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COURT OF APPEALS

STATE OF NEW YORK

GEORGITSI REALTY, LLC,

Appellant,

-against-

No. 156

PENN-STAR INSURANCE COMPANY,

Respondent.

20 Eagle Street
Albany, New York 12207
September 10, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 156. You look
2 like you're ready to go, counsel. Would you like any
3 rebuttal time?

4 MR. DWECK: Not necessary, Judge Lippman.

5 CHIEF JUDGE LIPPMAN: No rebuttal time.
6 Okay. Great; proceed.

7 MR. DWECK: Thank you, Your Honors. Good
8 afternoon, Your Honors. I'm Jack Dweck from The
9 Dweck Law Firm, and we represent the plaintiff,
10 Georgitsi Realty. You have before you two questions
11 that have been certified from the Second Circuit
12 Court of Appeals. We have a damage case that
13 resulted in a denial of coverage by the - - -

14 CHIEF JUDGE LIPPMAN: What - - - what is
15 vandalism all about in this policy? What do you have
16 to show to recover on a policy that has vandalism
17 coverage for willful and de - - - and malicious
18 damage to property?

19 MR. DWECK: Judge Lippman - - -

20 CHIEF JUDGE LIPPMAN: Yeah.

21 MR. DWECK: - - - you're right on with that
22 question, because you need to show either intentional
23 conduct - - -

24 CHIEF JUDGE LIPPMAN: Right.

25 MR. DWECK: - - - or conduct that is so

1 reckless and wanton as to constitute the equivalent
2 of intentional conduct.

3 CHIEF JUDGE LIPPMAN: How do you define the
4 latter? What - - - what has to happen to have
5 something that's so, you know, over the edge, that
6 it's the equivalent of intentional?

7 MR. DWECK: You mean egregious?

8 CHIEF JUDGE LIPPMAN: Egregious. Okay.

9 MR. DWECK: Okay.

10 CHIEF JUDGE LIPPMAN: Stand amended. Go
11 ahead.

12 MR. DWECK: One of the associates in my
13 office referred to it as I-don't-give-a-damn conduct.
14 In our particular instance - - -

15 CHIEF JUDGE LIPPMAN: Yes - - -

16 MR. DWECK: - - - here - - -

17 CHIEF JUDGE LIPPMAN: - - - tell us why in
18 this case it's I-don't-give-a-damn conduct.

19 MR. DWECK: - - - we have an adjacent owner
20 that was excavating to sixty feet below the surface.
21 They did not properly shore up the building, and my
22 lady who owns the apartment building has sustained
23 severe damage, because the building has become
24 unstable.

25 JUDGE READ: Well, there were stop-work

1 orders, right?

2 MR. DWECK: I'm sorry?

3 JUDGE READ: There were stop-work orders?
4 They were ignored? Is that what you're - - -

5 MR. DWECK: There were sixteen stop orders.

6 JUDGE READ: So you rely on that, that they
7 were ignored.

8 JUDGE GRAFFEO: Were they on notice that
9 there was potential damage to your particular
10 building?

11 MR. DWECK: Judge Graffeo, not only were
12 they on notice, but the summonses specifically
13 referred to the danger to our building by the
14 continued excavation in violation of the stop orders.

15 JUDGE SMITH: If you didn't - - - if you
16 didn't have the orders, would you still have
17 vandalism?

18 MR. DWECK: Absolutely.

19 JUDGE SMITH: Why?

20 MR. DWECK: Because they were on notice.
21 There was a TRO issued by a Supreme Court judge in
22 Brooklyn that they violated.

23 JUDGE SMITH: Okay, I guess what I'm really
24 saying is if you - - - you have these pe - - - you
25 have documents; you have a TRO, you have stop-work

1 orders, you have notices of violation. Suppose you
2 have - - - suppose all you have is you have cond - -
3 - they're on notice - - - they are - - - you've told
4 them stop doing it, they keep doing it. Is that
5 enough to be vandalism?

6 MR. DWECK: I do believe it is, Judge
7 Smith, because the notice that they have, whether it
8 was from my lady or the stop orders or any other
9 outside source, put them in a position where they
10 knew that the result of their continuing - - -

11 JUDGE SMITH: So every excavation case can
12 be within vandalism coverage?

13 MR. DWECK: If it's in continued disregard
14 with illegal conduct? Absolutely.

15 CHIEF JUDGE LIPPMAN: What about if they
16 didn't - - - weren't on notice. They're doing it - -
17 - they were just oblivious to what would happen to
18 your property? Would that be okay under the policy?

19 MR. DWECK: Judge Lippman, you're tempting
20 me with the Fanberg decision.

21 CHIEF JUDGE LIPPMAN: Go ahead. Don't be
22 tempted. Go for it.

23 MR. DWECK: If they were not on notice, it
24 would be a completely different story, because you'd
25 have to determine whether the conduct was

1 intentional, meaning whether there was any ill will
2 towards the adjacent property - - -

3 CHIEF JUDGE LIPPMAN: Say there - - -

4 MR. DWECK: - - - owner.

5 CHIEF JUDGE LIPPMAN: - - - was no ill will
6 towards you, but they could care less what happened
7 to your property. I would assume that anyone who's
8 doing excavation in that kind of a situation might
9 guess that this had the possibility of damaging
10 properties that were adjacent.

11 MR. DWECK: Judge Lippman - - -

12 CHIEF JUDGE LIPPMAN: Does - - - what - - -
13 explain to us where it kicks in. Is it once there's
14 a notice, a lot of notice? Could it be no notice if
15 you're oblivious to the consequences? Where do you
16 draw the lines here? Where I think Judge Smith might
17 have been going is, how much do we expose - - - what
18 exposure are in these policies for the insurer? In
19 other words, is any kind of excavation, basically,
20 you know, if it's damaged, you're going to be liable?

21 Where do you draw the line? Do you have to
22 have notice? What kind of notice? Or can you just
23 be, again, oblivious, not - - - could care less, but
24 have no particular ill will towards you? Doesn't
25 even know who you are other than that they are or

1 should be aware that if they're doing this, there
2 could be consequences - - - what are the - - - what
3 are the different gradations of this?

4 MR. DWECK: Judge Lippman, you're from one
5 extreme to the other.

6 CHIEF JUDGE LIPPMAN: Yes.

7 MR. DWECK: If there's no notice - - -

8 CHIEF JUDGE LIPPMAN: Yes.

9 MR. DWECK: - - - then you can't turn
10 around and say any excavation that causes damage
11 would fall within a V&MM clause.

12 CHIEF JUDGE LIPPMAN: So if there's - - -
13 if there's no notice, but you knew that other people
14 could be damaged, okay, right?

15 MR. DWECK: If the conduct was otherwise
16 legal.

17 CHIEF JUDGE LIPPMAN: Assuming it was
18 otherwise legal. Okay.

19 MR. DWECK: Okay.

20 CHIEF JUDGE LIPPMAN: What's the next step?
21 What gets you to the point where it is covered on
22 vandalism and under the pol - - - one notice?

23 MR. DWECK: One notice - - -

24 CHIEF JUDGE LIPPMAN: Yeah.

25 MR. DWECK: - - - with the expectation that

1 damage could possibly be caused.

2 CHIEF JUDGE LIPPMAN: Foreseeable?

3 Foreseeable at that - - -

4 MR. DWECK: Absolutely foreseeable. And
5 lawful con - - - unlawful conduct.

6 JUDGE READ: Well, so why doesn't every
7 excavation case, then, potentially fall under one of
8 these policy ex - - - policy provisions, a peril of
9 this sort?

10 MR. DWECK: Because not every excavation is
11 illegal, Judge Pigott.

12 CHIEF JUDGE LIPPMAN: Judge Read. Yes.

13 MR. DWECK: I'm sorry.

14 JUDGE READ: Well, that's - - - okay, let's
15 say this is an illegal excavation. Then would it - -
16 - then would it - - - then it would fall under the -
17 - - you're saying that's the key for you?

18 MR. DWECK: Not necessarily. Because one
19 of the cases that we had come across in our research
20 was one where they didn't secure a proper building
21 permit. And the notice was there, but they said it
22 wasn't enough - - -

23 JUDGE READ: Well, it occurs to me, I
24 guess, that this is not the kind of thing we usually
25 think of as vandalism. And are - - - so let me

1 follow that up with asking you, this is an all peril
2 - - - this is a perils policy, right?

3 MR. DWECK: Yes.

4 JUDGE READ: Are there other perils that
5 this - - - that you might have gotten insurance for
6 that would more closely - - - or more easily fall
7 within - - - I mean what about collapse or something
8 of that sort?

9 MR. DWECK: Yes, you could - - - you could
10 have an all-risk policy. This was a named perils
11 policy.

12 JUDGE READ: Well, what - - - are there
13 other - - - are there any other named perils under
14 which this more clearly falls? Or if I have a - - -
15 if I have - - - if I'm in your situation, is this the
16 kind of peril I have to get in the policy in order to
17 recover? There's nothing closer?

18 MR. DWECK: You could get a more broader
19 form policy that would cover any kind of damage.

20 JUDGE SMITH: Suppose you're sitting around
21 worrying that there might be an excavation next door
22 and it might damage your building, what kind of
23 insurance policy would you be well advised to get?

24 MR. DWECK: All-risk.

25 JUDGE SMITH: Um-hum.

1 MR. DWECK: All-risk, but - - -

2 JUDGE SMITH: And you - - - and your client
3 didn't get that?

4 MR. DWECK: She did not. She had to - - -

5 JUDGE SMITH: You would have had to pay a
6 higher premium to get that?

7 MR. DWECK: The premium would probably be
8 ten times what she paid.

9 JUDGE SMITH: Well, why should she get the
10 same coverage for one-tenth the premium?

11 MR. DWECK: Because it's a named peril for
12 which she did pay the premium, she's entitled to
13 recovery.

14 JUDGE READ: Well, I guess that's the
15 question.

16 CHIEF JUDGE LIPPMAN: And is it - - - is it
17 - - - the two things, I gather from what you're
18 saying, are notice and illegality? Those must be
19 there?

20 MR. DWECK: That's for the state of mind -
21 - -

22 CHIEF JUDGE LIPPMAN: Your - - - yeah.

23 MR. DWECK: - - - that's for the state of
24 mind portion of what was certified to you from the
25 Second Circuit.

1 JUDGE GRAFFEO: What - - - what about
2 proximity? I mean, do you agree with the Sixth
3 Circuit case where it was three miles away? Is there
4 - - - is there - - - I'm concerned with distance and
5 - - -

6 MR. DWECK: Judge Graffeo, that's the case
7 we're relying on on all fours, the Louisville case.

8 JUDGE GRAFFEO: Right. So - - -

9 MR. DWECK: That was three miles upriver.

10 JUDGE GRAFFEO: - - - proximity's not an
11 element of what you're suggesting?

12 MR. DWECK: No. If it's a - - - if the
13 damage is a natural consequence of the illegal
14 conduct, it's a covered peril under the V&MM cause.
15 So - - -

16 JUDGE SMITH: Did - - -

17 JUDGE GRAFFEO: Was there notice in the
18 Louisville case?

19 MR. DWECK: There - - - there was illegal
20 conduct in the Louisville case.

21 JUDGE GRAFFEO: Yes. The dumping of the -
22 - -

23 MR. DWECK: And they went further - - -

24 JUDGE GRAFFEO: - - - toxins.

25 MR. DWECK: - - - and said the natural flow

1 of the water into which the toxic substances were
2 placed, would naturally end up at the sewage plant.

3 JUDGE GRAFFEO: You need illegal conduct or
4 notice?

5 MR. DWECK: That's correct.

6 JUDGE GRAFFEO: I'm just trying to - - -

7 MR. DWECK: That's correct.

8 JUDGE GRAFFEO: - - - tick off all the
9 elements - - -

10 CHIEF JUDGE LIPPMAN: Even if - - -

11 JUDGE GRAFFEO: - - - that you think are
12 necessary.

13 CHIEF JUDGE LIPPMAN: - - - you didn't - -
14 - even if you didn't get the broadest policy, in your
15 kind of policy, if you have those two factors, that's
16 it?

17 MR. DWECK: That's it for the state of
18 mind, Judge Lippman.

19 CHIEF JUDGE LIPPMAN: Right.

20 MR. DWECK: Then you still have the other
21 question about the damage being inflicted directly
22 upon the property, which is what the lower court in
23 the Eastern District - - -

24 CHIEF JUDGE LIPPMAN: Right.

25 MR. DWECK: - - - dismissed us on. And I

1 think she was sorely mistaken. I think she just
2 either disregarded the Louisville case or
3 misinterpreted it, because the policy - - -

4 JUDGE SMITH: But why - - - why - - - maybe
5 it's just that her reaction, as Judge Read said a few
6 a minutes ago, when you des - - - you describe these
7 facts and then you ask yourself the question is this
8 vandalism, the word doesn't seem to fit. Why not?
9 What's the problem that's hanging us up here?

10 MR. DWECK: It's - - - Judge Smith, it's
11 vandalism and malicious mischief. They - - - they go
12 hand-in-hand. It's the - - - the inappropriate
13 conduct that constitutes the - - -

14 JUDGE SMITH: But there's a lot of
15 inappropriate conduct in the world, and you - - - and
16 vandalism is used only for a subset of that conduct.

17 MR. DWECK: Yeah, but it has to be combined
18 with - - -

19 JUDGE SMITH: It's a - - - it's a - - -
20 this - - - somehow this doesn't - - - to me, this
21 doesn't resemble the Vandals sacking Rome or - - - or
22 the teenagers across the street vandalizing my house.
23 Why is it really like that?

24 MR. DWECK: I hesitated to do this because
25 I didn't think it would be appropriate for this

1 court. But one of the associates in my office - - -

2 JUDGE SMITH: A picture of the sack of
3 Rome?

4 MR. DWECK: - - - no - - - told me this is
5 what I should be flashing before the judges in the
6 Court of Appeals. That was the attitude that was
7 manifested by the excavator - - -

8 JUDGE SMITH: Okay.

9 MR. DWECK: - - - and the adjacent owner.

10 JUDGE SMITH: Is every - - - is every
11 reckless damage to property vandalism?

12 MR. DWECK: If there's notice? If there's
13 illegal - - -

14 JUDGE SMITH: Well - - -

15 MR. DWECK: - - - conduct?

16 JUDGE SMITH: - - - it could hardly be
17 reckless without some kind of notice.

18 MR. DWECK: If there was notice and it was
19 illegal conduct, you bet your bottom dollar, Judge
20 Smith.

21 JUDGE GRAFFEO: Well - - -

22 JUDGE SMITH: So I don't need - - - so
23 maybe I - - - maybe I should save my money and not
24 buy a property damage policy and just buy a named
25 perils policy and put everything under vandalism.

1 MR. DWECK: That's correct. And that's
2 what people do, because otherwise you could have a
3 runaway expense for insurance coverage.

4 JUDGE RIVERA: Also - - - also in your
5 case, the - - - the next-door neighbor, these
6 excavators, they ended up paying for the privilege of
7 damaging your client's property. Is that not
8 correct? I mean, didn't they pay a certain amount of
9 these fines? It's almost like the cost of doing
10 business. I just have to pay that; I can keep
11 excavating?

12 MR. DWECK: Obviously you picked up that
13 point in my brief, Judge Rivera. It was an economic
14 - - -

15 JUDGE RIVERA: I read them now and then.
16 Yeah.

17 MR. DWECK: It was an economic decision.

18 JUDGE RIVERA: Um-hum.

19 MR. DWECK: And you turn around and say why
20 - - -

21 JUDGE ABDUS-SALAAM: Well, Mr. Dweck,
22 because it was an economic decision and basically a
23 calculated risk, why is that - - - going to your
24 second point about the state of mind, why is that
25 intent?

1 MR. DWECK: Because if they engage in
2 conduct that is in - - -

3 JUDGE ABDUS-SALAAM: To directly - - - to
4 directly damage your client's property.

5 MR. DWECK: They didn't care. They only
6 were concerned about getting their work done, getting
7 their workers - - -

8 JUDGE ABDUS-SALAAM: Exactly.

9 MR. DWECK: - - - to finish the job.

10 JUDGE ABDUS-SALAAM: So they weren't
11 intending to damage your client's property, they were
12 only concerned about getting the work done on their
13 property.

14 MR. DWECK: That's correct.

15 JUDGE READ: And the damage to your
16 property was just an - - -

17 JUDGE ABDUS-SALAAM: It's collateral - - -

18 JUDGE READ: - - - unfortunate consequence?

19 JUDGE ABDUS-SALAAM: - - - essentially.

20 MR. DWECK: It was incidental to their
21 conduct.

22 JUDGE READ: Yeah. That's the question,
23 though. So how does that go to intent?

24 MR. DWECK: Because if they turn around and
25 say, we don't give a damn, and they do things on a

1 reckless basis - - - they pleaded guilty to sixteen
2 summons - - -

3 CHIEF JUDGE LIPPMAN: But wait a - - - but
4 wait a second. I think what you're saying - - - and
5 let me understand your argument - - - it's because
6 they were on notice that this would damage you, not
7 just I don't give a damn and people say, oh, this
8 could hurt people. Did the notices indicate - - -
9 did what - - - the different forms - - - that this
10 would hurt your property in particular, and is that
11 necessary?

12 MR. DWECK: Absolutely, Judge Lippman. And
13 It's in the summonses - - -

14 CHIEF JUDGE LIPPMAN: But is that - - -

15 MR. DWECK: - - - that are published in the
16 record.

17 CHIEF JUDGE LIPPMAN: - - - is that another
18 element that's necessary? In other words, it's not
19 just - - - and I want to understand what your
20 argument is - - - I don't give a damn. It's I don't
21 give a damn about you. Is that - - -

22 MR. DWECK: I didn't give a damn about - -
23 -

24 CHIEF JUDGE LIPPMAN: - - - is that - - -

25 MR. DWECK: - - - you or anybody else.

1 CHIEF JUDGE LIPPMAN: Yeah, yeah. But it's
2 the "you", isn't that important? Doesn't it matter
3 that they had in front of them, oh, this would damage
4 your particular property?

5 MR. DWECK: That's correct. Absolutely
6 correct, Judge Lippman. And since they were on
7 notice that our property would be damaged, and they
8 continued to disregard the summonses anyway, pleading
9 guilty is the equivalent of intentional conduct. If
10 you're pleading guilty, you have intentional conduct,
11 then you have the state of mind that was referred to
12 you for determination - - -

13 CHIEF JUDGE LIPPMAN: So that makes it - -
14 -

15 MR. DWECK: - - - by the Second Circuit.

16 CHIEF JUDGE LIPPMAN: - - - that makes it -
17 - - and are you arguing this - - - that makes it
18 intent as to you?

19 MR. DWECK: That's correct.

20 CHIEF JUDGE LIPPMAN: Is that what you're
21 saying?

22 MR. DWECK: Yeah. And we're the only ones
23 here looking to have coverage from my dear - - -

24 CHIEF JUDGE LIPPMAN: Okay.

25 MR. DWECK: - - - friend, Mr. Verveniotis.

1 The other issue that I know you have before
2 you is whether the damage has to be inflicted
3 directly to our property. And I suggest to you that
4 the wording of the policy does not limit, as the
5 lower court in the Eastern District ruled, that the
6 damage has to be inflicted directly to our property.
7 It could be from any source. If the damage is
8 sustained as a result of illegal conduct, it covers
9 our - - -

10 CHIEF JUDGE LIPPMAN: And what's your be -
11 - -

12 MR. DWECK: - - - property.

13 CHIEF JUDGE LIPPMAN: - - - and what's your
14 best cases that you rely on?

15 MR. DWECK: Louisville.

16 CHIEF JUDGE LIPPMAN: Okay.

17 MR. DWECK: Louisville is a Sixth Circuit
18 case. You have the King case. You have the - - -

19 CHIEF JUDGE LIPPMAN: What about the Sec -
20 - -

21 MR. DWECK: - - - Trautwein case.

22 CHIEF JUDGE LIPPMAN: - - - what about the
23 Second Department case?

24 MR. DWECK: You mean Cresthill?

25 CHIEF JUDGE LIPPMAN: Yeah.

1 MR. DWECK: No notice in Cresthill.

2 JUDGE SMITH: Okay. But Cresthill went
3 your way, didn't it?

4 MR. DWECK: Cresthill went our way. And
5 the intentional act of severing the pipes - - -

6 JUDGE SMITH: Even on - - - even on - - -
7 and it wasn't your client's - - - it wasn't the
8 insured's pipes that were severed.

9 MR. DWECK: It was in the same building,
10 Judge Smith.

11 JUDGE SMITH: Well, I'm trying to argue
12 your side. Why are you arguing the other guy?
13 That's a case of an act on other - - - on somebody
14 else's property but which nevertheless was held to be
15 vandalism as to which the insured could collect for.

16 MR. DWECK: My recollection in reading
17 Cresthill was it was held that the pipes were severed
18 in the same building where the damage occurred.

19 JUDGE SMITH: So you think that
20 distinguishes Cresthill from this case?

21 MR. DWECK: That does.

22 JUDGE SMITH: Why do you want to
23 distinguish it? Why don't you - - - okay.

24 CHIEF JUDGE LIPPMAN: Okay.

25 MR. DWECK: It's favorable to us.

1 CHIEF JUDGE LIPPMAN: Thanks - - - thanks,
2 counsel.

3 MR. DWECK: Thank you very much.

4 CHIEF JUDGE LIPPMAN: We're going to hear
5 from your adversary.

6 MR. VERVENIOTIS: May it please the court,
7 my name is Steven Verveniotis. I represent Penn-Star
8 Insurance Company in this case.

9 CHIEF JUDGE LIPPMAN: Counsel, what about
10 if you have notice as to this particular business;
11 you have illegality; why shouldn't you be held on the
12 vandalism clause - - - why shouldn't you be held
13 liable? How much more do you need to have before
14 they can collect from you?

15 MR. VERVENIOTIS: I have a two-part answer.

16 CHIEF JUDGE LIPPMAN: Yes.

17 MR. VERVENIOTIS: The first - - -

18 CHIEF JUDGE LIPPMAN: Give it to us.

19 MR. VERVENIOTIS: - - - as to this specific
20 case - - -

21 CHIEF JUDGE LIPPMAN: Yes.

22 MR. VERVENIOTIS: - - - I know you've heard
23 a lot about sixteen violations. But if you go and
24 look at the violations, they run over a period of
25 five years. They include things such as not having

1 the proper plans in place - - -

2 JUDGE SMITH: But couldn't - - - couldn't a
3 jury find that these people were willful?

4 MR. VERVENIOTIS: A - - - not with respect
5 to the other property. What they pled guilty was
6 several violations, including not having plans, not
7 having handrails, not having all kinds of stuff.

8 JUDGE SMITH: They were never on notice
9 that there - - - that there was a threat to the
10 property next door?

11 MR. VERVENIOTIS: They were told to stop
12 work. They were given certain conditions, if you
13 look at the violations, under which they could
14 continue work - - -

15 CHIEF JUDGE LIPPMAN: Well, but that's not
16 what the judge asked you. Were they on no - - - were
17 you on notice as to them?

18 MR. VERVENIOTIS: There came a point in
19 2008 in which there was indication about stopping
20 work completely - - -

21 JUDGE SMITH: But was - - - is there a
22 point at which this excavator's conduct could be
23 called willful?

24 MR. VERVENIOTIS: I don't think so. Not
25 with respect to the other building, Your Honor. The

1 conduct here, in order to be malice - - - and the
2 issue that we were all going at before and we were
3 talking about it is, your conduct has to not be a
4 legitimate purpose, an - - - that has a consequence
5 that can be expected. Much of the case law in
6 insurance drives - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
8 if you - - - I understand that you're committed to
9 getting your job done. But if you know - - - if
10 you're on notice that you're performing, A) an
11 illegal act, and B) that it will hurt them, why
12 shouldn't you be held responsible?

13 MR. VERVENIOTIS: Because that's - - -

14 CHIEF JUDGE LIPPMAN: And that's not a
15 rhetorical question. What is the rationale under the
16 law or under policy - - -

17 MR. VERVENIOTIS: The - - -

18 CHIEF JUDGE LIPPMAN: - - - as to why they
19 aren't able to view this as willful to them?

20 MR. VERVENIOTIS: The rationale is that
21 it's not malice intended towards the other building.

22 CHIEF JUDGE LIPPMAN: Why - - -

23 MR. VERVENIOTIS: You may be violating - -

24 -

25 CHIEF JUDGE LIPPMAN: Why not - - -

1 MR. VERVENIOTIS: - - - the law.

2 CHIEF JUDGE LIPPMAN: - - - but why isn't
3 it - - -

4 MR. VERVENIOTIS: You may be - - -

5 CHIEF JUDGE LIPPMAN: - - - if you know
6 that - - - if you're on notice that it's going to
7 hurt them - - -

8 MR. VERVENIOTIS: You may - - -

9 CHIEF JUDGE LIPPMAN: - - - why isn't it
10 willful as to them?

11 MR. VERVENIOTIS: You may be negligent.
12 There might be circumstances as to a variety of
13 things happening, but the case law from this court
14 has always been that there's a division between the
15 possibility that things could happen and driving
16 something intentionally.

17 JUDGE SMITH: Well, you're not - - - you're
18 not saying that the excavator couldn't be liable to -
19 - - to the lady who owned the house?

20 MR. VERVENIOTIS: Of course not.

21 JUDGE SMITH: And in fact, maybe she could
22 even be liable for punitive damages?

23 MR. VERVENIOTIS: I don't know about
24 punitive damages.

25 JUDGE SMITH: If she - - - if she could - -

1 - I'm sorry, if they could - - - if they could be
2 liable to her for punitive damages, would that make
3 it vandalism? Would that cause your policy to kick
4 in?

5 MR. VERVENIOTIS: I think van - - -
6 punitive damages and vandalism are two different
7 things. And that's what I'm trying to drive at.

8 JUDGE SMITH: What's the te - - - what - -
9 - tell me - - - give me an example of conduct that
10 damages property and is so willful and wanton that
11 it's - - - that it would give rise to punitive
12 damages, but it's not vandalism?

13 MR. VERVENIOTIS: I think vandalism is not
14 in - - - not acting in accordance with how a
15 reasonable purpose would be to be - - - to be
16 somebody that's totally, as you heard, disregarding
17 the consequences. That's not what vandalism is.
18 Vandalism requires your purpose to be to damage this
19 building. All the cases that we've read - - -

20 JUDGE SMITH: Okay. Suppose - - - suppose
21 kids in the neighborhood don't like my neighbor, and
22 they start throwing bricks at his window. And they
23 miss and hit my window or some debris flies and
24 damages my house. Have I suffered damage from
25 vandalism?

1 that's what I'm trying to say in terms of explaining
2 about the history of this damage. When you look at
3 the record of this, you see engineers' reports that
4 talk about over a period of three years, this is
5 something that develops.

6 CHIEF JUDGE LIPPMAN: If you got - - -

7 MR. VERVENIOTIS: We - - -

8 CHIEF JUDGE LIPPMAN: - - - notice that
9 said - - - if you had a notice that said if you keep
10 doing this, they are going to be damaged in the
11 following fashion, if you have that notice, is that
12 vandalism? If you know specifically, if you keep
13 doing it and this is what's going to happen, that
14 could be willful that would have you responsible
15 under the vandalism clause or not? What - - -

16 MR. VERVENIOTIS: I think not, Your Honor.

17 CHIEF JUDGE LIPPMAN: Why not?

18 MR. VERVENIOTIS: Because - - -

19 CHIEF JUDGE LIPPMAN: Why not?

20 MR. VERVENIOTIS: - - - it's not what
21 you're giving notice of, it's what your intent is.
22 Vandalism - - -

23 CHIEF JUDGE LIPPMAN: How could you have
24 any other intent if you have notice that if you keep
25 doing it, it's going to - - - I mean, as long as your

1 intent is, well, you know what, this is going to help
2 me, so I don't care what happens to them, that's not
3 intent?

4 MR. VERVENIOTIS: No, Your Honor. That's
5 not what I'm saying. In the exam - - -

6 CHIEF JUDGE LIPPMAN: Why isn't - - - why
7 isn't it intent if you say I need to finish this. I
8 just got to get this garage done. I don't care what
9 happens to them. I'm going to finish it. Let - - -
10 whatever happens, happens. Why is that not willful
11 intent as to them that would make you liable?

12 MR. VERVENIOTIS: Because the willful and
13 malicious conduct has to be intended towards the
14 other building. It cannot be something that's a
15 consequence of what you did. That's the sticking
16 point.

17 JUDGE GRAFFEO: So you mean - - - say, for
18 instance, an adjacent building that your client - - -
19 hypothetical client owns, okay, and they torched the
20 building for whatever reason. They want the
21 insurance proceeds or something. They start a fire.
22 They intentionally start a fire. And that fire
23 spreads to the neighbor next door. You're not going
24 to cover that under the fire provision of this peril
25 policy, because they didn't - - - they only intended

1 to burn their building, not the building next door?

2 MR. VERVENIOTIS: I don't think that's
3 analogous, Your Honor. I mean, I don't know what the
4 answer would be under the fire coverage with respect
5 to that scenario.

6 JUDGE GRAFFEO: Well, it ought to - - - I
7 mean, it ought to be similar, shouldn't it?

8 MR. VERVENIOTIS: No, it's different
9 because vandalism is - - -

10 JUDGE GRAFFEO: If it's a wanton - - -

11 MR. VERVENIOTIS: - - - different than
12 other - - -

13 JUDGE GRAFFEO: - - - disregard - - -

14 MR. VERVENIOTIS: - - - conduct.

15 JUDGE GRAFFEO: - - - of the rights of
16 another party, shouldn't that be covered?

17 MR. VERVENIOTIS: But that's - - - that's
18 not vandalism. And malicious and willful tow - - -
19 directed towards the property, which is what the full
20 wording of the policy - - -

21 JUDGE SMITH: Well, suppose - - -

22 MR. VERVENIOTIS: - - - says.

23 JUDGE RIVERA: So - - - but I think in part
24 you're arguing that the purpose is to excavate, it's
25 not to damage their property. Okay. So but you have

1 different ways of excavating. And if you choose to
2 excavate in way that you know in advance will cause
3 that destruction, why is that not going to come
4 within the policy's coverage?

5 MR. VERVENIOTIS: First - - -

6 JUDGE RIVERA: I have several - - - several
7 choices. I pick the one that I know is going to have
8 a particular outcome that's adverse to this adjacent
9 property.

10 MR. VERVENIOTIS: First of all, clearly,
11 that did not happen here. If you go and look back at
12 the record, the excavation hap - - -

13 JUDGE READ: Well, let's assume it did.

14 MR. VERVENIOTIS: - - - happened between
15 2005 - - - right. So assuming it did, the fact that
16 there's different ways to excavate, again, brings you
17 back to the point that this excavator's purpose
18 wasn't to be maliciously damaging this building next
19 door. Vandalism is truly different - - -

20 JUDGE SMITH: Well, suppose - - -

21 MR. VERVENIOTIS: - - - than negligence.

22 JUDGE RIVERA: Maybe it wasn't the primary
23 purpose, but it's the - - -

24 JUDGE ABDUS-SALAAM: Well, what would you
25 call it? Would you call it gross negligence or

1 something?

2 MR. VERVENIOTIS: Even the most gross
3 negligence is not vandalism, because it's not - - -

4 JUDGE SMITH: Suppose - - - suppose a kid
5 digs a hole in your front yard because he likes to
6 dig holes and he knows it might cause your building
7 to cave in, but he doesn't care. He doesn't have
8 anything against you. He just likes to dig holes.
9 And your building caves in. Vandalism?

10 MR. VERVENIOTIS: I honestly don't know. I
11 don't know what that - - -

12 CHIEF JUDGE LIPPMAN: Counselor, what is a
13 hypothetical that would be vandalism under this
14 policy, assuming you're excavating, they have the
15 building next door. Give us a hypothetical where it
16 would come under the policy. You're doing
17 excavation; they're being damaged. When is it that
18 you would have to pay?

19 MR. VERVENIOTIS: I don't think excavation,
20 especially under - - -

21 CHIEF JUDGE LIPPMAN: So it would never be
22 ex - - -

23 MR. VERVENIOTIS: I don't think under this
24 policy it would be. This - - - even specifically in
25 this policy provision that says we're not covering

1 anything that has - - -

2 CHIEF JUDGE LIPPMAN: So it can never be
3 excavation because, why?

4 MR. VERVENIOTIS: Because excavation is not
5 vandalism. The words have to be given the meaning
6 that they have.

7 JUDGE READ: So they should have had - - -

8 MR. VERVENIOTIS: Vandalism means that - -
9 -

10 JUDGE READ: - - - they should have - - -

11 MR. VERVENIOTIS: - - - you intend to
12 willfully damage this property.

13 JUDGE READ: So in order to recover they
14 had to have an all-risk policy?

15 MR. VERVENIOTIS: They would have to have
16 an all-risk policy, yes, instead of this policy which
17 they paid - - -

18 JUDGE SMITH: You say excavation - - -

19 MR. VERVENIOTIS: - - - 3,000 dollars for.

20 JUDGE SMITH: - - - you say excavation is
21 not vandalism. But you can imagine that digging
22 holes might be vandalism?

23 MR. VERVENIOTIS: Digging holes, especially
24 on your property, that goes underneath, I guess, the
25 foundation of your property, if I take the

1 hypothetical - - -

2 JUDGE SMITH: Yeah, okay.

3 MR. VERVENIOTIS: - - - to I guess its
4 logical consequences, would be something where you're
5 actually doing something to the property.

6 JUDGE SMITH: Okay, but I mean - - -

7 MR. VERVENIOTIS: So I guess it's much
8 closer.

9 JUDGE SMITH: - - - I guess what I'm really
10 saying, isn't "excavation" a word that means digging
11 a hole?

12 MR. VERVENIOTIS: Except, Your Honor, the
13 excavation and all the work happened on another
14 property.

15 JUDGE SMITH: So if - - - so if the kid who
16 likes to dig a hole dug it in your neighbor's lawn,
17 and it undermined your house, then you have not
18 suffered any damage from vandalism?

19 MR. VERVENIOTIS: I don't think, under that
20 scenario, that that kid is any different than an
21 excavator who's doing something on somebody else's
22 property. They're not - - - they're not - - -
23 although they may be negligent, and they may have
24 proximately caused, under some scenario, I don't - -
25 - you know - - - the kid, as well as the contractor,

1 may have caused the damage - - -

2 JUDGE ABDUS-SALAAM: What if - - - what if
3 - - - again on a hypothetical. What if the person
4 was trying to knock down their house but knew that it
5 was going to knock down the neighbor's house as well?
6 Would that be vandalism?

7 MR. VERVENIOTIS: Again, Your Honor, I
8 don't think that's vandalism. The fact that
9 something - - - there may be some consequences to
10 your actions and you may be negligent in how you go
11 about doing your actions such that those consequences
12 occur - - -

13 JUDGE ABDUS-SALAAM: What if the person had
14 a grudge - - -

15 MR. VERVENIOTIS: Doesn't mean - - -

16 JUDGE ABDUS-SALAAM: - - - what if the
17 person had a grudge against the neighbor, and instead
18 of just harming the neighbor, decided well, I'll
19 just, you know, knock down my house and knock their
20 house down, too?

21 MR. VERVENIOTIS: I guess that could be
22 relevant in that - - - in that analysis, because if
23 the person's intent was to damage the building next
24 door, I guess - - - and that was their vehicle for
25 damaging next door - - -

1 JUDGE ABDUS-SALAAM: So you're saying it's
2 different because they didn't intend to - - -

3 MR. VERVENIOTIS: No, clearly when - - -

4 JUDGE ABDUS-SALAAM: - - - cause damage
5 next door.

6 MR. VERVENIOTIS: - - - you have a
7 legitimate purpose - - -

8 CHIEF JUDGE LIPPMAN: You're saying the
9 difference is that - - - your argument is as long as
10 primarily you're doing it for your purpose, even if
11 you don't give a damn, even if you know it will hurt
12 them, it doesn't matter. So the difference is intent
13 between what Judge Abdus-Salaam just said to you and
14 what you believe is the general law, that as long as
15 you have a reason for what you're doing, even if you
16 know it's going to hurt the other building - - -
17 you've been told, you're on notice about it - - - and
18 you say, oh, the hell with that, I don't care, that's
19 okay, as long as you have a purpose, illegal or
20 legal, that you're performing, that's okay, that's
21 not vandalism?

22 MR. VERVENIOTIS: My focus, Your Honor - - -
23 -

24 CHIEF JUDGE LIPPMAN: Is that your
25 argument?

1 MR. VERVENIOTIS: My focus - - -

2 CHIEF JUDGE LIPPMAN: Is - - -

3 MR. VERVENIOTIS: - - - I think so, but I
4 just want to be clear.

5 CHIEF JUDGE LIPPMAN: No, no, but in my - -
6 - in my words, answer my hypothetical. You - - - as
7 long as - - - you're building a garage underground,
8 or whatever you're doing there. You know it's going
9 to hurt them. You're on notice that it's going to
10 hurt them. It's illegal what you're doing. As long
11 as your mindset is, I don't give a flying you-know-
12 what, I want to finish this garage; no coverage, no
13 vandalism?

14 MR. VERVENIOTIS: I think that's not
15 vandalism. And indeed the quest - - -

16 CHIEF JUDGE LIPPMAN: What is it? What is
17 it?

18 MR. VERVENIOTIS: I think it may be
19 negligence. You can sue them and you can prove your
20 damages, which is what they're doing. But the
21 question that's been certified to this court asks you
22 understand that - - -

23 CHIEF JUDGE LIPPMAN: It's not willful - -

24 -

25 MR. VERVENIOTIS: - - - nothing that - - -

1 CHIEF JUDGE LIPPMAN: - - - it's not
2 willful and malicious damage to property?

3 MR. VERVENIOTIS: No, no. The certified
4 question is, an act not directed specifically at the
5 covered property.

6 JUDGE GRAFFEO: What's your best case for
7 your prop - - -

8 MR. VERVENIOTIS: Hmm?

9 JUDGE GRAFFEO: - - - what's your best case
10 other than the district court in this case?

11 MR. VERVENIOTIS: The Fanberg case, which
12 is on page 25. And then there's a series of other
13 cases - - -

14 JUDGE SMITH: Counsel, did you have a sense
15 of what happened? I mean, you don't learn much about
16 the facts from reading the Fanberg opinion.

17 MR. VERVENIOTIS: I think it's pretty
18 analogous. I don't think playing around with whether
19 you had a violation notice or not getting a permit.
20 You know it's illegal. Everybody knows what the
21 consequences are when you do excavation, especially
22 in the city. And you've got building next to - - -
23 buildings touching each other.

24 JUDGE ABDUS-SALAAM: Was the court - - -
25 counsel, was the court in Fanberg saying it's not

1 vandalism, or were they saying it wasn't - - - they
2 didn't intend to do it? The second question - - -

3 MR. VERVENIOTIS: No, the - - -

4 JUDGE ABDUS-SALAAM: - - - were they
5 answering the first question that we've been
6 certified - - -

7 MR. VERVENIOTIS: I think it's the first
8 question, because clearly it's the same - - - the
9 same type of coverage. And they said this isn't
10 vandalism coverage - - -

11 JUDGE SMITH: But couldn't - - -

12 MR. VERVENIOTIS: - - - because it's - - -

13 JUDGE SMITH: - - - couldn't - - -

14 MR. VERVENIOTIS: - - - construction next
15 door.

16 JUDGE ABDUS-SALAAM: But in Fanberg, didn't
17 they - - - didn't the Second Department cite
18 favorably the Cresthill case where they said it was
19 vandalism, when - - -

20 MR. VERVENIOTIS: Well - - -

21 JUDGE ABDUS-SALAAM: - - - someone ripped
22 out pipes and - - -

23 MR. VERVENIOTIS: - - - the Cresthill is
24 totally different. The consequence of running the
25 water is to - - - in the same building, is to - - -

1 for the water to flow downward. You are directing
2 something at the building. And again, I come to the
3 question - - - I come back to the question that's - -
4 -

5 JUDGE SMITH: Well, wait a minute.

6 MR. VERVENIOTIS: - - - been certified.

7 JUDGE SMITH: Why is - - - why is flowing
8 water onto somebody's property so different from
9 digging a hole next to his property when you know
10 it's going to undermine his foundation?

11 MR. VERVENIOTIS: Because the coverage for
12 vandalism depends upon you doing something to the
13 property.

14 JUDGE SMITH: Well, they did do something -
15 - -

16 MR. VERVENIOTIS: Digging a hole - - -

17 JUDGE SMITH: - - - they did do something
18 to the property. The problem is that it wasn't
19 directed at the property. But the guys in Cresthill
20 didn't care about the pe - - - they may not even have
21 known there was stuff downstairs. They were just
22 tearing off pipes.

23 MR. VERVENIOTIS: But that's the wording of
24 the coverage. It has to be directed to the - - - to
25 the property.

1 JUDGE GRAFFEO: If Crest - - - if Cresthill
2 was a condominium, so there were two units, different
3 title owners, would - - -

4 MR. VERVENIOTIS: I think it was.

5 JUDGE GRAFFEO: - - - would there be
6 coverage?

7 MR. VERVENIOTIS: I think it was two
8 different owners of two different units but - - -

9 JUDGE GRAFFEO: I thought - - -

10 MR. VERVENIOTIS: - - - in the same
11 building.

12 JUDGE GRAFFEO: - - - I thought they were
13 tenants, but maybe I'm wrong.

14 MR. VERVENIOTIS: No, it was two different
15 ownerships and - - -

16 JUDGE GRAFFEO: So it's - - -

17 MR. VERVENIOTIS: - - - two different
18 policies - - -

19 JUDGE GRAFFEO: - - - it's just in one
20 building?

21 MR. VERVENIOTIS: - - - involved. It was
22 in the same building.

23 JUDGE GRAFFEO: But because it's the same
24 building, you've got better coverage if you're
25 another unit - - -

1 MR. VERVENIOTIS: No, because - - -

2 JUDGE GRAFFEO: - - - in the same building
3 instead of being, say, two single-family houses
4 twenty feet apart?

5 MR. VERVENIOTIS: The water going onto that
6 property is something directed at that property. In
7 this case, there's nothing that is directed - - -

8 CHIEF JUDGE LIPPMAN: Isn't that an awful
9 fine distinction that you're making that if it goes
10 here, it's okay, but if it goes here - - - here it's
11 not.

12 MR. VERVENIOTIS: But Your Honor, it has to
13 be a fine distinction in this situation. The limited
14 coverage that's purchased for a very low price here,
15 has to be only for vandalism coverage, for somebody
16 coming and damaging your building directly, not
17 consequences - - -

18 CHIEF JUDGE LIPPMAN: But I think - - -

19 MR. VERVENIOTIS: - - - that impact your
20 building.

21 CHIEF JUDGE LIPPMAN: - - - but I think the
22 issue is, what is damaging your property directly?
23 Is it if it flows downward or if it flows across, are
24 those two different situations?

25 MR. VERVENIOTIS: Nothing flows across when

1 you excavate.

2 CHIEF JUDGE LIPPMAN: If you - - - if you -

3 - -

4 MR. VERVENIOTIS: When you're excavating -

5 - -

6 CHIEF JUDGE LIPPMAN: - - - excavate and

7 the other thing collapses, obviously something's

8 happening to the other property.

9 MR. VERVENIOTIS: But you're not doing it

10 to the property. You're doing something in order to

11 do construction work that the other property then

12 succumbs to. There's a difference.

13 Vandalism requires you not to do things

14 that there could be consequences to another building,

15 but to do something to the building.

16 CHIEF JUDGE LIPPMAN: Okay, counselor.

17 Thanks.

18 Thank you both.

19 MR. VERVENIOTIS: Thank you, Your Honors.

20 CHIEF JUDGE LIPPMAN: Appreciate it.

21 MR. DWECK: Thank you.

22 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Georgitsi Realty, LLC v. Penn-Star Insurance Company, No. 156 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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