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COURT OF APPEALS  
STATE OF NEW YORK

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MICHAEL CUTAIA,

Respondent,

-against-

NO. 24

THE BOARD OF MANAGERS OF THE 160/170  
VARICK STREET CONDOMINIUM, ET AL.

Appellants.

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20 Eagle Street  
Albany, New York  
March 24, 2021

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

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon. This is  
2 appeal number 24, Cutaia v. The Board of Managers of  
3 160/170 Varick Street Condominium.

4 Counsel?

5 MR. KOZORIZ: Good afternoon, Your Honors. May  
6 it please the court, my name is Michael Kozoriz from the  
7 Law Office of James J. Toomey, and I represent Trinity  
8 Church and Michilli. I respectfully request three minutes  
9 for rebuttal.

10 CHIEF JUDGE DIFIORE: You may have three minutes,  
11 sir.

12 MR. KOZORIZ: Thank you, Your Honor.

13 CHIEF JUDGE DIFIORE: You're welcome.

14 MR. KOZORIZ: On this appeal, we're simply asking  
15 this court to apply its own precedent in Nazario and to  
16 reverse the Supreme - - - I'm sorry - - - the First  
17 Department, to bring it in conformity with the other three  
18 Appellate Departments and with this court's guidance in  
19 Nazario.

20 Plaintiff is not entitled to summary judgment on  
21 his Labor Law 240(1) claim, absent proof of a statutory  
22 violation and that the violation was a proximate cause of  
23 his injuries.

24 JUDGE GARCIA: But Counsel - - - up here.

25 MR. KOZORIZ: Yes.



1 JUDGE GARCIA: Can we - - - I struggle with this,  
2 because let's assume - - - let's just assume for this  
3 question that placing the ladder against the wall in this  
4 position is wrong, right? You can't do it. It's not open.  
5 It's not locked. And I take your point on causation. But  
6 why isn't the response to that this is partial summary  
7 judgment, and you prove that up in damages?

8 MR. KOZORIZ: It's not partial summary judgment,  
9 because the improper placement of the ladder would be  
10 irrelevant if it was not the proximate cause of the - - -  
11 of the fall. If the electric shock was the proximate  
12 cause, which the Supreme Court found that it was, and  
13 awarded the plaintiffs summary judgment on its 241(6)  
14 claim, which we're not challenging, then whether the ladder  
15 was improperly placed or not, if the ladder didn't move or  
16 didn't fall or was not defective, there's no proximate  
17 cause.

18 JUDGE GARCIA: But could the injuries have been  
19 different if the ladder was being used the way it should  
20 have been used, even with the electric shock?

21 MR. KOZORIZ: Well, Your Honor, I think we get  
22 into speculation at that point.

23 JUDGE GARCIA: But does it get you to a jury  
24 trial - - -

25 MR. KOZORIZ: I - - -



1 JUDGE GARCIA: - - - on whether or not that  
2 caused any of the damages, right?

3 MR. KOZORIZ: - - - I think this - - - I think  
4 this is an issue for the jury. It recently - - - the First  
5 Department decided another case, Goundan, 188 A.D. 3d 596,  
6 where they cited the Vukovich case to grant summary  
7 judgment for the plaintiff when he fell off a scaffold  
8 under all - - - very similar circumstances here.

9 So before it was a ladder, it wasn't sufficient;  
10 and now a scaffold is not sufficient. It's our position  
11 that the First Department or certain panels of the First  
12 Department are using Vukovich to rubber stamp summary  
13 judgments in favor of plaintiffs on electrical shock cases,  
14 without having them show a statutory violation and that the  
15 violation was the proximate cause of the injuries.

16 To the extent that my - - -

17 JUDGE GARCIA: I guess my question is, can you  
18 say here - - - again assume you have a statutory violation;  
19 your question is proximate cause; you've got summary  
20 judgment on statutory violation; why can't you let the jury  
21 figure out proximate cause? Because you don't have any  
22 injuries proved yet, right?

23 MR. KOZORIZ: I don't think we get to summary  
24 judgment on 240 unless there's been proven a violation and  
25 proven proximate cause. I think that all has to wait for a



1 jury.

2 To the extent that my written or oral arguments  
3 fall short here, I would refer the court to Justice Tom's  
4 dissent in the case below, and in his reluctant cur - - -  
5 concurring opinion in Nazario as our position. I could not  
6 have stated it any better than Justice Tom did below.

7 JUDGE FAHEY: It seems one of the things we may  
8 have to grapple with here - - - and maybe not, but - - - is  
9 the distinguishing of Nazario and if Nazario can't be  
10 distinguished, then you would argue that you would be  
11 successful; is that right?

12 MR. KOZORIZ: Yes.

13 JUDGE FAHEY: All right, and then if it can be  
14 distinguished, what would be the basis of the  
15 distinguishment?

16 But before we do that, can we analytically just  
17 take a step back a second and say: don't we really have to  
18 answer the question now, the adequacy of the safety device  
19 in the first instance is what 241 - - - not 241(6), but 241  
20 - - - has to look at.

21 And that responsibility for providing the  
22 adequate safety device in the first instance would be your  
23 client's responsibility. You would agree with that  
24 premise?

25 MR. KOZORIZ: Under the statute, yes.



1 JUDGE FAHEY: Sure, under the statute. It's  
2 pretty straightforward basic labor law stuff.

3 That being the case, wouldn't it - - - you have  
4 to be protected from both - - - you have to provide a safe  
5 work environment, a safe way to do it, so if the device  
6 that's provided for you to work in an elevated setting on a  
7 particular location that could result in electrical shock,  
8 doesn't it have to both protect you from working in an  
9 elevated 241 circumstance and also from the electrical  
10 shock; which means that the device that you're on - - -  
11 whatever it's on, a scaffold or platform or whatever - - -  
12 has to be adequately grounded so that you won't get  
13 shocked?

14 And in this instance, the question is whether or  
15 not that safety device in the first instance was adequate?  
16 Wouldn't that precede any other analysis? And that seems -  
17 - - you know, that seems kind of a straightforward  
18 analysis.

19 MR. KOZORIZ: Is Your Honor's question whether  
20 the safety device itself was required to anticipate that  
21 the worker would receive an electric - - -

22 JUDGE FAHEY: Well, it's not - - -

23 MR. KOZORIZ: - - - shock?

24 JUDGE FAHEY: - - - a question of anticipation.  
25 You gave a guy - - - you tell a guy to go up there an work



1 on electrical device, and then you're elevated. So because  
2 you're elevated, he has to be able to work safely.

3 That means you don't fall off and you don't - - -  
4 you don't get shocked or damaged by electricity, just in  
5 the same way as if you were working on an elevated device  
6 and you had to perform another type of activity where the  
7 activity itself could hurt you. Wouldn't we first have to  
8 look at the adequacy of the safety device, which would here  
9 be the ladder, and the ladder had to protect you from both  
10 falling and from falling as a result of your shock.

11 MR. KOZORIZ: Well - - -

12 JUDGE FAHEY: Wouldn't it have to protect you?

13 MR. KOZORIZ: - - - Your Honor, respectfully, I  
14 think you misspoke when you said that he was there to work  
15 on - - - on an electrical situation.

16 JUDGE FAHEY: Go ahead.

17 MR. KOZORIZ: He was a plumber, and it was not  
18 anticipated that there were any live electrical wires up  
19 there. It was simply an accident that one of the caps on  
20 the wires fell off and happened to make contact with one of  
21 the pipes.

22 JUDGE FAHEY: No, I understand that.

23 MR. KOZORIZ: Right.

24 JUDGE FAHEY: I'm not questioning your recitation  
25 of the facts. I'm just wondering if the safety device has



1 to protect you from working around and in an environment  
2 where you could be injured in various ways, and one of them  
3 is through electrical shock, and you're in an elevated  
4 environment?

5 MR. KOZORIZ: I don't think so, Your Honor,  
6 because - - -

7 JUDGE FAHEY: And why is that?

8 MR. KOZORIZ: Because the safety device itself is  
9 to prevent - - - is to provide adequate protection and  
10 access to the work area.

11 JUDGE FAHEY: Um-hum.

12 MR. KOZORIZ: Now, certainly it has to be safe,  
13 but the law in this state and set forth by this court isn't  
14 that owners and general contractors have to anticipate  
15 every single possible danger that a worker may encounter on  
16 a work site.

17 JUDGE STEIN: So let's assume, for a second, that  
18 this ladder, you know - - - that there - - - at least  
19 there's a question about whether the ladder was  
20 appropriate. Do - - - does the - - - do you think the  
21 plaintiff has to show that there was another enumerated  
22 safety device that would have made that ladder safe?

23 MR. KOZORIZ: I don't think he has to do that if  
24 he can show, under the case law, as instructed by this  
25 court and all the other Departments, that if the ladder





1 failed him as a result of the electric shock - - - in all  
2 the other cases where summary judgment was affirmed for  
3 plaintiffs in the 240 case, it was demonstrated that the  
4 ladder itself did not provide the proper protection,  
5 because it collapsed or slipped or was otherwise defective.

6 Here in this case, there's no evidence that the  
7 ladder fell or slipped or was defective in any way.

8 JUDGE STEIN: Does it matter - - - does it matter  
9 whether the ladder wouldn't fit in the open position in  
10 that space versus whether it wouldn't reach where he needed  
11 to get?

12 MR. KOZORIZ: I don't - - -

13 JUDGE STEIN: Does that make a difference?

14 MR. KOZORIZ: I don't think it does make a  
15 difference, because he was using the ladder for five to  
16 fifteen minutes before his accident. He had no problem  
17 reaching the work space.

18 Now, granted, he should not have set up the  
19 ladder in that position. But the ladder itself and the  
20 positioning of the ladder was not the proximate cause of  
21 the accident. It was the electric shock.

22 JUDGE FAHEY: So let me ask this, then, are  
23 saying that the Court of Appeals - - - well, let me ask you  
24 this. Are you - - - can you point to something where the  
25 Court of Appeals has ever suggested that all elevated falls



1 following an electrical shock are carved out of the  
2 protections of the statute?

3 MR. KOZORIZ: Absolutely not. That was touched  
4 upon - - -

5 JUDGE FAHEY: Is there some form of an electrical  
6 shock exception that you're arguing for?

7 MR. KOZORIZ: Absolutely not. And - - -

8 JUDGE FAHEY: So shouldn't the safety device,  
9 then, protect you from an electrical shock, if you're  
10 working around electricity in an elevated situation?

11 MR. KOZORIZ: Well, what device would that be?  
12 As - - -

13 JUDGE FAHEY: Well, you ground it.

14 MR. KOZORIZ: You ground the - - -

15 JUDGE FAHEY: I mean, probably none of us here  
16 are electricians, but it - - - my minimal understanding,  
17 you just simply have a grounded device if you're working  
18 around - - -

19 JUDGE GARCIA: Would that require us to overrule  
20 Nazario? I mean, wasn't Nazario a shock case where the  
21 ladder was properly used and we said no, you don't have  
22 strict liability there?

23 MR. KOZORIZ: It would not require you to  
24 overrule Nazario, Your Honor.

25 JUDGE GARCIA: No, no, I'm saying would Judge



1 Fahey's point - - -

2 JUDGE FAHEY: Okay.

3 JUDGE GARCIA: - - - require us to overrule  
4 Nazario?

5 MR. KOZORIZ: Oh, yes, I think it would. I think  
6 - - - you know, I'm not an electrician either. I don't  
7 think grounding the ladder would have provided the  
8 protection to the plaintiff, because - - -

9 JUDGE GARCIA: But here the difference with  
10 Nazario to me is not do we need a rule that says any time  
11 you go up on a ladder you have to be protected for - - - by  
12 - - - from electric shock. It's, does it make a difference  
13 that this ladder was not open and locked as an A frame? Is  
14 that the difference that gets you out of Nazario?

15 MR. KOZORIZ: I do not think so, because if the  
16 plaintiff had testified that the ladder fell, and part of  
17 the reason was because I couldn't access my work area and I  
18 had to fold it up, and a proper ladder wasn't provided, and  
19 that's why I fell, then no. That would be an easy 240 case  
20 for the plaintiff.

21 JUDGE WILSON: Well, doesn't he say part of that?  
22 Doesn't he say I couldn't use the ladder in its open and  
23 locked position; I had to fold it and put it against the  
24 wall? He says that part of it, right?

25 MR. KOZORIZ: Correct.



1 JUDGE WILSON: And there is evidence that the  
2 ladder was sideways after the accident, on the floor, no?

3 MR. KOZORIZ: There's evidence that a ladder was  
4 sideways on the floor, not necessarily the ladder. There's  
5 testimony from Mr. Renna that he doesn't recall if he saw  
6 more than one ladder in the room.

7 He testified that he saw a wooden eight-foot A-  
8 frame ladder on the floor. But the plaintiff testified he  
9 was using a ten-foot blue fiberglass ladder. So the ladder  
10 that Mr. Renna saw on the floor was not the same ladder  
11 that the plaintiff was using, if we believe plaintiff's own  
12 testimony as to what ladder he was - - -

13 JUDGE RIVERA: But let me ask you, other than  
14 going to his credibility, what is the point of that?

15 MR. KOZORIZ: The point is, is that plaintiff has  
16 not met his prima facie burden to show that the ladder  
17 failed, that there was any - - -

18 JUDGE RIVERA: Well, I'm not understanding why  
19 the fact that he called it one - - - the ladder is made out  
20 of one kind material and someone speculates it's made out  
21 of another kind of material, why is that - - -

22 MR. KOZORIZ: It's two different - - -

23 JUDGE RIVERA: - - - matter to the - - - to the  
24 ladder that's actually next to him shortly after he's  
25 crying out?



1 MR. KOZORIZ: Well, it wasn't next to him. Mr.  
2 Renna didn't see the plaintiff until the plaintiff was  
3 already outside of the room where the accident happened.  
4 What Mr. Renna saw was a ladder lying on the floor.

5 JUDGE RIVERA: Um-hum.

6 MR. KOZORIZ: There were other ladders or could  
7 have been other ladders in the room. And that ladder on  
8 the floor might not have been the ladder that the plaintiff  
9 was using.

10 JUDGE RIVERA: Again, I'm sorry. Perhaps I'm not  
11 being so clear. Why would that matter if his testimony is  
12 I'm working on a ladder - - - you seem to not dispute that  
13 - - - and then he says I got electrocuted, I'm on the  
14 ground, I don't remember how that all happened?

15 MR. KOZORIZ: Well, the fact that there's a  
16 ladder on the ground - - -

17 JUDGE RIVERA: Yes.

18 MR. KOZORIZ: - - - is some evidence that perhaps  
19 that was the ladder he was using, and maybe it fell over.  
20 But there's also evidence- - -

21 JUDGE RIVERA: Yeah, but I thought your position  
22 is there's nothing wrong with the ladder?

23 MR. KOZORIZ: We - - - there - - - our position  
24 is, is that we don't know if the ladder that plaintiff was  
25 using at the time - - -



1 JUDGE RIVERA: Okay.

2 MR. KOZORIZ: - - - of this accident failed him  
3 in any way. We don't know if it fell over.

4 JUDGE RIVERA: But again, this distinction of  
5 what material it was made out of, I'm not really  
6 appreciating why - - -

7 MR. KOZORIZ: It - - -

8 JUDGE RIVERA: - - - that goes to that question,  
9 let me put it that way.

10 MR. KOZORIZ: - - - it's - - - it's because - - -  
11 it's because the ladder that Mr. Renna saw on the floor - -  
12 -

13 JUDGE RIVERA: Yes.

14 MR. KOZORIZ: - - - which everyone in this case,  
15 the lawyers throughout the depositions, were presuming - -  
16 -

17 JUDGE RIVERA: Yes.

18 MR. KOZORIZ: - - - was the ladder that the  
19 plaintiff was using and that it was on the floor because it  
20 collapsed - - -

21 JUDGE RIVERA: Um-hum.

22 MR. KOZORIZ: - - - was an eight-foot wooden A-  
23 frame ladder. Plaintiff has denied using a wooden eight-  
24 foot ladder as he was doing his work. So that raises an  
25 issue of fact as to whether or not the ladder Mr. Renna saw



1 on the floor was the ladder, or if it was another ladder  
2 that was standing erect against the wall that had it moved.

3 JUDGE WILSON: We do know, though, that the  
4 ladder provided to him was not an appropriate safety device  
5 for the job; is that fair?

6 MR. KOZORIZ: I would agree with that. Yeah.  
7 But it's - - - it does - - - we don't get to the - - -

8 JUDGE WILSON: I understand.

9 MR. KOZORIZ: - - - point of that being relevant  
10 unless that ladder failed him. And in this instance,  
11 there's a question of fact as to whether that ladder failed  
12 him.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 MR. KOZORIZ: Thank you.

15 THE COURT: Counsel?

16 MR. GRANDELLI: Good afternoon, Your Honor. My  
17 name is Louis Grandelli. I'm the attorney for the  
18 plaintiff, Michael Cutaia.

19 Just with respect to the discussion of the  
20 ladder, the only evidence that we have in the record is  
21 that there was one ladder in that room. I asked all the  
22 witnesses, and no one recalls seeing any ladder other than  
23 the A-frame ladder that Michael Cutaia was using and that  
24 was found under the exposed wire and the pipes by the  
25 defendant's project manager immediately - - -



1 JUDGE STEIN: Except that that's - - -

2 MR. GRANDELLI: - - - after the - - -

3 JUDGE STEIN: - - - not the ladder that the  
4 plaintiff testified he was using. And it's certainly  
5 possible that nobody was particularly paying attention to  
6 whether there was another ladder in the room or - - - you  
7 know, if it was standing up against the wall - - -

8 MR. GRANDELLI: Well - - -

9 JUDGE STEIN: - - - or what - - -

10 MR. GRANDELLI: - - - let - - - let me just go  
11 through space with you. This is - - -

12 JUDGE RIVERA: Can you address why it matters?  
13 I'm still - - - obviously answer Judge Stein. But I still  
14 don't understand why it matters.

15 MR. GRANDELLI: It - - -

16 JUDGE RIVERA: I may not be appreciating the  
17 argument.

18 MR. GRANDELLI: It an A-frame ladder either way,  
19 whether it's fiberglass or whether it's wood. There's only  
20 one ladder in that room. This was not a room that was used  
21 for storage.

22 And there was one thing that I missed in my brief  
23 I should have pointed out to you. There's testimony from  
24 the electrical contractors foreman George Lopez in pages  
25 1433 and 1434 of the record, where he goes there the day





1 after the incident and he says: this room is a wide-open  
2 room, concrete floor, four walls, pipes and electricity in  
3 the ceiling. It wasn't a room that was used for storage.  
4 There was no tools and no other ladders.

5 Michael Cutaia was using one ladder, the same A-  
6 frame ladder, all day. He said he regularly used that  
7 ladder. And he was able to use it that entire day in its  
8 intended fashion by opening it up, engaging its safety  
9 mechanism, and performing different tasks throughout the  
10 room.

11 JUDGE STEIN: Is there any indication in the  
12 record as to what the size of the space was? I could - - -  
13 I can see how you could read the plaintiff's testimony in a  
14 couple of different ways, and - - - you know, and some  
15 choose to read it in - - - to say that he couldn't reach  
16 the spot, and some would read it as saying without putting  
17 it up against the wall. And some people were saying that  
18 there wasn't room in - - - to get to the area he was  
19 working to open it up and lock it.

20 MR. GRANDELLI: Okay.

21 JUDGE STEIN: So - - -

22 MR. GRANDELLI: So let me - - -

23 JUDGE STEIN: - - - can we - - -

24 MR. GRANDELLI: - - - address that. So the room  
25 is intended to be a men's bathroom with two toilets, two



1 sinks, and a urinal. But at the time of the incident,  
2 Cutaia's uncontested testimony is it's just the roughing  
3 for the plumbing. There's no stalls. There's no urinals.  
4 There's nothing like that.

5 JUDGE STEIN: Okay, but I - - - but - - -

6 MR. GRANDELLI: And - - -

7 JUDGE STEIN: - - - that doesn't - - - for  
8 example - - - just for example, tell me the width or how  
9 they were - - -

10 MR. GRANDELLI: I will.

11 JUDGE STEIN: - - - because - - - and you know, I  
12 ask because you know, I have two bathrooms in my home. And  
13 they have the same fixtures, but they're very different  
14 sizes.

15 MR. GRANDELLI: So this is pages - - - the pages  
16 I just mentioned. George Lopez's testimony, pages 1433 and  
17 1434, they ask him to estimate the size of the room. He  
18 goes ten by twenty-five. And that's consistent with the  
19 size of any bathroom that contains urinals and toilets and  
20 two sinks.

21 But again, it was a wide open area. There's zero  
22 testimony anywhere in this record that there was any  
23 partitions or anything in that room other than things I  
24 mentioned. And it was only for this particular task, after  
25 lunch, when Cutaia said - - - and this is different than



1 any case they cite - - - I tried to open the ladder. I did  
2 the best I could. I tried to position it where I could get  
3 to the pipes.

4 So this part - - - this particular area was above  
5 the ten-foot wall, but it was over. And if you look at his  
6 testimony on pages 491 - - - sorry, 499 to 500, right in  
7 that area - - - he says the pipes were in front of me.

8 So if you have an A-frame ladder like this, and  
9 the worker's on the far side, he can't reach over the wall  
10 with - - - because he's on the far side with an A-frame  
11 ladder. So it was only after attempting to do that, that  
12 he folded the ladder, because there was no other way for  
13 him to use both of his hands to do the work that was  
14 necessary.

15 JUDGE STEIN: Okay. But for example, does that -  
16 - - does that answer the question for us which I didn't see  
17 particularly answered by anyone, as to whether alternative  
18 safety devices such as the scaffolding, the manlift - - -

19 MR. GRANDELLI: Yeah.

20 JUDGE STEIN: - - - would - - - would be able to  
21 be placed in that area to make it safer for him - - -

22 MR. GRANDELLI: Yeah, so - - -

23 JUDGE STEIN: - - - to do that work?

24 MR. GRANDELLI: - - - our expert reviewed all the  
25 testimony in the record and all the evidence that you have



1 in your - - - in - - - in the record. And what he said,  
2 for this particular task, due to the nature of the work,  
3 and considering the location of where it was being done,  
4 that a Baker scaffold or lift, something with a secure  
5 platform or rails, were the appropriate device for this  
6 work. And had they been provided, even with the shock, he  
7 would not have fallen over the side.

8 JUDGE STEIN: I - - - I don't - - -

9 MR. GRANDELLI: And that's similar to the Barreto  
10 case from this court - - -

11 JUDGE STEIN: Did he inspect the area? Was he  
12 there?

13 MR. GRANDELLI: No, he did not - - -

14 JUDGE STEIN: Okay.

15 MR. GRANDELLI: - - - do a physical inspection.

16 JUDGE STEIN: So the question is, is what would  
17 be his foundation for saying - - - I mean, I can see him  
18 saying sure, if he was on a lift or he was on a scaffold,  
19 obviously that would make it safer. But how would he know  
20 that that was possible in that space?

21 MR. GRANDELLI: So - - - well, a few reasons.  
22 Well, the - - - there's two different concepts. So first  
23 of all, the - - - can you fit a Baker scaffold or lift? It  
24 was not a confined area. Scaffolding could be assembled  
25 and disassembled very easily. It goes through any door - -



1 - any doorway you can get scaffolding in and it could be  
2 assembled, and it provides a safe platform with rails.

3 And he says if he had been on such a device, even  
4 with that shock, he would not have gone over the rails. He  
5 would have been protected from the elevated-height danger  
6 that occurred in this case, which necessitated five  
7 operations.

8 Same thing with a manlift. A manlift - - -

9 JUDGE STEIN: Well, did he address - - - if that  
10 was the case, even if he - - - I know this is another  
11 question, but in my mind a possible question of fact as to  
12 whether if he was thrown off by the electrical shock - - -

13 MR. GRANDELLI: So - - -

14 JUDGE STEIN: - - - if it was enough to throw him  
15 off, would a narrow scaffold like that - - - would it have  
16 prevented his fall? Does he - - - does the expert actually  
17 talk about that?

18 MR. GRANDELLI: Well, let me - - - first let - -  
19 - a manlift also, you can get a portable manlift. They're  
20 easily found. They're like two-and-a-half feet by like  
21 five feet. They can go through any doorway. So a manlift  
22 is very similar to a scaffold, with a platform and rails.

23 What you're saying, Your Honor, I think, is  
24 you're getting to the thrust of the electricity. And the  
25 dissent in this case is saying that electrical thrust - - -



1 electrical shocks have been known to thrust people - - -  
2 people across the room.

3 There's no evidence that - - -

4 JUDGE GARCIA: But that to me - - -

5 MR. GRANDELLI: - - - that's what occurred in  
6 this case.

7 JUDGE GARCIA: - - - but that to me, goes back to  
8 this causation issue. And I think in a way this lift and  
9 the scaffolding - - - I mean, in Nazario, we didn't say you  
10 have an A-frame ladder, you got shocked, you got knocked  
11 off, you should have had a lift or you should have had  
12 scaffolding.

13 That's not the rule. So it comes back to me is,  
14 is there a causation difference between leaning this ladder  
15 up against the wall and a locked A-frame? Because the  
16 locked A-frame we decided - - -

17 MR. GRANDELLI: Yes.

18 JUDGE GARCIA: - - - already in Nazario.

19 MR. GRANDELLI: I - - -

20 JUDGE GARCIA: So I think what if, instead of - -  
21 - we have the exact same facts here, but instead of he gets  
22 shocked and winds up on the ground - - - the entire floor  
23 just collapses through some structural flaw, and he lands -  
24 - - falls and lands in the floor below.

25 Would you have the same strict liability, because



1           you could have tacked him onto the wall? I mean, you have  
2           the ladder leaning against the wall, the floor collapses,  
3           he falls down, would you have strict liability in that  
4           case?

5                     MR. GRANDELLI: We have strict liability in this  
6           situation because this ladder was - - -

7                     JUDGE GARCIA: No, no.

8                     MR. GRANDELLI: - - - not open and locked.

9                     JUDGE GARCIA: Not this. Not this.

10                    MR. GRANDELLI: I'm trying to understand the  
11           hypothetical, Your Honor. I'm sorry.

12                    JUDGE GARCIA: So same facts here.

13                    MR. GRANDELLI: Yeah.

14                    JUDGE GARCIA: He leans the ladder against the  
15           wall. He's working up there. But instead of getting  
16           shocked, the floor collapses - - -

17                    MR. GRANDELLI: Okay.

18                    JUDGE GARCIA: - - - and he falls down, because  
19           the floor collapses, and he's injured from the fall. So  
20           would you have strict liability in that case, because you  
21           leaned the ladder against the wall, right? You shouldn't  
22           do that. And - - -

23                    MR. GRANDELLI: Well - - -

24                    JUDGE GARCIA: - - - you shouldn't work on that  
25           ladder.



1 MR. GRANDELLI: - - - under that hypothetical,  
2 even if he was on an open A-frame ladder, the - - - the  
3 ladder would have fallen whether it was closed or open.

4 JUDGE GARCIA: So isn't that the issue of fact  
5 here that has to go to the jury?

6 MR. GRANDELLI: There - - - but that's not the  
7 case that that's in front of us. The case in front of us  
8 is he's dealing with things that he's - - - tasks that he's  
9 performing in the ceiling, which includes using both of his  
10 hands to cut pipes, where there is electricity in the  
11 ceiling.

12 He has to solder with hand tools. He could burn  
13 himself. He could sneeze. Anything can happen while he's  
14 on that unsecured and unsupported ladder.

15 JUDGE GARCIA: Is there a difference between what  
16 would happen when this happens on an unsecured ladder and a  
17 secured ladder? That's the similarity in my hypothetical.

18 MR. GRANDELLI: It - - -

19 JUDGE GARCIA: Because clearly in my  
20 hypothetical, there is not.

21 MR. GRANDELLI: If - - - if - - -

22 JUDGE GARCIA: You're going to go.

23 MR. GRANDELLI: - - - if he's using a secure  
24 ladder, an A-frame ladder, in an open position, then he's  
25 using it in its intended fashion, and that would be a



1 question of fact under Nazario, as to whether or not it was  
2 an adequate safety device.

3 But that is not the facts here. In this case,  
4 one thing that hasn't been spoken about is our expert  
5 affidavit not only said that a Baker scaffold or lift was  
6 necessary for this work and would have prevented this  
7 accident from happening, but he also said even to the  
8 extent that a ladder was used, a safety belt or a harness  
9 would have prevented Cutaia from hitting the floor.

10 The defendants had those papers, and all they  
11 submitted in opposition was an affidavit from their project  
12 manager saying we didn't provide any tools, we didn't  
13 provide any equipment; we had no obligation.

14 Nowhere in that affidavit from their project  
15 manager that was submitted in opposition to my motion, did  
16 they controvert that the - - -

17 JUDGE GARCIA: So in Nazario - - -

18 MR. GRANDELLI: - - - the plaintiff's expert  
19 testimony, at all.

20 JUDGE GARCIA: - - - in Nazario, if you had had  
21 an affidavit like that, it would have come out differently?

22 MR. GRANDELLI: Again, it's a hypothetical. I  
23 wouldn't know what would be in that affidavit. But in this  
24 case, the affidavit was uncontroverted. And in Blake, this  
25 court said that once the plaintiff makes a prima facie



1 showing of a 240 violation, the burden shifts to the  
2 defendants to raise evidence showing that there's an issue  
3 of fact as to how - - - whether the ladder or the device  
4 was inadequate or whether the plaintiff's conduct was the  
5 sole proximate cause of the incident.

6 And the defendants have not proffered anything to  
7 contest the plaintiff's expert's affidavit in this case.  
8 They haven't shown that this ladder could be used in its  
9 intended fashion at all. It's completely distinguishable  
10 from Nazario and from Blake.

11 Blake, the holding in that case was really  
12 sustaining a jury's verdict showing that the ladder wasn't  
13 being used as intended, because the worker didn't recall if  
14 he locked the extension lip - - - clips in place when he  
15 ascended the ladder, leaving a jury of evidence to find  
16 that it was - - -

17 JUDGE GARCIA: But - - -

18 MR. GRANDELLI: - - - completely the sole  
19 proximate cause of the incident - - -

20 JUDGE GARCIA: - - - it can't be - - -

21 MR. GRANDELLI: - - - was plaintiff's conduct.

22 JUDGE GARCIA: - - - just not being used as  
23 intended, because in my hypothetical, the ladder wasn't  
24 being used as intended, either. And you're not going to  
25 recover if the floor collapses, right?



1                   So the standard isn't the ladder was being used  
2                   in a way it's not intended. That's the same. So what's  
3                   the difference from my hypothetical to yours? It's that  
4                   he's working on something related to where he's actually  
5                   working that it happens?

6                   MR. GRANDELLI: Your - - - Your Honor, I'm just -  
7                   - - I'd like - - - of all the cases and I've cited - - -  
8                   we've gone through 100 cases, there's no real cases that I  
9                   recall where the floor collapsing, and considering whether  
10                  or not that's an elevated height danger. So it's very hard  
11                  for me to really articulate - - -

12                  JUDGE GARCIA: But he falls. I mean - - -

13                  MR. GRANDELLI: - - - what - - - what the  
14                  argument be under those circumstances, because I wouldn't  
15                  know - - -

16                  JUDGE GARCIA: He falls.

17                  MR. GRANDELLI: - - - the facts in that case.

18                  JUDGE GARCIA: I mean, I'm on a ladder and I  
19                  fall. The ladder's not being used the right way. So you  
20                  have to look at what caused the fall, is my point.

21                  MR. GRANDELLI: Well - - -

22                  JUDGE GARCIA: In this hypothetical, I - - - it's  
23                  the floor collapses. But I fall off a ladder that's not  
24                  being used the right way.

25                  MR. GRANDELLI: Well, if you had an expert



1 affidavit in that case that a safety belt or a harness  
2 should have been used to protect the worker from falling to  
3 the ground, then even with the floor collapsing, the - - -  
4 the plaintiff would have been protected from an elevated  
5 height danger.

6 JUDGE GARCIA: So that means that any time you  
7 fall off a ladder, no matter what the cause, you could have  
8 secured yourself in some way to a wall or a ceiling or  
9 something, you're going to have strict liability? This is  
10 really a ladder rule?

11 MR. GRANDELLI: Not necessarily. If the ladder  
12 is being used like Nazario, it's an intended fashion. You  
13 don't - - -

14 JUDGE GARCIA: But if you would have - - -

15 MR. GRANDELLI: - - - always need - - -

16 JUDGE GARCIA: - - - if that person - - -

17 MR. GRANDELLI: - - - a safety belt or a harness.

18 JUDGE GARCIA: In Nazario - - -

19 MR. GRANDELLI: In the - - -

20 JUDGE GARCIA: - - - in Nazario, if he had been  
21 harnessed to the ceiling, he wouldn't have fallen. So  
22 under your theory, if I could get an expert to come in in  
23 Nazario and say if I harnessed this guy - - - plaintiff to  
24 the ceiling, he wouldn't have fallen, I get strict  
25 liability.



1 MR. GRANDELLI: Your Honor, whether or not you -  
2 - - Nazario obviously did not produce an expert affidavit.  
3 Whether this court would rule differently if they had  
4 uncontroverted expert testimony, that is - - - that a  
5 safety device, a personal fall arrest system was necessary,  
6 that would be for this court to decide.

7 It could just be evidence for the plaintiff to a  
8 jury if you decide it's a question of fact. But again,  
9 that's not what we have in front of us. But in this case,  
10 under this set of facts, we have an expert saying a safety  
11 belt or a harness would have prevented the plaintiff from  
12 falling to the ground, and we have nothing from the  
13 defendants to rebut that. So they did not sustain their  
14 burden of rebutting the plaintiff's prima facie proof.

15 JUDGE RIVERA: Well, under - - - under - - - over  
16 here. Sorry. Hello? Hi - - - counsel?

17 CHIEF JUDGE DIFIORE: Counsel, Judge Rivera has -  
18 - -

19 JUDGE RIVERA: Counsel?

20 CHIEF JUDGE DIFIORE: - - - a question.

21 MR. GRANDELLI: I'm sorry.

22 JUDGE RIVERA: It's very hard to see all of us.  
23 I know.

24 Under Judge Garcia's hypothetical, one could not  
25 even be working and fall through the floor. It's not



1 related to the work in that particular example. You might  
2 be on the work site, right, but you could be on a lunch  
3 break, just standing there when the floor collapses - - -  
4 floor - - -

5 MR. GRANDELLI: Yes.

6 JUDGE RIVERA: - - - collapses, right?

7 MR. GRANDELLI: Yes.

8 JUDGE RIVERA: And your point was about the  
9 ladder and the connection of the ladder to the injury?

10 MR. GRANDELLI: Yes, that if the ladder had not  
11 collapsed, which it did - - - the only evidence you have in  
12 this case is that there was one ladder in the room and it  
13 fell to the floor at the same time as him.

14 Even though he didn't recall, the ladder didn't  
15 fall on its own.

16 JUDGE RIVERA: But.

17 MR. GRANDELLI: It had to have fallen at the time  
18 he fell. So - - -

19 JUDGE RIVERA: Then - - -

20 MR. GRANDELLI: - - - even though he didn't  
21 recall what happened, he crawled out - - -

22 JUDGE RIVERA: Yeah.

23 MR. GRANDELLI: - - - this court has said in  
24 Felker and in Gordon, the plaintiff need not recount the  
25 precise manner in which the - - -



1 JUDGE RIVERA: Can there be - - -

2 MR. GRANDELLI: - - - accident happened.

3 JUDGE RIVERA: - - - more - - - can there be more  
4 than one proximate cause under the Labor Law?

5 MR. GRANDELLI: Yes. And in Gordon, this case -  
6 - - this court had a case where a worker was up on a ladder  
7 using a defective sandblaster. And in that case, the cause  
8 of injuries was partially due to the defective sandblaster  
9 and also due to the ladder failing its core purpose to  
10 protect the plaintiff from falling to the ground.

11 JUDGE FAHEY: Well, isn't that - - -

12 MR. GRANDELLI: So there's two proximate causes  
13 to one - - -

14 JUDGE FAHEY: - - - don't we have - - - don't - -  
15 - one of the problems, I think with these - - - this  
16 particular line of cases, it's an analytical problem of a  
17 dual risk that a worker confronts in a particular  
18 situation.

19 And I think it's difficult for - - - the court's  
20 struggling with it now, and the members of the bar are  
21 also, I think, struggling with where we're going on this.

22 And you have to look back at, I think, a line of  
23 cases, starting with Felker, which is a ladder case, going  
24 forward, in how to deal with this dual-risk problem. And  
25 I'm not sure that this case will necessarily resolve it.



1           But Judge Rivera's point is particularly  
2           important. Because when you have a dual-risk situation,  
3           what you have is a situation where there can be more than  
4           one proximate cause of an injury. And here we have a  
5           possibility there are two proximate causes of an injury.

6           And I think we've got to, in some ways - - - and  
7           both of you can comment on this if you want - - - we've got  
8           to go back and look at the basics. And the basics are that  
9           proximate cause isn't the only cause of an injury, but was  
10          it a substantial factor in causing those injuries.

11          So you could have a dual-risk situation where the  
12          failure of the ladder could cause the injury and also the  
13          electrical shock can be a substantial factor. And they're  
14          both substantial factors that could individually cause an  
15          injury or together cause an injury.

16          And it's - - - it's a difficult thing. I - - -  
17          it's really hard to even fault anybody. It's just a  
18          difficult thing to disentangle those things in the context  
19          of strict liability.

20          Not that I know the answer, but hopefully you'll  
21          provide us with an opportunity to write on it.

22          MR. GRANDELLI: Yeah, well, under this court's  
23          cases, it just - - - we have to show that the violation of  
24          240 was a contributing cause to the incident. We don't  
25          have to rule out any other causes.





1 JUDGE FAHEY: Well - - -

2 MR. GRANDELLI: And Felker, Your Honor, is  
3 materially indistinguishable. Felker was using a ladder  
4 all day with no incident.

5 JUDGE FAHEY: The problem you have, though, is  
6 that Nazario comes in the way. And so Judge Garcia  
7 correctly points out that it is such a recent case, you're  
8 really in the land of distinguishing the case not  
9 overruling it.

10 And the problem you had is it could be either one  
11 of those substantial factors. So I can see problems with  
12 both arguments, I guess is what I'm saying to you.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 MR. GRANDELLI: Okay.

15 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

16 MR. KOZORIZ: Your Honors, it's our position that  
17 the plaintiff didn't even get to the point of making out a  
18 prima facie case.

19 JUDGE STEIN: Why didn't - - - why wasn't there  
20 enough to show prima facie that the ladder fell or failed?

21 MR. KOZORIZ: Because - - -

22 JUDGE STEIN: What's missing?

23 MR. KOZORIZ: Because there's no sufficient  
24 evidence and there's disputed evidence as to whether or not  
25 the ladder that the plaintiff was using fell or collapsed



1 at all.

2 Mr. Grandelli said that - - - that the evidence  
3 is undisputed that there was only ladder in the room.  
4 That's simply incorrect.

5 Page 501 of the Appendix, Mr. Renna says that  
6 there could have been other ladders in the room, but he saw  
7 the wooden ladder on the floor. Page 507 of the Appendix,  
8 Mr. Renna says other ladders may have been upright, but he  
9 doesn't recall. Mr. Renna says that Mr. Alonzo's version  
10 that he gave to him of the plaintiff's accident was based  
11 on an assumption. And that's page 635 of the Appendix.

12 The witness that told Mr. Renna that - - - what  
13 the ladder was that the plaintiff was using at the time of  
14 the accident, Mr. Alonzo, he wasn't even in the room at the  
15 time of the accident. He told Mr. Renna that it was based  
16 on an assumption.

17 We can't give summary judgment to plaintiffs on  
18 240 cases based on assumptions. We don't even know - - -  
19 for example, in Nazario, the ladder in Nazario was set up  
20 properly and it still fell over. And this court found that  
21 there was an issue of fact.

22 Here we have a ladder - - - a ladder that was  
23 admittedly not set up properly, but there's no evidence or  
24 at least reasonably disputed evidence that that ladder  
25 moved at all, that it fell over.



1                   And that's the key here, is that there's no  
2 proximate cause, because there's disputed evidence that the  
3 ladder that the plaintiff was using - - -

4                   JUDGE RIVERA: So the scenario you're arguing  
5 that might have been the factual scenario is he's on the  
6 ladder, it's propped up against the wall, it's not open,  
7 just closed propped up against the wall; he gets the  
8 electrical shock. He's thrown off the ladder, but the  
9 ladder doesn't move at all. He's just thrown off himself?

10                  MR. KOZORIZ: Right.

11                  JUDGE RIVERA: Right? Okay. And so the argument  
12 there is that even if he had had a safety device that would  
13 not have made a difference? Is that - - -

14                  MR. KOZORIZ: It's that - - -

15                  JUDGE RIVERA: - - - what you're saying?

16                  MR. KOZORIZ: - - - even if he had - - -

17                  JUDGE RIVERA: A different safety device - - -

18                  MR. KOZORIZ: Right, if he had - - -

19                  JUDGE RIVERA: - - - my apologies. The ladder is  
20 a safety device.

21                  MR. KOZORIZ: If he had a ladder that was opened  
22 or could have been opened - - -

23                  JUDGE RIVERA: Um-hum.

24                  MR. KOZORIZ: - - - he still could have fell off.

25                  As I mentioned earlier, the recent case in the



1 First Department, 188 A.D. 3d 596, the court there cited  
2 Vukovich, very similar fact pattern, except the plaintiff  
3 was on a scaffold.

4 The First Department said, well, a scaffold's not  
5 enough, because he fell of the scaffold. They're using an  
6 electric shock as a means of skirting around the  
7 requirement that a plaintiff prove a violation and that the  
8 violation was the proximate cause of the accident. And  
9 that's contrary to all the other Departments and it's  
10 contrary to this court's ruling in Nazario. And that's why  
11 I believe that the decision and order of the First  
12 Department below here should be reversed.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 MR. KOZORIZ: Thank you.

15 CHIEF JUDGE DIFIORE: You're welcome.

16 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Michael Cutaia v. The Board of Managers of the 160/170 Varick Street Condominium, No. 24 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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