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COURT OF APPEALS

STATE OF NEW YORK

BARRETO,

Appellant,

-Against-

No. 33

METROPOLITAN TRANSPORTATION

AUTHORITY, ET AL.,

Respondents.

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 E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

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Appearances:

JOHN M. SHAW, ESQ.
GORAYEB & ASSOCIATES, P.C.
Attorneys for Appellant
100 William Street
Suite 1205
New York, NY 10038

PATRICK J. LAWLESS, ESQ.
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
Attorneys for Respondents MTA and NYCTA
150 East 42nd Street
23rd Floor
New York, NY 10017

SUSAN PAULSON, ESQ.
CORPORATION COUNSEL OF THE CITY OF NEW YORK
Attorneys for Respondent, The City of New York
100 Church Street
New York, NY 10007

CLIFFORD I. BASS, ESQ.
JONES MORRISON, LLP
Attorneys for Respondent IMS
670 White Plains Road, Penthouse
Scarsdale, NY 10583

1 CHIEF JUDGE LIPPMAN: Number 33, Barreto.
2 Counsel, you want any rebuttal time?

3 MR. SHAW: Yes, please. Three minutes,
4 Your Honor.

5 CHIEF JUDGE LIPPMAN: Three minutes. Go
6 ahead.

7 MR. SHAW: It's respectfully submitted,
8 Your Honors, that the Appellate Division erred when
9 they said that this device was the perfect safety
10 device and the plaintiff was - - -

11 CHIEF JUDGE LIPPMAN: What else could have
12 been done here in relation to a safety device?

13 MR. SHAW: There are multiple things that
14 could have been done. First - - -

15 CHIEF JUDGE LIPPMAN: The guard, the guard-
16 --rails - - -

17 MR. SHAW: The guardrails. Mr. Mazzurco
18 testified at length, he was hired - - - his company
19 was hired to ensure that there was safety. They were
20 the site safety people. They weren't some ancillary
21 entity - - -

22 CHIEF JUDGE LIPPMAN: So if they say you
23 need a guardrail, you need a guardrail?

24 MR. SHAW: Absolutely. He - - -, he, he's
25 the expert in the field who was specifically hired

1 not just to do general site safety supervision, where
2 someone may have fallen off a ladder and the site
3 safety people say, hey, no one told me about a
4 problem. His company was specifically hired to
5 ensure safety with respect to the installation of and
6 demolition aspect - - -

7 CHIEF JUDGE LIPPMAN: What about the fact -
8 - - of what significance is it that they're told,
9 listen, don't - - - don't start to break this thing
10 down until the - - - the manhole cover's back on?
11 Does that matter?

12 MR. SHAW: No, it does not, as a matter of
13 law, Your Honor. At most, it's a general safety
14 instruction sometime before the accident, that, hey,
15 don't break this down until the cover is done. There
16 was no specific prohibition saying you stay out of
17 that containment area until that thing is broken
18 down. Mr. - - -

19 JUDGE PIGOTT: Does Mazzurco give you a
20 241(6) claim? Is that what your argument is?

21 MR. SHAW: Excuse me?

22 JUDGE PIGOTT: Does Mazzurco's testimony
23 give you a claim under Labor Law Section 241(6)?

24 MR. SHAW: Absolutely. He gives me under
25 1.7(b). Mr. Mazzurco testif - - - confirms that a

1 safety barrier - - - a safety railing is a necessary
2 thing. And his company was there, despite his
3 backtracking, not only to ensure that the safety
4 railing was in place, because that's the custom and
5 practice of how to do it, but not - - - he
6 specifically testified, page 937 of the record, when
7 this safety railing was removed, or in this case,
8 when there was no safety railing, his company was
9 responsible for ensuring that that cover was put in
10 place before the demolition of the containment area
11 was done. That's an admission - - -

12 JUDGE FAHEY: I see how it gets you to the
13 241(6); I agree with Judge Pigott. What I'm
14 wondering is, so I thought the plaintiff testified
15 that the PAL supervisor and the IMS supervisor - - -
16 that's the super - - - that's the safety company - -
17 - that he said that they were responsible for the
18 manhole cover. So let's say that's a question of
19 fact connected to the 241(6), but how does it get you
20 to 240(1)?

21 MR. SHAW: To 240(1)?

22 JUDGE FAHEY: Yes.

23 MR. SHAW: Because it was - - - clearly it
24 was an elevation-related risk.

25 JUDGE FAHEY: You know, there's a lot of

1 case law on manhole covers.

2 MR. SHAW: There is a lot of case law - - -

3 JUDGE FAHEY: We could live our life - - -

4 MR. SHAW: There's - - -

5 JUDGE FAHEY: - - - discussing manhole
6 covers, you know?

7 MR. SHAW: But it all falls under the
8 rubric, when you fall through an unprotected opening
9 - - - there's numerous cases in the First Department.
10 There's the Klos case in the Second Department.
11 There's the Fourth Department case; I think it's
12 Allen. All are consistent that when you fall through
13 an unprotected hole, whether you're walking in - - -
14 in a building and you fall through an opening there,
15 whether it's a manhole, it all falls under the rubric
16 of you have to - - -

17 JUDGE FAHEY: Your argument is, you know,
18 you're at an elevated site; you fall from one floor
19 to another, that's no different than falling from
20 street level down through a manhole.

21 MR. SHAW: Absolutely. It's the same fact
22 scenario of they were, they were not given proper
23 protection. That's why they had to give - - -

24 CHIEF JUDGE LIPPMAN: What case in our
25 court supports that?

1 MR. SHAW: There's no particular case, yea
2 or nay, in the Court of Appeals, but all of the Court
3 of Appeals cases are consistent that when you have -
4 - -

5 CHIEF JUDGE LIPPMAN: Like what?

6 MR. SHAW: - - - an elevation - - -

7 CHIEF JUDGE LIPPMAN: Like what? Like
8 which ones?

9 MR. SHAW: Like - - - even the language in
10 Blake, that you have to have a proper protection and
11 everything unless there's some kind of egregious
12 misuse. In Ross, in all the other - - - Hugins, in
13 all the cases there's that foundation that you have
14 to provide proper protection when you're working from
15 an elevated worksite. Even in our - - -

16 CHIEF JUDGE LIPPMAN: If you fall through
17 it's - - -

18 MR. SHAW: You fall through, you have to be
19 given proper protection and - - -

20 JUDGE READ: Wasn't the cover the
21 protection?

22 MR. SHAW: The cover was not the proper
23 protection, because the cover was outside in the
24 containment area and there was - - - there was no - -
25 - first of all, there was no protocol whatsoever.

1 You had everyone pointing fingers at everyone else.
2 You had Mr. O'Loughlin testifying that that was IMS'
3 responsibility to make sure that cover was put in
4 place before the - - - the deconstruction took place.

5 JUDGE RIVERA: But I thought the relevant
6 protocol was you don't start breaking the area down
7 until you put the - - - the cover back on.

8 MR. SHAW: Well, that's the - - -

9 JUDGE RIVERA: Forget every other protocol;
10 that one's the one that matters.

11 MR. SHAW: That's the theoretical protocol,
12 but by Mr. Torres' own admission, first of all, in
13 the affidavit, they had an IMS supervisor who was - -
14 - Diego, who was there, who was supposed to make sure
15 that that protocol was fired- - - I mean, was - - -

16 JUDGE PIGOTT: What's the safety device
17 that either failed or was failed to be provided?

18 MR. SHAW: Two things. There was no
19 guardrail or safety railing that would - - - that
20 would have prevented this accident from happening
21 because by all - - -

22 JUDGE PIGOTT: That's like a railing on a -
23 - - on a scaffold?

24 MR. SHAW: Exactly. It - - - it's - - -
25 it, it serves the same purpose.

1 CHIEF JUDGE LIPPMAN: What about - - - is
2 there something that they would have to take that
3 down in order to - - - you know, before it would - -
4 - it wouldn't have protected him in this situation?

5 MR. SHAW: Well, that is completely pure
6 speculation. Under OSHA - - -

7 CHIEF JUDGE LIPPMAN: We don't - - -

8 MR. SHAW: - - - it is required - - -

9 CHIEF JUDGE LIPPMAN: We don't know that,
10 yeah.

11 MR. SHAW: Under OSHA it's required, under
12 2 - - - under the Industrial Code it's required, and
13 under their own site safety expert, who was there, he
14 said it's required. And it wasn't there. And
15 there's absolutely no feasible way that Mr. Barreto's
16 actions were the sole proximate cause of this
17 accident. He was never - - - he was wear - - - first
18 of all, after they got out of the containment area -
19 - - I mean, or they got out of the manhole, the
20 lights went out. No one controverts that.

21 CHIEF JUDGE LIPPMAN: So do you get - - -
22 Do you get judgment here, or its issues of facts?

23 MR. SHAW: I respectfully say that we're
24 entitled to judgment as a matter of law. At most,
25 Mr. Barreto's actions go to his comparative

1 negligence. In view of the fact that the Industrial
2 Code, the OSHA, and their own site safety expert,
3 who's on site, admits that they were responsible for
4 having guardrails, and if there were no guardrails,
5 Mr. Barreto wasn't responsible for ensuring the guard
6 - - - I mean, that the cover was there. PA - - -
7 PAL, IMS and MTA, according to Mr. Mazzurco, it was a
8 joint responsibility.

9 JUDGE PIGOTT: So you're saying judgment
10 against them all?

11 MR. SHAW: Judgment against them all.
12 They're a statutory agent - - -

13 JUDGE FAHEY: Wouldn't this - - -

14 MR. SHAW: - - - IMS, under laws.

15 JUDGE FAHEY: Wouldn't this be a
16 significant change, though, in the law to say a
17 street - - - it's a street-level case and the
18 elevation-related risk rule of 241 - - - I thought
19 there was a lot of case law that says it doesn't
20 apply in the street-level cases. There's not - - - I
21 don't think there's a Court of Appeals case on point,
22 but there seems to be a lot of AD cases that go the
23 other way from your point on 241.

24 MR. SHAW: There it - - -

25 JUDGE FAHEY: Just let me finish my thought

1 so you can address it. It just seems a significant
2 shift in the court's position, or or or the
3 jurisprudence in the area, if we say that you can be
4 working on a street-level ca - - - project and then,
5 you know, you have people falling down stairways,
6 they fall in holes to the basement, things like that,
7 that have been held consistently not to be 241 cases.

8 MR. SHAW: With all due respect, this is
9 actually not a stretch of the law at all. That's why
10 you had, initially, the - - - the ladder in the hole.
11 It's one of many cases where someone falls through an
12 unprotected opening, whether they're walking in a
13 hallway in the building - - -

14 JUDGE FAHEY: Let me give you an example.

15 MR. SHAW: - - - and they fall.

16 JUDGE FAHEY: I'm kind of familiar - - -

17 MR. SHAW: It's the same logic.

18 JUDGE FAHEY: - - - with the Allen case,
19 and there you had all these manhole covers and they
20 were - - - they were snow covered. There was - - -
21 there was a different kind of situation than what we
22 have here. It was a Fourth Department case that was
23 sort of on point and similar to this. But I guess
24 I'm looking for more clarity, and I suppose the bar
25 is too, on that particular point.

1 MR. SHAW: It all goes under the same
2 theme, Your Honor.

3 JUDGE FAHEY: Um-hum.

4 MR. SHAW: Under the Klos case and the
5 Pichardo case in the First Department, it - - - it's
6 whether you're outside in the street or whether
7 you're walking in a building and you fall through an
8 unprot - - - a hole in a building, the Appellate
9 Division - - -

10 JUDGE FAHEY: That is Klos, right, where it
11 - - -

12 MR. SHAW: The Klos is the Second
13 Department, and Pichardo; there's Berrios. There's a
14 whole line of cases that all have the same theme. In
15 this case it's - - - it goes under the same rhyme and
16 reason that, here, there was an opening, it was a
17 ten-foot hole, and that's why they had the ladder.

18 CHIEF JUDGE LIPPMAN: Okay, counselor.

19 MR. SHAW: Thank you.

20 CHIEF JUDGE LIPPMAN: Thanks, counselor.
21 You'll have your rebuttal.

22 MR. SHAW: Thank you, Your Honor.

23 CHIEF JUDGE LIPPMAN: Counsel?

24 MR. LAWLESS: Good afternoon. May it
25 please the Court. My name is Patrick Lawless and I

1 represent the MTA and the - - -

2 CHIEF JUDGE LIPPMAN: Go ahead.

3 MR. LAWLESS: - - - New York City Transit
4 Authority. The - - -

5 CHIEF JUDGE LIPPMAN: Why isn't it, then,
6 as your adversary says, just a simple elevation risk?
7 You fall through the third floor to the second floor,
8 you fall through a manhole. Why - - - why is it any
9 different than - - -

10 MR. LAWLESS: Well, in the first place, he
11 was never supposed to be working near an open manhole
12 to begin with. He was only supposed to be working -
13 - -

14 CHIEF JUDGE LIPPMAN: Is that his fault or
15 the people who are supervising?

16 MR. LAWLESS: That's, that's, that's
17 actually his fault because - - - the plaintiff
18 ignores his own testimony. His testimony was that he
19 was given not just a specific instruction, but he
20 knew from prior - - -

21 CHIEF JUDGE LIPPMAN: Yeah, but - - -

22 MR. LAWLESS: - - - from prior experience -
23 - -

24 CHIEF JUDGE LIPPMAN: - - - if it's so
25 specific, why did all of them start to do this before

1 the manhole was covered?

2 MR. LAWLESS: I don't know why they did it
3 on that day but the plaintiff testified - - -

4 CHIEF JUDGE LIPPMAN: Say that again. I'm
5 sorry?

6 MR. LAWLESS: I'm sorry. The plaintiff
7 testified that he was there for nearly a week, and
8 they followed that protocol every single day and
9 there was no problems, that every single day, as soon
10 as he - - - as soon as they were finished, and they
11 came up from the manhole, that they went to the
12 designated area, they waited till they were given the
13 go-ahead that the manhole cover - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but - - -

15 MR. LAWLESS: - - - was actually replaced.

16 CHIEF JUDGE LIPPMAN: But here - - - here,
17 he's not responsible for putting the manhole cover
18 on. He's not responsible for having the lights on or
19 off. But why is it clear to you that - - - that he's
20 the person here that made this happen? Why isn't
21 there any allegation related to him, more like
22 comparative negligence?

23 MR. LAWLESS: It's not in this situation
24 because - - -

25 CHIEF JUDGE LIPPMAN: Why not? Go ahead.

1 MR. LAWLESS: - - - because number one, he
2 and his coworkers were the ones responsible for
3 replacing - - - for removing and replacing the cover.
4 Now, he denied that he did it personally, but he also
5 - - -

6 JUDGE PIGOTT: Can I ask you a question?

7 MR. LAWLESS: - - - said that it was his
8 coworkers that did it.

9 JUDGE PIGOTT: Sorry to interrupt on that,
10 but are you making that argument as - - - in contr -
11 - - against his 240 case?

12 MR. LAWLESS: It's - - - it's, it was
13 raised below, to the court below, and it did - - -
14 the court didn't find - - - found only on sole
15 proximate cause. But the issue was raised below that
16 it wasn't a 240 case. The court - - - the court
17 dismissed on other grounds. It was never really
18 addressed by the First Department, but it was raised
19 - - -

20 JUDGE PIGOTT: You're not arguing
21 contributory negligence in a 240 case, are you?

22 MR. LAWLESS: I'm not arguing that at all.

23 JUDGE PIGOTT: All right. So when you say
24 it's his fault and, you know, and - - -

25 MR. LAWLESS: Well, he was - - - what I'm

1 saying is he was provided with the perfect safety
2 device, as the court found, which was the manhole
3 cover.

4 JUDGE PIGOTT: So you're saying it is a 240
5 case, but he had the proper security device?

6 MR. LAWLESS: What I'm saying is the court
7 properly found that he was the sole proximate cause.
8 I'm not conceding that it was a 240 case.

9 JUDGE PIGOTT: You're saying it's a 240
10 case; he's - - - he's the sole proximate cause.

11 MR. LAWLESS: If it is a 2 - - - if it's,
12 arguably, a 240 case, then he's the sole proximate
13 cause.

14 JUDGE ABDUS-SALAAM: Well, why isn't it a
15 240 case?

16 MR. LAWLESS: Because he was never supposed
17 to be - - - they raise all these arguments about the
18 - - - the guardrail, and I'll get to that in a
19 second, but he was never supposed to be exposed to
20 the elevated-related risk to begin with. He was
21 never supposed to work around the open manhole cover.
22 He was only supposed to work around a closed manhole
23 cover.

24 JUDGE PIGOTT: So if a person's on a
25 scaffold and you say, well, he's never supposed to be

1 near the edge and that's why he fell.

2 MR. LAWLESS: But he wasn't supposed to - -
3 - he - - - but this was supposed to be completely
4 covered. When - - - when you're working at a
5 scaffold - - - inherent in working on a scaffold is
6 that you may fall off under different circumstances.
7 If you're working near a closed manhole cover,
8 there's no way you're going to fall in the manhole
9 cover.

10 JUDGE FAHEY: Well, dissent makes a point,
11 though, that he wasn't really responsible for
12 covering the manhole.

13 MR. LAWLESS: But the - - -

14 JUDGE FAHEY: In the AD, I'm talking about
15 - - - the AD dissent makes that point.

16 MR. LAWLESS: But the record reflects that
17 when he was specifically asked who is responsible for
18 moving the manhole cover, he said we did it. Then he
19 kind of backtracked and said, well - - -

20 JUDGE FAHEY: Nobody - - -

21 MR. LAWLESS: - - - I didn't do it.

22 JUDGE FAHEY: Nobody could move a manhole
23 cover by themselves.

24 MR. LAWLESS: And he said - - - he said
25 that too, but when he said "we did it" he meant he

1 and his coworkers.

2 JUDGE FAHEY: Sure.

3 MR. LAWLESS: So - - - so he - - - he knew
4 that. And again, he - - -

5 JUDGE STEIN: So is there at least an issue
6 of fact, a question of fact on that?

7 MR. LAWLESS: I don't think it's a question
8 of fact, because I think it goes - - - just an
9 analogy, because they're saying there should have
10 been a guardrail. If he was told don't work around a
11 manhole cover unless the guardrail is there, and he
12 worked around a manhole cover and the guardrail
13 wasn't there and he fell in, it would be sole
14 proximate cause. It's the same thing. Because he -
15 - - the - - - the guardrail and the - - - and the
16 cover - - -

17 JUDGE PIGOTT: Do we say that? Do we say,
18 well, you climbed the ladder and it wasn't tied off,
19 so it's all your fault?

20 MR. LAWLESS: No, which - - - well, you
21 said in Robinson, when - - - when the plaintiff was
22 instructed to use the eight-foot ladder and not the
23 six-foot ladder, and he uses the six-foot ladder,
24 then he's the sole proximate cause.

25 CHIEF JUDGE LIPPMAN: But the safety people

1 themselves said you've got to have a guardrail.

2 MR. LAWLESS: That - - - that's not exactly
3 what - - -

4 CHIEF JUDGE LIPPMAN: What is exactly?

5 MR. LAWLESS: What he said was that when
6 working around an open manhole cover, there should be
7 a guardrail. But he also indicated that the - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but it's closed
9 after it's opened, so if it's open, doesn't that mean
10 you should have a guardrail - - -

11 MR. LAWLESS: But you also - - -

12 CHIEF JUDGE LIPPMAN: - - - have a
13 guardrail?

14 MR. LAWLESS: I'm sorry to interrupt, but
15 he also - - -

16 CHIEF JUDGE LIPPMAN: You're not
17 interrupting, but answer my question.

18 MR. LAWLESS: He also indicated - - -

19 CHIEF JUDGE LIPPMAN: No, no, no, but it's
20 open and then it's closed. Obviously, when it's open
21 is when you need the guardrail cover, not when it's -
22 - - the guardrail, not when it's closed.

23 MR. LAWLESS: But it was while he was
24 working in it. And this - - - this has never been
25 alleged. While he was working inside the manhole,

1 removing the asbestos, they were surrounded by the
2 protective shed which - - - which served the same
3 purpose as a guardrail. It surrounded the manhole on
4 all sides.

5 CHIEF JUDGE LIPPMAN: So why did the - - -

6 MR. LAWLESS: There was only - - -

7 CHIEF JUDGE LIPPMAN: - - - safety guy say
8 you need a guardrail too?

9 MR. LAWLESS: He never said you needed a
10 guardrail on top of that protective shed. He said
11 while that shed was up it essentially served the same
12 purpose as a guardrail. Then he said, just in
13 general, when you're working around an open manhole
14 cover, you need the guardrail. But in this case he
15 was never supposed to work around a completely open
16 manhole cover - - - excuse me - - - manhole; he was
17 supposed to work around a manhole, at the end of the
18 day, when the cover was placed back on.

19 CHIEF JUDGE LIPPMAN: Okay, counsel.

20 MR. LAWLESS: Thank you.

21 CHIEF JUDGE LIPPMAN: Thanks.

22 Counselor?

23 MS. PAULSON: May it please the court.

24 Susan Paulson on behalf of the City of New York.

25 Your Honor, the defendants were entitled to

1 judgment as a matter of law, because it was the
2 plaintiff's own negligence that was the proximate
3 cause, the sole proximate cause of this accident.

4 CHIEF JUDGE LIPPMAN: How do we know that
5 he was the sole proximate cause?

6 MS. PAULSON: He was the sole proximate
7 cause because the cause of the accident was the fact
8 that he exited the manhole and immediately began
9 deconstructing the containment enclosure. He
10 disregarded the specific instruction that he admitted
11 to in his own testimony not - - -

12 JUDGE ABDUS-SALAAM: Ms. Paulson, is there
13 anything in the record that shows what "immediate"
14 means? Was it that he gets out of the manhole cover
15 and then starts to break down the containment area?
16 Or does he get out of the cover, a couple of minutes
17 go by; is that "immediate"? I'm not sure what
18 "immediate" means here.

19 MS. PAULSON: Right. His testimony on the
20 record was, on page 520, that he began deconstruction
21 right away. He didn't give a number of minutes to
22 that. He - - - in two other places in the record, he
23 testified that he exited the manhole and began to
24 remove the plastic. There was no time given to the
25 circumscribed "immediate" there.

1 CHIEF JUDGE LIPPMAN: What about all these
2 issues about the lights, that you don't have the - -
3 - the lights were out and - - -

4 MS. PAULSON: There's no - - -

5 CHIEF JUDGE LIPPMAN: - - - was he
6 responsible for all of that stuff?

7 MS. PAULSON: There's no testimony that he
8 fell because of any deficiency in lighting. He fell
9 because he disregarded - - -

10 CHIEF JUDGE LIPPMAN: Well, if the lights
11 are out - - -

12 MS. PAULSON: - - - the instruction - - -

13 CHIEF JUDGE LIPPMAN: - - - wouldn't it
14 stand to reason, if that was standard practice, that
15 maybe you could fall through the hole?

16 MS. PAULSON: I don't know, Your Honor.
17 There was light from the street lights. Apparently
18 it was sufficient light.

19 CHIEF JUDGE LIPPMAN: Well, I'm asking your
20 common sense. If it's totally dark - - -

21 MS. PAULSON: It depends on - - -

22 CHIEF JUDGE LIPPMAN: - - - and normally
23 the lights are on, is he the - - - the cause of his
24 accident?

25 MS. PAULSON: He's the sole cause of his

1 accident because he disregarded the specific
2 instruction not to work around the open manhole. He
3 got out and he started working - - -

4 CHIEF JUDGE LIPPMAN: So he's like a - - -

5 MS. PAULSON: - - - around the open
6 manhole.

7 CHIEF JUDGE LIPPMAN: - - - recalcitrant
8 worker? He's saying I'm not doing it?

9 MS. PAULSON: That is correct.

10 CHIEF JUDGE LIPPMAN: Is that what happened
11 there?

12 MS. PAULSON: It is like a recalcitrant
13 worker.

14 CHIEF JUDGE LIPPMAN: We have testimony
15 that he said - - -

16 MS. PAULSON: That - - -

17 CHIEF JUDGE LIPPMAN: - - - I'm not doing
18 it?

19 MS. PAULSON: That's exactly correct.
20 There was a - - -

21 CHIEF JUDGE LIPPMAN: Where does it say
22 that - - -

23 MS. PAULSON: - - - readily available - - -

24 CHIEF JUDGE LIPPMAN: - - - that he said
25 I'm not doing it?

1 MS. PAULSON: He didn't have to say I'm not
2 doing it.

3 CHIEF JUDGE LIPPMAN: But you just told - -
4 -

5 MS. PAULSON: There was a readily - - -

6 CHIEF JUDGE LIPPMAN: - - - me he's a
7 recalcitrant worker.

8 MS. PAULSON: Yes, Your Honor, and I don't
9 think, under the, this court's cases, in Jastrzebski
10 (ph.), that you have to specifically state that
11 you're going to disregard the instruction.

12 CHIEF JUDGE LIPPMAN: What do you have to -
13 - -

14 JUDGE RIVERA: It was his choice not to
15 follow the protocol.

16 MS. PAULSON: It was his choice not to
17 follow the protocol.

18 JUDGE RIVERA: And not following the
19 protocol - - -

20 MS. PAULSON: Correct.

21 JUDGE RIVERA: - - - is what - - -

22 MS. PAULSON: And - - -

23 JUDGE RIVERA: - - - equates him with a
24 recalcitrant worker?

25 MS. PAULSON: That's correct. And in both

1 Gordon and Jastrzebski, this court said that, the,
2 it's not a duty of a continuing supervisor to insist
3 that a recalcitrant worker use an available safety
4 device.

5 CHIEF JUDGE LIPPMAN: That assumes he's a
6 recalcitrant worker.

7 MS. PAULSON: Yes, Your Honor.

8 CHIEF JUDGE LIPPMAN: Okay, counselor.
9 Thanks.

10 MS. PAULSON: Thank you very much.

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

13 MR. BASS: Good afternoon, Your Honors.
14 Clifford Bass, a partner at Jones Morrison, on behalf
15 of IMS Safety.

16 CHIEF JUDGE LIPPMAN: What's your
17 responsibility here with - - -

18 MR. BASS: We're a site safety consultant.
19 We're at the present - - -

20 CHIEF JUDGE LIPPMAN: Do you have
21 supervisory responsibility?

22 MR. BASS: No. We - - - our
23 responsibility, as evident from the scope of work
24 within the - - - within the record, this is - - -
25 it's primarily a air quality, confined space

1 requirement. Now, our man did say - - - the one - -
2 - the one man that's there, who would be consulting
3 with the - - -

4 CHIEF JUDGE LIPPMAN: Right.

5 MR. BASS: - - - nonparty here, PAL, who's
6 - - - who's really the - - - really the target.

7 JUDGE FAHEY: You mean Mazzurco?

8 MR. BASS: No - - - yeah, Mr. Mazzurco did
9 say - - -

10 CHIEF JUDGE LIPPMAN: Guardrail.

11 MR. BASS: - - - wait a minute - - - excuse
12 me?

13 CHIEF JUDGE LIPPMAN: He said guardrail
14 too, didn't he?

15 MR. BASS: Well, actually, counsel had it
16 correct. Mr. Lawless had it correct. He said on an
17 open manhole you could have a guardrail, but this
18 wasn't open. There was a construct - - -

19 CHIEF JUDGE LIPPMAN: So he wasn't saying
20 you need a guardrail here?

21 MR. BASS: No, he wasn't. He was - - - and
22 he also said - - - this is on page 938 of the record
23 - - -

24 CHIEF JUDGE LIPPMAN: Where was your guy
25 when all this stuff was going on?

1 MR. BASS: My guy was outside. The only
2 time he was in is - - -

3 CHIEF JUDGE LIPPMAN: Your guy was outside
4 watching the safety of the - - -

5 MR. BASS: No, you can't watch because it's
6 layers of plastic surrounded by more plastic there.

7 CHIEF JUDGE LIPPMAN: Where was he?

8 MR. BASS: So you can't - - -

9 CHIEF JUDGE LIPPMAN: Where was he?

10 MR. BASS: So from the record - - - I don't
11 know, but from the record, he was in a car, which was
12 not unusual. And Mr. Mazzurco even testified that
13 over the hours of this work - - - this was in lower
14 Manhattan, outside the family court - - - that the
15 safety consultant also has been - - - has to be
16 cognizant of street traffic and what have you. PAL
17 was the one, the employer, who was in direct control
18 - - -

19 CHIEF JUDGE LIPPMAN: Are you saying they
20 might be responsible, but you're not?

21 MR. BASS: If we - - -

22 CHIEF JUDGE LIPPMAN: They may be respo - -
23 -

24 MR. BASS: - - - see something wrong, we -
25 - -

1 CHIEF JUDGE LIPPMAN: Right, you call it to
2 their attention.

3 MR. BASS: - - - we tell PAL.

4 CHIEF JUDGE LIPPMAN: Yeah, okay.

5 MR. BASS: If we see something that's life-
6 threatening. Remember, we're outside of a number of
7 protective barriers.

8 JUDGE RIVERA: So who's responsible - - -

9 MR. BASS: We can't see what's going on
10 inside. In fact, Mr. Barreto testified that, other
11 than at the very beginning, after the MTA first looks
12 to make sure that there's no electrical issue down
13 below, after that, the manhole cover is out and IMS
14 then does the probe for gasses. From that point on,
15 the next four or five hours that they're doing the
16 work, IMS is outside.

17 JUDGE RIVERA: So under the protocol, who
18 makes the call - - - who says, okay, put the manhole
19 cover back?

20 MR. BASS: PAL. PAL tells us, go in.

21 JUDGE RIVERA: And when does PAL know - - -

22 MR. BASS: We finished our - - -

23 JUDGE RIVERA: - - - to go in - - - because
24 you can't look through this plastic - - -

25 MR. BASS: PAL's - - -

1 JUDGE RIVERA: - - - and they're telling
2 you nobody's there - - -

3 MR. BASS: PAL's got the shop steward and
4 it's got three employees there, and he's got the
5 supervisor, Torres.

6 JUDGE RIVERA: How does PAL know to do
7 this? I mean, when does PAL know - - -

8 MR. BASS: Okay. At this point - - -

9 JUDGE RIVERA: - - - oh, I should go check?

10 MR. BASS: At this point - - - we have to
11 remember, in this respect, I respectfully suggest
12 that the realities of the workplace, under the
13 Salazar - - -

14 JUDGE RIVERA: Yeah.

15 MR. BASS: - - - case really - - - really
16 have to be - - -

17 JUDGE RIVERA: Yeah.

18 MR. BASS: - - - perceived and - - - and
19 applied to this case.

20 JUDGE RIVERA: Okay.

21 MR. BASS: They do the work - - -
22 subterranean work. They're down there all night.
23 They then remove 100 - - - up to 180 bags of
24 asbestos. They first have it in a containment area.
25 They then put it in the decontamination area, which

1 is beyond the initial enclosure of plastic. It's
2 between two other sheets of plastic. Outside of that
3 is IMS and the MTA and NYCTA, New York City Transit
4 Authority, whoever else is outside. Torres is out
5 there; he's communicating with his people inside. So
6 Torres, at that point, would tell IMS they're
7 finished with their work.

8 At that point it's no longer a gravity-
9 related workplace. It's not too dissimilar from what
10 I was hearing on the Belver (ph.) case you were just
11 asking for.

12 JUDGE PIGOTT: But isn't gravity related to
13 the extent that he fell?

14 MR. BASS: Excuse me?

15 JUDGE PIGOTT: I mean, he fell in a hole.

16 MR. BASS: He fell in a hole, but that time
17 they're de - - - they're deconstructing - - - they're
18 right prior to deconstructing an area on street
19 level. And after they had done their work in the
20 hole, the - - - as the Appellate Division said the -
21 - -

22 JUDGE PIGOTT: You're persuasive, but - - -
23 and I don't know, as Judge Fahey indicated, 240 seems
24 like a stretch, but 241(6) doesn't. I mean, 240(6)
25 (sic) has barrier requirements and things like that,

1 which is - - -

2 MR. BASS: Yeah, but - - - also it doesn't
3 seem like a stretch that the Appellate Division is
4 noting that the perfect safety device here, the
5 cover, would have taken care of this.

6 JUDGE FAHEY: But then we go back to the
7 original question that Judge Rivera just asked.
8 While she was asking it, I looked it up in the
9 record, and there - - - and you can comment on this;
10 I ask you to dir - - - it's a question that was asked
11 on the record, I think this is to Mazzurco, at 937:
12 "What duties did IMS have with" - - - it's at line 15
13 - - - "with regard to the guardrails" - - - once - -
14 - around the manhole - - - or "once the guardrails
15 around the manhole is taken out?" Answer: "Ensure
16 the manhole cover gets back on safely."

17 MR. BASS: Yeah, but how do we know that
18 that's - - -

19 JUDGE FAHEY: How do you know what?

20 MR. BASS: I'm sorry, guard - - - if there
21 are guardrails. Elsewhere - - -

22 JUDGE FAHEY: "Ensure the manhole cover
23 gets back on safely."

24 MR. BASS: But he also testified, in 938 -
25 - -

1 JUDGE FAHEY: Um-hum.

2 MR. BASS: - - - that PAL would make the
3 determination if the guardrails would have to go up
4 or not, bec - - - in view of the fact that they're
5 moving things in and out.

6 JUDGE FAHEY: I guess for 241(6), though,
7 it's pretty clear that the plaintiff isn't making
8 that call. He's not making any determination. His
9 supervisors are in that, right, based on this
10 testimony?

11 Anyway - - -

12 MR. BASS: This - - -

13 JUDGE FAHEY: - - - think about it. It's -
14 - - it's tough when somebody whacks you with the
15 record in the middle of this thing, but - - - but
16 it's - - - when I had gone over it, that particular
17 question that Judge Rivera asked, I thought it was a
18 point that I wanted to just ask you about the record.
19 Don't worry about it.

20 CHIEF JUDGE LIPPMAN: Okay - - -

21 JUDGE RIVERA: Can I just - - -

22 MR. BASS: I think elsewhere in the record,
23 Your Honor - - -

24 JUDGE RIVERA: I'm sorry, may I just ask a
25 question?

1 CHIEF JUDGE LIPPMAN: Last question, Judge
2 Rivera.

3 JUDGE RIVERA: Just to clarify. They come
4 out, after they've thrown all the bags up or carried
5 them up, they come out of the manhole and where do
6 they stand? Where do they go until someone from PAL
7 comes and says, okay, put the manhole cover on, okay,
8 take down the cover. What - - - what are these
9 people doing - - -

10 MR. BASS: My understanding is - - -

11 JUDGE RIVERA: - - - that they don't fall
12 through the hole?

13 MR. BASS: Well, my understanding is that
14 there - - - within this decontamination section,
15 which is between the - - -

16 JUDGE RIVERA: You mean, this plastic.

17 MR. BASS: - - - first barrier of plastic,
18 it's in between the two. They've moved out the 180
19 bags. They've moved out the lights. They've moved
20 out the aluminum ladder, the tools.

21 JUDGE RIVERA: And in that process to
22 getting to this decontamination area, there's no
23 opportunity to fall back in this hole?

24 MR. BASS: Well, they're out of the hole,
25 and they're in an ext - - -

1 JUDGE RIVERA: But they're moving around -
2 - -

3 MR. BASS: - - - exterior perimeter.

4 JUDGE RIVERA: - - - with all those bags.
5 Aren't there tons of bags around them?

6 MR. BASS: But no, you have a confined area
7 and then you have a perimeter around - - - another
8 area around that, and that's where they are. At that
9 point the PAL supervisor should have called IMS, go
10 in there to make sure everything's out of the hole.
11 And there's no indica - - -

12 CHIEF JUDGE LIPPMAN: Okay, counsel.
13 Thanks, counsel.

14 MR. BASS: Thank you very much.

15 CHIEF JUDGE LIPPMAN: Okay. Counselor,
16 rebuttal? Counselor, 240(1) and (6), they both - - -
17 you're covered by both?

18 MR. SHAW: We certainly are, Your Honor.
19 Clearly - - -

20 CHIEF JUDGE LIPPMAN: Take each one
21 separately - - -

22 MR. SHAW: Okay.

23 CHIEF JUDGE LIPPMAN: - - - and tell us
24 why.

25 MR. SHAW: Okay. 240(1), whether or not

1 someone falls through an unprotected opening down ten
2 feet, or whether or not someone is working in a
3 building and falls through an opening, from one floor
4 to another, falls under the same rubric that is under
5 the statute and under - - - lack multiple precedent
6 of the First Department, Second Department and Fourth
7 Department. Even if there is not one particular case
8 on point does not in any way negate the fact that
9 this is clearly a case that screams for protection
10 under Labor Law Section 240(1). Here this was a man
11 who was working at night. The lights were taken out.
12 He had no guardrails, no safety railing, and the
13 ladder, by their own admission, it's an
14 elevated-related risk - - -

15 CHIEF JUDGE LIPPMAN: Okay. What about - -
16 -

17 MR. SHAW: - - - because they have - - -

18 CHIEF JUDGE LIPPMAN: And what about
19 241(6)?

20 MR. SHAW: 241(6) is clearly relevant and
21 they violated 241(6); they violated the Industrial
22 Code. There are sections under the Code they
23 violated, 1.7, 1.30, and by Mr. Mazzurco's own
24 admission, there were no safety railings. They're
25 trying to try to backtrack and say, well, he didn't

1 mean this particular site, other sites where they
2 were doing manhole covers. That's, in all due
3 respect, utter nonsense. His testimony - - - I know
4 Your Honors are aware of it - - - 924 to 935 of the
5 record, it - - - it is very clear that it concerns
6 this site.

7 And they failed - - - they all point
8 fingers at each other: you're responsible, you're
9 responsible. But one person who they acknowledge
10 isn't responsible, for this accident and for
11 supervision, was Mr. Barreto.

12 The key thing here also is Mr. Torres'
13 affidavit, who they got - - - MTA got Mr. Torres'
14 affidavit. That makes it a prima facie 240(1) and
15 241(6) case because Mr. Torres says, in the
16 affidavit, that IMS was supposed to protect these
17 covers - - - protect the workers and make sure that
18 the covers were on the manhole before they did the
19 work, not Mr. Barreto.

20 And Mr. - - - the last thing, in Mr.
21 Torres' accident report, corrective action, he admits
22 that he was supposed to supervise and make sure that
23 cover was done.

24 And there was a misstatement of the record.
25 Mr. Barreto just didn't suddenly pop up out of the

1 manhole and start working in the decamentation (sic)
2 - - - or decomentation (sic) area. What he did was
3 he went into this area - - - there's the curtain area
4 - - - and he took off one of his double Tyvek suits
5 off, and then he saw that the other workers were
6 breaking down - - -

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. SHAW: - - - the containment, and it
9 was pitch black - - -

10 CHIEF JUDGE LIPPMAN: Okay.

11 MR. SHAW: - - - and then he fell.

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. SHAW: Okay. Thank you.

14 CHIEF JUDGE LIPPMAN: Thank you all.
15 Appreciate it.

16 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Barreto v. Metropolitan Transportation Authority, et al., No. 33, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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Agency Name: eScribers

Address of Agency: 700 West 192nd Street

Suite # 607

New York, NY 10040

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