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COURT OF APPEALS

STATE OF NEW YORK

NICOMETI,

Appellant-Respondent,

-against-

No. 31

THE VINEYARDS OF FREDONIA, LLC,
et al.,

Respondent-Appellant.

20 Eagle Street
Albany, New York 12207
February 11, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE F. STEIN

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Appearances:

MICHAEL J. HUTTER, JR., ESQ.
POWERS & SANTOLA, LLP
Attorneys for Appellant-Respondent
39 North Pearl Street
Suite 6
Albany, NY 12207

ROBERT D. LEARY, ESQ.
KENNEY SHELTON LIPTAK NOWAK LLP
Attorneys for Respondent-Appellant Winter-Pfohl
The Calumet Building
233 Franklin Street
Buffalo, NY 14202

LAURENCE D. BEHR, ESQ.
BARTH SULLIVAN BEHR
Attorneys for Respondent-Appellant The Vineyards
43 Court Street
Suite 600
Buffalo, NY 14202

ARTHUR JOSEPH SMITH, ESQ.
BAXTER SMITH & SHAPIRO, P.C.
Attorneys for Respondent-Appellant WNY Plumbing
99 North Broadway
Hicksville, NY 11801

1 CHIEF JUDGE LIPPMAN: Number 31, Nicometi
2 v. the Vineyards of Fredonia.

3 Counsel, would you like any rebuttal time?

4 MR. HUTTER: Yes, three minutes, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Three minutes, sure.

7 MR. HUTTER: I'll wait till counsel - - -

8 CHIEF JUDGE LIPPMAN: Yeah, sure.

9 Go ahead, counsel.

10 MR. HUTTER: May it please the court. At
11 issue on plaintiff's appeal is whether a mere
12 instruction to use provided-for safety devices in a
13 icy area - - - and that area is within a much larger
14 area - - - insulates the owner, the contractor - - -

15 CHIEF JUDGE LIPPMAN: Well, can that be the
16 proximate cause?

17 MR. HUTTER: No, it can't, Your Honor.

18 CHIEF JUDGE LIPPMAN: Why not?

19 MR. HUTTER: Because one, the - - - the
20 problem here is that they - - - they - - - it's - - -
21 as part of this and this is what they all - - - the
22 entire court said. There was a failure to provide a
23 proper safety device. And - - -

24 CHIEF JUDGE LIPPMAN: What's the safety
25 device in this?

1 MR. HUTTER: The safety device here was the
2 stilts.

3 CHIEF JUDGE LIPPMAN: Were they - - - are
4 the stilts the safety device?

5 MR. HUTTER: Stilts are - - - are safety
6 devices. Melber clearly held that.

7 JUDGE READ: Is there any dispute - - -

8 MR. HUTTER: They were - - -

9 JUDGE READ: Is there any dispute in this
10 case as to whether - - -

11 MR. HUTTER: I'm sorry, Your Honor?

12 JUDGE READ: Is there any dispute in this
13 case as to whether it falls under the Scaffold Law at
14 all? I mean I know that the Appellate Division, all
15 the judges thought it did. But is that issue
16 something that your opponents contest?

17 MR. HUTTER: I'm not sure I'm following,
18 Your Honor.

19 JUDGE READ: Well, if this is - - - this
20 falls - - - it's a - - - it's a scaffold-type case
21 rather than just the ice being kind of a normal
22 workplace hazard, analogous to the conduit in Melber
23 or Marbor (sic) or whatever that case was called.

24 MR. HUTTER: Yeah. Well, I - - - I think
25 here that the entire court would agree - - - the - -

1 - the entire Fourth Department would agree with that.

2 JUDGE READ: I - - - I know they did. But
3 it - - - it - - - do we - - - is that question one
4 that's open for us to review?

5 MR. HUTTER: I would say probably, yes, in
6 - - - in that reg - - - regard because, again, there
7 is information in the record in which the only safety
8 devices provided Mr. Nicometi were the stilts, that
9 scaff - - - scaffolds, ladders were not provided to
10 him. And he was said (sic) this is what you are to
11 use.

12 CHIEF JUDGE LIPPMAN: Distinguish Melber.
13 What's - - - what's the difference between this case
14 - - - this case and Melber?

15 MR. HUTTER: The - - - the difference is
16 twofold, Your Honor. In Melber - - - of course,
17 using stilts.

18 CHIEF JUDGE LIPPMAN: Yeah, yeah.

19 MR. HUTTER: But in Melber the fall
20 occurred when he tripped over a electrical conduit as
21 he's walking away from the area that he was working.

22 CHIEF JUDGE LIPPMAN: So he wasn't wearing
23 the stilts when he was doing what he's supposed to -
24 - -

25 MR. HUTTER: He was wearing the stilts, but

1 he was away from - - -

2 CHIEF JUDGE LIPPMAN: No, no.

3 MR. HUTTER: - - - assigned work area.

4 CHIEF JUDGE LIPPMAN: He was - - - he
5 wasn't wearing stilts and doing his assignment.

6 MR. HUTTER: Exactly, Your Honor.

7 CHIEF JUDGE LIPPMAN: He was doing
8 something else.

9 MR. HUTTER: And - - - and Chief Judge
10 Kaye, in her decision, was very careful to say - - -

11 JUDGE ABDUS-SALAAM: Counsel - - - I'm
12 sorry. Mr. Hutter?

13 MR. HUTTER: - - - that this - - - if - - -
14 the situation may be different if, in fact, the
15 stilts failed while he was working.

16 CHIEF JUDGE LIPPMAN: Okay.

17 MR. HUTTER: Here he was working - - -

18 CHIEF JUDGE LIPPMAN: Okay, good.

19 JUDGE ABDUS-SALAAM: Mr. Hutter?

20 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam.

21 JUDGE ABDUS-SALAAM: So he was - - - you
22 said he wasn't doing exactly what he was assigned to
23 do, but wasn't he going to get a tool? Or was that
24 another stilts case?

25 MR. HUTTER: In - - - in - - - in Melber,

1 yes, he was working to get apparently another tool
2 that he felt he needed.

3 JUDGE ABDUS-SALAAM: Right, so - - -

4 MR. HUTTER: But he was not, again - - -

5 JUDGE ABDUS-SALAAM: - - - he was - - - he
6 was actually - - - but he wasn't actually, I guess,
7 doing the installation or painting or something, but
8 he was getting a tool that he needed to do that?

9 MR. HUTTER: I - - - I think that's an
10 accurate reading of - - - of Melber, Your Honor.
11 But, again, the court felt - - - at least the
12 language in the court was he was not engaged in that
13 - - -

14 CHIEF JUDGE LIPPMAN: And - - -

15 MR. HUTTER: - - - elevated risk at the
16 time the stilts failed.

17 JUDGE STEIN: How did the stilts - - - how
18 did the stilts fail here?

19 JUDGE READ: Yeah.

20 MR. HUTTER: Pardon me?

21 JUDGE STEIN: What - - - what went wrong
22 with the stilts here? How did they fail? Did they -
23 - - did they malfunction somewhere?

24 MR. HUTTER: They - - - they - - - they
25 failed in the sense that the stilts never should have

1 been provided in the first instance.

2 JUDGE STEIN: Well, but - - - but you said
3 that - - - that in - - - in Melber the - - - or in
4 other cases the stilts failed, but did they fail
5 here?

6 MR. HUTTER: Well, they - - - they failed
7 in the context - - - again, I'll - - - I'll put that
8 in quotes. As the - - - the dissenter said that
9 stilts on ice is not a good idea. They - - - they -
10 - -

11 JUDGE STEIN: But is that - - -

12 MR. HUTTER: - - - they provided the wrong
13 device.

14 JUDGE STEIN: Is that the - - - the
15 condition of the - - - the floor on which they are,
16 or is that a condition of the stilts?

17 MR. HUTTER: Yeah, that - - - that's true,
18 Your Honor. But the - - - but the fact is, with ice
19 present in that area, as the dissenters pointed out,
20 they never should have provided stilts, because
21 stilts on ice is dangerous.

22 JUDGE RIVERA: I thought the employee - - -
23 I thought - - - I thought the employee ack - - -
24 acknowledged that the stilts were the proper
25 equipment for the job?

1 MR. HUTTER: As a general proposition, yes.
2 He always - - - he always used them. But not - - -
3 he had not used these on - - - in an area where ice
4 was before, but - - -

5 JUDGE RIVERA: Was he told to use them
6 where there was ice?

7 MR. HUTTER: But generally stilts would be
8 a proper way of doing this.

9 JUDGE RIVERA: Was he - - - was he told to
10 use them where there was ice?

11 MR. HUTTER: Pardon me, Your Honor?

12 JUDGE RIVERA: Was he told to use them
13 where there was ice?

14 MR. HUTTER: He was told to use the stilts.

15 JUDGE RIVERA: Well, I'm - - - I
16 understand. Was he told to use them where there was
17 ice? I thought there was some issue - - -

18 MR. HUTTER: No, that's - - -

19 JUDGE RIVERA: - - - about the directive to
20 him - - -

21 MR. HUTTER: That's the crux of the issue
22 here.

23 JUDGE RIVERA: - - - not to use them where
24 there's ice.

25 MR. HUTTER: He was told to avoid the area.

1 JUDGE RIVERA: Um-hum.

2 MR. HUTTER: And our argument is that that
3 mere instruction to avoid that area - - - basically,
4 it's a four-by-four area within a much larger room -
5 - - that that was still not enough to insulate.

6 JUDGE RIVERA: What would have been enough?
7 What - - - what should the employer have done?

8 MR. HUTTER: First, they should have
9 provided a different safety device.

10 JUDGE ABDUS-SALAAM: Like what? Like what,
11 Mr. Hutter? Like what?

12 MR. HUTTER: Well, again, at least under
13 the cond - - - this case - - - this court's
14 decisions, we - - - the plaintiffs do not have to
15 specify exactly what other device might be provided.
16 But it's common sense.

17 CHIEF JUDGE LIPPMAN: But the stilts alone
18 - - -

19 MR. HUTTER: You provide a scaffold, you
20 provide a ladder.

21 CHIEF JUDGE LIPPMAN: The stilts alone
22 can't be sufficient as a safety device?

23 MR. HUTTER: Where ice is present.

24 JUDGE RIVERA: But what - - - what device
25 works on ice? What possible device works on ice?

1 Isn't the point that you can't do anything on the
2 ice?

3 MR. HUTTER: Well, that - - - that's what
4 they maybe should have done.

5 JUDGE RIVERA: So what - - - that's what
6 I'm asking you.

7 MR. HUTTER: Yes, I mean - - -

8 JUDGE RIVERA: What - - - what should the
9 employer have done?

10 MR. HUTTER: You either tell them not to
11 work or you give them a scaffold, which would then be
12 braced. You give them a ladder, which can be braced,
13 can be supported.

14 CHIEF JUDGE LIPPMAN: Counsel, what's - - -
15 what's the hazard? It's the height and the ice is
16 the hazard?

17 MR. HUTTER: The stilts elevated him
18 approximately three to five feet off the ground.

19 CHIEF JUDGE LIPPMAN: Right, but it's the
20 combination of those two that - - - that creates the
21 hazard under the law?

22 MR. HUTTER: Well, he's - - - he's working
23 at an elevated height, steps on the ice, and slips.

24 CHIEF JUDGE LIPPMAN: Right, it's the
25 height and the ice?

1 MR. HUTTER: Yes.

2 CHIEF JUDGE LIPPMAN: And you're saying
3 that there are other things, and you mentioned
4 ladders or whatever else that might be, that beyond
5 stilts, that might have been necessary there?

6 MR. HUTTER: Exactly.

7 JUDGE PIGOTT: Is there any - - - is there
8 any cases you can think of where stilts are used
9 where that same argument couldn't be used? In other
10 words, if - - - if he tripped over carpeting, if he -
11 - - if he's walking on stilts and forgets to duck and
12 hits the door and falls down. Wouldn't - - -
13 wouldn't - - -

14 MR. HUTTER: I think it would depend upon
15 the circumstances, Your Honor. But, again, generally
16 speaking, stilts, again the court was quite clear in
17 Melber, is an appropriate safety device. It's a
18 general proposition. It was not appropriate here.
19 Now, maybe in an area where there's torn carpeting
20 you may not want to use it. It would have to depend
21 upon the circumstances.

22 JUDGE PIGOTT: Well, I was going to suggest
23 where - - - where the - - - the guy on the stilts,
24 you know, just absentmindedly walks through a doorway
25 and he's taller than he thought he was and he falls

1 down. Could he not then make the argument that he
2 should not have been given stilts in a room that was
3 less than twelve feet tall in the - - - in the
4 doorways?

5 MR. HUTTER: No. I - - - I think in that
6 situation probably would be no law - - - then it
7 would be a question of fact whether - - - whether - -
8 - whether it was adequate in those circumstances.

9 JUDGE PIGOTT: Why isn't it a question of
10 fact here, then? How are we to decide ice, or how
11 are we to decide reaching for a tool, or how are we
12 to decide? I mean we're not experts in industrial -
13 - -

14 MR. HUTTER: No, I - - - I - - -

15 JUDGE PIGOTT: We like to think we are, but
16 I don't - - -

17 MR. HUTTER: I agree - - - I agree with
18 that, but I think it's common sense to see ice on
19 stilts is not a good idea. I don't think you need
20 expert testimony on that. In fact, I think if you
21 had an expert come in and say that you can't put ice
22 on it that would be excluded.

23 CHIEF JUDGE LIPPMAN: That - - - wasn't
24 that what the defen - - - what the dissent was saying
25 that it's just obvious?

1 JUDGE READ: Yeah, but is - - -

2 CHIEF JUDGE LIPPMAN: Isn't that what the
3 basis of the dissent, what you just said, that it's -
4 - - it's obvious this is not - - -

5 MR. HUTTER: I - - - I don't think so - - -

6 CHIEF JUDGE LIPPMAN: No.

7 MR. HUTTER: - - - because it really was
8 not open and obvious. And in this - - - and, again,
9 this court has never said that open and obvious
10 insulates.

11 CHIEF JUDGE LIPPMAN: You don't think it's
12 obvious that - - - I thought you just said it's
13 obvious that stilts were the wrong thing in this.

14 MR. HUTTER: Yes, in - - - in this context.
15 Yes, where - - - where - - - where ice is.

16 CHIEF JUDGE LIPPMAN: Yes, that's what I'm
17 asking.

18 MR. HUTTER: Because it's foreseeable.

19 JUDGE READ: Yeah, but isn't the haz - - -
20 isn't the haz - - -

21 MR. HUTTER: The consequence is as he's - -
22 - as he's working up here be foreseeable that he's
23 going to step on it. Negligence.

24 JUDGE READ: But isn't the hazard the ice?
25 It's not the stilts. It's just the stilts - - -

1 MR. HUTTER: Pardon me?

2 JUDGE READ: The hazard's the ice. It's
3 not - - - then that's not an elevation-related
4 hazard.

5 MR. HUTTER: Yes, it is, Your Honor.

6 JUDGE READ: The ice is?

7 MR. HUTTER: No, the - - - working - - -
8 working at the height is the elevated risk. Now,
9 again, this is - - - this is defen - - -

10 JUDGE READ: But it's not a problem except
11 for the ice.

12 MR. HUTTER: It's - - - I think here, and
13 I'm going to use what Judge Stein was getting at to
14 answer this, in that the elevate - - - he's working
15 at an elevated risk, because he has to be elevated to
16 work at the ceiling.

17 JUDGE READ: He - - - and he has a safety
18 device - - -

19 MR. HUTTER: Right.

20 JUDGE READ: - - - for that, the stilts.

21 MR. HUTTER: That's the stilts. The stilts
22 were not the proper device. He has to be furnished -
23 - - 240 says you have to be furnished with a proper
24 device. He was not furnished with a proper device
25 where ice is in the area. An example, as I think

1 Judge Stein was getting at, and correct me if I'm
2 wrong, but if - - - if he were to be given a - - - in
3 a situation where you're given a ladder, and you're
4 told here's the ladder, there's ice on it, avoid it,
5 are - - - is this court going to reach the same
6 result that well, gee, he could have put this ladder
7 somewhere differently. I think the case law is
8 consistent.

9 CHIEF JUDGE LIPPMAN: Do you think the
10 ladder cases and the - - - the - - - the stilts are
11 analogous?

12 MR. HUTTER: The same thing, Your Honor,
13 because they're safety devices.

14 CHIEF JUDGE LIPPMAN: Okay.

15 MR. HUTTER: I mean if you - - - the
16 consequences here is that what will happen is that
17 I'll tell a - - - I'm the foreman. I'll tell the - -
18 - if I just may finish this.

19 CHIEF JUDGE LIPPMAN: Sure. Finish your
20 thought, counsel.

21 MR. HUTTER: I'll tell the foreman - - - I
22 - - - I'm the foreman. Listen fellas, we don't have
23 - - - we have the scaffold, but we don't have any
24 railings. So go up on the scaffold, be careful about
25 stepping too close because you may fall. That

1 argument now is what they're saying is if you accept
2 their argument here, there's no liability.

3 JUDGE RIVERA: No, no, no. That's
4 different, because the scaffolding as you have
5 described it is - - -

6 JUDGE READ: Defective.

7 JUDGE RIVERA: - - - inherently defective.

8 JUDGE READ: It's defective.

9 JUDGE RIVERA: Right, because there's no -
10 - - no protection. The stilts are not - - - you said
11 before, the stilts themselves are not - - - excuse me
12 - - - are not defective. Excuse me.

13 MR. HUTTER: I - - - I - - -

14 JUDGE RIVERA: Yeah, excuse me. Generally,
15 they're the proper - - - the - - - the employee said
16 generally they are the proper device to be used for
17 this kind of task. The point, as Judge Read is
18 making, is that when you have ice, and that's your
19 argument too, that the stilts are not the problem.
20 It is the ice.

21 MR. HUTTER: It - - - it's the - - -

22 JUDGE RIVERA: But that's different from
23 your hypothetical.

24 MR. HUTTER: I - - - I think we're
25 splitting hairs, Your Honor.

1 JUDGE RIVERA: No, no, no, no. We're
2 talking about what the statute covers.

3 MR. HUTTER: Again, I - - - first of all, I
4 dis - - - respectfully disagree. I think here the
5 scaffold is defective not so much because the
6 scaffold is to work at a height. It's not inherently
7 defective because there are no railings. I don't
8 think there's much difference there whatsoever.

9 JUDGE RIVERA: I don't know that employees
10 would agree with you on that.

11 MR. HUTTER: Well, then I'll use another -
12 - - I'll use another example, Your Honor. I say go
13 up on the roof, there's a lot of ice on the roof.
14 Oh, be careful about getting close to the side. And
15 so they slip on ice and they fall over the roof.
16 That's 240.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.
18 You'll have rebuttal. Let's hear - - - let's hear
19 from - - - from the other side.

20 MR. LEARY: Good afternoon, Your Honor. My
21 name is Robert Leary, and I represent Winter-Pfohl.
22 And I'm going to address the - - - address the issue
23 of whether or not Labor Law 240 applies.

24 CHIEF JUDGE LIPPMAN: What's the hazard
25 here?

1 MR. LEARY: The hazard is when he's working
2 at a height, the hazard - - -

3 CHIEF JUDGE LIPPMAN: The height and the
4 ice are the hazard?

5 MR. LEARY: The force of gravity, Your
6 Honor. The - - - the risk is the force of gravity
7 hovering on - - -

8 CHIEF JUDGE LIPPMAN: What about - - - what
9 does - - - what does Runner say about the risk here?

10 MR. LEARY: Runner talks about the force of
11 gravity, Your Honor. And in here the force of
12 gravity is not what caused Mr. Nicometi to be injured
13 any more than had he fallen walking across a parking
14 lot in street shoes. What caused his injury here was
15 ice on the floor.

16 JUDGE ABDUS-SALAAM: Well, counsel, what
17 about Mr. Hutter's analogy to the ladders? What's -
18 - - what's the difference here between a stilt on ice
19 and a ladder on ice?

20 MR. LEARY: I think there, Your Honor,
21 we're getting into the issue of placement, because
22 the statute does talk about placement. But it would
23 be illogical to talk about placement in - - - in
24 connection with stilts. Stilts is not specifically
25 named in the statute. It, by case law, says is the

1 equivalent of a scaffold. And when you place a
2 ladder or you place a scaffold, you intend it to be
3 in one place and only one place and not to move until
4 you want to move it. Stilts, on the other hand, are
5 purposely designed to be able to move along with the
6 work. And it would be illog - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but while
8 you're doing the work you're - - - you have the
9 stilts and he's taking the - - - the insulation,
10 whatever it is, and he's - - - and he's putting it up
11 there. What the hell is the difference between that
12 and the ladder situation? That's what you're doing.

13 MR. LEARY: He is using the stilts in place
14 of the ladder.

15 CHIEF JUDGE LIPPMAN: To put up the - - -
16 and he's standing - - -

17 MR. LEARY: Yes.

18 CHIEF JUDGE LIPPMAN: - - - there using the
19 stilts to put up the insulation.

20 MR. LEARY: Yes.

21 CHIEF JUDGE LIPPMAN: What is the
22 difference between and the ladder case?

23 MR. LEARY: Are you talking about
24 placement, Your Honor?

25 CHIEF JUDGE LIPPMAN: You're talking about

1 placement.

2 MR. LEARY: Right.

3 CHIEF JUDGE LIPPMAN: I'm saying I don't
4 know what the difference is between those ladder
5 cases and - - - and the stilt case when Melber, or
6 whatever the name of the case is, is talking - - -
7 it's about something different, that they're going to
8 the conduit and going to get something else and
9 slipping over it. Yeah.

10 MR. LEARY: This case - - -

11 CHIEF JUDGE LIPPMAN: Yeah.

12 MR. LEARY: - - - and the decision of the
13 court in - - - the - - - the decision of the court in
14 Melber did - - -

15 CHIEF JUDGE LIPPMAN: You don't think this
16 case is distinguishable from Melber?

17 MR. LEARY: No, Your Honor, I do not think
18 it's distinguishable from Melber.

19 CHIEF JUDGE LIPPMAN: That - - - and the
20 court's talk - - - Judge Kaye's opinion when she
21 talks about that it would be different - - -

22 MR. LEARY: This court - - - this case - -
23 -

24 CHIEF JUDGE LIPPMAN: - - - if he was doing
25 his job or whatever it is?

1 MR. LEARY: The only court to make that
2 distinction is the First Department in Matos. And to
3 make that distinction is not the distinction to be
4 made, because you have to ask yourself - - -

5 CHIEF JUDGE LIPPMAN: The court made the
6 distinction in - - - in Melber, didn't it?

7 MR. LEARY: It was - - - in a very
8 truncated statement. But they - - - it went on and -
9 - -

10 CHIEF JUDGE LIPPMAN: It's truncated but
11 clear.

12 MR. LEARY: Your - - - Your Honor, right
13 after that they said but here, as was the case in
14 Ross.

15 CHIEF JUDGE LIPPMAN: Okay. But - - - but
16 this is not Melber. This is a very different case.
17 This guy goes in - - - in Melber and goes and trips
18 over whatever the hell it is. Here the guy is doing
19 the work that he's supposed to be doing, putting the
20 insulation up.

21 MR. LEARY: And this court in Melber
22 stated, "Even if, in that situation, the stilts
23 failed to avoid the pitfall, plaintiff's injuries
24 didn't flow from the deficiency in the stilts, but it
25 flowed instead from the" - - - in that case, the

1 conduit on the floor. This is no different - - -

2 CHIEF JUDGE LIPPMAN: Right, the conduit on
3 the floor.

4 MR. LEARY: Exactly.

5 CHIEF JUDGE LIPPMAN: Exactly right.

6 MR. LEARY: Conduit on the floor is no
7 different than ice on the floor. It's no different
8 than the - - - the pipes sticking out of the wall
9 through the ladder in the case of Cohen.

10 JUDGE ABDUS-SALAAM: Is this - - - is this
11 - - - what was I about to say, is this case different
12 from Nieves where there's a ladder and a conduit or
13 some sort of electrical something sticking out in the
14 ladder and the - - - the guy - - - the worker comes
15 down the ladder and trips? Is that - - - is it
16 different from - - - from Nieves?

17 MR. LEARY: Same case as Cohen, Your Honor.
18 That case of the - - - this - - - this court's
19 decision in Cohen. Again, that conduit coming out,
20 that's not a hazard that any device under Labor Law
21 240 was designed to protect against.

22 JUDGE STEIN: Getting back to placement, it
23 - - - when - - - when you're on the stilts - - -

24 MR. LEARY: Yes.

25 JUDGE STEIN: - - - aren't you essentially

1 placing them wherever you're standing on them? Why
2 is that different from - - - I - - - I'm getting back
3 to why is that different from placing the ladder?

4 MR. LEARY: The whole purpose - - - the
5 whole purpose of stilts is to walk along with the
6 work and - - - and move efficiently. And it would be
7 - - -

8 JUDGE STEIN: So every step you take you're
9 placing the stilts.

10 MR. LEARY: Exactly. And it would be
11 illogical - - -

12 CHIEF JUDGE LIPPMAN: What - - - what's the
13 difference between the ladder? That's what we're not
14 getting. You - - - you go to a particular spot and
15 you take it and you put the insulation up. You're on
16 a ladder. You put the insulation up. What is the
17 difference?

18 MR. LEARY: A ladder is a one-time
19 movement. You put the ladder on the ground - - -

20 CHIEF JUDGE LIPPMAN: And you move the - -
21 - and you move the ladder to put the insulation up.

22 MR. LEARY: Each time you move it, right.

23 CHIEF JUDGE LIPPMAN: Yeah.

24 MR. LEARY: But in order to - - - to make
25 the placement argument in this case, you would have

1 to assign a person to walk next to that worker and -
2 - - and tell him to place each step as he walks. And
3 he's walking. I mean you're just going - - - you're
4 walking along and hammering this thing in. It would
5 be illogical. And - - - and in Wilinski this court
6 refused to apply - - -

7 CHIEF JUDGE LIPPMAN: Okay, counsel.
8 Finish your thought, counsel. You - - - you're time
9 is up.

10 MR. LEARY: In Wilinski this court refused
11 to apply Labor Law 240 where it would be illogical to
12 do so. And in this case it would be illogical to do
13 so - - -

14 CHIEF JUDGE LIPPMAN: Okay, counsel.

15 MR. LEARY: - - - based on the placement.

16 CHIEF JUDGE LIPPMAN: Let's hear from your
17 colleagues.

18 Go ahead, counsel. What piece of this are
19 you going to deal with, counsel?

20 MR. BEHR: Your Honors, Larry Behr for the
21 owner, Vineyards of Fredonia.

22 CHIEF JUDGE LIPPMAN: What piece of this do
23 you want to talk about?

24 MR. BEHR: Well, I - - - I would just pick
25 up where we left off a little bit here.

1 CHIEF JUDGE LIPPMAN: Sure, go.

2 MR. BEHR: The statute, as Your Honors
3 know, is contravention of the common law and should
4 be strictly construed.

5 JUDGE PIGOTT: That ship sailed quite a
6 while ago, I think.

7 JUDGE READ: I would say so.

8 MR. BEHR: Well, it should be. It should.

9 JUDGE READ: Your second point?

10 CHIEF JUDGE LIPPMAN: Should be, okay.
11 Keep going.

12 JUDGE READ: The second point on the
13 argument?

14 MR. BEHR: It must be strictly construed,
15 Your Honors.

16 JUDGE RIVERA: Same point.

17 MR. BEHR: And it says, you know, the - - -
18 the owner or the gen - - - or the contractor shall
19 place - - - I'm paraphrasing, obviously. The owner
20 or the general contractor cannot place the stilts
21 when - - - when - - -

22 CHIEF JUDGE LIPPMAN: No, but the owner's
23 supposed to protect the worker. Isn't that the - - -
24 the whole business with - - - with the Labor Law and
25 with this section?

1 MR. BEHR: But the statute cannot logically
2 and fairly be read to put an onus on an owner or a
3 general contractor.

4 CHIEF JUDGE LIPPMAN: The onus is on the
5 owner to protect the worker. That's what the
6 statute's all about.

7 MR. BEHR: The onus should not be to guide
8 his every step as he's walking in a room.

9 CHIEF JUDGE LIPPMAN: But to take the
10 necessary safety precautions.

11 MR. BEHR: Which they did.

12 CHIEF JUDGE LIPPMAN: That's what the
13 statute - - -

14 MR. BEHR: They provided him with stilts.
15 That is, his employer provided him with stilts, as
16 agent of et cetera, et cetera, provided him with
17 stilts, were - - - which were the proper safety
18 device.

19 CHIEF JUDGE LIPPMAN: That's it in and of
20 itself? You're finished? You provided him with
21 stilts?

22 MR. BEHR: The stilts were the proper
23 safety device. The - - - the question of whether ice
24 should have been on the floor, of course, it oughtn't
25 to have been there. That's - - - that's a separate

1 question. This is not - - -

2 JUDGE PIGOTT: Would a ladder have been a
3 proper safety device?

4 MR. BEHR: No, because they don't use that.
5 Workers don't use that to install insulation. It's
6 too cumbersome and they don't do it.

7 JUDGE PIGOTT: No, I - - - I understand
8 that it's inefficient. But if - - - if they had used
9 a ladder would you call it a safety device?

10 MR. BEHR: If they had - - - I suppose. If
11 it had been - - -

12 JUDGE PIGOTT: It had - - - and it had to
13 be proper - - -

14 MR. BEHR: - - - in - - - in an A-frame, an
15 A-frame ladder - - -

16 JUDGE PIGOTT: Well - - -

17 MR. BEHR: - - - which would not have
18 slipped on ice. You can't go along on an extension
19 ladder within a - - - a dine - - - whatever, this was
20 a living room. You - - - you'd have to use a
21 stepladder.

22 JUDGE PIGOTT: But aren't - - -

23 MR. BEHR: And it wouldn't have slipped.

24 JUDGE PIGOTT: But aren't you arguing that
25 we should know enough about the way this stuff

1 happens that we can - - - can decide that no, you
2 shouldn't have used a ladder, stilts were fine? Or -
3 - - or, as Mr. Hutter's arguing, you could have used
4 a scaffold but stilts are better because they're
5 faster and that's - - - and these - - - these people
6 - - -

7 MR. BEHR: A scaff - - - is - - -

8 JUDGE PIGOTT: - - - are pretty good at
9 them. But how do we make those determinations?

10 MR. BEHR: A scaffold nor a ladder would
11 really have prote - - - provided protection, because
12 there was ice on the floor. Pushing a scaffold, he
13 could have slipped on the ice - - -

14 JUDGE PIGOTT: You're saying that there's a
15 - - -

16 MR. BEHR: - - - getting up or down from
17 the scaffold.

18 JUDGE PIGOTT: You're saying that there's a
19 safety device that would not have been adequate
20 because of ice?

21 MR. BEHR: There's really no adequate
22 safety device. A ladder could slip too.

23 JUDGE PIGOTT: But the stilts were a safety
24 device and it failed because there was ice.

25 MR. BEHR: The stilts did not fail. And

1 Melber is very clear and the plaintiff is - - -

2 JUDGE PIGOTT: That - - - that was Judge
3 Rivera's point, I mean - - - or maybe Judge Stein.
4 But somebody said the safety device didn't fail.

5 MR. BEHR: The - - - the - - - the stilts
6 did not fail. Melber said had the stilts failed
7 while he was installing. Melber did not say had the
8 stilts failed to provide protection, but had the
9 stilts - - - had the stilts failed. Meaning had they
10 broken in some way, a strap come loose; they said the
11 stilts, had they failed. That's what the court was
12 saying - - - this court was saying in Melber.

13 JUDGE RIVERA: So is the - - -

14 CHIEF JUDGE LIPPMAN: So if the stilts
15 didn't fail you're okay?

16 MR. BEHR: The stilts did not fail and - -
17 -

18 CHIEF JUDGE LIPPMAN: There - - - therefore
19 you're off the hook?

20 JUDGE RIVERA: So - - - so - - -

21 CHIEF JUDGE LIPPMAN: I'd like the answer.

22 MR. BEHR: Yes.

23 JUDGE RIVERA: I'm sorry.

24 MR. BEHR: Yes.

25 CHIEF JUDGE LIPPMAN: Go ahead, Judge

1 Rivera.

2 JUDGE RIVERA: No, no. I'm sorry. So it
3 sounds like you're saying that the stilts don't fail
4 so they're totally appropriate. But it also sounds
5 like your point is the ice is there and they
6 shouldn't be working where there's ice. So is it
7 then an inherently dangerous worksite and no one
8 should have been there, stilts or no stilts?

9 MR. BEHR: There's - - - I don't think
10 anyone would quibble that ice should have been
11 remedied. The plaintiff saw the ice. He complained
12 about it. His supervisor told him avoid the ice.
13 Ice shouldn't have been there and then that - - -

14 CHIEF JUDGE LIPPMAN: That doesn't make him
15 the proximate cause, though, right?

16 MR. BEHR: Well, can we go onto - - -

17 CHIEF JUDGE LIPPMAN: No, no. I'm asking
18 you a question.

19 MR. BEHR: I'm not going to get to talk
20 about sole proximate cause which is - - -

21 CHIEF JUDGE LIPPMAN: What? I'm asking you
22 a question.

23 MR. BEHR: I'm sorry.

24 CHIEF JUDGE LIPPMAN: Does that make him
25 the sole proximate cause because the supervisor said

1 avoid the ice?

2 MR. BEHR: Not alone. There is at least a
3 question of fact, not just because his supervisor
4 instructed him. And - - -

5 CHIEF JUDGE LIPPMAN: No, no. But we know
6 that because he instructed him it doesn't make him
7 the sole proximate cause. That's the law, right?

8 MR. BEHR: Well, in - - - in Blake there -
9 - - or, rather, was it Quattrochi - - - or Quattropi,
10 there was an instruction not to enter a doorway. And
11 this court said there's a question of fact whether he
12 disregarded that instruction and jostled - - -

13 CHIEF JUDGE LIPPMAN: Yeah, yeah. But
14 you're talking about a recalcitrant worker is one
15 thing.

16 MR. BEHR: No, this is sole proximate
17 cause, Your Honor.

18 CHIEF JUDGE LIPPMAN: Yeah. And I'm asking
19 you that you told him that the - - - that the
20 supervisor told him be careful or don't go over the
21 ice. That, as a matter of law, doesn't make the
22 worker the sole proximate cause. Isn't that correct?

23 MR. BEHR: As a matter of law, I think it
24 could.

25 JUDGE PIGOTT: Could?

1 MR. BEHR: I think it would be this court's
2 prerogative to search the record and grant summary
3 judgment based on that. Plus the fact that he saw
4 the ice, he complained about it, and he willingly
5 encountered it. All those things together at least
6 raise the question of fact - - -

7 CHIEF JUDGE LIPPMAN: So he took on all the
8 risk himself and the - - - the - - - the owner did
9 everything he had to do?

10 MR. BEHR: There's at least a question of
11 fact as to whether - - -

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. BEHR: - - - he's sole proximate cause.

14 CHIEF JUDGE LIPPMAN: Let's - - - let's
15 hear from your other colleague and we'll continue.

16 MR. SMITH: Good afternoon, Arthur Smith
17 representing Western New York Plumbing. I just
18 wanted to start out by saying that let's all take for
19 granted, and I happen to agree with this, that Labor
20 Law Section 240(1) is a good law and it protects
21 workers, and that's the whole purpose of this
22 particular statute.

23 And what I say to you today is that
24 protecting workers at unique heights is something
25 that this state has decided is important to the

1 state. But by corrupting that law, by compromising
2 that law - - -

3 CHIEF JUDGE LIPPMAN: How - - - how is the
4 law corrupted?

5 MR. SMITH: This court in the Melber case
6 said that if somebody's standing here and they step
7 over here and the safety device does not fail but
8 they simply fall, this court has said that is not a
9 240 case.

10 CHIEF JUDGE LIPPMAN: What else did Ju - -
11 - Judge Kaye say in that case?

12 MR. SMITH: Judge Kaye - - -

13 CHIEF JUDGE LIPPMAN: If he was doing the -
14 - - the job that he was supposed to be doing that
15 would be a different case, right?

16 MR. SMITH: She says if - - - it - - - it
17 could have been a different case. I submit to you if
18 he was doing the job that he was doing, and the
19 safety device itself had failed, that would have been
20 a 240 case. But that's not what happened here.

21 CHIEF JUDGE LIPPMAN: Was this guy doing
22 the job that he was supposed to be doing?

23 MR. SMITH: He was doing the job he was
24 doing. But if this court - - -

25 CHIEF JUDGE LIPPMAN: So what happened?

1 MR. SMITH: He was walking and he stepped
2 on ice and he - - - and he slipped. He stayed - - -
3 he was standing at this height above sea level. He
4 takes a step to his left, he's still this height
5 above sea level. He hasn't fallen down a trap. He
6 hasn't been hit from anything above. He stayed at
7 the exact same height. And - - -

8 CHIEF JUDGE LIPPMAN: Are you saying that
9 he's responsible? That he's the sole proximate cause
10 of his accident?

11 MR. SMITH: That's obviously an argument
12 that we've raised that the Fourth Department accepted
13 as a potential issue of fact. To the question of are
14 we off the hook? The answer's absolutely not.
15 241(6) provides for protections against things like
16 ice. It provides for statutory violations - - -

17 JUDGE READ: That's the - - -

18 MR. SMITH: - - - Industrial Code
19 violations. It provides - - -

20 JUDGE READ: That's the common work - - -
21 the common workplace hazards?

22 MR. SMITH: Exactly. That's what 241(6)
23 does. And in fairness, the plaintiff's brief very
24 much talks about all these Industrial Code
25 violations, which are cared for by the state but not

1 under Labor Law Section 240. They're cared for under
2 Labor Law Section 241(6).

3 CHIEF JUDGE LIPPMAN: Well, it doesn't mean
4 if you violate the Industrial Code that it
5 necessarily determines your 240, right?

6 MR. SMITH: I have never seen Labor Law 240
7 determined because of a violation of Industrial Code.

8 CHIEF JUDGE LIPPMAN: Yeah, yeah, but - - -

9 MR. SMITH: Labor Law 240 stands on its
10 own.

11 CHIEF JUDGE LIPPMAN: But - - - but right.
12 But the - - - the height and the ice can create a
13 hazard here, can't they?

14 MR. SMITH: If a height - - -

15 CHIEF JUDGE LIPPMAN: Didn't it?

16 MR. SMITH: Of course it creates a hazard.
17 And - - - and, arguably, there's a very much a 241(6)
18 violation here, arguably, very much so. But that's
19 not what we're here to argue about today. If ice can
20 cause a trip - - -

21 CHIEF JUDGE LIPPMAN: 240, argue about 240,
22 not 241(6).

23 MR. SMITH: If - - - if this court is going
24 to read ice as being a hazard, it is no different
25 from an electrical conduit, and it's no different

1 form a wire.

2 CHIEF JUDGE LIPPMAN: Is it different from
3 a ladder case?

4 MR. SMITH: I submit to you that it has to
5 be different to a certain extent because otherwise,
6 every time this man takes a step, you're essentially
7 moving a ladder. You're essentially moving a
8 scaffold. And if you're going to say that that's the
9 case here, then you're essentially saying Melber no
10 longer applies in this state. And I suggest to you -
11 - -

12 CHIEF JUDGE LIPPMAN: Well, it matters how
13 you interpret what Melber says.

14 MR. SMITH: Well, the - - - the problem
15 with Melber - - - and - - - and if this court buys -
16 - - counsel was asked why it's distinguishable. He
17 gave - - - he said there were two reasons. He said
18 one, it's because in Melber the guy was walking to go
19 get a tool. Let me suggest to this court, I've
20 talked about how good Labor Law is for the employees
21 here. If this court is going to cut out an exception
22 for somebody to go to walk for tools, the defense - -
23 - the defense and the insurance industry will cheer
24 because - - -

25 CHIEF JUDGE LIPPMAN: Yeah, but isn't that

1 a different case than we have here?

2 MR. SMITH: This case here is the man is
3 working. If you're going to cut it out and say it's
4 different from Melber because he was working as
5 compared to going for a tool then I submit that
6 applies everywhere. So when somebody's on a forty-
7 foot scaffold and he's going to go to lunch and that
8 scaffold collapses, that's not a 240 case anymore
9 because he's not doing his work anymore.

10 We've never, as a state, separated that.
11 We've never separated going from the place of work to
12 a place where you go and get a tool. We've always
13 said if you're at a height, you're at a height. And
14 if you're not at a height, you're not at a height.
15 To now create a - - - a - - - a - - - a distinction
16 because you're not working anymore but you're going
17 to get a tool, I tell you what, that's a defeat in
18 this case. But for the defense bar - - - I mean for
19 the defendants everywhere that's a victory because -
20 - -

21 CHIEF JUDGE LIPPMAN: Yeah, yeah. But we
22 don't worry about plaintiffs or defendants. We're
23 trying to figure out what the law is.

24 MR. SMITH: The law should not be - - - and
25 I submit if 240 means anything, it shouldn't be if

1 I'm here it's a violation and if I'm walking away to
2 go get a tool it's not a violation.

3 CHIEF JUDGE LIPPMAN: Okay, coun - - -

4 MR. SMITH: That should not be the law.

5 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
6 you.

7 MR. SMITH: Thank you very much.

8 CHIEF JUDGE LIPPMAN: Counselor, what about
9 Melber? Talk to us again about that. Is it
10 distinguishable? Do we have to overrule it? What's
11 the significance of Melber?

12 MR. HUTTER: Melber, you know, all you have
13 to do is distinguish it. This is - - - you don't
14 have to overrule it. Melber is a good decision.
15 Melber simply says is that when you are not - - -
16 when you slip and fall while not engaged in that
17 activity on your - - - on the elevatory list, it's
18 not actionable.

19 Now, I think in that respect the language
20 here - - - Judge Kaye uses "it fails". And I think
21 when it - - - when she says it fails it doesn't mean
22 that they broke. It means fails. It means 240 - - -
23 that's a safety device. It was not properly placed,
24 furnished, operated. That's it. That's - - - the
25 language "fail" takes into a lot of things. But a

1 couple other things just quickly, Your Honor.

2 CHIEF JUDGE LIPPMAN: So you want us to
3 grant summary judgment to your side or you want us
4 just to say there are factual issues?

5 MR. HUTTER: No, I - - - I think here we're
6 entitled to summary judgment as a matter of law.
7 Because, again, getting back to your initial - - -

8 CHIEF JUDGE LIPPMAN: What are your key
9 steps that you're entitled to summary judgment?

10 MR. HUTTER: One is that they failed to
11 provide a proper safety device, an elevation-related
12 risk. And, again, I think in response to Judge
13 Piggott's point here, common sense should tell this
14 court you don't need to be a rocket scientist. The -
15 - - the - - - the wisdom that this court has is that
16 you do not put, as Judge Fahey said and Judge Whalen,
17 you do not put workers in an area with stilts where
18 there's ice. It's a foreseeable consequence that
19 they will misstep; and that's part of negligence.
20 That's part of negligence. And, again, indicating
21 here well, gee, he should - - - he knew it, he should
22 have known about it, that's just part of negligence.
23 That is not part of anything.

24 CHIEF JUDGE LIPPMAN: What's the
25 relationship of 241(6) to all of this?

1 MR. HUTTER: There's nothing. It - - -
2 it's just pointing out that there are other things
3 out there. But as Mr. - - - I agree with Mr. Smith,
4 241(6) has nothing to do with 240.

5 CHIEF JUDGE LIPPMAN: It's not dispositive
6 then.

7 MR. HUTTER: It's just different - - -

8 JUDGE ABDUS-SALAAM: Mr. Hutter, on the
9 scaffold that you suggested that would be appropriate
10 here as an alternate - - - as a safety device, if the
11 worker were descending the step - - - the scaffold in
12 this case and fell on the ice, what would be the
13 hazard?

14 MR. HUTTER: Well, then I think - - - then
15 it would be - - - there - - - that would be a
16 question of fact as to whether or not the scaffold
17 was adequate under the circumstances. And I think
18 there, so long as the scaffold did not collapse, did
19 not move, and then it might be a question of
20 adequacy. But here it's the wrong device. And that
21 begins - - - and I think here, as my time is running
22 up, and getting back - - -

23 CHIEF JUDGE LIPPMAN: Go ahead.

24 MR. HUTTER: - - - to the point I was
25 trying to make with Judge Rivera - - - and I

1 apologize for interrupting, Judge, I thought you were
2 finished with your question.

3 JUDGE RIVERA: Okay.

4 MR. HUGGER: But the key here is - - - is
5 that with the instructions. This court has never
6 held with that mere instruction to avoid an unsafe
7 activity, such as, again, working in the area, now
8 absolves. That goes back to Gordon, goes back to
9 Hagins. And I think now after Gallagher it - - - it
10 clearly is still good law.

11 JUDGE READ: There's no dispute. I mean
12 when you say "mere instructions", there's no - - -
13 that's a - - - that's a characterization. Isn't
14 there - - -

15 MR. HUTTER: I'm sorry, Your Honor?

16 JUDGE READ: When you say "mere
17 instructions" that's a characterization of what the
18 direction was.

19 MR. HUTTER: Mere instruction to - - -

20 JUDGE READ: Isn't there a question of fact
21 - - - isn't there a question of fact - - -

22 MR. HUTTER: Instead of - - - I - - - I
23 think it's - - -

24 JUDGE READ: - - - presented on this
25 record?

1 MR. HUTTER: As Judge - - - Justice Whalen
2 and Fahey were pointing out, all they did is said
3 stay away from the area.

4 JUDGE READ: Well, isn't - - -

5 MR. HUTTER: They did not demark it.

6 JUDGE READ: That's not - - - there's not
7 some dispute about that as to - - -

8 MR. HUTTER: They - - - yeah, they - - -
9 they've got to do something, maybe something more.

10 JUDGE READ: No, no, as - - - as to what
11 was said? What - - - what the direction was?

12 MR. HUTTER: All it said was don't work in
13 that area.

14 JUDGE READ: And that's - - - that's
15 undisputed? That's all that was said?

16 MR. HUTTER: Right, that's - - - that's
17 what - - - and again, our client, the - - - two of
18 the workers deny hearing that. We're assuming that
19 for purposes of our motion, that it was said.

20 And just lastly on this, I think here
21 what's very interesting is that this - - - when you
22 look at the cases that both the majority and the
23 dissent relied upon, that Thome decision, if you take
24 a look at Justice Peradotto's dissent in that case,
25 she dissented and said no, as a matter of law you've

1 got to grant summary judgment. It nails this - - -
2 this area completely. In that respect, you have a
3 couple of the Fourth Department judges disagreeing
4 with where the rest of their brethren were going.
5 And lastly I would point out - - -

6 CHIEF JUDGE LIPPMAN: Finish up, counsel.
7 Go ahead.

8 MR. HUTTER: - - - a most recent decision.

9 CHIEF JUDGE LIPPMAN: Go ahead. Finish
10 your thought.

11 MR. HUTTER: Let me just - - - that - - -
12 that's it. Now, the First Department in the Hill
13 case last November, 122 AD3d 428, and in fact, Mr.
14 Smith's law firm represented the defendants in that
15 case. The - - - the First Department rejected the
16 argument mere instructions is enough now to absolve
17 liability.

18 CHIEF JUDGE LIPPMAN: Okay, counsel.

19 MR. HUTTER: Thank you, Your Honors.

20 CHIEF JUDGE LIPPMAN: Thank you all.

21 Appreciate it.

22 (Court is adjourned)

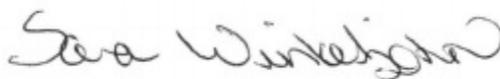
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C E R T I F I C A T I O N

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2 I, Sara Winkeljohn, certify that the
3 foregoing transcript of proceedings in the Court of
4 Appeals of Nicometi v. The Vineyards of Fredonia,
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