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COURT OF APPEALS
STATE OF NEW YORK

JAMES HEALY,

Appellant,

-against-

EST DOWNTOWN, LLC

Respondent.

NO. 27

20 Eagle Street
Albany, New York
March 16, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN 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: Appeal number 27, Healy v.
2 EST Downtown.

3 Counsel?

4 MR. NAVAGH: Thank you. May it please the court.
5 My name is Jim Navagh from the Law Offices of John Wallace.
6 I would like to reserve two minutes for rebuttal, please.

7 CHIEF JUDGE DIFIORE: You may have two minutes,
8 sir.

9 MR. NAVAGH: Thank you.

10 CHIEF JUDGE DIFIORE: You're welcome.

11 MR. NAVAGH: The issue in this case is really the
12 proper boundaries of Labor Law 240, specifically whether,
13 in this case, a maintenance worker standing on a ladder to
14 remove debris from a rain gutter is entitled to the
15 extraordinary protections of the scaffolding law.

16 At the Appellate Division level, this issue was
17 addressed in the terms of whether the activity was - - -
18 the enumerated activity of cleaning. And of course, to
19 make that determination, the court properly referred to the
20 Soto decision and the four factors.

21 Two of the four - - - well, the Appellate
22 Division unanimously found that two of the four factors
23 favored my position that 240 does not apply to this case,
24 that it's not the type of cleaning as defined in the
25 statute. The court split on the other two factors. So I'm



1 going to talk about the factors that the court split on.

2 The first one the court split on was whether this
3 is a routine type of activity. And Soto talks about the
4 type of activity that takes place on a relatively frequent
5 basis.

6 We have a plaintiff removing a nest from above a
7 doorway. Birds - - - birds form nests on buildings. In
8 the - - - in the Soto case itself, the question was about
9 whether dusting a shelf was a - - - was a routine activity.
10 At least that factor was addressed. Well, dust forms on
11 shelves the way birds build nests on buildings. I mean,
12 the court never addressed whether the plaintiff had ever
13 removed dust from a shelf before, or how frequently did it
14 happen. Rather, the court said that cleaning dust from the
15 shelf is the type of activity that would occur in a retail
16 establishment.

17 JUDGE TROUTMAN: So for - - - for the question of
18 the routine type of a task, do you look generally to what
19 groundskeepers do or specifically as to what this
20 particular plaintiff would do?

21 MR. NAVAGH: Well, the court in Soto looked
22 generally to the type of activity that is done in a retail
23 establishment. Again, the Fourth Department decision
24 seemed to talk about well, he never removed a bird's nest
25 before, so that means it's not routine. But we don't know



1 in Soto whether this particular plaintiff ever dusted a
2 shelf before or not, and the court, I think, twice used the
3 phrase "the type of activity".

4 JUDGE WILSON: So to put a point on it, are you
5 saying that the - - - as to that factor, the Appellate
6 Division majority used the wrong legal test?

7 MR. NAVAGH: I think - - - I - - - I would agree
8 with that sense of characterization that they - - - they
9 did - - - that they misapplied that factor, or they
10 misunderstood it, and they focused on whether he had done
11 it before.

12 And again, some of the arguments on this point
13 raised by counsel and possibly addressed by the majority
14 were the fact that it's a bird's nest. It's not leaves.
15 Because as I put in my papers, there were a number of cases
16 where the Appellate Division consistently held that
17 cleaning - - - that removing leaves from a gutter, or
18 debris from a gutter, is not the type of cleaning that's
19 covered by the statute.

20 And the argument was made well, this wasn't
21 leaves. This was a bird's nest, and that somehow makes it
22 different or nonroutine or extraordinary or unusual, and
23 it's not.

24 JUDGE TROUTMAN: So is the question is it a
25 routine type of task for a groundskeeper to remove birds -



1 - -

2 MR. NAVAGH: Yes.

3 JUDGE TROUTMAN: - - - or pests from gutters?

4 MR. NAVAGH: Yes. I think that's right, because
5 he testified as to what his job was, what his duties were,
6 and they were to maintain the grounds, to keep things
7 clean, and to respond to complaints, and that was what he
8 was doing. He was responding to a complaint. So this was
9 a routine thing for him.

10 He - - - he had to climb a ladder - - -

11 JUDGE WILSON: Well, but that's I think what
12 we're trying to get at. Does it matter whether it's
13 routine for him or not, or does it matter whether it's
14 routine for people generally who do this kind of activity.

15 MR. NAVAGH: Well, I think it's routine for him
16 and for people. I mean, I've cleaned gutters. I think
17 everybody knows a gutter - - - that things accumulate in
18 gutters. And, you know, we're talking about is this more
19 like a domestic household type of cleaning. Domestic
20 household cleaning frequently includes cleaning gutters. I
21 don't - - - I don't know - - -

22 JUDGE GARCIA: Well, let's say - - - let's do it
23 as a hypothetical.

24 So you have two different cases and in one case,
25 same job title, two buildings side by side, same building.



1 and in one case that every week the task of this person is
2 to go up and clean the gutters. The owner has a gutter
3 fetish, so I want my gutters cleaned. And the other one
4 maybe the handyperson does it once every nine months.
5 Routine in both or not routine in both?

6 MR. NAVAGH: I think it's routine in both,
7 because I think that gutters accumulate debris, and
8 therefore cleaning gutters on a structure, as the owner of
9 a structure, you have to address that. Some people may be
10 more particular, but it's something that occurred - - -
11 that recurs over time and you have to address it, and you
12 clean it out once, you're going to have to clean it out
13 again.

14 JUDGE CANNATARO: So what's - - - what's the
15 legal definition of routine? What's - - - what's the
16 holding that - - - that you propose here?

17 MR. NAVAGH: Well, the - - - the court in Soto
18 did - - - the court in Soto said routine means in the sense
19 that "it is the type of job that occurs on a daily, weekly,
20 or other relatively frequent and recurring basis as part of
21 the ordinary maintenance and care of commercial premises".

22 JUDGE CANNATARO: So daily or weekly, maybe not
23 every nine months. That - - - that - - - that sounds
24 nonroutine.

25 MR. NAVAGH: Well, the court says, "or other



1 relatively frequent and recurring basis". So if it were -
2 - - that might make a difference how - - - how frequently
3 it recurs based on this definition. But again, I would
4 hope - - -

5 JUDGE WILSON: Now, you're going back to how
6 frequently the particular plaintiff performed it, rather
7 than the job generally. That's what I'm trying to sort
8 through.

9 MR. NAVAGH: Well, that - - - it seems to me that
10 we don't know in Soto how frequently the plaintiff did it,
11 and the court ruled that it was routine in Soto without
12 making that inquiry at all. The court said, "Dusts
13 collects on shelves". "Dusting shelves is a routine
14 activity if you own a retail establishment." And my point
15 is that if you own a building, you're going to get - - -
16 you're going to get debris in your gutters. And - - -

17 JUDGE SINGAS: So Counselor, in your view,
18 cleaning gutters can never be cleaning under the Labor Law
19 for protective purposes?

20 MR. NAVAGH: That's a very good question, and I
21 would say - - - I would disagree with that. You know, you
22 have to apply all these factors, and some gutters may be
23 higher than others, and some gutters, you know, function
24 differently depending on the type of building. There might
25 be - - - you know, somebody could drop a huge - - - a piece



1 of - - - somebody could drop a - - - a worker could drop a
2 sledgehammer or heavy equipment in a gutter and you'd have
3 a completely different considerations. It would be a whole
4 different type of activity.

5 You know, the question here is getting a ladder -
6 - -

7 JUDGE TROUTMAN: So then the other factors then
8 come into play to make a determination as to whether it's
9 covered?

10 MR. NAVAGH: I'm sorry, could you say - - -

11 JUDGE TROUTMAN: With the other Soto factors.
12 For instance, with respect to specialized tools necessary
13 or equipment in order to get the gutters because they're so
14 high, would that help make that decision?

15 MR. NAVAGH: I think that the factors are all
16 related, you know, for example how high was it, what type
17 of equipment would be necessary. I would - - - I would
18 agree with that.

19 So I don't - - - I'm - - - I don't think the
20 court should make a ruling that cleaning gutters is never -
21 - - is never covered.

22 JUDGE RIVERA: So Counsel - - - I'm on the screen
23 - - - let me ask you a question before you continue.

24 I'm just trying to figure out why you're going
25 down this particular rabbit hole.



1 So if we agree with the Appellate Division
2 majority below on the two that you also agree and the
3 dissent agrees that are not factors that are satisfied - -
4 - Soto factors satisfied on this fact pattern, but two
5 were, and you're arguing - - - you started out on one, I
6 assume you're going to get to the second, right. If - - -
7 if we disagree with you about sort of the view of these
8 Soto factors, where - - - where does that leave us, because
9 Soto does say it's - - - right, the presence or absence of
10 any one is not necessarily dispositive?

11 MR. NAVAGH: That's right.

12 JUDGE RIVERA: Look at - - - you look at the
13 totality, right?

14 MR. NAVAGH: That's right, Your Honor.

15 JUDGE RIVERA: And let me just ask you this. How
16 do you understand that sentence? You looked at - - -
17 viewed in totality the remaining considerations, do you
18 take that word considerations to mean the other factors or
19 other considerations?

20 MR. NAVAGH: I understood it to mean the other
21 factors.

22 JUDGE RIVERA: Well, why doesn't it say that
23 then?

24 MR. NAVAGH: Well, I don't - - - well, the court
25 - - - those were the - - - those - - - that wasn't - - - in



1 Soto, the court looked at those factors - - -

2 JUDGE RIVERA: Yeah.

3 MR. NAVAGH: - - - and if there's other
4 considerations - - - I guess if the court would be open to
5 hearing other considerations that would be fine, but it
6 seems to me the way Soto was written it's those - - - it's
7 those factors. And maybe I'm reading it wrong, but - - -

8 JUDGE RIVERA: Well, then, do you read the
9 Appellate Division majority as saying, when it says, you
10 know, two are in favor of the plaintiff; two are not.
11 We're looking at the totality, and we think then that the
12 remaining consideration is in favor of the plaintiff. You
13 - - - you take that to mean that the court thought given
14 the two that militate in favor of the plaintiff, that that
15 outweighs the other two?

16 MR. NAVAGH: I was hoping the court would have
17 explained that, and the court didn't explain that. And it
18 - - -

19 JUDGE RIVERA: The court there, you mean the
20 majority below?

21 MR. NAVAGH: The majority at the Appellate
22 Division.

23 JUDGE RIVERA: Okay.

24 MR. NAVAGH: And for example - - - and that sort
25 of brings me to this other point about the elevation.



1 Again, we've got unanimity. The two factors don't apply.
2 We've got a split decision on the other two. So that seems
3 to me it's leaning a little bit in my favor just because of
4 that, but let me look - - -

5 JUDGE RIVERA: Well, no. It's fifty-fifty.
6 You're in equal poise. Go ahead.

7 MR. NAVAGH: Well, that's - - - that's - - -
8 that's certainly an argument.

9 JUDGE RIVERA: Yes.

10 MR. NAVAGH: In other words, it was my - - - the
11 factors in my favor are unanimous and the factors against
12 me are split decisions is what I'm saying, which - - -

13 JUDGE RIVERA: Fair enough.

14 MR. NAVAGH: - - - I understand. I'm not saying
15 that's dispositive, of course. But the elevation issue,
16 this was a five-foot elevation. The majority didn't
17 address the specific elevation.

18 JUDGE WILSON: So just so I - - - I'm sorry; over
19 here again.

20 Just - - - so there's agreement that the
21 elevation was five feet?

22 MR. NAVAGH: It was - - -

23 JUDGE WILSON: There was a factual dispute about
24 whether it was five feet.

25 MR. NAVAGH: It was - - - the only testimony on



1 how the accident happened came from the plaintiff, and he
2 said it was five feet. He was on the fifth rung - - -

3 JUDGE WILSON: Okay. So - - -

4 MR. NAVAGH: - - - and they were a foot apart.

5 JUDGE WILSON: - - - the dispute then is about
6 whether five feet is comparable to household cleaning?

7 MR. NAVAGH: Correct.

8 JUDGE WILSON: Okay.

9 MR. NAVAGH: In Soto, the court ruled that four
10 feet was - - - was comparable.

11 JUDGE WILSON: Well, that was a four foot
12 stepstool sort of ladder, but I don't think in Soto there
13 was testimony that he was on the top of that four-foot
14 stool. And I think instead, the evidence in Soto was that
15 the shelf he was dusting was at six feet high, and Mr. Soto
16 was five foot ten. It would be a little incongruous to be
17 - - - to make yourself ten feet tall to dust a six foot
18 shelf.

19 MR. NAVAGH: I - - - I noticed that, and I had
20 the same question, and I looked at the briefs for the
21 Appellate Division and the defendant's brief said plaintiff
22 testified that he allegedly climbed four steps to the top
23 of the ladder.

24 So I agree that it's hard to understand from the
25 decision why - - - I agree; why would you climb four feet



1 to do that. But again, my review of the documents below
2 indicates that the plaintiff testified that he was - - - he
3 climbed four feet.

4 And anyway - - - I don't want to belabor that,
5 because I don't know. But let me point out this.
6 Certainly, the dissent felt that five feet was comparable
7 to domestic cleaning.

8 Five months after my case in a case called
9 Fuhlbruck, the Fourth Department ruled on this exact issue.
10 A commercial cleaner, five feet up, Fourth Department
11 unanimously said that that was comparable to domestic
12 cleaning, and they ruled that 240 did not apply. And I
13 applaud the panel, which included Judge Troutman on that
14 case.

15 So I think that, again, the fact that that's a
16 close question that it's not overwhelming in one direction
17 would, you know, would not support the majority's position
18 that two-two should go for the plaintiff.

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 MR. NAVAGH: Thank you.

21 CHIEF JUDGE DIFIORE: Counsel?

22 MR. GORSKI: Good afternoon, Your Honors. May it
23 please the court? Jonathan Gorski from Dolce Panepinto on
24 behalf of the plaintiff/respondent, James Healy.

25 I think it's important to start by saying what



1 this case is not. This is not a case involving the routine
2 and frequent cleaning of gutters which occurs annually or
3 semiannually in the maintenance and care of a commercial or
4 residential property. If that was the case, I would not be
5 standing here before you today. This case would not have
6 made it this far.

7 It's well established that routine and frequently
8 occurring cleaning of gutters is not covered under the
9 Labor Law, but that's not what we have here. What we have
10 here is different. This is not routine. It's not
11 scheduled gutter cleaning.

12 JUDGE TROUTMAN: Counsel?

13 JUDGE CANNATARO: Counsel? I'm sorry. I'm - -
14 - I'm not even sure that - - - I'm not convinced that this
15 is cleaning at all, although it seems to be understood at
16 the Appellate Division and even among counsel here that
17 what we're talking about is some species of cleaning, but
18 this was a - - - it was a pest control request. There's
19 certainly a difference between removing a bird's nest and
20 cleaning the leaves out of a gutter.

21 To me, it seems like this is a subspecies of
22 building maintenance or something like that. Am I
23 constrained by the record to view this as a cleaning case?

24 MR. GORSKI: Your Honor, I respectfully disagree
25 with - - - with your - - - your position that this does not



1 potentially implicate cleaning.

2 The definition that has been used at appellate
3 courts is the Webster's dictionary. And it's the removal
4 of dirt or other impurities, extraneous materials.

5 Here, we have an extraneous - - -

6 JUDGE CANNATARO: Birds are impurities?

7 MR. GORSKI: Well, this is the nest itself, Your
8 Honor. The impurity - - - what's being removed is the
9 nest. The nest is composed of sticks, other materials that
10 they use to bind the nest together. That's what's being
11 removed. That's what's being cleaned from the gutter.
12 Just like cleaning - - - I mean, I think everyone would
13 agree that cleaning leaves and dirt and other things from a
14 gutter is cleaning.

15 JUDGE CANNATARO: The ticket that plaintiff got,
16 the work order that was given to him, was a pest control
17 work order, wasn't it?

18 MR. GORSKI: It did say that it was a pest
19 control work order. You are correct, Your Honor.

20 JUDGE CANNATARO: Do they have a cleaning work
21 order that's issued?

22 MR. GORSKI: I don't know the inner workings.
23 What I do know from the record is that when there's a
24 complaint from a tenant regarding an issue at the property,
25 it comes in a work order. And the work order - - - how the



1 work is described is put in by the supervisor that gets the
2 complaint and then gives it to the plaintiff or other
3 workers that are similarly situated as repair and
4 maintenance technicians.

5 JUDGE CANNATARO: Do you - - - do you find it - -
6 - well, we can talk about how it went to a repair and
7 maintenance technician, but for now, do you find it of any
8 significance that the work order denominated the task as
9 pest control and - - - and not cleaning?

10 MR. GORSKI: I find it of no significance, Your
11 Honor. The work order is certainly not dispositive as to
12 how it's described.

13 JUDGE TROUTMAN: Is the type of work that a
14 groundskeeper do dispositive?

15 MR. GORSKI: Well, in the Joblon case that was
16 decided by this court some time ago, the court held that a
17 worker's title, or the work that a worker generally does is
18 not dispositive.

19 Here, we have a maintenance repair technician.
20 He does maintenance. He does do maintenance; ordinary
21 maintenance: cutting the grass, weed-whacking, turning
22 over - - -

23 JUDGE TROUTMAN: Answering calls of pests?

24 MR. GORSKI: Turning over - - - there is no
25 evidence in the record that he's ever responded to a



1 complaint regarding a bird or any other pest. So we don't
2 know - - -

3 JUDGE TROUTMAN: So he - - - so he has to have
4 responded in the past to this type of complaint?

5 MR. GORSKI: There's nothing in the record
6 indicating one way or the other. He did testify that he
7 has never in his three years working for First Amherst
8 Development he never removed a bird's nest from a gutter.
9 There is testimony of that. Or, I'm sorry; there is
10 evidence of that. There is no evidence as to whether there
11 were any other - - -

12 JUDGE TROUTMAN: So we focus on that which is
13 specific as to him?

14 MR. GORSKI: Well, no. I think you have to look
15 at it generally and specifically.

16 If you look at it generally, this is not the
17 routine scheduled cleaning of leaves, dirt, water that
18 enters into a gutter through the normal use and operation.
19 This is something that came into the gutter as extraneous.
20 It's being removed.

21 I've owned my home for seven years.

22 JUDGE WILSON: Can something be routine and
23 unscheduled?

24 MR. GORSKI: Can it be routine and unscheduled?

25 JUDGE WILSON: Yeah.



1 MR. GORSKI: Yeah. I would say that turning over
2 an apartment perhaps. So a tenant leaves. He goes in - -
3 - it's not scheduled. It depends upon when the tenant
4 leaves. That's not scheduled. He goes in and turns it
5 over, does some vacuuming, mops the floor, that's routine.
6 That's not scheduled.

7 JUDGE WILSON: Okay. So routine doesn't depend
8 on being scheduled?

9 MR. GORSKI: Well, if we look at what this court
10 has stated in Soto, the definition of routine depends upon
11 whether it's frequently occurring, whether it happens on a
12 daily, weekly, or some other interval basis. Here, we
13 don't have that. We have three years of him working as a
14 First Amherst Development maintenance and repair
15 technician; he had never done it. So in the general sense,
16 removing a bird's nest from a gutter is not routine.

17 I've lived in my house for seven years. I've
18 never removed a bird's nest from a gutter. And it's
19 specific to him it's nonroutine in the sense that he has
20 never done it before.

21 He's worked for First Amherst Development for
22 three years. He's never removed a bird's nest from a
23 gutter.

24 JUDGE CANNATARO: Counsel - - -

25 MR. GORSKI: So whether we look at it - - -



1 JUDGE GARCIA: I'm sorry. Can - - - can - - -
2 and I take that point, but can I ask you something
3 different?

4 MR. GORSKI: Absolutely.

5 JUDGE GARCIA: This test, our Soto cleaning test,
6 right, is - - - is somewhat flexible, let's say, right?

7 And what I'm - - - like to get your opinion on is
8 what's the role of this court in reviewing the Appellate
9 Division application of that test since, you know, we've
10 had some algorithms lately before us, and this seems to be
11 the opposite. You know, you apply this, if you don't have
12 this part, you can look at the other parts. We're not
13 usually - - - I mean, it's somewhat unusual for us to be in
14 the position are we to just reapply this test, and if we
15 get a different answer that's the way we go?

16 MR. GORSKI: Well, I think what the question is
17 is whether the Appellate Division properly applied the
18 factors. That's the question to be decided. And if this
19 court finds that the Appellate Division did properly apply
20 the factors, and based upon the totality of the
21 circumstances, it militates in favor of cleaning, then the
22 court should affirm. That's the court's role in this case
23 is to determine whether the four Soto factors were properly
24 applied to the facts of this case.

25 What the defense is trying to do, even though



1 they backed off of it today, is they're trying to create a
2 categorical exclusion for cleaning of gutters. It's clear,
3 I said it earlier, if you're doing routine cleaning of
4 gutters, it's not covered. This is not routine in that
5 sense.

6 There is no categorical exclusion. That's not
7 how we look at the Labor Law. That's not how this court
8 has instructed lower courts to look at the Labor Law. It's
9 not black and white. There are no such things as
10 categorical exclusions. One goes into pile A, one goes
11 into pile B. We need to look at each case on a case-by-
12 case basis, look at what the - - - and plaintiff is doing
13 at the time and decide the case based upon those facts.

14 The best example I can give of that is commercial
15 window cleaning. This court has decided that commercial
16 window cleaning in some contexts is covered. In other
17 contexts it's not covered, okay. So the court has decided
18 that essentially the same exact task: water, soap, a
19 squeegee, a sponge, a rag that's used to clean a commercial
20 window is covered in some contexts and is covered in not.

21 I point the court's attention - - - I direct the
22 court's attention to the Swiderska case and the Broggy
23 case. Almost the exact same circumstances. However, in
24 the Broggy case, Labor Law 240 did not apply because there
25 was not an elevation-related hazard because the plaintiff



1 was provided with the tools to permit him to stand at the
2 floor level and do the cleaning instead of climbing on top
3 of a desk.

4 In Swiderska - - -

5 JUDGE RIVERA: Okay, so that strikes me as a
6 little bit different than where I thought you were going.
7 So let me ask you this on this.

8 Sometimes window cleaning is covered sometimes -
9 - - the commercial window cleaning; sometimes it is,
10 sometimes it's not. So you've got regular window cleaning
11 that happens on a commercial building, right? And then
12 you've got a tenant who says a bird just left some stuff on
13 the window. I can't really see through it. Get someone up
14 here to clean it. Which one's covered and which one's not?

15 MR. GORSKI: Under - - -

16 JUDGE RIVERA: Same tools used.

17 MR. GORSKI: Under - - - under commercial window
18 cleaning? We - - -

19 JUDGE RIVERA: Well, I'm asking you. You said
20 that there's - - - we set out this distinction, so I'm
21 asking you how this hypothetical would work as you
22 understand the distinction that the court has set out.

23 MR. GORSKI: Sure. We would have to look at the
24 other considerations which is what the Soto court directs
25 us to do. Look whether there's an elevation differential.



1 Look whether it's routine in nature, either generally or
2 specifically to the plaintiff himself. Look at the tools
3 that are used. There are other considerations that the
4 court uses to differentiate two tasks that are seemingly
5 very similar, and in some contexts the same. So you need
6 to look at the other considerations in that case.

7 If it's at ground level, and someone is cleaning
8 a storefront window at ground level, and can do it based
9 upon the height and decides to stand on top of a - - - or
10 decides to use a stepstool, well, that's not covered.
11 There's no elevation differential, no elevator - - -
12 elevation-related hazard.

13 On the other hand, if it's on the second floor or
14 the third floor and it has a significant elevation-related
15 hazard, that could be covered. We need to look at each
16 case fact - - -

17 JUDGE RIVERA: I know, but that wasn't my
18 hypothetical. We're going to assume that there's an
19 elevation component in my hypothetical, that you're up on
20 the forty-seventh floor, okay, and you're outside and
21 you're doing it that way. Which one's covered and which
22 one's not?

23 MR. GORSKI: Well, this - - -

24 JUDGE RIVERA: I mean, it matters whether or not
25 the person who came up and regularly cleans the windows



1 also came up to clean the stuff that the bird has left on
2 the window?

3 MR. GORSKI: I think that would matter under the
4 court's direction in Soto as to whether it's routine.
5 Something that happens daily, weekly, or on other - - - or
6 on some other recurring basis and whether it was specific
7 to the worker himself or generally.

8 So we'd have to take a look at the other
9 considerations, one being as Your Honor has alluded to,
10 whether this specific worker normally does this work.
11 Whether this is his type of work that he does on a daily,
12 weekly, or other recurring basis.

13 JUDGE WILSON: Let me just ask you one more thing
14 before you're - - - I mean, your time's already up, but
15 with the Chief's indulgence.

16 CHIEF JUDGE DIFIORE: Yes.

17 JUDGE WILSON: The Appellate Division expressly
18 said it wasn't deciding the claim about repair, right,
19 under 241. If we disagree with you, right, if we reverse,
20 what happens to that? Is that still alive or no?

21 MR. GORSKI: Yes. Yeah. We fully briefed that
22 at the Appellate Division on repair and alteration, so that
23 is in the record. That was before the Appellate Division.
24 So our position would be that if the court does decide
25 against us on cleaning, the court can look at the record



1 and make a determination on the law based upon the facts.

2 There is no factual dispute here. This court
3 sits in a position not of the trier of fact, but on the
4 question of law. And here, since there is no dispute in
5 the record over what the plaintiff was doing, the court can
6 determine that this is covered work under a different
7 enumerated activity, that being either repair or
8 alteration.

9 JUDGE WILSON: Thank you.

10 CHIEF JUDGE DIFIORE: Thank you, Counsel.

11 MR. GORSKI: Thank you.

12 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

13 MR. NAVAGH: Thank you, Your Honor. Quickly.

14 On whether to repair or not, that may be the one
15 question of fact that's in here is that the plaintiff said
16 that he was intended to patch the holes as part of his job,
17 and his supervisor said no, he wasn't. So that is a
18 question of fact. And that may be relevant to whether it's
19 a repair or not. That's been briefed in detail. I cited
20 the Azad case which said patching holes and gutters that
21 are functional is not a repair. It's component
22 replacement. I mean, that's a whole other argument I don't
23 think I have time for.

24 JUDGE RIVERA: Well, then, Counsel, does that
25 mean - - - I'm on the screen - - - does that mean that if



1 the court were to agree that this doesn't fall under
2 cleaning, that we have to send it back to the Appellate
3 Division?

4 MR. NAVAGH: I don't - - - I don't think so. My
5 understanding is - - -

6 JUDGE RIVERA: Well, if there's a factual
7 dispute, how are we going to resolve that?

8 MR. NAVAGH: Well, if the court - - - if the
9 court finds - - - if the court finds that it's - - - it's
10 not a repair, then - - - then that's the end of it. If the
11 court finds that patching the holes is a repair, then we
12 need to have - - - we need to have a trial on that issue.

13 I - - - I don't - - - my position is it's not a
14 repair, and I rely on the Azad case in my - - - my
15 arguments. It was a functional gutter.

16 I don't concede that this is cleaning. I'm here
17 talking about cleaning because the Fourth Department picked
18 up on that. That was one of many arguments that we made in
19 our papers. The trial court did not address cleaning. And
20 then we went to the Appellate Division and the whole
21 decision is based on Soto.

22 So I agree that - - - that putting your hand in a
23 hole and pulling something out isn't necessarily what
24 everybody's idea of cleaning is.

25 JUDGE GARCIA: Do you agree, Counsel, with your



1 opposing Counsel's description of our role in reviewing the
2 application of Soto by the Appellate Division?

3 MR. NAVAGH: Here's my understanding, as maybe
4 the least experienced appellate attorney in the room,
5 because I did look at this. My understanding is that this
6 court reviews this decision on a de novo basis and, you
7 know, whatever arguments are before the court the court may
8 address.

9 I - - - I raised other arguments. I - - - I
10 listened to people talk about nondefective ladders all
11 afternoon, and we have a nondefective ladder in this case,
12 and I think the court ought to reverse the Appellate
13 Division because there's no - - - there's no fault.
14 There's no liability because there's no statutory
15 violation. Plaintiff said the ladder was fine. It was
16 proper. It was nondefective. It performed as it should
17 perform. It was placed properly on a flat level dry
18 concrete surface.

19 A bird startled him. He lost his balance and
20 fell, and that was not - - - the ladder was not there to
21 prevent a bird from startling him. He was - - - it was - -
22 - the ladder performed properly. It was not defective, so
23 there was no violation and there should be no liability.
24 And I raised other arguments. But that's my understanding
25 is that this court would review the - - - all these issues



1 de novo.

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 (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 James Healy v. EST Downtown, LLC, No. 27 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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