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STATE OF NEW YORK

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POWERS,

Appellant,

-against-

No. 153

31 E 31 LLC,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
September 10, 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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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People (sic) v. 31  
2 East 31.

3 Counselor, would you like any rebuttal  
4 time?

5 MR. GOLANSKI: Yes, please, if I may have  
6 two minutes, please?

7 CHIEF JUDGE LIPPMAN: The statutes we're  
8 dealing with here are a model of clarity?

9 JUDGE READ: They're older.

10 MR. GOLANSKI: May it please, the court - -  
11 -

12 CHIEF JUDGE LIPPMAN: Go ahead.

13 MR. GOLANSKI: - - - Alani Golanski for the  
14 plaintiff. Thank you for - - - for hearing this  
15 case.

16 I'll get to the statute in a second. With  
17 the - - - with the court's indulgence, I'd like to  
18 start with the common law for a moment. Now, Justice  
19 Singh in the trial court said that the facts of  
20 Lesocovich merely showed that Lesocovich was a  
21 stronger case, not that it eliminates the idea of  
22 foreseeability herein.

23 So on the - - - on the threshold question  
24 of whether there's, at the very least, a triable  
25 issue of constructive notice here, I'd like to say

1 and show you that Les - - - that the present case is  
2 actually stronger than Lesocovich for at least a  
3 dozen reasons.

4 First of all, in Lesocovich the - - - the -  
5 - - the plaintiff merely used the roof on a few  
6 occasions. There were no prior gatherings, no groups  
7 of people, no friends involved. Here the - - - the  
8 undisputed testimony is that this setback roof was  
9 used for years and years. It was used often - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but there's  
11 also testimony that no one went out there and - - -  
12 and that no one used it for smoking or anything else,  
13 right?

14 MR. GOLANSKI: There was no such testimony  
15 in this case. The - - -

16 JUDGE READ: Can you describe this - - -  
17 this is what it's - - - it's five feet, is that the -  
18 - - the - - - I mean can you describe what this - - -

19 MR. GOLANSKI: Yes, the dimensions are five  
20 feet and the entire length of the building.

21 JUDGE READ: Which is about how many feet?

22 MR. GOLANSKI: I believe it's about thirty  
23 feet or so.

24 JUDGE READ: Okay.

25 MR. GOLANSKI: I don't know exactly.

1 JUDGE GRAFFEO: This isn't a French door or  
2 a really large window. This is a seventeen-inch by  
3 thirty-one-inch window?

4 MR. GOLANSKI: Well, that is another reason  
5 that this case is stronger than Lesocovich. In  
6 Lesocovich the - - -

7 JUDGE GRAFFEO: I guess I'm - - - if I  
8 could finish my question.

9 MR. GOLANSKI: Yes.

10 JUDGE GRAFFEO: How - - - how does the  
11 owner of the building have notice that people are  
12 going to crawl out of a window of this size?

13 MR. GOLANSKI: They don't crawl out of the  
14 window. They step out of the window onto an easily  
15 accessible setback roof.

16 CHIEF JUDGE LIPPMAN: But doesn't the super  
17 say no one's allowed to use the ledges?

18 MR. GOLANSKI: That's a very important  
19 point. The super says he actually spoke to the prior  
20 super. They discussed use of the setback roof, and  
21 they said nobody's allowed to use it. Now the  
22 important critical point is, as in Lesocovich, that  
23 was never communicated to anybody in the building.  
24 If that had been communicated - - -

25 CHIEF JUDGE LIPPMAN: You mean if there

1           were signs or whatever or - - -

2                   MR. GOLANSKI:   If there was a sign.

3                   CHIEF JUDGE LIPPMAN:   - - - warnings?

4                   MR. GOLANSKI:   If anybody had ever been  
5           told you're not allowed to use the setback roof,  
6           which is right outside your - - - your - - - your - -  
7           - your window, then we would have a different case  
8           here.  And I believe that even going to the very  
9           minimal burden that the - - - that the defendants  
10          would have, we - - - we might be - - -

11                   CHIEF JUDGE LIPPMAN:   What - - - get - - -

12                   MR. GOLANSKI:   - - - in - - - in trouble.

13                   CHIEF JUDGE LIPPMAN:   - - - get to the  
14          start.  What - - - what code governs here - - -

15                   MR. GOLANSKI:   Okay.

16                   CHIEF JUDGE LIPPMAN:   - - - in terms of  
17          what's supposed to be in place - - -

18                   MR. GOLANSKI:   I will get to the - - -

19                   CHIEF JUDGE LIPPMAN:   - - - to protect  
20          people?

21                   MR. GOLANSKI:   Yes, their first point is  
22          that - - - and the Appellate Division's point is that  
23          there's a - - - a grandfathering going back to 1909  
24          when the building was built.  If - - - if - - - if  
25          there were gutters in 1909 - - -

1 JUDGE SMITH: What's your answer to the  
2 question of which code governs?

3 MR. GOLANSKI: All right, the code that  
4 governs in the New York City Building Code, the  
5 administrative code, and it's provision 27-334.

6 JUDGE SMITH: The nine - - - this is 1968  
7 code?

8 MR. GOLANSKI: It's 1968, but it's repeated  
9 in the 2008, as well.

10 JUDGE SMITH: Okay, but this - - - this - -  
11 - this accident happened when?

12 MR. GOLANSKI: It happened just after the -  
13 - - after the 2008 code was instated in - - -

14 JUDGE READ: Are - - - are you - - -

15 JUDGE SMITH: I see. But - - - but - - -  
16 but this thing was built under the - - - under the -  
17 - - well, it was built a long time ago. But it was -  
18 - - it was - - - it was converted to residential use  
19 in '79?

20 MR. GOLANSKI: It was.

21 CHIEF JUDGE LIPPMAN: So what did they - -  
22 -

23 JUDGE SMITH: What do you make of - - -

24 CHIEF JUDGE LIPPMAN: What did they have to  
25 comply with? I think that's what - - - what's in

1 place here?

2 MR. GOLANSKI: They had to comply with the  
3 1968 provision, which is - - -

4 CHIEF JUDGE LIPPMAN: Okay.

5 MR. GOLANSKI: - - - 27-334 - - -

6 CHIEF JUDGE LIPPMAN: Okay.

7 MR. GOLANSKI: - - - at that time.

8 JUDGE GRAFFEO: Is that what their  
9 certificate of occupancy was based on? Was it based  
10 on the - - -

11 MR. GOLANSKI: Yes.

12 JUDGE GRAFFEO: - - - '68?

13 MR. GOLANSKI: Yes.

14 JUDGE GRAFFEO: Because of the '79  
15 remodeling. Is that why?

16 MR. GOLANSKI: Absolutely, and - - - and  
17 the point - - -

18 JUDGE SMITH: But didn't - - - didn't - - -  
19 didn't they elect the new code in the '79 remodel?

20 MR. GOLANSKI: They did, exactly the point.  
21 And I - - - I'm really glad that the court has  
22 noticed that. They expressly elected to proceed  
23 under the 1968 code and to not proceed under the  
24 prior codes, which would have gotten into the gutter  
25 versus parapet.

1 JUDGE GRAFFEO: So what are you claiming  
2 they were supposed to do under the '68 code that I -  
3 - -

4 MR. GOLANSKI: Well, therefore - - -

5 JUDGE GRAFFEO: - - - I assume you're  
6 saying they didn't do?

7 MR. GOLANSKI: Well, therefore, under the  
8 1968 code, for any roof surface in the building, they  
9 - - - that was flatter than twenty degrees and higher  
10 than - - - than twenty - - - twenty-two feet from the  
11 ground, they had to install a parapet wall or a guard  
12 railing so that - - -

13 JUDGE SMITH: You - - - you - - - you - - -  
14 you're saying they - - - they chose the '68 code.  
15 The '68 code says you got to have a parapet, end of  
16 story?

17 MR. GOLANSKI: That is - - - on - - - on  
18 the statutory and regulatory side, that is - - -

19 JUDGE GRAFFEO: Is it contested whether  
20 this is a roof surface or not?

21 MR. GOLANSKI: I don't believe it is  
22 contested whether it's a roof surface. I think they  
23 do their best to call it a ledge, but - - -

24 CHIEF JUDGE LIPPMAN: And it does - - - it  
25 doesn't matter whether you ever had gutters or didn't

1 have gutters in the building?

2 MR. GOLANSKI: No, not - - - once they  
3 elected the '68 code, it doesn't matter at all. And  
4 I - - - and I have to amend my - - - my response to  
5 your - - - to your question, Your Honor. They do  
6 contest that this was a roof surface, because as the  
7 Defense Association amicus brief says, if you look at  
8 the definitions in the Administrative Code of - - -  
9 of a roof, it says the topmost part of a building.

10 Now what the Defense Association ignores is  
11 that the term "building" is italicized, meaning you  
12 have to go to the definition of building. And that's  
13 omitted from the - - - from the defendant's papers.  
14 Now when you go to the code and you see the  
15 definition of building, it says you have to read  
16 building as - - - as any part thereof. So it's the  
17 topmost slab of any part of the building. And that's  
18 what this was, and that's why this was clearly a roof  
19 surface.

20 JUDGE READ: Is that the way the code's  
21 been interpreted, do you know? I mean throughout the  
22 city is that the case, because I - - - I mean, I - -  
23 - I don't know.

24 MR. GOLANSKI: Your Honor, in that respect,  
25 I would respectfully direct the court's attention to

1 the addendum to our reply brief in which Justice  
2 Heitler very carefully addressed this precise issue.  
3 And she brought in the deputy commissioner of the  
4 Department of Buildings to say does this provision,  
5 27-334, apply to other than the topmost roof of a  
6 building. Does it apply to this terrace, which is in  
7 the same category as - - - as this setback roof.

8 And the response in that case by the deputy  
9 commissioner - - - Judge Heitler termed it as  
10 unequivocal, yes. That applies here, and therefore,  
11 the plaintiff in that case won. It's just a simple  
12 reading of - - - of Justice Heitler's decision. And  
13 that, I believe, is the only decision that's occurred  
14 that other than the present one, in which that  
15 specific provision has been interpreted.

16 JUDGE ABDUS-SALAAM: Counsel, you started -  
17 - - I think you were starting to say something about  
18 your statutory argument, but you have a common law  
19 argument, too? Were you - - - were - - -

20 MR. GOLANSKI: Yes, the common law argument  
21 is really if we - - - if we compare this case to  
22 Lesocovich, and all we're trying to do is - - - is  
23 get a threshold of - - - of - - - on the constructive  
24 notice issue. Just look at the - - - at - - - at the  
25 basis for - - - for constructive notice. In

1 Lesocovich it was cinderblocks, which might or might  
2 not have been used for recreational use. In this  
3 case, there was undisputed evidence of - - - of  
4 cigarette butts and - - - and debris, namely  
5 cigarette packages, not just from the photographs in  
6 this case.

7 JUDGE ABDUS-SALAAM: Well, but the - - -  
8 the notice aside, given that the plaintiff doesn't  
9 remember how this - - - or at least it's been  
10 reported that he doesn't remember how this accident  
11 happened, don't you have a proximate cause problem  
12 here?

13 MR. GOLANSKI: Well, that's a very  
14 different issue. And on - - - and - - - and that's a  
15 Nose - - - I - - - I would refer to the Noseworthy  
16 decision where a defendant's negligence causes such  
17 harm to the plaintiff that he's not capable of  
18 testifying on his own behalf. And here, clearly, you  
19 know, there was expert testimony saying had there  
20 been a proper rail or parapet wall, the - - - the  
21 plaintiff would not have fallen that twenty-five-foot  
22 distance.

23 JUDGE READ: So you're saying there's a  
24 question of fact about that?

25 MR. GOLANSKI: Absolutely, it's a question

1 of fact. And in other cases such as the Hyman case  
2 or the First Department's decision in Morris, it was  
3 - - - the - - - the courts decided as a matter of law  
4 that the defect at issue could not have caused the -  
5 - - the - - - the fall that the plaintiffs took in  
6 those cases.

7 JUDGE READ: And the blood alcohol content,  
8 you would say, just goes to comparative negligence?

9 MR. GOLANSKI: The alcohol content goes to  
10 contributory negligence. The undisputed testimony  
11 here was that the plaintiff was not acting in a way  
12 that - - - that indicated he was impaired. It's a -  
13 - - it's one of the facts of the case - - -

14 CHIEF JUDGE LIPPMAN: Okay, counselor.  
15 Thanks.

16 MR. GOLANSKI: Thank you. Thank you, Your  
17 Honor.

18 CHIEF JUDGE LIPPMAN: You'll get your  
19 rebuttal.

20 MR. GOLANSKI: Thank you.

21 CHIEF JUDGE LIPPMAN: Let's - - - let's  
22 hear from your adversary.

23 MS. BROWN: Good afternoon, Your Honors,  
24 Linda Brown from Herzfeld & Rubin on behalf of the  
25 respondents.

1 CHIEF JUDGE LIPPMAN: Coun - - - counselor,  
2 isn't it - - - isn't it an inherently dangerous  
3 situation without any kind of warnings as to what  
4 could go on here?

5 MS. BROWN: Well, as the Appellate Division  
6 stated in its decision, this - - - this feature, the  
7 setback ledge, was guarded by its location and by its  
8 very nature.

9 CHIEF JUDGE LIPPMAN: What about the  
10 cigarette butts and all of that, that people  
11 obviously used it?

12 MS. BROWN: Well, the cigarette butts, if  
13 you look at the photographs, they're - - - they're  
14 basically immediately outside of the window. And  
15 that's consistent with people's - - - flicking the -  
16 - - their used cigarettes out the window. It doesn't  
17 necessarily mean - - -

18 JUDGE PIGOTT: What about what Mr. Conway  
19 said?

20 MR. GOLANSKI: Excuse me?

21 JUDGE PIGOTT: What about Mr. - - - what  
22 Mr. Conway said in his deposition?

23 MS. BROWN: Mr. Conway, he admitted that no  
24 one from the defendant - - - the superintendent had  
25 never - - - he - - - seen him on the ledge.

1                   JUDGE PIGOTT: But - - - but you said it  
2 could have come from people flicking the ones out,  
3 and Conway said that he and his co-tenants often went  
4 out onto the roof to smoke cigarettes and get fresh  
5 air.

6                   MS. BROWN: Right, well, in - - - in terms  
7 of - - -

8                   JUDGE PIGOTT: So there is testimony,  
9 contrary to what you were just telling us, that it  
10 may have just have been that they were flicking  
11 cigarettes out the window.

12                   MS. BROWN: Well, it goes to the notice - -  
13 -

14                   JUDGE SMITH: You - - - you're saying the  
15 landlord could have thought that they were just  
16 flicking them out there even though - - -

17                   MS. BROWN: Right.

18                   JUDGE SMITH: - - - they weren't.

19                   MS. BROWN: But the - - - the - - - the  
20 testimony - - -

21                   JUDGE SMITH: But couldn't - - - couldn't  
22 the landlord - - - shouldn't the landlord maybe have  
23 had a suspicion that somebody went out there to  
24 smoke? It doesn't seem like such a farfetched idea.

25                   MS. BROWN: The superintendent said that he

1           could not see the ledge at all, because his apartment  
2           was - - - had a similar ledge. He could not see the  
3           ledge below him. And that - - - and that - - - that  
4           it - - - he - - - he - - - there was no reason for  
5           anyone to go out there. There was no proof that  
6           there had been any repair people out there. There  
7           was no reason - - -

8                         JUDGE SMITH: Isn't it - - - isn't it - - -  
9           isn't it common knowledge that people with New York  
10          City apartments with a walk - - - a walkable space  
11          outside the window will go to some trouble on a nice  
12          night to get out there?

13                        MS. BROWN: This was a - - - they - - -  
14          they had - - - he - - - the plaintiff had to climb  
15          out of a three foot - - - it was three foot by  
16          seventeen-and-a-half inches wide. That should have  
17          been a signal that this ar - - - that the ledge was  
18          not supposed to be utilized.

19                        JUDGE SMITH: He - - - he - - - he and all  
20          his friends did it, though.

21                        MS. BROWN: But - - -

22                        JUDGE SMITH: And - - - and - - - and the -  
23          - - and his host had done it before.

24                        MS. BROWN: If - - - if the landlord had  
25          intended people to use that ledge as a recreational

1 space, the landlord would have installed sliding  
2 glass doors.

3 JUDGE SMITH: Well, it's not - - - it's not  
4 whether he - - -

5 MS. BROWN: Not a window.

6 JUDGE SMITH: It's not whether he intended  
7 - - - it's not whether he intended it. It's whether  
8 he should have foreseen that that might happen.

9 MS. BROWN: This - - - this - - - the  
10 landlord made - - - had - - - did nothing to make  
11 this space inviting. It was - - -

12 JUDGE PIGOTT: All of that may be true, but  
13 the - - - the point is that you're saying that you're  
14 entitled to judgment as a matter of law. And you're  
15 making, essentially, factual arguments as to what the  
16 superintendent thought or knew, as to what the owner  
17 thought or knew. And that contrasts with what the  
18 plaintiff's witnesses said and knew.

19 MS. BROWN: But the plaintiff's witnesses  
20 at no time said the defendant was aware of any of  
21 this. That the - - - they - - - there's no issue of  
22 fact that - - - the defendant had no notice of people  
23 going out - - -

24 JUDGE RIVERA: What - - - what - - -

25 MS. BROWN: - - - on the ledge and - - -

1 and - - -

2 JUDGE GRAFFEO: It all kind of went - - -

3 JUDGE RIVERA: What if - - - what, if any,  
4 significance is - - - is there that the - - - the  
5 adjacent building had coverage over a similar gap?

6 MS. BROWN: That's not - - - you know, that  
7 was an argument that was raised for the first time on  
8 appeal. And it - - - those - - - those photographs  
9 are not clear; and what the neighboring building did  
10 is not the standard here. I want - - -

11 CHIEF JUDGE LIPPMAN: Yeah, but if you  
12 create a dangerous condition, aren't you responsible  
13 for it as the - - - as the owner?

14 MS. BROWN: Well - - -

15 CHIEF JUDGE LIPPMAN: Do you have to have  
16 seen the people on the - - - on the - - - on the  
17 ledge doing it to - - - to be responsible?

18 MS. BROWN: This building was built in  
19 1906, and it - - - and over more than a hundred years  
20 there were - - - were no accidents involving this - -  
21 -

22 JUDGE SMITH: But it was - - - it was only  
23 converted to residential use in '79, right?

24 MS. BROWN: Right, which brings that - - -  
25 which I'd - - - I'd like to discuss the - - -

1                   JUDGE SMITH: And you don't - - - yeah,  
2                   your verbiage - - - that does lead to the question,  
3                   did you - - - did - - - did - - - why is it you're  
4                   electing the new code in the case? You know, why - -  
5                   - why aren't you bound by the rules of a parapet?

6                   MS. BROWN: Because the - - - for the - - -  
7                   and only a limited section of the building was  
8                   affected by that renovation. The setback roof was  
9                   not affected - - -

10                  JUDGE SMITH: Yeah, but didn't - - - but  
11                  didn't - - - but didn't - - - but didn't your  
12                  election - - - well, yeah, well, wasn't that - - -

13                  MS. BROWN: And well, we're only required  
14                  to retrofit the entire building when the - - - when  
15                  the renovations are sixty percent of the building.  
16                  Then we would have to - - -

17                  JUDGE SMITH: I understand that. But  
18                  there's - - - there's a provision that says  
19                  regardless of how much you spend, you can comply with  
20                  the new code if you prefer that to complying with the  
21                  old one, and you made that choice.

22                  MS. BROWN: Even - - - but we are - - - we  
23                  were required to comply with the code with respect to  
24                  the - - - those sections of the building that were  
25                  renovated. It doesn't mean that the entire building

1 has to be renovated to the '68 code.

2 JUDGE PIGOTT: Can I understand - - -

3 MS. BROWN: It was only when the sixty  
4 percent - - -

5 JUDGE PIGOTT: Could you square that away  
6 for me, because let's assume you've got stairways.

7 MS. BROWN: Okay.

8 JUDGE PIGOTT: And it seems like everyplace  
9 you go now they say you got to have a - - - a rail,  
10 you know, that's fourteen inches above the steps and  
11 then - - - and then even - - - are you saying that  
12 because your building was a hundred years old that  
13 you wouldn't have to put the stair rails in?

14 MS. BROWN: There'd be no statutory duty.

15 JUDGE PIGOTT: So if - - -

16 MS. BROWN: We were grandfathered.

17 JUDGE PIGOTT: So if your tenants fell down  
18 the stairs because there's a - - - there's a  
19 requirement that there be stair rails, you'd say  
20 doesn't apply to us; we're a hundred years old?

21 MS. BROWN: Well, I mean, this - - - this  
22 setback ledge was not - - - it was not in - - - it's  
23 not a roof within the intendment of the code. And  
24 it's - - - it's very different from the roof - - -  
25 the roof in Lesocovich.

1 JUDGE PIGOTT: No, I understand all that,  
2 but I - - - I - - -

3 MS. BROWN: Um-hum.

4 JUDGE PIGOTT: - - - now you're back onto  
5 common law.

6 MS. BROWN: Um-hum.

7 JUDGE PIGOTT: But what - - - what I was -  
8 - - what I was wondering is, it seemed like part of  
9 your argument was we have a C of O.

10 MS. BROWN: Um-hum.

11 JUDGE PIGOTT: C of A - - - C of O.

12 JUDGE SMITH: O.

13 JUDGE PIGOTT: And therefore, we can't be  
14 sued?

15 MS. BROWN: Well, we - - - we also have the  
16 - - - we - - - we - - - we have the engineering  
17 affidavit.

18 JUDGE PIGOTT: Well, they have one, too.

19 MS. BROWN: Right, excuse me?

20 JUDGE PIGOTT: They have one, too.

21 MS. BROWN: Right, but this ledge was  
22 guarded by its location, again. It - - - it - - -  
23 and it's - - - it was - - -

24 JUDGE READ: And so you're saying it didn't  
25 need a - - - what was it - - - fenced parapet or

1           whatever else the '68 provision - - -

2                   MS. BROWN:   Um-hum.

3                   JUDGE READ:   You're saying that it wasn't  
4           required to have a - - - a railing, fence, or a  
5           combination of a parapet and railing or fence?

6                   MS. BROWN:   Right, because it was built in  
7           1906.  It complied with the 1895 code accord - - -  
8           according to our engineer.

9                   JUDGE PIGOTT:  Is that fairly standard in  
10          the City of New York that as long as you comply with  
11          the 1895 code you're okay in 2014?

12                   MS. BROWN:   Well, each code - - - each new  
13          code said that if you're in compliance with the  
14          previous code then you're deemed to be in - - -

15                   JUDGE PIGOTT:  So your answer's yes?

16                   MS. BROWN:   Excuse me?

17                   JUDGE PIGOTT:  Your answer's yes?

18                   MS. BROWN:   Your question was?

19                   JUDGE PIGOTT:  As long as you were in  
20          compliance with the 1895 code, you were fine?

21                   MS. BROWN:   If - - - and if you're  
22          grandfathered.

23                   JUDGE PIGOTT:  Your answer's yes.

24                   MS. BROWN:   Yes, yes.

25                   JUDGE PIGOTT:  So - - - so - - -

1 MS. BROWN: In - - - in terms of the stat -  
2 - - yes.

3 JUDGE PIGOTT: Did anybody suggest maybe  
4 electricity in your building? I'm kidding. I - - -  
5 I mean you're saying 1895, you know, you can stay  
6 there and you don't have to do a darn thing.

7 MS. BROWN: Well, this is what the  
8 legislature has provided for in the code. It has  
9 grandfathering provisions - - - provisions.

10 JUDGE SMITH: But aren't - - - but aren't -  
11 - - aren't more safety precautions obviously  
12 necessary in a residential building than, say, a  
13 warehouse or a factory - - - certainly a warehouse?

14 MS. BROWN: I'm not in a position to - - -

15 JUDGE SMITH: And let me - - - let me - - -  
16 let me read you from the - - - the - - - the '68  
17 code. "At the option of the owner, regardless the  
18 cost of the alteration or conversion, an alteration  
19 may be made or a build - - - building may be  
20 converted to a multiple dwelling in accordance with  
21 all requirements of this code or in accordance with  
22 the old code." Why - - - and you chose in accordance  
23 with all re - - - why doesn't all requirements mean  
24 all requirements? Why doesn't it include the  
25 parapet?

1 MS. BROWN: Statutorily be - - - because  
2 the setback roof was not part of the renovation in  
3 1979.

4 JUDGE SMITH: It wasn't part of the  
5 renovation, but didn't the conversion from a - - -  
6 from a - - - from a nonresidential to a residential  
7 use logically trigger some more precautions? And  
8 isn't that - - - isn't that what this is - - - this  
9 is - - - what - - - what this whole specific code has  
10 been designed for?

11 MS. BROWN: I don't think the code is - - -  
12 the code - - - the code - - - the structure says that  
13 there is no need to renovate the entire building  
14 until - - - unless the sixty percent limit is  
15 reached.

16 JUDGE SMITH: Or - - - or if it's used.

17 JUDGE GRAFFEO: And you're saying you can -  
18 - - you can apply the '68 code to just part of the  
19 building, and the part that wasn't renovated - - -

20 MS. BROWN: Yes, absolutely.

21 JUDGE GRAFFEO: - - - remains under the '09  
22 code?

23 MS. BROWN: That's what the code says.

24 Yes.

25 JUDGE GRAFFEO: Is there any case that says

1           you can do that?

2                       MS. BROWN:  The statute says that.  It's at  
3           27-115 and 27-116.  It - - - it read - - - it says if  
4           - - -

5                       JUDGE GRAFFEO:  Because the building - - -

6                       MS. BROWN:  I believe those are the - - -  
7           those - - -

8                       JUDGE GRAFFEO:  - - - because the building  
9           wasn't renov - - - because sixty percent of the  
10          building wasn't renovated?  Is that why?

11                      MS. BROWN:  Yes, that's what the code  
12          provides for.

13                      CHIEF JUDGE LIPPMAN:  So what does that  
14          sixty percent of the building or whatever it is - - -  
15          what do they have to comply with?  The part that's  
16          not renovated, what - - - what's their story?

17                      MS. BROWN:  They - - - they - - -

18                      CHIEF JUDGE LIPPMAN:  They're based on  
19          compliance with what?

20                      MS. BROWN:  They - - - they complied with -  
21          - - they complied with the old code.  They don't have  
22          to be - - - it doesn't have to be updated to the - -  
23          - to the more - - -

24                      JUDGE SMITH:  But isn't - - - but isn't - -  
25          - doesn't that - - - the - - - the - - - doesn't - -

1 - isn't what 27-120 is saying that 27-115 and 27-116  
2 give you an option, but you don't have to take that  
3 option? You can use the new code, if you want,  
4 because the new code obviously offers some advantages  
5 to - - - to - - - to renovators, too.

6 MS. BROWN: Yes, you can use the new code  
7 to - - - to - - - to perform the renovations that you  
8 are doing. But if you're not renovating the setback  
9 ledge, then it has no up - - -

10 JUDGE SMITH: Then why - - - why are the  
11 words in 27-120, "Regardless of the cost of the  
12 alteration or conversion"?

13 MS. BROWN: Well, the - - - the owner - - -  
14 it - - - it could but was not required to update the  
15 section of the building to the more recent code. So  
16 there was no re - - - requirement, it was purely  
17 elective. And the - - - and that it - - - that the  
18 owner had took - - -

19 JUDGE SMITH: But he elected it.

20 MS. BROWN: What?

21 JUDGE SMITH: But he elected it.

22 MS. BROWN: But that - - - that - - -  
23 they're still talking - - - I don't think that  
24 Section 120 means that the - - - that if you perform  
25 a renovation on a - - - on a - - - on the doorway

1 according to the 1968 code. That means you have to  
2 go - - - go back and - - - and - - - and re-upd - - -  
3 update the entire building. There's no requirement  
4 in that in - - - in 27-120.

5 JUDGE SMITH: Well, that is not a  
6 requirement.

7 MS. BROWN: Is it - - -

8 JUDGE SMITH: It's an option, but it's an  
9 option you chose.

10 MS. BROWN: But the statute doesn't say  
11 that you're re - - - that - - - that - - - doesn't -  
12 - - doesn't even imply that that - - -

13 JUDGE SMITH: May - - - "May be converted"  
14 - - -

15 MS. BROWN: - - - because you - - -

16 JUDGE SMITH: - - - "to a multiple dwelling  
17 in accordance with all requirements of this code."

18 MS. BROWN: That's - - - I think you're  
19 reading too much into that statute, into that - - -  
20 you're not - - - that's not the plain meaning of the  
21 statute. But - - -

22 JUDGE READ: I - - -

23 MS. BROWN: - - - in any event, you know,  
24 this - - -

25 CHIEF JUDGE LIPPMAN: Counselor, Judge Read

1 has a question for you.

2 JUDGE READ: You - - -

3 MS. BROWN: Okay.

4 JUDGE READ: Well, I should let you finish.

5 MS. BROWN: Okay.

6 CHIEF JUDGE LIPPMAN: Go ahead.

7 MS. BROWN: In any event, this - - - as - -  
8 - as one of the justices pointed out, the plaintiff  
9 has no recollection of how this accident occurred.  
10 So it's speculation to - - - to argue that a  
11 guardrail would have prevented this accident and - -  
12 -

13 JUDGE PIGOTT: I'm struck by the fact that  
14 apparently, you don't need to put in smoke alarms or  
15 fire - - - fire alarms or sprinklers or any type of  
16 safety equipment for tenants that you've got in your  
17 building because you don't have to comply with any  
18 part of the code. Is that true?

19 MS. BROWN: Well, that's a common law  
20 argument. I - - -

21 JUDGE PIGOTT: No, no, you're saying - - -  
22 I'm saying if - - - if under the - - - under the New  
23 York City Code you - - - you - - - it's required that  
24 you have smoke alarms, let's say, or the - - - or  
25 carbon monoxide - - -

1 MS. BROWN: Um-hum.

2 JUDGE PIGOTT: - - - detectors.

3 MS. BROWN: Um-hum.

4 JUDGE PIGOTT: You're saying you don't have  
5 to com - - - comply with that with respect to your  
6 tenants because you're - - - you're under the 1909  
7 code.

8 MS. BROWN: Well, this is a - - - this is a  
9 policy that the legislature has made. When it - - -

10 JUDGE PIGOTT: Your answer's yes?

11 MS. BROWN: When it's - - - when it enacted  
12 those - - - the provisions req - - -

13 JUDGE PIGOTT: Is your answer yes?

14 MS. BROWN: Excuse me?

15 JUDGE PIGOTT: I'm going to take that as a  
16 yes, you do not have to provide - - -

17 MS. BROWN: Yes, you do not have to.

18 JUDGE PIGOTT: Okay.

19 CHIEF JUDGE LIPPMAN: Okay, Judge Read,  
20 let's go.

21 JUDGE READ: Well, yes. Yeah, I - - -

22 CHIEF JUDGE LIPPMAN: Go ahead.

23 JUDGE READ: Okay, I - - - I wanted - - -  
24 I'm confused about this now. Are you arguing, or  
25 maybe you're arguing alternatively, that the '68 code

1 didn't require a railing, fence, or a combination of  
2 that and a parapet on the ledge because the ledge  
3 wasn't part of the sixty percent of the building that  
4 was renovated? Or are you arguing that it wasn't  
5 required because the ledge is not a roof? Or are you  
6 arguing that alternatively?

7 MS. BROWN: Well, multiple arguments.

8 JUDGE READ: So you're arguing that  
9 alternatively?

10 MS. BROWN: There's multiple arguments.  
11 Yes, yes.

12 JUDGE READ: All right, and as to the ledge  
13 is not a roof argument - - -

14 MS. BROWN: Um-hum.

15 JUDGE READ: - - - what about the - - -  
16 what about the - - - the affidavit from the person  
17 from the Department of Buildings, I guess it is, in  
18 front of Judge Heitler that your adversary mentioned?  
19 Which - - -

20 MS. BROWN: But - - -

21 JUDGE READ: Does that - - -

22 MS. BROWN: He - - - the - - - that's - - -  
23 that's a case involving a terrace. This is not - - -  
24 this is a ledge. This is by no means a terrace. And  
25 - - -

1 JUDGE READ: So you're saying that - - -  
2 okay. I'll - - - I'll - - -

3 MS. BROWN: Okay.

4 JUDGE READ: All right, fine.

5 CHIEF JUDGE LIPPMAN: Okay, counselor.  
6 Thanks, counselor.

7 MS. BROWN: Okay, thank you.

8 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

9 MR. GOLANSKI: Just briefly. Your Honor,  
10 counsel mentioned under 27-120. What if the defen -  
11 - - what if the - - - the building just installs a  
12 doorway? Do - - - does 120 mean, therefore, that  
13 they have to bring the entire building up to the  
14 code? That's not what 27-120's about. 27-120 is  
15 about converting a commercial building or another  
16 kind of building to a multiple dwelling. When you  
17 convert a building to a - - - to a - - - to a - - -

18 JUDGE ABDUS-SALAAM: So you're saying it  
19 has to comply with all of the - - -

20 MR. GOLANSKI: Yes.

21 JUDGE ABDUS-SALAAM: - - - requirements for  
22 a residential building?

23 MR. GOLANSKI: Yes, once you're - - -

24 JUDGE ABDUS-SALAAM: Even though the code  
25 might not, you know, require that they redo the

1 parapet?

2 MS. BROWN: Yes, once you - - - once you  
3 make an entire building habitable - - -

4 CHIEF JUDGE LIPPMAN: Even the part that's  
5 not renovated, is your point?

6 MR. GOLANSKI: Yes, because you're  
7 converting it into - - -

8 JUDGE SMITH: If - - - if - - - if you  
9 elect the new code?

10 MR. GOLANSKI: Yes, because you're  
11 converting an entire building to a building that's  
12 going to be a multiple dwelling and people are going  
13 to live there. You can't pick and choose and - - -  
14 and just look at the parts that you've worked on.  
15 You have to make the building - - - bring it up to  
16 code. And you elect the code, and that's - - - and  
17 that's an election that they made for economic and -  
18 - - and burden reasons, as their expert said. It was  
19 less burdensome to go with the '68 code, and they  
20 can't pick and choose at that point. If there are  
21 any other questions?

22 CHIEF JUDGE LIPPMAN: Okay, thank you both.

23 MR. GOLANSKI: Thank you, Your Honor.

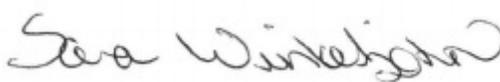
24 CHIEF JUDGE LIPPMAN: Appreciate it.

25 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Powers v. 31 E 31 LLC, No. 153 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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