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COURT OF APPEALS
STATE OF NEW YORK

STONEHAM,

Appellant,

-against-

NO. APL 2023-0001

BARSUK,

Respondent.

92 Franklin Street
Buffalo, NY
November 16, 2023

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: The next case on the
2 calendar is Stoneham v. Barsuk.

3 MR. LIPSITZ: Chief Judge, I'd like to reserve
4 three minutes for rebuttal.

5 CHIEF JUDGE WILSON: Yes, sir.

6 MR. LIPSITZ: May it please the court. My name
7 is John Lipsitz. I represent the plaintiff, or appellant,
8 Mark Stoneham. He seeks reinstatement of his claim under
9 Labor Law 240, sub 1. At the age of 57, Mark was injured
10 when the trailer under which he was working collapsed and
11 crushed his pelvis. The key point of difference separating
12 plaintiff Stoneham's 240 sub 1 claim against defendant
13 Barsuk from whatever hypothetical claim a garage mechanic
14 might have against the owner of the family car brought in
15 for regular service is that defendant Barsuk owned the
16 unsafe premises where the injury occurred, owned the
17 trailer which collapsed upon and injured him - - -
18 Stoneham.

19 JUDGE SINGAS: Counselor, somebody bringing their
20 car in for maintenance, that would be put up on the lift,
21 in somewhere like Meineke owns that vehicle, as well.

22 MR. LIPSITZ: That's right. But that person
23 would have no expectation that she would be cast in
24 absolute liability or responsible --- or being responsible
25 for maintaining a safe place of employment.

1 JUDGE CANNATARO: Would they have that
2 expectation after a favorable result for you in this case?

3 MR. LIPSITZ: Absolutely not.

4 JUDGE CANNATARO: Why not?

5 MR. LIPSITZ: The - - - if - - - a favorable
6 result in this case, based on the facts in this case, would
7 not open up the floodgates of claims for such things as
8 claims by the mechanic at Pep Boys or Midas Muffler against
9 the family - - - the person with the family car bringing in
10 for service.

11 CHIEF JUDGE WILSON: What about against Pep Boys
12 or Meineke?

13 MR. LIPSITZ: Or - - - or against Pep Boys or
14 Meineke, for that matter. And it's probably workers' comp
15 part and that - - -

16 CHIEF JUDGE WILSON: What's the distinction there
17 - - - what's the distinction there, then?

18 MR. LIPSITZ: The distinction between my client
19 being injured at the Barsuk scrapyard and the --- and the
20 in the person at Pep Boys being injured, or rather having
21 the claim, the mechanic, if the car falls off the lift
22 and --- and falls on him. Well, certainly I don't ---

23 CHIEF JUDGE WILSON: The claim against the owner
24 of the shop?

25 MR. LIPSITZ: Well, I mean there may well be a

1 claim for negligence or ---

2 CHIEF JUDGE WILSON: The question is, why is it
3 not --- why is it --- why is that not a Labor Law 241 claim
4 where this one is?

5 MR. LIPSITZ: Well, that's not a Labor Law 240
6 sub 1 claim because we're talking about a workplace which
7 essentially is similar to the manufacturing facility in ---
8 in Dahar, or in Preston where you've got a regular
9 workplace, people come in, they punch the clock, they work
10 shift work, they do things repetitively. It's a service-
11 oriented business. It has more to do with Dahar and
12 Preston in that regard.

13 JUDGE CANNATARO: I'd like to counter to you that
14 this that's more like a Labor Law 241 claim because at
15 least at the Meineke or the repair shop, they're actually
16 in the business of lifting cars up at a height and creating
17 that unique sort of risk that's incurred when you're ---
18 when you're dealing with elevation differentials. This
19 was, you know, obviously there was an elevation
20 differential involved in this case, too, but it was a
21 rather unique set of circumstances that brought it into
22 existence.

23 MR. LIPSITZ: I would say that not only was it a
24 rather unique set of circumstances, but the --- when you
25 have the Midas muffler situation, you've got lifts that are

1 used dozens and dozens of times a day. They're designed,
2 situated and --- and put, you know, posted in the ground.
3 They're time tested.

4 JUDGE CANNATARO: And one would hope that that
5 would be done for the purpose of the safety, not just of
6 the --- of the people who own the car, but for the people
7 who work on the car as well; wouldn't it?

8 MR. LIPSITZ: Absolutely. But the ---

9 JUDGE CANNATARO: So how is that not Labor Law
10 241 at Meineke?

11 MR. LIPSITZ: I don't --- under this court's
12 decisions in Dahar and Preston, and I think under a
13 commonsense approach I don't see that a decision upholding
14 or sustaining my client's 240 sub 1 case would spill over
15 to the Meineke muffler situation.

16 JUDGE HALLIGAN: But why not? Why would it not
17 have that effect?

18 MR. LIPSITZ: Why would it not? Well,
19 essentially garage work, you know, it's done indoors in a
20 regulated, routinized setting. It's akin to the routine
21 cleaning and assembly processes occurring in the regular
22 course of manufacturing products and a factory setting.

23 CHIEF JUDGE WILSON: Okay. So let me give you a
24 different let me give you a different example then. What
25 about have you seen outdoor parking lots where cars are

1 stacked up and right? So now we're outdoors. Now we don't
2 exactly have a routine. It's not manufacturing. Car slips
3 off one of those and hits the garage --- the parking
4 attendant.

5 MR. LIPSITZ: Well, Your Honor, you could posit
6 any number of scenarios.

7 CHIEF JUDGE WILSON: I will if I have to.

8 MR. LIPSITZ: Okay. But the scenario we're
9 dealing with here, and that's where I started my argument
10 is Mr. Barsuk owned the scrapyard. It was unsafe. He
11 owned the trailer, which was a massive object. He owned
12 the front-end loader, which in a kind of jerry-rigged sense
13 was used to lift it up. And he also owned what he claimed
14 were the logs or the timbers and pieces of metal that he
15 sort of ridiculously or absurdly argued could have been
16 used to keep the thing from slipping.

17 CHIEF JUDGE WILSON: But all --- all those things
18 would have been true of my parking lot owner, too. So
19 we're still looking for, I think, I mean, I don't speak for
20 anybody else, is why this doesn't spill over to other
21 situations.

22 MR. LIPSITZ: Well, I don't suppose that when
23 you're taking your car to the parking lot in midtown
24 Manhattan and you're going to a show and you're leaving it
25 with a parking attendant, that you have any reasonable

1 expectation that you're responsible for the safe operation
2 of the parking lot or the machinery that's used to elevate
3 the car?

4 CHIEF JUDGE WILSON: No, of course. Now, the
5 claim is not against the owner of the car. The claim would
6 be against the operator, owner of the --- of the parking
7 lot, right, by an employee of that lot for a car falling
8 off of a three high lift.

9 MR. LIPSITZ: The floodgates argument raised by
10 the defendant in this case has to do with the ownership of
11 the structure, namely that the vehicle - - - the vehicle
12 that's brought in by the consumer. I can't speak to the --
13 - the question of whether there's some liability on the
14 part of the owner of the parking lot and the parking lot
15 attendant. Clearly, there's liability for negligence
16 unless there's a worker's comp bar involved between the two
17 of them. So I, you know ---

18 JUDGE CANNATARO: A little bit somewhat different
19 question along the same lines, did Mr. Stoneham work for
20 the owner of the structure or the owner of the location
21 where the structure was located?

22 MR. LIPSITZ: Well, yeah, our --- our claim is
23 that he was employed, within the meaning of that word for
24 240 sub 1 purposes, by Mr. Barsuk, but he did --- if your
25 next question is, did he bring a claim for worker's

1 compensation benefits ---

2 JUDGE CANNATARO: No, no.

3 MR. LIPSITZ: --- he did not.

4 JUDGE CANNATARO: No. I'm really interested in
5 the nature of the employment relationship. In this
6 situation, correct me if I'm wrong, Mr. Stoneham undertook
7 to do the work on the --- that thing, whatever it is ---

8 MR. LIPSITZ: It was a --- it was a trailer.

9 JUDGE CANNATARO: A trailer, in exchange for,
10 like, some kind of loan forgiveness, right?

11 MR. LIPSITZ: He had --- approximately three
12 months before he had, Mr. Barsuk, had loaned him \$5,000 ---
13 I'm sorry, \$25,000. And the understanding was, according
14 to my client's testimony and his affidavit, which is
15 totally consistent with his testimony, that he would work
16 off that money or some of that money by providing labor.
17 In other words, he was obliged to provide labor in order to
18 meet his obligation.

19 JUDGE CANNATARO: Wasn't - - -

20 JUDGE SINGAS: Well, that other point, didn't he
21 also say that he intended to pay back that loan in full?

22 MR. LIPSITZ: Well, that's ambiguous, at least,
23 because the point in which he said that it was just easily
24 could have been interpreted as in addition to the work that
25 I've done to pay it off. When it comes time for me to

1 settle with him, I'll make sure he gets all his money back.
2 But he did say, and he was asked, well, is --- is Mr.
3 Barsuk keeping track or is someone keeping track of the
4 work you're doing and debiting against what you owe him?
5 And he said, yeah, Mr. Barsuk was doing that. Now, Mr.
6 Barsuk put it in an affidavit. I don't believe the
7 affidavit flatly contradicts that. But Mr. Barsuk's never
8 been subject to any kind of cross-examination. It's simply
9 his affidavit. There's a clash.

10 CHIEF JUDGE WILSON: Well, how do you -- how do
11 you --- how do you deal with your client's testimony that
12 he was not an employee. He was not an independent
13 contractor. He wasn't an employee of the recycling plant
14 or anybody having to do anything with the Barsuk family.
15 That's under oath, I mean.

16 MR. LIPSITZ: He also --- he also testified that
17 he had borrowed money and that he was doing work at the
18 scrapyard on heavy equipment to pay back Mr. Barsuk for
19 that money that he borrowed.

20 JUDGE CANNATARO: Go back to Judge Singas'
21 question for just one second. But I don't get that it was
22 ever anyone's expectation that Mr. Stoneham was going to
23 pay off the entirety of the debt through labor. My
24 understanding, please correct me if I'm wrong, is that
25 he---he knew he had a debt. He intended to pay it back,

1 but he wanted some credits to the debt by doing occasional
2 things around this yard of Mr. Barsuk's.

3 MR. LIPSITZ: I think in - - - at least from Mr.
4 Stoneham's testimony and from his affidavit, it's much more
5 formal than that. It's much more an understanding and a
6 clear, concrete understanding on Mr. Stoneham's part that
7 when he --- when he got up in the morning and --- well,
8 actually, he went to the scrap yard three times to work on
9 the trailer, once at the end of July, once on August 4th,
10 and once on August 18th, he said, I didn't get up out of my
11 house, drive all the way to the scrapyard, do all this work
12 on the expectation --- because it was a volunteer. I was
13 expecting that this would reduce my indebtedness.

14 JUDGE TROUTMAN: So if it was more formal than
15 that, was this reduced to a writing?

16 MR. LIPSITZ: No.

17 JUDGE CANNATARO: Did he do it every day?

18 MR. LIPSITZ: No, he was he was an occasional
19 worker for Mr. Barsuk's scrapyard. His regular employment
20 was at a paving company. And he worked --- over the course
21 of some number of years, he said he went in and out of the
22 scrap yard, the Barsuk businesses, to do this kind of
23 mechanical work on heavy equipment.

24 JUDGE SINGAS: And where they keep a log of how
25 many hours he was working to --- how much he was being paid

1 off, and how that would set off the loan that he received?

2 MR. LIPSITZ: There's no --- there's no formal
3 accounting in the record. But the trial court did find
4 that there was an issue of fact to be determined to be
5 resolved by a jury with respect to whether he was an
6 employee or a volunteer. At the Fourth Department, I think
7 the majority basically didn't deal with that issue. But
8 the --- the two descending justices said, yeah, there's an
9 issue of fact here. And in fact, the trial court read the
10 proper authorities the --- I'm sorry, the cases are --- one
11 of --- one of them is a court of appeals case. It's the
12 stringer, I think, and read --- the appropriate appellate
13 division authorities looked at the facts, looked at the
14 testimony, looked at the affidavits from both parties, and
15 concluded that there was an issue of fact that had to be
16 resolved by a jury.

17 So with respect to that issue, I think --- I
18 don't - - - I mean, as we put in our brief and with due
19 respect to the court, I don't think it's before the court.
20 It's certainly not any kind of plain error on the part of
21 the trial judge who said it's an issue of fact to be
22 resolved by a jury.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. LIPSITZ: But if I could go a little bit
25 further with respect to the things that distinguish ---

1 CHIEF JUDGE WILSON: Did you say rebuttal time?
2 I've forgotten.

3 MR. LIPSITZ: I saved three minutes.

4 CHIEF JUDGE WILSON: Okay. We'll hear you then
5 and we'll let you go a little longer than if we need to.

6 MR. LIPSITZ: Thank you. Should I --- I'll sit
7 down.

8 MR. SPECYAL: Good afternoon, Your Honors. James
9 Specyal for Mr. Barsuk. I --- first thing, I should point
10 out on the point that my client wasn't deposed in this case
11 yet. That's because plaintiff moved before they deposed
12 him. So that's why that seems to be that --- I thought
13 that was a strategy of some kind. So I'm not sure that
14 that hurts us at all. But with respect to the point about
15 he's a volunteer, I think as Chief Judge Wilson pointed
16 out, he's clearly asked, were you ever an employee? He
17 says, no. Were you ever an independent contractor? He
18 says, no. My client also says that in his affidavit,
19 there's no records, there's no ---

20 JUDGE TROUTMAN: What about the claim that they
21 traded off services, and he was trying to pay down a debt
22 here?

23 MR. SPECYAL: Well, I mean, to --- to me, I find
24 his testimony that that he's going to pay back the full
25 loan weird in light of that because you're paying back

1 money, he --- he doesn't owe, right? And also ---

2 JUDGE RIVERA: Well, he says he's paying ---
3 paying the loan in full. That could include having done
4 work that is then credited towards the debt. He's simply
5 saying, I'm not going to cheat on my debt. I'll pay it in
6 full. It could be through cash payments. That could be
7 through service. It could be through both.

8 MR. SPECYAL: Okay. Yeah even --- even if you
9 read it like that, we had asked him to list the jobs that
10 he had done as part of working off this debt. And he gives
11 a list and went --- during our questioning, he doesn't say
12 this. He says other work. So he --- so he was given an
13 opportunity to just say, yes, it was for this.

14 CHIEF JUDGE WILSON: Let's --- let's take for
15 granted that he said things that are contradictory, right?
16 Some would suggest that he is an employee, and some suggest
17 he's not. Why isn't that an issue of fact? The jury gets
18 to assess his credibility. Maybe they agree he was lying
19 one time or the other.

20 MR. SPECYAL: Well, because I don't think it's a
21 legitimate dispute of fact because there's --- I don't
22 think it's enough for him to say, well, in - - - in my
23 mind, I was an employee or I was paid, because that --- to
24 me, that sounds like almost like a statement you --- you
25 would see in a pleading that's done.

1 CHIEF JUDGE WILSON: He doesn't -- he doesn't
2 exactly say that, though, right? He says --- he testifies,
3 I was not an employee. I was not an independent
4 contractor. But he also says in an affidavit that he
5 expected to be compensated for the services he provided.
6 And you might understand how a layperson would think, I did
7 expect to get, you know, pay down some of this debt by
8 providing some work for this person. But I don't think of
9 myself as an employee. But the lay person might not have
10 an understanding of what it takes to be considered an
11 employer under New York law. I mean, he's not a lawyer.

12 MR. SPECYAL: Sure.

13 CHIEF JUDGE WILSON: So maybe there's an issue
14 factor.

15 MR. SPECYAL: But I would say on that, I mean,
16 what I would go back to is when we asked him, okay, what
17 work did you do to pay off the loan, he --- he lists out
18 things, but not this. During his deposition --- during his
19 deposition, it certainly seemed like this was not --- and
20 there was no question this was not until the question at
21 the end when he says, well, in my mind is how the question
22 was phrased. So I would go back to when he was asked very
23 clearly, okay, tell us what jobs, he lists them, he doesn't
24 list this.

25 CHIEF JUDGE WILSON: And he also says Mr. Barsuk

1 was keeping track.

2 MR. SPECYAL: He says that but --- and in my
3 client's affidavit ---

4 CHIEF JUDGE WILSON: He doesn't say I wasn't
5 keeping track.

6 MR. SPECYAL: Sure, but he's --- he wasn't if the
7 issue is that well, he hasn't been subject to cross,
8 well---

9 JUDGE TROUTMAN: Was the \$25,000 a gift from your
10 client?

11 MR. SPECYAL: No, it's --- it's not a gift.
12 It --- it wasn't a gift for ---

13 JUDGE TROUTMAN: So he did expect repayment?

14 MR. SPECYAL: Sure. Yeah. Turning to the issue
15 of the structure, or the trailer, I don't see why it
16 wouldn't apply to Pep Boys or any other type of business
17 like that. I mean, there too, you would have a car on a
18 lift. If a piece falls off, I don't even think it would
19 need to be the --- the full car falling off that that would
20 trigger 240. A piece could fall off, I don't see why it
21 wouldn't ---

22 JUDGE CANNATARO: Well, one reason why it might
23 not apply in that context is under 240 the liability runs
24 to the owner of the structure, right? Which I guess in the
25 Pep Boys scenario is --- the structure is the car that's

1 been brought in. And it would seem to me and forgive me,
2 I'm sort of thinking of the exclusion for one and two
3 family homes here, but I would think there would be some
4 kind of exclusion implicit in the statute that would make
5 the owners of cars not liable, maybe.

6 MR. SPECYAL: I, I mean, I --- I would say that I
7 hope that it could be read that way, but I don't think it
8 can now, because ---

9 JUDGE TROUTMAN: Instead of just hoping, would
10 you look at the legislative intent and say that?

11 MR. SPECYAL: Yeah, right, right. I mean, so
12 there's nothing in there that I've ever seen to suggest
13 that says it should all apply to car repair work. And when
14 you look at the statute itself, it --- it says the single-
15 family dwelling. So if this court were to --- to rule,
16 yes, it applies in this case and therefore it would apply
17 to cars. I don't think tomorrow everybody is going to be
18 saying, oh, well, there's no issue for every car owner in
19 the state. I think there's a --- there's a real concern
20 that ordinary car owners like you and I, let's say ---
21 let's say when you're driving back to New York, and you get
22 a flat tire ---

23 JUDGE HALLIGAN: Can I ask you, Counsel, how do
24 you distinguish Caddy, the railroad car case? Is there
25 something different about a railroad car from a regular

1 vehicle? And how does the trailer bed here fit in there?

2 MR. SPECYAL: Right. So the railroad car, it
3 runs on rails, so it's not in the category of --- of a
4 vehicle that we're talking about here.

5 JUDGE HALLIGAN: In the category as defined
6 where, in the VTL?

7 MR. SPECYAL: Right.

8 JUDGE HALLIGAN: And so we would --- you'd have
9 us import that definition? I'm trying to understand how we
10 square Caddy with your view.

11 MR. SPECYAL: Well - - - and - - - right, so - -
12 - and I think that's what the --- what the Fourth
13 Department did is they didn't say that this wasn't a 240
14 case because the trailer was not a structure. If they did,
15 then I think Caddy comes into play.

16 JUDGE HALLIGAN: So you think it is a structure?

17 MR. SPECYAL: I --- under the --- under the
18 definition of Caddy, or in Caddy, it would be because
19 anything ---

20 JUDGE HALLIGAN: And why is it not covered?

21 MR. SPECYAL: Because vehicle maintenance given
22 that he was in --- well, there's a there's two parts to it.
23 Vehicle maintenance isn't covered under 240. I've never
24 seen anything in the --- in the legislative ---

25 JUDGE CANNATARO: Structural repair is covered

1 under 240, right? So if this is a structure vis-a-vis
2 Caddy, and the work being done is more akin to a repair
3 than maintenance, that's it, 240 applies, or am I wrong?

4 MR. SPECYAL: If it's a repair of a structure,
5 no. Because --- because not all repairs of structures are
6 240 cases.

7 JUDGE CANNATARO: So what's the --- what's the
8 missing ingredient that takes it out of 240?

9 MR. SPECYAL: It's he was involved in his
10 ordinary occupation of being a --- of being a mechanic,
11 which is why I cite two cases like Misseritti, right,
12 because in that case that got --- that plaintiff was also
13 seriously hurt. But there's always going to be a risk when
14 you're a construction worker of a wall coming down. And
15 the same is true here about, like at Pep Boys or the same
16 type of business, every time anyone gets under the car
17 there --- there's always a risk of the car itself or a
18 piece could fall. So if --- if all that's necessary is
19 that --- if it can only be based on repair of a structure,
20 then I think I don't see why there would be a concern about
21 240 coming in to play in all these, you know, if a --- and
22 for businesses like Pep Boys or a similar. So I --- I
23 essentially think that's too narrow. I think we have ---

24 JUDGE CANNATARO: Counsel, you just reminded me
25 of some other thing when you talked about the lift. At Pep

1 Boys and Meineke, they have these really nice steel
2 hydraulic lifts with, you know, those poles that go into
3 the floor. Here, there was an earth mover that was used to
4 hoist the --- what your adversary claims is a structure.
5 Is there any argument with respect to - - - you know, 240
6 provides for the provision of certain devices when you're
7 lifting a load. Is there any dispute on your part that the
8 device provided was adequate to the task, or are you sort
9 of ceding ground on that one?

10 MR. SPECYAL: So the bucket he was using at the
11 time, clearly it didn't work and it's not something that's
12 ordinarily, I would think, used to lift things like that.
13 Why --- why he didn't use the fork that was used the ---
14 the prior time, we don't know. My ---

15 JUDGE CANNATARO: But all those things do belong
16 to your client, the bucket, the fork, the machine itself?
17 Those all belong to Mr. Barsuk, right?

18 MR. SPECYAL: Right. Yeah. So really what I'm
19 saying is it's not just a repair on a structure. That's a
20 too narrow of a view to just require those two --- two
21 things. I think, as this court often has in the past, you
22 have to look at the nature of --- nature of the work, and
23 if it's an ordinary hazard of the workplace. And here I
24 would say it is because any time someone like Mr. Stoneham
25 gets under a car, there's always that risk. And I --- and

1 I would say that would be why a situation of like Pep Boys,
2 people wouldn't ordinarily think of it as 240. But if it's
3 not 240 there because it's an ordinary risk. It's not 240
4 here because it's also the same risk of the --- of people
5 who do the same job as Mr. Stoneham. If --- if there's
6 nothing else, then I'll sit down.

7 CHIEF JUDGE WILSON: Thank you.

8 MR. LIPSITZ: I'm going to use my three minutes
9 as efficiently as I can. That is the risk. The risk at
10 240 sub 1 deals with is an elevation related risk. And
11 this was a falling object case. And if you say this was
12 his ordinary work, and because his ordinary work was
13 getting under things to fix them and they can fall on them,
14 then you're going to eviscerate the statute altogether.
15 And by the way, this wasn't his normal employment. His
16 normal employment was at a paving company.

17 Judge Wilson, you said perhaps he would
18 understand the word employee in a different way. Well,
19 yes. He was employed regularly at a paving company.
20 That's who he --- that's where he went to work on a regular
21 basis. He didn't go to the scrapyard on a on a regular
22 basis.

23 And as far as Caddy is concerned, I think more of
24 the point is even Gordon, the --- the other railroad case
25 involving the sandblasting of the railroad car. There, the

1 court said what's really important here is that the
2 defendant owned the rail yard. And that's why the
3 defendant --- because the defendant said, well, I didn't
4 own the rail card, but you own the rail yard. And that's
5 where the unsafe activity was taking place.

6 JUDGE HALLIGAN: Counsel, what do you do about
7 Dahar? Dahar says that while this court hasn't held that
8 Labor Law only applies to work performed on construction
9 sites, that the central concern was dangers affecting
10 workers in the construction industry. And this is
11 obviously not that setting?

12 MR. LIPSITZ: Your Honor, if you go back and you
13 look at Caddy, Gordon, Jahar v. - - - Joblon v. Solow, all
14 of these cases say the central concern is that there be a
15 safe workplace. They --- they never --- this court has
16 never privileged construction --- traditional construction
17 sites over nonconstruction sites.

18 JUDGE HALLIGAN: Dahar certainly says that the
19 primary concern is construction sites.

20 MR. LIPSITZ: Well, Dahar says that, but it's ---
21 it's --- it's not terribly in sync with 100 years of
22 jurisprudence preceding it, which was rooted in an
23 examination of the statute at its very foundation. And I'm
24 talking about Caddy, which is clearly not a construction
25 site case. And that was the first case.

1 JUDGE SINGAS: But in Caddy --- Counselor, in
2 Caddy, I'm looking at it right now, and one of the
3 conclusions is, "It justifies a further conclusion that the
4 temporary support which surrounded it was a scaffold." So
5 they brought it into the scaffold law very directly here.

6 MR. LIPSITZ: Caddy was primarily concerned with
7 this question of whether the structure was some kind of a
8 subset of a building. And I think what Caddy said was it
9 says structure or building. And when you talk about the
10 scaffold, I mean, if you want to look at our case, you can
11 look at the --- the trailer essentially as being a scaffold
12 which collapsed on a worker. I mean, it's --- it's
13 something that people walk across, and he happened to be
14 underneath it repairing something. And it was held up
15 about five feet above his head and then it crashed on him.

16 And just one other thing I'd like to --- that I
17 think is important to bring up, that this work, this scrap
18 yard was so unsafe, there was no --- evidently no emergency
19 plan. My client was pinned under that trailer for five
20 hours before anyone came to see him, and it was Barsuk that
21 ended up catching --- finding him. The thing was fenced
22 in, it was isolated. It was filled with construction
23 equipment, pieces of debris, logs, pieces of metal objects.
24 It was not the regular kind of routine that you'd find in
25 the --- in the Pep Boys, you know, with a three bays and

1 the four --- or the four bays and those beautiful hydraulic
2 lifts, which, by the way, probably there'd be no ---
3 nobody's going to - - - nobody's going to be hit by a
4 falling car there unless it's the result of --- of
5 improperly positioning the car on the lift in the first
6 place.

7 I wanted to bring up just two cases and for ---
8 demonstrate how there's no evidence and there's no
9 possibility of some kind of floodgates. One of them is the
10 case Cornacchione v. Clark Concrete. And there the court
11 found that that a person engaged in --- in painting the
12 name of a company on the --- on both sides of the boom of a
13 of a large crane that --- that that person was engaged in
14 working on a structure. And a crane, by the way, as we
15 pointed out in our brief, is a vehicle. And there's also
16 Moore v. Shulman. Let me get back to that.

17 In the dissent in Cornacchione, there was ---
18 well, in the majority was Justice Pigott, and he was also
19 in the majority of Moore v. Shulman. But in --- in
20 Cornacchione, the dissent said, gee, I'm worried that this
21 could open up the floodgates, and every time someone brings
22 the family car in to be painted another color, if somebody
23 falls off the steps who are painting it, they're going to
24 sue them under 240 sub 1. It's never happened. I mean, it
25 just didn't happen. It didn't happen after Moore v.

1 Shulman, where they're converting utility vans into cargo
2 vans. Nobody came in later and said that somebody hired me
3 to convert my car to a hot rod, and a piece ---

4 CHIEF JUDGE WILSON: Was there one more point you
5 wanted to make because ---

6 MR. LIPSITZ: That's it. I'm done. Thank you
7 very much.

8 CHIEF JUDGE WILSON: Okay. We're going to take a
9 short ten-minute break, and we'll return.

10 (Court is adjourned)

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

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Stoneham v. Barsuk, No. APL-2023-0001 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Christy Wright

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