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WASHINGTON MUNOZ,)
)
Plaintiff,)
)
vs.)
)
L.P. CIMINELLI, and)
PAINO ROOFING CO., INC.,)
)
Defendants.)

TRANSCRIPT
OF
TRIAL

Place: Middlesex County Courthouse
56 Paterson St.
New Brunswick, NJ 0803

Date: July 14, 2017
Volume 2 of 2
Page 201 to 232

BEFORE:

HONORABLE ANDREA G. CARTER-LATIMER, J.S.C., AND JURY

TRANSCRIPT ORDERED BY:

JOSEPH J. GULINO, ESQ.
Nicoletti Gonson Spinner, LLP

APPEARANCES:

GERALD H. CLARK, ESQ.
LAZARO BERENQUER, ESQ.
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Attorneys for the Plaintiff

JOSEPH J. GULINO, ESQ.
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Audio Recorded
Recording Operator, Regina M. Janusz

1 THE COURT: The objection is sustained.

2 Let's move on.

3 BY MR. CLARK:

4 Q Did you -- did you guys kick anyone off the
5 jobsite for violating those housekeeping rules?

6 THE COURT: The objection --

7 MR. GULINO: Objection.

8 THE COURT: -- is sustained. Stop it, move
9 on.

10 BY MR. CLARK:

11 Q And when you went up there, if I understand
12 it, only two pictures of the scene were taken?

13 A I believe so, yes sir.

14 Q Okay. I show you plaintiff's exhibit 8,
15 you're familiar with that area obviously; right?

16 A I believe it's the same area, yes.

17 Q Okay. So, you believe plaintiff's exhibit 8
18 is the same area that's shown in plaintiff's --

19 A Could I see that?

20 Q Yes, of course.

21 A Can I see that picture?

22 Q Sure.

23 A It may not --

24 Q No, no, don't -- don't show -- sorry. Don't
25 show 8 to the jury, just show it to yourself.

1 MR. GULINO: It's not in evidence. It's not
2 in -- that's the one not in evidence, right, just ID,
3 okay.

4 THE WITNESS: Understood.

5 MR. GULINO: Yeah.

6 THE WITNESS: I'm going to -- I'm going to
7 backtrack, because I don't know what all this is.

8 BY MR. CLARK:

9 Q The question very simply is the area shown in
10 photo 8, you're familiar with that area; correct?

11 A I'm not sure now from looking at it.

12 Q We'll take one from the wider angle. And
13 this one was shown to the jury, this is plaintiff's
14 exhibit 6. You're familiar with that area? So, if you
15 do want to flip it around, I suppose you can if it's
16 all right with the Court.

17 A I am familiar with that area, yes.

18 Q Okay. Would you just show that to the jury.

19 MR. GULINO: Objection. No, I'm sorry.

20 THE COURT: What's the --

21 MR. GULINO: I'm --

22 THE COURT: -- what's --

23 MR. GULINO: -- sorry, I apologize.

24 THE COURT: -- what's the question, is there
25 a question? Is there a question that you have?

1 MR. CLARK: No there's not.

2 THE COURT: Okay.

3 MR. CLARK: Okay.

4 BY MR. CLARK:

5 Q And the area that's blacked out with the blue
6 on there, that's -- that's basically the same area --

7 MR. GULINO: Objection.

8 THE COURT: How would he know that?

9 MR. CLARK: Because he's familiar with the
10 area. That's the --

11 THE WITNESS: Sir, do you have --

12 MR. GULINO: Can we have a sidebar?

13 THE WITNESS: -- any idea how big the roof --

14 MR. GULINO: Objection.

15 THE WITNESS: -- was on this building? Sir?

16 MR. GULINO: Objection.

17 THE COURT: He's answering the question, do
18 you -- do you -- can you tell?

19 THE WITNESS: No.

20 THE COURT: Okay, so then that --

21 THE WITNESS: No.

22 THE COURT: -- solves that.

23 BY MR. CLARK:

24 Q So, you recall there was a site inspection
25 that you attended at the area of the incident with the

1 attorneys, both for Mr. Munoz and the attorneys for LP
2 Ciminelli. Do you recall that?

3 A Yes.

4 Q And you are in the photo -- that photo;
5 correct?

6 A Yes sir.

7 Q Okay. And do you recognize the other woman
8 in the photo standing next to you?

9 A I believe that's Angela. I believe.

10 Q And she's one of your attorney or the LP
11 Ciminelli's attorneys in the case; right?

12 A Yes. At the time yes.

13 Q Okay. So, if you would show that to the
14 jury, if you don't mind please. So, that was probably
15 the photo that was taken at the time of that inspection
16 with the attorneys in the case; right?

17 A It was the only time her and I were there, yes.

18 Q Okay. And you did the inspection of the area
19 of the incident; right?

20 A Yes.

21 Q Okay. So, you can say now, can you not, that
22 the area behind the blue section on that photo is the
23 same area in plaintiff's exhibit 4, the incident area;
24 right?

25 A Except I don't know what the blue thing is for. I

1 don't know what's behind the blue.

2 MR. GULINO: There's no question.

3 THE COURT: There's no question.

4 THE WITNESS: Okay, sorry.

5 BY MR. CLARK:

6 Q Well, we have another photo --

7 A I was trying to answer him.

8 Q -- we have another photo from that same day,
9 plaintiff's exhibit 7. Do you recognize what's shown
10 in that --

11 MR. GULINO: Objection.

12 MR. CLARK: -- photo?

13 MR. GULINO: Your Honor.

14 THE COURT: You could turn the photo down for
15 me please. Just turn it down. There is an objection.
16 Where -- where are we going with this?

17 MR. CLARK: I'm trying to establish that --
18 sir, may I please have the bottom -- the bottom photo.
19 Thank you. I'm -- I'm trying to establish through the
20 witness that the area circled here --

21 THE COURT: Okay.

22 MR. CLARK: -- of the plaintiff is the drain
23 hole underneath.

24 THE COURT: Okay. So, is there a need to use
25 those photos?

1 MR. CLARK: With the witness, because it --
2 it shows.

3 THE COURT: Well, he's already said he can't
4 tell from that photo, so I need you to move on.

5 MR. CLARK: But he can from this photo and
6 this photo, and that's the pending question.

7 THE COURT: Can you sir?

8 THE WITNESS: I'm not sure right now what the
9 question is.

10 THE COURT: Okay.

11 THE WITNESS: It show --

12 THE COURT: Re-ask your question.

13 MR. CLARK: Okay.

14 BY MR. CLARK:

15 Q Plaintiff's exhibit 7, that's another photo
16 from that inspection. Do you recognize the area that's
17 shown in that photo?

18 A Yes.

19 Q Okay. And that's the area of the incident;
20 right?

21 A Yes.

22 Q Okay. And the ar -- the area of the incident
23 in photo 7 is the same area in photo 6, correct, just a
24 close-up or different angle?

25 A Yes.

1 Q Okay, great. And the area in photo 8 -- now
2 that you've seen all the areas of the scene, the area
3 in photo 8 is the same area that we're talking about in
4 photo 7 and photo 6; right?

5 A I will not answer that in the affirmative, because
6 of this, it's not visible in that picture.

7 MR. CLARK: Judge, at this time I'd like to
8 sh -- show photo 6, 7 and 8 to the jury?

9 THE COURT: Absolutely not. The objection is
10 sustained.

11 MR. CLARK: Okay.

12 BY MR. CLARK:

13 Q In -- in any event sir, in the photo in 7 --
14 in the area in photo 7 and the area of photo 6 there
15 are two drain holes in that areas; correct?

16 A Correct.

17 Q Great. Now, when we look at the close-up of
18 the incident scene photo number plaintiff's 3, you see
19 the two corresponding area where the drains would go?

20 A I see where the one drain would go, yes.

21 Q And the second drain would go right where
22 that yellow or where the red circle is, based on
23 looking at that; right?

24 MR. GULINO: Could I have that repeated
25 please, what was the question?

1 THE WITNESS: Yeah.

2 MR. GULINO: I want to hear the question
3 again.

4 THE WITNESS: Understood.

5 MR. GULINO: I want to hear the question
6 again.

7 THE COURT: Can you repeat the question?

8 MR. GULINO: I didn't hear it, the question.

9 THE COURT: He didn't hear the question.

10 MR. CLARK: Okay.

11 BY MR. CLARK:

12 Q So, when we look at photo 6 and 7 which show
13 the two drain holes afterwards when they're complete,
14 those two drain holes correspond with this hole here,
15 and the area here which is circled in red; right?

16 A That's what I'm telling you sir, I can't confirm
17 that. I don't know that that's covering the holes in
18 your pictures --

19 Q Okay.

20 A -- that.

21 Q You don't know either way?

22 A I'm saying I don't know that that -- that's the
23 same. You're asking me to say yes, it's the same area,
24 and I can't do that.

25 Q Okay. And photo number 7 shows --

1 MR. GULINO: Objection, becoming
2 argumentative with the witness, and we're going over
3 the same thing over and over again.

4 THE COURT: Why are we back to that again?

5 MR. CLARK: Just cause it shows him right at
6 that hole here.

7 THE COURT: Move on.

8 MR. CLARK: Okay.

9 THE COURT: Move on.

10 MR. CLARK: That's all I have, thank you Your
11 Honor. Thank you sir.

12 THE COURT: Re?

13 MR. GULINO: Very quickly Your Honor.

14 REDIRECT EXAMINATION BY MR. GULINO:

15 Q Bob, you heard before about the three strike
16 rule. Why don't you explain that to the jury, what is
17 it?

18 A The stre -- three strike rule is a -- it's
19 typically included in some paperwork. The Unions refer
20 to it as that, it's a verbal warning, a written
21 warning, and then removed from the site. Any
22 contractor --

23 Q Why don't we do this, can you give the
24 example of the three strike rule where it would come
25 into play?

1 A Yeah.

2 Q Withdrawn. Would drinking on -- on the site
3 be a three strike rule?

4 A No.

5 Q Would obscene language be a three strike
6 rule?

7 A No.

8 Q What would be a three strike rule?

9 A It would be if someone -- a supervisor walking
10 along and the guy didn't have his hardhat on. He said
11 sir, you need to put your hardhat on. That's a verbal
12 warning to you. Then he comes along a couple days
13 later, the guy has no hardhat. Whatever, Joe, Dick,
14 Harry, I talked to you about this the other day, I got
15 to write you up for this. You got a written warning.
16 Then he comes a couple days later, he's still there, no
17 hardhat, okay. Now, that -- that's how it typically
18 applies. But when you get into issues of the next
19 level, for example, fall protection. If you got a guy
20 standing on the edge of the building, you are not --
21 you're -- you're going to exercise management
22 prerogative and you are not giving that person two more
23 warnings. In a typical PLA, Union agreement, owners
24 and whatever, they -- they will support that basis what
25 OSHA calls that it's an egregious violation.

1 Q You were at the inspection a few years ago?

2 A Yes sir.

3 Q And do you have an understanding as to who
4 requested the inspection?

5 A Yes I do.

6 Q Who was that? Who was that?

7 A The --

8 Q Do you have an understanding as to who --
9 withdrawn. Was anyone else -- was -- was anyone
10 representing Mr. Munoz at that inspection?

11 A Yes.

12 Q And you were asked before about Friday and
13 Thursday.

14 A Yes sir.

15 Q Let's put it this way.

16 A Yes sir.

17 Q How many days after the accident did --
18 withdrawn. How many days after the accident was
19 reported to you did you take that photo?

20 A The next morning.

21 MR. GULINO: Nothing further Your Honor,
22 thank you.

23 THE COURT: Anything else?

24 MR. CLARK: Yes Judge.

25 RE-CROSS EXAMINATION BY MR. CLARK:

1 Q So sir, let me get this straight. You're
2 saying that with regard to the three strikes rule,
3 there's some flexibility?

4 A Yes sir.

5 Q And what you're saying is that for some
6 safety violations are so bad that the contractor may
7 not even get the benefit of three strikes, they may be
8 out on the first strike. Is that what you're saying?

9 A Correct.

10 Q Okay. And that would be like if a worker is
11 li -- was exposed to serious bodily injury or death,
12 such as being on a very high scaffold with no fall
13 protection. In that kind of situation you might not
14 give the contractor or the person that caused that the
15 benefit. Is that kind of what you're saying?

16 A Kind of what I'm saying that's one example, yes
17 sir.

18 Q Okay. And -- and -- and those -- and so --
19 so, the three strikes rule didn't apply here, because
20 the guy didn't report it within an hour and that's --

21 A No.

22 Q -- equated with a -- that's equated with --
23 that -- you're equating those to be the same thing?

24 A No, there's more to the circumstances than just
25 that.

1 Q Sir --

2 MR. CLARK: Where's the curse words?

3 BY MR. CLARK:

4 Q We had read your deposition earlier and there
5 were some things that were said. But you guys had an
6 obscene language rule and you had something against
7 that too; right?

8 A An obscene language rule?

9 Q Let me withdraw that. The disciplinary
10 procedure about the three strikes and you're out,
11 that's a -- that's a workers safety rule, right --

12 A It's --

13 Q -- that you talked about with the fall
14 protection and all that?

15 A -- it's part of the CCIP en -- environment, yes
16 sir.

17 Q That's a worker safety rule?

18 A The three strike, no it's not a worker safety
19 rule.

20 Q Well, the -- when you were saying about the
21 fall protection situation, they might not get the
22 benefit of three strikes, because it comes to worker
23 injury and death. That's basically what you're saying,
24 right, remember that?

25 A Yes.

1 Q Okay.

2 A I do remember that.

3 Q And -- and sir, this -- this one hour rule,
4 that's a cover your ass rule, isn't it?

5 MR. GULINO: Objection.

6 THE COURT: The objection is sustained.

7 MR. CLARK: No further questions.

8 THE COURT: Anything further?

9 MR. GULINO: Nothing Your Honor, thank you.

10 THE COURT: All right. You may step down.

11 MR. BEARDSLEY: Thank you. Stage -- we done?

12 MR. GULINO: Your Honor, I have one more
13 witness left.

14 THE COURT: Okay.

15 MR. GULINO: Monday I intend to play the
16 video deposition of our orthopedist Edward Decter.

17 THE COURT: Okay.

18 MR. GULINO: And then I hopefully will rest.

19 THE COURT: All right. So, members of the
20 jury, you're going to get an early release today. So,
21 enjoy the weekend, be safe. We'll see you back here on
22 Monday at 8:30. Please over the weekend don't talk
23 about this case. We'll see you back 8:30.

24 (Jury exit courtroom)

25 THE COURT: Let's take about ten minutes.

1 Let's take ten minutes.

2 MR. GULINO: You going to come back out here
3 Judge or do you want us --

4 (Recess)

5 MR. CLARK: Judge, I had circulated my
6 request this morning, I have hard copies here. Do you
7 want hard copies or --

8 THE COURT: You know what, I think that --
9 did you add anything else, cause I printed out what you
10 sent me?

11 MR. CLARK: No, I just crossed something out.

12 THE COURT: Okay, so I'll take that. I'll
13 take what you have.

14 MR. CLARK: Or do you just want to cross out
15 yours, I mean it's the whole -- it's one sentence?

16 THE COURT: Okay, then I can do that.

17 MR. GULINO: What do you got?

18 MR. CLARK: Just if you want to pull up my
19 jury charges, I'm going to cross out what get crossed
20 out.

21 MR. GULINO: Which one will you talk about?

22 MR. CLARK: We need one for defense counsel
23 too.

24 MR. BERENGUER: You need what?

25 MR. CLARK: One of these.

1 MR. BERENGUER: Okay.

2 MR. CLARK: On the last page 6.

3 THE COURT: Okay.

4 MR. CLARK: The paragraph at the top 1910.22,
5 that -- that reference should be cross out, in the
6 event.

7 And I have a proposed verdict sheet as well,
8 if Your Honor wants a hard copy of that, that I did not
9 email.

10 THE COURT: Okay. She was going to ask if
11 you had that, I'll take that.

12 MR. BERENGUER: Your Honor, I'm just going to
13 use the printer in case you hear a loud noise.

14 THE COURT: Okay. Thanks for the warning,
15 cause before I was like what is that noise.

16 MR. CLARK: Sorry about that.

17 MR. GULINO: Your Honor, mine was done, I
18 believe you have it, and that was way back in March. I
19 -- the only one I -- I didn't submit to you, and it's
20 not that complicated and I'm sure we'll okay on it, is
21 I was under the impression that the lost wage claim was
22 withdrawn, so I didn't go into economic damages. So,
23 and what I think -- I think the plaintiff's did, so we
24 can just --

25 THE COURT: I'm sorry.

1 MR. GULINO: I didn't -- when I -- when this
2 was prepared way back in March I think, we did not
3 include lost wages, which I think is 8-11 or something
4 or 8.11, because we were under the impression that it
5 had been withdrawn the lost wage claim -- economic
6 loss. So, that's the only one that I might want to
7 add. But I think -- I think Jerry added it anyway on
8 his side, and we can just talk about that.

9 MR. CLARK: Can -- can --

10 MR. GULINO: And I did not prepare a verdict
11 sheet.

12 MR. CLARK: -- can we go off the record for
13 one second?

14 (Off the record discussion)

15 THE COURT: All right. So, counsel, in terms
16 of your proposed jury charges, are you saying you
17 submitted something different in March then you gave me
18 this time?

19 MR. GULINO: No, no, no. I -- oh, the one
20 you have now March 14, I think if you look -- go on the
21 last page.

22 THE COURT: I see, okay.

23 MR. GULINO: Yeah, I never did another one.

24 THE COURT: Okay.

25 MR. GULINO: We were supposed to go on the

1 15th I think --

2 THE COURT: Okay.

3 MR. GULINO: -- so I never did another one
4 after that.

5 THE COURT: Okay. Did you have a chance to
6 look at the proposed charges of the plaintiff?

7 MR. GULINO: Did I change the (indiscernible)
8 what?

9 THE COURT: Did you have a chance to look at
10 what the plaintiff has proposed?

11 MR. GULINO: Not really, I got it this
12 morning. Yeah, this morning.

13 THE COURT: Yes. So, I mean I don't --

14 MR. GULINO: So, I mean I'm --

15 THE COURT: -- I don't want this to be an
16 exercise in futility, if you need some time to take a
17 look at each others' proposed charges. I mean --

18 MR. GULINO: I probably do. I -- I can -- I
19 can talk about one of them or do you want to talk about
20 all of them later, cause there's --

21 THE COURT: Well which -- which one?

22 MR. GULINO: I got a supplemental here about
23 this is a charge to prevent jurors from speculating
24 about workers compensation benefits.

25 THE COURT: Right.

1 MR. GULINO: It wasn't mentioned. The only
2 time in -- in this case that anybody mentioned anything
3 about insurance was I'm not sure if it was Mr. Munoz or
4 his doctor. I believe it was Mr. Munoz. And -- and
5 that was it, we were done. So, that could be health
6 insurance, it could be workers comp insurance, it could
7 be disability insurance. So, I don't think we need to
8 telegraph the fact that workers comp is involved here.

9 THE COURT: You want to address that?

10 MR. CLARK: Judge, I did sort of a little
11 note and stars at the top as to why we're requesting
12 this. In the model charges they have the note to the
13 judge at the bottom, so that's sort of our version of
14 the note to the Judge. I don't know if Your Honor had
15 a chance to look at that. But basically in our
16 experience with focus groups, juror research, prior
17 experience speaking with jurors after a case, in -- in
18 worker injury cases with damages very, very often the
19 -- the jury just starts talking about workers comp on
20 their own. When we -- and so that's the purpose of
21 this. Cause either way he gets comp. And it's also
22 important, because medical insurance did come out. Not
23 -- at one point it wasn't even a stray mention in the
24 deposition of Sociedade there was -- it was like part
25 of the cross examination about you know cause the cross

1 was well, he never came back to you, and well I don't
2 know if he has insurance to cover it. So, I think it's
3 important, cause I think ties into that.

4 And the most important thing here is there's
5 no harm, there's no prejudice to the defendant to not
6 do this. And it's - it's factually accurate and it's
7 true. And I would note we have at least one Union
8 member on the jury, we have another one whose son is a
9 construction worker, they -- they inevitably know about
10 workers compensation insurance. And it's -- and
11 actually, I got this there was a trial before Judge
12 Leblon sometime ago and I was speaking with the
13 attorney about it. And that's where -- that's why I
14 said it's taken from another case used in Middlesex
15 County meant to prevent that kind of juror thing.

16 So, it's really connected to also the
17 proposed thing I have on the medical bills. And
18 there's -- there's really no prejudice to it, and I
19 think it's important. There's nothing inaccurate about
20 it, it's factually true, doesn't prejudice anyone. The
21 collateral source rule is there to prevent the double
22 dipping. And I think it's important and it's very
23 important to us in this case that the jury kind of be
24 instructed about those things.

25 MR. GULINO: One --

1 THE COURT: So --

2 MR. GULINO: -- one of the -- one of the
3 reasons I always get worried about workers comp is
4 because we know it doesn't have anything to do with
5 fault, it has to do with status. You are an employee,
6 you get comp. They, if they don't know about it,
7 there's a very good chance they think it means fault,
8 and that he's gets covered because someone did
9 something wrong. And that's not what comp is about.

10 Now, we can talk about you know war stories
11 and -- and other cases, but in the cases that I have
12 had, and not in this jurisdiction Your Honor. But in
13 cases that I have had in which that charge, and there's
14 a similar charge in New York, but that's when workers
15 comp was mentioned. When it was mentioned in front of
16 a jury, I'm okay with that. But this isn't, so we're
17 just dealing in pure speculation.

18 MR. CLARK: Medical insurance was mentioned,
19 and that's workers comp medical insurance.

20 MR. GULINO: By him not me. By his -- his --
21 by his client not me.

22 MR. CLARK: It -- it's true, it did -- it did
23 kind of -- it did kind of blurt out on the plaintiff,
24 but it also came out on the cross of Dr. Sociedade, and
25 there's no prejudice or harm to it.

1 MR. GULINO: Not workers comp, health
2 insurance. It was health insurance, cause he's a
3 member of the Union.

4 THE COURT: Let me --

5 MR. CLARK: That --

6 THE COURT: Go ahead.

7 MR. CLARK: I didn't mean to jump, but that
8 -- that's important too. Because there was also cross
9 about you're a Union member, you get Union benefits.
10 And everyone knows in the Union -- a Union benefit that
11 there's workers comp coverage. The -- the -- number 5
12 is definitely going to know it, number 7 is definitely
13 going to know it, and the re --

14 MR. GULINO: Seven?

15 MR. CLARK: -- the rest of them are probably
16 going to know it too. So, there's no harm to it, and I
17 think it's an appropriate case, particularly because
18 we're all talking about employers and were hit -- were
19 hurt on the job, and there's no harm.

20 THE COURT: Let me -- let me give some
21 thought to it, because I -- I will say from the Court's
22 experience with jurors who are deliberating in cases
23 where they are hurt during the course of their
24 employment, I seem to recall at least once, if not more
25 than once, because the cases all tend to run together

1 at some point. But I seem to recall a case or two
2 where there was a question from the jury about whether
3 the plaintiff received workers comp. So and -- and I
4 can't sit here and say for sure it was because it was
5 mentioned or not mentioned during the trial. It may --
6 it may have been both scenarios, I just honestly don't
7 remember. So, I suppose that even when it's not
8 mentioned one could sort of ask that question you know
9 if you got hurt on the job why are we here, why isn't
10 -- wasn't he compensated through any workers comp
11 benefits even where it's not mentioned. So, let me --
12 let me give it some -- some thought.

13 MR. CLARK: Judge --

14 THE COURT: Let me give it some thought.
15 Yes.

16 MR. CLARK: Just cause we're on that too just
17 to alert Your Honor. I -- I did in the medical section
18 as well, I did a supplemental. And I have it -- it's
19 on page 2, but it's related to that so and it actually
20 -- I think it might also refer to the workers comp.
21 So, I -- I mention it on page 2, and it's also
22 mentioned in very short form on page 4 after the future
23 medical expenses, just reminds them of it.

24 THE COURT: All right. So, I think what I'd
25 like to have a discussion on is missing from the

1 plaintiff's proposed charges is the issue of
2 contributory negligence on the part of the plaintiff.
3 You requested it, the plaintiff has not, and so why
4 don't we talk briefly about that. And -- and we're not
5 going to stay until 5 o'clock today, at 4:30 we are --
6 we're done. So, what we don't get done, we'll have to
7 deal with on Monday.

8 MR. CLARK: Judge, can I talk about that
9 first?

10 THE COURT: Sure.

11 MR. CLARK: All right, real quick. If this
12 were a ordinary sidewalk fall down case, and I know
13 obviously defendants arguments going to be he saw it,
14 it was sloped, he should have been looking where he was
15 going, he testified he was looking down at the time. I
16 get all that. So in an ordinary fall down case, I
17 think a court would be in quite safe territory to
18 charge comparative negligence. The difference in this
19 case, however, is that this is a workplace setting
20 case. I flagged this to the Court, I attached in my in
21 limine papers -- I attached in my in limine papers a
22 brief on it, and I also attached the article I wrote
23 about the Fernandes case.

24 I wrote the article, Fernandes was argued by
25 -- this was the first time in front of this -- well, my

1 only time in front of the Supreme Court, and it was a
2 workplace sa -- safety setting case in front of Judge
3 Vena in -- in Essex County. And the rule is very
4 different in a workplace setting cases, It's -- it's
5 definitely a high standard, they have to knowingly and
6 unreasonably encounter a known risk. So, all I -- all
7 I can say Judge is I would just request that the Court
8 take a look at the Fernandes case, it's cited in the
9 papers. And -- and the article I wrote gives --

10 THE COURT: Especially since you wrote it,
11 right, of course.

12 MR. CLARK: It give a non-advocacy summary of
13 it.

14 THE COURT: I'm sure.

15 MR. CLARK: Now, there -- there -- there's
16 -- there's a tinge of advocacy in the article, it was
17 from -- it was in the Law Journal. But they're always
18 looking for content, so that's not a big deal that you
19 get published in the Law Journal.

20 THE COURT: Shameless plugging, do you hear
21 it?

22 MR. CLARK: No, just -- it's not that. But I
23 would just ask the Court to read the Fernandes case, I
24 don't think the facts support it. And I can make
25 defense counsel's argument for him, like I think I

1 already did. He saw where he was going, he was
2 looking, but that stuff is very different in a
3 workplace case.

4 THE COURT: Yes, you want to be heard?

5 MR. GULINO: I -- anything else, let me see.

6 THE COURT: No, no, we were just addressing
7 that the plaintiff has reque --

8 MR. GULINO: Oh, oh.

9 THE COURT: Cause you're asking for
10 contributory negligence, and they're saying it doesn't
11 apply.

12 MR. GULINO: This is "not" a workplace case,
13 because it's not a comp case. Workplace case you don't
14 worry about fault, you get hurt at your job, you win.
15 I know you don't win pain and suffering, but you -- but
16 fault has nothing to do with it. Here, this is a
17 negligence case based upon construction area, that's
18 fine. He still has a responsibility to watch out for
19 himself. It was walking, it's not a -- it's not an
20 assumption of risk case, where he has to you know oh my
21 god, it's a very dangerous thing. It's not, he's
22 walking. And he's -- according to his testimony, he's
23 going from one place to another to -- to do a job.
24 Says he's walking and he's looking down, he and steps
25 and he trips. That is no different really on level

1 sidewalk. I mean I know it's a construction site, not
2 a level sidewalk, he'd have to go in and say is he
3 comparatively negligent? Of course. And I think here
4 that the jury should be -- should be allowed to make a
5 determination. I don't -- I don't see how they don't
6 get that here, this isn't a strict liability case.

7 MR. CLARK: Judge, all -- all I want to say
8 in response to that is because the citation and the
9 submission in the article is to the Westlaw Reporter.
10 But I just want to give the Court the cite, it's 222
11 N.J. 390, 222 N.J. 390. The unanimous court, no
12 descents.

13 MR. GULINO: Oh, I see why you did this.

14 MR. CLARK: (Indiscernible)

15 MR. GULINO: No, I get it. I didn't
16 understand it, I read it too quickly.

17 MR. CLARK: You didn't put the plaintiff's
18 that's why. I was waiting for the plaintiff to come in
19 (indiscernible) You were only including the
20 defendants.

21 MR. CLARK: (Indiscernible) whose got the
22 best poker face in the world.

23 MR. GULINO: You know -- you know what I'm
24 saying just right there.

25 MR. CLARK: (Indiscernible) poker face.

1 MR. GULINO: It's like this.

2 THE COURT: So, Mr. Clark, are -- were there
3 any specific ones that -- other than obviously the
4 contributory negligence charge that was being --

5 MR. GULINO: That --

6 THE COURT: -- requested that -- that you
7 want to address? Cause I'm -- I'm going to give you
8 some time to take a look at what you've received from
9 the plaintiff.

10 MR. GULINO: I got them at either 2:52 this
11 morning or 5:32 this morning. I only -- and --

12 THE COURT: They're late.

13 MR. GULINO: -- that they were handed to me
14 this morning.

15 THE COURT: I mean I didn't -- I didn't get
16 them till this morning either --

17 MR. GULINO: Okay.

18 THE COURT: -- so.

19 MR. GULINO: If I may Judge. The schedule on
20 Monday, do you want to have our charge conference
21 before the doctor's thing goes on or --

22 THE COURT: No.

23 MR. GULINO: -- do you want to put the
24 doctor's thing on?

25 THE COURT: Be -- because we put the --

1 because we asked this jury to be here at 8:30, I -- I
2 hate making them just simply come. We asked them to be
3 on time, we should do -- give them the courtesy of
4 starting on time. So, if we could start at 9 o'clock,
5 play that video, and then we'll address whatever needs
6 to be addressed with the charge afterwards.

7 MR. GULINO: Fine.

8 THE COURT: Even it means like they're given
9 a little bit longer of a break.

10 MR. CLARK: Judge, sometimes I can't help
11 myself, but I'm looking caused you asked about the
12 other one. I'm looking at 5.10, and I'm -- but I see
13 another citation to Costa vs. Gaccione, another -- that
14 was my case also.

15 So, the only other -- the only other out of
16 the ordinary kind of charge it starts on page 4 of my
17 submission and it's 5.10H and 5.30. I had kind of been
18 alluding to that several times when we talked about
19 things, including on the directed verdict motion. This
20 is basically the same kind of thing if it were an auto
21 case, and we -- and there was a request to charge
22 statute, a red light/green light statute that might
23 apply.

24 And I put citations in there that kind of
25 supports it. And then I put -- I put the specific OSHA

1 regulations that there was testimony about that they
2 heard about. And then in the red light/green light
3 case you would actually read I believe the -- you know
4 the applicable Title 39 code. So, that's kind of what
5 I did there.

6 And you know I can -- I can -- I don't know
7 if the Court wants to hear this, but like I know
8 there's been some stuff about what other courts have
9 done in terms of Dr. Decter's censor and stuff. But so
10 I figure I could be just frank with the Court. The
11 judges that I have seen with this they -- most of them
12 charge some version of this, and I've actually whittled
13 it down a lot to -- too, but pretty much. I'm not
14 going to (indiscernible) just about every case. I
15 didn't even want to say that, I don't think it's
16 terribly --

17 THE COURT: Oh yes you did.

18 MR. CLARK: Okay, yeah, they did, they would
19 always charge this kind of thing. They would do it.
20 But the part about the duty of the general contractor
21 has been whittled down a lot, cause they usually kind
22 of whittle that down. So, I've whittled it down,
23 but --

24 THE COURT: Not as much as they would have
25 whittle it down.

1 MR. CLARK: Actually, I think it helps,
2 because when they're sitting there going through the
3 long, long, I don't think that's -- that's great
4 either.

5 THE COURT: No, it's not. And so I'm always
6 mindful of that as well. If we could sort of you know
7 you tend to lose some of the jury at some, when you
8 give them too much, right, so.

9 MR. CLARK: Yeah.

10 MR. GULINO: I am -- I am all for -- in a
11 Federal case one time we charged first, and then some
12 don't. Because in Federal Court everybody in New York,
13 at least everybody gets the charge and the judge reads
14 it to them. So, she charged first, and then we summed
15 up. So, everybody knew who was going to sum up exactly
16 what the charge was, and so you tailored your summation
17 to it. And I've asked a lot of judges would you do
18 that, and most of them don't want to do it.

19 THE COURT: Yeah. All right. I think we're
20 all petered out at this point, running out of gas. We
21 are done for today.

22 MR. GULINO: Thank you Your Honor, have a
23 good weekend.

24 THE COURT: Thank you.

25 MR. CLARK: Thanks.

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(Day's Proceedings Concluded)

CERTIFICATION

I, Deborah Mastrantonio, the assigned transcriber, do hereby certify the foregoing transcript of proceedings digitally recorded from 9:28 a.m. to 4:24 p.m., is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

Deborah Mastrantonio

Deborah Mastrantonio, AOC #474
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Date: July 31, 2017