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COURT OF APPEALS

STATE OF NEW YORK

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NEWMAN,

Appellant,

-against-

No. 174

RCPI LANDMARK PROPERTIES, LLC,

Respondent.

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20 Eagle Street  
Albany, New York  
October 18, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
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  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is number 174, Newman v. RCPI Landmark  
3 Properties, LLC.

4 MR. NAPOLI: Hi, Judge. I'd like to reserve two  
5 minutes of my time for rebuttal, please.

6 CHIEF JUDGE DIFIORE: You may, sir.

7 MR. NAPOLI: Thank you. This court granted leave  
8 to appeal from an order of the Appellate Division First  
9 Department that dismissed my client's case as a matter of  
10 law. The trial court or the lower court observed that in  
11 no way can this be a matter of law in terms of this  
12 particular case. Mr. Newman - - - Mr. Newman is that - - -  
13 is that the position of Mr. Newman is that these crates  
14 were positioned in such a way that two were together on the  
15 bottom followed by one above them between those and - - -  
16 and it sort of looked like steps to him. He was following  
17 his part - - -

18 JUDGE STEIN: Reasonable? Counselor, is it  
19 reasonable for him to have followed his colleague down  
20 those steps when there was at least one other way he knew  
21 of that would not require him to do that, and that is to go  
22 back the way he came?

23 MR. NAPOLI: Absolutely wrong. He didn't know of  
24 the other way. The other way - - -

25 JUDGE STEIN: No. He came - - - he - - - as I

1 understand it, the record shows he had maybe been there  
2 once before. They walked through the subbasement, they got  
3 to the platform, they could have walked back exactly the  
4 way they got there.

5 MR. NAPOLI: The - - - he was never there once  
6 before. The record - - -

7 JUDGE STEIN: Even if he wasn't, they didn't get  
8 there by climbing up the - - - the crates, right? That's  
9 not how they got to the platform, correct?

10 MR. NAPOLI: It was - - - that was his first time  
11 at the - - -

12 JUDGE STEIN: No, no.

13 MR. NAPOLI: - - - platform.

14 JUDGE STEIN: He got there somehow. He was on  
15 the platform, right?

16 MR. NAPOLI: He got to the platform.

17 JUDGE STEIN: Okay. How did he get there? He  
18 walked there.

19 MR. NAPOLI: He got there from the building.

20 JUDGE STEIN: From the building. Why couldn't he  
21 go back through the building? He was - - -

22 MR. NAPOLI: Because he was going to another part  
23 of the building down below, that he was going to another  
24 area in the building. So he was going to another area in  
25 the building, and this appears to him to be a logical place

1 to go down. It is stacked neatly. You have - - - you have  
2 - - -

3 JUDGE RIVERA: But - - - but it could be  
4 unreasonable to make - - - to take that risk for  
5 convenience purposes.

6 MR. NAPOLI: Well, not as a matter of law, Your  
7 Honor. It's not unreasonable as a matter of law. This  
8 isn't a situation where the Appellate Division talks about  
9 someone jumping off a roof or someone jumping off an - - -  
10 an elevator that's stuck between the floors.

11 JUDGE RIVERA: But if he jumped off the dock,  
12 didn't go through these little - - - these crates - - -

13 MR. NAPOLI: Well, these - - -

14 JUDGE RIVERA: - - - would that have been  
15 unreasonable, even though it might be more convenient?

16 MR. NAPOLI: No. It wouldn't be unreasonable  
17 just like - - - just like the cases we cite in the  
18 Appellate Division where it says it wasn't unreasonable for  
19 someone to be on a - - - be on a ladder and underneath the  
20 ladder there was a defective floor, and they - - - the  
21 court - - - the court held - - -

22 JUDGE ABDUS-SALAAM: So basically, Counsel - - -

23 MR. NAPOLI: - - - that that was a question of  
24 fact for the jury.

25 JUDGE ABDUS-SALAAM: - - - you would like your -

1 - - your client to go before a jury and the jury would  
2 determine whether it would be unreasonable or not for him  
3 to do that. And would the jury be able to find that it was  
4 - - - he was a hundred percent liable for his own injuries  
5 or ninety-nine percent liable?

6 MR. NAPOLI: Oh, sure. The juror could do - - -  
7 a juror could find him ninety percent. I don't think in  
8 this particular case a juror would even find him negligent,  
9 but that's for - - - you know, that's for a trial jury.  
10 The - - - the - - -

11 JUDGE FAHEY: Can I - - - can I take a step back?  
12 We're - - - we're arguing kind of the sole proximate cause  
13 prong of the - - - of liability. But they - - - they  
14 brought their motion as an affirmative defense under  
15 culpable conduct. So we're talking comparative negligence.  
16 Which means that first, there's negligence, then there's -  
17 - - then there's proximate cause. And so let's start with  
18 the negligence. What do you say that the landowner - - -  
19 how was the landowner negligent here?

20 MR. NAPOLI: Well - - -

21 JUDGE FAHEY: What did they do? The - - - let me  
22 just frame my question for you so you can answer it. They  
23 didn't put the crates there. There was a ladder there but  
24 apparently, it wasn't visible because of the way a truck  
25 was parked. But they did provide a means of egress.

1 MR. NAPOLI: Two trucks, Your Honor.

2 JUDGE FAHEY: Let - - - let me finish. And so  
3 whether there were two or one is, for my purposes,  
4 irrelevant. So based on that, I - - - my question is  
5 before I even get to sole - - - proximate cause and whether  
6 there's sole proximate cause is I want to know how you  
7 think because you're really the one who could tell us. How  
8 are they negligent?

9 MR. NAPOLI: Well, in the record there's a - - -  
10 there's an engineering expert, Stanley Fein.

11 JUDGE FAHEY: Um-hum.

12 MR. NAPOLI: And engine - - - and the engineering  
13 expert says that the loading dock did not possess the  
14 proper form of egress, and it was violation of the building  
15 code. And - - - and he concludes - - -

16 JUDGE FAHEY: So you're saying the negligence was  
17 a violation of a statute?

18 MR. NAPOLI: Violation - - - violation of a  
19 statute and violation of the common law. He says: "In  
20 conclusion and speaking in general terms, a subject wall--  
21 wall-mounted ladder was not an adequate means" - - - he say  
22 - - - he even says the wall ladder wasn't adequate means,  
23 but that's besides the point from the loading platform.  
24 "And it was not available of the time of the incident. A  
25 set of steps with proper handrails or wall guards should -

1 - - should have been provided. Accessing the vertical  
2 ladder was unsafe and did not provide" - - - so - - -

3 JUDGE FAHEY: Can you tell - - - can you tell me  
4 this. Does he say what specific statute was violated?

5 MR. NAPOLI: Yes. Yes. He says the - - - a  
6 building code - - - the Building Code 28-301.1.

7 JUDGE ABDUS-SALAAM: And this building was not  
8 zoned to - - -

9 MR. NAPOLI: This was the - - -

10 JUDGE ABDUS-SALAAM: - - - some exception or  
11 grandparented in because it was built some time before  
12 that?

13 MR. NAPOLI: No. It's Rockefeller Center which  
14 is like pristine in terms of security and in terms of  
15 keeping - - -

16 JUDGE ABDUS-SALAAM: Yeah. But that doesn't - -  
17 - I mean Rockefeller Center wasn't built like twenty years  
18 ago or whenever - - - I mean the - - - when - - - what  
19 building code is he saying was violated?

20 MR. NAPOLI: He cites these - - - he cites the -  
21 - - in the record, he cites the building code that was in  
22 existence at - - - you know, at the time. He cites the  
23 predecessor to - - - to this particular section. He also  
24 cites, you know, custom and practice in terms of that  
25 there's not - - - not being a proper - - - you have to

1 understand that there was - - - there was six - - - there  
2 was six or seven loading docks in Rockefeller Center. All  
3 the other loading docks had stairs or ramps. This was the  
4 only loading dock that didn't have stair - - - stairs or  
5 ramps and no stairs or ramps were visible. So when you - -  
6 - when you would - - -

7 JUDGE RIVERA: But did - - -

8 MR. NAPOLI: - - - get to the loading dock you  
9 could see them. And - - -

10 JUDGE RIVERA: Did he look for a ladder?

11 MR. NAPOLI: No.

12 JUDGE RIVERA: Did he ever look?

13 MR. NAPOLI: He got there. He saw - - - he saw  
14 the crates. This particular loading dock was fourteen feet  
15 wide. There were two - - - there were two trucks there.  
16 I'm assuming they were straight - - - they're straight  
17 trucks which are, like, eight feet wide. So even if there  
18 was a ladder, one of the trucks had to be against the wall.  
19 He couldn't even climb down the ladder.

20 JUDGE STEIN: So your position is is that it - -  
21 - it could be reasonable for someone in - - - in his  
22 position to go down and use those crates without even  
23 looking around to see if there was any other way down. Is  
24 that your position? That a jury could find that to be a  
25 reasonable thing to do?

1 MR. NAPOLI: Yes. Yes, Your Honor.

2 JUDGE RIVERA: When, as you say, for every other  
3 dock there's another way down.

4 MR. NAPOLI: There is - - - there is steps,  
5 actual steps, and there are also ramps. So there are  
6 ramps. This is the only dock in Rockefeller Center that  
7 doesn't have steps or ramps. All right.

8 JUDGE ABDUS-SALAAM: Is this - - - this is  
9 outside, right, counsel? Is this - - -

10 MR. NAPOLI: No. It's - - - it's inside.

11 JUDGE ABDUS-SALAAM: It's inside? Okay.

12 MR. NAPOLI: In other words, when you come down  
13 Fiftieth Street, you would come in into the - - - I guess  
14 it would be the - - - the loading dock area, and you come  
15 down a ramp and people from Tishman would actually park  
16 their cars down there because they obviously own the  
17 building or maintain the building. And then there would be  
18 deliveries made, and these were milk crates. So we all  
19 know that - - -

20 CHIEF JUDGE DIFIORE: There's a ladder attached -  
21 - -

22 JUDGE FAHEY: Yes. Who's - - -

23 CHIEF JUDGE DIFIORE: - - - to the loading dock,  
24 correct? There was a ladder attached to the - - -

25 MR. NAPOLI: No. The ladder was on the wall,

1 Judge. The ladder - - - in other words, let's assume this  
2 is the loading dock, and he's going to go down the steps.  
3 There's a truck to his left, and then there's the ladder on  
4 the wall that's hidden by this truck, and it's his first  
5 time there so he doesn't the ladder is there. His part - -  
6 -

7 CHIEF JUDGE DIFIORE: What's the purpose of that  
8 ladder?

9 MR. NAPOLI: We don't know. It could have been a  
10 fire ladder. It could have been a ladder going up to the  
11 ceiling. No one testified that the purpose of that ladder  
12 was to get off the loading dock. There's nothing in the  
13 record with respect to that. So the only way to get off  
14 the loading dock was using these crates, and they were milk  
15 crates. And this accident - - -

16 JUDGE FAHEY: The thing that jumps out at me is  
17 whose crates were they?

18 MR. NAPOLI: Well, we don't know whose crates  
19 they are.

20 JUDGE FAHEY: I see.

21 MR. NAPOLI: But we do know from the record that  
22 restaurants would deliver milk - - -

23 JUDGE FAHEY: That's why - - - that's why - - -  
24 the reason I ask you that is because that's why I asked you  
25 the negligence question. It seems to me that the - - - the

1 building owner did not put the crates there. They didn't  
2 create the negligence. So the only way you get the  
3 building owner, I think at all, is if there's some defect  
4 in design. And the efficacy of the ladder, okay. But I  
5 don't know if that gets you over the - - - so that's why I  
6 asked the question.

7 MR. NAPOLI: Well, Judge, the - - - the - - - Mr.  
8 Hagen, who's - - - who was the safety officer who testified  
9 in a deposition said that there was a video, and those  
10 crates were there for at least a half an hour. He saw them  
11 in the video for half an hour.

12 JUDGE FAHEY: I see.

13 MR. NAPOLI: The video for the whole day they  
14 destroyed. So these crates weren't just willy nilly there  
15 for one purpose. They were there at - - - at least a half  
16 an hour before. They were probably there from early on in  
17 the morning because milk is delivered early on in the  
18 morning. This accident happens at 10 o'clock. So they  
19 acquiesced in allowing these crates to be the only way in  
20 or - - - in - - - onto and off of the loading dock. So  
21 they don't have to have - - - it couldn't be their crates  
22 but they acquiesced in the idea that this is the only way  
23 to get on and off. And his partner had been there before  
24 and used the crates before, so it wasn't like the first  
25 time they were there. And they actually have a centr - - -

1 central control that - - - that has the video where they  
2 can see from central control what's going on at the loading  
3 dock.

4 JUDGE ABDUS-SALAAM: Counsel, are you saying - -  
5 -

6 MR. NAPOLI: And so the accident happens - - -

7 JUDGE ABDUS-SALAAM: Couns - - - are you saying,  
8 counsel, that his partner of that day had used those same  
9 crates on another day?

10 MR. NAPOLI: Yes. He has been there before.

11 JUDGE ABDUS-SALAAM: In the same loading dock?

12 MR. NAPOLI: He - - - he was the one leading him  
13 through because he - - - he had known this was the way to  
14 get off the loading dock. He didn't know any other way.  
15 He didn't know about any ladder on the wall that was not  
16 accessible because there - - - these are trucks coming in  
17 and out making deliveries to the various - - - the various  
18 restaurants.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 JUDGE PIGOTT: Okay. No. It's fine.

21 MR. KAMINSKA: May it please the court, Glenn  
22 Kaminska with the firm of Ahmuty, Demers & McManus. I'm  
23 counsel for the defendant-respondents in this matter.

24 JUDGE FAHEY: Can you go to the negligence  
25 question? He'd said that there was a building code

1 violation. Want to address that?

2 MR. KAMINSKA: The - - - the building code  
3 violations that the expert, Mr. Fein, refers to is about  
4 ingress and egress. They're not applicable to this loading  
5 dock in any way. They - - - this is not - - - it's in our  
6 brief that the - - - the position of Mr. Fein, who we see  
7 all the time in these cases, is he's citing a provision of  
8 the building code which talks about entering and leaving  
9 the building and what is required of staircases for  
10 entrance and exit of the building. Not anything to do with  
11 a loading dock. It's simply a red herring and inapplicable  
12 in any way. So the answer to your question is there no  
13 negligence for the owner - - -

14 JUDGE FAHEY: So we don't really need to - - - if  
15 there is no negligence, this court would not need to  
16 address the applicability of a sole proximate cause because  
17 there was no negligence in the first instance; is that  
18 correct?

19 MR. KAMINSKA: That is true. Yeah. If there - -  
20 - if this court finds there's no negligence, which I think  
21 they easily could, we're talking about three milk crates,  
22 then you wouldn't have to address the - - -

23 JUDGE FAHEY: Well, except the milk crates were  
24 there and you were on notice of them, apparently.

25 MR. KAMINSKA: Well, I have to take exception to

1 counsel's position. Mr. Rinaldi never testified in this  
2 case.

3 JUDGE FAHEY: Um-hum.

4 MR. KAMINSKA: There is no statement that he had  
5 been there before and had used those milk crates before.  
6 But we do know that the plaintiff himself had been at this  
7 location about a month prior. I believe it's 164 in the  
8 record. Oh, I'm sorry, at 143 of the record. He had been  
9 there before, and he turned around and went back the way he  
10 came because that was the safe way to go.

11 JUDGE PIGOTT: Is there something where you said,  
12 following up on what Judge Fahey was asking, that you don't  
13 disagree that it's your burden on the - - - in the first  
14 instance to establish your entitlement to judgment as a  
15 matter of law under 3212?

16 MR. KAMINSKA: I - - - I think that's absolutely  
17 true. I'd love to fight that but I don't think I can.

18 JUDGE PIGOTT: Did you - - - did you establish  
19 that by saying we were not negligent?

20 MR. KAMINSKA: I think we establ - - - yes, I  
21 think we established - - -

22 JUDGE PIGOTT: Who testified - - -

23 MR. KAMINSKA: - - - by the facts of the case - - -

24 -

25 JUDGE PIGOTT: Well, that's - - - that's very

1 general. Who said we are not negligent because?

2 MR. KAMINSKA: Well, I don't know that anyone  
3 ever says that but what we - - -

4 JUDGE PIGOTT: Right.

5 MR. KAMINSKA: - - - did say is - - -

6 JUDGE PIGOTT: What - - -

7 MR. KAMINSKA: - - - presented the facts that he  
8 - - -

9 JUDGE PIGOTT: What you said, as I under - - -  
10 I'm sorry, as I understand it was whether we're negligent  
11 or not, there's only one negligence that counts in this and  
12 that's his.

13 MR. KAMINSKA: That's true.

14 JUDGE PIGOTT: Now is that - - - is that belongs  
15 to any - - - I - - - I get it, as counsel's pointing out,  
16 where a jury can tell you that. But it seems - - - and in  
17 240, does it seem like where, you know, 240 is accreting  
18 into common law negligence here. Is - - - am I misreading  
19 the record?

20 MR. KAMINSKA: Well, no. The labor law really  
21 has nothing to do with this case, you know.

22 JUDGE FAHEY: Well, it's because of the phrase  
23 that's being used, sole proximate cause.

24 MR. KAMINSKA: Sole proximate cause, but sole - -  
25 -

1                   JUDGE FAHEY: Take - - - take a step back for a  
2 second. Sole proximate cause is a response to the minimal  
3 requirements for holding a defendant in under Labor Law  
4 subsection 1. If - - - if we assume that negligence is  
5 negligence plus proximate cause and if a defendant can be  
6 held in, under labor law, with one percent negligence, then  
7 the sole proximate cause defense develops. A labor - - - a  
8 company - - - a construction site doesn't provide a ladder  
9 but the plaintiff comes to work drunk. So the proximate  
10 cause of his injuries is not - - - is not the nonprovision  
11 of a ladder but his - - - the sole proximate cause of his  
12 injuries is the fact that he was climbing on whatever was  
13 provided to him and he was - - - and he had been - - - and  
14 drank a six-pack before he came to work. That's where the  
15 sole proximate cause as substantial factor defense comes  
16 into it.

17                   Now what we're talking here is culpable conduct  
18 Section 1411 of the C.P.L.R. comparative negligence. And  
19 that's why Judge Pigott's question really directs us in the  
20 right place. And that's why I was asking about the  
21 negligence question because I'm trying to figure - - - in  
22 the first instance you argued in your briefs, but how do  
23 you argue on negligence? Was there a duty? Apparently,  
24 there was a duty to provide ingress and egress. No one's  
25 denying that. So how did you fulfill it?

1 MR. KAMINSKA: Okay. Again, this is not an  
2 ingress and egress matter because he's not entering or  
3 leaving the building.

4 JUDGE FAHEY: Up and down the ladder. Okay.

5 MR. KAMINSKA: He's going up and down the ladder.

6 JUDGE FAHEY: All right.

7 MR. KAMINSKA: So how did we fulfill it? One,  
8 there is, in fact, a ladder. Okay. Two, he could have  
9 turned around and came the - - - back the way he came, the  
10 way he did it a month before - - -

11 JUDGE FAHEY: And your argument is he had two  
12 ways of getting up and down?

13 MR. KAMINSKA: Oh, no. There's - - - there's a  
14 third way.

15 JUDGE FAHEY: Oh, okay.

16 MR. KAMINSKA: He - - - he could also have - - -  
17 as testified by Mr. Hagen, he could have gone around to use  
18 one of the ramps that were available on the other six or  
19 seven - - - I believe five or six, excuse me, other loading  
20 docks.

21 JUDGE PIGOTT: Aren't those questions of facts?

22 MR. KAMINSKA: I'm sorry?

23 JUDGE PIGOTT: Aren't those questions of fact  
24 having to do with what the person's doing at the time and -  
25 - -

1 MR. KAMINSKA: Not at all.

2 JUDGE PIGOTT: Well, if - - - if you're unloading  
3 a - - - a particular truck, let's say, and somebody says  
4 well, you know, you could have gone three bays down and - -  
5 - and there's steps down there, well, that's not within the  
6 contemplation of the worker at the time that - - - that he  
7 or she is doing the job. So it's a question of fact as to  
8 whether that makes sense that a jury would say no, they - -  
9 - they did not have to go three bays down to get - - - you  
10 know, to get off.

11 MR. KAMINSKA: I think there is a - - - just a  
12 fundamental issue here that this guy's job was done before  
13 he even got on the loading dock.

14 JUDGE PIGOTT: So - - -

15 MR. KAMINSKA: Okay. He was there to look at a  
16 storage room - - -

17 JUDGE PIGOTT: Well, that doesn't make it - - -  
18 pardon me?

19 MR. KAMINSKA: But he never - - - he - - -

20 JUDGE PIGOTT: Pardon me?

21 MR. KAMINSKA: He was there to look at storage  
22 rooms - - -

23 JUDGE PIGOTT: Right.

24 MR. KAMINSKA: - - - that were behind the dock,  
25 behind the dock.

1 JUDGE PIGOTT: Okay.

2 MR. KAMINSKA: And then he testified we were  
3 going back to the fifty-ninth floor, which is the floor he  
4 came from. So he was done. Essentially, this is all  
5 detour and frolic. He didn't need to any of this.

6 JUDGE PIGOTT: That's - - - that's not your  
7 defense.

8 JUDGE FAHEY: That's are all factual questions.

9 MR. KAMINSKA: You know, but - - -

10 JUDGE PIGOTT: Yeah.

11 MR. KAMINSKA: But the important thing is - - -

12 JUDGE PIGOTT: That wasn't your defense.

13 MR. KAMINSKA: - - - he sees - - -

14 JUDGE PIGOTT: You did not say he was on a frolic  
15 of his own.

16 MR. KAMINSKA: No, no. But I'm just saying - - -

17 JUDGE PIGOTT: Well, then why are you arguing it  
18 now?

19 MR. KAMINSKA: Because it's - - -

20 JUDGE PIGOTT: There are things in this record  
21 that we ought to get - - - get to know. All right.

22 MR. KAMINSKA: The important thing is this. It's  
23 unreasonable to walk to the end of a loading dock, see  
24 something you identify, you know are black milk crates that  
25 are stacked side-by-side with one in the middle - - -

1 they're not even stacked like they would, you know, milk  
2 crates interconnect in order to be - - -

3 JUDGE ABDUS-SALAAM: But does it matter, counsel,  
4 that his partner went down on those same milk crates and  
5 nothing happened? He wasn't the first one to use the milk  
6 crates.

7 MR. KAMINSKA: No. It doesn't. It - - - it does  
8 not. You know - - -

9 JUDGE ABDUS-SALAAM: Why?

10 MR. KAMINSKA: This - - - this appeal comes from  
11 the First Department, but I was born and raised in Niagara  
12 Falls. And my mom would tell me all the time, if your  
13 friends jump off the Grand Island Bridge, are you going to  
14 jump off - - -

15 JUDGE PIGOTT: Careful. Careful.

16 MR. KAMINSKA: - - - the Grand Island Bridge?

17 JUDGE STEIN: But - - - but - - -

18 MR. KAMINSKA: Because if they do and I follow  
19 them, that's my fault.

20 JUDGE STEIN: But does - - - does the plaintiff's  
21 conduct have to be unforeseeable in order for it to be the  
22 sole proximate cause?

23 MR. KAMINSKA: The law is if the - - -  
24 unnecessary, unforeseeable and it is. It's just like all  
25 these - - - these cases with the buckets that people turn

1 upside down - - -

2 JUDGE STEIN: Well, how - - - how is it  
3 unforeseeable that he would - - - he would descend using  
4 those crates?

5 MR. KAMINSKA: How is it unforeseeable? We have  
6 crates there. All right. Well, what if there was a  
7 folding chair? Would that be okay? He can - - - he can  
8 use that?

9 JUDGE PIGOTT: Sure.

10 JUDGE STEIN: Well, I guess the question is - - -

11 MR. KAMINSKA: I mean they're crates. They're  
12 not what they're for.

13 JUDGE STEIN: - - - can we decide that as a  
14 matter of law?

15 MR. KAMINSKA: Absolutely.

16 JUDGE STEIN: That's the - - -

17 MR. KAMINSKA: Absolutely. And the case is  
18 allowed - - -

19 JUDGE RIVERA: Is it because you're saying it's  
20 inherently dangerous, it's obvious?

21 MR. KAMINSKA: It's an - - - it's an  
22 unreasonable, dangerous act he took unilaterally. The only  
23 reason he fell is because he did this and he did it himself  
24 for no reason other than he didn't turn around and go the  
25 way he came the way he did it a month before.

1 JUDGE ABDUS-SALAAM: And it doesn't matter that  
2 the crates were there for at least a half an hour according  
3 to the video that was - - -

4 MR. KAMINSKA: No.

5 JUDGE ABDUS-SALAAM: - - - taken by your own - -  
6 -

7 MR. KAMINSKA: It's a - - - it's a loading dock.  
8 You know, materials are - - - are there for - - - at  
9 loading docks. You know, but because there's material  
10 stacked at a loading dock is not an invitation for someone  
11 to take an unreasonably dangerous act and step on something  
12 because - - -

13 JUDGE ABDUS-SALAAM: Instead of milk crates, if  
14 they were cinderblocks that were pretty - - - much more  
15 substantial, do you think that would have been any  
16 difference?

17 MR. KAMINSKA: I - - - I do not think that you  
18 should - - -

19 JUDGE ABDUS-SALAAM: More like steps?

20 MR. KAMINSKA: - - - look at something stacked at  
21 a loading dock and say boy, you know what, that's my way to  
22 get down.

23 JUDGE RIVERA: Is - - - isn't his argument  
24 stronger because the ladder is covered? If the ladder was  
25 exposed and obvious, wouldn't that be a different kind of

1 case? But it's - - - it's covered by a truck. And as you  
2 said, it's a loading dock. These things happen, right?

3 MR. KAMINSKA: I - - - I would say it doesn't  
4 really - - - doesn't make it stronger, no. You know,  
5 because he never looked. You know, all - - - the First  
6 Department tells you he didn't look.

7 JUDGE RIVERA: So if he - - - if he had testified  
8 and said, well, I looked around, there was nothing else?

9 MR. KAMINSKA: That would have made a stronger  
10 case because he - - - then he - - - then maybe he made a  
11 choice different but he still always had an option.

12 JUDGE RIVERA: Aren't those all questions for the  
13 jury?

14 MR. KAMINSKA: No.

15 JUDGE RIVERA: Aren't those all factual questions  
16 at that point?

17 MR. KAMINSKA: Not at all. Because -- no,  
18 because there's nothing dangerous about three milk crates  
19 in a loading dock except if someone trips over them or  
20 backs into them like Mr. Hagen said, that's a dangerous  
21 condition. It's not dangerous because he used them for  
22 something completely unforeseeable, for some use that  
23 they're not supposed to be used for.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MR. KAMINSKA: Thank you.

1 CHIEF JUDGE DIFIORE: Counsel.

2 MR. NAPOLI: Why do I feel that having heard my  
3 adversary's argument that I feel I'm - - - I'm at the trial  
4 court and he summed up for the defendant and now it's my  
5 turn to sum up for the plaintiff? These are definitely  
6 issues of fact for the jury. He did look to - - - in that  
7 direction. He didn't see any ladder, Judge, because the  
8 truck was blocking it. So whether he was reasonable or  
9 unreasonable is a question of fact for the jury. They  
10 never really argued, strangely, if they argued at all, that  
11 they were free of negligence - - -

12 JUDGE GARCIA: The Appellate Division - - -

13 MR. NAPOLI: - - - in this particular case.

14 JUDGE GARCIA: The Appellate Division found here  
15 he didn't look, right?

16 MR. NAPOLI: Excuse me, Judge?

17 JUDGE GARCIA: The Appellate Division decision  
18 says he did not look. Are we bound by that?

19 MR. NAPOLI: Well, if you look at the record, the  
20 - - - his transcript says in the record that he looked in  
21 that direction and he - - - he - - - so - - -

22 JUDGE GARCIA: I guess my fundamental issue here,  
23 though, is there is no argument that he thinks the milk  
24 crates are the way to get down off of this platform. I  
25 mean there's - - - they're there. They're obviously

1 temporarily there, if it's a half hour or if it's two hours  
2 if they were delivered first thing in the morning. That's  
3 not the way the ramp is design - - - this loading dock is  
4 designed. No one thinks to get off this loading ramp I  
5 step onto some milk crates.

6 MR. NAPOLI: Well, Judge, then you and I differ,  
7 Judge. If I - - - if I were approaching the loading dock  
8 and I looked around and there was no other way to get down  
9 and I want to get down - - -

10 JUDGE GARCIA: Say where are the milk crates?

11 MR. NAPOLI: I would - - - maybe I'm  
12 unreasonable. I would have taken - - - I would have - - -  
13 and then my - - -

14 JUDGE RIVERA: But there is another way as Judge  
15 Stein said at the beginning - - -

16 MR. NAPOLI: - - - and my coworker jumped down, I  
17 would have taken it.

18 JUDGE RIVERA: Counsel. Counsel. But there is -  
19 - - counsel.

20 MR. NAPOLI: Maybe I'm all unreasonable.

21 JUDGE RIVERA: Counsel. There is another way.  
22 You can retrace your steps, as Judge Stein pointed out when  
23 we started this oral argument.

24 MR. NAPOLI: But - - - but - - -

25 JUDGE RIVERA: I know you argue that that is

1           inconvenient, but there is another way.  It's not that he's  
2           trapped.

3                       MR. NAPOLI:  It was never argued that he was - -  
4           - that he was going back, that he could have gone back.  He  
5           was going forward for some reason.

6                       JUDGE RIVERA:  It's obvious that he can retrace,  
7           right?  Because that's how he got to the dock.

8                       MR. NAPOLI:  Judge - - - Judge, if you go back -  
9           - - if you go to - - - if you go to Rockefeller Center, it  
10          goes from Forty-Sixth Street to Fiftieth Street, it goes  
11          from Fifth Avenue to Sixth Avenue.  It takes so much time  
12          to walk, as he says, to walk to another area.  You're  
13          walking blocks.  I have - - - I have - - -

14                      JUDGE RIVERA:  Well, you walk down blocks.

15                      MR. NAPOLI:  - - - an office on Fifth Avenue and  
16          Eighth - - -

17                      JUDGE RIVERA:  You're not worried you're going to  
18          fall over - - - you're not worried you're going to fall  
19          over milk cartons?

20                      MR. NAPOLI:  No.  But it was such an obvious  
21          thing.  It's there.  The way it was set up, Judge, is  
22          here's the loading dock.  Here - - - it was set up the way  
23          it was even.  It was - - - it was even - - - the crate was  
24          even with the loading dock.  It's a question of fact for  
25          the jury.  We should be allowed to - - - to try this case

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in - - - in Supreme Court New York County. Thank you for  
your time. Thank you.

CHIEF JUDGE DIFIORE: Thank you, sir.

(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 People v. RCPI Landmark Properties, LLC, No. 174 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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