To Be Argued By:
BRIAN J. SHOOT
Time Requested: 30 Minutes

APL-2019-00198

New York County Clerk's Index No. 155016/15

Court of Appeals

STATE OF NEW YORK

CURBY TOUSSAINT,

Plaintiff-Respondent,

against

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant-Appellant,

and

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

Defendants.

BRIEF FOR PLAINTIFF-RESPONDENT

SULLIVAN PAPAIN BLOCK MCGRATH
COFFINAS & CANNAVO P.C.
120 Broadway, 18th Floor
New York, New York 10271
212-732-9000
bshoot@triallaw1.com

Appellate Counsel to:

LAW OFFICE OF CLIFFORD J. STERN
2 Park Avenue, 19th Floor
New York, New York 10016
212-813-1515
cstern@cjslawfirm.com

Attorneys for Plaintiff-Respondent

Of Counsel:

BRIAN J. SHOOT

Date Completed: March 5, 2020

Table Of Contents

Preliminary Statement 1

Questions Presented 6

Statement Of Facts 9

The Parties 9

The Facts Upon Which All Witnesses Agree: That Plaintiff Was Struck By A Power Buggy Driven By James Melvin, A Site Worker Who Was Not Authorized Or Trained To Drive It 9

Plaintiff's Testimony Concerning The Accident: "Pauly" And "Jimmy" Were "Joking" And "Talking Crap" Up Until The Accident Itself 10

Melvin's Contemporaneous Statement And Testimony Concerning The Accident: The Buggy Was In The Way And Had To Be Moved 10

The Defendant's Made-For-The-Motion Affidavits 11

The Proceedings Below 14

The Defendants' Motion For Summary Judgment 14

Supreme Court's Ruling 15

The Parties' Respective Appeals To The Appellate Division 16

The Appellate Division Ruling, And The Dissent 16

POINT I

12 NYCRR 23-9.9(a), WHICH EXPRESSLY FORBIDS OPERATION OF POWER BUGGIES BY ANYONE OTHER THAN "A TRAINED AND COMPETENT OPERATOR DESIGNATED BY THE EMPLOYER," IS SUFFICIENTLY SPECIFIC TO CONSTITUTE A PREDICATE FOR LIABILITY UNDER LABOR LAW § 241(6) 19

A. The Specificity Prerequisite Of Labor Law § 241(6) Was Intended To Distinguish Directives That Set Forth Specific "Standards Of Conduct" From Directives That Merely Require "Reasonable And Adequate Protection And Safety," Not To Thwart The Legislature's Goal Of Protecting Construction Workers From The Hazards Of The Workplace 21

B. The Regulation In Issue Plainly Imposed A Very Specific And Very Limited Standard Of Conduct — Which Was Plainly Violated At Bar 26

C. There Are More Than Ten Other Industrial Code Provisions That Prohibit The Performance Of Enumerated Tasks Except By "Trained," "Competent," And/Or "Designated" Persons, The Lower Courts Have Deemed Most Of Those Provisions To Be Valid Labor Law § 241(6) Predicates, And The Few Exceptions Arose From Flawed Analysis 29

1. The More Than Ten Similarly Worded Industrial Code Provisions, And The Lower Court Rulings Concerning Those Provisions 30

2. Appellant's Decidedly Unpersuasive And Also Illogical Efforts To Distinguish The Contrary Authority 36

3. The Case Law On Appellant Principally Relies, And The Flawed Reasoning Which Produced It 40

4. Conclusion 44

POINT II

APPELLANT'S VARIOUS ARGUMENTS AS TO WHY THE SUBJECT REGULATION SHOULD BE DEEMED INAPPLICABLE OR DISREGARDED LACK MERIT 45

POINT III

APPELLANT'S VARIOUS CRITICISMS OF THE APPELLATE DIVISION'S GRANT OF SUMMARY JUDGMENT TO THE PLAINTIFF ARE UNPRESERVED AND THEREBY UNREVIEWABLE, BUT IN ANY EVENT MERITLESS 54

A. The Appellant's Arguments Concerning The Appellate Division's Grant Of Summary Judgment Are Unpreserved And Unreviewable 54

B. The Appellant's Criticisms Of The Appellate Division's Grant Of Summary Judgment — Including Appellant's Erroneous Statement That The Appellate Division Resolved "All Issues Of Fact In Plaintiff's Favor" — Lack Merit 56

C. The Appellate Division Correctly Granted Plaintiff Summary Judgment Since, Under Any View Of The Facts, The Site Contractor Negligently Violated A "Concrete" Requirement Of Industrial Code 23 And Such Violation Was A Proximate Cause Of The Subject Accident 59

Conclusion 62

Table Of Authorities

Table Of Cases

Abelleira v City of New York,
120 AD3d 1163 [2d Dept 2014] 33

Adams v New York City Tr. Auth.,
211 AD2d 285 [1st Dept 1995] 51

Allen v Cloutier Const. Corp.,
44 NY2d 290 [1978] 52, 53

Allington v Templeton Found.,
167 AD3d 1437 [4th Dept 2018] 58

Andre v Pomeroy,
35 NY2d 361 [1974] 58

Arbusto v Bank St. Commons, LLC
[N.Y. Sup Ct, Bronx County 2011] 32

Batista v Manhattanville Coll.,
138 AD3d 572 [1st Dept 2016], *mod. on another ground*, 28 NY3d 1093 [2016] 31

Bennett v St. John's Home,
26 NY3d 1033 [2015] 55, 56

Berg v Albany Ladder Co., Inc.,
40 AD3d 1282 [3d Dept 2007], *aff'd* 10 NY3d 902 [2008] 33, 41

Bland v Manocherian,
66 NY2d 452 [1985] 22

Burns v Merritt Eng'g,
302 NY 131 [1951] 49

Conte v Large Scale Dev. Corp.,
10 NY2d 20 [1961] 22

Cunha v Crossroads II,
131 AD3d 440 [2d Dept 2015] 34

De Wald v Seidenberg,
297 NY 335 [1948] 49

Derdiarian v Felix Contr. Corp.,
51 NY2d 308 [1980] 4, 47, 48

Dunham v Hilco Const. Co., Inc.,
89 NY2d 425 [1996] 55

Elliott v. City of New York,
95 NY2d 730 [2001] 57

Eujoy Realty Corp. v Van Wagner Communications, LLC,
22 NY3d 413 [2013] 55

Ferguson v. Durst Pyramid, LLC,
178 AD3d 634 [1st Dept 2019] 58

Fisher v WNY Bus Parts, Inc.,
12 AD3d 1138 [4th Dept 2004] 33

Galeto v 147 Flatbush Ave. Prop. Owner, LLC,
34 Misc 3d 1205(A) [Sup Ct 2012] 31

Gonnerman v Huddleston,
78 AD3d 993 [2d Dept 2010] 30

Gonzalez v Perkan Concrete Corp.,
110 AD3d 955 [2d Dept 2013] 33

Gordon v E. Ry. Supply, Inc.,
82 NY2d 555 [1993] 48n

Guallpa v Canarsie Plaza, LLC,
144 AD3d 1088 [2d Dept 2016] 33

Haynes v Boricua Vil. Hous. Dev. Fund Co., Inc.,
170 AD3d 509 [1st Dept 2019] 58

Healy v Rennert,
9 NY2d 202 [1961] 57

Hecker v State,
20 NY3d 1087 [2013] 55

Howell v Karl Koch Erecting Corp.,
192 Misc 2d 491 [Sup Ct 2002] 32

Hricus v Aurora Contractors, Inc.,
63 AD3d 1004 [2d Dept 2009] 33, 42

Juarez by Juarez v Wavecrest Mgt. Team Ltd.,
88 NY2d 628 [1996] 58

Judith M. v Sisters of Charity Hosp.,
93 NY2d 932 [1999] 51

Long v Forest-Fehlhaber,
55 NY2d 154 [1982] 22

Lubrano v Malinet,
65 NY2d 616 [1985] 49

Luciano v New York City Hous. Auth.,
157 AD3d 617 [1st Dept 2018] 59

Matz v Lab. Inst. of Merchandising (LIT),
27 Misc 3d 1220(A) [Sup Ct 2010] 31

McGuinness v Hertz Corp.,
15 AD3d 160 [1st Dept 2005] 30

Medina v 42nd and 10th Assoc., LLC,
129 AD3d 610 [1st Dept 2015] 31

Merritt Hill Vineyards Inc. v Windy Hgts. Vineyard, Inc.,
61 NY2d 106 [1984] 55

Misicki v Caradonna,
12 NY3d 511 [2009] 24, 25, 39, 44

Morris v Pavarini Const.,
22 NY3d 668 [2014] 21

N.X. v Cabrini Med. Ctr.,
97 NY2d 247 [2002] 51

Nicola v United Veterans Mut. Hous. No. 2, Corp.,
178 AD3d 937 [2d Dept 2019] 33

Ortega v R.C. Diocese of Brooklyn,
178 AD3d 940 [2d Dept 2019] 58

Quizhpi v S. Queens Boys & Girls Club, Inc.,
166 AD3d 683 [2d Dept 2018] 58

Ramos v Jake Realty Co.,
21 AD3d 744 [1st Dept 2005] 49

Rich v 125 W. 31st St. Assoc., LLC,
92 AD3d 433 [1st Dept 2012] 32

Riviello v Waldron,
47 NY2d 297 [1979] 50

Rizzuto v L.A. Wenger Contr. Co., Inc.,
91 NY2d 343 [1998] 4, 6, 23, 44, 46, 52

Robles v Taconic Mgt. Co., LLC,
173 AD3d 1089 [2d Dept 2019] 32, 33, 43

Ross v Curtis-Palmer Hydro-Electric Co.,
81 NY2d 494 [1993] 17, 22, 26

Sanchez v State of New York,
99 NY2d 247 [2002] 46

Sawczyszyn v New York Univ.,
158 AD3d 510 [1st Dept 2018] 58

Sawicki v AGA 15th St., LLC,
143 AD3d 549 [1st Dept 2016] 37

Schilt v New York City Tr. Auth.,
304 AD2d 189 [1st Dept 2003] 51

Scott v Westmore Fuel Co., Inc.,
96 AD3d 520 [1st Dept 2012] 17, 33, 34, 37

St. Louis v Town of N. Elba,
16 NY3d 411 [2011] 4, 6, 21, 25, 28, 46

Toussaint v Port Auth. of New York and New Jersey,
174 AD3d 42 [1st Dept 2019] 16, 57

U.S. Bank National Association v. DLJ Mrge Capital, Inc.,
33 NY3d 84 [2019] 55

Vasquez v Urbahn Assoc. Inc.,
79 AD3d 493 [1st Dept 2010] 31

Wade v Bovis Lend Lease LMB, Inc.,
102 AD3d 476 [1st Dept 2013] 32, 43

Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.,
18 NY3d 1 [2011] 26n, 29

Wilke v Communications Const. Group, Inc.,
274 AD2d 473 [2d Dept 2000] 34

Wolodin v Lehr Constr. Corp.,
177 AD3d 496 [1st Dept 2019] 58

Young Bai Choi v D & D Novelties, Inc.,
157 AD2d 777 [2d Dept 1990] 49

Statutes And Other Authorities

12 NYCRR 23-1.7(d) 23

12 NYCRR 23-1.7(b)(17) 27n

12 NYCRR 23-1.7(b)(40) 27n

12 NYCRR 23-1.25(d) 22

12 NYCRR 23-1.29(a) 30, 35

12 NYCRR 23-3.3(c) 26n, 30, 35

12 NYCRR 23-5.1(h) 31, 35, 38

12 NYCRR 23-5.8(c)(1) 31, 35

12 NYCRR 23-6.1(c)(1) 31, 35

12 NYCRR 23-7.1 43

12 NYCRR 23-7.1(c) 31, 35, 40, 43

12 NYCRR 23-7.2(b)(3) 35n

12 NYCRR 23-7.2(j)(4) 32, 35

12 NYCRR 23-8.1(b)(1) 32

12 NCYRR 23-8.1(b)(4) 35, 35n

12 NYCRR 23-9.2(a) 24, 35n, 44

12 NYCRR 23-9.2(b)(1) 27, 33, 33n, 34, 35, 40, 41, 42, 43

12 NYCRR 23-9.5(a) 35

12 NYCRR 23-9.5(c) 34, 37, 42, 47

12 NYCRR 23-9.6(c)(1) 34, 35, 47

12 NYCRR 23-9.9(a) ....*passim*

12 NYCRR 23-9.9(c)(1) 39

12 NYCRR 23-9.9(c)(2) 39

12 NYCRR 23-9.9(c)(3) 39

12 NYCRR 23-9.9(d)(2) 39

Berg v Albany Ladder Co., Inc., App. Div. Br. for Third-Party Plaintiff-Respondent, Capital Framing and Construction Corp., 2006 WL 4723778 42

Berg v Albany Ladder Co., Inc., App. Div. Reply Br., 2006 WL 4748600 42

Brian J. Shoot, *The Legislature's Power to Correct the Anomaly of Benefitting from A Failure to Preserve an Argument for Appellate Review*, 80 Alb L Rev 1323 [2016-2017] 56n

CPLR 3212(b) 54

Labor Law § 200 .... 16n

Labor Law § 240 .... 41n

Labor Law § 241(6) ....*passim*

Medina v 42nd and 10th Assoc., LLC, Br. for Defts.-Resp.-Apps., 2015 WL 7443786 36

Preliminary Statement

This personal injury action arises from an October 2014 accident that occurred during the construction of the World Trade Center ("WTC") Transportation Hub. The Appellate Division for the First Department granted plaintiff Curby Toussaint summary judgment on liability, "upon a search of record," based upon Labor Law § 241(6) and 12 NYCRR 23-9.9(a). The defendant Port Authority of New York and New Jersey ("Port Authority" or "appellant") now appeals from that order.

The principal issue on the appeal is whether the single directive of Industrial Code ("the Code") 23-9.9(a) — that "[n]o person other than a trained and competent operator designated by the employer shall operate a power buggy" — is sufficiently specific to serve as a predicate for liability under Labor Law § 241(6). In arguing the negative, appellant contends that the lower courts have deemed "similarly, if not almost identically, worded Industrial Code provisions" to be "too general" to serve as Labor Law predicates (Deft.-App. Br. at 17).

Appellant additionally argues that the Appellate Division erred, both in concluding that the regulation was violated and in awarding plaintiff summary judgment (*id.* at 12), because, *inter alia*,

> a) plaintiff failed to prove, as purportedly "is his burden," that the subject accident arose from "a failure to use reasonable care on the part of the Port Authority" (*id.* at 35),

b) it was, purportedly, unforeseeable as a matter of law that "an untrained, non-designated Operating Engineer" would "operate a concrete buggy" (*id.* at 31-32),

c) the "fact" that the man operating the vehicle was then engaged in "horse play" allegedly means that the incident did not occur in the scope of his employment, which in turn allegedly means that the defendant site owner cannot be held legally responsible for that conduct under Labor Law § 241(6) (*id.* at 2, 23-29), and,

d) allowing appellant to stand liable for the regulatory breach would purportedly "render[] the Port Authority, and all owners in this State, insurers" (*id.* at 2).

As is demonstrated below, the Port Authority's various arguments for reversal are seriously flawed, and its criticisms of the Appellate Division's direction of summary judgment in the plaintiff's favor are also largely unpreserved and therefore unreviewable.

Amongst other fallacies embedded in appellant's current claims, a site owner's liability under Labor Law § 241(6) does not depend upon proof that it was personally negligent, and if the rule were otherwise the statute would then mean nothing at all since any defendant liable under the statute would already be liable under common law. *See* page 46, *infra*.

Also, while appellant contends that "similarly, if not almost identically, worded Industrial Code provisions have been found to be too general to support such a claim" (Deft.-App. Br. at 17), there are actually more than ten Industrial Code requirements that restrict enumerated activities to "competent," "trained," and/or "designated" individuals, and most of those provisions have been deemed sufficiently specific to serve as Labor Law § 241(6) predicates. *See* pages 29 to 44, *infra*.

Appellant's thesis that any regulatory violation arising from a site worker's "horse play" is beyond the scope of employment and thereby beyond the scope of Labor Law § 241(6) is doubly wrong. Well settled law holds that a worker's momentary departures from his or her work duties to engage in "horse play" does not take the worker outside the bounds of his or her employment. That aside, the entire question of whether *the vehicle operator* was acting within the scope of his employment is a false issue inasmuch as the individual who had been entrusted with the power buggy was certainly acting within the scope of *his* employment when he allowed an untrained person to operate the machine. *See* pages 49 to 52, *infra*.

Appellant's claim that it was unforeseeable as a matter of law that an undesignated individual might try operating a power buggy is legally untenable since, amongst other reasons, a) that was the very event that the Commissioner anticipated and specifically prohibited in the subject regulation, and, b) even at common law, "[a]n intervening act may not serve as a superseding cause, and relieve an actor of

responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent." *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316 [1980]. *See* pages 46 to 48, *infra*.

Finally and most importantly, when appellant asks the Court to effectively construe the subject regulation out of existence and laments that it "and all owners in this State" would otherwise be rendered "insurers," it misconstrues the very purpose for which Labor Law § 241(6) was enacted. *See* pages 52 to 53, *infra*.

Labor Law § 241(6) does not render anyone an "insurer." It does, however, render the site owner and the general contractor vicariously liable for injuries that arise from a site contractor's negligent violation of one or more of the specific safety standards set forth in Industrial Code Rule 23. *Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 350 [1998]. Those provisions were drafted for the purpose, "of protecting construction laborers against hazards in the workplace." *St. Louis v Town of N. Elba*, 16 NY3d 411, 416 [2011].

The subject regulation applies to only one kind of power-operated equipment: power buggies. And it sets forth one specific directive: that such devices be operated only by trained and designated personnel. If a directive that limited and that specific were deemed too general to serve as a Labor Law § 241(6) predicate, then very few provisions of the Code would pass muster, and the Code would then no longer serve the function the legislature intended it serve.

For this and the other reasons noted below, the Appellate Division's ruling was plainly correct, and should be affirmed.

Questions Presented

1. Where,

a) this Court has said that a provision of Industrial Code Rule 23 can serve as a Labor Law § 241(6) predicate where the subject provision "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto*, 91 NY2d at 351),

b) Industrial Code 23-9.9(a) applies to only one kind of equipment, power buggies, and states only that, "No person other than a trained and competent operator designated by the employer shall operate a power buggy,"

c) there are more than ten different provisions of Industrial Code Rule 23 that mandate that various enumerated activities be performed only by "trained," "competent" and/or "designated" persons,

d) the lower courts have deemed most of those provisions to be sufficiently specific to serve as Labor Law § 241(6) predicates (*see* pages 29 to 39, *infra*), and the few decisions that went the other way largely arose from the circumstance that the directives there in issue were coupled, in the very same sentence, with the general bromide to operate the subject device "in a safe manner" (*see* pages 40 to 44, *infra*), and,

e) failure to deem such provisions sufficiently specific to serve as Labor Law § 241(6) predicates would obviously and substantially thwart the statute's purpose of "protecting construction laborers against hazards in the workplace" (*St. Louis*, 16 NY3d at 416),

did the lower courts err in ruling that Industrial Code 23-9.9(a) was sufficiently specific to serve as a Labor Law § 241(6) predicate?

Plaintiff submits, in Point I of this brief, that the answer should be No.

2. Where,

a) there were conflicting claims whether the man who lost control of the subject buggy was helping to move the buggy out of the way (R.577, 611-612), was instead driving it solely for his own amusement (R.57-59), or was driving it both for his amusement and because it had to be moved,

b) it was wholly undisputed that the man then operating the machine, James Melvin, had not been designated to operate the power buggy and had not had "any training whatsoever on a power buggy" (R.592-593), and,

c) the site owner argued that the very fact that Melvin had not been designated to operate the power buggy constituted a legal defense (R.57-59), or, alternatively, that a site owner cannot be held liable under Labor Law § 241(6) unless it was personally negligent in allowing the regulatory violation to occur (R.55-56),

did the lower courts err in ruling that the site owner was not entitled to dismissal of the plaintiff's cause of action premised on Labor Law § 241(6) and Industrial Code 23-9.9(a)?

Plaintiff submits, in Point II of this brief, that the answer should be No.

3. Where,

a) defendant offered no proof disputing plaintiff's testimony that Paul Estavio, the designated operator of the power buggy (R.669, ¶ 6), was "joking" and "talking crap" with James Melvin mere moments before Melvin boarded the vehicle and thereafter lost control of it (R.206, 210),

b) defendant offered no proof that Estavio *asked* Melvin to get off the vehicle, nor any proof that Melvin overpowered Estavio or assumed control of the vehicle via some trickery, and,

c) plaintiff contended in the Appellate Division that he was entitled to partial summary judgment on liability since, irrespective of whether Melvin was moving the vehicle out of the way or was driving it for his own amusement (or both), it was uncontroverted that Melvin was not "trained" or "designated" to operate the power buggy, and uncontroverted that such was a proximate cause of the subject accident,

did the Appellate Division err in granting plaintiff summary judgment on his Labor Law § 241(6) cause of action "upon a search of the record"?

Plaintiff submits, in Point III of this brief, that the issue is not preserved for Court of Appeals review but, if reached, the answer should be No.

Statement Of Facts

The Parties

Plaintiff Curby Toussaint, a union lather (R.150), was employed by non-party Skanska Granite Skanska Joint Venture ("SGS") (R.30, 128). Toussaint had worked at the World Trade Center ("WTC") construction site essentially since there was a WTC construction site (R.154).

Defendant Port Authority owned the site (R.88, ¶ 51) and had hired SGS to build a new transportation hub (R.839-840).

The Facts Upon Which All Witnesses Agree: That Plaintiff Was Struck By A Power Buggy Driven By James Melvin, A Site Worker Who Was Not Authorized Or Trained To Drive It

The accident occurred at approximately 1:10 p.m. on October 24, 2014 (R.28-29, 145, 570-578). Although there was a dispute whether James Melvin was driving the subject buggy because it was blocking traffic (R.577), because he was "horse playing" (R.218), or for both reasons, it was undisputed that Melvin drove the buggy into plaintiff, and also that plaintiff was not part of any "horse playing" (R.31-32, 157-158). It was also undisputed that Melvin had not been trained or designated to operate the buggy (R.593-594).

Plaintiff's Testimony Concerning The Accident: "Pauly" And "Jimmy" Were "Joking" And <u>"Talking Crap" Up Until The Accident Itself</u>

Toussaint testified that he had worked underground the entire morning of October 24, 2014 (R.155). After breaking for lunch, he went "to the top" (*i.e.*, up to ground level) to operate a rebar bending machine (R.157-158).

Toussaint said that as he was "bending steel" there was "[a] guy named Pauly" who seemed to be "playing" with a "concrete buggy" (R.206, 209). "Pauly," who was actually Paul Estavio (R.671-672), was a SGS laborer but not part of Toussaint's four-person crew (R.208-209).

Toussaint testified that "Pauly" dismounted from the buggy and began talking with "another guy" named "Jimmy" (*i.e.*, James Melvin) (R.206, 208). "Jimmy" then got on the buggy while he and Pauly continued "talking crap" (R.210). Toussaint "glanced" at them, noticed the two men "joking" and "playing," and went back to bending steel (R.206). The "next thing" Toussaint knew, he "heard everybody scream" (R.206). Melvin afterwards apologized (R.206-207).

Melvin's Contemporaneous Statement And Testimony Concerning The Accident: The <u>Buggy Was In the Way And Had To Be Moved</u>

Non-party James "Jimmy" Melvin gave a contemporaneous statement (R.577) and was later deposed (R.585-649). In his statement, Melvin admitted driving the

buggy into plaintiff but claimed, as follows, that he moved the buggy because it was blocking traffic and had to be moved (R.577):

> 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.

Emphasis added.

When deposed in August of 2016, Melvin testified that his job at the site essentially consisted of maintaining the cranes (R.592). Melvin freely admitted that he had not had "any training whatsoever on a power buggy," and also that he had not been assigned to operate the buggy (R.592-593).

While appellant denigrates Melvin's contemporaneous statement and reports that "Melvin specifically testified that the statement was not his handwriting and was not his quote" (Deft.-App. Br. at 9), Melvin testified that he signed the statement (R.611-612). He also testified, in the very next answer after that hyped by the defendants, that such was indeed what he told the interviewer (R.611-612).

The Defendants' Made-For-The-Motion Affidavits

Melvin contemporaneously claimed that he "[w]ent to move the concrete buggy because it was in the middle of the road" (R.577). Up until the motion itself, there was no proof that the buggy was not blocking the way when Melvin tried to move it, and no proof that Melvin had not been permitted to move the buggy.

Defendant attempted to fill that void with two made-for-the-motion affidavits, one by Paul ("Pauly") Estavio (R.671-672) and one by Estavio's foreperson, Joseph De Rosa (R.668-669). Each was exactly two pages long inclusive of caption (R.668-669, 671-672).

De Rosa's two-page affidavit stated that he had been continuously employed by SGS since 2001 (R.668). He was still working for SGS when he signed the prepared-for-the-motion affidavit (R.668).

De Rosa admitted in his affidavit that, just as Melvin claimed after the accident (R.557), two concrete buggies "were blocking a truck's access and needed to be moved" (R.669). But De Rosa claimed that "[n]o one instructed Mr. Melvin to operate the buggy" (R.669).

De Rosa's affidavit further stated "[a]t the time of Mr. Toussaint's incident, the subject buggy had already been moved out of the truck's way by Mr. Estavio" (R.669). However, De Rosa did not specify whether he *actually saw* that the buggy was no longer in the way when Melvin took the wheel or whether he was just repeating what he had been told (R.669). If the latter, his affidavit was obviously based on hearsay. If the former — that is, if DeRosa actually saw Melvin operate the buggy — the question not answered in his brief affidavit was why DeRosa did not instruct or ask Melvin to get off the buggy.

Estavio's two-page affidavit said that "an individual by the name of James Melvin approached the area where I was working" and "took control of one of the buggies and drove it away" (R.671). Estavio therein proclaimed that he did not give Melvin "permission to take, drive or move the buggy" (R.672).

Beyond that, Estavio contradicted De Rosa's possibly hearsay claim that the subject buggy "had already been moved out of the truck's way …" (R.669). Estavio instead said he was still "in the process of moving the concrete mud buggies" when Melvin "approached the area" and "took control of one of the buggies and drove it away" (R.671).

What Estavio for some reason failed to address is whether plaintiff had gotten it wrong when he testified under oath that Estavio and "Jimmy" Melvin were "joking and playing" and "talking crap" just before the accident (R.206, 210). Estavio also neglected to say whether plaintiff misspoke when he testified that Estavio was *himself* "playing with it [the buggy]" *before* "Jimmy" tried his hand at it (R.209).

Most of all, while plainly trying to convey *the impression* that Melvin seized control of the buggy without Estavio's implied or express consent, Estavio utterly failed to say how Melvin managed to do so. Had Melvin overpowered Estavio and taken the buggy by force? Or had Melvin instead employed stealth to sneak onto the buggy? Estavio's made-for-the-motion affidavit did not say (R.670-671).

The Proceedings Below

The Defendants' Motion For Summary Judgment

Defendants Port Authority and Granite Construction Northeast, Inc. ("Granite") moved for summary judgment with respect to plaintiffs' Labor Law § 241(6) claims on the stated grounds that each of the regulations that plaintiff had pleaded was either too general to serve as a Labor Law § 241(6) predicate, inapplicable, or had not been violated (R.45-61).

With respect to 12 NYCRR 23-9-9(a), defendants argued, 1) the provision was "insufficiently specific to sustain a cause of action pursuant to Labor Law § 241(6)" (R.53), 2) the very fact that Melvin had not been designated to drive the buggy purportedly meant that the provision had not been violated and/or that the event did not occur in the scope of Melvin's employment (R.57-59), and, 3) the defendants were as a matter of law not negligent in allowing the violation to occur (R.55-56).

Defendants additionally urged that plaintiff was barred from suing Granite since it was one of the joint venturers of the joint venture that employed Toussaint (R.61-62) and that the plaintiff's common law and Labor Law § 200 claims should be dismissed on the ground that the defendants had not directed or controlled the details of the work (R.40-45).

Supreme Court's Ruling

The motion was heard by the Honorable Lynn R. Kotler (Supreme Court, New York County). She ruled:

> (1) defendants were entitled to dismissal of the plaintiff's claims under Labor Law § 200 because "neither of them exercised supervisory control over the injury-producing work" (R.5);
>
> (2) defendant Granite was entitled to dismissal of all claims against it because Toussaint was "barred by the Workers' Compensation law from suing [Granite]" (R.6); and,
>
> (3) the defendant Port Authority was not entitled to dismissal of the plaintiff's Labor Law § 241(6) claim to the extent it was premised upon alleged violation of 12 NYCRR 23-9.9(a) (R.7).

Regarding the last ruling, the judge expressly "reject[ed] defendants' argument that § 23-9.9(a) is too general" (R.7). As for defendants' alternative argument that they could not be held responsible "because [James] Melvin was acting outside the scope of his employment" (R.7), Justice Kotler ruled that there were triable issues of fact of whether Melvin "moved the buggy because it was in the middle of the road" and whether he was "acting to further his employer's interests when he went to move the buggy" (R.7).

The Parties' Respective Appeals To The Appellate Division

Defendant Port Authority appealed from that part of Justice Kotler's order as denied its motion for dismissal of plaintiff's cause of action premised on Labor Law § 241(6) and Industrial Code 23-9.9(a). It argued, a) Industrial Code 23-9.9(a) was not sufficiently specific to serve as a Labor Law § 241(6) predicate (Deft. App. Div. Br. at 12-13), and, b) the "fact" that the accident was a product of "horse play" supposedly meant there could be no liability under Labor Law § 241(6) (*id.* at 19-25).

Although plaintiff had not moved for summary judgment in Supreme Court, plaintiff formally cross-appealed on the single asserted ground that he was entitled to summary judgment since, under any view of the facts, the accident was caused by a wholly unexcused violation of the specific prohibition of Industrial Code Rule 23-9.9(a).[1]

The Appellate Division Ruling, And The Dissent

In a decision penned by Justice Singh and joined by Justices Sweeny and Webber, the Appellate Division ruled by 3 to 2 vote, 1) Industrial Code 23-9.9(a) was sufficiently specific to serve as a Labor Law § 241(6) (*Toussaint v Port Auth. of New York and New Jersey*, 174 AD3d 42, 43-45 [1st Dept 2019]), and, 2) plaintiff was entitled to summary judgment since it was "undisputed" that Melvin "was not designated to

[1] Plaintiff's cross-appeal did not challenge the dismissal of his common law and Labor Law § 200 claims. Nor did plaintiff challenge Supreme Court's dismissal of the claims against Granite.

operate the power buggy" and "his operation of the power buggy was a proximate cause of plaintiff's injuries" (*id.* at 43, 46).

In ruling that the regulation was sufficiently specific to serve as a Labor Law § 241(6) predicate, the majority reasoned, first, that "[t]he requirement that a designated person operate a power buggy is 'self-executing in the sense that [it] may be implemented without regard to external considerations such as rules and regulations, contracts or custom and usage'" (*id.* at 44, *quoting Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 503 [1993]), and, second, that "[w]e [the First Department] have held that similarly worded provisions of the Industrial Code … sufficiently specific to support a Labor Law § 241(6) claim" (*id.*).

In contrast, the dissent never explained how, exactly, a specific prohibition that applied only to power buggies and forbid operation except by trained and designated persons to do so was a "general safety standard." The dissent gave only two reasons for dismissal of the plaintiff's 241(6) cause of action:

> 1) the First Department had in *Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520 [1st Dept 2012] deemed the "almost identical[ly]" worded 23-9.2(b)(1) to be insufficiently specific to serve as a 241(6) predicate (Dissent, 174 AD3d at 48), and,
>
> 2) to impose liability in this instance in which "Melvin was an interloper rather than an improperly designated operator" 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” (id.).

Left unsaid was the fact that, under the dissent’s construction of the regulation, it would be logically impossible for violation to give rise to liability in <u>any</u> case. In any instance in which operation of a power buggy caused injury, the operator would necessarily have been designated to operate the machine or would not have been designated to operate it. If the former (the operator *was* designated), there would be no violation. If the latter (the operator was *not* designated), the violation would of itself constitute the defense since the operator would then be an unauthorized “interloper.”

POINT I

12 NYCRR 23-9.9(a), WHICH EXPRESSLY FORBIDS OPERATION OF POWER BUGGIES BY ANYONE OTHER THAN "A TRAINED AND COMPETENT OPERATOR DESIGNATED BY THE EMPLOYER," IS SUFFICIENTLY SPECIFIC TO CONSTITUTE A PREDICATE FOR LIABILITY UNDER LABOR LAW § 241(6).

The provision in issue, 12 NYCRR 23-9.9(a), could not have been clearer as to what it specifically forbids. Amongst all the different kinds of equipment that might be used at a construction site, it singles out one particular kind of equipment, power buggies, and forbids operation by anyone other than "a trained and competent driver designated by the employer." The regulation states:

> **Section 23-9.9. Power buggies**
> (a) Assigned operator. No person other than a trained and competent operator designated by the employer shall operate a power buggy.

Unable to deny that James Melvin was neither "trained" nor "competent" nor "designated" to operate the power buggies, and unable to deny that such was a material cause of the subject accident, appellant instead argues, *inter alia*, that the regulation is "too general" to serve as a Labor Law § 241(6) predicate (R.52-55, 735-742). Appellant further argues that such conclusion should follow from the "fact" that the lower courts have ruled that three "similarly worded" regulations— Industrial

Code 23-7.1, 23-9.2(b)(1), and 23-9.6(c)(1) — are too general to serve as Labor Law § 241(6) predicates (R.53-55, 736-738).

The argument lacks merit. As plaintiff below demonstrates,

> (1) the specificity prerequisite was not intended to thwart the legislature's goal of protecting construction workers from the hazards of the work site, but instead serves only to distinguish those Industrial Code provisions which set forth "a specific requirement or standard of conduct" from those merely require "that the work area 'provide reasonable and adequate protection and safety'" (*Ross*, 81 NY2d at 503 [1993],
>
> (2) there can be no doubt that the subject provision set forth a specific standard of conduct that was here violated (Point IB, *infra*), and,
>
> (3) the reality is that there are <u>more than ten</u> Rule 23 provisions that forbid the performance of enumerated activities except by "trained," "competent" and/or "designated" personnel, and the great majority of those provisions <u>have been</u> deemed valid Labor Law § 241(6) predicates (Point IC, *infra*).

A. The Specificity Prerequisite Of Labor Law § 241(6) Was Intended To Distinguish Directives That Set Forth Specific "Standards Of Conduct" From Directives That Merely Require "Reasonable And Adequate Protection And Safety," Not To Thwart The Legislature's Goal Of Protecting Construction Workers From The Hazards Of The Workplace.

Anyone who was attempting to discern the pertinent legal standard simply from a reading of the appellant's brief might erroneously conclude that the specificity prerequisite on which appellant relies was devised in order to invalidate as many site safety standards as possible. However, that is not what the distinction is all about.

"The legislative intent of [Labor Law] section 241(6) is to ensure the safety of workers at construction sites." *Morris v Pavarini Const.*, 22 NY3d 668, 673 [2014]. The same applies to the regulations enacted under the authority of Labor Law § 241(6). For this reason, this Court has repeatedly rejected overly narrow constructions of the regulations that would provide "diminished" protection in instances in which the subject provision could be "sensibly" applied to provide site workers with greater protection. *Morris*, 22 NY3d at 675 (rejecting construction of the term "forms" as being limited to completed forms where the regulatory language could be "sensibly be applied to other than a completed form," and where the defendants' narrower construction of the term "would result in diminished protections for workers during the assembly of forms" and would thus "undermine[] the legislative intent to ensure worker safety"); *St. Louis*, 16 NY3d at 416 (where the subject regulation expressly applied only to "power shovels" and "backhoes," it should be construed to

additionally apply to a front-end loader that was *used* as a power shovel or backhoe since "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace"); *Conte v Large Scale Dev. Corp.*, 10 NY2d 20, 27-28 [1961] (the regulatory term "runway" should not be construed to exclude runways made of natural earth inasmuch as "[t]he safety factor is no less important because the runway is constructed of earth rather than of wood").

Within this context, the distinction between overly general Industrial Code requirements and their sufficiently specific counterparts largely arises from this Court's decision in *Ross*, 81 NY2d 494. There, the plaintiff relied exclusively upon 12 NYCRR 23-1.25(d) in claiming a violation of Labor Law § 241(6). That regulation required that "[a]ll persons engaged in welding or flame-cutting *** be provided where necessary with *proper* scaffolds." The plaintiff claimed that the scaffold there in issue was not "proper."

In holding that the regulation there in issue could not serve as a Labor Law § 241(6) predicate, the *Ross* Court framed the distinction as being whether the provision in question "sets forth a specific requirement or standard of conduct or instead 'does no more than broadly [require]' that the work area 'provide reasonable and adequate protection and safety'" (81 NY2d at 503, *quoting Bland v Manocherian*, 66 NY2d 452, 460-461 [1985], *quoting Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]). The subject

regulation, requiring only that the scaffold be "proper," was deemed overly general because it "add[ed] nothing to the general common-law rule requiring the provision of a safe workplace" (*id.* at 504).

Five years later, in *Rizzuto*, 91 NY2d 343, the Court provided bench and bar with an example of a regulation that was sufficiently specific to serve as a Labor Law § 241(6) predicate. There, in a case in which the plaintiff-worker slipped on diesel fuel, plaintiff relied on 12 NYCRR 23-1.7(d). That regulation, 1) directed employers not to "suffer or permit any employee" to use a "slippery" floor or walkway, and, 2) required that any "foreign substance which may cause slippery footing shall be removed … to provide safe footing." Defendant argued that the subject regulation merely reiterated common law standards and could therefore not serve as a Labor Law § 241(6) predicate. This Court ruled otherwise, stating that the regulation "mandate[d] a distinct standard of conduct" and was "precisely the type of 'concrete specification' that *Ross* requires" (91 NY2d at 351).

In the wake of *Ross* and *Rizzuto*, it remains that the subject provision must "set[] forth a specific standard of conduct and not simply a recitation of common-law safety principles." *St. Louis*, 16 NY3d at 414. But it also remains that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace." *Id.* at 416.

It is, additionally, clear that in determining whether any particular provision of the Industrial Code is sufficiently "specific" or "concrete" to serve as a Labor Law § 241(6) predicate, one must focus upon the particular requirement in issue inasmuch as it is entirely possible for the same regulation, or even the same subsection of a regulation, to contain a mix of "general" and "concrete" requirements.

Such was indeed what occurred in *Misicki v Caradonna*, 12 NY3d 511, 520-521 [2009]. 12 NYCRR 23-9.2(a), the subsection in issue in *Misicki*, set forth various maintenance requirements that applied to all "power-operated equipment," as follows:

> (a) Maintenance. All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest.

Emphasis added.

In determining whether 23-9.2(a) could serve as a 241(6) predicate, the *Misicki* Court did exactly what appellant says should not be done: the Court focused upon the specificity of the *particular portion* of the provision that the defendants were claimed to

have violated.[2] The Court noted that the first two sentences of the above-quoted provision —mandating that all power-operated equipment be kept "in good repair," and that there be "[s]ufficient inspections" to "insure" the equipment was kept in good repair — were "not specific enough to permit recovery under section 241(6)" since they "employ[ed] only such general phrases as 'good repair,' 'proper operating condition,' '[s]ufficient inspections,' and 'adequate frequency'" (*id.*).

Yet, the *Misicki* Court further held that the third sentence, on which the plaintiff there relied, was sufficiently specific to serve as a 241(6) predicate inasmuch as it imposed an affirmative duty to promptly correct "any structure defect or unsafe condition in such equipment" that was found to exist. In focusing upon the third sentence and ruling the directive *in that sentence* could serve as a 241(6) predicate, the Court expressly rejected the defense claim that it should instead consider all three sentences as a whole to mean "nothing more than 'tools shouldn't be broken; you must check to make sure that tools aren't broken; and when you find that tools are broken, you must fix or replace them'" (12 NY3d at 520).

Thus, under *Ross* and its progeny, the legally pertinent question is whether the provision actually in issue, the above-quoted requirement of 12 NYCRR 23-9.9(a), sets forth a "specific standard of conduct" (*St. Louis*, 16 NY3d at 414) or whether it instead imposes nothing more than the broad requirement "that the work area

[2] *Compare* Deft.-App. Br. at 2 (charging that the Appellate Division "erroneously parsed the provision, rather than reading it as a whole, in order to find it sufficiently specific").

'provide reasonable and adequate protection and safety'" (*Ross*, 81 NY2d at 504). Yet, for the reasons stated immediately below, that is not much of an issue.

B. The Regulation In Issue Plainly Imposed A Very Specific And Very Limited Standard Of Conduct — Which Was Plainly Violated At Bar.

As far as plaintiff is aware, this Court has never had occasion to determine whether any of the Rule 23 provisions that restrict various other activities to "trained," "competent," and/or "designated" persons can serve as Labor Law § 241(6) predicates.[3] That notwithstanding, plaintiff respectfully submits not merely that the subject regulation should be deemed sufficient to serve as a 241(6) predicate, but also that the issue does not present a difficult or close case despite the dissent below.

First and most obviously, the directive here in issue was not some amorphous mandate that a device be operated "properly" or "safely." Amongst the thousands of

---

[3] In *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011], the Court held that 12 NYCRR 23-3.3(c) can serve as a Labor Law § 241(6) predicate. That provision states:

> During hand demolition operations, continuing inspections shall be made 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. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.

Emphasis added.

However, it appears from the decision that the plaintiffs' complaint was not that the "continuing inspections" were performed by undesignated persons, but instead that the "continuing inspections" were not performed at all.

different activities that may occur at a construction site, 12 NYCRR 23-9.9(a) applies to only one: operation of power buggies. The regulation does not apply to any other kind of equipment, or to any activity other than operation of that one kind of equipment. The provision mandated a specific safeguard, that power buggies be operated only by "a trained and competent operator designated by the employer."[4] Indeed, even if an operator who had not been trained or designated to operate power buggies did so "safely," such would still be violative of the provision.

Second, the subject regulation, 12 NYCRR 23-9.9(a), is itself a much more specific version of the first part of 12 NYCRR 23-9.2(b)(1), the regulation that serves as defendant's principal analogy. The latter provision sets forth two different requirements in the same sentence: first, that "[a]ll power-operated equipment used in construction, demolition or excavation operations … be operated only by trained, designated persons," and, second, that "all such equipment … be operated in a safe manner at all times."

Since power buggies are *one kind* of "power-operated equipment," the first part of 12 NYCRR 23-9.2(b)(1) would of itself dictate that power buggies "be operated only by trained, designated persons" even if 12 NYCRR 23-9.9(a) did not exist. Why,

---

[4] The regulations define a "Power buggy" as "a small self-powered vehicle operated by one person and used solely for the movement of materials on or about construction, demolition or excavation sites." 12 NYCRR 23-1.7(b)(40). They define a "Designated person" as "[a] person selected and directed by an employer or his authorized agent to perform a specific task or duty." 12 NYCRR 23-1.7(b)(17).

then, did the Commissioner also include the much more specific but also redundant command that "[n]o person other than a trained and competent operator designated by the employer shall operate a power buggy"? There can be only one answer: the Commissioner deemed the hazard posed by untrained operation of power buggies to be a particular concern above and beyond the general concern of untrained persons operating "power-operated equipment."

Presumably, the Commissioner had some reason for singling out power buggies, a kind of equipment which cannot even be found on most sites. One presumes the reason likely had something to do with the fact that such devices — which are essentially ATVs (all-terrain vehicles) — can pose an obvious attraction both to site workers and virtually anyone else. Yet, whether that or some other logic underlay the Commissioner's decree, it remains that a directive that applies only to power buggies is obviously more specific than a directive that applies to "[a]ll power-operated equipment."

Third, the provision in issue should be deemed sufficiently specific to serve as a 241(6) predicate because the alternative ruling would undermine the very purpose of Industrial Code Rule 23. The Industrial Code was intended to protect construction workers from the hazards of the workplace. *St. Louis*, 16 NY3d at 416. If a provision as specific as Industrial Code § 23-9.9(a) were nonetheless deemed "too general" to serve as a Labor Law § 241(6) predicate — perhaps because it does not additionally

specify *how much* training must be imparted, or by what means a worker should be "designated" to operate power buggies — few regulations would pass muster and most if not all of Industrial Code Rule 23 would be rendered inconsequential.

C. There Are More Than Ten Other Industrial Code Provisions That Prohibit The Performance Of Enumerated Tasks Except By "Trained," "Competent," And/Or "Designated" Persons, The Lower Courts Have Deemed Most Of Those Provisions To Be Valid Labor Law § 241(6) Predicates, And The Few Exceptions Arose From Flawed Analysis.

Appellant contends that that the Appellate Division has *generally* held that regulations forbidding enumerated activities except by "designated persons" are too general to serve as 241(6) predicates. Of course, even if that claim were accurate, those rulings would not be binding on this Court. *Wilinski*, 18 NY3d at 12 (noting that "lower courts ruling on this issue have largely adopted defendants' proposed readings of the regulation," but then holding that "the Appellate Division's interpretation is the better one"). By the same token, that the weight of the lower court precedent actually supported plaintiff's position would not matter a great deal if this Court felt that the minority view was the better one.

Be that as it may, plaintiff below demonstrates:

1) there are more than ten Industrial Code provisions that prohibit specified activities except by "trained," "competent," and/or

"designated" persons — and the lower courts have deemed most of those provisions to be valid 241(6) predicates; and,

2) the few rulings that went in the defendants' favor were the product of flawed analysis, and followed mainly from the courts' failure to focus, as required by *Misicki et al.*, upon the particular directive that was actually in issue.

1. The More Than Ten Similarly Worded Industrial Code Provisions, And The Lower Court Rulings Concerning Those Provisions

Appellant cites several regulations that it claims to be "similarly worded" and represents that "[w]hen courts have considered similar, and almost identical Industrial Code provisions … they have found them too general to support a § 241(6) claim." Deft.-App. Br. at 2. In reality, there are more than ten such regulations, and the lower courts have deemed most of them valid 241(6) predicates.

12 NYCRR § 23-1.29(a) requires traffic be "fenced or barricaded" or "controlled by designated persons" "where public vehicular traffic may be hazardous to the persons performing such work." The lower courts have deemed the provision a valid Labor law § 241(6) predicate. *McGuinness v Hertz Corp.*, 15 AD3d 160, 161 [1st Dept 2005]; *Gonnerman v Huddleston*, 78 AD3d 993, 995 [2d Dept 2010].

The same is true of 12 NYCRR 23-3.3(c), which applies "[d]uring hand demolition operations" and specifies that "continuing inspections shall be made by

designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or form loosened material." *Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493, 494 [1st Dept 2010].

The same is true of 12 NYCRR 23-5.1(h) and 23-5.8(c)(1). The first states, "Every scaffold shall be erected and removed under the supervision of a designated person." The latter provides, "The installation or horizontal change in position of every suspended scaffold shall be in charge of and under the direct supervision of a designated person." Both have been deemed sufficiently specific to serve as 241(6) predicates. *Medina v 42nd and 10th Assoc., LLC*, 129 AD3d 610, 611 [1st Dept 2015]; *Batista v Manhattanville Coll.*, 138 AD3d 572, 572-573 [1st Dept 2016], *mod. on another ground*, 28 NY3d 1093 [2016].

12 NYCRR 23-6.1(c)(1) states, "Only trained, designated persons shall operate hoisting equipment and such equipment shall be operated in a safe manner at all times." It has apparently been addressed only at the Supreme Court level, and with ostensibly conflicting results. *Galeto v 147 Flatbush Ave. Prop. Owner, LLC*, 34 Misc 3d 1205(A) [Sup Ct 2012] (holding that the provision was a valid 241(6) predicate); *Matz v Lab. Inst. of Merchandising (LIT)*, 27 Misc 3d 1220(A) [Sup Ct 2010] (reaching the opposite conclusion).

12 NYCRR 23-7.1(c), one of the very few "designated person" provisions that appellant purports to find analogous, states, "Only trained, designated persons shall

operate personnel hoists and such hoists shall be operated in a safe manner at all times." It thus combines, in a single sentence, an analogous "designated persons" restriction with an obviously general "in a safe manner" directive. As appellant correctly notes, the provision was deemed overly general in *Wade v Bovis Lend Lease LMB, Inc.*, 102 AD3d 476, 477 [1st Dept 2013] and *Robles v Taconic Mgt. Co., LLC*, 173 AD3d 1089, 1091 [2d Dept 2019]. Appellant fails to mention that the provision was deemed a valid Labor Law 241(6) predicate in *Rich v 125 W. 31st St. Assoc., LLC*, 92 AD3d 433, 435 [1st Dept 2012]. Moreover, precisely because Industrial Code 23-7.1(c) combines two very different directives, those rulings are not necessarily inconsistent.

12 NYCRR 23-7.2(j)(4) states, "Persons designated as car attendants for temporary personnel hoists shall be over 18 years of age, trained, qualified and competent to operate the cars of such hoists." That provision was deemed a valid 241(6) predicate in *Arbusto v Bank St. Commons, LLC* [N.Y. Sup Ct, Bronx County 2011].

12 NYCRR 23-8.1(b)(1) states, in part, "Every mobile crane, tower crane and derrick shall 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 was deemed a valid 241(6) predicate in *Howell v Karl Koch Erecting Corp.*, 192 Misc 2d 491, 494-495 [Sup Ct 2002].

12 NYCRR 23-9.2(b)(1), the supposedly "almost identical" provision on which appellant principally relies (Deft.-App. Br. at 2, 12, 13, 17), starts with the admonition, "All power-operated equipment used in construction, demolition or excavation operations shall be operated only by trained, designated persons …" It then continues in the very same sentence with the directive, for which Industrial Code 23-9.9(a) has no analog, that "all such equipment shall be operated in a safe manner at all times."

As appellant notes, 12 NYCRR 23-9.2(b)(1) was deemed not to constitute a valid 241(6) predicate in *Scott,* 96 AD3d at 521, *Berg v Albany Ladder Co., Inc.*, 40 AD3d 1282, 1285 [3d Dept 2007], *aff'd* 10 NY3d 902 [2008] and *Robles*, 173 AD3d at 1091-1092. It was also deemed invalid as a 241(6) predicate in *Nicola v United Veterans Mut. Hous. No. 2, Corp.*, 178 AD3d 937 [2d Dept 2019], *Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1092 [2d Dept 2016], *Abelleira v City of New York*, 120 AD3d 1163, 1165 [2d Dept 2014], *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 958-958 [2d Dept 2013], and, strangely, *Hricus v Aurora Contractors, Inc.*, 63 AD3d 1004, 1005 [2d Dept 2009].[5] However, the Fourth Department reached the opposite conclusion in *Fisher v WNY Bus Parts, Inc.*, 12 AD3d 1138, 1140 [4th Dept 2004].

---

[5] Review of the appellate briefs in *Hricus* reveals that 12 NYCRR 23-9.1(b)(1) was not cited either by the plaintiffs-appellants or the defendants-respondents as a provision that had allegedly been violated

12 NYCRR 23-9.5(c) states in pertinent part, "Excavating machines shall be operated only by designated persons …" As with the provision here in issue (12 NYCRR 23-9.9[a]), the provision connotes a particular concern with one particular kind of power-operated equipment since above-quoted 12 NYCRR 23-9.2(b)(1) would of itself restrict operation of excavating machines to "trained, designated persons" even if 23-9.5(c) did not exist. 23-9.5(c) has consistently been deemed a valid 241(6) predicate, including, ironically, in the very Appellate Division decision on which appellant principally relies. *Scott*, 96 AD3d at 520-521 ("we find that plaintiff has a claim under 12 NYCRR § 23-9.5(c), in view of plaintiff's testimony that he was not licensed or trained to operate a backhoe, and his foreman's testimony that plaintiff's responsibilities entailed primarily excavation work"); *Cunha v Crossroads II*, 131 AD3d 440, 441-442 [2d Dept 2015] ("Contrary to the defendants' contention, 12 NYCRR 23-9.5(c) sets forth a specific, rather than general, safety standard, and is sufficient to support a Labor Law § 241(6) cause of action").

Finally, 23 NYCRR 23-9.6(c)(1) states, "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." It was apparently last addressed in *Wilke v*

Communications Const. Group, Inc., 274 AD2d 473, 474 [2d Dept 2000], where the Court ruled that it was insufficiently specific to serve as a 241(6) predicate.[6]

Thus, simply in terms of the weight (as opposed to the persuasiveness) of the lower court authority, <u>seven</u> of the "designated person" have been valid 241(6) predicates (sections 23-1.29[a], 23-3.3[c], 23-5.1[h], 23-5.8[c][1], 23-7.2[j][4], 23-8.1[b][1], and 23-9.5[a]), albeit some solely by virtue of trial court rulings. <u>Three</u> of the "designated person" provisions — 23-6.1(c)(1), 23-7.1(c), and 23-9.2(b)(1) — have given rise to ostensibly conflicting lower court rulings which, for the reasons suggested below, are not necessarily inconsistent. Only <u>one</u> "designated person" provision, 23-9.6(c)(1), has consistently been deemed insufficiently specific to serve as a 241(6) predicate, except that the term "consistently" probably overstates the case since the case authority consists of a single decision rendered 20 years ago.

So, to the extent that the matter turns on which side is supported by the weight of the lower court authority — which, at this level, is obviously not the case — it is clearly not appellant's side of the argument.

---

[6] There are, in addition, several "designated person" provisions for which, as best as we can discern, there is no case law at all. 12 NYCRR 23-7.2(b)(3) (stating, "Hoist towers shall be erected and dismantled only under the direct supervision of qualified, designated persons"); 12 NCYRR 23-8.1(b)(4) (stating, "Adjustments and repairs to mobile cranes, tower cranes and derricks shall be made only by competent, designated persons"); 12 NYCRR 23-9.2(a) (the fourth sentence, stating that the servicing and repair of "power-operated equipment" "shall be performed by or under the supervision of designated persons").

2. Appellant's Decidedly Unpersuasive And Also Illogical Efforts To Distinguish The Contrary Authority

It is simply a fact, as has already been shown, that the lower courts have deemed most of the "designated person" provisions of Rule 23 to be valid 241(6) predicates. Appellant has, to be sure, attempted to distinguish those rulings. However, those distinctions are so patently unpersuasive as to ultimately prove plaintiff's point.

Appellant argues that the contrary case authority should be rejected because, 1) "those cases … do not address 23-9.9(a)" (Deft.-App. Br. at 20), and, 2) the three cases on which the Appellate Division majority relied are, according to appellant, distinguishable (*id.* at 19-20).

Neither claim withstands scrutiny.

First, none of the cases cited by either side "address 23-9.9(a)." That is why the parties, and the lower courts, were compelled to proceed by analogy. That appellant deems that a telling point as to plaintiff's case authority but not as to its own speaks for itself.

Second, while appellant tries to distinguish the case law on which the Appellate Division principally relied, appellant's arguments make no sense. For example, review of the briefs filed in *Medina*, 129 AD3d 610 show that the defendants therein expressly argued that Industrial Code sections 23-5.1 and 23-5.8 were "too general to form a basis for liability as a matter of law." *Medina*, Br. for Defts.-Resp.-Apps., 2015 WL

7443786, at 23. The Appellate Division plainly ruled otherwise when it said that "Industrial Code (12 NYCRR) § 23-5.1(c)(1) has been found insufficiently specific to support a Labor Law § 241(6) claim" but that "[a]s to 12 NYCRR 23-5.1(h) and 23-5.8(c)(1), issues of fact exist whether a 'designated person' was supervising." *Medina*, 129 AD3d at 611.

As for appellant's argument that *Medina* is distinguishable because there were "issues of fact regarding whether a designated person was supervising" whereas it is here undisputed that the vehicle operator "was not a designated person" (Deft.-App. Br. at 19),[7] plaintiff is at a loss to comprehend how the fact that the regulation was here *undisputedly* violated counts in appellant's favor.

Likewise, that the excavating machine in *Sawicki v AGA 15th St., LLC*, 143 AD3d 549, 550 [1st Dept 2016] *was* being operated by a "designated person" in compliance with Industrial Code 23-9.5(c) (quoted, in substance, above) and such was not the case here is not a distinction that weighs in appellant's favor. That aside, Industrial Code 23-9.5(c) was also deemed a valid 241(6) predicate in other reported cases, including in the very case on which the Appellate Division dissent principally relied. *Scott*, 96 AD3d at 521; *Cunha*, 131 AD3d at 441.

As for appellant's arguments concerning the First Department's ruling in *Batista*, 138 AD3d at 572-573, plaintiff very frankly has no idea what appellant is trying

---

[7] Parenthetically, the defense argument in *Medina* was that plaintiff himself was the "designated person." *Medina*, Br. for Defts.-Resp.-Apps. at 23.

to say. Deft.-App. Br. at 19-20. However, given that the court there said that "[t]he Labor Law § 241(6) cause of action must be dismissed *except insofar* as it is predicated upon alleged violations of Industrial Code (12 NYCRR) § 23-5.1(e), (g), and (h) [emphasis added]," and given that it then said in the very next sentence that "[t]he *other* Industrial Code provisions that plaintiff cited in the bill of particulars and addresses on appeal are either insufficiently specific to sustain a Labor Law § 241(6) claim inapplicable to the facts of this case [emphasis added]," the Court plainly deemed Industrial Code 23-5.1(h) sufficiently specific to serve as a 241(6) predicate.

Finally, while appellant below argued that Industrial Code 23-9.5(c), concerning operation of excavating machines by designated persons, is distinguishable when considered as a whole because the provision also includes "six (6) concrete specifications that simply do not exist in sections 23-9.9(a), 23-9.2(b)(1) or 23-9.6(c)(1) of the Industrial Code" (Deft. App. Div. Reply Br. at 9), such exposes the fallacy which undermines appellant's entire "consider as a whole" argument.

If one were to actually consider the power buggy regulation (Industrial Code 23-9.9) "as a whole" — which appellant does not, and which the Appellate Division dissent also did not — one would then observe that the other parts of Industrial Code 23-9.9 command, *inter alia*,

> that "[e]very power buggy shall be so designed and constructed as to withstand without tilting … [a] 45 degree turn at full rated load and

> maximum designed forward speed … [and] [l]ateral traversal of 10 percent grade slopes at full rated load and maximum designed speed" (Industrial Code 23-9.9[c][1]),
>
> that "[e]very power buggy shall be provided with brakes and tire surfaces capable of bringing such buggy to a full stop within 25 feet on a level dry plank surface or frictional equivalent at full rated load and maximum designed speed" (Industrial Code 23-9.9[c][2]) that "[t]he controls of every power buggy shall be so arranged, shielded or located that they cannot be accidentally engaged" (Industrial Code 23-9.9[c][3]), and,
>
> that "[n]o power buggy shall be operated … at a speed greater than 12 miles per hour" or "on grades steeper than 25 percent" (Industrial Code 23-9.9[d][2]).

Whether Industrial Code 23-9.9(a) in issue is considered of itself (as *Misicki* directs) or is instead considered "as a whole," the provision does not "simply declare general safety standards or reiterate common-law principles" (*Misicki*, 12 NY3d at 515). And the lower courts have, in reality, reached that conclusion with respect to most of the "designated person" provisions that appear throughout Industrial Code 23.

3. The Case Law On Appellant Principally Relies, And The Flawed Reasoning Which Produced It

Plaintiff has thus far demonstrated, 1) the provision in issue is plainly "concrete" within the meaning of the governing Court of Appeals case law (*see* pages 21 to 29, above), and, 2) the lower courts have deemed most of the "designated persons" that appear throughout Industrial Code 23 to be sufficiently specific to serve as Labor Law § 241 predicates (*see* pages 29 to 39, above). Such may well be sufficient for the purposes of this appeal. There is, however, a further point which the Court may wish to address for the benefit of bench and bar. Plaintiff refers to the flawed analysis which produced the case law on which appellant principally relies, a flawed analysis which has become all too common in litigation concerning Labor Law § 241(6).

Appellant principally relies upon the provisions of Industrial Code 23-7.1(c) (concerning operation of "personnel hoists") and 23-9.2(b)(1) (concerning operation of all "power-operated" equipment). In fact, while appellant purports to find those provisions "almost identical" to the regulation here in issue, each of those provisions combines a "designated person" restriction with the further command, in the very same sentence, to operate the equipment "in a safe manner at all times."

Obviously, 23-9.2(b)(1), concerning operation of <u>all</u> power-operated equipment, is far broader in scope than 23-9.9(a), which relates solely to operation of power buggies. But, even as to "power-operated equipment" as a whole, how, this

Court might wonder, could anyone but the most zealous advocate conclude that a directive restricting operation to "designated persons" was nothing more than a common-law rule which could therefore be judicially nullified? The answer is that the rulings did not arise from that kind of analysis. They arose from a lack of careful analysis, and from the fact that two very different directives were combined in the same sentence.

The first of the cases to deem 23-9.2(b)(1) non-specific was *Berg*, 40 AD3d at 1285, wherein the Third Department ruled that 12 NYCRR 23-9.2(b)(1) "is no more than a restatement of common-law requirements and is insufficient to establish a nondelegable duty under Labor Law § 241(6)."[8] However, review of the appellate briefs in *Berg* reveals that it was the second part of 9.2(b)(1), the "operated in a safe manner at all times" directive, that was actually in issue.

The accident in *Berg* arose from allegedly negligent operation of a forklift. The forklift operator was claimed to have negligently caused some street trusses to roll towards the plaintiff, thus causing him to fall (*Berg*, 10 NY3d at 903). The plaintiff urged that such was violative of Industrial Code 23-9.2(b)(1). The responsive brief filed by defendant Capital Framing and Construction Corp. conceded that the regulation had previously been deemed a valid 241(6) predicate, but pointed out that "<u>[p]laintiff never testified that Spellane [the forklift operator] was not qualified to</u>

[8] This Court's affirmance concerned only the plaintiff's Labor Law § 240 claim.

operate the lull or that he was not 'trained' or 'designated [emphasis added].'" *Berg*, App. Div. Br. for Third-Party Plaintiff-Respondent, Capital Framing and Construction Corp., 2006 WL 4723778 at 33. The plaintiff's reply brief did not contest the point. *Berg*, App. Div. Reply Br., 2006 WL 4748600.

Thus, the alleged violation in *Berg* related to the "in a safe manner" standard, not to the "designated person" restriction that appeared in the same sentence. Unfortunately, the Third Department ruling in *Berg* did not specify what the claimed regulatory violation had been, or which portion of 23-9.2(b)(1) had allegedly been violated. It instead said only that the cited rule "is no more than a restatement of common-law requirements and is insufficient to establish a nondelegable duty under Labor Law § 241(6)" (40 AD3d at 1285). And the rulings that then followed did not go beyond the decision itself to uncover what the alleged violation had been, or whether it had involved the "designated persons" part of the provision.

So, the *Hricus* Court deemed the subsection too general, citing only to *Berg*, in an analysis that was exactly one sentence long. *Hricus*, 63 AD3d at 1005. The *Scott* Court then reached the same conclusion, even while holding otherwise as to the "designated persons" provision of 12 NYCRR 23-9.5(c), citing only *Berg* and *Hricus*. The *Scott* Court's analysis concerning 12 NYCRR 23-9.2(b)(1) was also a sentence long.

And from the small acorn in *Berg* a line of precedent was born.

Much the same process produced the conflict in the case law concerning Industrial Code 23-7.1(c). As with 23-9.2(b)(1), that provision combines a "designated persons" restriction, in a single sentence, with the directive that the personnel hoists "shall be operated in a safe manner at all times." The first case in the line of authority on which appellant relies was *Wade*, 102 AD3d 476. Review 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. The hoist became stuck and when plaintiff emerged from it, a piece of the hoisting mechanism came loose, fell 200 feet, and struck plaintiff. *Wade*, 102 AD3d at 476. The *Wade* Court dismissed the claim premised on 12 NYCRR 23-7.1 in a single sentence, stating only that "the applicable Industrial Code section upon which plaintiff relies, 12 NYCRR 23-7.1, is not sufficiently specific to support the claim." *Id.* at 477. The Second Department thereafter repeated the same conclusion, citing solely to *Wade*, in *Robles*, 173 AD3d at 1091.

Fortunately, most of the "designated persons" provisions that appear throughout Industrial Code Rule 23 are not joined in a single sentence with a directive to perform the given activity "in a safe manner at all times." Unfortunately, it is not at all unusual for general directives and specific requirements to be combined in a single subdivision, or even in the same sentence, with the consequence that a single imprecise statement concerning a Code provision can cause a great deal of mischief.

Further, while one may have thought or at least hoped that bench and bar would have learned the lesson of *Misicki* (where the first two sentences of the provision were deemed overly general but the third was deemed a valid 241(6) predicate), the very fact that two dissenting judges here felt that a regulation must stand or fall "as a whole" indicates that additional guidance may be warranted.

4. Conclusion

Even if Industrial Code 23-9.9(a) did not exist, Industrial Code 23-9.2(a) of itself forbid operation of power-operated equipment except "by trained, designated persons." This notwithstanding, the Commissioner deemed the hazards posed by unskilled operation of power buggies to be of such concern as to specifically and additionally forbid operation of power buggies except by "a trained and competent operator designated by the employer." 12 NYCRR 23-9.9(a).

Plaintiff submits that such prohibition plainly "'mandates a distinct standard of conduct.'" *Misicki*, 12 NY3d at 521, *quoting Rizzuto*, 91 NY2d at 351. Were the rule otherwise, few provisions of the Industrial Code would pass muster, and the Code itself would be rendered largely inconsequential. And, to the extent it matters, the great weight of the lower court authority concerning truly analogous "designated person" restrictions — this as opposed to the "in a safe manner" requirements that are in some instances linked to a "designated person" restriction — does not support appellant's thesis.

POINT II

APPELLANT'S VARIOUS ARGUMENTS AS TO WHY THE SUBJECT REGULATION SHOULD BE DEEMED INAPPLICABLE OR DISREGARDED LACK MERIT.

Apart from arguing that the subject regulation is too general to serve as a Labor Law § 241(6) predicate, appellant argues that the provision should be deemed inapplicable or disregarded because,

1) plaintiff "has not proven, as is his burden … [there was] a failure to use reasonable care on the part of the Port Authority" (Deft.-App. Br. at 35),

2) it was purportedly "unforeseeable as a matter of law" that a site worker who had not been assigned to operate a power buggy would do so while engaged in "horse play" (*id.* at 2, 25, 38),

3) the fact that James Melvin's operation of the machine constituted "a significant departure from his own normal work duties or assignments" purportedly means that his conduct did not come within the scope of his employment, which in turn purportedly means that the Port Authority cannot "be held vicariously liable" for Melvin's conduct (*id.* at 32), and,

4) the rulings below "rendered the Port Authority, and all owners in this State, insurers" (*id.* at 2, 14, 15, 26, 30).

The appellant's arguments are legally and logically bankrupt.

First, an "owner" or "contractor" within the scope of Labor Law § 241(6) statute's scope is legally responsible for a statutory breach *irrespective* of whether it was negligent. *Rizzuto*, 91 NY2d at 350 ("the general contractor [or owner, as the case may be] is vicariously liable without regard to his or her fault").

Similarly, "[s]ince section 241(6) imposes a nondelegable duty on property owners, plaintiff need not show that defendants exercised supervision or control over the work site in order to establish a right of recovery under section 241(6)." *St. Louis*, 16 NY3d at 413.

And it is difficult to imagine which decision concerning Labor Law § 241(6) could have convinced appellant that plaintiff had a "burden" to prove that there was "a failure to use reasonable care on the part of the Port Authority" (Deft.-App. Br. at 35).

Second, while appellant argues that it was "unforeseeable as a matter of law" that a non-designated person would operate the power buggy, the reality is that such conduct was not only foreseeable but also foreseen. *Sanchez v State of New York*, 99 NY2d 247, 253, 254 [2002] (where the State had anticipated that an inmate-on-inmate assault could occur and developed rules to prevent such occurrences, it followed that the occurrence was foreseeable).

Of all the different kinds of power-operated equipment that might be utilized at a construction site, the Commissioner singled out three kinds of machines — excavating machines (12 NYCRR 23-9.5[c]), aerial buckets (12 NYCRR 23-9.6[c][1]) and power buggies (12 NYCRR 23-9.9[a]) — as requiring particular warning that such machines be operated by designated personnel. Had it been "unforeseeable" that someone else might try to operate a power buggy, there would be no need for the restriction in the first place. In any event, even at common law, "[a]n intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor [here, Paul Estavio] negligent." *Derdiarian*, 51 NY2d at 316.

The facts in *Derdiarian* nicely demonstrate how far Melvin's conduct was from anything remotely resembling a legally superseding cause. In *Derdiarian*, as here, a worker at a construction site was struck by an errant vehicle. That, however, is where the similarity ends. The accident therein began when a passing motorist who had neglected to take his medication suffered a consequent seizure, lost consciousness, and thus lost control of his vehicle (51 NY2d at 313-314). Because the contractor charged with blocking the site off from passing traffic had installed only "a single wooden horse-type barricade," the errant car "careen[ed] into the work site" and struck the plaintiff (*id.* at 313). That was not, however, when the true harm occurred. The plaintiff-worker was struck with such force that he was "throw[n] into the air"

(*id.*). Upon landing, "he was splattered over his face, head and body with 400 degree boiling hot liquid enamel from a kettle struck by the automobile," with the result that his body "ignited into a fire ball" (*id.*).

The *Derdiarian* defendants argued that they could not have foreseen that an epileptic seizure would lead to a collision that would then cause a worker to be "ignited into a fire ball." This Court's answer was that "Plaintiff need not demonstrate … that the precise manner in which the accident happened, or the extent of injuries, was foreseeable," that a contractor had "negligently failed to safeguard the excavation site," and that "[a] prime hazard associated with such dereliction is the possibility that a driver will negligently enter the work site and cause injury to a worker." *Derdiarian*, 51 NY2d at 315-316. "That the driver was negligent, or even reckless" did not "insulate [the contractor] from liability." *Id.*

Here, there was no seizure, no fireball, and no surprising chain of events. A site worker who had not been designated to operate the power buggy and had not been trained to do so lost control of a power buggy and struck the plaintiff. That was exactly what one could expect to occur, and precisely why there was a regulation restricting use to designated personnel.[9]

---

[9] While plaintiff's appellate counsel is flattered to be characterized as "a regular and respected contributor to the New York Law Journal" (Deft.-App. Br. at 24-25), the statement regarding foreseeability which appellant takes out of context, 1) concerned liability under Labor Law § 240, and, 2) related to the chain of events in *Gordon v E. Ry. Supply, Inc.*, 82 NY2d 555 [1993]. That was a case in which the defendant's alleged provision of the

Third, while appellant argues that "the undisputed evidence" established that Melvin's conduct was "outside the scope of his employment" (Deft.-App. Br. at 29-31), the assertion is legally wrong and, even more importantly, legally irrelevant.

As this Court observed in a case in which two "gas jockeys" at a service station were injured while attempting a "trick" that involved tossing "a lighted match into a bucket containing a residue of oil, gasoline and grease without causing an explosion," employees do not legally step beyond the bounds of their employment when they "momentarily abandon work to play, tease, test one another or satisfy their curiosity." *Lubrano v Malinet*, 65 NY2d 616, 617-618 [1985]; *see also*, *Burns v Merritt Eng'g*, 302 NY 131, 133 [1951] (where claimant's coemployee pulled a "prank" that entailed replacing gin with carbon tetrachloride).

Indeed, even intentional torts are often deemed within the scope of employment. *De Wald v Seidenberg*, 297 NY 335 [1948] (where defendant's building superintendent had an argument with a tenant that escalated to an assault); *Ramos v Jake Realty Co.*, 21 AD3d 744, 745 [1st Dept 2005] (factually similar to *DeWald*); *Young Bai Choi v D & D Novelties, Inc.*, 157 AD2d 777, 778 [2d Dept 1990] (where defendant "was shoveling snow from under his car so that he could pick up mail essential to his

---

wrong elevating device (a ladder instead of a scaffold) purportedly caused the plaintiff to fall, which in turn caused him to drop his sandblaster, which "continued to spray sand, apparently because of a defective trigger," which thus caused injury (82 NY2d at 560-561).

Here, there was no chain of events that led from violation to injury. There was instead operation by an untrained, undesignated site worker which directly caused collision for the simple and predicable reason that Melvin was an untrained, undesignated operator.

employer's mail-order business from a distant post office" and that led to an altercation in which he intentionally struck the plaintiff with the shovel).

Here, were the issue really whether Melvin was acting in the scope of employment when he injured plaintiff, even that issue would have to be resolved in the plaintiff's favor as a matter of law for one simple reason. It is uncontroverted that Melvin *was* "doing his master's work, no matter how irregularly, or with what disregard of instructions." *Riviello v Waldron*, 47 NY2d 297, 302 [1979].

As has been noted, Melvin claimed that he "[w]ent to move the buggy because it was in the middle of the road" (R.591-592). Although defendant's *counsel* disputed that assertion, that is not what their own witness, Paul Estavio, said. Estavio, who was the only witness apart from Melvin who actually purported to have first-hand knowledge of whether the buggy had already been moved,[10] said that he "was in the process of moving the concrete mud buggies [plural]" when Melvin "approached the area," "took control of one of the buggies and drove it away" (R.671). This being so, it was uncontroverted that the buggy had to be moved and that Melvin *was* "doing his master's work" even if he was combining pleasure and business and even if he was acting in "disregard of instructions." *Riviello*, 47 NY2d at 302.

---

[10] While foreperson Joseph DeRosa claimed in his own made-for-the-motion affidavit that the buggy had already been moved out of the way when Melvin commandeered it (R.669), he conspicuously failed to say whether he *actually saw* that the buggy had already been moved or had merely been told such was the case (R.669).

Nor was Melvin's conduct even remotely comparable to the fact patterns appellant deems analogous. Those cases include a hospital employee who sexually abused a patient (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]), a surgical resident who sexually assaulted a patient he was not even treating (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 250-253 [2002]), a token booth clerk who attacked and literally choked a passenger who "asked directions to 34th Street" (*Adams v New York City Tr. Auth.*, 211 AD2d 285, 286-287 [1st Dept 1995]), and a police officer who "punched plaintiff in the face through the open driver's side window," then "jumped on top of plaintiff, striking him six or seven more times," and then walked off with plaintiff's driver's license and three of his credit cards (*Schilt v New York City Tr. Auth.*, 304 AD2d 189, 192 [1st Dept 2003]).

All of that aside, the issue is <u>not</u> whether Melvin was acting in the scope of his employment. The issue is whether there was a violation of Labor Law § 241(6) which was a proximate cause of the accident. To illustrate, had one of the site contractors allowed a passerby to move the power buggy out of the way — in which event it would be absolutely clear that the driver was not acting within the scope of his or her employment — such would not alter that the event constituted a breach of Industrial Code 23-9.9(a). Similarly, the fact that the errant driver who failed to take his anti-seizure medication in *Derdiarian* was certainly not acting within the scope of *his* employment did not constitute a legal defense in that case.

In this vein, while defendant tries to make the issue whether Melvin was acting in the scope of *his* employment when he drove the buggy, the only pertinent issue — except that it is not really in issue since it cannot be seriously disputed — is whether Estavio was acting in the scope of *his* employment when he allowed an untrained individual to operate the machine with which Estavio had been entrusted.

Finally, while appellant laments that the Appellate Division's refusal to render the Industrial Code a nullity renders "the Port Authority, and all owners in this State, insurers" (Deft.-App. Br. at 2), defendant misstates the legal rule and misunderstands the legislative policy that precipitated the rule.

Labor Law § 241(6) does not render the site owner an "insurer," but it does "impose[] a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained *due to another party's negligence* in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein." *Rizzuto*, 91 NY2d at 350, emphasis by the Court.

The reason the legislature imposed that legal responsibility upon the site owner and general contractor was, as this Court explained in *Allen v Cloutier Const. Corp.*, 44 NY2d 290 [1978], because the prior rule had led to too many work site injuries and deaths.

Prior to the 1969 amendment of Labor Law § 241(6), the law was as the Port Authority now imagines it to be. Liability was "dependent upon a showing that they [the owner and general contractor] exercised some degree of control or supervision of the work site." *Allen*, 44 NY2d at 299. In consequence, "[o]wners and contractors were able to insulate themselves from liability for injuries caused by dangerous and unlawful conditions on the job site, and indeed were encouraged to disregard such conditions, lest they be found to be in control." *Id.* at 299-300. "More importantly, the inclination of an owner or contractor to engage a subcontractor predicated on price alone was greatly enhanced, with a concomitant disregard of the safety record and practices of the subcontractor." *Id.* at 300.

As a result of the human toll that followed from the prior failure to impose a nondelegable duty upon the site owners and general contractors, the present statute was born. As for appellant's claim that the law is too harsh, this Court's response in *Allen*, 44 NY2d 290 is equally applicable here:

> Doubtless this duty is onerous; yet, it is one the Legislature quite reasonably deemed necessary by reason of the exceptional dangers inherent in connection with "constructing or demolishing buildings or doing any excavating in connection therewith."

Allen, 44 NY2d at 300-301.

POINT III

APPELLANT'S VARIOUS CRITICISMS OF THE APPELLATE DIVISION'S GRANT OF SUMMARY JUDGMENT TO THE PLAINTIFF ARE UNPRESERVED AND THEREBY UNREVIEWABLE, BUT IN ANY EVENT MERITLESS.

Appellant argues that the Appellate Division erred in granting plaintiff summary judgment inasmuch as, a) plaintiff had not sought such relief in Supreme Court (Deft.-App. Br. at 11, 13), and, b) the motion purportedly turned on issues of fact that could not be resolved as a matter of law.

As plaintiff now demonstrates, appellant's arguments concerning the Appellate Division's grant of summary judgment are unreviewable and also lacking in merit.

A. The Appellant's Arguments Concerning The Appellate Division's Grant Of Summary Judgment Are Unpreserved And Unreviewable.

Appellant is correct in stating that plaintiff did not move or cross-move for summary judgment in Supreme Court. Deft.-App. Br. at 11. It is incorrect in positing that such dictates reversal of the Appellate Division's grant of summary judgment to the plaintiff. In actuality, such renders the Appellate Division's grant of summary judgment unreviewable.

The last sentence of CPLR 3212(b) states that if "it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." As a consequence, the

Appellate Division has authority to grant summary judgment to a nonmoving party even in the absence of an appeal by the nonmoving party. *Merritt Hill Vineyards Inc. v Windy Hgts. Vineyard, Inc.*, 61 NY2d 106, 110-111 [1984]; *Dunham v Hilco Const. Co., Inc.*, 89 NY2d 425, 429 [1996]. The only limitation upon such authority is that the Appellate Division may do so "only with respect to a cause of action or issue that is the subject of the motions before the court." *Dunham*, 89 NY2d at 429-430.

Here, the question of whether there was a violation of 12 NYCRR 9.9(a), and the further question of whether such violation proximately caused the subject accident, were raised in defendant's own motion papers (R.50-61).

However, that the Appellate Division had authority to grant that relief does not mean that this Court has jurisdiction to review the Appellate Division's grant of that relief. Quite the contrary, this Court has repeatedly held where the Appellate Division reviews and resolves an unpreserved issue the Court of Appeals "lacks power to review either the Appellate Division's exercise of its discretion to reach the issue, or the issue itself." *Bennett v St. John's Home*, 26 NY3d 1033, 1034 [2015]; *U.S. Bank National Association v. DLJ Mrge Capital, Inc.*, 33 NY3d 84, 89 [2019]; *Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 423 [2013]; *Hecker v State*, 20 NY3d 1087, 1087-1088 [2013].

This is so even when, as was true in all four of the cases cited immediately above, such rule effectively benefits the party who prevailed in the Appellate Division on a claim that he or she had not preserved in Supreme Court.[11]

Accordingly, while it is quite true that the Appellate Division here granted plaintiff relief that plaintiff had not sought in the lower court, the Appellate Division had statutory authority to do so and, per this Court's rulings, this Court "lacks the power to review either the Appellate Division's exercise of its discretion to reach the issue, or the issue itself." *Bennett*, 26 NY3d at 1034.

B. The Appellant's Criticisms Of The Appellate Division's Grant Of Summary Judgment — Including Appellant's Erroneous Statement That The Appellate Division Resolved "All Issues Of Fact In Plaintiff's Favor" — Lack Merit.

Apart from its preserved but meritless contention that the subject regulation is too general to serve as a Labor Law § 241(6) predicate, appellant advances two principal criticisms of the Appellate Division ruling: 1) the Appellate Division purportedly "resolved all issues of fact in Plaintiff's favor" (Deft.-App. Br. at 3), and, 2) the fact that violation of a regulation is classically "some evidence of negligence" (as opposed to negligence *per se*) purportedly precludes the grant of summary judgment in plaintiff's favor (*id.* at 33-37).

---

[11] Plaintiff would observe that the rule has been criticized, including by plaintiff's appellate counsel herein. Brian J. Shoot, *The Legislature's Power to Correct the Anomaly of Benefitting from A Failure to Preserve an Argument for Appellate Review*, 80 Alb L Rev 1323 [2016-2017].

Neither argument has merit.

<u>*First*</u>, the Appellate Division did not resolve <u>any</u> contested issues of fact in plaintiff's favor, much less "all issues of fact." Yes, there was a dispute as to whether Melvin moved the power buggy, a) for his own amusement, b) because it had to be moved, or, c) for both reasons. *See* pages 10 to 13, above. Yes, the Appellate Division assumed, for purposes of its ruling, that Melvin was "'horse playing.'" *Toussaint*, 174 AD3d at 45-46. However, such was what *defendant* asked the Appellate Division to find, and what it even now asks this Court to find. Had the Appellate Division instead made the opposite finding — namely, that Melvin was not "horse playing" and instead moved the power buggy only because it was in the way and had to be moved — the Court could not have reached defendant's arguments against application of the regulation.

<u>*Second*</u>, while it is true that violation of a regulation (as opposed to violation of a statute) is classically "some evidence of negligence" rather than negligence *per se* (*Healy v Rennert*, 9 NY2d 202, 211 [1961]; *Elliott v. City of New York*, 95 NY2d 730, 734-736 [2001]), that misses the central point. This is not a case in which the individual for whom defendant stands legally responsible drove at 50 mph on a road on which local regulation had set a speed limit of 45 mph. Estavio allowed a wholly untrained individual to operate a power buggy, and to do so in the middle of a construction site in which other workers were using hazardous equipment.

Although the question of whether a party was negligent *usually* presents an issue of fact that should be resolved by a jury, there are cases in which the conduct in issue was so clearly negligent that the issue can be resolved in the plaintiff's favor as a matter of law <u>even where the allegedly negligent individual is not alleged to have violated any specific statute or regulation</u>. *E.g.*, *Andre v. Pomeroy*, 35 NY2d 361, 364 [1974] (holding that there was no triable issue where defendant flatly admitted looking away from the road to retrieve a compact from her purse and that "an unfounded reluctance to employ the remedy will only serve to swell the Trial Calender and thus deny to other litigants the right to have their claims promptly adjudicated").

It logically follows that summary judgment may also be granted in the plaintiff's favor where, as here, the clearly negligent party's conduct <u>was</u> violative of a state regulation. *Juarez by Juarez v Wavecrest Mgt. Team Ltd.*, 88 NY2d 628, 646-649 [1996].

The proof of the pudding is that the Appellate Division has very frequently granted the plaintiff summary judgment under Labor Law § 241(6) where, as here, the subject conduct was plainly negligent. *Ferguson v. Durst Pyramid, LLC*, 178 AD3d 634 [1st Dept 2019]; *Ortega v R.C. Diocese of Brooklyn*, 178 AD3d 940, 941-942 [2d Dept 2019]; *Wolodin v Lehr Constr. Corp.*, 177 AD3d 496, 497 [1st Dept 2019]; *Haynes v Boricua Vil. Hous. Dev. Fund Co., Inc.*, 170 AD3d 509, 510 [1st Dept 2019]; *Allington v Templeton Found.*, 167 AD3d 1437, 1438-1439 [4th Dept 2018]; *Quizhpi v S. Queens Boys & Girls Club, Inc.*, 166 AD3d 683, 685 [2d Dept 2018]; *Sawczyszyn v New York Univ.*,

158 AD3d 510, 512 [1st Dept 2018]; *Luciano v New York City Hous. Auth.*, 157 AD3d 617, 617 [1st Dept 2018].

C. The Appellate Division Correctly Granted Plaintiff Summary Judgment Since, Under Any View Of The Facts, The Site Contractor Negligently Violated A "Concrete" Requirement Of Industrial Code 23 And Such Violation Was A Proximate Cause Of The Subject Accident.

Melvin contemporaneously claimed that he moved the power buggy "because it was in the middle of the road" and had to be moved (R.577). While appellant artfully suggests that Melvin disowned the statement when deposed (Deft.-App. Br. at 9), review of the testimony shows the very opposite (R.609, 611-612). Melvin testified that he did not write the statement in issue, but agreed that such was what he contemporaneously told the entrant and that he signed the statement (R.609, 611-612).

In this context, it is difficult to see how the conclusory witness statements (reproduced at R.668-672) that defendants crafted for purposes of the motion could have sufficed to raise a bona fide issue of fact regarding their claim that Melvin's movement of the power buggy was solely for his own amusement. Yet, even supposing that the statements sufficed to create a triable issue regarding Melvin's *purpose* in moving the buggy, it would *still* remain utterly undisputed that,

a) appellant's contractor entrusted Paul Estavio with the subject power buggy (R.699),

b) plaintiff's testimony that Estavio and Melvin were "joking," "playing," and "talking crap" immediately before Melvin drove the buggy (R.206, 210, 671-672) was utterly undisputed,

c) it was also undisputed that Melvin had no training at all in the buggy's operation (R.592-593), that he nonetheless attempted to drive it (R.592), and that he immediately lost control of it and drove into plaintiff (R.594-596), and,

d) there was no proof contradicting plaintiff's testimony that Estavio was in Melvin's immediate presence when the latter mounted the buggy, no proof that Melvin took it without Estavio's knowledge or that Melvin overpowered Estavio (R.671-672), and no proof that Estavio at any point *asked* Melvin to get off the power buggy (R.671-672).

Very simply, even if Estavio's conduct had not run afoul of a state regulation, there is no way that anyone could reasonably posit that it was not negligent for Estavio to allow a wholly untrained co-worker to operate a power buggy in the middle of a busy work site. Nor could one reasonably posit that such was not a proximate cause of the subject accident.

So, even ignoring that the issue is not legally reviewable, and even assuming for sake of argument that the regulatory violation would or could be deemed excusable if

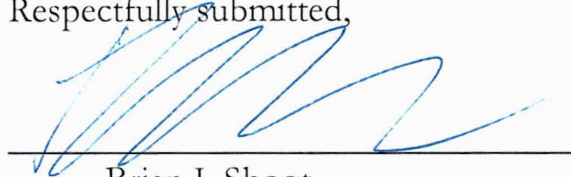
there were actually proof to the effect that Melvin overpowered the designated employee or alternatively that Melvin gained control of the power buggy by stealth, there was no such proof. Accordingly, the Appellate Division did not err in concluding that the regulation was negligently violated and that such violation was a proximate cause of the subject accident.

Conclusion

For the reasons stated above, the order appealed from should be affirmed.

Dated: New York, New York
March 5, 2020

Respectfully submitted,



By: ______________________________

Brian J. Shoot
SULLIVAN PAPAIN BLOCK MCGRATH COFFINAS & CANNAVO
Appellate Counsel for Plaintiff-Respondent Curby Toussaint
120 Broadway
New York, New York 10271
(212) 732-9000
bshoot@triallaw1.com

LAW OFFICES OF CLIFFORD J. STERN
Two Park Avenue, 19th Floor
New York, New York 10016
(212) 813-1515

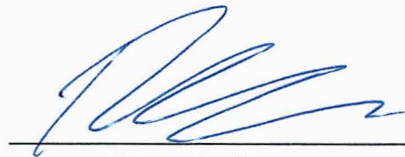
Printing Specification Statement
Pursuant to Rule 6500.11(m)

Microsoft Word states that, exclusive of the Table of Contents, Table of Authorities, and this Certificate, the Reply Letter submitted herewith is 13,995 words long.

Dated: New York, New York
March 5, 2020

Respectfully submitted,

SULLIVAN PAPAIN BLOCK MCGRATH & CANNAVO
Attorneys for Plaintiff-Respondent
Curby Toussaint



By: ______________________________
Brian J. Shoot
120 Broadway
New York, New York 10271
(212)732-9000