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COURT OF APPEALS

STATE OF NEW YORK

KENNETH J. HECKER,

Appellant,

-against-

No. 38

THE STATE OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York 12207
February 07, 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.

Appearances:

JEFFREY A. VAISEY, ESQ.
TONES VAISEY, PLLC
Attorneys for Appellant
155 Clinton Square
Rochester, NY 14604

RICHARD C. BRISTER, ESQ.
KENNEY SHELTON LIPTAK NOWAK, LLP
Attorneys for Respondent
16 East Main Street
Suite 900
Rochester, NY 14614

Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 38, Hecker v. State
2 of New York.

3 Counselor, do you want any rebuttal time?

4 MR. VAISEY: Yes, three minutes, please.

5 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

6 MR. VAISEY: May it please the court, my
7 name is Jeffrey Vaisey and I represent the appellant,
8 Kenneth Hecker.

9 At issue in this case is the - - - the
10 meanings of the words floor, walkway, passageway for
11 --

12 JUDGE SMITH: Before you get to passageway,
13 isn't there a basic problem that you - - - is your
14 position that they had to - - - you have to provide a
15 snow-free surface for these guys to shovel snow from?
16 Isn't that - - - isn't there something wrong with
17 that?

18 MR. VAISEY: No, the issue is that they
19 needed to - - - and that speaks to the negligence
20 component of it, that someone within the chain of
21 construction was negligent. But ultimately, what
22 we're saying is that the appellant, and it's his
23 employer, Hohl, they were not in any way prepared to
24 remove the sixteen to eighteen inches of snow that
25 were on these necessary - - -

1 CHIEF JUDGE LIPPMAN: What was your role
2 versus whoever would have been responsible for
3 removing the snow?

4 MR. VAISEY: What was the question?

5 CHIEF JUDGE LIPPMAN: What's your - - -
6 what's your person's role versus someone who might
7 have been responsible for moving the snow? What were
8 you doing, your client?

9 MR. VAISEY: His - - - his job was very
10 specific, and I think the record fairly represents
11 this, that he was there to fix the defective bridge
12 components that were there from - - -

13 JUDGE SMITH: But was shoveling the snow
14 part of his job?

15 MR. VAISEY: The shoveling the snow was not
16 part of his job.

17 JUDGE SMITH: So they - - - it was the
18 employer or the - - - I guess the state's obligation
19 to get somebody else to shovel the snow before your
20 guy showed up?

21 MR. VAISEY: Yes. I mean, it was - - - and
22 again, that's one interpretation of what a reasonable
23 - - - of what's reasonable under the circumstances.

24 JUDGE SMITH: But what's reasonable - - - I
25 mean, this is - - - this is Rochester - - - was it

1 Rochester or Buffalo - - - in the wintertime it snows
2 a lot. It was - - - there's stuff in the record - -
3 - it was snowing every day. You're saying that if I
4 hire somebody to fix a bridge in the wintertime, I
5 also have to - - - in order to give those people a
6 safe place to work I have to hire other people to
7 shovel the snow first?

8 MR. VAISEY: A good example would be you -
9 - - well, in this case, let's say that - - - I mean,
10 he came to work, if you - - - and he should have and
11 he wanted to get to work. There was a - - - this was
12 part of a much bigger project where there were, you
13 know, multiple parties involved in the project. They
14 came back to fix a part from a previous - - - you
15 know, from this smaller portion of the larger project
16 that they had performed. At no point was it made it
17 clear to them that they should be removing snow. And
18 I think the record reflects that.

19 JUDGE SMITH: The foreman thought it was
20 clear.

21 MR. VAISEY: I don't think - - - I disagree
22 with that. I think the foreman - - - if the record -
23 - - he says - - - you know, the appellant says:
24 Whose job is it to shovel snow? And then the - - -
25 and then he says it's yours. And he grabbed a

1 plastic shovel out of the back of his truck. But - -
2 -

3 JUDGE READ: I have a - - - I have a more
4 fundamental question; is that issue even in front of
5 us? Because this is up here on a two-judge dissent.
6 Was there any dissent on that issue in the Appellate
7 Division?

8 MR. VAISEY: There was not.

9 JUDGE READ: But do you think - - - is the
10 issue in front of us, though?

11 MR. VAISEY: I don't - - - I do not think
12 that the issue is in front - - -

13 JUDGE SMITH: Are we limited - - - I guess
14 the question is are we limited to the issue on which
15 there was a dissent, or can we decide on whatever - -
16 - if we - - - again, the Court of Claims decided on
17 that issue, and the Appellate Division agreed,
18 unanimately, that she was wrong. Are we allowed - -
19 - can we adopt the Court of Claims rationale or are
20 we stuck with whatever - - - the issues on which the
21 Appellate Division disagreed?

22 MR. VAISEY: I believe you're limited to
23 the issue on - - - the legal issue on which the
24 Appellate Division was split.

25 JUDGE READ: And with respect to that

1 issue, is it preserved? This is the pass - - - I'll
2 call them - - - in my mind there's the ice and snow
3 part of the provision and the passageway part of the
4 provision.

5 MR. VAISEY: Yes.

6 JUDGE READ: And the Appellate Division
7 disagreed 3-2 on the passageway piece - - -

8 MR. VAISEY: That's correct.

9 JUDGE READ: - - - right?

10 MR. VAISEY: Yes.

11 JUDGE READ: Was that issue ever argued in
12 front of Judge Minarik?

13 MR. VAISEY: Not - - - it wasn't
14 specifically argued, but it was part of the - - -
15 this isn't a very, you know, complicated allegation.
16 It's - - - you know, and it involves - - - and the
17 actual Industrial Code regulation that was violated,
18 you know, stated this. It was alleged - - - just
19 because we didn't - - - you know, we didn't get into
20 a dispute over what the meaning of that specific word
21 was, I don't necessarily believe that it's completely
22 foreign to the - - -

23 JUDGE READ: Well, did anybody - - -

24 MR. VAISEY: - - - prior proceedings.

25 JUDGE READ: I guess, in the motions below,

1 did anybody say this isn't a passageway?

2 MR. VAISEY: No.

3 JUDGE READ: So that came up - - - when did
4 that come up, in oral argument in the Fourth
5 Department, or - - -

6 MR. VAISEY: No, not even.

7 JUDGE READ: Not even?

8 MR. VAISEY: No.

9 JUDGE READ: Okay. When did it come up?
10 When you read the decision?

11 MR. VAISEY: The claim, from the very
12 inception, was about this - - -

13 JUDGE READ: Provision.

14 MR. VAISEY: - - - this Gaisor case with
15 the integral part of the work.

16 JUDGE READ: Yeah.

17 MR. VAISEY: That was where all the fight
18 was. And we went up to, you know, the Appellate
19 Division, and they essentially said they agreed with
20 our position that it's, you know, comparative fault;
21 it's not to be a complete defense. And then the - -
22 - but then in the decision, they wrote - - - you
23 know, they said well, we affirm on other grounds.

24 JUDGE SMITH: So the three judges in the
25 Appellate Division majority were the first three

1 people in this case who ever said this isn't a
2 passageway?

3 MR. VAISEY: Correct.

4 JUDGE READ: Okay. So how is it preserved
5 for us to review the issue?

6 MR. VAISEY: I don't believe it is
7 preserved. And frankly, I mean, I - - - you know, I
8 wanted to be responsive to the questions that have
9 been asked, so - - - but I do ultimately believe - -
10 -

11 JUDGE READ: We appreciate that, by the
12 way.

13 MR. VAISEY: Yeah. Yeah. No, but the - -
14 -

15 JUDGE GRAFFEO: So what do you think is the
16 preserved issue or issues in front of us?

17 MR. VAISEY: The - - - I think, in
18 reviewing all of the cases -- and I know that I've -
19 - - you know, in my lifetime I've not, maybe,
20 reviewed as many as you have. But this seems to be
21 just as clear as you can get with respect to the two
22 judges and the three judges saying - - - putting it
23 on a platter; this is exactly what the issue is. And
24 they both say it's the - - - the meaning of
25 passageway or walkway.

1 JUDGE SMITH: Since you're almost out of
2 time, maybe you should answer the question I stopped
3 you from answering - - -

4 MR. VAISEY: Okay.

5 JUDGE SMITH: - - - eight minutes ago or
6 seven minutes ago. Why is this a passageway?

7 MR. VAISEY: This is a passageway because
8 the body of case law says that as long as it's a
9 defined area that provides access to the worksite and
10 is not open, common or remote from the worksite, then
11 it's a passageway for the purposes of 23-1.7(d).

12 CHIEF JUDGE LIPPMAN: Could it be a
13 vertical passageway?

14 MR. VAISEY: It could be. I mean, I think
15 - - -

16 JUDGE SMITH: Where - - - he was standing
17 on top of the trap door that it was eventually going
18 to lead down to the pit; is that the id - - - is that
19 what was going on?

20 MR. VAISEY: It was a - - - it's a classic
21 lift bridge with Washington Street and the Erie Canal
22 on the other side. There was a sidewalk along or a
23 bride walkway along the - - - along the edge. There
24 was a vertical - - - or a horizontal plate over the
25 grating with the diamond plate on it, which in just -

1 - - in a five-by-five area, and that just covered
2 this pit that was thirty feet - - - a thirty-foot
3 pit.

4 JUDGE SMITH: He was going to first shovel
5 it off and then pick it up and remove the grate and
6 go down the ladder?

7 MR. VAISEY: Correct.

8 JUDGE GRAFFEO: He didn't - - - he didn't
9 slip down into the pit?

10 MR. VAISEY: No, he - - - there was sixteen
11 to eighteen inches of snow. He wasn't directed to do
12 snow removal. He would have gone right down - - -

13 JUDGE GRAFFEO: He slipped on the trap door
14 cover?

15 MR. VAISEY: He slipped on the trap door
16 cover as he was clearing it off in order to descend.

17 JUDGE GRAFFEO: So tell me where the
18 elevation - - -

19 MR. VAISEY: The - - -

20 JUDGE GRAFFEO: - - - factor comes in.

21 MR. VAISEY: There's no elevation required
22 in this -- for this regulation.

23 JUDGE GRAFFEO: We don't have to worry
24 about elevation?

25 MR. VAISEY: Huh-uh.

1 CHIEF JUDGE LIPPMAN: Okay. Thanks,
2 counselor. You'll have rebuttal.

3 MR. BRISTER: May it please the court, Your
4 Honor, my name is Rick Brister, and I represent the
5 State of New York in this case.

6 CHIEF JUDGE LIPPMAN: Counsel, why isn't -
7 - - let's start with are we limited to the passageway
8 issue?

9 MR. BRISTER: You're not, Your Honor, and
10 it is preserved. The issue at the Court of Claims
11 was whether or not 23-1.7(d) applies. We said it did
12 not apply because Gaisor case was so precise and so
13 exact and so identical to our case, and it didn't
14 apply under Gaisor because he was - - - he fell in
15 the snow that he was actually charged with removing.

16 The Appellate Division disagreed with our
17 reliance on Gaisor, but still the issue was whether
18 this statute applied, and they argued that the
19 statute applied.

20 JUDGE READ: Regulation.

21 MR. BRISTER: I'm sorry, the regulation
22 applied, based on whether or not it's a passageway.

23 JUDGE READ: But that already - - - Judge
24 Minarik never ruled on that issue, am I correct on
25 that?

1 MR. BRISTER: Judge Minarik did not rule on
2 that. It did come up in the Appellate Division
3 argument, but only in the form of a question: "What
4 do you say, counsel, about whether or not the bridge
5 is a passageway?"

6 CHIEF JUDGE LIPPMAN: Yeah, but let me
7 understand what you're saying. Do we have anything
8 else to decide, other than whether or not this is a
9 passageway?

10 MR. BRISTER: The only reason I brought up
11 the Gaisor case is because I - - -

12 CHIEF JUDGE LIPPMAN: No, but I'm just
13 asking you: Yes or no?

14 MR. BRISTER: Oh, I don't think you need to
15 go to anything else. It was - - - it was an issue -
16 - -

17 JUDGE SMITH: Yeah, but do we have power -
18 - - I mean, or do you know, do we have power to go
19 beyond the issue that divided the Appellate Division
20 or not?

21 MR. BRISTER: I think you do have the power
22 to go back and look at Justice Minarik's rationale
23 because the issue is whether or not 23-1.7(d)
24 applies. We said Gaisor says it doesn't apply; they
25 - - - the Appellate Division has said passageway

1 says it doesn't apply. Then when you do get to the
2 issue of passageway, though, which I thought the
3 court and this court has the authority to go and do
4 and look into the record and do, I thought they were
5 correct.

6 CHIEF JUDGE LIPPMAN: Let me ask you; let's
7 talk about passageway.

8 MR. BRISTER: Yes, sir.

9 CHIEF JUDGE LIPPMAN: Why isn't this just a
10 vertical passageway?

11 MR. BRISTER: Judge, there's sort of a
12 mischaracterization. The charge of the appellant,
13 Mr. Hecker, was to clear all the snow off from the
14 gang boxes and clear all four corners of the bridge.
15 This was one - - - this is the third corner of a
16 bridge. In that corner is - - - are these Bilco
17 doors.

18 CHIEF JUDGE LIPPMAN: But you've got to
19 provide - - - you've got to provide a safe condition
20 on the passageway, right - - - on a passageway,
21 assuming this is a passageway?

22 MR. BRISTER: It is not a passageway,
23 because it's the wide-open outdoors, exposed to the
24 elements.

25 CHIEF JUDGE LIPPMAN: So that's my question

1 to you; why isn't this a vertical passageway?

2 MR. BRISTER: It - - - it could have been,
3 had he cleared off the snow here, cleared off the
4 snow on the fourth corner, opened up the Bilco doors,
5 and went down into the passageway; then you have way
6 less - - -

7 JUDGE SMITH: That's what he was going to
8 do if he hadn't fallen.

9 MR. BRISTER: He was going to do, Judge.
10 That's - - -

11 JUDGE SMITH: Well, wasn't he on his way,
12 and doesn't that suggest that he was passing on his
13 passageway?

14 MR. BRISTER: Well, he wasn't passing,
15 though; he was actually working. If you look at the
16 Hertel case cited by the Appellate Division, that's
17 why this case is similar to Hertel.

18 JUDGE SMITH: So if you work to clear your
19 passageway, it ceases to be a passageway?

20 MR. BRISTER: He wasn't working to clear
21 his passageway; he was working to clear all four
22 corners of the deck. He happened to be on the Bilco
23 doors at the time.

24 JUDGE SMITH: Well, wasn't the point of
25 clearing it so that they could get to where they were

1 going?

2 MR. BRISTER: That was the point, but then,
3 in that case, what you're saying is - - - we're not
4 going to be stretching the law to cover an area that
5 would be covered under Whalen if he goes down the icy
6 staircase, because once he opens up those doors,
7 which would have occurred well after he removed the
8 snow - - - which, indeed, was his job.

9 CHIEF JUDGE LIPPMAN: Yeah, but if it's a
10 passageway, what does it matter whether he's clearing
11 it or walking on it?

12 MR. BRISTER: Well, Judge, you bring up an
13 interesting hypo. If one person is walking down a
14 staircase or another person is clearing off a
15 staircase, the Hertel case says one of those persons
16 was using the area as a passageway.

17 JUDGE PIGOTT: Why do we have to get there?
18 If the plaintiff's to be believed, I mean, you put
19 him in - - - let's not say a dangerous place; I know
20 Rochester is snow. But you didn't provide - - - I
21 mean, you just said go do your job, and so he went to
22 do his job. If he had not gotten his own shovel and
23 then just tried to go down the passageway and slipped
24 as he did, you wouldn't have an argument. But
25 because he - - - you said, you know, well, you're

1 fending for yourself on this thing - - -

2 MR. BRISTER: With respect - - -

3 JUDGE PIGOTT: - - - he slips and falls.

4 MR. BRISTER: With respect, Your Honor, it
5 wasn't his shovel; it was provided by the state or
6 Hohl Industrial Services.

7 JUDGE PIGOTT: Well, he went to his truck
8 and got it, so I - - -

9 MR. BRISTER: But that is his job. He is a
10 millwright; this is what millwrights do. And they
11 all admitted in the record that they do anything and
12 everything to complete the job.

13 JUDGE PIGOTT: Yeah, but that - - - I get
14 that. I mean, they do an awful lot.

15 MR. BRISTER: Right.

16 JUDGE PIGOTT: But you want to say, well,
17 you know, because we were - - - you know, we sent you
18 out on one of the snowiest days of the year to do
19 what maybe you could have done two weeks before or
20 two weeks after, you're stuck, you know; you were
21 stupid enough to try to shovel snow in the snow and
22 you fell, and that's not our fault.

23 MR. BRISTER: Well, Judge, the - - - it was
24 within the chain of construction; that was an
25 argument that was made. It was his job to do that.

1 In fact, that was - - - at the point, was his only
2 job, was to remove the snow from - - -

3 JUDGE PIGOTT: No - - -

4 MR. BRISTER: - - - the four corners.

5 JUDGE PIGOTT: - - - well, if that was his
6 only job, then 240 doesn't - - - 241 doesn't even
7 apply. I mean, it's got to be excavation,
8 construction or demolition, and so everybody seems to
9 think it's construction. So now you've got him on a
10 construction site and he slips and falls. If that
11 was just sheer ice and he'd walked out there and done
12 it, what would your argument be then?

13 MR. BRISTER: Well, I would argue that
14 certainly he wasn't in a passageway, and I would
15 argue that Gaisor - - -

16 JUDGE PIGOTT: We'd be back to passageway.

17 MR. BRISTER: Well, we would be back to the
18 argument of a passageway, and he wasn't on a
19 passageway.

20 CHIEF JUDGE LIPPMAN: Counselor, isn't it
21 enough that it occurred on a passageway - - -

22 MR. BRISTER: It didn't - - -

23 CHIEF JUDGE LIPPMAN: - - - whatever or how
24 he was - - -

25 MR. BRISTER: It didn't occur on a

1 passageway. These are - - - this is a wide-open area
2 on the bridge deck.

3 CHIEF JUDGE LIPPMAN: Wait, wait, wait,
4 wait. It's a vert - - - let's assume it's a vertical
5 passageway. It's on the passageway, no?

6 MR. BRISTER: Well, respectfully, no,
7 Judge, because - - -

8 CHIEF JUDGE LIPPMAN: What - - - so what is
9 - - - it's just an open area above a passageway?

10 MR. BRISTER: It's not even an open area;
11 it's a surfa - - - a bridge deck, and it's the third
12 corner of four corners. The bridge - - - that corner
13 contains sidewalk, some median, these Bilco doors;
14 all of that area was being cleared. He happened to
15 be on the Bilco doors at the time. He wasn't going
16 to then open up the Bilco doors.

17 CHIEF JUDGE LIPPMAN: So if he's on the
18 doors, is that on a passageway?

19 MR. BRISTER: He would have opened the door
20 and found the passageway.

21 CHIEF JUDGE LIPPMAN: But I guess what I'm
22 saying is, the distinction that I'm not getting is -
23 - -

24 MR. BRISTER: Judge, if he would have
25 opened those doors - - -

1 CHIEF JUDGE LIPPMAN: - - - that it doesn't
2 really matter whether he's clearing it or walking on
3 it, he was on the doors and he fell. And as, I think
4 it was Judge Pigott, said, or maybe it was Judge
5 Smith, if there was - - - just if there wasn't
6 eighteen inches of snow, it was just ice on there and
7 he fell, good enough?

8 MR. BRISTER: Not if his job - - - remember
9 the Hertel case, and in the Hecker case he wasn't
10 using it as a passageway; he was clearing --

11 CHIEF JUDGE LIPPMAN: But --

12 MR. BRISTER: -- snow off of it.

13 CHIEF JUDGE LIPPMAN: But that's what I'm
14 saying to you, that is there a good argument that if
15 it happens on a passageway, it doesn't matter how the
16 worker is using it, there's a responsibility to keep
17 it safe?

18 MR. BRISTER: And our reply - - -

19 CHIEF JUDGE LIPPMAN: Is that a good
20 argument?

21 MR. BRISTER: Respectfully, I don't think
22 so, Your Honor - - -

23 CHIEF JUDGE LIPPMAN: Why not?

24 MR. BRISTER: - - - because - - -

25 CHIEF JUDGE LIPPMAN: Why not?

1 MR. BRISTER: - - - because it wasn't on a
2 passageway. It's - - -

3 CHIEF JUDGE LIPPMAN: But you just said
4 it's on the doors, right? That's when he fell.

5 MR. BRISTER: No, Your Honor. What he
6 would have to do after he cleared the snow - - -

7 JUDGE GRAFFEO: Is this like a manhole
8 cover in a street?

9 MR. BRISTER: No, Your Honor, it's five-
10 foot doors that are split in the middle and they open
11 up like this.

12 JUDGE PIGOTT: Like those ones that you see
13 in the sidewalk for stores?

14 MR. BRISTER: Yes, sir. And once he
15 finished clearing the snow there and once he went
16 across the street and cleared the snow on the fourth
17 corner of the bridge, he would have accessed one of
18 those corners, we know.

19 JUDGE GRAFFEO: So you're saying until he
20 opened the doors it's not a passageway?

21 MR. BRISTER: That's precisely correct,
22 Your Honor. That's - - - and then you would have
23 Whalen.

24 JUDGE GRAFFEO: Is there any case that
25 supports that?

1 MR. BRISTER: Well, I have their case that
2 supports it. Whalen, the case cited by the defense -
3 - - by the dissent, says that if he's on an icy
4 staircase - - - and I have no doubt it would have
5 been an icy staircase, had he gone down into that
6 area - - - once he went down in there, Whalen does
7 apply, and there would have been protection.

8 CHIEF JUDGE LIPPMAN: But what if you need
9 to open the doors to get down in there?

10 MR. BRISTER: He's still - - - he's still
11 in an area that's exposed to the elements.

12 JUDGE PIGOTT: Aren't you slicing it very
13 thinly, though? I mean, you're the one who said
14 millwrights do everything. I mean, so you - - - he's
15 got to go do this job.

16 Now, if he decides that because there's no
17 shovel that he's going to use a blowtorch and melt it
18 and he sets fire to himself - - - and that's when you
19 get into comparative negligence, I would think, on
20 that issue of the 241(6), you know, which talks about
21 use of a floor, passageway, walkway, scaffold,
22 platform or other elevated working surface. So
23 doesn't it fit in there somewhere? You say, you
24 know, if he'd opened the door, 240 applies - - -
25 241(6) applies; if he doesn't open the door, he's - -

1 - you know, it's all him.

2 MR. BRISTER: Well, if he doesn't open the
3 door, he's still in a wide-open bridge deck, exposed
4 to all the elements. And it's not an enclosed area.
5 Once he opens the door - - - and who knows when that
6 would have been - - -

7 JUDGE SMITH: You can have an outdoor
8 passageway, can't you?

9 MR. BRISTER: Surely, you can have - - -

10 JUDGE SMITH: Even an uncovered outdoor
11 passageway?

12 MR. BRISTER: And in Fassett and in - - -
13 in Fassett, that was an outdoor passageway, if you
14 will, because he was stepping off of the cab of a
15 backhoe, and that was outdoor. It was a very well -
16 - - a very narrowly defined area, this battery cover
17 that he was stepping on, in Fassett, cited by the
18 dissent.

19 We don't have that here. We've got a
20 surface, a wide-open bridge surface exposed to the
21 elements.

22 JUDGE PIGOTT: You make it sound like he's
23 a pedestrian, that - - - you know - - -

24 MR. BRISTER: He's not a pedestrian, but he
25 is out in the open.

1 JUDGE PIGOTT: But isn't 240, the whole
2 point of it, you know, the protection of workers, and
3 aren't we supposed to construe it in favor of the
4 protection of workers who may be subject to dangerous
5 conditions?

6 MR. BRISTER: Literally, Judge, we're
7 supposed to construe it if the statute applies.

8 JUDGE PIGOTT: Yeah.

9 MR. BRISTER: And in this case, the statute
10 doesn't apply, because it wasn't an open - - - it was
11 in an open area and he was not using the area - - -

12 JUDGE PIGOTT: He hadn't got to that point.

13 MR. BRISTER: - - - as a passageway.

14 CHIEF JUDGE LIPPMAN: Okay, counselor,
15 thanks.

16 MR. BRISTER: Thank you, Judge.

17 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

18 MR. VAISEY: A couple of points. The wide-
19 open area is - - - you know, it doesn't make sense
20 and it doesn't match any case law.

21 JUDGE PIGOTT: Are there pictures in the
22 record?

23 MR. VAISEY: I don't believe there are
24 pictures in the record.

25 JUDGE GRAFFEO: If he had slipped and fell

1 two or three feet away from this door, would you be
2 making this same argument?

3 MR. VAISEY: Yes. That's a - - - that's my
4 arg - - - our argument is - - -

5 JUDGE GRAFFEO: Even though it's - - -

6 MR. VAISEY: - - - it was a passageway - -
7 -

8 JUDGE GRAFFEO: Even though it's not the
9 door?

10 MR. VAISEY: Yeah, the sidewalk's a
11 passageway, the top of the doors are passageways - -
12 -

13 JUDGE SMITH: Wouldn't your argument - - -

14 MR. VAISEY: - - - going down there is a
15 passageway.

16 JUDGE SMITH: Wouldn't your argument be
17 stronger if he was on the sidewalk, because that's
18 something you have to step on to get into the pit;
19 you don't have to step on the door itself to get into
20 the pit.

21 MR. VAISEY: Well, he was on - - - these
22 doors are actually on the sidewalk. They're on the
23 path.

24 JUDGE SMITH: Yeah, but I - - - if you're
25 talking - - - after your guy gets through shoveling,

1 and he or the next guy wants to go down into the pit,
2 you open the doors; you don't step on them, right?

3 MR. VAISEY: Right, but the - - - but
4 remember, the doors have diamond plate decking on
5 them for a reason, because they're to be stepped on.
6 That's supposed to be a walkway. That is a walkway,
7 along the edge of the bridge, between the Erie Canal
8 and Washington Street. It's clearly defined. This
9 is not - - -

10 JUDGE SMITH: Well, and parking lots are
11 supposed to be stepped on, too, and people walk
12 around parking lots - - -

13 MR. VAISEY: Exactly.

14 JUDGE SMITH: - - - and they aren't all
15 passageways.

16 MR. VAISEY: I agree with you completely.
17 Look at Hertel. The two cases that the Appellate Div
18 - - - that the three-justice majority relied on were
19 Hertel, which was an open area between two buildings,
20 and - - - and what's the - - - and Bale, which was
21 another open area.

22 JUDGE SMITH: Let me - - -

23 MR. VAISEY: Both of them failed for
24 openness, and they - - -

25 JUDGE SMITH: Let me - - - I'm wondering if

1 I can ask you something else. What did the Appellate
2 Division mean? I guess both the majority and the
3 dissent said that the - - - that the question of
4 whether it was part of the job he was doing goes to
5 comparative negligence. I just didn't understand it.

6 MR. VAISEY: What they mean there is that
7 there's a body of case law out there that - - - and
8 there's really two schools of thought. There's the
9 very strict, integral part of the work analysis,
10 where if you're doing something that's so integral
11 that the danger that you're talking about is so - - -
12 is necessary - - - necessarily required to - - - you
13 know, as part of the job you're doing, you can't, you
14 know, call foul.

15 JUDGE READ: It's like the open and
16 obvious, right?

17 MR. VAISEY: Right. No - - - yeah - - -
18 no, and but on the other side then there's a body of
19 case law that sort of allows for these looser
20 connections, such as - - -

21 JUDGE READ: I've been looking for somebody
22 to bring a case like that to us so we could decide
23 that question. But you're right, there's a division
24 in the cases - - -

25 MR. VAISEY: Exactly.

1 JUDGE READ: - - - as to whether it's a
2 matter of comparative negligence or no negligence.

3 MR. VAISEY: Exactly.

4 JUDGE PIGOTT: Well, the lingua franca is
5 240 is strict and 241 isn't.

6 MR. VAISEY: Correct.

7 JUDGE PIGOTT: And you can be
8 contributorily negligent in 241.

9 MR. VAISEY: Right.

10 JUDGE SMITH: Now, I must be slow, but I
11 still don't understand how - - - how the fact that
12 his job was to shovel the snow could make him
13 comparatively negligent or not comparatively
14 negligent.

15 MR. VAISEY: The idea would be - - - it
16 goes back to, I think, maybe your original point
17 about, you know, what did you want him to do, or
18 like, he's out there - - -

19 JUDGE SMITH: Okay.

20 MR. VAISEY: - - - he's in Rochester - - -

21 JUDGE SMITH: Okay. But make an argument
22 for or against comparative negligence based on that;
23 what's the argument?

24 MR. VAISEY: The argument is that the
25 closer it's tied to his actual job he was hired for,

1 the less - - - or the more that he was not reasonable
2 in his actions, the less that the state would be on
3 the hook for not being reasonable and for failing for
4 its duty for providing a safe worksite. Because
5 ultimately, that's the idea here, is it's their job
6 to provide this worksite.

7 JUDGE SMITH: Um-hum. So is there - - -
8 but you said there's nothing to the idea that - - -
9 at some point doesn't common sense tell you that you
10 can't provide a - - - that the employer can't have
11 the duty to provide a space that is free from the
12 very hazard that you hired the guy to eliminate?

13 MR. VAISEY: That's correct.

14 JUDGE PIGOTT: But this is - - - if I'm
15 understanding - - -

16 MR. VAISEY: That's not this case, that's -
17 -

18 JUDGE PIGOTT: - - - if you're a
19 millwright, you're supposed to go out and fix the
20 bridge; there's something underneath you're supposed
21 to be doing. To get there, you've got to do this.
22 This is incidental, but not your mission. You are
23 not there as snow shovelers; you're out there as
24 millwrights.

25 MR. VAISEY: It sounds like you've been

1 reading my appellate brief.

2 JUDGE PIGOTT: Every now and then we'll do
3 that. The - - - the other side of that, though, is
4 it's conceivable in this case that you were sent out
5 there - - - your client was sent out there at the
6 wrong time, that, you know, it was almost like an
7 ongoing storm. If - - - it's not the State of New
8 York's fault that it snows in Rochester, as much as
9 we'd like to blame them. So if - - - they would have
10 that type of a defense, conceivably.

11 MR. VAISEY: It's objective manifestations
12 of intent. Here you've got that he had a plastic
13 shovel, that the appellant didn't even - - - he was
14 wondering, he was sort of a little bit annoyed by the
15 fact that nobody had cleaned - - - cleared this
16 place, the fact that prior to this - - - and he
17 wasn't there to clear the whole deck, he wasn't there
18 shoveling the whole walkway along the bridge, he
19 wasn't shoveling this whole area; he was shoveling
20 exactly what was necessary to get down to the
21 subterranean mechanism.

22 CHIEF JUDGE LIPPMAN: Okay.

23 MR. VAISEY: And again, that's not the
24 issue that's preserved. So it's all sort of academic
25 at some - - -

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CHIEF JUDGE LIPPMAN: Okay, thanks. Thank
you both. Appreciate it.

(Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of KENNETH J. HECKER v. THE STATE OF NEW YORK, No. 38 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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