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COURT OF APPEALS

STATE OF NEW YORK

LEND LEASE (US) CONSTRUCTION LMB INC.,

Appellant,

-against-

NO. 11

ZURICH AMERICAN INSURANCE COMPANY,

Respondent.

20 Eagle Street
Albany, New York
January 11, 2017

Before:

CHIEF JUDGE JANET DIFIORE
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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1 CHIEF JUDGE DIFIORE: The next matter on this
2 afternoon's calendar is appeal number 11, Lend Lease
3 Construction v. Zurich American Insurance Company.

4 Counsel.

5 MR. LODGE: Good afternoon. May it please the
6 court, my name is Matt Lodge, and I'm counsel for one of
7 the appellants, Lend Lease (US) Construction LMB Inc. As I
8 only have five minutes, I'm going to jump right into it.
9 So I'm going to talk first about whether the tower crane is
10 covered property, and covered property is - - - is
11 something that includes something called temporary works.
12 And so what we're going to do is jump to the definition of
13 temporary works, and the definition of temporary works
14 requires a couple things. It - - - from - - - from our
15 perspective, we - - - we are seeking to prove that the
16 tower crane is a temporary structure, and the - - - the
17 specific definition of temporary works includes the phrase
18 "temporary buildings or structures." And so we say the
19 tower crane is - - -

20 JUDGE ABDUS-SALAAM: Counsel, could I just ask
21 this before you get into that. As - - - assuming this is a
22 temporary - - - the crane is a temporary structure, can it
23 also be equipment or machinery?

24 MR. LODGE: We - - - we don't think it - - - it
25 constitutes equipment or machinery for purposes of the

1 exclusion. I think that, from a colloquial standpoint, you
2 could call it equipment. You could also call scaffolding
3 equipment. You know, so for example, one of the - - - the
4 specific items that's identified as a temporary work in the
5 definition of temporary work is scaffolding. Scaffolding -
6 - - scaffolding is something that I think, you know,
7 routinely is referred to as - - - as "equipment." And so
8 yes, it could be given that label. It would not be - - - I
9 don't think it would be especially wrong to do so.

10 JUDGE FAHEY: Listen, you only got five minutes,
11 the - - - the nub of this case, in my mind, is the - - -
12 the question of illusoriness, which - - - which gets us to
13 the exclusion. And can you tell me or - - - or point me to
14 some place in the record that I should look at that shows
15 that there is - - - that there is or is not remaining
16 coverage on any activities that such that it would render
17 the coverage either exclusion on the basis of the - - -
18 it's illusory on the basis of the operation exclusion or
19 nearly illusory, as some of the case law has said? In
20 other words, where in the record can I go? Because it
21 seems to me there's certain things left over, shoring, the
22 formwork, scaffolding, there are some things that may or
23 may not be left over, though I - - - I'm not sure about
24 scaffolding. But tell me what's excluded? What's left
25 after this exclusion operates?

1 MR. LODGE: So the - - -

2 JUDGE FAHEY: Let's assume you're covered, okay.
3 Assume you're covered for now. Let's say - - - let's at
4 least say it's a question of fact - - -

5 MR. LODGE: Right.

6 JUDGE FAHEY: - - - as to whether or not you're
7 covered. Get to the exclusion. What is - - -

8 MR. LODGE: What is - - - what is excluded by the
9 exclusion?

10 JUDGE FAHEY: What's your position on the
11 illusory nature of coverage that was in the dissent?

12 MR. LODGE: Okay. You're - - - so I'm not
13 entirely sure I understand your question.

14 JUDGE FAHEY: What I want to know is - - - is the
15 dissent said the coverage was illusory here in the
16 operation. And, okay, if it's illusory that means, in my
17 mind, that there is nothing left covered as a result of the
18 operation of the exclusion.

19 MR. LODGE: Right.

20 JUDGE FAHEY: That's your position, right?

21 MR. LODGE: There - - - there's not nothing.
22 There's - - - there's a lot of things that are - - - that
23 are excluded by the exclusion for sure.

24 JUDGE FAHEY: Um-hum, but there are some things
25 left.

1 MR. LODGE: And - - - and we're saying that the
2 tower - - - the tower crane is - - - is not one of those
3 things.

4 JUDGE FAHEY: I see.

5 MR. LODGE: And, you know, so a cement mixer, a
6 drill, a - - - a saw, you know, all the - - - the run-of-
7 the-mill tools of - - - of contractors are - - - are things
8 that would be excluded. I mean this is something - - -

9 JUDGE STEIN: Well, why aren't those tools as
10 opposed to equipment and machinery? I mean the - - - the -
11 - - we have to assume that those phrases, that those terms
12 mean three different things.

13 MR. LODGE: I - - - I agree with completely. So
14 - - - so, I mean, one of the - - - one of the points and
15 one of - - - one of the things that I think illustrates our
16 position is the scaffolding. Scaffolding is one of the
17 things that's specifically mentioned as - - - as a
18 temporary work. Scaffolding can be equipment. The
19 exclusion applies to equipment, tools and equipment. And,
20 you know, I - - - I believe that - - - that - - -

21 JUDGE FAHEY: They - - - they argue in the brief
22 that scaffolding has - - - has never been excluded. That's
23 the way I read it.

24 MR. LODGE: The - - - I was just going to say
25 that. They - - - they agree to that. And what we're

1 saying is we're in the same category as them. You know,
2 the - - - the tower crane, the vast majority of it, is
3 basically a very large scaffold. It's - - - it's massive.
4 That's the - - -

5 JUDGE RIVERA: But - - - but isn't it - - - isn't
6 it referred to as heavy machinery in your contract with
7 Pinnacle?

8 MR. LODGE: But - - -

9 JUDGE RIVERA: I mean how is it - - - how is it
10 not fitting under this if you yourselves have signed off on
11 a contract that calls it machinery?

12 MR. LODGE: Because it also qualifies as a
13 temporary work, and the temporary works are not subject to
14 the exclusion.

15 JUDGE ABDUS-SALAAM: Why - - -

16 JUDGE FAHEY: The problem - - - oh, I'm sorry,
17 Judge. Go ahead.

18 JUDGE ABDUS-SALAAM: Why is it a temporary work?

19 MR. LODGE: It's - - - it's a temporary work
20 because it's - - - it checks all the boxes. So the - - -
21 one of the things that - - - that it needs to be, at least
22 from our perspective, our - - - our argument is that
23 because it's a temporary structure, that's one of the
24 things. It is included in the total project value.

25 JUDGE FAHEY: Okay. Let's - - - let's stop you

1 there.

2 MR. LODGE: And it - - -

3 JUDGE RIVERA: Isn't everything temporary that's
4 not the building that you're trying to build? Isn't
5 everything temporary that's not the building you're trying
6 to build? So what - - - what would this provision apply
7 to?

8 MR. LODGE: Well, it doesn't - - - it doesn't
9 refer to the - - - like the things I mentioned before, the
10 traditional tools. I mean this is - - - this is a
11 structure integrated into the building. It's different
12 than the things that typically - - -

13 JUDGE FAHEY: But - - - but to covered under
14 temporary works it has be included within total project
15 values.

16 MR. LODGE: Right.

17 JUDGE FAHEY: I understand that your argument is
18 that it's included within the cost for superstructure
19 concrete, I guess Pinnacle, and it's not - - - it's not a
20 specific line item, right?

21 MR. LODGE: It's - - - it's under a contract.
22 It's under the Pinnacle contract and within the Pinnacle
23 contract is the obligation to - - - to erect and operate
24 the tower crane.

25 JUDGE FAHEY: Cut to the chase, though. It's not

1 listed crane, under - - - under temporary works at any
2 point, right?

3 MR. LODGE: Under the definition of temporary
4 works in the policy, no, it does not list crane.

5 JUDGE FAHEY: So and you say it's covered in the
6 cost to Pinnacle under the eight-nine million as a
7 superstructure concrete costs. So that's why I asked you.
8 Assuming that's - - - and maybe your co-counsel can - - -
9 can raise this issue because it's the same issue to both of
10 you. When - - - it's include - - - if it's an - - - if
11 it's a question of fact as to whether or not that property
12 is covered, and that's why I say assuming it is, then we
13 get to the operation of the exclusion. And when we're
14 talking about the operation of the exclusion, my question
15 to everybody today is what's left after the exclusion
16 operates? What's covered under this policy? That's - - -
17 that's where I was going with it.

18 MR. LODGE: Right. And the tower crane is
19 covered.

20 JUDGE FAHEY: I see.

21 MR. LODGE: Is not excluded.

22 JUDGE FAHEY: Well, I - - - I don't know if I
23 agree with the argument, but I see what you're saying.
24 Okay. Thank you.

25 MR. LODGE: Okay.

1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MR. LODGE: Thank you.

3 CHIEF JUDGE DIFIORE: Mr. Lambert.

4 MR. LAMBERT: Richard Lambert for Extell West
5 57th Street. Every single item in the temporary works
6 coverage provision can be deemed to be contractor's
7 equipment. Okay.

8 JUDGE GARCIA: Counsel, could I stop you on
9 there? Just to follow up on something Judge Fahey was
10 saying about the - - - the value. Would it be your
11 position if the crane was completely destroyed in this
12 storm that you would be covered for that cost?

13 MR. LAMBERT: That is correct.

14 JUDGE GARCIA: And where - - - and do you know an
15 approximate value of this crane?

16 MR. LAMBERT: Well, accord - - - see the value of
17 the crane - - - if it got totally destroyed, there's a
18 separate provision in the policy for valuation which states
19 that the amount of the loss will be determined at the time
20 and the place of the loss. Whereas the total project value
21 is determined prior to the issuance of the policy because
22 it's the estimated construction costs, in total. It's a
23 three-page - - - three pages in the record of the estimated
24 construction costs, a laundry list of all of the items.
25 And it's 700 million dollars, and that becomes the amount

1 of the policy prior to the issuance.

2 JUDGE GARCIA: Right. But I think a key point
3 here is the value - - - obviously, is the value of this
4 crane included in total project value. That is, obviously,
5 a key question here. Because if it's in there, I think it
6 has to be a temporary work because it doesn't fall under
7 any of the other categories - - -

8 MR. LAMBERT: Right.

9 JUDGE GARCIA: - - - of total project value.
10 Wait. So what I'm wondering is your loss here is determine
11 from the record what you're claiming. It seems some to the
12 crane, some to the building. But total project value, to
13 me, including the crane, which seemed to me to cover - - -
14 and maybe this isn't relevant, but seemed to cover the loss
15 of the use of the crane or getting it back into operation.
16 And how would you then cover - - - let's say I don't know -
17 - - I have no idea how much this crane is worth to re - - -
18 to replace. But your view would be that that value, a
19 replacement value for this crane, is covered in the total
20 project value?

21 MR. LAMBERT: No. Total project value is the
22 estimated construction costs for the project. So the value
23 of the tower crane - - - were the construction costs of the
24 tower crane included in the total project value, the total
25 project construction costs? And it is because the

1 construction costs for the crane, which involved the
2 engineering design, the providing of all the parts and
3 materials, the labor to erect it, and the labor to
4 disassemble it, where all included in the eighty million
5 dollar Pinnacle contract, which is a package deal.

6 JUDGE STEIN: But to follow up on Judge Garcia's
7 question, then if there is - - - if you're making a claim
8 then why isn't that limited to loss of use versus if you
9 had included the entire value of the claim - - - of the
10 crane itself, then if the crane itself was destroyed then
11 you'd have coverage of the crane? Is - - -

12 MR. LAMBERT: No. There was no requirement to
13 put the replacement value of the crane into - - -

14 JUDGE STEIN: Why would an insurance company have
15 a policy in that way? So it - - - I mean I have no idea
16 what this crane is worth.

17 MR. LAMBERT: It covers - - -

18 JUDGE STEIN: So let's say it's worth hundreds of
19 millions of dollars, okay. Why would they cover its total
20 loss if that wasn't included in the - - - in the - - -

21 MR. LAMBERT: It's included in the total project
22 value which are the construction costs for the project.
23 The construct - - - for instance, the Pinnacle contract is
24 an eighty million dollar contract. It includes all kinds
25 of temporary works. It includes scaffolding, it includes

1 formwork, it includes two tower cranes.

2 JUDGE STEIN: But - - - but do you put in the - -
3 - the value of the scaffolding or just the cost to erect it
4 and bring it there and - - - and take it down when you're
5 done? Which is it? That's the question.

6 MR. LAMBERT: Well, all of that - - - all of
7 these temporary works are covered because the construction
8 costs for this work, scaffolding, formwork, tower crane,
9 were all included in the eighty million dollar - - -

10 JUDGE ABDUS-SALAAM: Who owns the crane, counsel?
11 Is it Pinnacle or do you own the crane? Who owns the
12 crane?

13 MR. LAMBERT: The crane is owned by someone that
14 it was leased from.

15 JUDGE FAHEY: Yeah. I thought you leased it for
16 79,000 a month or something like that.

17 MR. LAMBERT: Well, that - - - that was, you
18 know, the tower crane, that was a part of the tower crane
19 that sits on the top. But the temporary works coverage
20 provision doesn't say rented scaffolding, owned
21 scaffolding, leased scaffolding. Okay. You - - - you are
22 reading that into the temporary works coverage provision.
23 Scaffolding is covered whether it's rented, owned,
24 borrowed, or stolen.

25 JUDGE FAHEY: My - - - my question to your co - -

1 - co-counsel, and just to follow up on the other - - -
2 other judges' questions is - - - is the same. Assuming
3 that it's a question of fact as to whether or not the crane
4 was covered property and included within the total project
5 value, it is not explicit. You can argue - - - I think a
6 reasonable argument could be made that it's a question of
7 fact. So let's assume it is. So then we go to the
8 question of the exclusion and is the - - - has the
9 exclusion created an illusory contract by virtue of the
10 fact that it would eliminate everything that's supposedly
11 covered? In other words, you would have no benefit of your
12 - - -

13 MR. LAMBERT: Right.

14 JUDGE FAHEY: And it would - - - and your - - -
15 your response when you first came up was - - - was that
16 everything there could be characterized as a tool, so
17 therefore it's illusory.

18 MR. LAMBERT: So the temporary works coverage
19 provision would be illusory because the exclusion provision
20 would swallow that entire temporary works coverage - - -

21 JUDGE FAHEY: So your position is the formwork
22 wasn't covered? The shoring wasn't covered. None of the
23 scaffolding costs or erection or anything was covered?

24 MR. LAMBERT: It's all covered in temporary works
25 provision, and it's specifically covered in the temporary

1 works provision.

2 JUDGE FAHEY: I understand that.

3 MR. LAMBERT: And that specific - - -

4 JUDGE FAHEY: That's not my question, though. My
5 question is by operation of the exclusion, was that
6 coverage lost or were those things, in your mind, still
7 covered?

8 MR. LAMBERT: The exclusion provision does not
9 apply to those temporary works - - -

10 JUDGE FAHEY: So they were still covered.

11 MR. LAMBERT: Yes.

12 JUDGE FAHEY: Okay.

13 MR. LAMBERT: Because the exclusion provision, if
14 you apply it to all of those temporary works items, because
15 they are all - - - can be deemed contractor's equipment,
16 would render the temporary works provision of no force and
17 effect because all of them would be excluded. And at page 49
18 of defendant insurer's brief they acknowledge the fact that
19 all of the items in the temporary works provision are not
20 subject to the exclusion provision except for temporary
21 structures which makes no sense.

22 JUDGE FAHEY: I see. Thank you.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. LAMBERT: Thank you.

25 CHIEF JUDGE DIFIORE: Counsel.

1 MR. SILVERBERG: Thank you, Your Honors, Philip
2 Silverberg for the respondents. I'd like to just,
3 obviously, of course, address all of your questions. I'd
4 like to address a couple of comments that were made by - -
5 -

6 JUDGE RIVERA: Is - - - is your position what he
7 just said that temporary structures are excluded?

8 MR. SILVERBERG: Well, let's look at the
9 provision temporary works. And the policy defines what's a
10 temporary works, and it talks about scaff - - -

11 JUDGE RIVERA: Is the answer - - - is it yes or
12 no? And then you can - - -

13 MR. SILVERBERG: The answer is "temporary
14 buildings or structures including office and job site
15 trailers, all incidental to the project."

16 JUDGE STEIN: But assuming that we - - - we were
17 to find that this crane fits within that coverage provision
18 or at least that there's a question of fact to that. Just
19 assume that for a moment.

20 MR. SILVERBERG: Yes.

21 JUDGE STEIN: Okay. Then - - - then tell us what
22 you think the exclusion provision does to that coverage
23 provision.

24 MR. SILVERBERG: The exclusion provision - - -
25 and - - - and this is basically, you know, fundamental

1 insurance and contract case law. The exclusion takes away,
2 it's an exclusion - - - takes away certain things that are
3 granted in the coverage.

4 JUDGE STEIN: Does it take away all of those
5 things listed in the temporary works, scaffolding and
6 fencing and all of those things?

7 MR. SILVERBERG: No. It does not.

8 JUDGE FAHEY: Why?

9 MR. SILVERBERG: Provided that it meets the
10 criteria of what is a temporary works, and I recognize your
11 question is conditioned on my assuming - - -

12 JUDGE STEIN: Yes.

13 MR. SILVERBERG: - - - that the crane, that this
14 750 foot crane - - -

15 JUDGE FAHEY: And does it - - -

16 JUDGE STEIN: We're - - - we're trying to
17 determine if there's any distinction between those items,
18 assuming they're all part of temporary works, and - - - and
19 if there's anything left to any of those after the
20 temporary works.

21 MR. SILVERBERG: Yes, there is.

22 JUDGE STEIN: After the exclusion.

23 MR. SILVERBERG: And - - - and you even heard it
24 in answer from counsel. He talked about cement mixers, he
25 talked about tools, he talked about all these other things.

1 JUDGE FAHEY: Yeah. But - - - but that's - - -
2 of the items that were listed under the temporary works, is
3 anything left after the exclusion operates?

4 MR. SILVERBERG: Yes.

5 JUDGE FAHEY: What?

6 MR. SILVERBERG: Cement mixers, tools - - -

7 JUDGE RIVERA: But - - - but - - -

8 MR. SILVERBERG: - - - equipment.

9 JUDGE RIVERA: - - - the exclusion says tools.

10 MR. SILVERBERG: What?

11 JUDGE RIVERA: The exclusion says tools.

12 MR. SILVERBERG: No. He - - -

13 JUDGE RIVERA: Why isn't a cement mixer
14 machinery?

15 MR. SILVERBERG: I - - - I think - - -

16 JUDGE RIVERA: Why isn't it equipment?

17 MR. SILVERBERG: I think it is machinery, but if
18 you go back to the temporary works provision, it enumerates
19 very specific things. It talks about scaffolding, it talks
20 about formwork, and then it talks about office and job site
21 trailers. And - - -

22 JUDGE STEIN: I thought your argument was that
23 because scaffolding and those other things were
24 specifically listed - - -

25 MR. SILVERBERG: That's exactly right.

1 JUDGE STEIN: - - - they don't fall within the
2 exclusion, but because that provision doesn't say crane
3 that does fall within the exclusion.

4 MR. SILVERBERG: That - - - that's correct.

5 JUDGE STEIN: Is that your argument?

6 MR. SILVERBERG: And I'm sorry if I - - - if I
7 misstated it. What - - - and the only - - - the only
8 comment about temporary buildings and structures in the
9 temporary works definition says "including office and job
10 site trailers, all incidental." So the including - - -

11 JUDGE RIVERA: So - - - I'm sorry. So then your
12 position is if something, let's just use the word thing
13 now, excuse me for the moment, is a temporary structure and
14 a - - - machinery, it's excluded? Is that a yes or a no?
15 That's all it takes here.

16 MR. SILVERBERG: I would say that's a yes.

17 JUDGE RIVERA: Okay. So then your position,
18 though, is that there are other things that don't fit under
19 the exclusion that are temporary structures. That may not
20 already be listed, correct?

21 MR. SILVERBERG: That's correct.

22 JUDGE RIVERA: Okay.

23 MR. SILVERBERG: Yes. That's - - - that's
24 correct, and I believe that. At least I hope that's what
25 came - - - came across in our briefing. Now - - -

1 JUDGE FAHEY: So - - - so we're not - - - we're
2 not leaving this point yet. So - - -

3 MR. SILVERBERG: Sure.

4 JUDGE FAHEY: So - - - so scaffolding, shoring,
5 formwork, falsework those are all still covered under your
6 interpretation of the contract even after the exclusion
7 operates?

8 MR. SILVERBERG: Yes, Your Honor.

9 JUDGE FAHEY: Okay.

10 MR. SILVERBERG: Yes, they are. Provided that
11 they - - -

12 JUDGE ABDUS-SALAAM: So you disagree with your
13 adversary that that - - - those - - - all of those things
14 that are listed under temporary works could also be
15 considered equipment?

16 MR. SILVERBERG: I would - - - I don't think that
17 they would be considered equipment, but again, the point is
18 is that these are specifically enumerated in the temporary
19 works provision definition. It defines what is a temporary
20 work, which also includes office and job site trailers and
21 - - - and items of that ilk. This crane is something very,
22 very different, and there's a couple of points I'd like to
23 make. There are a lot of questions about the value of the
24 crane itself. And even the dissent, which - - - which went
25 out of its way to say, you know, they disagreed with - - -

1 with the insurers here, and we disagree with that part of
2 the dissent.

3 But what the dissent did say is we would not
4 grant summary judgment because we have know if the value of
5 the crane itself was in the policy because as it says in
6 the temporary works provision "total project value." We
7 haven't gotten a straight answer. I - - - what I can say
8 it the value of the crane itself is not listed. It's not
9 part of the project value. Yes, there's a 77,000-dollar-a-
10 month lease. Yes, there may have been labor costs to erect
11 this crane. The value of the crane itself, it's owned by a
12 third party. It's leased to a subcontractor who then works
13 on the project.

14 JUDGE STEIN: If they're not - - - if they're not
15 seeking a claim for the value of the crane itself, their
16 claim is for the loss of use, maybe some damage that
17 prevented it for using the crane for a period of time,
18 delaying the project, all that. If that's their claim why
19 wouldn't that be covered if those costs are included in the
20 contract?

21 MR. SILVERBERG: Because this is the first-party
22 property policy. We insure the property itself. This
23 piece of property is not insured under this policy. It is
24 insured under another policy. It's not insured under this
25 policy.

1 JUDGE ABDUS-SALAAM: This piece of property being
2 the crane?

3 MR. SILVERBERG: The crane is the piece of
4 property that's not insured here. We say it's not insured.
5 It's - - -

6 JUDGE ABDUS-SALAAM: Or is it Pinnacle has
7 insurance on the crane?

8 MR. SILVERBERG: Yes. Now also, I think it's
9 worth noting and we mentioned in - - - in our briefing that
10 the insured, Extell, did have an opportunity to endorse
11 onto this policy the tower crane. And that - - - that
12 endorsement is record 825 - 826. It's blank. They didn't
13 list it. If this was such an important part of the project
14 that they wanted to insure, they - - - they could have
15 chosen to insure it. They did not.

16 There was also, I think, a very early question
17 about whether or not the tower crane - - - crane was
18 equipment. And while we point it in our brief and just the
19 record cite would be 602, the crane is referred to as
20 equipment in the sublease itself. There's no question that
21 this crane is a - - - is a massive piece of equipment.
22 Going back, and I recognize that - - - that some of the
23 questions here today have asked me to assume that it is a
24 temporary works, I don't think a fair reading of this
25 entire contract gets you to find that this crane falls

1 within the definition of temporary works when you look at
2 what's listed and when you look at what modifies buildings
3 or structures, including office and job site trailers, this
4 crane is nothing like that. As - - - and it's - - - it's
5 well documented in the record and in the briefing. It's
6 750 feet. They had to build a platform for it. This is a
7 massive structure. This is not the type of item, short of
8 a separate endorsement, where it would be insured under the
9 - - - under this type of builder's risk policy. Also, one
10 of the things where I think was really - - -

11 JUDGE RIVERA: Well, just to clarify.

12 MR. SILVERBERG: Sure.

13 JUDGE RIVERA: Are the - - - the items that are
14 specifically listed, scaffolding, so forth, excuse my
15 ignorance, are any of them attached to the building you're
16 trying to build or that they're trying to build?

17 MR. SILVERBERG: I - - - I believe temporarily
18 they would be. Sure.

19 JUDGE RIVERA: Physically attached and could not
20 work but for being attached, or would not be used but for
21 being attached?

22 MR. SILVERBERG: I - - -

23 JUDGE RIVERA: Like the crane, right? The
24 crane's got to be attached.

25 MR. SILVERBERG: Well, it - - - you know, it's

1 not - - - you know, I get - - - sure, someone wants to say
2 attached in one form or another, and I'm not quite a
3 construction expert, although I dabble in it a little bit
4 in my - - - in my legal life. For the most part, not - - -
5 certainly not attached where this was built into the
6 building at some point and then, of course, taken out and -
7 - - and unassembled. I'm talking about the crane itself.
8 Whether or not scaffolding is physically attached for - - -
9 for a part of the time while the building's going up, it
10 may be. I don't - - - I don't specifically know the answer
11 to that question.

12 But I will say in - - - in the dissent,
13 essentially, it - - - the phrase "all incidental to the
14 project," and we say that the crane is something very
15 different than scaffolding, very different than a job site
16 trailer or some - - - or any of these other items, it was
17 not just incidental. And I know that there is a lot of
18 back-and-forth between the majority and the dissent on
19 this. But to accept the dissent's treatment of that phrase
20 is essentially to - - - to wipe that phrase out because
21 essentially, everything that's temporary would - - - would
22 not be incidental. They're - - - they're reading that
23 phrase out of it and they - - - and they basically create a
24 superfluous term here. That's not what the majority did,
25 and that's certainly black letter of contract instruction.

1 JUDGE RIVERA: You say incidental only applies to
2 the temporary buildings or structures?

3 MR. SILVERBERG: Right. And it would not apply -
4 - -

5 JUDGE RIVERA: So what's the point of the - - -

6 MR. SILVERBERG: In other words, the crane is not
7 something incidental.

8 JUDGE RIVERA: Yes. What's the point of the word
9 "all" as opposed to saying which are, that are?

10 MR. SILVERBERG: I - - - because I believe it
11 modifies including office and job site trailers, all
12 incidental.

13 JUDGE RIVERA: I'm saying but why wouldn't it
14 have been clear to have said that are, which are? Doesn't
15 all suggest that perhaps it applies and modifies more than
16 what you say it does?

17 MR. SILVERBERG: But then - - - but then what
18 would - - - what would be the purpose of that phrase at all
19 if everything that's not a permanent part of the project
20 becomes a temporary work? Everything? And I - - - and
21 that would render that a superfluous term. And I - - - I
22 believe that was the point of the major - - - majority. I
23 know it's my point here, and I believe that's' where the
24 dissent got it wrong. I see - - -

25 JUDGE GARCIA: Thank you, counsel.

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MR. SILVERBERG: Thank you
(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. Zurich American Insurance Company, No. 11 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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