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COURT OF APPEALS

STATE OF NEW YORK

RUISECH,

Appellant,

-against-

NO. 104

STRUCTURE TONE INC.,

Respondent.

20 Eagle Street
Albany, New York
October 15, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Ruisech v. Structure Tone.

2 MR. LAVELLE: Good afternoon, Your Honors. May
3 it please the court. My name is John Lavelle. I'm here
4 today on behalf of the appellants. I would like to reserve
5 two minutes at the end for rebuttal, if necessary.

6 CHIEF JUDGE WILSON: Yes.

7 MR. LAVELLE: There are two major issues before
8 the court here. The first would be the timeliness of the
9 petition for leave to appeal. The second is more of a
10 labor law issue with regard to whether or not what caused
11 the plaintiff to fall was a - - - something that's integral
12 to the work.

13 So I'd like to discuss the timeliness issue.
14 First. There is an inconsistency between the First and
15 Second Department with regard to NYSEF docking of notices
16 of entry. In the Second Department, you can docket an
17 appellate decision with the notice of entry on NYSEF
18 directly. In the First Department, appellate decisions
19 with notices of entry are actually filed on the trial
20 docket NYSEF is - - -

21 JUDGE SINGAS: Counselor, is your position that
22 you didn't receive notice. There may be an inconsistency,
23 but I was looking through your papers, and is your position
24 that you didn't know - - - you didn't receive notice, or
25 just that it's maybe unfair the way - - -

1 MR. LAVELLE: The position is more the second,
2 Your Honor, more that it's unfair that the idea of a notice
3 of entry - - - and before a NYSEF, you get something in the
4 mail, so you have a document come in the mail, you open you
5 up and say, okay, you know, this - - - we've got to figure
6 this out.

7 In this instance, you have an appellate motion,
8 an appellate - - - the full briefing schedule, an appellate
9 decision. That decision ends up in the trial court docket.
10 And your remedy is to go back to the appellate court and
11 then eventually to the Court of Appeals. So it's our
12 position that that structure is inconsistent and
13 insufficient as it's constituted.

14 JUDGE CANNATARO: And what - - - how - - - what's
15 our ability to remedy that? Because it sounds like you
16 have some sort of - - - I don't know what - - - if I want
17 to call it a policy complaint or a mode of business
18 complaint about the way these notices of entry are served.
19 What's our power to help you?

20 MR. LAVELLE: So I believe it's an implementation
21 of the system. In other words, at some point in the First
22 Department, their dropdown menus, that option was removed.
23 And that creates an inconsistency within department. So I
24 do believe it's within the discretion of this court to
25 enforce consistency between the departments to lead to

1 consistent results.

2 CHIEF JUDGE WILSON: What is it that would allow
3 electronic service of the notice of entry for appeals to
4 the Court of Appeals?

5 MR. LAVELLE: There's a separate system for the
6 Court of Appeals. So - - -

7 CHIEF JUDGE WILSON: No, I'm sorry. What's the
8 stat - - - so when I look at the CPLR, I think it's
9 2103(7), it authorizes electronic service pursuant to the
10 rules of the chief administrator of the courts - - -

11 MR. LAVELLE: Yes.

12 CHIEF JUDGE WILSON: - - - for the trial courts.
13 That is, if you look at the - - - if you look at the
14 statute that authorizes the chief administrator, his
15 authority is limited to - - - it actually is only limited
16 to certain of the trial courts at the moment. And there's
17 pending legislation to expand that to all the trial courts.
18 But it's to the trial courts. So I'm not sure that it's
19 through 2103 that you can get any authority as to the
20 effectiveness of electronic service as regards to the Court
21 of Appeals.

22 MR. LAVELLE: So my response to that would be,
23 nonetheless, there - - - each of the four departments do
24 have a system under - - -

25 CHIEF JUDGE WILSON: Correct. Because - - -



1 because 2103 also starts by saying, unless otherwise
2 authorized by law or court order. And there is an order
3 from the four appellate divisions - - - joint order - - -
4 authorizing electronic service as to them.

5 MR. LAVELLE: Okay.

6 CHIEF JUDGE WILSON: But we don't have an order
7 like that yet.

8 MR. LAVELLE: Okay.

9 CHIEF JUDGE WILSON: So what is it that is the
10 statutory basis to conclude that the electronic service,
11 whether it's in the court of instance or it's in the Second
12 Department, you know, whichever it is, is effective as
13 regards our timing requirements?

14 MR. LAVELLE: Because what I would say, Your
15 Honor, is the - - - the purpose of that notice of entry is
16 to apprise the person, not only of the order, but in the
17 court that it's in. And by setting it up, the way it's
18 structured, it creates an incongruity for litigants that I
19 believe is unfair and should be remedied by this court.

20 CHIEF JUDGE WILSON: Well, I understand that.
21 I'm not sure you're answering my question, which is - - -

22 MR. LAVELLE: I'm doing my best, Your Honor.

23 CHIEF JUDGE WILSON: - - - it used to - - - I
24 appreciate that. You did say that it used to be you got
25 some paper?

1 MR. LAVELLE: Yes.

2 CHIEF JUDGE WILSON: Right?

3 MR. LAVELLE: Correct.

4 CHIEF JUDGE WILSON: So what is it that you
5 think, if you do think, changed that as regards to the
6 Court of Appeals?

7 MR. LAVELLE: Well, one - - -

8 CHIEF JUDGE WILSON: Why shouldn't - - - why
9 shouldn't you still be getting paper? What changed?

10 MR. LAVELLE: I don't believe you should, Your
11 Honor. So what - - - so when NYSIF first came out, you'd
12 still be getting papers, and it was very confusing as to
13 when the clock started.

14 CHIEF JUDGE WILSON: Uh-huh.

15 MR. LAVELLE: Was it NYSEF time? Was it mailing?
16 And those - - - those things became confusing. But what's
17 happened, especially since COVID, as a practical litigation
18 matter, is people filings of NYSEF that the mailings have
19 pretty much stopped. So my point on this issue is because
20 it's an appellate order, an appellate motion, an appellate
21 decision, if you're going to channel it through NYSEF, it
22 should be channeled through the appellate NYSIF site as
23 opposed to the trial court.

24 JUDGE HALLIGAN: So the - - -

25 JUDGE CANNATARO: Well, you have no underlying



1 problem with this court accepting NYSEF-based service of
2 notices of entries. Is that - - - you're not disputing
3 that?

4 MR. LAVELLE: I'm not disputing that, no.

5 JUDGE HALLIGAN: So the practice in terms of
6 abandoning mail is just because that has happened, not
7 because of any change in the rules?

8 MR. LAVELLE: That's my understanding, Your
9 Honor. And I admittedly could be wrong on that issue, but
10 I mean, this is what I do all day, every day, and it
11 started with COVID, and it just is pretty much vanished.
12 Everything from BPs to other documents as well, used to get
13 motions this thick, and then that was eliminated,
14 especially during COVID. Even, you know, working copies
15 were eliminated by court rules as well.

16 So - - - and if there's anything else in the
17 issue, I'd like to move to the second issue. So this whole
18 integral to the work issue. So what you have here is there
19 are channels dug out and there are these large glass
20 petitions, 500-pound pieces of glass, and the channels are
21 dug out first, and then the panels are moved by the
22 workers. So it's not in the - - - what they called spoils
23 or the debris of the channel digging is not integral to the
24 work. That's debris, and it should be debris.

25 JUDGE GARCIA: So if you tripped over the

1 channel, that would be different, right?

2 MR. LAVELLE: Of course. There's the famous case
3 - - - there's an electrical conduit. It's part of the
4 structure, trips over that. Okay. That's integral to the
5 work. But in this instance it's a failure to maintain
6 cleanliness at the site. And there was - - - there were
7 multiple layers here. So the 241(6) claim with the
8 industrial code sections. And then there were the 200
9 claims which follow a general negligence structure, and
10 it's our position that the respondents did not meet their
11 burden of proving that there was no constructive notice of
12 them because they couldn't come up with anything. They
13 couldn't - - - they said there were inspections. They
14 couldn't say when they were last there. They couldn't say
15 when they had last been the area. There's no written
16 document - - - there's no documentation. And in this case,
17 for a summary judgment motion, the burden rests with them
18 initially and then comes back to us, and they never shifted
19 that burden.

20 JUDGE HALLIGAN: On the 200 negligence issue, do
21 you think this is better looked at as a dangerous condition
22 or manner of work?

23 MR. LAVELLE: Dangerous condition.

24 JUDGE HALLIGAN: And why is that?

25 MR. LAVELLE: Because it's debris left on the



1 ground, which is slippery condition. And it's not really a
2 matter of work issue. It's a matter of their - - - they
3 have to dig out these channels and there has to be certain
4 debris from that. It's not the manner in which way they're
5 doing it, it's the fact they fail to clean it after the
6 channels were dug out.

7 JUDGE HALLIGAN: And so the failure to clean it
8 properly is not a manner of work?

9 MR. LAVELLE: Correct.

10 If no further questions.

11 CHIEF JUDGE WILSON: No. Thank you.

12 MR. LAVELLE: Thank you.

13 MS. SNYDER: All right. Good afternoon. May it
14 please the court. Allison Snyder, with Barry McTiernan &
15 Moore for defendant, Structure Tone. We're also - - - we
16 also have - - - we're a move in - - - we have a motion to
17 dismiss on the grounds of jurisdiction.

18 And just to address the issue of exactly what the
19 basis is, as the court had requested, that the parties
20 brief the issue of what starts the time of whether
21 electronic service through NYSEF actually starts the time
22 for leave to appeal. The basis for that is literally found
23 in CPLR 5513(b). It says you compute the time from the
24 date of service of the notice of the order being appealed
25 with notice of entry. And in this particular case, there's

1 no dispute that it's in - - - it was a mandatory e-filing
2 case. The chief - - - the chief of the court said that for
3 cases in New York County beginning in 2012, that that - - -
4 that those are mandatory e-filed cases. And if you look at
5 the uniform rules, it specifically says that all - - - that
6 for the filing and service of all documents in an action
7 that's e-filed, that it has to be served by electronic
8 means, and the electronic means is specifically stated, is
9 literally just filing on the NYSEF site.

10 Now, I understand that there may be some issues
11 with some discrepancy between - - - actually, the First
12 Department is the outlier. It's the Second, Third and
13 Fourth Departments that do allow you to go ahead and serve
14 notice of - - - or file notice of entry on that particular
15 docket. But that doesn't really matter. The rules
16 specifically say that as long as you file on the NYSEF site
17 - - - oh, actually - - -

18 JUDGE TROUTMAN: Because you could still - - - in
19 the other departments, you could file an either/or?

20 MS. SNYDER: Well, I - - - it's true, you - - -
21 it would be your preference, but I imagine that - - -

22 JUDGE TROUTMAN: So if the First Department
23 changed their rule, here, they wouldn't allow it. But if
24 they changed the rule, it would just allow it to be filed
25 in both, right?

1 MS. SNYDER: Right. And it's - - - to be honest,
2 it's - - - it's - - - I imagine it's just a matter of
3 convenience. If you're appellate counsel, if you know that
4 there's some discrepancy out there that the legislature
5 doesn't see fit to change, then it's a very easy fix. When
6 you're appellate counsel, you just appear in both the
7 underlying action and the appellate division action, and
8 you'll get - - - you'll get a notice.

9 The one thing I just wanted to clarify, and I - -
10 - I apologize, I noticed as I went through my brief that I
11 was very consistent in mis-citing the uniform rule that
12 deals with notice of entry. It's 202.5-B(h)(2). And that
13 specifically says that if you want to serve notice of entry
14 that you - - - you file it with the NYSEF site, and that
15 shall constitute service by the filer.

16 And the one thing I just wanted to also clarify
17 is that if you would go ahead and try and serve by other
18 means, it doesn't - - - it doesn't affect the effectiveness
19 of the service by electronic means. And the - - - there -
20 - -

21 JUDGE CANNATARO: What would have happened if you
22 tried to file a notice of entry in this case on the
23 appellate division docket?

24 MS. SNYDER: Well, we already know, with the - -
25 - with the first appeal, when the First - - - First

1 Department granted the defendant's appeal and dismissed the
2 complaint, we went ahead and tried to do that, and the
3 clerk rejected it, sent an email saying, we do things
4 differently in the First Department. You go ahead - - -
5 you're good to go ahead and file that in the - - - before
6 the court of original jurisdiction, which we did.

7 JUDGE CANNATARO: And would your argument be that
8 that's the motivating rationale behind the - - - your
9 argument that filing on NYSEF is filing on NYSEF; it
10 doesn't matter which docket you're filing on?

11 MS. SNYDER: Exactly. And the one thing I also
12 wanted to say is that - - - is that the court specifically
13 - - - or the rules specifically - - - the uniform rules
14 specifically say that the county clerks are unable to
15 accept papers - - - paper copies of any documents that in
16 an - - - in an electronically - - - in a mandatory filing
17 case, they are unable to accept copies - - - paper copies
18 of any document that must be filed by electronic means.
19 And I just want to - - -

20 JUDGE CANNATARO: So had you served notice of
21 entry by mail in this case, which is a mandatory e-file
22 case, right?

23 MS. SNYDER: Yes.

24 JUDGE CANNATARO: That would have been not
25 accepted and potentially ineffective service?



1 MS. SNYDER: Well, I actually think that - - -
2 no, I think that it would just be - - - the plaintiff would
3 have an additional five days, I - - - I believe. Well,
4 actually, I'm sorry, I take that back. I think you would
5 have to do it by electronic means - - -

6 JUDGE CANNATARO: Would a clerk take it? Is
7 there a clerk somewhere - - - in a mandatory e file case,
8 if you tried to file the notice of entry done by mail,
9 would there be a clerk who would take it?

10 MS. SNYDER: Well, I think you can go ahead and
11 serve by whatever means you want. It's just what you do
12 with your proof of service. And the rules specifically say
13 that if you e-file and you also serve by mail, you don't
14 get the benefit of the extra five days, you're - - - you're
15 confined to the five day - - - you know - - - or if you
16 then file proof of service - - - if you e-file proof of
17 service, you know, that doesn't start your time running.
18 So you can serve by whatever means you want. But I believe
19 in a - - - I'm sorry, I believe in an e-file case, because
20 the rules specifically say it has to be - - - all filings
21 have to be - - - filing and service of all documents must -
22 - - shall be by electronic means, the only effective way of
23 doing it is by e-filing. If you then do something
24 additional and try and file a paper copy, the clerk
25 literally cannot accept it.

1 And I noticed that in the court's general rules
2 it says that, you know, you don't have to serve notice of
3 entry. Just if you have an order, it's effective on the
4 date that it's issued. But if you want to go ahead and you
5 know, file proof of service by some other means, it has to
6 be in the court of original jurisdiction. And in an e-file
7 case, the only way you're ever going to file that - - -
8 that proof of service is literally by filing on NYSEF,
9 whether that's - - - I guess - - - I don't know why you
10 would want it to go ahead and do that proof of service in
11 an appellate division - - - but if you want to, I guess
12 they would take - - - they would take it.

13 But under 5513(b), it's clear that if the date
14 for computing the time of service starts with notice of
15 entry, and in an e-file case, you have to serve it by e-
16 filing, then the time automatically commences. There's no
17 other way that you can do it.

18 And the basis for our motion to dismiss was not
19 only to raise that jurisdictional issue and make sure that
20 - - - the plaintiff was taking the position that this - - -
21 that the court had waived any issue over the jurisdiction,
22 but also that the plaintiff failed to actually cite the
23 date when he served his papers. And that's obviously
24 essential for determining timeliness.

25 I found one single mention in the plaintiff's



1 papers that he had served his - - - his motion on December
2 23rd, and that's the 31st day. If you go ahead and - - -
3 if we - - - if we serve notice of entry on eleven - - - on
4 November 22nd, and - - - so you begin to start counting on
5 November 23rd. The 30th day is December 22nd, and the
6 plaintiff was one day late. And that's just something that
7 he fails to mention over and over again in his brief in
8 terms of timeliness.

9 And I - - - I'll go ahead and leave the labor law
10 issues to my colleagues.

11 CHIEF JUDGE WILSON: Thank you.

12 MS. SNYDER: Thank you.

13 MR. JOHNSON: Good evening, Your Honors. This is
14 C. Briggs Johnson, for CBRE. You know, I just wanted to
15 highlight that regarding the notice of entry filed by one
16 party, that starts the clock as to all parties, right?
17 Because when the legislature amended CPLR 5513, it said
18 specifically that it provides for the commencement of time
19 to appeal is running from the time of service - - -

20 JUDGE TROUTMAN: So it's not party - - -
21 bipartisan; it's party by party?

22 MR. JOHNSON: No. It's a party.

23 JUDGE TROUTMAN: So are - - - you're saying
24 everybody gets benefit - - -

25 MR. JOHNSON: From Structure Tones notice of



1 entry. That's correct. And as the Second Department said
2 in the Rogowski Farm case, you know, when - - - the - - -
3 when you look at the statutory text and you're interpreting
4 the statute the clearest intent of what the legislature
5 wanted to say is in the statutory text, and it says time to
6 appeal is running from service of order with written notice
7 of entry - - -

8 JUDGE TROUTMAN: What about Rotenberg?

9 MR. JOHNSON: Excuse me?

10 JUDGE TROUTMAN: Rotenberg, 91 N.Y.2d 932, with
11 respect to party-by-party approach by this court.

12 MR. JOHNSON: Is - - - what - - - what date is
13 that decision, Your Honor? I'm sorry.

14 JUDGE CANNATARO: It's 1997.

15 MR. JOHNSON: 1997. I don't know specifically
16 when CPLR 5513 was amended to be honest. And I think
17 that's probably the crucial distinction, because when you
18 say a party, it's not limited to the party serving the
19 notice of entry, or a different party, or the party that's
20 looking to get the benefit of the notice entry. A party is
21 necessarily unlimited, so it would apply to any party. And
22 you know, just as a - - - just as a - - - I guess from a
23 standpoint of confusion and burden, right, if - - - if you
24 have a complicated case with thirty-five parties, and it's
25 a single order, and all twenty parties filed a notice of

1 entry on different days, you're creating a little bit of
2 chaos because what notice of entry applies to me? Do I
3 have to do the notice of entry - - - my notice of appeal to
4 their notice of entry, or my other adversaries notice of
5 entry, or the other twenty-three notices of entry? And you
6 know, you get a little bit of confusion regarding which one
7 might apply to you, but it's a single order. So I think -
8 - -

9 JUDGE CANNATARO: The CPLR was amended in '97 as
10 well, wasn't it?

11 MR. JOHNSON: 553?

12 JUDGE CANNATARO: 5513.

13 MR. JOHNSON: 13?

14 JUDGE CANNATARO: Yeah.

15 MR. JOHNSON: So I don't - - - I don't know if
16 that decision predates - - -

17 JUDGE SINGAS: Rotenberg came after the amend - -
18 -

19 MR. JOHNSON: Rotenberg came after.

20 JUDGE SINGAS: Yeah. Where this court said that
21 even after the 1997 amendment requiring analysis about
22 whether the plaintiff's motion to appeal was timely, was
23 based on each defendant.

24 MR. JOHNSON: Okay. So I understand, I guess,
25 where you're going with that. So I'm going to turn to the

1 Labor Law 241(6) case.

2 JUDGE RIVERA: Perhaps we could go to the labor
3 law issues.

4 MR. JOHNSON: Yes. Yes.

5 JUDGE RIVERA: Very good.

6 MR. JOHNSON: So - - - so Your Honor, it - - -
7 it's undisputed on this record that plaintiff's coworkers
8 created the incidental concrete debris, but it's the dust.
9 It's particles. It's granulates. Right. And it's
10 undisputed that they needed to dig the channels, and that
11 it was an inherent and unavoidable byproduct of the ongoing
12 work. Right. And that from - - - and - - - and we - - -
13 there's a legion of cases from the First, Second, Third and
14 Fourth Department that say when your jackhammering a
15 sidewalk or when you're doing demolition work, if - - -

16 JUDGE RIVERA: So then what - - - where do you
17 draw the distinction between what you're calling this
18 integral to work particulate matter versus debris that has
19 to be cleared off? Where would you draw that line for the
20 rule?

21 MR. JOHNSON: So can you - - - can you repeat the
22 question again?

23 JUDGE RIVERA: Well, I'm - - - if you're arguing
24 this is integral to the work - - -

25 MR. JOHNSON: Right.



1 JUDGE RIVERA: - - - because it's created in the
2 process.

3 MR. JOHNSON: Right.

4 JUDGE RIVERA: So I assume, though, at some
5 point, you agree there is something that would be debris
6 that doesn't fit that definition, so I'm trying to figure
7 out where you draw that line.

8 MR. JOHNSON: Well, yeah, Your Honor, and I - - -
9 and I think - - - I think, you know, that that's a good
10 point. I think the line has to be drawn, and I think it
11 has been drawn a little bit in some of the Appellate
12 Division decisions. You know, if - - - if the - - - if - -
13 - let's say that a contractor - - - a subcontractor is
14 jackhammering a sidewalk, right.

15 JUDGE RIVERA: Uh-huh.

16 MR. JOHNSON: And that debris is - - - there's
17 little part - - - there's big chunks on the ground. Right.
18 And then another electrical subcontractor comes in, his
19 work is unrelated to that - - -

20 JUDGE RIVERA: Uh-huh.

21 MR. JOHNSON: - - - and he comes a day later.
22 Right. Not only did that contractor have time to remove
23 the debris, but it's unrelated to his work, right?

24 JUDGE RIVERA: Uh-huh.

25 MR. JOHNSON: What we're talking about here is a

1 foreman, an experienced construction worker whose coworkers
2 are creating, right, that debris in real time because they
3 need to put the glass into the channels.

4 JUDGE CANNATARO: And when are - - - when are
5 they coming in to do the glass - - -

6 MR. JOHNSON: Excuse me?

7 JUDGE CANNATARO: - - - relative to when the
8 channel - - - because my thinking on this is you've got
9 different trades, right?

10 MR. JOHNSON: Right.

11 JUDGE CANNATARO: You've got the - - - the
12 channel digging trade - - -

13 MR. JOHNSON: Right.

14 JUDGE CANNATARO: - - - which uses jackhammers or
15 whatever they use.

16 MR. JOHNSON: Right.

17 JUDGE CANNATARO: And then the glazier trade that
18 comes in and installs the glass. So I mean, that could be
19 one potential answer to the question you were just asked.

20 MR. JOHNSON: Sure.

21 JUDGE CANNATARO: That's the demarcation between
22 inherent in the work and just general debris.

23 MR. JOHNSON: It can be.

24 JUDGE CANNATARO: Could be.

25 MR. JOHNSON: It could be.

1 JUDGE CANNATARO: I'm sure you think it's not,
2 but it could be.

3 MR. JOHNSON: Of course. Of course.

4 JUDGE CANNATARO: So my only question is, what's
5 the time gap between when one trade stopped their work and
6 the other - - - the glaziers came in to do the glass?

7 MR. JOHNSON: So - - -

8 JUDGE CANNATARO: Is it a day a week?

9 MR. JOHNSON: So in this case - - -

10 JUDGE CANNATARO: An hour?

11 MR. JOHNSON: - - - plaintiff's employer created
12 the channels. That - - - that's his employer's work.
13 That's his coworker's work.

14 JUDGE CANNATARO: Yeah, but it's a different
15 trade.

16 MR. JOHNSON: No, it's the same trade. It's - -
17 - it's his employer. He - - - him and his coworkers are
18 creating the channels and the glass - - -

19 JUDGE CANNATARO: The same people who installed
20 the glass dug out the - - -

21 MR. JOHNSON: Yes. Yes.

22 JUDGE CANNATARO: - - - the - - - the channels.

23 MR. JOHNSON: Yes. Yes. Yes.

24 JUDGE CANNATARO: That's what the record
25 reflects?

1 MR. JOHNSON: That's what the record says.

2 JUDGE GARCIA: But say they dug the channels one
3 day, and they leave all this all over the floor, and the
4 next day they come in with the glass.

5 MR. JOHNSON: Yes.

6 JUDGE GARCIA: Same case, same result?

7 MR. JOHNSON: I'm going to say it is, but I'm
8 also going to fall - - -

9 JUDGE GARCIA: Well, why don't we say what - - -
10 like, answer my question - - -

11 MR. JOHNSON: Right. So point 2B - - - point 2B
12 of my brief, right, is this is an ongoing construction
13 project, and they're - - -

14 JUDGE GARCIA: Yeah. But let's say in my - - -

15 MR. JOHNSON: Yeah.

16 JUDGE GARCIA: - - - hypothetical - - -

17 MR. JOHNSON: Right.

18 JUDGE GARCIA: - - - they dig the channel one day
19 - - -

20 MR. JOHNSON: Right.

21 JUDGE GARCIA: - - - everything stays on the
22 floor. The glaziers - - - the people carrying the glass
23 come in the next day, and they left that on the floor.

24 MR. JOHNSON: I think it's still integral to the
25 work, because plaintiff's own testimony on this record

1 shows that these particles were so small that he could not
2 see them. We're talking about dust. We're talking about
3 very, very, very tiny particles. And when you have a
4 construction project that's ongoing - - -

5 CHIEF JUDGE WILSON: Size - - - what does the
6 size of the particle - - - how does that bear on whether
7 it's integral to the work or not?

8 MR. JOHNSON: Because if you can't see them and
9 if a broom can't catch them, right. If - - - and if the
10 work is still going on - - -

11 JUDGE TROUTMAN: What about a vacuum?

12 MR. JOHNSON: Excuse me?

13 JUDGE TROUTMAN: A vacuum?

14 MR. JOHNSON: Yes. Well, perhaps a vacuum might
15 be able - - -

16 JUDGE HALLIGAN: That might make you not
17 negligent.

18 MR. JOHNSON: Right.

19 JUDGE HALLIGAN: Or you might argue that.

20 MR. JOHNSON: Right.

21 JUDGE HALLIGAN: But how does that make it not
22 integral to the work?

23 MR. JOHNSON: I'm sorry. Say the question again.

24 JUDGE HALLIGAN: If you can't see them - - -

25 MR. JOHNSON: Right.



1 JUDGE HALLIGAN: - - - right, perhaps you have an
2 argument that you are not negligent - - -

3 MR. JOHNSON: Right.

4 JUDGE HALLIGAN: - - - for vacuuming them up. My
5 guess is your adversary would say something different to
6 that.

7 MR. JOHNSON: Right. Right.

8 JUDGE HALLIGAN: But how does the size bear on
9 whether it's integral to the work or not?

10 MR. JOHNSON: I - - - I understand your point,
11 but I think - - - I think - - - I think to answer your
12 question, I think I'm going to turn to the - - - I - - -
13 and I think we're talking about 1.7(d) of the industrial
14 code at this point. Right. Because - - - because the - -
15 - and - - - or excuse me, I think I'm kind of jumping ahead
16 of your question. So I think it's integral to the work
17 because it's - - - it's an inherent and necessary byproduct
18 of the unknown work - - -

19 JUDGE HALLIGAN: Yeah, but that doesn't seem to
20 bear on the size, right?

21 MR. JOHNSON: Sure. That's fine. That - - - and
22 I understand that. Right. Because when you're
23 jackhammering a sidewalk and the debris is huge, you know,
24 the courts have said that's inherent byproduct of the work
25 too - - -

1 JUDGE HALLIGAN: And if it was left - - - to
2 return to Judge Garcia's question - - - if it was left for
3 a week, would that make any difference?

4 MR. JOHNSON: I think there is case law from the
5 Appellate Division, right, where - - - where - - - let's
6 say there's debris around for three months. Right. You
7 leave a piece of plywood, or you have rocks there for four
8 months. You can't say that's integral to the work, right?
9 There's too much of a time gap.

10 JUDGE HALLIGAN: It may be integral - - -

11 JUDGE RIVERA: May I ask how you're defining
12 work? What's the word - - -

13 MR. JOHNSON: In this case?

14 JUDGE RIVERA: Yes. Yes.

15 MR. JOHNSON: Well, I - - - I used - - - I used
16 this court's definition, which was the O'Brien case from
17 2006, which is integral to the work applies not only to
18 plaintiff's work but to the construction project generally.
19 So it doesn't have to be plaintiff's work - - -

20 JUDGE SINGAS: What about our most recent case,
21 Bazdaric? How do you reconcile that?

22 MR. JOHNSON: This case with Bazdaric?

23 JUDGE SINGAS: Yeah.

24 MR. JOHNSON: Well, I think - - - I - - -

25 JUDGE SINGAS: Where we said it's the task that



1 you're doing at the time as opposed to the general work.

2 MR. JOHNSON: That's a fair point. But - - - but
3 I think, you know, the facts in this case are a lot
4 different than Basderic. Right. Because in Bazdaric, the
5 plastic covering was not only not a part of the
6 functionality of the elevator, but it was undisputed at
7 that point that it - - - it had nothing to do with the work
8 and that there was a safer alternative. Right?

9 CHIEF JUDGE WILSON: Well, it had something to do
10 with the work.

11 MR. JOHNSON: Right. It had - - - it had - - -
12 but it had - - - it had nothing to do with the
13 functionality of the elevator, in this court's own words.
14 Right. But if - - - and - - - but if we get to 1.7(d),
15 which is foreign substance. Right. We're talking about
16 the tarp being a foreign substance to the elevator. This
17 debris is inherent in the work. The particles are inherent
18 byproduct of the work. So the tarp and Bazdaric was
19 foreign to the work. But plaintiff's coworkers are digging
20 the channel in real time, so you can't say that the
21 particles that were created by the jackhammering work were
22 a foreign substance.

23 JUDGE RIVERA: I'm a little confused. When you
24 say real time - - - I know your red light is on here.

25 MR. JOHNSON: I'm sorry.



1 JUDGE RIVERA: When you're saying real time - - -

2 MR. JOHNSON: Yes.

3 JUDGE RIVERA: - - - do you mean that there are
4 still construction workers who are indeed creating this
5 channel while people are coming in with these 500-pound
6 plates of glass?

7 MR. JOHNSON: No. No, I didn't mean to say that.
8 I didn't mean to say that.

9 JUDGE RIVERA: Oh, okay. So I misunderstood - -
10 -

11 MR. JOHNSON: Yeah, I meant to say that - - -
12 that the work is still ongoing. Right. The glass
13 installation work is not yet completed. So the channels
14 are dug, and they're in the process of installing the glass
15 into the channels.

16 JUDGE RIVERA: So then that would - - - what you
17 just explained would apply to Judge Garcia's example, where
18 you finished with the channels Monday, and the glass is
19 coming in on Tuesday.

20 MR. JOHNSON: So - - -

21 JUDGE RIVERA: Is that the way you meant that?

22 MR. JOHNSON: I'm - - - I'm sorry.

23 JUDGE RIVERA: That's all part of the same work
24 task?

25 MR. JOHNSON: I - - - I think - - -

1 JUDGE RIVERA: It's happening in real time.

2 MR. JOHNSON: Yeah, I - - - I think - - - I think
3 it's all part of the same - - -

4 JUDGE RIVERA: Even though there's been an
5 overnight break, and you've finished one task, and you're
6 moving on to the other.

7 MR. JOHNSON: I think it's the same work. I
8 think it's all part of the same work. Right. So the work
9 for that subcontractor has not finished yet.

10 JUDGE GARCIA: But couldn't you say that about
11 basically the whole project? Like, it isn't done yet, so
12 we can leave the debris on the floor, and then we're going
13 to finish the project at some point? I mean, it seems to
14 me the integral to the work argument in the purest sense in
15 this case - - -

16 MR. JOHNSON: Right.

17 JUDGE GARCIA: - - - would be because of the
18 nature of the surface, you have to dig the channel and
19 slide the glass in at the same time almost.

20 MR. JOHNSON: Right.

21 JUDGE GARCIA: When you dig the channel, you
22 slide it in, or else it's not going to work. But that's
23 not what happened here, right? It's just you took a while
24 to get the glass out, and you had the channels dug, but you
25 hadn't cleaned up the debris yet.

1 MR. JOHNSON: Well, the record is unclear on how
2 long the debris has been there. I mean, to be honest - - -
3 and the plaintiff doesn't know how long it was there. I
4 mean, the channels could have been dug earlier that day,
5 for all we know, but the testimony doesn't reveal itself in
6 that - - - in that respect - - -

7 JUDGE CANNATARO: Or a week earlier?

8 MR. JOHNSON: Excuse me?

9 JUDGE CANNATARO: Or a week earlier?

10 MR. JOHNSON: Well, that's - - - that - - - yes,
11 that - - - that's a possibility - - -

12 JUDGE GARCIA: Whose burden is it to show that?

13 MR. JOHNSON: I understand what you're saying. I
14 - - - you know, and - - - and I would just - - - I know my
15 time is up. If I could just - - - on 1.7(d), when we talk
16 about foreign substance. Right. Ice, water, grease,
17 something that is foreign to the work. Right. The tarp
18 and Basderic was foreign to the elevator.

19 CHIEF JUDGE WILSON: Well, the grease could come
20 from a piece - - - it could have come from the equipment
21 used to dig the channel.

22 MR. JOHNSON: Excuse me?

23 CHIEF JUDGE WILSON: Grease could have, for
24 example, come from a piece of equipment used to dig the
25 channel.

1 MR. JOHNSON: Right. But grease is specifically
2 enumerated in 1.7(d) - - -

3 CHIEF JUDGE WILSON: Yeah.

4 MR. JOHNSON: - - - and you know, debris that is
5 an inherent - - - a necessary byproduct of the work is not.
6 And especially in this case, when it's a necessary
7 byproduct of the work. And that's the point I'm trying to
8 make.

9 I appreciate your time today. Thank you.

10 MS. CHERKIS: Good afternoon, Your Honors. My
11 name is Louise Cherkis, and I represent Tishman Speyer
12 Properties, LP and 200 Park LP. And that's actually
13 particularly important here. And the Tishman Speyer
14 Properties LP and 200 Park LP were really not discussed at
15 all in the brief by plaintiff before this court. And to
16 the extent that they were mentioned at all, they were
17 mischaracterized as being the - - - having had the contract
18 with Structure Tone. What they are is the owner of the
19 building who was an out of possession owner, who, prior to
20 this whole contract - - - all construction being done, had
21 a tenant, the tenant being CBRE, who - - - and it is CBRE
22 that had the contract with Structure Tone, and then
23 Structure Tone had its subcontract with A-Val.

24 And my particular concern about this is not - - -
25 it's - - - you start off with that and then all the

1 analyzes about who was there, what day, and this and that,
2 you were - - - you not only have that we were the out of
3 possession owner, but with regard to 200 - - - that's 200
4 Park. But with Tishman Speyer, the 241(6) complaint
5 allegations were dismissed in the lower court. The lower
6 court, meaning the trial court. And it was not appealed by
7 plaintiff. And for - - - so for plaintiff to now be coming
8 before Your Honors lumping Tishman involved with any of
9 this with 241(6) should be beyond the court even taking any
10 consideration of it, even were the court to accept
11 plaintiff's argument with regard to the other - - -

12 CHIEF JUDGE WILSON: I understand - - - I
13 understand your procedural - - - I understand your
14 procedural point.

15 MS. CHERKIS: Yeah.

16 CHIEF JUDGE WILSON: On the substantive point, do
17 you know of case law as to 241(6) that says an out-of-
18 possession owner is not liable?

19 MS. CHERKIS: Well, here the out-of-possession -
20 - - the - - - the out-of-possession owner here - - - well -
21 - - well, we - - - we didn't - - -

22 CHIEF JUDGE WILSON: I'm not asking about the
23 facts of the case. I'm just asking for case law. If that
24 is - - - it might be a proposition of law that an out of
25 possession owner of a building - - - where an in-possession

1 owner might be liable under 241(6) and out of possession
2 owner might be exempt, do you know of any cases saying
3 that?

4 MS. CHERKIS: Well, I - - - off the top - - - I'm
5 - - - off the top of my head right now, standing in front
6 of you, I'm not thinking of a case.

7 CHIEF JUDGE WILSON: Okay.

8 MS. CHERKIS: I do believe I do have cases
9 written in the briefing. But I would go forward to 200 - -
10 - to 200 and - - - and in common law also where we didn't -
11 - - neither one of us, we didn't create a condition. We
12 were the ad possession owner, the agent. We weren't - - -
13 that wasn't our agent, you know, and all that was - - - was
14 - - - was gone on that. We weren't involved in the project
15 at all.

16 And I also would - - - would stay - - - say with
17 regard to plaintiff himself that the plaintiff - - - it's
18 awkward to think that plaintiff can create an issue of fact
19 here when the plaintiff himself doesn't not - - - does not
20 know with regard to the channel when it was created in the
21 first place. That's plaintiff who does not present - - -
22 present that. And yet, he is an employee of the trade who
23 did put in the channel itself, and he was an experienced
24 worker who was used to the routine of putting in these
25 glass panels once there was a cut put in.

1 It's - - - also, I just want to remind the court
2 that where this happened - - - okay. He was right at the
3 channel. He's - - - he's in these minute pieces. They're
4 just - - - they're very minute. While he had said he had
5 seen debris before, he wasn't - - - he had never seen these
6 minute pieces before. And I think it's - - - it all
7 together is part of that, that this is all - - - it was all
8 integral to the work. His role in the project would
9 include what - - - in - - - the channels being there was an
10 essential part of his. It's not a part of his huge to say
11 that the whole construction project, you know, would be
12 integral. No, it's just that he - - - to - - - for him to
13 perform his chore, those channels had to be right there,
14 and - - - and he was - - - and he was right there. And
15 just - - - and again, this - - - he - - - he did not know,
16 and - - - and he did not, and he - - - and of course, we
17 know that he also did not - - - did not fall either - - -

18 CHIEF JUDGE WILSON: Thank you, Counsel. Thank
19 you.

20 MS. CHERKIS: - - - but - - - thank you.

21 MR. LAVELLE: The only thing that I'd like to
22 issue - - - just to point out to the court, is under 23-
23 1.7(d), the statute within - - - in addition to the
24 enumerated things, says any other foreign substance which
25 may cause slippery footing shall be removed, so it falls

1 under that category.

2 Thank you for your time.

3 JUDGE RIVERA: Could I just - - - before you said

4 - - -

5 JUDGE CANNATARO: Could I just ask you what your
6 position - - -

7 JUDGE RIVERA: Go ahead.

8 JUDGE CANNATARO: Oh, I'm sorry.

9 JUDGE RIVERA: Go ahead. No. No. Go ahead.

10 JUDGE CANNATARO: Your position on Tishman's
11 liability under 200. Is - - - is there an argument in
12 response to what was just stated?

13 MR. LAVELLE: No, Your Honor.

14 JUDGE CANNATARO: Okay.

15 JUDGE RIVERA: Okay. I just want to be clear.
16 Can the glass be put in this channel if there's debris in
17 the channel? Like, how - - - how do they ensure there's no
18 debris in the channel?

19 MR. LAVELLE: That - - - that was not actually
20 fleshed out in the record. The one thing that is in the
21 record, though, Your Honor, is there were basically two
22 teams, one did channeling and one did glass installation,
23 and plaintiff was on the glass installation team. So there
24 is that temporal gap, which I believe should give rise to
25 liability. At the very least, a question of fact because

1 that's why we're here today.

2 JUDGE RIVERA: Thank you.

3 MR. LAVELLE: Thank you.

4 CHIEF JUDGE WILSON: Thank you.

5 (Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Ruisch v. Structure Tone Inc., No. 104 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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