMAN: - - - rel - - - relates in his
22 onset report, that he fell off.

23 JUDGE RIVERA: But even if he fell off the
24 machine, didn't you have to provide him with a safety
25 device so he wouldn't fall off the machine? I mean, if



1 you're up in the air - - -

2 MR. FISHMAN: That's - - -

3 JUDGE RIVERA: - - - the potential to fall is
4 always there.

5 MR. FISHMAN: Well, that's - - -

6 JUDGE RIVERA: Isn't that the point of the
7 statute?

8 MR. FISHMAN: That's what we have to - - -

9 JUDGE FAHEY: I thought to Krammer's EBT seemed
10 to be pretty consistent in his description of the accident
11 with the plaintiff description of it.

12 MR. FISHMAN: I don't believe so - - -

13 JUDGE FAHEY: Oh.

14 MR. FISHMAN: - - - because Mr. Krammer gave a
15 number of explanations as to what plaintiff told him had
16 occurred.

17 JUDGE FEINMAN: But the reality is Krammer isn't
18 there. He doesn't see the accident, and everything he has
19 to say is really speculation - - -

20 MR. FISHMAN: Well - - -

21 JUDGE FEINMAN: - - - other than the fact - - -
22 the only thing he knows is that, when he comes to the
23 scene, the - - - the machine is upright.

24 MR. FISHMAN: Well, he knows the machine is
25 upright. He knows that the machine did not tilt, because



1 if it tilted, it would have needed some other equipment to
2 re-right it. So we know that the machine did not tilt
3 over; it didn't slam into the ground. So that's - - - we
4 know that.

5 JUDGE FEINMAN: Right.

6 MR. FISHMAN: We know - - -

7 JUDGE STEIN: What is your theory about how you
8 think the plaintiff could have been the - - - the sole
9 proximate cause of this - - -

10 MR. FISHMAN: We think the plaintiff - - - well,
11 the plaintiff could have been the sole proximate cause
12 because he - - - you know, assuming that he did fall from
13 the machine in the manner he suggests, he could have
14 slammed on the brakes of the machine when he came in
15 contact with the scaffold. The machine may have just
16 tilted slightly when it came in contact with the scaffold,
17 if he slammed on the brakes. He may not have - - - he may
18 have had the pallet blocking his vision and didn't observe
19 the - - - you know, the scaffold itself. He didn't follow
20 the directions of the person on the scaffold that was
21 giving him the hand signals. I mean, there's a var - - -
22 variety of reasons of how the accident could have occurred.

23 JUDGE FAHEY: But aren't those all comparative
24 negligence questions, not sole proximate cause questions?

25 MR. FISHMAN: No, because when you have a



1 situation where the lift itself is not defective, the lift
2 operates properly, the lift - - -

3 JUDGE FAHEY: Well, sole proximate cause usually
4 involves either the refusal to use a safety device or a
5 disregarding a supervisor's instructions on a safety
6 device. Is it - - -

7 MR. FISHMAN: Just that - - -

8 JUDGE FAHEY: Let me finish. It falls within one
9 of those two categories. Everything you've described means
10 that he didn't operate the machine correctly. He made a
11 mistake.

12 MR. FISHMAN: Well, those are the more recent
13 cases dealing with sole proximate cause. But going back to
14 the more historic cases, like - - - such as Blake, when
15 this court determined that it was a question for the jury
16 to decide - - - rightfully to decide - - -

17 JUDGE FAHEY: It's a funny thing about Blake;
18 both parties quote it - - -

19 MR. FISHMAN: Well - - -

20 JUDGE FAHEY: - - - in this case.

21 MR. FISHMAN: You see, but in Blake, there - - -
22 there's no definitive proof that the plaintiff failed to
23 lock the - - - the locking mechanism on the ladder. We - -
24 - we get to it in sort of reverse fashion. You can get to
25 it by finding that the ladder is properly placed. He



1 admitted it was properly placed. He admitted that the
2 ladder was not defective. He just couldn't recall whether
3 or not he had locked the ladder or not. And yet - - -

4 JUDGE RIVERA: But - - - but here - - - that - -
5 - that's my point. Here, what - - - what's the safety
6 device - - -

7 MR. FISHMAN: Well - - -

8 JUDGE RIVERA: - - - for him not to fall off?
9 How - - -- how have you provided something to minimize that
10 risk or avoid the risk completely?

11 MR. FISHMAN: Well, we submit that there is no
12 safety device required to protect him from - - - from an
13 eight-inch elevation by standing on a platform - - -

14 JUDGE RIVERA: Okay, did - - - did you - - -

15 JUDGE FAHEY: But then we're back to - - -

16 JUDGE RIVERA: - - - submit anything in
17 opposition to the motion to summary judgment related to
18 that response?

19 MR. FISHMAN: Well, that issue wasn't argued
20 below, because the issue that the plaintiff had argued
21 before both the trial court and the First Department was
22 that the lift itself tipped over because it was inadequate
23 to handle the load. The - - - the argument that he should
24 have been provided with some sort of seat belt or whatever,
25 some unidentified safety device, was first raised in the



1 plaintiff's brief in this court.

2 So - - -

3 JUDGE FEINMAN: But - - - but you didn't say in
4 opposition to the motion, wait a minute, Judge, this is not
5 a 240 case to begin with.

6 MR. FISHMAN: Well, we argued that there was
7 discovery that was necessary. And so because - - -

8 JUDGE FEINMAN: No, no - - -

9 MR. FISHMAN: - - - once this case is premature,
10 then a lot of things can happen once the discovery comes
11 out. I don't know what the discovery is going to relay. I
12 just know that the depo - - - the depositions, the
13 eyewitnesses who are on the - - - on the scaffold itself,
14 could relate as to exactly what happened. We don't know
15 what happened. All I know is we have questions of fact all
16 over the place as to what might have happened. Because he
17 testifies that he only lifts the scaffold five feet - - -
18 only - - - only lifts the pallet five feet. The scaffold's
19 six feet tall and yet - - -

20 JUDGE FEINMAN: All right, so - - - so - - - but
21 the - - - the - - -

22 MR. FISHMAN: - - - the pallet ends up on - - -

23 JUDGE FEINMAN: I - - - I just want to be clear
24 about who has control over these various eyewitnesses.
25 Whose employees are they?



1 MR. FISHMAN: Town Masonry; they're third
2 parties. They're nonparties.

3 JUDGE FEINMAN: Okay.

4 MR. FISHMAN: Nonparties.

5 CHIEF JUDGE DIFIORE: Thank you, Counsel.

6 MR. FISHMAN: Thank you.

7 CHIEF JUDGE DIFIORE: Counsel?

8 MR. ISAAC: Good afternoon, Your Honors. Brian
9 Isaac, I represent the plaintiff-respondent. Before I get
10 into my argument, I just wanted to correct a couple of
11 factual statements, and I have record references for you.

12 Judge Fahey, you had asked a question about what
13 Krammer said. Krammer said exactly what the plaintiff
14 said, 345, line 15: "I went over to look at the handlebars
15 and piece of machinery to see how he" - - - referring to
16 the plaintiff - - - "said. He said he flew over the
17 handlebars, and I'm like either - - - that it's like
18 falling off a motorcycle. You slam on the brakes and fly
19 off. He said he hit the ribs" - - - it should be his ribs,
20 but the ribs - - - "on the handlebar."

21 JUDGE STEIN: That doesn't sound to me like the
22 same as being thrown up in the air, hitting the ceiling,
23 and coming back down. That sounds like a completely
24 different explanation.

25 MR. ISAAC: Well, when you fly over the handle -



1 - -

2 JUDGE STEIN: Well, you fly over - - -

3 MR. ISAAC: - - - and the handle where it is,
4 that's what - - - that's what he said, so I - - -

5 JUDGE STEIN: And you hit your ribs, that doesn't
6 indicate to me - - -

7 MR. ISAAC: He hit his - - -

8 JUDGE STEIN: - - - that you're being thrown in
9 the air.

10 MR. ISAAC: - - - hit his - - - hit his ribs on -
11 - - on - - - on the way up. That's - - - that's - - -
12 that's what he meant.

13 CHIEF JUDGE DIFIORE: Very basically, what's the
14 statutory violation here?

15 MR. ISAAC: The statutory violation is that the
16 prime mover did not function as intended by catapulting
17 plaintiff. As Judge Fahey said, there are about seven
18 cases dealing with catapults, and the catapults are not
19 just - - -

20 CHIEF JUDGE DIFIORE: So what is it about the
21 prime mover that was defective or inadequate?

22 MR. ISAAC: Well, here's the thing. My adversary
23 keeps referring to that, but when you look at the statute,
24 the statute itself refers not just to defects, but to op -
25 - - to de - - - to improper use, operation, or control.



1 And if you read my brief, I believe the Third Department -
2 - - sorry - - - has the Morin line of cases which say that,
3 when you're dealing with improper operation, improper use,
4 showing a physical defect is irrelevant. That's - - -
5 these are the ladder cases.

6 Every Appellate Division, every intermediate
7 Appellate Division, has held that you do not have to prove
8 defectiveness when the ladder is insecured, even in
9 situations where the plaintiff set up the ladder by himself
10 - - -

11 CHIEF JUDGE DIFIORE: So what should be done in -
12 - - with respect to a prime mover being used at a job site?

13 MR. ISAAC: The prime mover should be used in a
14 way that doesn't cause somebody on the back to be
15 catapulted. Now, I agree that there are two - - - two
16 potential problems. The plaintiff's testimony is, I was
17 moving it; I was four to six feet away; I went down and I
18 flew up. Defendant's position is, I believe, as Judge Tom
19 said in the last part of his decision, was that the
20 plaintiff was actually either loading it and loaded it too
21 hard, or actually stuck it. The fact is, since Rocovich,
22 since Haines, since Zimmer, since Bland, comparative
23 negligence is not a defense to a 240(1) claim.

24 Now the problem is - - -

25 CHIEF JUDGE DIFIORE: Fair.



1 MR. ISAAC: - - - that it is very, very, very
2 difficult to distinguish between comparative negligence and
3 sole proximate cause.

4 JUDGE RIVERA: So on the - - - on the summary
5 judgment, what - - - what was your argument about the
6 safety device? Are you - - - are you also in agreement
7 that the safety device is the actual machinery?

8 MR. ISAAC: No, my - - - my - - - our argument
9 below was that there was no safety device to prevent the
10 plaintiff from being catapulted off. Zero.

11 JUDGE FEINMAN: So what should have been there?

12 CHIEF JUDGE DIFIORE: A cage?

13 JUDGE FEINMAN: A belt? A - - -

14 MR. ISAAC: You could have had - - - you could
15 have had - - - well, the reason they didn't have it is
16 obviously because nobody thought that this would happen,
17 and that's - - - if you look at all the cases, Potter,
18 Bilderback, Penaranda, they're all the same. Nobody ever
19 expects it to happen. But you could - - - you could
20 prevent this accident easily. Just have a harness on it.
21 Just nobody ever thinks it's going to happen.

22 The fact of the matter is, though - - -

23 JUDGE RIVERA: So what was your burden of proof
24 on that summary judgment related to this question about the
25 safety device?



1 MR. ISAAC: To show that the device did not
2 function properly. And let me go to the O'Brien case - - -

3 JUDGE RIVERA: The device here being the machine
4 that he's riding?

5 MR. ISAAC: Yes, the machine as it was being
6 operated did not function as intended. And let me go to
7 the O'Brien case. And Judge Fahey, you brought up a - - -

8 CHIEF JUDGE DIFIORE: And "as intended" is to
9 have the operator remain on the little platform, no matter
10 what happens.

11 MR. ISAAC: You bet. No one who's on a - - - on
12 a Hi-Lo, on a prime mover, on a bobcat, they're not
13 supposed to fly off. No one can say that that's a - - - a
14 permitted use of that - - -

15 CHIEF JUDGE DIFIORE: So this machine has that
16 platform that also kicks up, right, and you can walk behind
17 it like a lawnmower, almost - - -

18 MR. ISAAC: Yes, what you do is - - -

19 CHIEF JUDGE DIFIORE: - - - right?

20 MR. ISAAC: - - - you fix the platform - - -

21 CHIEF JUDGE DIFIORE: Right.

22 MR. ISAAC: - - - and then you use it like a
23 lawnmower; that's correct.

24 CHIEF JUDGE DIFIORE: What happens if he's
25 walking behind it and he smashes his head for some reason?



1 Same deal?

2 MR. ISAAC: Well, not the same deal, because you
3 have a different fact. Now you might not have an
4 elevation-related risk. But here there are multiple
5 elevation-related risks caused by the fact that not only
6 are you on an - - - an object that's capable of catapulting
7 you, but you're clearly, under Runner, have an elevation-
8 related risk, because you are actually lifting a 1,500-
9 pound load into an area that is actually fraught with
10 danger. And I wanted to - - -

11 JUDGE STEIN: But I think the question is, what
12 if he was walking behind the prime mover, lifting this
13 load, and the same thing happened, only instead he fell
14 forward and hit his head on - - - on the back of the prime
15 mover?

16 MR. ISAAC: Well, I think you'd have a different
17 situation, based on your decision in Rocovich. Rocovich
18 basically says that not every elevation-related risk that
19 you have falls within the Labor Law.

20 JUDGE STEIN: Well, so - - - but here, that's the
21 point is that we - - - there are apparently some witnesses
22 who actually saw what happened, and - - - and what we
23 really have only is the testimony at this point of what the
24 plaintiff now says happened and what the supervisor says he
25 said happened. So don't we need to hear from these other



1 witnesses to determine whether, in fact, this is a 240
2 case, an elevation-related case, to see how - - - what - -
3 - what actually happened? Because to me, if he's standing
4 on the back, and he went - - - and he was propelled forward
5 and hit his ribs on - - - on the handlebars or whatever
6 they are, that's a - - - that's a completely different
7 issue, so - - -

8 MR. ISAAC: Yeah, but that - - -

9 JUDGE STEIN: - - - why don't we need - - - why
10 is - - - why don't we need this discovery before we can
11 say, as a matter law, what caused this accident?

12 MR. ISAAC: I can give you one factual reason and
13 one legal reason. Let me give you the factual reason.
14 It's as simple as - - - as the day. If you look at page
15 441 to 443 of the record. That's Mr. Catalano. That's the
16 - - - that's - - - that's the witness that they subpoenaed.
17 They have his affidavit. So the - - - to say that you need
18 discovery when you have the affidavit of a witness who's
19 there, it really doesn't make any sense.

20 The legal argument is then - - -

21 JUDGE STEIN: Well, sure it does, because that's
22 - - - he's - - - he's not been subject to - - -

23 MR. ISAAC: They prepared his affidavit.

24 JUDGE STEIN: I understand - - -

25 MR. ISAAC: So - - - and - - - and I - - -



1 JUDGE STEIN: I understand, but he's one of
2 several witnesses.

3 MR. ISAAC: Well, but the fact of the matter is
4 that, just because there's outstanding discovery, doesn't
5 mean that I have to wait on my summary judgment motion, and
6 as we - - -

7 JUDGE WILSON: Is there nothing - - -

8 MR. ISAAC: - - - as we - - -

9 JUDGE WILSON: Is there nothing the other
10 witnesses could say that would change the result? That is
11 - - -

12 MR. ISAAC: I don't - - - I don't think so,
13 because - - -

14 JUDGE WILSON: So if they said we saw him trying
15 to pop a wheelie?

16 MR. ISAAC: Well, here - - - there's no - - -

17 JUDGE WILSON: I know there's no evidence of
18 that, but that's because there's no evidence.

19 MR. ISAAC: Right, there's no - - - there's no
20 evidence. You have to have - - - you have to show under
21 the cases in your decision - - - your cases are Chemical
22 Bank v. PIC Line, and Auerbach v. Bennett - - - not just
23 that you have the right to conduct discovery or even that
24 discovery is outstanding, but that you made some effort and
25 that you know what these witnesses are going to show.



1 JUDGE FEINMAN: Well, you know, when they hear
2 what the plaintiff has to say and who might be there,
3 within three weeks they're serving subpoenas, but you've
4 already beat them and gotten the partial summary judgment
5 stay - - -

6 MR. ISAAC: The action - - - this - - -

7 JUDGE FEINMAN: - - - excuse me, the automatic
8 stay.

9 MR. ISAAC: Your Honor, that - - - that's
10 certainly true, except this action's been going on for
11 three years. It's not like we didn't make - - - it's not
12 like - - - it's not like they didn't have the opportunity
13 to do this right away.

14 JUDGE FEINMAN: So why is this not controlled by
15 Groves v. Lands End?

16 MR. ISAAC: Because in this case, in Groves v.
17 Lands End, the First Department and this court said that
18 there were different versions of the accident. There are
19 no different versions of the accident here. There are
20 none. If you look at - - -

21 JUDGE RIVERA: Did - - -

22 JUDGE FEINMAN: We don't know if there - - - we
23 don't know if there are other - - -

24 JUDGE RIVERA: - - - did they argue that - - -
25 that he wasn't on top? I understand they're arguing we



1 don't know what happened, but did they argue that he was
2 not - - -

3 MR. ISAAC: I didn't - - -

4 JUDGE RIVERA: - - - actually using it - - -

5 MR. ISAAC: No - - -

6 JUDGE RIVERA: - - - and on the platform?

7 MR. ISAAC: - - - there - - - there is no
8 testimony whatsoever. There's not a medical record. There
9 isn't a contrary statement. There isn't a hearsay
10 statement that contradicts what the plaintiff said.

11 Nothing. Zero. That's what he was supposed to be doing.

12 In fact, Judge Stein and Judge Rivera, apropos to what you
13 just asked, and Judge Feinman as well, let me read to you
14 what Mr. Catalano said. This is the supervisor. The one
15 who says that - - - the one whose affidavit they have.

16 I'm reading it, pa - - - paragraph 8, 442: "The
17 pallet bricks weighed approximately 1,500 pounds, which was
18 within the capacity of the prime mover. Indeed, we had
19 moved and lifted similarly weighted pallets of bricks with
20 the same prime mover for several weeks prior to August 5,
21 2011, without any problems being noted or communicated.
22 There was no indication that the prime mover malfunctioned
23 or that it had been overloaded at the time of the
24 accident." This was a permitted use. This is what they
25 did.



1 JUDGE RIVERA: Does he say I saw him standing on
2 the machine and using it?

3 MR. ISAAC: Well, I - - - he did - - - he clearly
4 wasn't a witness, but he came there afterward. The part I
5 read before is - - - came afterward. So it wasn't like he
6 wasn't injured. And - - - and I just wanted to say one
7 thing. If you take a look at your cases, I think this
8 breaks down very, very simply, and I'm not going to go over
9 my time, because I don't.

10 There's a difference between comparative
11 negligence and misuse, okay. And I actually figured it
12 out, believe it or not, at 7:42 this morning when I was
13 walking by the Albany Port and trying to figure out the
14 cases you were going to ask me. Here's the difference. If
15 I'm driving a vehicle, and I make a turn to come to Eagle
16 Street and I hit a pedestrian, that's comparative
17 negligence, because I'm doing something that I should be
18 doing with my car, but I'm doing it badly.

19 If I miss the Eagle Street turn and I decide that
20 I'm not going to go around, but I'm going to back up and
21 back up into that spot, that's a misuse. If you take a
22 look at every one of your decisions, I checked every one,
23 from Haimes, to Felker, to Gordon, to Batista, which is
24 mine, Weininger, Blake, it breaks down perfectly.

25 If you're doing something that constitutes a



1 misuse, that's sole proximate cause. My client could not
2 have done that, because he was doing, definitionally, what
3 he was supposed to do and what Mr. Catalano said he was
4 supposed to do at the time.

5 I see my time is up. I'm going to sit down.
6 Thank you.

7 CHIEF JUDGE DIFIORE: Counsel?

8 MR. FISHMAN: Yes, just briefly. First, Mr.
9 Catalano is not one of the eyewitnesses that we need to
10 depose. He was admittedly on the roof or some other level
11 at the time of the accident and also heard about it
12 afterwards and came down after the accident occurred.

13 The people we need to depose were the people that
14 were at the scene, that were at the scaffold, whose names
15 we only know as "Mike," "Mike," and the individual that was
16 flagging the plaintiff.

17 JUDGE STEIN: How - - - how did you plan to find
18 out who they were?

19 MR. FISHMAN: We need to take a - - - a subpoena
20 on Town Masonry and get their payroll records to find out,
21 you know, who was at the scene. The records that we have
22 from Plaza don't identify the particular individuals that
23 were actually working at the scene.

24 JUDGE STEIN: Was there a reason you hadn't done
25 that yet?



1 MR. FISHMAN: We had chosen to take the
2 depositions first of Mr. Caratini and Mr. Catalano, who
3 were the people that were identified. We had - - -

4 JUDGE STEIN: You didn't know the motion for
5 summary judgment was going to be - - -

6 MR. FISHMAN: No, we had - - - because we had at
7 least until December 6th of that year, and we're talking
8 about June or July of that year, in order - - - before the
9 note of issue was even required to be filed, and in New
10 York County those note of issues can be extended if we - -
11 - if necessary, if there's good reason to do so. So - - -

12 JUDGE RIVERA: So - - - so, Counselor, I
13 understand that you're arguing that you don't know whether
14 or not he's negligent - - - used the machinery in a
15 negligent manner. Did you take the position that he was
16 not, in fact, elevated on this machine and using it? Was
17 that the argument you made?

18 MR. FISHMAN: Well, that's what Justice Tom
19 determined in the dissent.

20 JUDGE RIVERA: No, no, I'm asking you what you -
21 - - your argument, what you preserved?

22 MR. FISHMAN: I don't recall that - - - that
23 issue being raised, whether or not the - - - the fact that
24 the platform was only inches off the ground. I think it
25 was raised, but I don't have a firm recollection of it.



1 But I just want to note that, in terms of the
2 distinction between negligence and sole proximate cause,
3 here we have the plaintiff admitting in its brief on page
4 28 that the "Plaintiff operated the prime mover in a way
5 that created the instability which propelled plaintiff over
6 the handlebars."

7 To me that sounds that, you know, the - - - the
8 prime mover itself wouldn't have been unstable, except for
9 the fact that the way plaintiff operated it. That's what
10 the plaintiff is arguing before this court. That certainly
11 raises a question of fact, whether or not, whatever he was
12 doing, you know, goes to whether or not his negligence was
13 the sole proximate cause or not.

14 And because this whole issue is premature,
15 because of the need for discovery, at least the
16 eyewitnesses who actually saw what happened, you know, we
17 believe that the - - - this - - - the First Department's
18 decision should be reversed, and the case should be
19 remanded back to the Supreme Court in New York County so
20 that we can conduct the discovery that we needed and what
21 we should have been able to conduct before this motion was
22 made.

23 CHIEF JUDGE DIFIORE: Thank you, Counsel.

24 (Court is adjourned)

25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 Michael Somereve, et al. v. Plaza Construction Corp., No. 33 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: February 21, 2018

