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COURT OF APPEALS

STATE OF NEW YORK

ALLISON GAMMONS,

Respondent,

-against-

No. 220

CITY OF NEW YORK AND
NEW YORK CITY POLICE DEPARTMENT,

Appellants.

20 Eagle Street
Albany, New York 12207
November 17, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 220, Gammons
2 v. the City of New York.

3 Counselor, would you like any rebuttal
4 time?

5 MR. SHENDER: Two minutes, please, Your
6 Honor.

7 CHIEF JUDGE LIPPMAN: Two minutes, go
8 ahead, counsel.

9 MR. SHENDER: Good afternoon, Your Honors,
10 and may it please the court, my name is Michael
11 Shender for the City of New York.

12 Your Honors, under PESHA the legislature
13 has enacted a detailed, comprehensive enforcement
14 scheme which expressly vests the state's labor
15 commissioner with exclusive authority - - -

16 JUDGE PIGOTT: But you know the - - - the -
17 - -

18 MR. SHENDER: - - - to determine - - -

19 JUDGE PIGOTT: - - - the police have the
20 exclusive control over the Vehicle and Traffic law.
21 Now that doesn't mean you can't sue somebody on
22 negligence and say and the negligence is a violation
23 of 1180(d) or, you know, whatever section. Why
24 wouldn't this be the same where you can - - - you can
25 bring an action, not necessarily under the general

1 statute, but if you - - - if you bring an action and
2 say and the violation is - - - and I think there's a
3 sub - - - there's a sub-reg that says you got to have
4 side rails or something, wouldn't that be a valuable
5 - - - a - - - a valid cause of action?

6 MR. SHENDER: Well, Your - - - Your Honor,
7 this statute dif - - - differs drastically from other
8 predicates that this court has previously deemed
9 sufficient for 205-e causes of action. For example,
10 let me take VTLS, as you had suggested; VTL expressly
11 provides for civil liability and tort action.
12 Section 388 places liability with the owner of the
13 vehicle, and insurance law - - -

14 JUDGE SMITH: But isn't - - - but isn't it
15 the point of 205-e to give police officers a cause of
16 action that members of the general public don't have?

17 MR. SHENDER: Well, I don't think so. I
18 think what this court actually had said in some of
19 the earliest cases which examine 205-e - - - I
20 believe, you know, we could look at Desmond; we could
21 look at Galapo - - - is that 205-e was not intended
22 to give police officers greater rights than those who
23 are available to general public.

24 JUDGE SMITH: Well, the - - - well, police
25 officers have - - - under the fireman's rule have - -

1 - firefighter's rule have - - - have - - - have, in
2 some ways, less rights than members of the general
3 public.

4 MR. SHENDER: That's correct.

5 JUDGE SMITH: And isn't - - - isn't - - -
6 isn't the point of 205-e to - - - to - - - to
7 compensate for that, in a way, by saying but when
8 there's a statute, even one that doesn't necessarily
9 give a cause of action to the general public, we're
10 going to - - - we're - - - we're going to give a
11 cause of action to police officers?

12 MR. SHENDER: Well, let me address that,
13 Your Honor. First of all, police officers since the
14 enact - - - enactment of GOL 11-106 have the right
15 that the general public has against the - - -

16 JUDGE SMITH: Against everybody except
17 their employer.

18 MR. SHENDER: - - - against everybody else
19 exc - - - except for the employers and - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but why don't
21 they have an umbrella of protection? Why can't you
22 view this statutory scheme as giving police officers
23 an umbrella of protection that they deserve? That
24 seems to be - - - by everything that's happened since
25 the enactment of the statute, they seem to want it

1 interpreted expansively so that they have that
2 protection, and why aren't they entitled to that
3 protection?

4 MR. SHENDER: And it has been, Your Honor.
5 I think if we look - - -

6 CHIEF JUDGE LIPPMAN: Yeah, so why
7 shouldn't it be here?

8 MR. SHENDER: Well, because when - - - when
9 this court has considered in the past whether or not
10 certain rules could be statutory predicates for
11 205-e, this court looked at these rules. They - - -

12 JUDGE READ: I was going to say isn't - - -
13 we - - - we talked about a well-developed body of
14 law, right?

15 MR. SHENDER: That's correct.

16 JUDGE READ: Are you arguing that point, or
17 have you abandoned that point?

18 MR. SHENDER: Well, Your - - - Your Honor,
19 precedentially PESHA is not a well-developed body of
20 law because no state court, I should mention, has
21 ever defined what a recognized hazard is. There's
22 few Appellate Division cases that - - -

23 JUDGE READ: So you are arguing that?

24 MR. SHENDER: Well, I - - - I don't think
25 the court has to go that far. All we have to do is

1 actually look at PESHA and - - - and - - -

2 JUDGE READ: What if we disagree with you?

3 Is that an alternative argument?

4 MR. SHENDER: Well, it - - - it could be an
5 alternative argument.

6 JUDGE SMITH: How do you figure out whether
7 a body of law is well developed or not so well
8 developed?

9 MR. SHENDER: Well, prec - - -
10 precedentially I think there has to be some guidance
11 for the court. There's been no guidance in this area
12 for the court, and - - - and - - - and - - -

13 JUDGE SMITH: So - - - so - - - so we could
14 - - - theoretically we could say there are not enough
15 cases under - - - under 27-a; come back in ten years,
16 there are more cases and it will be well developed?

17 MR. SHENDER: Not necessarily, Your Honor.
18 I think when we look at PESHA and what the
19 legislature has done, is it's given the - - - the
20 state labor commissioner the exclusive authority to -
21 - - to - - -

22 CHIEF JUDGE LIPPMAN: The labor - - - the
23 labor commissioner replaces the courts, replaces
24 everything in something that's meant to - - - to
25 protect people? I mean PESHA and - - - I think what

1 you're saying is you're never going to have it,
2 because we don't have it now, because it hasn't been
3 interpreted that way. Isn't that what - - - what's
4 supposed to be doing - - -

5 MR. SHENDER: Well, I - - - I think - - -

6 CHIEF JUDGE LIPPMAN: - - - to look at it
7 and see whether it makes sense here - - -

8 MR. SHENDER: I think this is a perfect - -
9 -

10 CHIEF JUDGE LIPPMAN: - - - as a predicate,
11 yeah?

12 MR. SHENDER: It's a perfect example of a
13 legislative wisdom. I think what the legislature did
14 under PESHA is it did provide the role for the
15 courts.

16 CHIEF JUDGE LIPPMAN: Yeah, but aren't we
17 supposed to interpret what the legislature did?

18 MR. SHENDER: Right, well, the legislature
19 expressly, in this case, delegated the exclusive
20 authority to the state's labor commissioner.

21 JUDGE PIGOTT: But isn't that true in - - -
22 in Labor Law 241 cases, as well, and we say - - - and
23 we say you can sue under 241, but you have to have a
24 specific statute, a - - - a specific reg upon which
25 you're making the claim. So if - - - if this

1 plaintiff said I'm - - - I'm making a claim under
2 this and here is the specific reg, would that be a
3 viable cause of action in your view?

4 MR. SHENDER: Yes, and - - - and - - - and
5 it has been recognized by the court. But I'm glad
6 you brought up Labor Law 241(6) as well as Labor Law
7 240. If we look at the Third Department's decision
8 in Gain, which examines another statute also modeled
9 after OSHA just like PESHA was, in that case the
10 Third Department looked at 22 - - - Labor Law 202-h,
11 which deals with electrocution. And the court said
12 that that statute cannot provide a tort remedy
13 because the legislature intended for the state's
14 labor commissioner to make determinations whether or
15 not there was violation.

16 JUDGE PIGOTT: That's true, but - - - but I
17 mean the - - - the person was electrocuted. If he
18 sued the - - - whoever, you know, obviously not his
19 employer, but someone else and said, you know, the
20 negligence of this person led to me execu - - -
21 electrocution that's a - - - that's a good cause of
22 action, right?

23 MR. SHENDER: That's correct.

24 JUDGE PIGOTT: You can't say well, you
25 know, wait a minute the - - - the - - - the utility

1 board or something said this is electrocution and
2 therefore, they - - - they usurped it. All they're -
3 - - all they're doing here is outlining, you know,
4 what - - - what can and can't - - - you know, people
5 can and can't do, and if they violate it, I would
6 think you could say that they were negligent and the
7 negligence was that they violated PESHSA, in this
8 case.

9 MR. SHENDER: Well, it - - - again, I think
10 what we would have to do is look at the purpose of
11 PESHSA, and the stated purpose for PESHSA is to
12 actually limit the financial exposure to public
13 employers. If - - - if you look, the legislature
14 actually said that it was concerned with injuries to
15 visitors to public places of employment.

16 JUDGE PIGOTT: But was it - - - isn't their
17 - - - isn't their concern is that you - - - you got
18 to be safe. In other words, telling the - - - you
19 know, public entities follow these rules and - - -
20 and people won't get hurt.

21 MR. SHENDER: Cert - - - certainly - - -

22 JUDGE PIGOTT: Follow these rules and
23 people won't get hurt, and if they do, they're out of
24 luck.

25 MR. SHENDER: Certainly safety is an

1 overriding concern. But let's look at - - - let's
2 look at analogous cases that this court has decided.
3 Let's - - - let's look at Mark G. v. Sabol and
4 McLean. In those cases, this court found that the
5 Social Services Law was enacted specifically for the
6 protection of the plaintiffs that brought those
7 actions. Nonetheless - - - and I'm quoting what this
8 court said is that, "Where the legislature
9 specifically considered and expressly provided for
10 enforcement mechanism," such - - - "such
11 comprehensive enforcement mechanism envisions that no
12 other enforcement mechanism beyond the statute's
13 already comprehensive scheme can be implied." And -
14 - - and so in this case, there's no doubt that PESHA
15 was implemented - - -

16 JUDGE SMITH: Are - - - are you saying that
17 - - - that - - - that no - - - that 503-e can never
18 have as a predicate a statute that does not create a
19 private right of action?

20 MR. SHENDER: You mean 205-e?

21 JUDGE SMITH: 205-e, yes.

22 MR. SHENDER: Whether or not another
23 statute - - - whether or not the purported predicate
24 creates a private right of action is just but one
25 factor.

1 JUDGE SMITH: So - - - well, so you ad - -
2 - you ad - - - you admit the possibility that there
3 could be a predicate statute that did not create a
4 private right of action?

5 MR. SHENDER: Well, that's correct. I
6 think - - - I - - - I think Penal Law has been used
7 as a predicate record.

8 JUDGE READ: But it can't be 27-e? You're
9 saying 20 - - - 27-e - - - a, rather, could never
10 serve as a predicate. Is that what you're - - -
11 that's what you're arguing?

12 MR. SHENDER: PESHA, PESHA - - -

13 JUDGE READ: Yeah.

14 MR. SHENDER: - - - which is 27-a.

15 JUDGE READ: Yeah.

16 MR. SHENDER: What - - -

17 JUDGE READ: It can never serve as a
18 predicate?

19 MR. SHENDER: Can never serve as a
20 predicate, and - - - and we're saying that because if
21 we look at the statute - - - and I see my time is up,
22 Your Honors.

23 CHIEF JUDGE LIPPMAN: Go ahead, answer the
24 question.

25 MR. SHENDER: If we look at the statute - -

1 - and I think the Appellate Division didn't consider
2 it. My - - - my opponent does not cite PESHA. It
3 specifically provides a mechanism force - - - for
4 enforcement. So the - - -

5 JUDGE PIGOTT: That's - - - that's a
6 divided argument, it seems to me. It - - - I - - - I
7 - - - I see your point where it's such a general
8 thing. They've got to provide a safe place to work
9 or something like that. But if - - - if it follows
10 that - - - that the derivative of that is one of the
11 specific regs that's been clearly violated, isn't
12 there a cause of action there?

13 MR. SHENDER: Well, not - - -

14 JUDGE READ: Just like there would be under
15 the Labor Law?

16 MR. SHENDER: Not - - - not - - - not where
17 we have an - - - a comprehensive enforcement scheme
18 with limited role for the courts. I think - - - and
19 the statute does have a citizen suit provision which
20 allows citizens to - - -

21 CHIEF JUDGE LIPPMAN: Yeah, but that - - -
22 doesn't that read out an expansive reading of - - -
23 of 205?

24 MR. SHENDER: Well, 205 is certainly an
25 expansive statute.

1 CHIEF JUDGE LIPPMAN: No, no, but - - - but
2 if you're - - - if you're being so restrictive in
3 terms of what serves as a predicate, you're making it
4 really useless, aren't you?

5 MR. SHENDER: Absolutely not, Your Honor.
6 We're not being overly restrictive. We're simply
7 reading PESHA, and we're simply following the
8 legislative wisdom in this case.

9 CHIEF JUDGE LIPPMAN: You're saying under
10 PESHA you can never - - - you can never have a
11 private right of action?

12 MR. SHENDER: Well, there's no doubt that
13 PESHA was never meant to form basis for tort
14 liability, and this is exactly what plaintiff is
15 using the statute here for.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 JUDGE PIGOTT: Well, can ask one more? I'm
18 sorry, Judge.

19 CHIEF JUDGE LIPPMAN: Sure.

20 JUDGE PIGOTT: I - - - I - - - I noted
21 1910.23, which the plaintiff put in their
22 supplemental verified bill of particulars, talked
23 about every open-sided floor or platform four feet or
24 more above adjacent floors, and it goes on to give
25 very specific guardrails. If they violate that

1 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
2 Rivera.

3 MR. SHENDER: Yes, Your Honor.

4 JUDGE RIVERA: I just - - - I just want to
5 follow up something. Just clarify for me why - - -
6 why allowing the officer to go forward with this
7 claim would undermine the Commissioner of Labor's
8 authority under PESHA?

9 MR. SHENDER: Well - - -

10 JUDGE RIVERA: I'm - - - I'm just not
11 understanding this argument you're making.

12 MR. SHENDER: It would certainly rewrite
13 the statute and - - - and - - - and create another
14 enforcement mech - - - mechanism for the statute.
15 That's what it would do, and I think the same - - -

16 CHIEF JUDGE LIPPMAN: But you answered
17 before that - - - that you don't have to have a
18 private right of action in a statute for it to be a
19 predicate, right?

20 MR. SHENDER: Right, it could be implied,
21 so that's what - - -

22 CHIEF JUDGE LIPPMAN: So why is this case
23 so different than - - -

24 MR. SHENDER: Because - - -

25 CHIEF JUDGE LIPPMAN: - - - any other case?

1 MR. SHENDER: Because unlike any other
2 predicate that this court has deemed sufficient, this
3 statute specifically provides comprehensive
4 enforcement scheme where it envisions inspections.

5 CHIEF JUDGE LIPPMAN: Okay, counsel.

6 MR. SHENDER: - - - and gives commissioner
7 exclusive authority.

8 CHIEF JUDGE LIPPMAN: You'll have rebuttal.
9 Let's hear from your adversary.

10 MR. SHENDER: Thank you, Your Honor.

11 MR. KREMEN: Good afternoon, Your Honors,
12 David Kremen for - - - for Allison Gammons.

13 CHIEF JUDGE LIPPMAN: Counsel, what about
14 the enforcement scheme of PESHA?

15 MR. KREMEN: Well - - -

16 CHIEF JUDGE LIPPMAN: Your argument is - -
17 - your adversary's arguing that you're going to be
18 grossly violative of - - - of the statutory scheme
19 and that, basically, the Labor Law Commissioner is
20 the one that's supposed to make these determinations.

21 MR. KREMEN: Well, to begin with, PESHA is
22 not comprehensive. PESHA basically adopts OSHA, and
23 OSHA, according to the U.S. Supreme Court, is not a
24 comprehensive scheme. State tort law, statutory, and
25 common law is supposed to be there for - - - for

1 protection. PESHA was put into place because tort
2 law and state statutes weren't enough safety
3 provisions. That was - - - that's why it was put in.

4 As for - - - as for the statute itself, the
5 - - - the exclusive authority, this court in - - - in
6 Williams held that the exclusive authority of a jury
7 of twelve to hear a - - - to - - - to rule on a
8 felony conviction was - - - didn't have - - - you
9 didn't have to have a trial for that in order to have
10 a 205-e case. That's something that's sacrosanct,
11 and you didn't have to - - - to go there. So I don't
12 see any reason why you would have to have a violation
13 found.

14 JUDGE SMITH: Is - - - isn't this - - -
15 isn't this sort of thing different from the Penal Law
16 when you have a detailed regulatory structure and a -
17 - - and - - - and a - - - and an administrative
18 agency to enforce it. Isn't - - - yeah, isn't
19 throwing lawsuits into the mix contrary to the
20 legislative intent?

21 MR. KREMEN: No, I think, as I said, the
22 legislative intent is that the lawsuit is supposed to
23 be in place and it - - -

24 JUDGE SMITH: You - - - you - - - you say
25 there is a private right of action under PESHA?

1 MR. KREMEN: No.

2 JUDGE SMITH: You - - - you - - - you say
3 you don't have to be a police or fireman; anybody can
4 sue?

5 MR. KREMEN: No, no, no, no. There's - - -
6 there's no question that PESHA and OSHA have - - -
7 have - - - well, certainly OSHA, has been - - -
8 nobody's saying that - - - that it's a private right
9 of action. The private right of action comes from
10 205-e. And as this court has held in similar
11 circumstances, they're conflating the idea of a
12 private right of action under PESHA with a private
13 right of action under 205-e.

14 CHIEF JUDGE LIPPMAN: How does this case
15 differ from - - - or - - - or these - - - this
16 statute differ from the other statutes that we found
17 are predicates under 205-e?

18 MR. KREMEN: I - - - I don't think it does
19 differ, and - - - and I'll - - - I'll tell you one -
20 - - one other thing that's - - - that's not in the
21 brief but it's in the direct language of - - - of the
22 section itself. The exclusive enf - - - authority is
23 for the standards promulgated under 27-a. The
24 general duty clause, which is what's - - - what's at
25 issue today, is not a standard promulgated under

1 27-a. It's a standard promul - - - a standard
2 promulgated by the - - - the commissioner, and if you
3 look at - - - at 27-a(1) - - - (3)(a) - - - and we
4 know it's a set - - - it's not a standard. It says,
5 every employer shall comply with the general duty
6 clause and the, saf - - - safety and health standards
7 promulgated under this action. So even if - - - if
8 you want to read it as - - - as giving the
9 commissioner exclusive authority, which I don't
10 believe is the case for purposes of 205-e liability,
11 the statute itself doesn't give the authority for
12 purposes of the general duty law.

13 JUDGE PIGOTT: But what does that do?
14 Assuming you're right for - - - on 205-e, 2 - - -
15 27-a is - - - is a general statute. If we go back to
16 the Labor Law, you can't - - - you can't sue on 241.
17 You've got to have a reg, and it would seem to me
18 that if - - - even if you're right, you can't simply
19 say well, you violated 27-a(3), because that means
20 that, you know, if somebody slips and falls on
21 spilled coffee in the - - - in the - - - in the break
22 room, that they've got a cause - - - a statutory
23 cause of action against their - - -

24 MR. KREMEN: 205-e(3) was amended for just
25 that purpose.

1 JUDGE PIGOTT: No - - -

2 MR. KREMEN: Modifications of common law.

3 JUDGE PIGOTT: For negligence, right, but
4 you can't - - - I mean you - - - you want to argue a
5 statutory - - - you want to argue a - - - not
6 negligence, you want to argue a statutory violation
7 of PESHA means you can recover.

8 MR. KREMEN: Right, but 205 - - - 205-e
9 subdivision(3) codifies that - - - or - - - or
10 provides that if - - - if a codified statute simp - -
11 - or a statute simply codifies common law, then
12 that's sufficient as a predicate, and that's what 27-
13 a is - - - or at least 2 - - - the - - - the first
14 section of 27-a. It does just that.

15 JUDGE PIGOTT: I thought you said it was an
16 enabling statute.

17 JUDGE SMITH: What's - - - what's an
18 example of - - -

19 MR. KREMEN: No, it's not - - - oh, I'm
20 sorry.

21 JUDGE SMITH: What's an example of a
22 statute not a - - - I mean that - - - that would not
23 be a possible predicate for a - - - I'm going to get
24 it wrong again - - - 203-a?

25 MR. KREMEN: 2 - - - 20 - - - 20 - - -

1 CHIEF JUDGE LIPPMAN: 205.

2 JUDGE SMITH: 205, all right.

3 MR. KREMEN: 205-e. Well, it - - - it
4 would depend on if it applied, obviously, to the
5 facts. I mean - - -

6 JUDGE SMITH: Well, make up your own.

7 MR. KREMEN: I mean well, 20 - - - I mean
8 if we're looking 27-a, if it - - - if it doesn't
9 concern a - - - a safe place to work - - - you know,
10 if - - - if there were railings and everything was in
11 order here and the person fell, then it wouldn't be
12 applicable. I mean it's - - - I - - - I'm not sure
13 of a statute off the top of my head that would - - -

14 JUDGE ABDUS-SALAAM: Counsel - - -

15 MR. KREMEN: - - - have not applied.

16 JUDGE ABDUS-SALAAM: - - - in keeping with
17 the analogy to the Labor Law, are you saying that
18 27-a is - - - could be, like, 200 of the Labor Law,
19 of the common law?

20 MR. KREMEN: Well, it's - - - it's very
21 similar in - - - in nature to 200, as well, could be
22 a - - - a statutory predicate.

23 JUDGE PIGOTT: Is there - - - is there
24 comparative negligence then?

25 MR. KREMEN: Well, 205-e does not provide

1 for comparative.

2 JUDGE PIGOTT: That's right, and - - - and
3 - - - and - - - and - - - and when you look at 2 - -
4 - 27-a(3), you want to say if it's a violation of
5 that you win, right?

6 MR. KREMEN: That - - - that's the way the
7 statute's written.

8 JUDGE PIGOTT: All right, well, Judge Smith
9 asked you if there's any statutes that you couldn't
10 put into that. I mean if someone's out hunting
11 without a license and - - - and you get shot, you say
12 well he was without a license, therefore, I win? Or
13 do you have to show some - - -

14 MR. KREMEN: Direct or indirect - - -

15 JUDGE PIGOTT: Or do you have to show some
16 negligence?

17 JUDGE SMITH: If - - - if I understood your
18 answer to Judge Abdus-Salaam, Labor Law Section 200
19 could be a predicate, which basically just says don't
20 be negligent.

21 JUDGE ABDUS-SALAAM: Yeah.

22 MR. KREMEN: Well, 2 - - - and 205-e
23 expressly - - - expressly provides that codifica - -
24 - that law that cod - - - codifies common law
25 negligence are - - - are proper predicates.

1 JUDGE SMITH: And why - - - why do they - -
2 - why do they - - - when they're writing 205 - - -
3 205-e - - -

4 MR. KREMEN: Yeah.

5 JUDGE SMITH: - - - I've learned it. To -
6 - - when - - - when they were writing 205-e, why did
7 they use all those words? Why didn't they just say
8 you have a general negligence cause of action against
9 your employer?

10 MR. KREMEN: I honestly don't know why. I
11 mean they - - - they - - - they ended up going to 110
12 uh - - - to 106 to - - - to go in that direction with
13 respect to - - - to everyone but municipal employers.

14 JUDGE PIGOTT: Well, let's take a look at
15 this - - - if you look at the facts in this case, one
16 of the allegations, I guess, is that the truck was
17 too small or too short.

18 MR. KREMEN: It's too - - - too short,
19 right.

20 JUDGE PIGOTT: There's nothing in PESHA
21 that says you got to have a - - - a - - - a truck of
22 a certain length.

23 MR. KREMEN: There's no - - - well, that's
24 the general duty clause, but there's nothing in the -
25 - -

1 JUDGE PIGOTT: That's right, and - - -

2 MR. KREMEN: - - - in the underwriting - -
3 - right.

4 JUDGE PIGOTT: Right, so you want to say
5 under the general duty clause, if we say the truck is
6 too short, we win.

7 MR. KREMEN: Well, right, it's too - - -
8 too short.

9 JUDGE PIGOTT: That's silly. I mean I - -
10 - I - - -

11 MR. KREMEN: It's too short for the purpose
12 that it was - - -

13 JUDGE PIGOTT: I mean, my goodness, where -
14 - - where does this stop?

15 MR. KREMEN: I'm sorry?

16 JUDGE PIGOTT: Well, where does this stop?
17 And what's the sense in having all those regs then?
18 I mean you - - - you - - - if you've got - - - if
19 you've got 20 - - - if you've got 207-a(3)(A) - - -

20 MR. KREMEN: Well, it's - - -

21 JUDGE PIGOTT: - - - liability, it's - - -
22 it's - - - that's 240 with - - - with the world is
23 your oyster.

24 MR. KREMEN: It's - - - it's not limited to
25 - - - to just the - - - the size of the truck, and

1 it's - - - and it does concern the circumstances.

2 They had to have - - -

3 JUDGE PIGOTT: Right, so that was one of
4 your allegations. You're saying that they - - -

5 MR. KREMEN: Yes.

6 JUDGE PIGOTT: - - - they - - - well, geez,
7 I mean if - - - if - - - all right.

8 MR. KREMEN: I mean they - - - they knew
9 the truck was too short. They had trucks that were
10 longer. They had trucks that had tailgates. And
11 yet, they didn't supply that.

12 JUDGE PIGOTT: But the guy stuck her with -
13 - - in the chest with a pole, and you want to say
14 well, the reason why she fell was because the truck
15 was too short. How about the guy that hit her in the
16 chest - - -

17 MR. KREMEN: But - - -

18 JUDGE PIGOTT: - - - with a pole?

19 MR. KREMEN: Clearly there's more than one
20 cause.

21 JUDGE PIGOTT: You don't want comparative,
22 and - - - and - - - and want to say that based - - -
23 based on - - -

24 MR. KREMEN: Well, we're not talking - - -
25 we're not talking about comparative.

1 JUDGE PIGOTT: - - - you want to say
2 27-a(3), unsafe place to work, I win.

3 MR. KREMEN: We're not talking about
4 comparative in that situation.

5 JUDGE PIGOTT: I - - -

6 MR. KREMEN: We're talking about what would
7 be apportionment between a co-employee and - - - and
8 the city itself.

9 JUDGE PIGOTT: You - - - you - - - you get
10 my point, right?

11 MR. KREMEN: I - - - I understand.

12 JUDGE PIGOTT: And - - - and - - -

13 MR. KREMEN: But there's no issue of
14 comparative in this case anyway.

15 JUDGE PIGOTT: In other words if these two
16 - - - if these two were fooling around and - - - and
17 - - - and she falls off the truck and you say well,
18 the truck was too short, you win.

19 MR. KREMEN: Well, no, if they were fooling
20 around I don't think it would be a - - - a - - -
21 direct or indirect cause of violation.

22 CHIEF JUDGE LIPPMAN: You want to say,
23 what, that if the truck was too short and if that's a
24 substantial factor in the accident?

25 MR. KREMEN: We're - - - we were saying

1 that the truck was - - - was too short for the - - -

2 CHIEF JUDGE LIPPMAN: Oh, but you - - -

3 MR. KREMEN: - - - the barricades that were
4 - - - were being used. They have shorter barricades
5 and they have longer trucks. And also, they have
6 longer trucks that have - - - that have tailgates,
7 and so we were saying in - - - in addition to the - -
8 - the specific regulation that wasn't addressed by
9 the lower court, that this constituted a violation of
10 27-a, the general duty clause.

11 JUDGE PIGOTT: What's wrong with just
12 saying 27-a is a basis upon which you can bring
13 something, but, like we say in 241(6), you have to -
14 - - if you're going to use - - - if you're going to
15 use PESHA, you got to cite to a specific reg. Would
16 that hurt?

17 MR. KREMEN: I'm - - - I'm sorry?

18 JUDGE PIGOTT: If - - - if you're going to
19 - - - if you're going to make a claim under PESHA,
20 you can't use the general - - - the - - - the general
21 law like you can't use 241(6). You've got to - - -
22 you've got to cite to a specific violation of one of
23 the regs under PESHA.

24 MR. KREMEN: There's nothing in the
25 legislative history that would - - - that would say

1 that that's a - - - a right way to read this, and I
2 think it's - - - it's - - -

3 JUDGE SMITH: Let - - - let me ask you a
4 variation.

5 MR. KREMEN: - - - contradictory to
6 everything else in the regs. Even with - - -

7 JUDGE SMITH: Let me ask you a variation of
8 the question I asked you earlier. Is there any
9 situation, in your view, in which a police officer is
10 injured by the negligence of a fellow employee that
11 would not give that officer a suit against the city?

12 MR. KREMEN: Sure, I mean if - - - if an
13 officer were - - - were to trip and fell - - - fall
14 on a private premises, there's no safe to place to
15 work that's provided by the city - - -

16 JUDGE SMITH: Well, no - - - no, I said
17 through the negligence of a fellow employee.

18 MR. KREMEN: Of a fellow employee. Yeah,
19 it - - - I'm trying to think if there's - - - there's
20 situations where a fellow employee slams a car door
21 on a - - - on a coworker. I - - - I can't think of
22 any regulation that would come into - - -

23 CHIEF JUDGE LIPPMAN: It has nothing to do
24 with a safe place to work, is your answer.

25 MR. KREMEN: Correct.

1 JUDGE PIGOTT: Well, could it be - - - if -
2 - - if the officer get - - - gets out of the - - -
3 slips on ice and then said well, it's not a safe
4 place to work. You parked - - - you - - - you pulled
5 the car up next to a - - - a slippery spot; he's got
6 a claim or she's got a claim?

7 MR. KREMEN: De - - - depends if it's the
8 other - - - you're saying the other officer pulls up?

9 JUDGE PIGOTT: It's a claim, correct?

10 MR. KREMEN: No, I - - - I don't think that
11 would constitute a safe place to work.

12 JUDGE PIGOTT: Whether they prevail or not
13 is another question, but it - - - it's certainly - -
14 -

15 MR. KREMEN: Well - - -

16 JUDGE PIGOTT: - - - failure to put a - - -
17 to - - - to place him or her in a - - - in a safe
18 place.

19 MR. KREMEN: Right, I mean everything comes
20 down to the - - - to the specifics, of course. The
21 devil's in the details.

22 CHIEF JUDGE LIPPMAN: Okay, counsel.

23 MR. KREMEN: Thank you.

24 CHIEF JUDGE LIPPMAN: Thanks, counsel.

25 Counselor, rebuttal?

1 MR. SHENDER: Thank you, Your Honor. Let
2 me follow up on one of the questions Judge - - - that
3 Judge Smith had - - - had asked. Is there a statute
4 that would not constitute a valid predicate under GML
5 205-e? And I think the answer is it is the statute
6 that has its own enforcement mechanism, which is
7 comprehensive and which limits the role of the courts
8 in terms of fact-finding and in terms of what the
9 courts have to do.

10 And it provides specific mechanism where -
11 - - as to how to determine if there was a violation.
12 It's by physical inspections. When the Appellate
13 Division said that this case could be proven by
14 expert testimony, it completely ignores PESHA, which
15 specifically provides that there has to be a physical
16 inspection.

17 JUDGE PIGOTT: Well, PESHA has a ton of
18 regs, right? I mean it - - - it covers a lot of
19 stuff. I mean OSHA's about as comprehensive as you
20 can get.

21 MR. SHENDER: It certainly does, Your
22 Honor.

23 JUDGE PIGOTT: So you're saying that if
24 anything happens to an officer or firefighter under
25 PESHA, they're out of luck?

1 MR. SHENDER: Right, be - - - because - - -
2 exactly right because of the legislative wisdom under
3 PESHA that this - - -

4 JUDGE PIGOTT: So if there was carbon
5 monoxide in the - - - in the - - - in the truck, it
6 was a clear violation of PESHA, no cause of action?

7 MR. SHENDER: Well, that - - - that - - -
8 that brings me to Farella. I think there are several
9 cases that we've cited which actually speak about
10 this sub - - - this - - - this subject matter. One
11 case is Capers, but the case that's more relevant to
12 your question, Your Honor, is Farella. In that case,
13 police officers sued the city because of lead paint
14 in one of the firing - - - firing ran - - - ranges,
15 and as one of the predicates for - - - for their
16 claim, under 1983 they tried to use PESHA.

17 And what the Southern District said,
18 relying on the state court's decision in Capers v.
19 Guiliani and in Shaw, which was a decision from
20 Albany, that - - - that PESHA does not allow courts
21 to determine whether or not there was a violation in
22 the first instance and that - - - that is left - - -
23 these are technical matters that are - - - that are -
24 - - that are left to the expertise of the
25 Commissioner of Labor.

1 CHIEF JUDGE LIPPMAN: What about the
2 purposes of 205-e?

3 MR. SHENDER: Well, certainly, the general
4 purpose of 205-e is not sufficient to override a
5 preexisting statutory scheme, and - - - and - - - and
6 I - - - and I - - -

7 CHIEF JUDGE LIPPMAN: It's not overriding
8 it. It's using the statute as - - - the other
9 statute as a predicate.

10 MR. SHENDER: Right, it - - - it - - - it -
11 - - it's - - - it's using the other statute as basis
12 for liability. I see my time's up, could I briefly
13 conclude?

14 CHIEF JUDGE LIPPMAN: Yeah, go ahead. Keep
15 going, yeah, answer the question.

16 MR. SHENDER: Well, yeah, it's using the
17 other statute as the basis for liability. That's
18 what it's doing. That's what - - - 205-e is simply a
19 narrow passageway as this court - - -

20 CHIEF JUDGE LIPPMAN: But it's not narrow.

21 MR. SHENDER: But this - - -

22 CHIEF JUDGE LIPPMAN: We know that the
23 legislature's intent is that it be expansive. We
24 know that from all the amendments, right?

25 MR. SHENDER: And I'm quoting from this

1 court's decision in Galapo where Chief Judge Kaye did
2 say that it's a narrow passageway around common law
3 rule, and the reason she used the word narrow is
4 because you do need a statute that as - - -

5 CHIEF JUDGE LIPPMAN: You think the
6 legislature's intention is that - - - that it's - - -
7 that 205-e is narrow?

8 MR. SHENDER: Well, absolutely. And it
9 preserved - - -

10 CHIEF JUDGE LIPPMAN: Absolutely it is?

11 MR. SHENDER: Well - - - well, no, in - - -
12 in terms of - - - in terms of it is not as broad as
13 police officers' right of action against other
14 entities because it does require that there has to be
15 a statutory predicate. And following up on what
16 Judge Smith has said - - -

17 CHIEF JUDGE LIPPMAN: Well, that could be a
18 - - - a - - - a - - - a developed body of law or a
19 particular statute that you can hang your hat on,
20 right?

21 MR. SHENDER: It has - - - it has to be a
22 statute that this court can adjudicate. It has to be
23 a stat - - - for example, let's take VTL. We have
24 388 which provides lia - - - tort liability. New
25 York City Charter Administrative Code 7-210

1 specifically says if you have prior written notice,
2 you could sue the government. Penal law has always
3 been this court's province in terms of adjudicating
4 whether or not there was a violation - - - or the
5 jury. It has none of those statutes.

6 CHIEF JUDGE LIPPMAN: Okay, counsel.

7 Thanks.

8 MR. SHENDER: Thank you, Your Honor.

9 CHIEF JUDGE LIPPMAN: Thank you both.

10 MR. SHENDER: Thank you.

11 CHIEF JUDGE LIPPMAN: Appreciate it.

12 (Court is adjourned)

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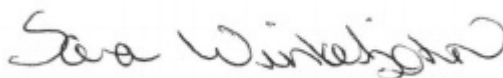
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I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Allison Gammons v. City of New York and New York City Police Department, No. 220 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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