To be Argued by:
ANDREW W. DEAN
(Time Requested: 15 Minutes)

APL-2019-00198
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Court of Appeals
of the
State of New York

CURBY TOUSSAINT,

Plaintiff-Respondent,

– against –

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant-Appellant,

GRANITE CONSTRUCTION NORTHEAST, INC., SKANSKA USA CIVIL NORTHEAST, INC., SKANSKA USA BUILDING, INC. and SKANSKA KOCH, INC.,

Defendants.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Preliminary Statement

In this case involving Plaintiff's Labor Law § 241(6) claim, the Port Authority presented two grounds supporting its dismissal. The first concerns the fact that the Industrial Code provision Plaintiff relies upon—12 NYCRR § 23-9.9(a)—is a mere general safety standard and is insufficiently specific to serve as a predicate for liability under Labor Law § 241(6). The provision simply states *"Assigned Operator. No person other than a trained and competent operator designated by the employer shall operate a power buggy*." The Port Authority demonstrated that similarly worded provisions have been found by this Court and the Appellate Divisions to be too general. In response, Plaintiff relies upon the fallacious claim that it was specific merely because it identified a "power buggy," and he cites to dissimilar Code provisions to avoid dismissal. Therefore, the Port Authority asks this Court to reverse and dismiss Plaintiff's Labor Law § 241(6) claim.

Second, even if this Court found § 23-9.9(a) was sufficiently specific, the Port Authority established it could not be held vicariously liable under § 241(6) because the incident was unforeseeable as a matter of law, and no statutory violation proximately caused the incident. Rather, as the First Department's majority *and* dissent concluded, the power buggy struck Plaintiff after Melvin inexplicably engaged in horseplay and decided to operate the buggy. Melvin's

actions, which resulted in his immediate firing, ran contrary to union rules, and was outside the scope of his employment. Nothing Melvin did furthered the business interests of his employer. Plaintiff's attempts to avoid dismissal by misinterpreting precedent regarding superseding incidents and causation and relying upon his counsel's expressions of disbelief as to the veracity of the Port Authority's evidence cannot create an issue of fact, and the fact that this incident was unforeseeable presents a second ground supporting reversal and dismissal.

A final issue arises should this Court refuse to dismiss. The Supreme Court denied the Port Authority's motion because issues existed as to whether Melvin's actions furthered the interests of his employer. Then, despite Plaintiff never moving for summary judgment, the First Department's majority considered all evidence in favor of Plaintiff and concluded § 23-9.9(a) was sufficiently specific, that it was violated, and that the violation caused the incident. While Plaintiff argues this Court cannot consider the First Department's granting of summary judgment in his favor, the Port Authority respectfully submits this argument should be rejected for two reasons. First, the issue has been preserved. Plaintiff has argued from his first submission that questions exist that preclude summary judgment. Second, as Plaintiff acknowledges, there is universal support for this Court being able to exercise jurisdiction over Appellate Division rulings that award relief to a non-moving party. Thus, should this Court refuse to dismiss, the Port Authority

asks this Court to reverse the Appellate Division's decision that awarded Plaintiff summary judgment on the issue of liability under Labor Law § 241(6).

Legal Arguments

I. THE APPELLATE DIVISION ERRED BY FAILING TO DISMISS PLAINTIFF'S LABOR LAW § 241(6) CLAIM PREMISED ON INDUSTRIAL CODE § 23-9.9(a)

A. *Plaintiff failed to refute the Port Authority's showing that Industrial Code § 23-9.9(a) is too general to impose liability under Labor Law § 241(6).*

Although "[i]t is well established that, in a Labor Law § 241 (6) claim, the rule or regulation alleged to have been breached must be a specific, positive command" (*Gasques v. State of New York,* 15 N.Y.3d 869, 870 (2010)), Plaintiff conclusively asserts at page 20 of his brief that "there can be no doubt that the subject provision set forth a specific standard of conduct that was here violated." Indeed, Plaintiff's argument that forms the basis of his position that § 23-9.9(a) is sufficiently specific can be synthesized thusly: because the provision "applies only to power buggies," it therefore must be specific because it singles out a particular piece of equipment as opposed to a provision that only applies to equipment generally. Plaintiff cites to no legal principle that supports this contention.

Plaintiff argues on page 28 that the Commissioner "[p]resumably" had some reason for singling out power buggies for the purpose of promulgating § 23-9.9. But Plaintiff provides no legitimate support for this supposition. Respectfully,

counsel "(s)aying so, however, does not make it so." *Matter of Fludd v. Goldberg*, 51 A.D.3d 153, 157 (1st Dep't 2006). Presumptions, assumptions, and conclusory assertions of counsel are insufficient to defeat a summary-judgment motion, and dismissal was warranted. *See*, *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). But Plaintiff has provided this Court with nothing more than the conclusory assertions of counsel to support an unreasonable interpretation of the Code provision, and the Port Authority asks this Court to reverse and dismiss.

Contrary to Plaintiff's contention, courts in this State have concluded that numerous Industrial Code provisions that address specific pieces of equipment, including power-operated equipment, are *not* sufficiently specific to support a § 241(6) claim. In *Wade v. Bovis Lend Lease LMB, Inc.,* 102 A.D.3d 476, 477 (1st Dep't 2013), the First Department considered 12 NYCRR § 23-7.1, which required that "[o]nly trained, designated persons shall operate personnel hoists and such hoists shall be operated in a safe manner at all times." Despite the Code specifying "personnel hoists," the Appellate Division ruled it was "not sufficiently specific to support [Labor Law § 241(6)] claim." *Id.*; *see also Robles v. Taconic Mgt. Co., LLC*, 173 A.D.3d 1089, 1091-1092 (2d Dep't 2019).

The Second Department in *Wilke v. Communications Const. Group, Inc.*, 274 A.D.2d 473, 474 (2d Dep't 2000) considered § 23-9.6(c) that required aerial basket truck drivers and aerial basket operators to be competent designated persons

who have been trained in the operation and use of such equipment. Again, even though the provision was specific to aerial baskets, the Appellate Division concluded it merely set forth "nonspecific standards of general regulatory criteria, akin to a common-law standard of reasonable care, rather than a concrete specification" and thus "cannot serve as a predicate for a violation of Labor Law § 241(6)." *Id.* The Supreme Court in *Bruno v. Mall 1-Bay Plaza, LLC*, 2019 N.Y. Misc. LEXIS 6350, *17 (Sup. Ct., New York County, Nov. 26, 2019) similarly ruled when it found § 23-7.3(e) too general despite the fact that it specified that elevators "shall be operated only by competent, trained, designated persons."

In attempting to distinguish *Wade*, *supra*, Plaintiff claims on page 43 that a purported "[r]eview of the briefs in *Wade* reveals that the plaintiff did not claim that the operator was untrained or had not been designated to operate the hoist. The plaintiff's argument was with the hoist itself, not its operator." According to Plaintiff, *Wade* concerned § 23-7.1(b)—"Maintenance" and inspections of personnel hoisting equipment—not § 23-7.1(c), which dealt with the "Operation" of personnel hoists by trained, designated persons. Again, counsel repeating a contention will not make it so. Further, Plaintiff conveniently ignores *Bruno,* 2019 N.Y. Misc. LEXIS 6350, *17, where the court reviewed § 23-7.1(c), which precisely addresses whether "the operator was untrained or had not been

designated to operate the hoist" and dismissed the claim, relying on *Wade* and *Robles*.

With respect to Industrial Code § 23-9.2(b)(1)—the operation of "power-operated equipment"—Plaintiff assails the trial courts and Appellate Divisions, arguing that the provision is "nothing more than a common-law rule" that "arose from a lack of a careful analysis" by the Courts because "two very different directives were combined in the same sentence." On page 40, Plaintiff charges the courts employed "flawed reasoning." Respectfully, accepting Plaintiff's baseless arguments will result in flawed holdings.

Thus, Plaintiff's argument that § 23-9.9(a) is sufficiently specific for a § 241(6) claim simply because it identifies a power buggy does not withstand scrutiny. One of the keystones for this unfounded assertion was Plaintiff's attempt to distinguish *Berg v Albany Ladder Co., Inc.*, 40 A.D.3d 1282, 1285 (3d Dep't 2007), *aff'd* 10 N.Y.3d 902 (2008) and the holding that § 23-9.2(b)(1) was not sufficiently specific. According to Plaintiff, the Third Department and this Court erroneously concluded § 23-9.2(b)(1) was too general and did not specify what portion of the single-sentence provision the courts relied upon. And as a result of this "acorn," a tree of erroneous rulings sprouted. As John Adams once said, however, "Facts are stubborn things." And the facts undermine Plaintiff's assertions.

To support his argument, Plaintiff refers to the briefs filed in *Berg* but mischaracterizes the arguments made. According to Plaintiff, the briefs only challenged the second part of § 23-9.2(b)(1) and that the Capital Framing brief conceded § 23-9.2(b)(1) had been found sufficiently specific. In reality, a review of the briefs prove that Capital Framing's primary argument in the Third Department was that § 23-9.2(b)(1)—a provision comprised of a single sentence—was too general *as a whole* and pointed to appellate precedent to support its argument. The brief pointed to *Fairchild v. Servidone Constr. Equip. Co.*, 288 A.D.2d 665 (3d Dep't 2001) and *Moffett v. Harrison & Burrowes Bridge Contractors*, 266 A.D.2d 652 (3d Dep't 1999), in which the Appellate Division previously ruled that 12 NYCRR § 23-9.2 could not form the predicate for plaintiff's Labor Law § 241(6) claim as it merely encompassed "the general requirements for power-operated equipment." *Fairchild*, *supra*, 288 A.D.2d at 667-68.

Various sections of the Capital Framing brief provided additional support for the rejection of Plaintiff's analysis. The "Preliminary Statement," "Questions Presented," and "Statement of Facts" all argued that § 23-9.2(b)(1) was too general and reported that the Supreme Court had ruled the provision was too general. It was only an argument *made in the alternative* that Capital Framing asserted that even if the court found it sufficiently specific, it was inapplicable to the facts. Therefore, the Port Authority submits Plaintiff's speculation that § 23-9.9(a) is

sufficiently specific simply because it identifies a power buggy finds no basis in law and should be rejected.

The First Department specifically addressed § 23-9.2(b)(1) in *Scott v. Westmore Fuel Co., Inc.*, 96 A.D.3d 520 (1st Dept 2012) and found that it "is a mere general safety standard that is insufficiently specific to give rise to a nondelegable duty under [Labor Law § 241(6)]). But with no justification, the First Department's majority in this case jettisoned this logic by parsing the words of a *single sentence*; it did not analyze one sentence in a multi-sentence Code provision as in *Misicki v. Caradonna*, 12 N.Y.3d 511 (2009) on which Plaintiff principally relies.

Plaintiff contends at page 41 that § 23-9.2(b)(1) is distinguishable from § 23-9.9(a) because it contains a "second part," namely that the equipment be "operated in a safe manner at all times." But Plaintiff improperly cherry picks portions of § 23-9.2(b)(1) because precedent demonstrates that § 23-9.2(b)(1), *including the first part*—"All power-operated equipment used in construction, demolition or excavation operations shall be operated only by trained, designated persons"—is a mere general safety standard that is insufficiently specific to give rise to a nondelegable duty under § 241(6). *See*, *Scott*, *supra* 96 A.D.3d at 521 (§ 23-9.2(b)(1) is a mere general safety standard that is insufficiently specific to give rise to a nondelegable duty under § 241(6)); *Berg*, *supra* 40 A.D.3d at 1283

("Because 12 NYCRR 23-9.2(b)(1), the rule upon which the worker relied, was no more than a restatement of common-law requirements, it was insufficient to establish a nondelegable duty under Labor Law § 241(6)."); *Nicola v United Veterans Mut. Hous. No. 2, Corp.*, 178 A.D.3d 937, 940 (2d Dep't 2019) ("12 NYCRR 23-9.2(b)(1) is merely a general safety standard that does not give rise to a nondelegable duty under Labor Law § 241(6)"); and *Martinez v. Hitachi Constr. Mach. Co.*, 2006 NYLJ LEXIS 4989, *17 (Sup. Ct., Bronx Cnty., Oct. 27, 2006) ("Section 23-9.2(b)(1) similarly requires safe operation of the equipment *by trained designated persons, but this provision is insufficiently specific or concrete to support a claim under Labor Law 241(6)*.") (emphasis added).

Thus, despite the fact that the First, Second, and Third Departments, as well as numerous trial courts, having ruled that the "designated persons" language in § 23-9.2(b)(1) is insufficiently specific to support a Labor Law § 241(6) claim, Plaintiff strains to suggest that all of these Courts must have only based their rulings on the second part of the provision. The facts and law do not support Plaintiff's assertions, and the Port Authority asks this Court to reverse and dismiss.

B. *Finding § 23-9.9(a) too general to support a § 241(6) claim will not "thwart" the Statute's purpose of protecting workers.*

Bereft of factual and legal support, Plaintiff hyperbolically charges that the failure to deem § 23-9.9(a) sufficiently specific to serve as a predicate for Labor Law § 241(6) would "thwart" the statute's purpose of protecting construction

workers against hazards in the workplace. According to this logic, *every* Industrial Code provision must be found sufficiently specific in order to ensure worker protection. New York Courts, however, have not enacted such an unreasonably expansive interpretation of the Code. Indeed, the courts have held that several similar, if not identical, provisions to § 23-9.9(a), including provisions related to specific equipment (including power-operated equipment) are too general to support a § 241(6) claim. Yet the Industrial Code has continued to protect construction workers against hazards in the workplace as the Legislature intended.

Contrary to Plaintiff's position, and correctly noted by the Appellate Division's dissent, imposing liability against the Port Authority under these circumstances unreasonably exposes owners and contractors to liability "anytime an unauthorized person on his own initiative *or even a trespasser* moved such an item of equipment and caused injuries, an outcome not within the scope of the statute and inconsistent with our precedent." (R. 1009) The majority's holding, however, exposes defendants to liability "whenever a person neither trained nor competent operated a machine and injured a worker, regardless of whether the operator was designated by the employer to operate the machinery. This is clearly not supported by Industrial Code § 23-9.9(a)." (R. 1009)

C. *Plaintiff's erroneous reliance on Misicki cannot transform § 23-9.9(a) into a Code provision sufficient to support a § 241(6) cause of action.*

The Port Authority argued that the Appellate Division erroneously parsed § 23-9.9(a)—a Code provision comprised of a single sentence with no commas or conjunctions—in order to find it sufficiently specific. In response, Plaintiff derides such a contention and argues the courts should engage in the hyper-parsing of a single sentence. To support his untenable position, Plaintiff relies upon *Misicki v. Caradonna,* 12 N.Y.3d 511 (2009), arguing that the courts must focus on "the *particular provision* that the defendants were claimed to have violated."

Much like his flawed analysis of *Berg*, Plaintiff's review of *Misicki* proves superficial, and its facts are distinguishable. In *Misicki*, this Court held that only the third sentence of Industrial Code § 23-9.2(a) was specific enough to be the basis of a violation of Labor Law § 241(6). *Id.*, 12 N.Y.3d 520-21. The first two sentences were each too general. The third sentence—"Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement."—that this Court relied upon contained a specific directive, as opposed the generalities of § 23-9.9(a)'s single sentence. Indeed, this Court ruled the third sentence "imposes an affirmative duty on employers" and that "an employee who claims to have suffered injuries proximately caused by a previously identified and unremedied structural defect or

unsafe condition affecting an item of power-operated heavy equipment or machinery" states a claim under § 241(6) based on § 23-9.2(a).

The differences between this case and *Misicki* are more than the number of sentences in each provision. This Court found the first two sentences too general under Labor Law § 241(6) but concluded the third sentence sufficiently specific. This Court did not parse certain words of the third sentence: it analyzed the *entire sentence as a whole*. Here, § 23-9.9(a) is comprised of a single sentence with no punctuation or conjunctions, and it simply provides, "*Assigned Operator. No person other than a trained and competent operator designated by the employer shall operate a power buggy*." It represents a singular, complete thought. The First Department improperly refused to read the provision as a whole and cherry-picked particular words within the sentence to find specificity where none existed. Neither *Misicki* nor any principle of statutory interpretation sanctions what Plaintiff demands, and the Port Authority asks this Court to reject his overtures.

D. *The Code provisions Plaintiff relies upon are distinguishable and do not support his demand to unreasonably expand liability under § 241(6).*

Even a cursory review of the "more than ten" Industrial Code provisions cited by Plaintiff show little to no similarity to the provisions relied upon by the Port Authority. Plaintiff cites to § 23-1.29(a) and the ruling in *McGuinness v. Hertz Corp.*, 15 A.D.3d 160 (1st Dep't 2005). In *McGuinness*, the First Department did

not analyze the provision as Plaintiff desires: it read the *entire* provision. The Appellate Division found that § 241(6) could be based upon § 23-1.29(a), which provides that "(a) Whenever any construction … work is being performed over, on or in close proximity to a street, road, highway or any other location where public vehicular traffic may be hazardous to the persons performing such work, such work area shall be so fenced or barricaded as to direct such public vehicular traffic away from such area, or such traffic shall be controlled by designated persons." Skanska did not attack the "designated persons" portion of the provision, and the Appellate Division found it specific because work the plaintiff was performing constituted an integral part of the construction project and was performed "on or in close proximity to a street." *Id.*, 15 A.D.3d at 161. *Gonnerman v. Huddleston*, 78 A.D.3d 993 (2d Dep't 2010) reached the identical conclusion when it found § 23-1.29(a) specific because provision concerned work being performed in close proximity of the street.

Plaintiff's reliance upon § 23-3.3(c) fails. This provision mandates "continuing inspections … by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material" and is explicitly aimed at preventing persons from working "where such hazards exist until protection has been provided by shoring, bracing or other effective means." *Vasquez v. Urbahn Assoc., Inc.*, 79 A.D.3d 493,

494 (1st Dep't 2010). In finding the provision sufficient to support a § 241(6) claim, the Appellate Division relied upon language mandating that inspections be performed to protect workers from weakened or deteriorated floors.

Section § 23-6.1(c)(1)—"Only trained, designated persons shall operate hoisting equipment and such equipment shall be operated in a safe manner at all times."—was actually found to be too general. The Fourth Department in *Sharrow v. Dick Corp.*, 233 A.D.2d 858, 861 (4th Dep't 1996) ruled 12 NYCRR 23-6.1(c) is not sufficiently concrete in its specifications to support plaintiff's Labor Law § 241(6) claim. Courts have concluded this provision is "unquestionably general." *Id.*; *see also*, *Matz v. Laboratory Inst. of Merchandising*, 27 Misc. 3d 1220(A) (Sup. Ct., New York Cnty., Apr. 10, 2010); *Harris v. NYU Langone Med. Ctr.*, 2019 N.Y. Misc. LEXIS 2414 (Sup. Ct., New York Cnty., May 10, 2019); *Martinez v. 342 Prop. LLC*, 2014 N.Y. Misc. LEXIS 944, *5, 2014 NY Slip Op 30541(U), 4 (Sup. Ct., Bronx Cnty., Jan. 22, 2014); *Higgins v Consol. Edison Co. of NY Inc.*, 2009 N.Y. Misc. LEXIS 4416, *20, 2009 NY Slip Op 31935(U) (Sup. Ct., New York Cnty., Aug. 26, 2009) (§23-6.1(c)(1) is a "general, not specific or concrete regulation, and therefore, legally insufficient to support a claim under Labor Law § 241 (6)."). *Galeto v. 147 Flatbush Ave. Prop. Owner, LLC*, 34 Misc. 3d 1205(A) (Sup. Ct. Kings Cnty., Jan. 5, 2012), which Plaintiff trumpets as

supporting the finding of specificity, never addressed issue of whether the provision was too general.

Plaintiff's citation of § 23-8.1(b)(1) and *Howell v. Karl Koch Erecting Corp.*, 192 Misc. 2d 491 (Sup. Ct. Bronx Cnty. July 11, 2002) actually support the Port Authority's position. This provision mandates that mobile cranes, tower cranes, and derricks be "thoroughly inspected by a competent, designated employee or authorized agent of the owner or lessee of such mobile crane, tower crane or derrick at intervals not exceeding one month." It continues that these "inspections shall include but not be limited to all blocks, shackles, sheaves, wire rope, connectors, the various devices on the mast or boom, hooks, controls and braking mechanisms." In finding this provision sufficiently specific, *Howell* reasoned it was because it "requires mandatory monthly inspection of cranes at work sites." *Id.* The court provided three grounds for its conclusion: first, requiring monthly inspection contributed to overall safety of the work site; second, inspections may prevent numerous crane injuries by revealing crane defects that might be otherwise undetectable; and third, the regulation specified "all blocks, shackles, sheaves, wire rope, connectors, the various devices on the mast or boom, hooks, controls and braking mechanisms" as items to be inspected. *Id.*, 192 Misc.2d at 494-95. Section 9.9(a) provides no such specificity.

Howell's denial of summary judgment further weakens Plaintiff's argument. The trial court held that a question existed as to whether an inspection occurred. *Id.*, at 495. Critically, it referred to a repairman from the crane owner coming to the site before the accident. The court did not find a question as to whether the repairman was "competent" or "designated," but whether an inspection occurred. *Id.* Thus, the finding of specificity was based upon the rigorous and timely inspections and the multiple items that were mandated to be inspected, not on the individuals performing the inspections.

Section 23-7.1(c)—"Operation. Only trained, designated persons shall operate personnel hoists and such hoists shall be operated in a safe manner at all times."—has been found to merely set forth a general safety requirement. *See*, *Wade*, *supra* and *Bruno*, *supra*. Plaintiff claims *Rich v. West 31st St. Assoc., LLC*, 92 A.D.3d 433 (1st Dep't 2012) concluded this provision was sufficiently specific, but the First Department's ruling made no mention of the Code section. Therefore, his reliance is unfounded. This is similar to Plaintiff's arguments concerning § 23-7.2(j)(4) and *Arbusto v. Bank St. Commons, LLC* for which he provides no citation. Indeed, the only citation found for the case—*Arbusto v. Bank St. Commons, LLC*, 2012 N.Y. Misc. LEXIS 6428 (Sup. Ct., Bronx Cnty., Feb. 7, 2012)—does not address § 241(6) or any Code provision. Thus, this Court should reject Plaintiff's reliance.

Sections 23-5.1(h) and 23-5.8(c)(1) cited by Plaintiff provide for "general provisions for all scaffolds" and "Installation and Use" for suspended scaffolds. Respectfully, they "pertain to scaffolds and have no relevance in this matter." *Walker v. New York City Transit Auth.*, 2008 N.Y. Misc. LEXIS 8052, *22, 2008 NY Slip Op 33220(U), 20 (Sup. Ct., New York Cnty., Nov. 24, 2008); *see also Tapia v. 125th St. Gateway Ventures LLC,* 2012 N.Y. Misc. LEXIS 4546, *8, 2012 NY Slip Op 32416(U) (Sup. Ct., Queens Cnty. Sept. 4, 2012) ("To support his claim under Labor Law § 241(6) the plaintiff has alleged in his bill of particulars violations of….23-5. [and] 23-5.8, The plaintiff does not oppose the dismissal of the claims based upon all provisions except 12 NYCRR 23-1.18, as these provisions are either *general safety provisions or not applicable to the facts of the case*. Therefore, the portion of the Labor Law § 241(6) claims predicated on those provisions of the Industrial Code will be dismissed.") (emphasis added).

The Port Authority demonstrated that § 23.9.9(a)—"Assigned Operator. No person other than a trained and competent operator designated by the employer shall operate a power buggy."—is *not* sufficiently specific to support a § 241(6) cause of action. It contains a single, general directive that courts when considering similar provisions—such as *Scott*—have found to be too general. Even the First Department's majority acknowledged this (R. 1001-003), but it eschewed precedent to unreasonably expand the protections of § 241(6) in contravention of

this Court's directive in *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993), which mandates plaintiffs rely upon provisions that impose specific, *not general*, standards of care. The Port Authority proved § 23.9.9(a) is a general provision that contains no concrete specifications and provides no specific details elucidating, among other things, what training a power buggy operator must undergo and what criterion determines whether a power buggy operator is competent. Thus, it cannot support Plaintiff's § 241(6) claim, and the Port Authority asks this Court to reverse and dismiss.

II. PLAINTIFF FAILED TO REBUT THE PORT AUTHORITY'S SHOWING THAT THIS INCIDENT WAS UNFORESEEABLE AS A MATTER OF LAW, AND THE PORT AUTHORITY CANNOT BE HELD VICARIOUSLY LIABLE UNDER LABOR LAW § 241(6).

Should this Court conclude that Industrial Code § 23-9.9(a) is sufficiently specific to impose a nondelegable duty under Labor Law § 241(6) (respectfully it is not), the Port Authority should not be vicariously liable for the unforeseeable horseplay of a contractor's employee. An owner or general contractor may "raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence." *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343, 349-50 (1998). Thus, the Port Authority cannot be held vicariously liable for Melvin's unforeseeable actions under the doctrine of *respondeat superior*. Indeed, the evidence shows Melvin was not authorized to operate the power buggy, union rules prohibited him from using it,

his inexplicable commandeering of the power buggy to engage in horseplay did nothing to further the interests of his employer, and his prohibited conduct resulted in his immediate firing. Thus, his actions were unforeseeable as a matter of law, and the Port Authority asks this Court to reverse.

In opposition, Plaintiff argues at page 46 that the Port Authority is "responsible for a statutory breach irrespective of whether it was negligent." In fact, Plaintiff asserts at page 57 that "violation of a regulation (as opposed to violation of a statute) is classically 'some evidence of negligence' rather than negligence *per se.*" Plaintiff essentially seeks to impose liability merely because an incident occurred. This Court, however, has held for well over a century that the mere happening of an incident does not permit an inference of negligence. *See*, *Eaton v. New York Cent. & H.R.R.R. Co.*, 195 N.Y. 267 (1909).

The First Department's dissent correctly noted that the incident was unforeseeable as a matter of law and is exposing the Port Authority to liability for the horseplay of a non-party tortfeasor. While the majority imposed insurer-type liability on the Port Authority, the dissent opined that the majority "misses the point that Melvin was an interloper rather than an improperly designated operator." (R. 1009) The dissent concluded there was no "basis for concluding that [Melvin] could have been acting under the direction of the [Port Authority]." (R. 1009)

Plaintiff again strains to argue that the incident was foreseeable as a matter of law, citing to *Sanchez v. State of New York*, 99 N.Y.2d 247, 253-54 (2002) in support. *Sanchez*, however, was not a Labor Law case. It dealt with the issue of whether inmate-on-inmate assault was a foreseeable incident that could occur in prison. It is difficult to comprehend a more foreseeable incident that an inmate-on-inmate assault, *in prison*. *See, e.g., Harriston v. Mead*, 2008 U.S. Dist. LEXIS 79001, *15-16, 2008 WL 4507608 (E.D.N.Y. 2008).

Here, unlike a physical altercation in a prison, the facts involved the unauthorized use of a power buggy on a job site. Melvin was not even assigned to work anywhere near Plaintiff. Union rules—to which all workers were bound to follow—prohibited Melvin from using the power buggy. The First Department's majority and dissenting opinions characterized the underlying accident as being the product of "horse playing" on the part of Melvin. Melvin was immediately terminated based upon his unforeseeable and inexplicable actions.

Plaintiff's counsel, assuming the dual role of advocate and trier of fact, demeans and dismisses the admissible proof produced by the Port Authority and deems sworn testimony unworthy of belief. Unlike the speculative assertions of Plaintiff's counsel, the Port Authority presented proof in admissible form that proved its contractor designated a competent and trained laborer to operate the concrete buggy on the day of the incident. Indeed, De Rosa—a Laborer Foreman

for SGS—designated Estavio, a Laborer employed with SGS, to move two concrete buggies on the date in question, including the subject concrete buggy. (R. 669, 671) The incident took place simply because Melvin approached the area and "took control of one of the buggies and drove it away." (R. 671) Melvin was assigned as an "oiler on a crane" at a different part of the WTC construction site. (R. 616) Plaintiff testified that Melvin was a watchman on a different part of the job site and was not supposed to be near his area "messing with that machine." (R. 211-13, 355-56), and Melvin admitted that he was merely passing Plaintiff's work area while "walking over there [to his supervisor's office] from lunch." (R. 610, 615, 617) Melvin also admitted that he was not assigned to operate concrete buggies, that only Laborers are assigned to operate concrete buggies, and that he did not have permission to operate the buggy. (R. 595, 672)

The concrete buggies at the WTC construction site were not owned by the Port Authority or operated by any Port Authority employees (R. 662), and there would be no reason for the Port Authority to suspect that an untrained, non-designated Operating Engineer would go against his own union rules.

Thus, at the time of the incident, Melvin had no work assignment, he was in a completely different area from where he worked, he engaged in a task that he admittedly was never supposed to perform and was prohibited by union rules, and his actions were a significant departure from his own normal work duties or

assignments. There is no basis for concluding that Melvin was acting under the direction of the Port Authority or in the course of his employment at the time of the incident. Melvin was a person who was not, or would be, designated to move the buggy, and the dissent correctly noted this "misses the point that Melvin was an interloper rather than an improperly designated operator." (R. 1008)

As pointed out on pages 24-25 of our principal brief, plaintiff's appellate counsel has written an article which recognizes that foreseeability is an integral part of assessing liability under the Labor Law. Now, on pages 48-49 of his brief, he attempts to distance himself from his published article by contending that foreseeability is not an issue here because there was "no surprising chain of events." Simple common sense reveals that plaintiff's appellate counsel is once again mistaken.

As outlined through this brief and our principal brief, Melvin, an experienced union worker, violated numerous rules in entering an area where he was not working and effectively hijacking the buggy in a reckless act of horseplay which caused needless and unexpected injuries to plaintiff. Melvin was immediately terminated.

If this was not a "surprising chain of events," then every construction site would be reduced to a scene of utter chaos where nothing would be accomplished except for injury and/or destruction.

Plaintiff's contention in this respect further betrays the fatal flaw in his position.

Despite the unforeseeable nature of this incident and the Port Authority's freedom from fault, Plaintiff demands that the Port Authority be found absolutely liable, effectively removing a defense available to the Port Authority and all owners and contractors in this State when defending against § 241(6) claims. *See*, *Rizzuto*, *supra,* 91 N.Y.2d at 349-50 (1998); *Rossi v. Mt. Vernon Hosp.*, 265 A.D.2d 542 (2d Dep't 1999). Plaintiff scoffs at the eventuality that all owners and contractors will be exposed to insurers by rendering them liable for unforeseeable incidents, but the law supports the Port Authority's arguments. *See*, *Blake v. Neighborhood Housing Srvcs. of New York City, Inc.*, 1 N.Y.3d 280, 286 (2003) ("[a]t no time, however, did the Court or the Legislature ever suggest that a defendant should be treated as an insurer after having furnished a safe workplace."); *Sanatass v. Consolidated Investing Co., Inc.*, 10 N.Y.3d 333 (2008); and *Ventricelli v. Kinney System Rent A Car, Inc.*, 45 N.Y.2d 950 (1978).

Based upon the facts and applicable law, the Port Authority submits it cannot be held liable for Melvin's unforeseeable conduct. To hold otherwise would render the Port Authority—and all owners and contractors—a guarantor of safety in contravention of this Court's precedent. Therefore, the Port Authority asks this Court to reverse and dismiss Plaintiff's § 241(6) cause of action.

III. THE PORT AUTHORITY'S ARGUMENTS REGARDING THE APPELLATE DIVISION'S GRANT OF SUMMARY JUDGMENT TO PLAINTIFF ARE PRESERVED, REVIEWABLE, AND MERITORIOUS.

Plaintiff admits at page 54 that the Port Authority "is correct in stating that plaintiff did not move or cross-move for summary judgment in [the] Supreme Court." He also acknowledges on page 58 of his brief that the question of whether a party is negligent "presents an issue of fact that should be resolved by a jury." Despite these admissions, Plaintiff argues the Appellate Division's granting of summary judgment to Plaintiff on the issue of liability is not preserved and not reviewable based upon *Bennett v. St. John's Home*, 26 N.Y.3d 1033 (2015). The Port Authority submits two grounds undermine this assertion.

First, Bennett is completely distinguishable. In Bennett, the issue sought to be reviewed was not preserved in the motion court. In stark contrast, as noted above, *plaintiff* himself has conceded that summary judgment in his favor is not warranted. Bennett does not advance plaintiff's position at all. The issues of whether any violation of § 23-9.9(a) was sufficiently specific *and* if such a violation proximately caused the incident have been raised since the inception of motion practice. Plaintiff advocated for the conclusion that a jury should decide the causation issue. Yet now he advocates for this Court rejecting the precise argument he advanced. We submit that plaintiff cannot have it both ways.

Second, even if this Court considered Plaintiff's arguments, this Court can consider whether the Appellate Division abused its discretion in awarding him summary judgment on the issue of liability as a matter of law. *See*, *Andon v. 302-304 Mott St. Assocs.*, 94 N.Y.2d 740 (2000). Further, Judge Smith's concurrence in *Hecker v. State*, 20 N.Y.3d 1087 (2013)—a case also involving an Industrial Code provision and § 241(6) claim—warrants review of this unjust procedural and inequitable quirk. As pointed out in the concurrence in *Hecker*, there are two restrictions on this Court's power of review. The first follows CPLR § 5501(b), which does not apply here. According to Judge Smith, "(t)he second restriction does not follow from any statute, *does not make sense*, and sometimes — as in this case — *rewards a party for failing to preserve a legal issue*." (emphasis added) *Id.*, 20 N.Y.3d at 1088.

According to Judge Smith, "the Appellate Division's unreviewable, discretionary choice to reach the issue [the applicability of an Industrial Code provision] does not make the issue itself any less one of law. Nor can I imagine any common sense reason why, if the Appellate Division erred in deciding that issue, we should be powerless to correct the error." *Id.* There is no "authority" that "offers any justification, either in statutory language or in policy, for the conclusion that a legal issue in a civil case is made unreviewable here by the failure to preserve it in the trial court, even when the Appellate Division has

chosen to review it." *Id.* "In the civil area, there is not even a misread statute to support the motion that unpreserved issues are somehow not 'legal' ones." *Id.*, at 1089.

Respectfully, the question of whether Plaintiff demonstrated his entitlement to judgment as a matter of law on the issue of liability under § 23-9.9(a) "is an issue of law of the sort that CPLR § 5501(b) authorizes" this Court to review. *Id.* But the present rule that would prohibit this Court from reviewing the First Department's legal conclusion "produces a bizarre result" that permits Plaintiff's summary-judgment award to stand. *Id.* Similar to this case, in *Hecker*, the State of New York failed to preserve the argument, but the Appellate Division exercised its discretion, forgave its oversight, reached the question anyway, decided that the section did not apply, and dismissed the claim. *Id.* Judge Smith set forth the deleterious ramifications because "claimant loses the case − whether he is right or wrong on the merits − because of *defendant's* neglect." *Id.* Such a result is "counterintuitive." *Id.* Here, the Port Authority's ability to defend the issue of liability has been lost because of Plaintiff's neglect, and this Court should review this issue if it does not dismiss. *See*, *Andon*, *supra*.

Plaintiff's counsel beseeches this Court to clarify what he feels as flawed reasoning from *Berg* for the courts and bar. The Port Authority submits such an argument is misplaced as the Appellate Divisions have consistently ruled that Code

provisions akin to § 23-9.9(a) are too general to support a Labor Law § 241(6) cause of action. Rather, the need for clarification is on this issue where Plaintiff is being rewarded for his neglect. The corollary is that the Port Authority is being punished despite Plaintiff's neglect.

The Port Authority is well aware of the doctrine of *stare decisis*, but it is not intended to fit this Court like a straitjacket and to prevent mistakes from being rectified. "A court should be slow to overrule its precedents, there is little reason to avoid doing so when persuaded by the 'lessons of experience and the force of better reasoning." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting). The Port Authority asks this Court to jettison this inequitable rule and address the First Department's abuse of discretion if it does not dismiss.

And when considering the issue, Plaintiff's arguments in opposition fall flat. Plaintiff's counsel argues on page 58 that the "proof of the pudding" and that the Port Authority was "plainly negligent." Such a contention only proves true if this Court turns the standard of review upside down and consider all evidence in a light most favorable to Plaintiff and continue to permit counsel to assume the roles of advocate, judge, and juror.

Melvin's act of moving the concrete buggy cannot be considered advancing or furthering the interests of his employer as it was outside the general scope of his

employment. When viewing the evidence in a light most favorable to the Port Authority, nothing Melvin did at the time of the accident furthered the business interests of his employer. Plaintiff testified that Melvin was engaging in horseplay, and Melvin admitted as much. (R. 218, 224-25, 244) Indeed, the majority and dissent reached the same conclusion that Melvin was engaged in horseplay at the time of the incident. Further, Melvin was not supposed to be operating the buggy, and he was fired immediately after the incident. (R. 612) Melvin's conduct was not foreseeable, and the Port Authority did not have any notice that the untrained Melvin—or any other untrained worker—would take it upon himself to just jump on a concrete buggy without any instruction or permission to do so. (R. 662)

Thus, even if Industrial Code § 23-9.9(a) provides a basis for liability under § 241(6), Melvin's unforeseeable horseplay was the superseding and proximate cause of Plaintiff's accident. *See*, *Hajderlli v. Wiljohn 59 LLC*, 71 A.D.3d 416, 416-17 (1st Dept 2010) ("That act was not foreseeable in the normal course of events, and was so far removed from any conceivable violation of the statute due to the failure to use, or inadequacy of, a safety device of the kind enumerated in the statute as to constitute, as a matter of law, a superseding act that broke any causal connection between any such violation of the statute and plaintiff's injuries.").

Accordingly, even if this Court found § 23-9.9(a) reasonably specific to support liability under Labor Law § 241(6), which the Port Authority denies, the

Port Authority respectfully submits that it cannot be held vicariously liable for any violation of Code § 23-9.9(a) by a worker engaging in horseplay outside the bounds of his work duties, and it asks this Court to reverse and dismiss this claim.

Conclusion

Two grounds support the dismissal of Plaintiff's Labor Law § 241(6) claim. First, the Industrial Code provision Plaintiff relies upon—12 NYCRR § 23-9.9(a)—is a mere general safety standard and is insufficiently specific to serve as a predicate for liability under Labor Law § 241(6). This Court and other courts in this State have declared similarly worded provisions too general. Second, even § 23-9.9(a) is found sufficiently specific, the Port Authority established it could not be held vicariously liable under § 241(6) because the incident was unforeseeable as a matter of law, and no statutory violation proximately caused the incident. Thus, the Port Authority asks this Court to reverse the Appellate Division, First Department's order and dismiss Plaintiff's Labor Law § 241(6).

A final issue concerns the reviewability of the Appellate Division's grant of summary judgment to Plaintiff despite his admitted failure to move for this relief in the Supreme Court. Inexplicable and inequitable rules arguably prohibit this Court from reviewing this decision. As a result, the Port Authority will be prejudiced by having its ability to defend against Plaintiff's liability claims because of *Plaintiff's neglect*. Such an inequitable result cannot stand, and should this Court refuse to

dismiss, the Port Authority asks this Court to reach this issue and reverse Plaintiff's award of summary judgment.

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