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.

BRIEF FOR DEFENDANT-APPELLANT

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STATEMENT PURSUANT TO RULE 500.13(a)

As of the date of completion of this brief, there is no related litigation pending before any court.

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PRELIMINARY STATEMENT

In order to maintain a Labor Law § 241(6) cause of action, a plaintiff must cite to an Industrial Code provision that is applicable *and* sufficiently specific. The failure to do so supports dismissal. Here, Plaintiff was working at the World Trade Center construction site when an "interloper"—another worker not authorized to drive a concrete buggy—unforeseeably began to drive a concrete buggy, lost control, and struck him. In support of his Labor Law § 241(6) claim against the Port Authority of New York and New Jersey, Plaintiff relies solely upon 12 NYCRR § 23-9.9(a). Respectfully, two grounds support the dismissal of this claim, and the Port Authority asks this Court to reverse.

First, § 23-9.9(a) is a mere general safety standard that is insufficiently specific to support a claim under Labor Law § 241(6). The straightforward reading of § 23-9.9(a) generally requires that power buggies be operated by trained and competent individuals. It reads as nothing more than "*Assigned Operator. No person other than a trained and competent operator designated by the employer shall operate a power buggy*." (emphasis added). It makes 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 the power buggy operator is competent. Nor does it distinguish between

employer designated individuals and unauthorized individuals. When courts have considered similar, and almost identical, Industrial Code provisions such as 12 NYCRR §§ 23-9.2(b)(1), they have found them too general to support a § 241(6) claim. The Appellate Division, First Department's majority, however, ignored prior precedent—*Scott v. Westmore Fuel Co., Inc.*, 96 A.D.3d 520 (1st Dept 2012)—and erroneously parsed the provision, rather than reading it as a whole, in order to find it sufficiently specific.

Second, even if this Court concluded § 23-9.9(a) is sufficiently specific, the Port Authority submits the incident was unforeseeable as a matter of law, and it should not be vicariously liable for the horseplay of a non-party tortfeasor. But in exposing the Port Authority to liability under § 241(6) for the unforeseeable and unauthorized acts of persons, including trespassers, on a construction site the Appellate Division has rendered the Port Authority, and all owners in this State, insurers.

Finally, a violation is merely some evidence that the jury may consider on the question of the Port Authority's negligence. Therefore, even assuming § 23-9.9(a) is sufficiently specific and applicable, it remains for a jury to decide whether a violation, in fact, occurred, and whether the foreseeable negligence of some party to, or participant in, the construction project caused Plaintiff's injuries. While the

Port Authority submits the Appellate Division erroneously concluded § 23-9.9(a) was sufficiently specific and applicable, it compounded its errors when it searched the record and awarded Plaintiff summary judgment on the issue of liability despite the fact that Plaintiff never moved for this relief in the trial court, and in fact admitted he was not seeking such relief. Indeed, Plaintiff's opposition made no request for affirmative relief. But the Appellate Division resolved all issues of fact in Plaintiff's favor, concluding that even though the Port Authority demonstrated its freedom from active fault, it was still statutorily liable. The Port Authority respectfully submits this was error, and it asks this Court to reverse.

JURISDICTIONAL STATEMENT

CPLR § 5602(b)(1) provides that an appeal may be taken to the Court of Appeals by permission of the Appellate Division "from an order of the appellate division which does not finally determine an action[.]"

By order entered September 26, 2019 pursuant to CPLR § 5713 (R. 1013-1014), the Appellate Division, First Department granted the Port Authority leave to appeal to this Court from its non-final 3-2 Decision and Order entered May 30, 2019, which modified, on the law, and upon a search of the record, an order of the Supreme Court, New York County dated October 18, 2017, to grant Plaintiff summary judgment as to liability on Plaintiff's Labor Law § 241(6) claim predicated on Industrial Code § 23-9.9(a).

The Appellate Division certified the question: "Was the order of this Court, which modified, the order of the Supreme Court, to grant plaintiff summary judgment as to liability on the Labor Law § 241(6) claim insofar as it is predicated on 12 NYCRR 23-9.9(a) as against defendant Port Authority of New York and New Jersey, properly made?" (R. 1013-1014).

QUESTION PRESENTED FOR REVIEW

1. Was the Appellate Division First Department's order, which modified, the order of the Supreme Court, to grant plaintiff summary judgment as to liability on the Labor Law § 241(6) claim insofar as it is predicated on 12 NYCRR 23-9.9(a) as against defendant Port Authority of New York and New Jersey, properly made?"

This Honorable Court should answer "No."

STATEMENT OF FACTS

A. The October 24, 2014 accident caused by unforeseeable horseplay.

On October 24, 2014, Plaintiff was being struck by a concrete buggy at the World Trade Center ("WTC") construction site (R. 122-124).

Plaintiff was assigned to fabricate steel on a rebar-bending machine located on the north side of the WTC construction site, near Fulton Street (R. 157-160). At the time of the incident, he was bending steel for the eventual construction of a wall (R. 205). Plaintiff testified that while he was bending steel for the wall, an individual drove a concrete buggy into him:

> A guy named Pauly was playing with the concrete buggy. It wasn't really -- it was like, you know, because it looked like he knew how to ride it, so he rode it, and brought it close to the machine. And there was another guy, when Pauly got off of it, and got on it and they was talking. Then, I glanced to see what was going on back there. I glanced to see that they was talking loud, *joking, and playing*. And then, I went to go bend the [steel] stick. Next thing I heard, I heard everybody scream…

(R. 206) (emphasis added).

According to Plaintiff, "Pauly" was a laborer for Skanska and was not part of his work crew (R. 208-209). Pauly initially moved the concrete buggy (R. 209). Plaintiff identified "Jimmy" as the individual who struck him with the concrete

buggy (R. 208). He testified that Jimmy "jumped on it, and he lost control of the buggy, fell off the buggy, and it smashed me." (R. 209).

Plaintiff had seen Jimmy around and stated that Jimmy was an operating engineer who was not supposed to be working in Plaintiff's work zone area. Specifically, Jimmy was not "supposed to be on that side of town messing with that machine." (R. 211-213). Plaintiff was told Jimmy was supposed to be a watchman on the south side of the WTC construction site – "Jimmy was not assigned to the north side of Fulton," where Plaintiff was working (R. 355-356).

Following the incident, Plaintiff testified Jimmy "kept saying sorry he didn't mean to do that. *He said he was horse playing. That's what he said. He was horse playing around*." (R. 218, 224-225, 244) (emphasis added).

B. The Port Authority's freedom from negligence, and the unforeseeable nature of the incident.

In October 2014, Michael Grieco worked in "construction site fire safety management" at the WTC Transportation Hub for the Port Authority (R. 430-431). Grieco testified that, on this job site, only assigned Laborers operate and were authorized to operate concrete buggies (R. 481-483). According to site-wide and standard Union rules, Laborers were assigned to operate buggies by their foreman (R. 483), and other construction trades did not perform other trades' work (R. 484).

Grieco testified that the person operating the concrete buggy at the time of the incident was an Operating Engineer, *not* a Laborer (R. 522).

Grieco averred that the Port Authority did not own or operate any concrete buggies at the WTC construction site, including the concrete buggy involved in the incident, and that the buggies on the project were owned and operated by the contractors and/or subcontractors (R. 662). Before October 24, 2014, Grieco was unaware of any circumstances or incidents where an untrained or non-designated worker operated a concrete buggy at the WTC construction site, and on October 24, 2014, the Port Authority did not have prior notice that Jimmy ("Jimmy" or "Melvin") was operating a concrete buggy, nor that Melvin was untrained and not designated to operate the concrete buggy (R. 662).

Moreover, the Port Authority did not supervise, instruct or direct any construction workers at the WTC construction site (R. 662). The contractors and subcontractors directly controlled and were responsible for their own means and methods of their contracted work, and supervised, instructed, and directed their own workers without involvement by the Port Authority (R. 663).

Melvin, the actual tortfeasor who caused Plaintiff's incident, was working at the WTC construction site for Skanska as an Operating Engineer (R. 591-592, 594).

On the date of the incident, Melvin was assigned as an "oiler on a crane" at the Oculus project on the job site (R. 616). The incident, however, occurred on a different part of the job site as Melvin testified that the incident happened at the WTC Transportation Hub, at "Fulton Street, around that area" (R. 591, 594). Melvin testified that he was passing by Plaintiff's work area while "walking over there [to his Supervisor, Tom Kelly's office] from lunch" (R. 610, 615, 617).

At his deposition, Plaintiff's counsel asked Melvin to read a post-accident statement, which stated: "went to move the concrete buggy because it was in the middle of the road. Buggy was running; brake was pushed down; grabbed handle throttle, squeezed throttle and buggy took off" (R. 610-612, 625). While he signed the bottom of the statement, Melvin specifically testified that the statement was not his handwriting and was not his quote (R. 611).

Melvin testified that he was neither designated nor trained to operate the concrete buggy on the date of the incident (R. 593-594, 612). He admitted that only Laborers were assigned to operate concrete buggies (R. 593). Plaintiff's specific claim that Melvin was "horse playing around" (R. 244) was supported by the fact that Melvin was not supposed to be operating the buggy and the fact that he was fired immediately after the incident (R. 612).

On the date of the incident, Joseph De Rosa was working as a Laborer Foreman for Skanska Granite Skanska ("SGS") in the vicinity of the north side of the WTC Transportation Hub construction site, where Plaintiff's incident occurred (R. 668). De Rosa had instructed Paul Estavio—a Laborer employed with SGS—to move two concrete buggies from the area in the vicinity of Plaintiff's incident (R. 669). De Rosa did not instruct anyone to help Estavio, and specifically, never directed Melvin to operate the concrete buggy (R. 669).

De Rosa attested that Melvin—an Operating Engineer at the Oculus project—was not expected to operate the concrete buggy, and it was not common practice or procedure for an Operating Engineer to operate or move a concrete buggy (R. 669).

Estavio recalled he worked as a Laborer for SGS at the WTC Transportation Hub construction site (R. 671). Estavio was instructed by his foreman—De Rosa—to move two concrete buggies at the WTC construction site (R. 671). He was in the process of moving the concrete buggies when Melvin approached the area and inexplicably "took control of one of the buggies and drove it away" (R. 671).

At no time did Estavio give Melvin permission to take, drive or move the concrete buggy, and he never instructed Melvin to move the concrete buggy (R. 672). He attested that only crew foreman or supervisors designated workers to

operate concrete buggies (R. 671). Estavio was the only person instructed by his foreman to move the concrete buggy, and it was not Melvin's responsibility to move the concrete buggy (R. 671-672).

C. The Supreme Court, New York County's Order and Decision

The Port Authority moved for summary judgment pursuant to CPLR § 3212 dismissing Plaintiff's claims against the Port Authority (R. 26-27). Plaintiff opposed the motion (R. 675-60). At no time did Plaintiff ever move or cross-move for summary judgment. Plaintiff never asked the court for summary relief in his opposition. Plaintiff actually argued that if questions of fact were found in his favor "by a jury… it would entitle plaintiff to prevail at trial." (R. 676). Plaintiff advised the court "it is important to note that *plaintiff is not seeking summary judgment on liability*" under Labor Law § 241(6) (emphasis added) (R. 683).

The Honorable Justice Lynn Kotler dismissed Plaintiff's causes of action except for the Labor Law § 241(6) claim predicated on Industrial Code § 23-9.9(a) (R. 7). Justice Kotler dismissed Plaintiff's Labor Law § 200 claim, holding that "[d]efendants have come forward with admissible evidence that Port Authority merely provides general oversight of the construction project. Justice Kotler also dismissed Plaintiff's Labor Law § 241(6) claim based on all Industrial Codes

sections other than § 23-9.9(a) as they were either insufficiently specific to support a Labor Law § 241(6) claim or were abandoned by Plaintiff (R. 6-7).

Although the Supreme Court disagreed with the Port Authority's argument that Industrial Code § 23-9.9(a) was too general, Justice Kotler provided no legal justification to support of this contention aside from citing *Scott* (96 A.D.3d 520) where the Appellate Division found that 12 NYCRR § 23-9.2(b)(1), an Industrial Code provision containing almost identical language to that in § 23-9.9(a), was only a mere general safety standard that is insufficiently specific to give rise to a non-delegable duty under Labor Law § 241(6) (R. 7). The Supreme Court ultimately denied the Port Authority's motion for summary judgment on § 241(6) claim based on § 23-9.9(a) because it found there was an issue of fact as to whether Plaintiff was acting to further his employer's interest when he moved the buggy and struck Plaintiff (R. 7). The court found questions existed as to whether Melvin was merely "horsing around" as stated by Plaintiff or moving the buggy because it was in the middle of the road as Melvin testified (R. 7).

D. The Appellate Division, First Department's decision that ignored precedent and awarded relief to Plaintiff despite the fact he never requested this relief.

Both sides appealed to the Appellate Division, First Department (R. 998). The Appellate Division, with two Justices dissenting, modified, on the law, and

upon a search of the record, the Supreme Court's order to grant Plaintiff summary judgment as to liability on his Labor Law § 241(6) claim predicated on Industrial Code § 23-9.9(a) (R. 1012). Initially, the majority agreed with the dissent that regulation's requirement that a "trained and competent operator" operate the buggy was "general" and lacked "a specific requirement or standard of conduct." (R. 1003). The majority then parsed the provision, relying on the term "designated person" and ignoring all other language, to conclude that § 23-9.9(a) was specific (R. 1003). The majority then resolved all issues of fact in favor of Plaintiff—the party that never moved or requested affirmative relief—and awarded him summary judgment on the issue of liability (R. 1005).

In his comprehensive dissent, Justice Tom (joined by Justice Kahn) noted that "the Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-9.9 (a) is untenable under the facts of this case" (R. 1006). Thus, the dissent "conclude[d] that the [Port Authority] is entitled to summary judgment dismissing the claim under Labor Law § 241(6) insofar as it is predicated on 12 NYCRR 23-9.9(a) (R. 1012). The dissent relied upon the First Department's prior precedent in *Scott v. Westmore Fuel Co., Inc.*, 96 A.D.3d 520 (1st Dept 2012), where it found that "12 NYCRR 23-9.2 (b) (1), which, in almost identical language to that in § 23-9.9(a), requires that '[a]ll power-operated equipment used in construction . . .

operations shall be operated only by trained, designated persons,' was only a 'mere general safety standard that is insufficiently specific to give rise to a non-delegable duty under [Labor Law § 241 (6)],' a characterization that applies also to § 23-9.9 (a)." (R. 1007). In following the court's precedent, the dissent concluded that § 23-9.9(a) was "insufficiently specific to support a claim under Labor Law § 241(6)." (R. 1007). The dissent pointed out that the majority relied "on the phrase *that we have already found to lack specificity, and is ignoring the remainder of the regulatory language, which is also non-actionable*." (R. 1007) (emphasis added). The dissent criticized the majority for parsing the regulation, and not considering it as a whole, to reach its conclusion that the provision was sufficiently specific (R. 1007).

It took issue with the majority's resolution of all issues of facts in Plaintiff's favor in awarding him summary judgment. 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 that there was no "basis for concluding that [Melvin] could have been acting under the direction of the [Port Authority]." (R. 1009). Rather, the record proved that while Melvin was without authorization to operate the buggy, it did "not follow" that "if no one was designated, so that the

owner faces liability on that basis. Such a conclusion is not logically supported by the regulatory language with respect to Labor Law 241(6) liability." (R. 1009). The dissent cautioned that imposing liability under these circumstances "would potentially expose a defendant to liability any time 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. Under the majority's holding, a defendant would be exposed 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)." (emphasis added) (R. 1009).

On September 26, 2019, the Appellate Division, First Department granted the Port Authority leave to appeal to this Court, certifying the question: "Was the order of this Court, which modified, the order of the Supreme Court, to grant plaintiff summary judgment as to liability on the Labor Law § 241 (6) claim insofar as it is predicated on 12 NYCRR 23-9.9 (a) as against defendant Port Authority of New York and New Jersey, properly made." (R. 1013-1014).

ARGUMENT

I. This Court should reverse the Appellate Division, First Department's Decision and Order Granting Plaintiff Summary Judgment as to Liability Under Labor Law § 241(6) Predicated on Industrial Code § 23-9.9(a) Because This Provision is Insufficiently Specific to Support a § 241(6) Claim

Labor Law § 241(6) imposes a duty upon owners, contractors and their agents "to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-502 (1993).

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable." *Misicki v. Caradonna,* 12 N.Y.3d 511, 515 (2009). In addition, "[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles." *Id.* citing *Ross,* 81 N.Y.2d at 504-505. Therefore, in order to prevail on a Labor Law § 241(6) claim, "a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct" (*see Ortega v. Everest Realty LLC*, 84 A.D.3d 542, 544 [1st Dept 2001]), and that the violation was a proximate cause

of the injury. *See Egan v. Monadnock Constr., Inc.*, 43 A.D.3d 692, 694 (1st Dept 2007), *lv denied*, 10 N.Y.2d 706, 886 (2008).

If a plaintiff does not allege violations of applicable and specific regulations under § 241(6) that are "concrete specifications sufficient to impose a duty on the defendant," the defendant's motion for summary judgment must be granted. *Narrow v. Crane-Hogan Structural Sys.*, 202 A.D.2d 841, 842-843 (3d Dept 1994); *see also Stairs v State St. Assoc.*, 206 A.D.2d 817, 818 (3d Dept 1994).

Here, Plaintiff relies solely upon 12 NYCRR § 23-9.9(a). Before this case, there was no case law interpreting or addressing this provision as a predicate for liability under § 241(6). The Port Authority respectfully submits that the Appellate Division, First Department's majority erred in ruling that § 23-9.9(a) is sufficiently specific to support such a claim because similarly, if not almost identically, worded Industrial Code provisions have been found to be too general to support such a claim.

The Appellate Division, First Department considered a similar provision in *Scott v. Westmore Fuel Co., Inc.*, 96 A.D.3d 520 (1st Dept 2012). In *Scott*, a ruling the majority ignored, the First Department found that 12 NYCRR § 23-9.2(b)(1), which pertains to power-operated equipment, "is a mere general safety standard that is insufficiently specific to give rise to a nondelegable duty under [Labor Law

§ 241(6)])." Similar to the Code provision here, § 23-9.2(b)(1)—entitled, "Operation"—provides "All power-operated equipment used in construction, demolition or excavation operations shall be operated only by trained, designated persons and all such equipment shall be operated in a safe manner at all times." A side-by-side analysis of these two provisions bolsters the dissent's conclusion that they have "almost identical language":

12 NYCRR § 23-9.9(a), entitled "Assigned operator," states: "*No person other than a trained and competent operator designated by the employer shall operate a power buggy*."	12 NYCRR § 23-9.2(b)(1), entitled "Operation," states: "*All power-operated equipment used in construction, demolition or excavation operations shall be operated only by trained, designated persons* and all such equipment shall be operated in a safe manner at all times."

(emphasis added).

While the First Department's majority jettisoned its precedent in *Scott*, in ruling that § 23-9.9(a) was sufficiently specific to support a Labor Law § 241(6) claim, it concluded that it had held that "similarly worded provisions of the Industrial Code are sufficiently specific" and cited to three decisions that interpreted Code provisions that used the term "designated person." (R. 1001). The majority's cases, however, never explicitly addressed the issue of specificity

with respect to the cited Code provisions, and certainly do not address 12 NYCRR § 23-9.9(a). In *Medina v 42nd & 10th Assoc., LLC,* 129 A.D.3d 610 (1st Dept 2015), plaintiff "had to" place the scaffold over the sidewalk bridge to reach the windows so that he could complete his job. Leaning at an extreme angle against the sidewalk bridge, the scaffold collapsed and plaintiff fell. *Medina* concerned issues of fact regarding whether a designated person was supervising, and the Appellate Division denied plaintiff summary judgment based upon 12 NYCRR §§ 23-5.1(h) and 23-5.8(c)(1). Melvin was not a designated person.

Sawicki v AGA 15th St., LLC, 143 A.D.3d 549 (1st Dept 2016) involved a case where a Bobcat backed up and ran over his left foot. The First Department dismissed plaintiff's § 241(6) claim that was based on 12 NYCRR § 23-9.5(c) because the operator was designated by the employer to operate the machine. This did not address the facts here where Melvin was never designated by anyone to operate the buggy. Indeed, union rules barred him from operating it.

Finally, *Batista v Manhattanville Coll.*, 138 A.D.3d 572 (1st Dept 2016), *mod on other grounds*, 28 N.Y.3d 1093 (2016) does not support the First Department's majority's conclusion. In *Batista*, the First Department refused to dismiss plaintiff's § 241(6) claim based upon 12 NYCRR 23-5.1(e), (g), and (h). This Court granted plaintiff summary judgment under Labor Law § 240(1) on the

ground that the defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries. This was wholly unrelated to his § 241(6) claim. The sole question to be addressed by this Court concerned § 240(1), which this Court "answered in the negative." Thus, *Batista* provides no further clarification of the fact in regard to § 241(6). As the dissent noted, it was inappropriate to imply from this Court's ruling that it concerned § 241(6), in general, and the particular factual context that a qualified designated person had previously moved the buggy to a proper location, and no one, certainly not Melvin, was authorized to move it again at that time and place.

Respectfully, the decisions relied on by the majority, which do not explicitly address the issue of specificity with respect to the Industrial Code provisions cited in those cases and do not address § 23-9.9(a). Indeed, when courts have considered Industrial Code provisions with language similar to § 23-9.9(a), *when viewed as a whole*, they have been found to contain only a mere general safety standard that is insufficiently specific to give rise to a nondelegable duty under Labor Law § 241(6). *See, e.g., Wade v. Bovis Lend Lease LMB, Inc.*, 102 A.D.3d 476, 477 (1st Dept 2013) (12 NYCRR § 23-7.1 requiring that "[o]nly trained, designated persons shall operate personnel hoists and such hoists shall be operated in a safe manner at all times" held "not sufficiently specific to support [Labor Law § 241(6)] claim."");

Robles v. Taconic Mgt. Co., LLC, 173 A.D.3d 1089, 1091-1092 (2d Dept 2019) (same); *Wilke v. Communications Const. Group, Inc.*, 274 A.D.2d 473, 474 (2d Dept 2000) (§ 23-9.6(c) requiring that aerial basket truck drivers and aerial basket operators shall be competent designated persons who have been trained in the operation and use of such equipment "sets forth only 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)."); *Berg v Albany Ladder Co., Inc.*, 40 A.D.3d 1282, 1285 (3d Dept 2007), *affd* 10 N.Y.3d 902 (2008) (§ 23-9.2 (b)(1) requiring power operated equipment to be "operated only by trained, designated persons and all such equipment shall be operated in a safe manner at all times" held to be "no more than a restatement of common-law requirements and [] insufficient to establish a nondelegable duty under Labor Law § 241(6)"); *Bruno v. Mall 1-Bay Plaza, LLC*, 2019 N.Y. Misc. LEXIS 6350, *17 (Sup. Ct., New York County, Nov. 26, 2019) ("Since section 23-7.3(e), merely requires that the Elevator 'shall be operated only by competent, trained, designated persons' it is only a general restatement of a common-law requirement. As such, section 23-7.3(e) is insufficient to establish a duty under Labor Law § 241(6).").

Critically, the First Department's majority erred by not considering the language of § 23-9.9(a) as a whole. McKinney's Statutes § 97 ("A statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislator's intent."). Rather, the majority erroneously parsed the provision and focused exclusively on the term "designated person," despite the fact that it "agree[s] with the dissent that the regulation's requirement that a 'trained and competent operator . . . shall' operate the power buggy is general as it lacks a specific requirement or standard of conduct" (R. 1001-1003). Thus, the majority acknowledged the *Scott* ruling where it had analyzed similar language and ruled it lacked specificity. But the majority impermissibly and inexplicably ignored this language that has already been found to be non-actionable.

Section 23-9.9(a) has one plain, general requirement—that the operator of a power buggy be "trained and competent" and designated by the employer. This general requirement has been held to be insufficient impose liability in the operation of aerial lifts, elevators, and "power operated equipment in construction, demolition or excavation operations." It must equally be insufficient to impose liability for power buggies. Thus, in order for litigants in this State to have consistency in the application of these provisions, this Court should conclude that §

23-9.9(a) does not set out a specific safety rule that requires promulgation by the Commissioner of the Department of Labor. The Port Authority respectfully submits this Court should hold that Industrial Code § 23-9.9(a) sets forth only general safety expectations and asks this Court to reverse and grant its summary-judgment motion, dismissing Plaintiff's Labor Law § 241(6) claim predicated on that section.

II. In the Alternative, No Statutory Violation Proximately Caused this Unforeseeable Incident for Which the Port Authority Should Be Vicariously Liable Under Labor Law § 241(6)

Even if this Court concluded that § 23-9.9(a) is sufficiently specific to support a Labor Law § 241(6) claim, which is strenuously disputed, the Port Authority should not be held vicariously liable for the unforeseeable horseplay of a non-party tortfeasor—Melvin—that the Port Authority had no notice of and could not control. Melvin's horseplay was a superseding cause that broke any connection to an alleged Labor Law § 241(6) violation.

For almost 90 years, this Court has instructed litigants that foreseeability is not found "(l)ooking back at the mishap with the wisdom born of the event." *Greene v. Sibley, Lindsay & Curr Co.*, 257 N.Y. 190, 192 (1931). And this Court has recognized that the concept of foreseeability is an integral element in analyzing potential liability under New York's Labor Law governing construction site

accidents. In *Gordon v. Eastern Railway Supply, Inc.*, 82 N.Y.2d 555, 562 (1993), which is one of this Court's seminal decisions concerning the scope of Labor Law § 240, it was stated that "[d]efendants are liable for all normal and *foreseeable* consequences of their acts." (emphasis supplied).

While Plaintiff may bemoan the Port Authority's raising of foreseeability, this Court has held that 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, 349-350 (1998) (emphasis added); *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 521-522 (1985) (same); *Couillard*, *supra* (A "violation of Labor Law § 241(6) and a regulation under it does not warrant summary judgment and an owner or general contractor 'may ... raise any valid defense ... including contributory and comparative negligence.'").

Indeed, our adversary, a regular and respected contributor to the New York Law Journal, has written on this topic in that publication. *See*, "*Considering Foreseeability in Shaping Liability Under Labor Law*" Shoot, Brian J., N.Y.L.J., October 16, 2012. There, counsel opined that "(i)n my view, irrespective of whether Labor Law § 240 liability is now to be conditioned upon foreseeability of the subject accident, any reliance on *Gordon* as generally supporting a

foreseeability argument is misplaced." In order to accept our adversary's hypothesis, however, one would have to assume that this Court's words in *Gordon* were superfluous, or that this Court did not mean what it said. We simply cannot accept such an untenable proposition as it ultimately results in defendants being required to have "(e)xtraordinary prevision" in order to avoid incident, which this Court has long rejected. *Greene*, *supra*, 257 N.Y. at 192.

In *Gordon*, this Court held that "an independent intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendant's conduct that responsibility for the injury should not reasonably be attributed to them." *Id.*, 82 N.Y.2d at 561-62, *citing*, *inter alia*, *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308 (1980). There, this Court held, "[t]here are certain instances, to be sure, where only one conclusion may be drawn from the established facts and where the legal cause may be decided as a matter of law." *Id.*, 51 N.Y.2d at 315.

The Port Authority submits that this is such a case. Both the Appellate Division majority and dissenting opinions characterized the underlying accident as being the product of "horse playing" on the part of Melvin, for which Melvin apologized to Plaintiff. Melvin was immediately terminated based upon his unforeseeable and inexplicable actions. No liability should be imposed on the Port

Authority for such unforeseeable conduct. If this Court should affirm, however, this will convert Port Authority, and all owners in this State, into an insurer of the safety of workers on the jobsite. This Court has repeatedly cautioned against such a result. *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."); and *Sanatass v. Consolidated Investing Co., Inc.*, 10 N.Y.3d 333 (2008).

In this respect, this Court's decision in *Ventricelli v. Kinney System Rent A Car, Inc.*, 45 N.Y.2d 950 (1978) is also instructive. In writing about the intertwined concepts of proximate cause and foreseeability, this Court held, "[w]hat we do mean by the word 'proximate' is, that because of convenience, of *public policy*, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *Id.*, 45 N.Y.2d at 952 (emphasis supplied) (citation omitted). The Port Authority submits that Justice Tom's well-reasoned dissent falls squarely within the foregoing parameters: "To impose liability under these circumstances and on these facts . . . would potentially expose a defendant to liability any time an unauthorized person on his own initiative or even a trespasser moved such an item of equipment and caused injuries. ..."

Melvin's reckless and irresponsible actions, which resulted in his immediate termination, were unforeseeable as a matter of law. The record was devoid of any evidence that horseplay was a common occurrence on this worksite or that it had *ever* occurred. Nor was there proof that there was a "lull" in the work. Indeed, Plaintiff was actively engaged in his work. Thus, the First Department's majority's reliance upon *Christey v. Geylon*, 88 A.D.2d 769 (4th Dep't 1982) fails. In *Christey*, plaintiff and codefendant were coworkers, and the issue was whether the defendant's affirmative defense that the complaint was barred by the Workers' Compensation Law. According to the Fourth Department, before "the incident the two men had been engaging in 'horseplay', a *common practice on the job and one condoned by the employer*." (emphasis added). An issue existed as plaintiff claimed the horseplay had terminated at the time of the assault, but the defendant submitted evidence that it had not. *Id.*, 88 A.D.2d at 770. The incident in this case did not occur during a lull in the work, and horseplay was never condoned on the worksite. Indeed, *Christey* held that if the incident occurred after horseplay concluded or was excessive, it would be outside the scope of employment. *Id.*

"[T]he doctrine of Respondeat superior renders a master vicariously liable for a tort committed by his servant while acting within the scope of his employment." *Riviello v. Waldron,* 47 N.Y.2d 297, 302 (1979). "Pursuant to this

doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment. If, however, an employee 'for purposes of his own departs from the line of his duty so that for the time being his acts constitute an abandonment of his service, the master is not liable'." *Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932, 933 (1999); *N.X. v. Cabrini Med. Ctr.*, 97 N.Y.2d 247, 251 (2002) (An "employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment."); *Adams v. New York City Transit Auth.*, 211 A.D.2d 285, 294 (1st Dept 1995) ("[i]n order for [vicarious liability under the doctrine of respondeat superior] to attach, the tortious act must have in some way been effectuated to advance the employer's interest. Liability will not attach, however, where the acts are outside the general scope of the employment or are done with a purpose foreign to the interests of the employer."); *Schilt v. New York City Transit Auth.*, 304 A.D.2d 189, 193 (1st Dept 2003) ("Regardless of the manner in which the rule is phrased, however, 'an employee's actions are not within the scope of employment unless the purpose in performing such actions is to further the employer's interest, or to carry out duties incumbent upon the employee in furthering the employer's business.").

While questions of whether an employee's actions fall within the scope of his employment are ordinarily questions of fact for a jury, "where there are no disputed facts and there is no question that the employee's acts fall outside the scope of his employment, as here, the determination becomes one of law for the court and not one of fact for the jury." *Nicollette T. v. Hosp. for Joint Diseases/Orthopaedic Institute*, 198 A.D.2d 54 (1st Dept 1993). Here, a competent and trained laborer was designated by the Port Authority's contractor to operate the concrete buggy on the day of Plaintiff's 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). 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. While Melvin was a person who was not, or would be, designated to move the buggy, the dissent correctly noted that this "misses the point that Melvin was an interloper rather than an improperly designated operator." (R. 1008).

Melvin was not acting under the Port Authority's direction or at the behest of any entity. Rather, the undisputed evidence showed Melvin had no authority to operate the buggy. While § 23-9.9(a) requires someone is authorized to move the buggy be "designated," this does not equate to the conclusion that "if no one was authorized to move the buggy, a fortiori no one was designated, so that the owner faces liability on that basis. Such a conclusion is not logically supported by the regulatory language with respect to Labor Law § 241(6) liability." (R. 1008-09). The Port Authority submits that imposing liability under these facts exposes it, and every owner in this State, "to liability any time 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. Under the majority's holding, a defendant would be exposed 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." (R. 1008-09).

There is no evidence in the record to suggest that Melvin's unforeseeable actions could have been in the furtherance of his employer's interest because the employer had no idea he would move the concrete buggy as that was not part of his normal work duties. Indeed, Union rules barred him from operating the buggy. The

motion court correctly found that there was no dispute Melvin "had not been instructed by his employer" to move the concrete buggy (R. 4). 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. 211-213, 355-356), 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). Thus, at the time of the incident, Melvin had no work assignment, he was in a completely different area from his work site, he engaged in a task that he admittedly was never supposed to perform, and his actions were a significant departure from his own normal work duties or assignments.

In addition, 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 and work duties to operate a concrete buggy that already had a trained and designated Laborer assigned to operate it.

As a result, Melvin's act of moving the concrete buggy cannot be considered advancing or furthering the interests of his employer as it was clearly "outside the general scope of his employment." *Schilt*, 304 A.D.2d at 193; *Adams*, 211 A.D.2d at 294. Further, Plaintiff specifically testified that Melvin was engaging in horseplay, and that Melvin immediately admitted after the incident that he was "horse playing around" (R. 218, 224-225, 244). Indeed, the majority and dissent reached the same conclusion that Melvin was engaged in horseplay at the time of the incident. Plaintiff's claim that Melvin was horse playing is further supported by the fact that Melvin was not supposed to be operating the buggy and that he was fired immediately after the incident (R. 612). The horseplay by Melvin 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, Gordon, supra* 82 N.Y.2d at 562 ("An independent intervening act may constitute a superseding cause, and be sufficient

to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them."); *Hajderlli v. Wiljohn 59 LLC*, 71 A.D.3d 416, 416-417 (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.

III. Even if it is Found that Industrial Code § 23-9.9(a) Was Violated, Such Violation Would Only be Some Evidence of Negligence

Even if the Court finds that Industrial Code § 23-9.9(a) is sufficiently specific and was violated, and that the Port Authority can be held vicariously liable for Melvin's horseplay of moving the concrete buggy causing Plaintiff's accident,

Labor Law § 241(6) is "merely some evidence which the jury may consider on the question of defendant's negligence," and 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*, *supra* 91 N.Y.2d at 349-350.

It is not enough simply for the provision to have been violated. Rather, the inquiry is whether defendant's conduct was reasonable and adequate under the particular circumstances. *Id.* at 351; *see also Bland v. Manocherian*, 66 N.Y.2d 452, 460 (1985) ("a violation of Labor Law § 241(6) does not constitute negligence as a matter of law resulting in absolute liability."). In *Rizzuto*, this Court noted that Labor Law § 241(6) liability is triggered by a violation of an administrative regulation as opposed to an explicit provision of a statute proper:

> While the latter gives rise to absolute liability without regard to whether the failure to observe special statutory precautions was caused by the fault or negligence of any particular individual, the former is "simply some evidence of negligence which the jury could take into consideration with all the other evidence bearing on that subject."

Rizzuto, 91 N.Y.2d at 349, citing *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 298 (1978). Accordingly, this Court noted the "long and firmly established" principle that: "[a] violation of section 241(6) is merely some evidence which the

jury may consider on the question of the defendant's negligence." *Rizzuto*, 91 N.Y.2d at 349, citing *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 160 (1982).

This Court concluded:

> [A] violation of 12 NYCRR 23-1.7(d), while not conclusive on the question of negligence, would thus constitute some evidence of negligence and thereby reserve, for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances.

Rizzuto, 91 N.Y.2d at 351; *see also Belcastro v. Hewlett-Woodmere Union Free Sch. Dist.*, 286 A.D.2d 744, 746 (2d Dept 2001); *Seaman v. Bellmore Fire Dist.*, 59 A.D.3d 515, 516 (2d Dept 2009).

Here, even if this Court were to find a violation of Industrial Code § 23-9.9(a) caused Plaintiff's accident, a jury still must consider whether the operation and conduct at the worksite was reasonable and adequate under the particular circumstances, and whether the Plaintiff's worksite was reasonably safe under the circumstances. Plaintiff, however, has not proven, as is his burden, that whatever happened constitutes a failure to use reasonable care on the part of the Port Authority and that the alleged failure to use reasonable care was a substantial factor causing Plaintiff's injuries. Indeed, Plaintiff never attempted to satisfy his

burden because he never moved for summary judgment and acknowledged to the Supreme Court that he was not demanding this relief.

Critically, Plaintiff not only failed to satisfy his burden of proof entitling him to the extraordinary remedy of summary relief, when the First Department's majority considered the facts, it did so giving *Plaintiff* the benefit of every inference. This violates this Court's precedent that in deciding summary-judgment motions, courts will draw all reasonable inferences in favor of the opposition. *See*, *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012). While the First Department's majority held that "horse playing" should be deemed to have occurred within the scope of employment (R. 1004), the dissent correctly noted that "the [single] case cited by the majority for that proposition is a worker's compensation case, a legal context that also is inapplicable to this case" (R. 1010).

Aside from being an inapplicable worker's compensation case, *Christy*, which the majority cited for its contention that horseplay may be deemed to have occurred within the scope of employment, held that horseplay may be deemed "outside the scope of [] employment because the [employee's] conduct was excessive or occurred after the horseplay had terminated." *Id.* at 770. In fact, the Supreme Court actually found an issue of fact as to whether Melvin was engaged in horseplay or acting to further his employer's interests at the time of the incident.

Thus, at the very least, there is an issue of fact concerning whether Melvin was acting to further his employer's interests at the time of the incident that precludes summary judgment in Plaintiff's favor on the Labor Law § 241(6) claim predicated on Industrial Code § 23-9.9(a). *See*, *Christy*, *supra*, 88 A.D.2d at 770 ("The motion papers here present a question of fact as to whether the acts sued upon occurred during the course of defendants' employment and thus foreclose plaintiff's common-law action.").

Thus, even if there were a violation of § 241(6), which is expressly denied, the Port Authority would still be entitled to a liability trial before a determination of damages to determine whether the alleged violation was the result of and constituted a failure to use reasonable care. *Seamon*, *supra* 59 A.D.2d at 516.

CONCLUSION

The Port Authority submits that two grounds support the dismissal of Plaintiff's Labor Law § 241(6) claim based upon 12 NYCRR § 23-9.9(a). First, § 23-9.9(a) is not sufficiently specific to support a § 241(6) cause of action. The provision requires that only a "trained and competent operator designated by the employer shall operate a power buggy." The First Department's majority abandoned precedent that had found this language lacked specificity, and this Court should reverse. Second, even if this Court rules § 23-9.9(a) was sufficiently specific, the incident was unforeseeable as a matter of law. The majority and dissent concluded that the buggy struck after Melvin inexplicably engaged in horseplay and decided to operate the concrete buggy. This was against Union rules and outside the scope of his employment. Finally, in the alternative, should this Court not dismiss, the Port Authority asks this Court to reverse and deny Plaintiff summary judgment on liability under § 241(6), relief that he admitted he never requested and acknowledged was improper based upon questions of fact.

Dated: New York, New York
January 23, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to section 500.13(c)(1) of the Rules of the Court of Appeals, I certify the word count of this brief is 8,198. The word count applies only to the body of the brief and is exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by subsection 500.1(h) of this Part.

Dated: New York, New York
January 23, 2020