

**Zieris v City of New York**

2011 NY Slip Op 34046(U)

January 10, 2011

Sup Ct, New York County

Docket Number: 103335/2006E

Judge: Paul G. Feinman

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HON. PAUL G. FENMAN

PART 12

PRESENT:

Index Number : 103335/2006  
ZIERIS, JOHN  
vs  
CITY OF NEW YORK  
Sequence Number : 006  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Filed Documents  
PAPERS-NUMBERED  
8, 8-1 through 8-10  
12  
15/16  
27

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Transcript of Oral Argument

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is granted in accordance with the annexed decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/10/2011

JAF

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
 JOHN ZIERIS and PATRICIA ZIERIS,  
 Plaintiffs,

-against-

THE CITY OF NEW YORK,  
 Defendant.

**INDEX NUMBER 103335/2006E**  
**Motion Seq. No. 006**  
**DECISION & ORDER**

-----X

<b>Appearances:</b>	<b>Plaintiffs:</b>	<b>Defendant:</b>
	Sacks and Sacks, LLP	Fabiani Cohen & Hall, LLP
	By: Adam S. Levien, Esq.	By: Mary J. Joseph, Esq.
	150 Broadway, 4 <sup>th</sup> Fl.	570 Lexington Ave., 4 <sup>th</sup> Fl.
	New York NY 10038	New York NY 10022

**Papers considered on review of this motion for summary judgment:**

<u>PAPERS</u>	<u>E-FILING DOCUMENT NO.</u>
Notice of Motion, Annexed Affs. and Exhibits	8, 8-1 through 8-10
Affirmation in Opposition, Exhibits	12
Reply Aff., Aff. of Service	15, 16
Transcript of Oral Argument	27

**PAUL G. FEINMAN, J.:**

In this personal injury action arising out of a construction accident, defendant City of New York moves, by order to show cause, for an order awarding it summary judgment in its favor and dismissing the complaint in its entirety. The court notes that the plaintiffs conceded that the claims premised on Labor Law § 240(1) cannot succeed and are therefore withdrawn. Remaining at issue on this motion is the plaintiffs' Labor Law § § 200 and 241(6) claims. For the reasons which follow, the motion is granted in its entirety.

*Factual Background*

Plaintiff John Zieris (Zieris) was allegedly injured on September 20, 2005 at a construction site on the Williamsburg Bridge (the Bridge). Zieris, then 37 years old, was an

ironworker employed by Koch Skanska, Inc. (KSI), a firm engaged by the City to work on the Bridge. He claims that he tripped and fell over debris and refuse at the job site and that the City was therefore liable for his injuries under sections 200, 240(1) and 241 (6) of New York State's Labor Law. As already noted the Labor Law § 240(1) claim has been withdrawn.

KSI was the general contractor for reconstruction of the Williamsburg Bridge. Zieris first worked for KSI at the Bridge from approximately February 2003 to February 2004. He returned to the Bridge in the summer of 2005 and remained until the incident on September 20, 2005. His work involved replacing old steel with new steel. He had done the same work for KSI at the Manhattan Bridge during 2002. Removal of old steel required using "a hell dog . . . a hand-held, jackhammer type tool" to remove the rivets or bolts that held it in place. Zieris Transcript at 17, attached as Ex. D to Notice of Motion, NYSCEF Doc. No. 8-4. The hell dog breaks the rivet head away from its shaft (also referred to as a bolt or stem) and then punches the shaft out of the hole in the connected steel plates or beams. Zieris and his partner used a cone to catch the rivet pieces as they fell away from the steel. One ironworker held the cone as the other operated the hell dog. The cone would then be tipped into a bucket located next to the ironworkers. Removal of one rivet, according to Zieris, "could take anywhere from a minute to an hour, depending upon the difficulty of the stubbornness of the rivet." *Id.* at 21. He testified that the bolt portions were seven-eighths to one inch in diameter and anywhere from two to four inches long. *Id.* at 61. The rivets he was removing on the day of the incident, he recalls, were mostly seven-eighths diameter and two inches long. *Id.* at 80-81.

At the time of the incident, he had been working on a platform at the southwest tower leg of the Bridge, for a "few weeks." *Id.* at 33. This platform was made of wood and metal with a

plywood surface. It sat about 20 feet above the water and Zieris estimated that it was roughly 100 feet by 200 feet. *Id.* at 49. The platform was apparently fixed, but a scaffold, of unidentified dimensions, raised him to a work site on the tower.<sup>1</sup> On the day of the incident, the work site was near the top of the tower, and the scaffold ascended from and descended to the platform.

Zieris worked with the same partner apparently the entire time after he returned to the Bridge in the summer of 2005. They, both journeyman ironworkers, alternated operating the hell dog and holding the cone. Apprentice ironworkers emptied the buckets, as needed, and also removed debris from the job site. *Id.* at 43, 52. He testified that about 50 other KSI workers were replacing old steel with new steel at the time, but worked no closer than 40 or 50 feet from him and his partner. *Id.* at 31, 41. Painters were also working on the Bridge at about the same time, but Zieris was unable to recall if any were working on the day of the incident. *Id.* at 30. He and his partner removed rivets from about seven in the morning, the start of the work day, until a morning break around 9:30 A.M., and until their lunch break, near noon. At each break, he exited the scaffold onto the platform and went to a shanty located on the platform, roughly about 120 feet across the platform. *Id.* at 59.

Zieris stated that he never saw bolts on the platform at any time prior to the incident. *Id.* at 61. Specifically, he never saw rivet heads or bolts before in the area where he fell. *Id.* at 79. He knew of no complaints about the presence of debris on the platform. *Id.* at 66. On September 20, 2005, at about 1:45 P.M., he and his partner finished their work on one section of the Bridge tower, lowered the scaffold to the platform and headed towards the next area to work. He was

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<sup>1</sup>While the fixed platform and the moveable scaffold are separate structures, questions and answers in Zieris's transcript are often imprecise in distinguishing them.

carrying his tools in a bucket, weighing 20 to 30 pounds, with two hands in front of him, when he “stepped on a rivet and fell.” *Id.* at 84, 72. He had walked about 15 feet from the scaffold to his left, then turned right and walked about 15 feet more, when he fell. *Id.* at 73. His partner had walked ahead, and Zieris saw no one else nearby, although rivet removal work was being done on other parts of the Bridge tower. He testified that he looked down at the platform surface for most of the 30 or so feet that he walked before falling. *Id.* at 81-83. He saw no intact rivets, heads or bolts while he walked, nor any other debris. *Id.* at 81, 90.

He fell backwards and landed on his back. He could not recollect when he let go of the bucket of tools that he was carrying. *Id.* at 90-91. Only his partner and an inspector approached him when he was on the ground. This inspector, employed by either KSI or the City, pointed to a bolt about four inches long on the ground. *Id.* at 89. No one picked up the bolt and Zieris does not know what happened to it. *Id.* at 99-100. After a brief time, his foreman appeared, then a “safety guy” from KSI and a KSI supervisor. *Id.* at 101-102, 107. The safety guy drove him to the hospital in a company van.

Zieris did not know if City employees were ever at the job site, or if the City received any complaints about the conditions of the platform where he fell. *Id.* at 180.

Anil K. Rudra, a civil engineer with the City’s Department of Transportation, was deposed on July 24, 2008 regarding the Bridge project, where he was assistant engineer-in-charge from March 2003 through the time of the incident. He was at the job site daily, walking around to see what work was being performed. His superior, Verghese Menachery, was the only other City employee regularly visiting the site, but Menachery only came weekly. Rudra Transcript at 18, Ex. E, NYSCEF Doc. No. 8-6. He stated that the City hired only KSI to do the construction

work on the Bridge, but KSI hired subcontractors, such as painters and electricians, to assist them. *Id.* at 25. The City engaged GPI as resident engineer inspectors for the project. Rudra estimated that GPI had 14 to 16 employees inspecting the work on a daily basis, and that he met with all of them each day. *Id.* at 28, 29. He estimated the size of the platform where the incident occurred as roughly 120 feet long by 60 feet wide.

He described the rivet removal process in essentially the same manner as had Zieris. When KSI workers were on scaffolds removing rivets on some parts of the Bridge, netting was rigged below the scaffolds to catch falling rivets or their pieces. *Id.* at 47-49. However, netting was not used around the Bridge towers, where Zieris was working, and cones did not always catch all the rivet heads when they were chipped off. *Id.* at 49, 44-45. Rudra testified that it was KSI's responsibility to clean the job site. *Id.* at 32-33. It was GPI's responsibility to make sure that the job site was clear. If GPI inspectors saw debris, including pieces of rivets, on the ground, they were supposed to ask the KSI supervisor to get it cleaned up. *Id.* at 34. Removed rivets were to be collected in buckets and drums, which were placed in a storage yard by KSI. *Id.*

Thomas Koch, employed by KSI as the site safety representative for the Bridge project, submits a short affidavit that is consistent with Rudra's testimony. Ex. G, NYSCEF Doc. No. 8-8. He estimates that the platform or decking at the base of the Bridge tower, the site of the incident, was about 165 feet by 66 feet, and the rivets being removed were about three-quarters of an inch thick and three inches long. He speculates that "rivets would fall from where they [Zieris and his partner] were working (on a spider scaffold) onto decking below." Koch Aff., ¶

2.<sup>2</sup> The platform was “maintained and cleaned by Koch Skanska apprentice ironworkers.” *Id.*, ¶ 5. He does not claim to have witnessed the incident and states that he “do[es] not know of any witnesses to John Zieris’ accident.” *Id.*, ¶ 8. Yet, he asserts that “at the time of John Zieris’ accident, the deck was clean of all debris.” *Id.*, ¶ 5. He concludes by stating that KSI never “received any complaints regarding debris on the platform from the ironworkers at the Williamsburg Bridge project.” *Id.*, ¶ 10.

Tony Raimo, retained as an expert by the City on construction site safety, submits an affidavit, based on his review of the relevant documents in the action. Ex. H, NYSCEF Doc. No. 8-9. His comments are purely conclusory and will not be considered here.

#### *Analysis*

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007), citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1<sup>st</sup> Dept 2002).

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<sup>2</sup>At oral argument before the court, on September 22, 2010, plaintiffs’ counsel acknowledged “that there was some possibility that rivet stems and heads of the rivets would fall to the ground.” Transcript at 6.

Labor Law § 200 is the codification of common-law negligence.

“Under Labor Law § 200, in addition to liability for a dangerous condition arising from the methods employed by a subcontractor, over which the owner or general contractor exercises supervision and/or control, liability can also arise when the accident is caused by a dangerous condition at the work site, that was either created by the owner or general contractor or about which they had prior notice.”

*Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 808 (1st Dept 2010). The City is indisputably the owner of the Bridge.

Labor Law § 241 (6) provides that “the owners and contractors and their agents for such [construction, demolition or excavation] work . . . shall comply” with the New York State Industrial Code (Industrial Code). However, holding an owner liable for work site injuries requires a specific violation of the Industrial Code. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 (1993) (“we hold that, for purposes of the nondelegable duty imposed by Labor Law § 241 [6] and the regulations promulgated thereunder, a distinction must be drawn between provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards”). In their opposition to the instant motion, plaintiffs withdraw all allegations of Industrial Code violations except for Industrial Code §§ 23-1.7 (e) (1) and (2). These provisions address the risk of tripping in passageways and working areas:

- (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
- (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

#### Labor Law § 200 and Common-Law Negligence

There is no triable issue of fact regarding the City’s liability for Zieris’s injuries under

either of the two standards of Labor Law § 200, defendant's responsibility for the means and methods of the work, or its creation or notice of a dangerous condition. While it hired KSI to reconstruct the Bridge and GPI as resident engineer inspectors, there is no evidence of any supervision and/or control of the project by the City. Plaintiffs concede that "the City of New York did not supervise and control plaintiff's work." Opposition Aff., ¶ 48, NYSCEF Doc. No. 12. "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200." *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993). Zieris saw no City personnel at the job site at any time before the incident. The inspector who approached him immediately after he fell may have been the only City employee or agent that he ever had any contact with, although that inspector may have also been a KSI employee. Rudra, a City engineer, claimed that he was present every day, observing the work being performed, not directing it. That was also the case when his superior visited weekly. Such scrutiny itself does not evoke supervision or control. *Aragon v 233 W. 21st St., Inc.*, 201 AD2d 353, 354 (1st Dept 1994). Koch testified that "[o]n and prior to September 20, 2005, Koch Skanska provided direct supervision of the ironworkers at the Williamsburg Bridge project." Koch Aff., ¶ 9.

A violation of Labor Law § 200 by the City, then, requires evidence that the City created or had notice of the dangerous condition that allegedly resulted in Zieris's injury.<sup>3</sup> Plaintiffs contend that the absence of netting around the Bridge tower where rivets were being broken into pieces created a dangerous condition. However, there is no evidence that the City had a role in

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<sup>3</sup>The City does not try to discount or deny the danger.

setting up the work site and, thereby, creating a dangerous condition.

No one, including Zieris, claims that debris was ever observed in the vicinity of the incident, or that reports of debris were ever made to the City or KSI. Since Zieris did not see the bolt he claims to have tripped on until after he fell, although he testified that he looked where he was walking on the platform, it is unreasonable to suppose that Rudra would have seen it some time earlier on his daily rounds. Plaintiffs maintain correctly that Rudra knew that ironworkers were working in an area that had no netting to catch broken rivet parts, and that Rudra recognized that there was a probability that some pieces might not be caught in the cones. They argue that this, in itself, was notice of a dangerous condition, but New York law requires more to constitute constructive notice. *Gordon v American Museum of Natural History*, 67 NY2d 836, 838 (1986) (“a general awareness that litter or some other dangerous condition may be present . . . before [plaintiff’s] fall is [not] legally sufficient to charge defendant with constructive notice of the paper [plaintiff] fell on”); *Bogart v F. W. Woolworth Co.*, 24 NY2d 936, 937 (1969) (“there was neither actual nor constructive notice of the particular debris which allegedly caused plaintiff’s fall”); *DeJesus v New York City Hous. Auth.*, 53 AD3d 410, 411 (1st Dept 2008) (“It is well settled that neither a general awareness of the presence of litter or some other dangerous condition nor plaintiff’s observation of trash in the general area is legally sufficient to charge defendant with constructive notice of the piece of carpet she slipped on”).

Plaintiffs concede that the City did not supervise or control the Bridge project. Inspection by City employees or its hired agents does not constitute supervision or control. No one suggests that anyone but KSI ran the project.

There is no evidence that the City, with only one or two direct employees on site, was in a

position to create the hazardous condition at issue, or that the GPI resident engineer inspectors engaged by the City may have been responsible.

Actual or constructive notice of the hazardous condition cannot be attributed to the City. No one, including Zieris, saw the offending bolt until after he fell. Zieris testified that he had never seen a bolt or any other debris on the platform where he fell in the several weeks he worked at the Bridge. Particularly, he did not claim to have seen any debris on the platform earlier that day before the incident, that is, when he arrived at work and went to his scaffold, when he left and returned to his scaffold at his morning break, or when he left and returned to his scaffold at his lunch break. Zieris's partner preceded him immediately in leaving the scaffold and moving to the next work location, without any indication that he experienced or observed any hazard on the platform.

While it was Rudra's duty to observe and GPI's to inspect the working environment, there is no evidence that they were on notice of the allegedly hazardous condition in the course of performing their duties, since there is no evidence that the hazard existed more than moments before Zieris fell.

There is no triable issue of fact that would entail liability for the City under Labor Law § 200 under these circumstances. Under these circumstances, the Labor Law § 200 and common-law causes of action against the City must be dismissed.

Labor Law § 241 (6)

In addressing possible violations of Industrial Code § 23-1.7 (e) (1) and (2), as required to find the City liable under Labor Law § 241 (6), plaintiffs insist that the accident site was both a passageway and a working area. They contend that Zieris "**had no choice** but to enter the work

zone through a **defined opening wherein he encountered an obstruction that caused**

**tripping.”** Opposition Aff., ¶ 19, NYSCEF Doc. No. 12. Zieris describes the path he took as follows:

“I took the only route available to me without having to climb over and through steel beam cross-bracing or walking over hoses and material. When I got off the scaffold I walked approximately fifteen feet and made a right turn around a staircase that led up to the upper roadway. I then walked another 15 feet along the staircase, which was on my right. To my left, approximately 4-6 feet away, was the railing at the edge of the platform separating us from the river. When I came to the end of the staircase I made another right, took 1-2 steps, and I tripped and fell over a busted rivet. On the date of my accident this was the first time walking this passageway.”

Zieris Affid., ¶ 4.

The City claims that the accident site was neither a passageway nor a working area. It relies upon *Dalanna v City of New York* (308 AD2d 400, 401 [1st Dept 2003]) (“The slab, although regularly traversed to bring pipes to the tanks, remained a common, open area between the job site and the street, and thus was not ‘passageway’ covered by 12 NYCRR 23-1.7 [e] [1]”), and *Canning v Barney’s N.Y.* (289 AD2d 32, 35 [1st Dept 2001]) (a passageway subject to 12 NYCRR 23-1.7 [e] [1] is distinct from floors, platforms and similar areas where persons pass).

Significantly, the City argues broadly that 12 NYCRR 23-1.7 (e) does not apply in the instant action, regardless of the character of the accident site as a passageway or working area, because the purported hazardous condition, a piece of a broken rivet, was an integral part of the work Zieris was performing. Plaintiffs maintain that the broken rivet at issue was not an integral part of Zieris’s work, because of the distance he walked from the scaffold, and the location of his fall was not directly below where he was working on the Bridge tower. They contend that it is, at least, a question of fact as to the origin of the bolt Zieris tripped on, and he states that he and his

partner “managed to catch every rivet we busted into the orange cone.” Zieris Affid., ¶ 2, Ex. 1 to NYSCEF Doc. No. 12. Plaintiffs’ position is that the offending object itself must have been the subject of Zieris’s own work in order for it to be considered integral to his work.

The City also relies upon *Castillo v Starrett City, Inc.* (4 AD3d 320, 322 [2d Dept 2004]) (when a worker installing insulation on the roof of a building slipped on a small piece of insulation, the Court held that “the object on which the plaintiff slipped was an integral part of the work he was performing”), and *Harvey v Morse Diesel Intl.* (299 AD2d 451, 453 [2d Dept 2002]) (when an electrician tripped on a six-inch piece of electrical cable, which was on the floor below the ladder she was descending, the Court held that, because the cable was “the type with which she was working,” it was an integral part of the work she was performing). In each instance, the Court did not find that only the plaintiff could have produced the hazardous condition. Such exclusivity is not a necessary factor in determining whether the offending object was an integral part of the work. Without question, other KSI workers were removing rivets from the Bridge tower at or about the time of the incident, and several cases demonstrate that there is no requirement that the injured party have a direct or exclusive connection with the offending object in order to find it an integral part of the work. See *Furino v P & O Ports*, 24 AD3d 502, 503, 504 (2d Dept 2005) (nails left sticking up from the floor by another worker were an integral part of the work for plaintiff who was moving crates in the area); *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 (2d Dept 2003) (demolition debris created by plaintiff and his coworkers was an integral part of the work being performed); *Adams v Glass Fab*, 212 AD2d 972, 973 (4th Dept 1995) (where a cement truck driver tripped over wire mesh that was meant to reinforce the concrete he was delivering, the “wire mesh was an integral part of the

floor that was being constructed”).

Plaintiffs attempt to draw a parallel in their behalf to cases where the alleged hazard was found not to be integral to the injured party’s work – *Maza v University Ave. Dev. Corp.* (13 AD3d 65, 66 [1st Dept 2004]) (the debris, scattered materials and dirt at the job site “were not integral to plaintiff’s work as a bricklayer”); *Beltrone v City of New York* (299 AD2d 306, 308 [2d Dept 2002]) (when plaintiff slipped because of an oil leak in the crane’s engine, summary judgment was denied defendant, because the “presence [of oil] on the deck of the crane was inconsistent with the work the injured plaintiff was performing”). In those cases, the disconnect between the injured party’s work and the alleged hazard is obvious, unlike the instant action where Zieris, an ironworker occupied with breaking rivets all day, does not claim to have tripped over some random collection of debris, dirt or garbage, but rather, a piece of a broken rivet.

The circumstances here are more akin to *Castillo*, *Harvey* and *Salinas* where the courts found an integral connection between the hazardous condition and the work of the plaintiffs and/or their co-workers. To pursue a Labor Law § 241 (6) cause of action, the hazardous condition complained of must not be an integral part of the injured party’s work. Zieris testified that, as a journeyman ironworker, he spent his work day on the Bridge removing old rivets in order to replace old steel, held in place by the rivets, with new steel. He and his partner used a power tool to break the rivet head off the shaft or bolt portion and then push the bolt out of its hole. Whether or not the bolt that he allegedly tripped over once he descended to the platform below was one that he had literally broken is irrelevant. In spite of the scarcity of information about the actual bolt, which was not recovered after the incident, no one questions that it came from the Bridge. It was, therefore, an integral part of Zieris’s work and cannot be the basis for a

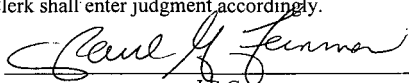
Labor Law § 241 (6) claim.

Accordingly, it is

ORDERED that the City's motion for summary judgment dismissing the complaint in its entirety is granted, with costs and disbursements to the City as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: January 10, 2011  
New York, New York

  
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J.S.C.