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COURT OF APPEALS
STATE OF NEW YORK

DAVID BONCZAR,

Appellant,

-against-

NO. 26

AMERICAN MULTI-CINEMA, INC.

Respondent.

20 Eagle Street
Albany, NY 12207
March 16, 2022

Before:

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

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is Appeal Number 26, Bonczar v.
3 American Multi-Cinema.

4 We'll take a moment, Counsel, to allow our
5 colleagues to leave the courtroom.

6 Okay. Good afternoon, Counsel.

7 MR. COLLINS: Good afternoon, Your Honors.

8 So if it please the Court, John Collins on behalf
9 of the plaintiff/appellant, David Bonczar. I would like to
10 reserve two minutes for rebuttal argument?

11 CHIEF JUDGE DIFIORE: You may have two minutes.

12 MR. COLLINS: Thank you, Your Honor.

13 CHIEF JUDGE DIFIORE: You're welcome.

14 MR. COLLINS: As the Court is aware, this appeal
15 raises two nearly identical questions of law in this
16 construction accident case, which also involves a fall from
17 a ladder. Albeit, those questions arise under two discrete
18 factual records.

19 The first question is did plaintiff establish an
20 entitlement to partial summary judgment as to liability
21 under Section 240(1) of the labor law. The appellate
22 division said no, and the case went to trial.

23 And the second question is when the action was
24 tried, following the appellate division's reversal and
25 denial of plaintiff's motion, did plaintiff establish his



1 entitlement to a directed verdict as to liability under
2 Section 240?

3 And the summary judgment motion, which I'll
4 address first, the relevant facts were drawn in their
5 entirety from plaintiff's deposition. He testified that he
6 was caused to fall when the six-foot stepladder that he was
7 using shifted and wobbled as he was descending it causing
8 him to lose his balance.

9 Defendant interposed no evidence and testified -
10 - -

11 JUDGE RIVERA: Counsel, I'm going to interrupt
12 you. I'm on the screen.

13 MR. COLLINS: Yes.

14 JUDGE RIVERA: Yes. Hi. Good afternoon.

15 So I just want to be clear on that 2018 appellate
16 division decision which is the first one you're talking
17 about on the partial summary judgment motion - - -
18 plaintiff's partial summary judgment motion - - - what is
19 the factual question or questions that the majority said
20 needed to go to a jury?

21 MR. COLLINS: During the course of his
22 deposition, defense counsel asked plaintiff immediately
23 before the ascent that resulted in your fall, did you check
24 the position of the ladder and check that it was locked.

25 JUDGE RIVERA: Um-hum.



1 MR. COLLINS: And plaintiff testified that he
2 might've, but he wasn't entirely sure - - -

3 JUDGE RIVERA: Um-hum.

4 MR. COLLINS: - - - that he did.

5 JUDGE RIVERA: Um-hum.

6 MR. COLLINS: He did also, during the course of
7 his testimony, say that the ladder was fully open.

8 JUDGE RIVERA: Um-hum.

9 MR. COLLINS: He had successfully ascended and
10 descended the ladder several times before the fall incident
11 without a problem.

12 According to the majority's view, that testimony
13 about possibly not checking it immediately before the final
14 ascent raised the question of fact and opened the question
15 - - - a triable issue of fact and - - -

16 JUDGE RIVERA: But what - - - again, what's the
17 question of fact, not the conclusion of law? What's the
18 question of fact whether or not the ladder was indeed
19 properly positioned and opened because he doesn't know
20 since he didn't check, although I'm not sure that's what
21 the record reveals, but sort of following this line of
22 analysis, or the fact that he doesn't recall must mean that
23 it actually wasn't positioned and checked, and the - - -
24 you know, and the arms locked?

25 MR. COLLINS: I don't think the appellate



1 division majority thought that because he couldn't recall
2 it was necessarily either - - -

3 JUDGE RIVERA: Okay.

4 MR. COLLINS: - - - informally positioned and/or
5 not locked.

6 JUDGE RIVERA: Okay.

7 MR. COLLINS: I think the court concluded that
8 because he couldn't recall, there was a triable question of
9 fact.

10 JUDGE WILSON: As to sole prox - - - sorry; over
11 here. As to sole proximate cause; is that where it went?

12 MR. COLLINS: As to sole proximate cause, yes,
13 because if they hadn't found that there was a question as
14 to sole proximate cause, that is if they found that there
15 was some sort of failure to ensure that the ladder was
16 constructed, placed, and operated that did not, you know,
17 hinge upon the plaintiff's own conduct, then the court, you
18 know, necessarily would have affirmed the summary judgment
19 - - -

20 JUDGE RIVERA: So the factual question is whether
21 or not the ladder was properly positioned and locked?

22 MR. COLLINS: That, according to the appellate
23 division - - -

24 JUDGE RIVERA: I'm sorry. That last time that he
25 ascended and descended. I'm talking about that last



1 moment.

2 MR. COLLINS: That's right. And the descent,
3 which obviously, you know, plaintiff believes that the
4 better of the argument, and the better result was that
5 given his testimony that the ladder was fully open, it
6 would have been, you know, speculative for a jury to
7 conclude that the fall was caused by, you know, the ladder
8 - - - his not having checked the ladder that time as to,
9 you know, its positioning and/or the lacking of the arms
10 that pulled the ladder open. And I submit that the
11 appellate division dissent was correct that it was
12 speculative, that they also properly distinguished this
13 Court's decision in Blake v. Neighborhood Housing which the
14 appellate division majority, you know, found to be
15 persuasive and controlling here.

16 In that case, there was a trial, and the
17 plaintiff testified that he may not have checked the
18 extension clips, which their sole purpose is to hold the
19 ladder, the extension, upwards. The extension, the
20 evidence shows, slid down, and therefore the jury was
21 entitled to find that, you know, he was the sole proximate
22 cause.

23 The dissent in the appellate division held that's
24 distinct here, because an extension ladder can unextend and
25 retract only if the clips aren't in place, but here are



1 multiple reasons a ladder can shake and wobble. There are
2 multiple cases out there involving them. And for that
3 reason, the appellate division dissent concluded it was - -
4 - you know, would be speculative for a jury to find that
5 there was not, in fact, liability here, and that the
6 plaintiff was the sole proximate cause.

7 And for that reason, I submit - - -

8 JUDGE WILSON: Let me ask you - - - sorry, over
9 here again.

10 MR. COLLINS: Yes.

11 JUDGE WILSON: I want to ask you sort of an
12 abstract question.

13 Suppose for a moment there is sufficient evidence
14 to support the jury's verdict for the defense. I know
15 that's not your position. We'll get to the second
16 argument, but suppose that for a second. And suppose,
17 also, that you're right, that the appellate division
18 dissenters in the summary judgment were correct. Why would
19 we replace the summary judgment decision with a decision
20 made a fuller record by a jury?

21 MR. COLLINS: Because I submit, Your Honor, that
22 the - - - if this Court concluded that the appellate
23 division dissent had the correct view of it, it would - - -
24 it's the appellate division's order would one - - - or
25 rather be this Court's decision would necessarily affect



1 that order. The final judgment would necessarily affect
2 that.

3 JUDGE WILSON: Well, why would it? Because there
4 were - - - the issues were still available to be tried, and
5 you were - - - you and your adversary were able to put on
6 more and different evidence if you so choose?

7 MR. COLLINS: I think it would still be deemed a
8 nullity because at that moment in time, what the - - - what
9 existed was the summary judgment record, and I submit that
10 if the Court concluded that that summary judgment record
11 indicated that the trial court indeed had the better view
12 of things, that the dissent had the better view of things,
13 then the subsequent trial would have to be deemed a
14 nullity, it should not have occurred, and basically, we are
15 back to where we were when the supreme court, you know,
16 granted summary judgment as to liability, and - - -

17 JUDGE RIVERA: So Counsel, if I'm understanding
18 this argument or response to Judge Wilson, your - - - your
19 position is that the reason that the jury determination
20 should be stand is because it was not fact-finding, it was
21 merely guesswork, which is what the dissent foresaw would
22 be the result of sending this case to the jury?

23 MR. COLLINS: That's certainly a part of it, but
24 I think it goes beyond that, because as Judge Wilson
25 alluded to, you know, there are separate arguments as to



1 why the jury's verdict, even if we assume that the
2 Appellate Division properly denied summary judgment and
3 remitted the case for trial, why the jury's verdict cannot
4 stand. Going beyond speculation, it enters into
5 irrationality for this reason.

6 At trial, the defense counsel again submitted no
7 proof calling into account plaintiff's trial testimony as
8 to how the accident occurred. And plaintiff, unlike at his
9 deposition, because he was never asked at his deposition,
10 described in detail how before first using the ladder he
11 visually inspected it, manually inspected and tested it by
12 pulling it apart, making sure that the extension arms
13 dropped down. He said when it's fully open as he opened
14 it, they dropped down and are necessarily locked, which was
15 one of the factual questions that was left open according
16 to the appellate division majority.

17 He also said that he placed it and used it at
18 least four times without - - -

19 JUDGE RIVERA: Well, Counsel, it is - - - is it
20 not possible that the jury did not credit his testimony
21 given the questioning at the deposition? Although it is
22 obvious in the record that plaintiff is trying to explain
23 his answer about not having checked it, right. But he
24 meant only the last time, not any other time. But it's
25 possible, is it not, on this record that one could read



1 that record and say the jury just didn't believe his
2 attempt to explain the answer at the deposition?

3 MR. COLLINS: I would say no, Your Honor, for
4 this reason. The defense called an expert construction
5 site safety consultant by the name of Daniel Paine. And Mr.
6 Paine did not criticize or in any way take issue with the
7 method by which plaintiff had inspected and tested the
8 ladder before using it that plaintiff testified to at
9 trial. Rather, Mr. Paine acknowledged that Mr. Bonczar had
10 been provided with proper protection under Section 240
11 stating, "He was provided with a ladder that was adequate
12 and properly set up". That's at page 1142 of the record.

13 JUDGE RIVERA: Yes, but Counsel that - - - the
14 expert wasn't there when the accident occurred, right? You
15 were saying -- so if he did what he said he did, this
16 follows from that, and the jury could have decided as a
17 credibility determination that it was not going to credit
18 plaintiff's testimony, no?

19 MR. COLLINS: Well, I think that was not the
20 defendant's argument, which was made solely through Mr.
21 Paine. Mr. Paine, in addition to stating what I just
22 quoted, said the question of whether Mr. Bonczar had set
23 the ladder up properly and performed his work isn't the
24 issue. Rather, he said, he's descending, and when the
25 ladder wobbled, he should have maintained and shifted - - -



1 ladder wobbled and shifted.

2 He should have made three-point contact. He
3 didn't. He testified that he missed a step. Ultimately,
4 he let go and fell backwards. For two reasons, that
5 position, which is defendant's position at trial as stated
6 by its own expert, is not sufficient to support the jury's
7 verdict.

8 The first is that as this Court has frequently
9 held, most prominently in Blake, a plaintiff's comparative
10 fault is not enough to raise a sole proximate cause issue.
11 And here, when the ladder shifted and wobbled, and the
12 trial court in its instructions to the jury which are, you
13 know, on the record and now centrally the law of the case,
14 told the jurors the ladder shifted and wobbled for no
15 apparent reason. And the defendant, therefore, had the
16 burden of showing that it was either not properly set up,
17 or that plaintiff hadn't checked the locking mechanism, and
18 that that was the sole proximate cause of the accident.

19 Mr. Paine had, by extension the defendant, said
20 no, that's not really what the factual question here is.
21 Quoting the expert, the factual question was, "Plaintiff
22 let go". And as I said, that is nothing but comparative
23 fault, because if the ladder is shaking and wobbling it
24 establishes the existence of a violation of 240. And when
25 the ladder shook and wobbled, people might react at various



1 ways, but if plaintiff missed a step, and the expert says
2 well, he never should have missed a step, if he let go, and
3 the expert says well, he should have held on as firmly as
4 possible, again, that doesn't establish sole proximate
5 cause.

6 And the second reason is that, you know, is
7 insufficient to support the verdict thus rendering it
8 irrational is that the jury charge specifically instructed
9 the jurors that there were only two bases for finding
10 liability on the sole proximate cause on the part of the
11 plaintiff. One was that he hadn't checked the ladder's
12 position and it was, in fact, improperly positioned. One,
13 that he hadn't checked the spreader arm and they were, in
14 fact, not totally extended, and that that caused the ladder
15 to fall - - - or rather to move.

16 The defendant's expert said no, I can see that it
17 was properly set up, and he just should have, you know,
18 maintained three-point contact.

19 That was not one of the bases set forth in the
20 jury charge. And therefore, the jury's finding in conflict
21 with both plaintiff's testimony and the defense theory of
22 the case is irrational and cannot stand.

23 CHIEF JUDGE DIFIORE: Thank you, Counsel.

24 Counsel?

25 MR. KARDISCH: May it please the Court? My name



1 is Josh Kardisch from the law firm of Russo & Gould, and we
2 represent the defendant/respondent in this case.

3 And I'm going to say that this case is a reminder
4 of how dangerous it is for a trial court to grant summary
5 judgment to plaintiff on the issue of liability under Labor
6 Law 240 when there are genuine and material issues of fact
7 that only a jury should decide.

8 It would have been patently unfair to the defendant in this
9 case had the Fourth Department affirmed summary judgment
10 for the plaintiff, and we had some sort of crystal ball to
11 see what the jury was going to do, or would have done had
12 the Fourth Department done so.

13 JUDGE CANNATARO: Counsel, what do you make of
14 this argument that the jury trial was a nullity based on
15 the dissent's view that any fact-finding that might take
16 place was pure speculation?

17 MR. KARDISCH: Well, I have a couple responses to
18 that.

19 First of all, the case law is very, very clear
20 that everything that plaintiff/appellant is mentioning are
21 issues of fact that a jury needs to decide. That's what
22 the Blake case said, and that's what the cases that came
23 out of this courthouse, O'Brien in 2017, said especially in
24 a situation where you have a plaintiff who is claiming that
25 he fell from a ladder but has no witnesses to verify that.



1 At trial, the plaintiff testified that one
2 individual named Justin Drombley I think his name was,
3 witnessed his fall, but he never called that person to
4 testify.

5 And the Carlos case which is a Fourth Department
6 case and other cases say very clearly that when an accident
7 - - - when there's a fall from a ladder and there are no
8 witnesses to the accident, a trial is necessary so that the
9 plaintiff can be cross-examined and a jury could make the
10 important decisions with regard to credibility.

11 So summary judgment never should have been
12 granted in the first place.

13 JUDGE RIVERA: So Counsel, let me interrupt you -
14 - - I'm on the screen - - - taking what you just suggested.

15 So let's take the plaintiff gets on the stand,
16 says I really don't recall. I don't recall. I just don't
17 remember. What - - - what is the jury going to base its
18 fact-finding on?

19 MR. KARDISCH: Well, based - - -

20 JUDGE RIVERA: And the jury believes, unlike what
21 I - - - my question to your adversary - - - the jury
22 believes that the plaintiff doesn't recall. It's not a
23 credibility, well, I'm not so sure that that's true, you
24 said something else previously. The plaintiff is
25 consistent throughout. What fact-finding is going to



1 happen there?

2 MR. KARDISCH: Abs - - - well, the plaintiff,
3 obviously, has the burden of proving that there was a
4 violation of the labor law and that - - -

5 JUDGE RIVERA: If I have - - - but didn't we - -
6 - haven't we already said in the past if you've got the
7 ladder and the ladder wobbles, the presumption is - - - and
8 wasn't that the jury charge - - - the presumption is that
9 there's something wrong with the ladder.

10 MR. KARDISCH: That is not exactly correct.

11 JUDGE RIVERA: Okay.

12 MR. KARDISCH: That presumption - - - that
13 presumption which the dissent in overturning the summary
14 judgment order mentioned only applies when the ladder
15 malfunctions or is defective, and there's no apparent
16 reason why it fell.

17 This Court, in Blake and in many other cases - -
18 -

19 JUDGE RIVERA: That sounds a little bit - - -
20 that sounds a little circular to me. I'm not understanding
21 your point from that.

22 MR. KARDISCH: Well, there's no - - -

23 JUDGE RIVERA: If one does not know, and there
24 are many reasons why this particular ladder might wobble,
25 right, and the plaintiff said I don't know why it did that,



1 I don't - - - I have no idea, you're saying you don't get
2 the presumption in that situation - - -

3 MR. KARDISCH: You don't - - -

4 JUDGE RIVERA: - - - that it must be something
5 with the ladder?

6 MR. KARDISCH: You don't get the presumption when
7 there's no evidence whatsoever that the ladder
8 malfunctioned. Our expert testified at trial very
9 specifically, and their expert, Mr. Dube could not refute
10 this that there was absolutely nothing wrong with the
11 ladder. This is not like a case where the feet are missing
12 or it's bent or something else.

13 The only thing that was wrong with the ladder is
14 that the plaintiff didn't check the positioning on his last
15 time going up the ladder which our expert said you have to
16 do each and every time.

17 The ladder didn't malfunction, and if the Court
18 were to determine that it doesn't matter whether it
19 malfunctioned or not, then it would be violating all the
20 cases that say that simply because a plaintiff falls off a
21 ladder does not create a - - -

22 JUDGE RIVERA: Okay. So again, what's the fact-
23 finding that the jury's going through? What - - - what is
24 it going to decide when plaintiff says I don't recall?
25 It's going to decide that the ladder was either properly



1 positioned and stabilized or it wasn't, right?

2 MR. KARDISCH: So - - - so it - - -

3 JUDGE RIVERA: And if no one's there except the
4 plaintiff, and they say I don't recall, what's the exercise
5 of fact-finding that will happen in that kind of a case?

6 MR. KARDISCH: Okay.

7 JUDGE RIVERA: Or is your position then the
8 plaintiff never can carry the burden in that example?

9 MR. KARDISCH: Okay. So what the appellate court
10 decided in overturning summary judgment was that there were
11 genuine issues of fact as to whether there was a violation
12 on the defendant's part, and whether the plaintiff was the
13 sole proximate cause. And the court specifically stated
14 plaintiff didn't know why the ladder wobbled or shifted,
15 and he acknowledged that he may not have checked the
16 positioning of the locking mechanism despite having been
17 aware of the need to do so. And that's precisely what the
18 jury found. That was the question of fact - - -

19 JUDGE RIVERA: Yeah, but - - -

20 MR. KARDISCH: - - - to determine.

21 JUDGE RIVERA: Okay. But let's - - - let's say
22 they believe him when he says - - - well, he says I don't
23 remember, and they decide no, we think you didn't check it.
24 How does that get you to the fact-finding that therefore,
25 it is not properly positioned and stabilized?



1 MR. KARDISCH: Well, there were very many things
2 both at his deposition and at trial that the plaintiff did
3 not remember. He did not remember which of many ladders in
4 the room he used. He did not remember if he brought the
5 ladder into the room himself which creates an issue of fact
6 as to whether he set it up himself in the first place.
7 There were a lot of things that the jury heard that he did
8 not remember.

9 So it was very reasonable and logical for the
10 jury to conclude if he remembers climbing the ladder four
11 or five times with nothing happening, which is another
12 indication that there was absolutely nothing wrong with the
13 ladder, and he doesn't remember that whether or not he
14 positioned it and locked it correctly on the - - - on the
15 last time, and maybe he didn't do so.

16 And our expert testified that the only reason the
17 ladder fell or could have fallen - - - I'm sorry, the
18 ladder didn't fall. The only reason the plaintiff could
19 have fallen without the ladder falling is if the plaintiff
20 did something or failed to do something that amounted to
21 some kind of - - -

22 JUDGE RIVERA: Let me ask you this. If the
23 evidence is that the plaintiff checked at the beginning,
24 but didn't check on the last time, what - - - what - - -
25 what evidence - - - what would be the fact-finding on that?



1 Isn't the fact-finding on that that there's something wrong
2 with the ladder if it was properly positioned and locked in
3 place?

4 MR. KARDISCH: No. Because for a number of
5 reasons.

6 First of all, the plaintiff testified that in the
7 course of the day - - - and in his deposition he said he
8 was up and down that ladder for a fair amount of the day -
9 - - the plaintiff testified that he left the room for some
10 period of time. When he came back, there was one ladder
11 gone that had been there before. He didn't know which
12 ladder he had used. He didn't remember anything about the
13 circumstances other than the fact that when he started to
14 come down - - - and Your Honor, his testimony with regard
15 to how he positioned and transitioned his body coming down,
16 this very, very large man on a ladder rated for a 225-pound
17 individual, he didn't remember a lot about what happened.

18 So in - - - so these are all the factors and the
19 facts that the jury had to consider quite consistently with
20 what the appellate division held it overturned in summary
21 judgment. These were the very facts that were at issue
22 that the jury decided. And I want to say something also
23 about the verdict.

24 The judge instructed the jury that if they find
25 that there was no violation of the labor law, that they



1 should skip over the question on proximate cause, and go to
2 the four questions that existed on sole proximate cause.

3 Now, if there's no violation of the labor law,
4 then you don't get to the affirmative defense of sole
5 proximate cause. And what the court should have done is
6 instruct the jury to end its deliberations when it found
7 that there was no violation of the labor law.

8 JUDGE WILSON: And did you - - - did you object
9 to the form on that basis?

10 MR. KARDISCH: Yes. Yeah. Obviously, we didn't
11 raise it on appeal because we won summary judgment - - -
12 the summary judgment order decision and we also won at
13 trial. But had the - - - had the jury stopped when it
14 should have, we would not even be talking about sole
15 proximate cause. But the jury did go further and found in
16 four separate questions, because the plaintiff - - - the
17 jury found that the plaintiff didn't position the ladder
18 properly, didn't lock the mechanisms, didn't make sure that
19 the legs were extended - - -

20 JUDGE WILSON: No, no, I thought - - - I thought
21 - - - I'm sorry. I read the jury form. I believe there
22 were two sets of questions. One of them is about
23 positioning the spreaders, four questions. Another one is
24 four questions about positioning of the ladder. And as to
25 four about the spreaders, there is written yes, yes, yes,



1 yes, yes, which is then crossed out and the word "skip" is
2 notated next to each of those.

3 MR. KARDISCH: No. I believe - - -

4 JUDGE WILSON: So that it looks to me as if what
5 the jury decided was on positioning only, not on the
6 spreaders.

7 MR. KARDISCH: The jury determined in question
8 number 3, "Did plaintiff fail to check the positioning of
9 the ladder" then - - -

10 JUDGE WILSON: That's positioning, yes.

11 MR. KARDISCH: Yeah.

12 JUDGE WILSON: What about spreaders?

13 MR. KARDISCH: And then the next one, "Was the
14 ladder improperly positioned" - - -

15 JUDGE WILSON: That's positioning. What about
16 spreaders?

17 MR. KARDISCH: Yes. Did it - - - did the ladder
18 - - - "Did plaintiff fall because the ladder was improperly
19 positioned? Yes."

20 JUDGE WILSON: That's positioning.

21 MR. KARDISCH: Okay. And "Did the improper
22 position" - - -

23 JUDGE WILSON: That's positioning.

24 MR. KARDISCH: Right. Okay. Okay.

25 So I stand corrected. On the spreaders - - -



1 JUDGE WILSON: I just want to make sure I read it
2 the same way as you.

3 MR. KARDISCH: Right. It's on the positioning -
4 - -

5 JUDGE WILSON: Okay.

6 MR. KARDISCH: - - - that the jury - - - but
7 again, the jury should never have gotten to that point
8 having determined that there was no violation of the labor
9 law.

10 So not only did the appellate division rule
11 correctly that these were all genuine issues of fact, but
12 the jury considered all of these points, and the jury made
13 a determination. There's nothing to suggest that the
14 jury's determination was against the weight of the
15 evidence, or was a product of some insanity on the part of
16 the jurors. The testimony was very clear from the
17 plaintiff as to the fact that he didn't remember
18 positioning the ladder the way he should have.

19 Our expert testified that since the ladder didn't
20 fall, there was nothing wrong with the ladder, and it had
21 everything to do with both the positioning of the ladder
22 and the plaintiff's failure to maintain three points of
23 contact, which opposing counsel mentioned.

24 And the point - - - the point of the three points
25 of contact is that the plaintiff's testimony at trial was



1 not clear at what point he lost his contact with the
2 ladder, whether it wobbled and shifted and then he lost
3 contact. In another place during the trial he said that he
4 misstepped and he missed the step.

5 So again, the jury had to make those factual
6 determinations, and it's our position that the jury did so
7 correctly, and that this Court should affirm the verdict,
8 and also the denial of the summary judgment motion.

9 CHIEF JUDGE DIFIORE: Thank you, Counsel.

10 MR. KARDISCH: Thank you.

11 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

12 MR. COLLINS: Yes, Your Honor. I want to address
13 a few of the arguments made by my opponent.

14 He initially said - - - argued that because the
15 accident was unwitnessed, there is an inherent triable
16 issue of fact precluding the argument as a matter of law.
17 That is not the case in plaintiff's brief.

18 I cite the case of Klein v. New York and Pannett
19 v. County of Erie, both from this Court, in which the
20 plaintiff was the sole witness to its own accident, and the
21 Court in both cases held essentially that in the absence of
22 any proof as to, you know, credibility or establishing some
23 question as to whether the plaintiff was accurate, then the
24 plaintiff is nevertheless, even though he acts as his own
25 witness, still entitled to judgment providing that there



1 was a failure to, you know, provide a ladder that was
2 constructed, placed, and operated as to provide protection.

3 It's also irrelevant that the plaintiff could not
4 identify precisely which ladder he was using. The evidence
5 shows that there were a number of trades doing a number of
6 different jobs at this reconstruction, rehabilitation of
7 the theater. He testified that he used a ladder that was
8 in the room, that he set it up, checked it, used it four to
9 six times.

10 So regardless of who owned that ladder, whether
11 it was his employer - - - and he said it looked like one of
12 my employers but I can't be a hundred percent sure - - -
13 the fact that it shifted and wobbled is what is critical
14 here and not the ownership or identity of that particular
15 ladder.

16 And on that issue, contrary to defendant's
17 argument, shifting and wobbling is the type of malfunction
18 or failure that gives rise to liability. I cite a number
19 of appellate division cases which obviously are not
20 controlling before this Court but are instructive. I also
21 cite the Gordon v. Eastern Railway case in which the
22 plaintiff was on a ladder that "tipped". And I think
23 whether the ladder tips, shifts, or wobbles causing someone
24 to lose their balance and fall, it is the classic, you
25 know, case for the application of Labor Law 240.



1 The defendant also argues that their expert, you
2 know, said that because the ladder didn't fall, the
3 plaintiff must have done something wrong.

4 But regardless of whether the ladder fell, or it
5 simply wobbled and shifted and caused the plaintiff to lose
6 his balance, you know, it's again a case for application of
7 240.

8 And to reiterate, the defense expert said, you
9 know, the ladder was properly set up, and whether it was or
10 not isn't the issue. The issue, according to defense
11 expert and, therefore, defendant by extension is that he
12 didn't maintain three-point contact.

13 Again, we reiterate that was imperative fault at
14 most and it's undisputed on this record that the ladder
15 shifted and wobbled. The jury was so told. And there's no
16 basis on this record where the jury could rationally and
17 not speculatively find that the plaintiff didn't properly
18 position or check the position of the ladder, because all
19 of the evidence is contrary, and the concession by
20 defendant's expert is to the contrary.

21 CHIEF JUDGE DIFIORE: Thank you, Counsel.

22 MR. COLLINS: Thank you.

23 CHIEF JUDGE DIFIORE: At this point in time, the
24 Court will stand in recess for ten minutes in order to
25 allow for the execution of our COVID cleaning protocols.



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THE CLERK: All rise.

(Court is adjourned)



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

I, Ellen S. Kolman, certify that the foregoing transcript of proceedings in the Court of Appeals of David Bonczar v. American Multi-Cinema, LLC, No. 26 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Ellen S. Kolman

Signature: _____

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