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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF BODENMILLER,

Appellant,

-against-

NO. 105

DINAPOLI,

Respondent.

20 Eagle Street
Albany, New York
November 19, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Matter of Bodenmiller v. DiNapoli.

3 MR. SCHAEFER: May it please the court. I'm
4 Wayne Schaefer. I represent the petitioner in this case,
5 Robert Bodenmiller. I would respectfully request three
6 minutes' rebuttal time.

7 CHIEF JUDGE WILSON: Yes, sir.

8 MR. SCHAEFER: The decision of the Third
9 Department should be reversed because the standard, whether
10 or not a precipitating event could be reasonably
11 anticipated, is unsupported by the decisions of this court
12 and the language of the statute, Retirement and Social
13 Security Law, section 363-c.

14 In making its ruling below, one of the pivotal
15 phrases employed by the Third Department was, quote, "It is
16 logically consistent that a condition could be readily
17 observable, but that the precipitating event itself could
18 still not be reasonably anticipated."

19 This characterization overlooks and ignores the
20 fact that what underlied - - - the emphasis or the need to
21 point out the immateriality of readily observable was the
22 fact that it was brought up in the context of trying to
23 justify a deny - - - a - - - a - - - a resolution of the
24 issue of whether it was an accident. We're not talking
25 about any readily observable accident.

1 As the dissent pointed out in in Kelly - - -
2 actually, it was the Matter of Sica, two compendium cases
3 that came up - - -

4 JUDGE RIVERA: Well, there's a little bit of
5 confusion here. The - - - the readily observable language,
6 the Third Department has clarified, applies to the
7 condition, whereas the reasonably - - - that one can
8 anticipate it, right - - - reasonably anticipate it - - -
9 applies to the precipitating event, right?

10 MR. SCHAEFER: Well, that's - - - that's exactly
11 the point.

12 JUDGE RIVERA: The holes are the condition, the
13 wheel getting stuck in the hole and the chair tipping over,
14 is the precipitating event that results in an injury.

15 MR. SCHAEFER: But that's the - - - that's
16 precisely the point. Whether you call it a readily
17 observable condition - - -

18 JUDGE RIVERA: Uh-huh.

19 MR. SCHAEFER: - - - or a reasonably anticipated
20 event, the underlying materiality is the same. It has to
21 be something that's relevant in the context of
22 communicating notice of a hazard. There's really no
23 substantive distinction between the two of them. The
24 reality is that the - - - and - - - and I think everyone
25 can agree the case law in this area has not been consistent

1 or a model of clarity. The lodestar has always been - - -
2 whether starting with the - - - with the analysis of the
3 facts and circumstances - - - whether the injury resulted
4 from an accident inherent in that particular applicant's
5 job duties. Once it is determined that it was not
6 inherent, then it's found to be an accident.

7 Now, in determining whether it was inherent in
8 the job duties of the officer - - - in other words,
9 addressing the overriding question under Lichtenstein
10 whether it was a sudden, fortuitous event, there is case
11 law, as - - - as - - - as highlighted by Matter of Rizzo,
12 that allows an inquiry factually as to whether that
13 applicant knew about that hazard at that time. And as a
14 basis for finding what otherwise would appear to be
15 fortuitous and unexpected - - -

16 JUDGE HALLIGAN: And - - -

17 MR. SCHAEFER: - - - in fact, in that particular
18 case, was not - - - in that case.

19 JUDGE HALLIGAN: And to - - - to pick up on that.
20 Right. So - - - so in Rizzo, we said that because the
21 petitioner conceded that she knew that the door would slam
22 - - - the heavy door would slam, and her movements were
23 intended to avoid the closure, that it could not be the
24 cause of an accident. Right. So her - - - her actual
25 knowledge precluded finding it was an accident.

1 And so it seems to me here that there is perhaps
2 likewise an acknowledgment that the ruts are in the floor.
3 Why is that not the same as what we found in Rizzo, to
4 preclude the finding of an accident?

5 MR. SCHAEFER: Because in Rizzo it was a finding
6 of actual knowledge of a hazard - - -

7 JUDGE HALLIGAN: Uh-huh.

8 MR. SCHAEFER: - - - not of an underlying
9 condition. In Rizzo, the finding is - - -

10 JUDGE HALLIGAN: Well - - -

11 CHIEF JUDGE WILSON: Well, wait, can't - - -
12 can't - - - can't a hazard be an underlying - - - or the
13 other way around - - - can't an underlying condition be a
14 hazard?

15 MR. SCHAEFER: It - - - it has the potential to
16 be a hazard, obviously, but the question is if you're going
17 to take away - - - or if you're going to - - - going to
18 make a factual finding that a particular applicant had
19 sufficient knowledge so that what otherwise ordinarily
20 would be a fortuitous event is, in fact, no longer
21 fortuitous, it seems to be common sense that you have to
22 make a finding that the individual had knowledge of
23 something - - -

24 JUDGE CANNATARO: So - - -

25 MR. SCHAEFER: - - - a hazard that would cause

1 him to change his behavior.

2 JUDGE HALLIGAN: Well - - -

3 JUDGE CANNATARO: The practical translation of
4 that principle that you just stated would be that here the
5 claimant had knowledge that there was a rut in the floor,
6 but not knowledge of the fact that the rut was so severe
7 that it could cause a chair to tip over. Is that it?

8 MR. SCHAEFER: Exactly. And we make this point
9 emphatically on brief. We point out that all that this
10 record established was that he had a general knowledge of
11 the floor condition, generally, just like people who go
12 into offices all across the country have a general
13 knowledge of the condition of the floor where they go in,
14 of the condition of the room where they go in.

15 What Rizzo says is that - - -

16 JUDGE CANNATARO: What would it have - - - what
17 would it have taken for this claimant to have knowledge of
18 the hazard, short of actually having - - - you know, short
19 of what actually happened to him?

20 MR. SCHAEFER: As Rizzo - - - as Rizzo instructs
21 us, it's precisely what respondents said should have
22 happened here at some point. For example, requesting a
23 apron underneath a chair, requesting some - - - remedial
24 measure, something which would have allowed a nexus to be
25 drawn - - -

1 JUDGE GARCIA: Did that happen in Rizzo? Did she
2 request the remedial measure in - - -

3 MR. SCHAEFER: What she did - - - what - - - she
4 - - - she - - - she testified - - - I believe - - - the
5 evidence showed that she engaged in evasive movements,
6 which confirmed that she was aware of the actual hazard.

7 JUDGE HALLIGAN: Well, he - - - he did concede, I
8 think, several points in the record that he knew that the
9 holes were there in the floor, and he says that he wasn't
10 aware of the severity of them. So - - - so - - - but he -
11 - - he is acknowledging, though, that he understands that
12 they were there.

13 MR. SCHAEFER: He acknowledged that there was a
14 generally deteriorated condition of the floor, which
15 included holes. That's right.

16 JUDGE RIVERA: I - - - I thought it was a little
17 bit more. I thought he recognized that they were about
18 three inches. I thought he also said that they were near
19 the chair - - - or the chair was near them.

20 MR. SCHAEFER: He may - - -

21 JUDGE RIVERA: It's a little bit more than saying
22 I looked and I saw that, you know, the carpet was a little
23 bit ragged.

24 MR. SCHAEFER: He may have referenced the width
25 of the holes, but of course it wasn't the width of the hole

1 that caused the chair to get caught, it was the depth of
2 it. And there's no evidence that he had any awareness of
3 the hazard arising from the width - - -

4 JUDGE RIVERA: But he knew there were several
5 holes.

6 MR. SCHAEFER: Well, he knew there were - - -
7 there were holes in - - -

8 JUDGE RIVERA: He knew his chair had wheels.

9 JUDGE HALLIGAN: And the - - -

10 JUDGE RIVERA: And he knew the only way to use
11 the chair is to push off from the wheels. Right. You have
12 to roll over that floor.

13 MR. SCHAEFER: That's true. But the reality is,
14 generally speaking, knowledge of a condition - - - as - - -
15 as we mentioned on brief, we have all worked in - - - in
16 offices, and we have all acknowledged that they have had
17 less than perfect environmental conditions.

18 JUDGE HALLIGAN: Well, but - - - but Rizzo does
19 hold, I think - - - tell me if you have a different read of
20 it - - - that there, the claimant's knowledge of the risk
21 precluded finding it was an accident.

22 MR. SCHAEFER: Because she had knowledge of the
23 actual risk. That's true.

24 JUDGE HALLIGAN: Right. Okay. And - - - and - - -
25 -

1 MR. SCHAEFER: It's an individualized inquiry.

2 JUDGE HALLIGAN: Yes. And so isn't then the
3 question whether or not his admissions that he knew about
4 the holes - - - and - - - and you know, the holes - - -
5 whatever we want to call them - - - ruts - - - are - - -
6 are in the record. They're clearly significant. And he
7 testifies that he knows about them. So I'm just struggling
8 to understand how that's different from what we have in
9 Rizzo. Maybe you can help me with that.

10 MR. SCHAEFER: Well, it's different in a
11 procedural context as well, given the fact that although
12 the retirement system did raise the issue of direct
13 knowledge akin to Rizzo on brief, that was not the ground
14 that the hearing officer, and ultimately the retirement
15 system, relied in denying the application. They
16 specifically invoked the reasonably anticipated criteria
17 used in Stancarone. They did not find, akin to Rizzo, that
18 there was direct knowledge.

19 They found that, again - - - and this is the
20 problem with the reasonably anticipated standard - - - it
21 is not an individualized inquiry which looks to the actual
22 state of mind of the applicant. It is not something that's
23 premised on the things that administrative law judges are
24 supposed to be doing in these hearings, evaluating
25 testimony, reviewing documents, making evidentiary

1 findings, empirical findings. Instead, reasonably
2 anticipated is essentially a judicial construct along the
3 lines of a finding of - - - the only thing you can really
4 compare it - - - compare it to would be something like
5 contributory negligence.

6 JUDGE HALLIGAN: Or foreseeability. I mean, in
7 the - - - in the negligence - - - in a negligence case,
8 right, I - - - I think that - - - that we - - - we do have
9 courts all the time look at the question of whether
10 something was foreseeable. And it seems to me that that
11 inquiry probably is - - - is similar in a lot of respects
12 to the question of whether something was reasonably - - -
13 whether a risk was reasonably anticipated. So I'm not sure
14 why courts would be - - - or - - - or the hearing officer
15 would be ill equipped to handle that - - - that question.

16 MR. SCHAEFER: But as Justice Wilson pointed out
17 in dissent on - - - on a matter of Rizzo, reasonably
18 anticipated is in fact either redundant or unwarranted.
19 It's redundant because - - -

20 JUDGE HALLIGAN: But that's a different - - - if
21 I can, that's a different question, I think, than whether
22 the - - - the courts or the Comptroller can - - - can
23 capably answer the question, right?

24 MR. SCHAEFER: Even if they can capably answer
25 that question, the question is, are they empowered to

1 answer that question under the law? We submit, the answer
2 is no. There is no provision under the law - - - again, as
3 was pointed out - - - for a hearing officer to entertain
4 the question of whether in his mind, beyond - - -

5 CHIEF JUDGE WILSON: So you're - - - just so I
6 understand your test, if I can call it that, if a
7 reasonable person would have anticipated a particular
8 danger but the particular - - - the plaintiff in this case
9 doesn't, for whatever reason, unreasonably fails to notify
10 - - - to notice the danger, that's still an accident?

11 MR. SCHAEFER: It's still an accident if he is -
12 - - fails to reasonably anticipate - - - forgive me - - -
13 if he - - - if he does not have actual knowledge of the
14 hazard, there would still have to be a finding if, in fact,
15 there was a sequence of events which were not within his
16 inherent job duties. That's correct. I notice my time has
17 expired.

18 CHIEF JUDGE WILSON: Thank you.

19 JUDGE HALLIGAN: Not to jump the gun, but - - -
20 but perhaps I will. Can you address whether you think
21 there is a meaningful distinction between readily
22 observable and reasonably anticipated, and if so, what it
23 is?

24 MR. BRODIE: Yes, Your Honor. The readily
25 observable test asked how easily the hazard could be

1 perceived with our senses.

2 JUDGE HALLIGAN: The hazard or the condition?
3 Are those the same thing?

4 MR. BRODIE: Well, I - - - I think, you know,
5 there - - - there - - - there is an analytical distinction
6 between the two, but I think, you know, readily observable
7 is important in determining whether something is expected.
8 And that's a clarification, I think, that this court should
9 make to the third - - - the third - - -

10 JUDGE RIVERA: But I don't - - - I'm not
11 answering Judge Halligan's question. And it's in part what
12 I was trying to get to with your adversary at the very
13 beginning. Is that referring to the condition itself or
14 the precipitating event? I mean, the condition could be
15 the hazard. I'm not going to tell you otherwise. But
16 perhaps something else is the hazard.

17 MR. BRODIE: Well, I think - - - and - - - and
18 you know, let's - - - let's go back to Rizzo. Rizzo says
19 that - - -

20 JUDGE RIVERA: But what does the Third Department
21 say?

22 MR. BRODIE: I'm sorry?

23 JUDGE RIVERA: What does the Third Department
24 say? This is their standard.

25 MR. BRODIE: The Third Department, I - - - I



1 believe they say that it's the hazard.

2 JUDGE HALLIGAN: So if we - - - if we start with
3 Kelly, right, which I think is where you were - - - you
4 were about to address footnote 3. But what the court says
5 in Kelly is that the requirement that a petitioner
6 demonstrate that a condition was not readily observable to
7 show an accident is inconsistent with our prior case law
8 and cites some cases, including, you know, some that
9 involve the slip and falls. Right. One could read that as
10 saying, that's not an affirmative obligation that a
11 petitioner must meet. Or you could read it, I suppose, as
12 suggesting that the inquiry itself is not appropriate in
13 determining - - - the court - - - the court or the
14 Comptroller should not engage in - - - in that inquiry.

15 So I - - - I guess I'm interested in your view,
16 both of what footnote 3 means, that statement, and whether
17 or not that precludes consideration of reasonably
18 anticipated in deciding whether something is an accident.

19 MR. BRODIE: We think that the - - - the footnote
20 means that petitioners aren't required to prove
21 affirmatively that a hazard was latent or hidden. But
22 readily observable isn't at issue in this case because the
23 record shows that petitioner actually observed the holes,
24 so we don't need to ask whether they were observable.

25 But readily observable does differ from

1 reasonably anticipated because, again, readily observable
2 asks what can we perceive with our senses. Reasonably
3 anticipated, as the Third Department has articulated it,
4 looks to what a person in petitioner's position and
5 location could or should have expected.

6 JUDGE CANNATARO: So to go to Judge Halligan's
7 term used before, it's akin to a foreseeability type of
8 analysis.

9 MR. BRODIE: That's right. It's - - - it's - - -
10 it is similar to foreseeability. And - - - and this is
11 where we get a tension in these cases because of the
12 willful negligence clause in section 363. The tension is
13 that the term unexpected in the court's definition of
14 accident suggests an ordinary negligence standard, while
15 the statute carves out only willful negligence. But the
16 legislature seems comfortable with that tension. It has
17 left this court's definition and the Third Department's
18 implementation of that definition in place for decades,
19 even while amending the RSSL multiple times.

20 JUDGE CANNATARO: So what does that mean? Do we
21 just ignore willful negligence because the legislature
22 seems to have tolerated all these little chips at it?

23 MR. BRODIE: Well, certainly, if - - - if - - -
24 if someone is willfully negligent, then it's not an
25 accident.

1 JUDGE CANNATARO: No, but what if someone's
2 something less than willfully negligent, and it's still not
3 an accident?

4 MR. BRODIE: Well, there's - - - there's a whole
5 body of case law where people were less than willfully
6 negligent, and it's found not to be an accident because
7 they could or should have reasonably anticipated the
8 hazard. At - - -

9 JUDGE GARCIA: Could you - - - could you have an
10 accident, under the standard definition that we've given,
11 then lose on willful negligence? Could something be
12 unexpected, but you're somehow willfully negligent in
13 becoming injured?

14 MR. BRODIE: Certainly. I'll give you an
15 example. Imagine two police officers roughhousing in the
16 station house, and in the midst of that tussle, one of them
17 slips on a pool of water, and the pool of water they didn't
18 see wasn't reasonably anticipated, but they were in the
19 midst of willful negligence. They were - - - they were
20 having a tussle that they shouldn't have had at work. So
21 that's an example that - - - that we're - - -

22 JUDGE RIVERA: That's a little unclear. What - -
23 - how - - - how would they not have anticipated they might
24 fall and slip if - - - if they were roughhousing?

25 MR. BRODIE: They - - - they wouldn't have

1 anticipated falling.

2 JUDGE RIVERA: Why - - - why - - - why not? I -
3 - -

4 MR. BRODIE: They wouldn't have anticipated
5 slipping and falling on a pool of water.

6 JUDGE SINGAS: Because they didn't see the water;
7 is that your argument?

8 MR. BRODIE: Because they didn't - - - they
9 didn't expect the water would be there, and they didn't see
10 it. They - - - they wouldn't have reasonably expected the
11 water to be there. They wouldn't have reasonably
12 anticipated it. And I do agree with - - - with opposing
13 counsel, that whether something is reasonably anticipated -
14 - -

15 JUDGE RIVERA: So they, like, slipped just on the
16 floor, not water, they just - - - the foot kind of caught
17 while they're roughhousing. Is that an accident?

18 MR. BRODIE: I'm sorry - - - I'm sorry. The - -
19 -

20 JUDGE RIVERA: If there's not water that causes
21 the slip, it's just the physicality in someone's foot, you
22 know, gives way.

23 MR. BRODIE: Well, if - - - if they're
24 roughhousing - - -

25 JUDGE RIVERA: Yeah.

1 MR. BRODIE: - - - that's willful negligence. So
2 they don't get accidental no matter what. They're out
3 because they fall within that carve-out.

4 JUDGE HALLIGAN: So if we use some aspects of
5 ordinary negligence to decide whether something is an
6 accident, which I think is what you're suggesting, right,
7 what - - - what do we do with the cases in which there is a
8 finding of an accident where it looks like, you know, you -
9 - - slip and fall sort of case. Are those cases correctly
10 decided under your view?

11 MR. BRODIE: Well, there - - - there is this
12 tension between the court's decision in Kenny where a
13 person slips and - - - and falls on a wet surface, rainy
14 day. That's not an accident.

15 JUDGE HALLIGAN: And McCambridge.

16 MR. BRODIE: And the - - - and McCambridge,
17 Knight, which was one of the cases decided in McCambridge.
18 And I think that - - - that there's this line of cases - -
19 - Knight going all the way back, I think, to the late 1980s
20 - - - and since then, there's been this line of cases - - -
21 Lang, where the person tripped over the computer wires that
22 she could obviously see. Kenny, where the person slips on
23 a wet surface, almost the same facts as Knight. And
24 finally, Rizzo, where the person reasonably - - - I'm
25 sorry, not reasonably anticipated - - - but where - - -

1 where the closing door was a known condition.

2 And - - - and - - - and I want to underscore
3 known condition in - - - in contrast to opposing counsel.
4 In Rizzo, the court held that a known condition, not a
5 known hazard, but a known condition, cannot be the cause of
6 an accident. That's 39 NY3d at 992. And in Kenny, the
7 court explained that when you know about a hazard, it's not
8 unexpected. And - - -

9 JUDGE HALLIGAN: But in - - - in some of the slip
10 and fall cases, is it - - - is it your view that they came
11 out the way they did where it is found to be an accident
12 because there's some implication that the claimant didn't
13 see the water. I - - - I mean, do - - - do you think
14 there's a way to reconcile the - - - harmonize all of those
15 cases or - - - or not?

16 MR. BRODIE: I think. I mean, we tried to - - -

17 JUDGE HALLIGAN: And how is that?

18 MR. BRODIE: We - - - we tried to do so in - - -
19 in our brief. If - - - if there's - - - if you can't see
20 the water - - - cannot see the water, and there's no reason
21 for you to be looking down to see the water, and you don't
22 reasonably anticipate water, then it's an accident. But if
23 - - - if you do reasonably anticipate water, for instance,
24 on a rainy day, then it's - - - it's not an accident. It's
25 reasonably anticipated.



1 And - - - and here again, remembering that this -
2 - - this is a substantial evidence case, there is
3 substantial evidence that petitioner not only reasonably
4 anticipated the condition, but - - - but actually knew of
5 it, just like in Rizzo.

6 Page 110 of the record. Question: "Were you
7 aware that there were ruts in the floor prior to sitting
8 down that day?" Answer: "I was aware of the condition of
9 the floor." Page 104. Question: "But you had seen the
10 condition of the floor prior to getting stuck." Answer:
11 "Yes. I glanced at the floor. I saw it, yes."

12 Now, petitioner's claim that he didn't appreciate
13 the severity of the holes doesn't transform the event into
14 an accident. There is no accident when an injury is caused
15 by a known condition that gives rise to a reasonably
16 anticipated risk. For - - -

17 JUDGE SINGAS: Is that the difference between a
18 subjective and an objective opinion?

19 MR. BRODIE: I - - - I think so, certainly. This
20 petitioner subjectively knew that there were holes in the
21 floor. And in fact, he knew the holes were in the exact
22 spot where the chair wheels would be. The exact spot.
23 That's page 107 in the record.

24 JUDGE HALLIGAN: But I think his point is that -
25 - - that - - - while knowing that the holes were there,

1 that he didn't anticipate that the chair would tip over.
2 So what do you do about that piece of it?

3 MR. BRODIE: Well, for a risk to be reasonably
4 anticipated - - - and again, going - - - going back to the
5 question before, that's an - - - an objective standard, and
6 we argue that in the brief. You might not subjectively
7 expect it, but if everyone else - - - if a reasonable
8 person in your position and location could or should have
9 expected it, then not an accident.

10 JUDGE RIVERA: Well, so why, in this case, would
11 a reasonable person have expected it?

12 MR. BRODIE: Because - - -

13 JUDGE RIVERA: The center didn't think so. So
14 maybe they're reasonable, maybe they're not. But in
15 response to your adversary.

16 MR. BRODIE: There are holes in the floor.

17 JUDGE RIVERA: Uh-huh.

18 MR. BRODIE: He sees the holes in the floor. He
19 notes that the holes in the floor are at least three inches
20 across.

21 JUDGE RIVERA: Uh-huh.

22 MR. BRODIE: And he notes that the holes in the
23 floor are in the exact spot where his chair wheels are
24 going to be.

25 JUDGE RIVERA: Uh-huh.

1 MR. BRODIE: And a reasonable person in that
2 position with that knowledge would anticipate that the
3 chair wheel is going to get caught in a hole. And it might
4 be a problem.

5 CHIEF JUDGE WILSON: So there's a - - - there's a
6 thunderstorm. The roof on the firehouse is leaking. A
7 firefighter goes up on a ladder to try and patch it so the
8 water doesn't pour in and is hit by lightning. Now, we
9 understand that a thunderstorm, you know, brings lightning
10 with it. Accident? Not an accident?

11 MR. BRODIE: I would say not an accident.
12 Because I was always taught as a child not to go out in the
13 thunderstorm because you could get hit by lightning. And I
14 think most people know that. A reasonable person in that
15 position and location would know that - - - don't go out on
16 the roof of your building because you could act as a
17 lightning rod, and - - - and that would - - -

18 JUDGE RIVERA: Regardless of the risk, let's say
19 the odds were one in a million.

20 CHIEF JUDGE WILSON: You wouldn't say that was a
21 sudden, fortuitous, missed chance.

22 MR. BRODIE: If you put yourself in harm's way,
23 that's not a sudden, fortuitous, missed chance - - -

24 CHIEF JUDGE WILSON: Well, but that's what first
25 responders do as part of their jobs. They put themselves

1 in harm's way all the time.

2 MR. BRODIE: Well, exactly. And they're - - -

3 CHIEF JUDGE WILSON: And so they're disabled from
4 getting - - - I didn't mean to use it that way - - - ADR
5 benefits.

6 MR. BRODIE: Well, yes, because that's an
7 inherent risk. These people are paid to encounter risks.
8 So you don't get - - - if you're a first responder, you
9 don't get accidental disability retirement every time
10 you're injured. And the reason for that is you're paid to
11 go out. You're paid to encounter risks. It's an inherent
12 risk of your job. And I think the next case on the
13 calendar is going to examine that inherent risk doctrine.

14 But yes, inherent risk - - - now - - - now,
15 getting struck by lightning, not an inherent risk of being
16 a fireman, a firefighter, but you - - - so then you go to
17 the next level of, well, would a reasonable person in that
18 position and location have expected to get hit by
19 lightning, and you - - - you could reasonably expect to get
20 hit by lightning if you're on top of a roof in a
21 thunderstorm.

22 JUDGE RIVERA: So the Comptroller embraced this
23 Third Department two categories approach.

24 MR. BRODIE: Yes. The Third - - - the
25 Comptroller tries to follow the Third Department and did so



1 here. I would - - - I would differ with opposing counsel -
2 - -

3 JUDGE RIVERA: Well, I know you tried to follow.
4 I understand that. But - - - but do you think that is a -
5 - - an appropriate way to address these kinds of cases - -
6 - this - - - these two categories - - -

7 MR. BRODIE: Yes, it - - - it is.

8 JUDGE HALLIGAN: And an administrable way, right?
9 I'm asking you a question.

10 MR. BRODIE: Yes. Yes. What we need
11 clarification on is what does the fact that something is
12 readily observable do? Because there's been some - - -
13 there have been arguments since footnote three in Kelly
14 that you can't use readily observable at all.

15 JUDGE HALLIGAN: Well, are you - - - are you
16 distinguishing that from reasonably anticipated, or are you
17 treating them as one and the same?

18 MR. BRODIE: I'm treating - - - I think readily
19 observable is a fact that bears on whether - - -

20 JUDGE HALLIGAN: Huh.

21 MR. BRODIE: - - - something is reasonably
22 anticipated. So it would be wrong - - -

23 JUDGE HALLIGAN: But they're not synonyms, I take
24 it, you're saying?

25 MR. BRODIE: They're not synonyms, no. Because

1 that - - -

2 JUDGE RIVERA: But that - - - that - - - that's,
3 again, begging the question, what is it one is observing
4 versus what is it one is anticipating. I thought that the
5 Third Department was saying these - - - these phrases apply
6 to two different things.

7 MR. BRODIE: I - - - I agree - - -

8 JUDGE RIVERA: I observe the condition, right,
9 versus anticipating the precipitating event.

10 MR. BRODIE: I - - - I agree with what Your Honor
11 just said. And here, Mr. Bodenmiller observed the holes -
12 - -

13 JUDGE RIVERA: Uh-huh.

14 MR. BRODIE: - - - and he could or should have
15 reasonably anticipated the event. But in any event - - -

16 JUDGE RIVERA: So in this case, the fact that he
17 observed the - - - let's just assume that for one moment.
18 I know you take issue with that. Let's just assume for one
19 moment. The fact that he observed the ruts - - - the holes
20 leads to this conclusion that it's reasonably anticipated
21 that the chair with the wheels might get caught and it'll
22 tip and you'll get injured.

23 MR. BRODIE: Given all the knowledge that he had,
24 that's correct.

25 JUDGE RIVERA: And if he had never seen the

1 holes?

2 MR. BRODIE: If he hadn't seen the holes - - -

3 JUDGE RIVERA: Actually, as a matter of fact, had
4 not seen the holes - - -

5 MR. BRODIE: Right. If he - - - if he hadn't
6 seen the holes - - -

7 JUDGE RIVERA: Yeah.

8 MR. BRODIE: - - - I think that would make this
9 case turn differently. Yeah. This case would be like - -
10 -

11 JUDGE HALLIGAN: So if there was a carpet, for
12 example, on the floor, and so he couldn't see the holes, in
13 fact.

14 MR. BRODIE: Right. If - - - if he couldn't - -
15 -

16 JUDGE HALLIGAN: And had no experience having,
17 you know, run into them.

18 MR. BRODIE: Right. If he couldn't and didn't
19 see the holes, I think this case would be like Pratt, where
20 the firefighter dismounts from the fire truck and steps in
21 a pothole, and he didn't see the pothole. He didn't have
22 any reason to look for the pothole. Court holds it's an
23 accident. That's this court. So I think the case where -
24 - -

25 JUDGE RIVERA: Except there are potholes on the



1 street, so it's a little bit odd with that case. But here,
2 one need not - - - right - - - it's not sort of an
3 automatic thing that one assumes there are holes in a
4 floor.

5 MR. BRODIE: I - - - I - - - I agree. One
6 wouldn't - - -

7 JUDGE RIVERA: I think this is kind of a stronger
8 case.

9 MR. BRODIE: - - - automatically assume holes in
10 the floor. And what the basis of our case here is the fact
11 that he actually did see them. And that's, I think, what
12 substantial evidence bears out.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. BRODIE: Thank you.

15 MR. SCHAEFER: Very briefly. And again, as
16 someone pointed out, applying a reasonably anticipated
17 standard here, in fact, begs the question. This question
18 is whether it can be supported as - - - as a matter of the
19 applicable statutory law and the decisions of this court.

20 JUDGE RIVERA: Yes, except that in Lichtenstein,
21 one of the - - - the words used to explain an accident is
22 unexpected.

23 MR. SCHAEFER: That's correct. And - - -

24 JUDGE RIVERA: So if it's anticipated, it is the
25 opposite of unexpected. It is expected.



1 MR. SCHAEFER: But remember, we only get to the
2 question of reasonably anticipated - - -

3 JUDGE RIVERA: Uh-huh. Yes.

4 MR. SCHAEFER: - - - once we have already
5 determined that the actual accident was unexpected, because
6 there's already been a determination that the accident was
7 not a consequence of duties performed in the normal course
8 of employment. Even the Third Department agrees to that.
9 The Third Department in this case - - -

10 JUDGE RIVERA: You mean you only get to that if
11 you've made a decision about - - -

12 MR. SCHAEFER: Right.

13 JUDGE RIVERA: - - - whether or not it's a risk
14 inherent to the job.

15 MR. SCHAEFER: The Third Department in this case
16 specifically found that the - - - the incident where he
17 tipped over in the chair was not a risk inherent in his - -
18 -

19 JUDGE RIVERA: Right.

20 MR. SCHAEFER: - - - police employment.

21 JUDGE GARCIA: But that's different than it being
22 an accident. So as I understand it, you know, a
23 firefighter can rush into a building and get hit by debris,
24 an accident, but it's inherent risk in what that
25 firefighter's duties are to go into a building to try to

1 save someone. So then if it isn't that, if it isn't an
2 inherent risk, then you get to accident. Is this an
3 accident? Because that can be an accident, and you're
4 still not going to recover? It's not intentional, right?
5 Somebody runs in a building, thing falls down. You don't
6 recover your - - - that's a line of duty recovery. So I
7 disagree with kind of how you're splitting it. Then you
8 get to accident, and then you have to show it's unexpected
9 or whatever our definition is, no?

10 MR. SCHAEFER: I - - - I have - - - we have tried
11 to follow the guidance of the cases here, and it seems to
12 us, basically, that there's been a clear bright line
13 demarcation. First, you address the issue of whether
14 there's a, quote, accident within the meaning of
15 Lichtenstein, something that does not occur in the - - - as
16 a result of an inherent risk. And then you get to these
17 peripheral issues, for better or for worse. And that is
18 part of the problem here. If we go to a - - - I'm sorry -
19 - -

20 JUDGE SINGAS: Well, is it - - - is it your
21 position that if it's not inherent in the work, then it's
22 automatically an accident, or is there - - - there has to
23 be a determination?

24 MR. SCHAEFER: It - - -

25 JUDGE SINGAS: I - - - I think you're saying it

1 is automatically, and I don't think that's what the case
2 law says.

3 MR. SCHAEFER: It - - - it's sort of bringing it
4 in through the side door, if I may. I'm not putting it
5 strictly in terms of saying that Rizzo is a, quote,
6 exception to something that would otherwise be an accident
7 because it was not inherent in - - - in the job duties.
8 I'm saying that Rizzo countenances a finding that if, as a
9 factual matter in a given case, it's determined that an
10 applicant had actual knowledge of a hazard that would cause
11 a reasonable person to forego certain behavior, that - - -
12 in that case, we're going to say that it was not something
13 that did not occur as a result of something not inherent
14 risk of the employment.

15 JUDGE GARCIA: This - - - this is how the
16 Appellate Division described this: "The first category
17 involves precipitating events that arise out of a risk
18 inherent in the petitioner's ordinary job duties, the work
19 performed. Precipitating events that fall within this
20 category can never be considered accidents, because by
21 definition, they are not unexpected and therefore cannot be
22 the basis for accidental disability.

23 'The second category are precipitating events' -
24 - - not accidents - - - "precipitating events that do not
25 arise out of these inherent risks. Precipitating events

1 that fall into this category may be deemed accidents, but
2 only if they are unexpected, out of the ordinary, and
3 injurious on impact."

4 So that seems pretty clear to me. Precipitating
5 event, inherent risk, not inherent risk. Is that
6 precipitating event an accident?

7 MR. SCHAEFER: I - - - I - - - I see your point.
8 But again, to try to distill this into a comprehensible
9 framework, I don't see how you get to a point where you - -
10 - you cannot make one determination initially followed by
11 the second determination. In other words, it's true that
12 something that is - - - occurs as a result of an inherent
13 risk - - -

14 JUDGE GARCIA: But I'll give you an example, beam
15 falls on a firefighters - - -

16 MR. SCHAEFER: Uh-huh.

17 JUDGE GARCIA: - - - firefighter's head. If he's
18 in a building, that can never be an accident that he's
19 rushed into and there's a fire. If he's in the - - - he's
20 in the office, then it can be an accident. That's, to me,
21 is the difference, right?

22 MR. SCHAEFER: If it - - - and again, I don't
23 really mean to belabor, you know, the wordplay for lack of
24 a better word of this. But in the second example, if he's
25 in an office doing paperwork and he is not assigned to a

1 position where he ordinarily does paperwork to foreclose
2 that argument that he's, you know, an administrative
3 lieutenant or something, let's just say he's a police
4 officer - - - he's a firefighter who has to make a loan
5 report, something outside of the ordinary course of his
6 duties. And he's in that room, and beam falls from the
7 ceiling, and it hits him.

8 JUDGE GARCIA: But that's not an inherent risk of
9 his duties in going in the office - - -

10 MR. SCHAEFER: That's the whole point. It's an
11 accident.

12 JUDGE GARCIA: Right. So you don't get - - - you
13 get to step two, but then you have to say, okay, was it
14 unexpected? Was it - - - is it an accident? It's a
15 precipitating event. It's the same precipitating event
16 type. But in the first case, you never get to the second
17 part because it's inherent. In the second, you do.

18 MR. SCHAEFER: That's the point. So what do you
19 do once you get to that point? Okay. Do you conduct an
20 administrative hearing to determine, as a factual matter,
21 what he knew when he knew it? Or do you allow a hearing
22 officer to substitute his beliefs as to what that officer
23 should or shouldn't have known at that given time, usually
24 a year and a half after the fact?

25 JUDGE GARCIA: Or do you let the officer - - - or

1 do you let the officer look at the entire record, make a
2 determination as to whether it was unexpected, and then
3 review it under our standard?

4 MR. SCHAEFER: Whether it was - - - well, we've
5 already established that as - - - as - - - as a matter of
6 the - - - of the case law, typically, it was unexpected.
7 It was - - - it was not - - - it was a fortuitous event
8 within the meaning of Lichtenstein. If you're going to go
9 beyond that, it seems to us - - -

10 JUDGE CANNATARO: But that's not the holding of
11 the Appellate Division here, right? They didn't say that
12 it was an unexpected event, but somehow reasonably
13 anticipated. Their whole - - - the point of this decision,
14 as I read it, is that whether something is reasonably
15 anticipated or not goes to the very crux of the
16 determination about whether something is unexpected.

17 MR. SCHAEFER: Then why did they go to the
18 trouble of characterizing what happened as something that
19 would meet the qualification of accident under Lichtenstein
20 in the first instance, which they said. They - - - they -
21 - - they made that ruling. Why - - - why do that if you're
22 going to somehow preserve, you know, the question, when
23 you've already moved beyond this issue, to go to the issue
24 of whether something, even though it is otherwise
25 accidental within the meaning of Lichtenstein, is - - -

1 should - - - that - - - that - - - that the benefit should
2 be denied because in - - - in a - - - in hindsight, it
3 should have been reasonably anticipated. We just don't
4 think there's any basis in the law for this.

5 The reality is the law already provides a
6 standard of sorts to disqualify people from receiving a
7 benefit that otherwise would qualify as something that was
8 accidental. That's the - - - the willful negligence
9 standard. To the extent that that standard should be
10 changed, I think this is an appropriate question for the
11 legislature - - -

12 CHIEF JUDGE WILSON: Thank you, Counsel.

13 MR. SCHAEFER: Thank you very much.

14 (Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Bodenmiller v. DiNapoli, No. 105 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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