

1 CHIEF JUDGE LIPPMAN: Let's start with
2 number 45, Isabella v. Koubek.

3 MR. SIEGEL: Good afternoon, Your Honors.

4 CHIEF JUDGE LIPPMAN: Counsel, would you
5 like any rebuttal time?

6 MR. SIEGEL: Three minutes, Your Honor.

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

9 MR. SIEGEL: Thank you. Over the past
10 fifty-six years, this court has established a
11 framework to deal with the interplay between the
12 vicarious liability statute, such as 388 of Vehicle
13 and Traffic Law and comprehensive exclusive remedies,
14 such as the Workers' Compensation Law, that beginning
15 with Rauch and Naso back in 1958.

16 CHIEF JUDGE LIPPMAN: How does your
17 position fit in with the spirit of the Workmen's
18 Compensation Law?

19 MR. SIEGEL: I think it fits in with the
20 spirit, because primarily we're dealing here with a
21 third-party action, a contribution action.

22 CHIEF JUDGE LIPPMAN: Right.

23 MR. SIEGEL: Workers' Compensation Law
24 specifically precludes third-party con - - -
25 contribution actions, except for grave injury. I

1 think what this principle allows if a third-party
2 claim were to be brought against the owner - - -

3 CHIEF JUDGE LIPPMAN: Right.

4 MR. SIEGEL: - - - is it's essentially,
5 it's a way of bypassing or avoiding the prohibition
6 against third-party claims under Workers'
7 Compensation.

8 JUDGE GRAFFEO: Is there any language in
9 the statute that you would rely upon to indicate that
10 the exclusivity aspect was intended to encompass
11 individuals that don't have an employment
12 relationship?

13 MR. SIEGEL: I think that the - - -

14 JUDGE GRAFFEO: Because that was pretty
15 much what the Appellate Division decision focused on.

16 MR. SIEGEL: Right. I think that
17 essentially what - - - what this court has said
18 repeatedly is when you have an individual such as co-
19 employee who has no liability but Workers'
20 Compensation liability, that you cannot have
21 vicarious - - - the liability evolve from that, that
22 you - - - when you start with nothing, you have
23 nothing to vicariously give to an owner.

24 So I think that the way that Workers'
25 Compensation Law has been interpreted by the courts

1 is that, particularly when you have to protect, first
2 and foremost Workers' Compensation Law - - -

3 CHIEF JUDGE LIPPMAN: What's your most
4 analogous case for your - - - that supports your
5 position?

6 MR. SIEGEL: Well, I think the most
7 analogous case is - - - is the Kenny case. That
8 deals with the federal Workers' Compensation.

9 CHIEF JUDGE LIPPMAN: Does it matter that
10 it deals with a little different milieu?

11 MR. SIEGEL: I don't - - - I don't think it
12 does, because I think the principle's the same, and I
13 think that basically you can't have - - - the
14 plaintiff, we - - - we all agree that the plaintiff
15 can't sue the owner of the vehicle that was - - -
16 that was being driven - - -

17 CHIEF JUDGE LIPPMAN: Right.

18 MR. SIEGEL: - - - by Oldenborg. By the
19 same token the third-party plaintiff should not be
20 permitted to sue the owner, because that party's
21 rights derive - - -

22 CHIEF JUDGE LIPPMAN: What's - - -

23 MR. SIEGEL: - - - from the plaintiff.

24 CHIEF JUDGE LIPPMAN: Yeah, but what - - -
25 what's fairer in light of the - - - what went on here

1 with the - - - with the split into - - - in terms of
2 who's responsible and the percentages - - - what's
3 fairer here in terms of this particular case?
4 Putting aside the - - - the history of the two
5 statutes - - -

6 MR. SIEGEL: Um-hum.

7 CHIEF JUDGE LIPPMAN: - - - what's a fair
8 outcome here?

9 MR. SIEGEL: Okay, I think what's fair is
10 that the third-party plaintiff - - - the defendant,
11 live by the joint and several liability that all
12 defendants have to abide by, as opposed to the owner,
13 Koubek, my client, who has no negligence at all.
14 That's established. No active negligence at all. By
15 virtue of the Workers' Compensation bar, he cannot go
16 after the negligent party responsible, so he has no
17 recourse.

18 CHIEF JUDGE LIPPMAN: But how about that
19 the - - - the other car? Wasn't there only ten
20 percent liable, and now they're - - - they're fitting
21 the - - - footing the whole bill?

22 MR. SIEGEL: That's correct, but that is -
23 - -

24 CHIEF JUDGE LIPPMAN: Is that - - - is that
25 fair?

1 MR. SIEGEL: That - - -

2 CHIEF JUDGE LIPPMAN: I'm not saying on the
3 law, I'm just saying it seems - - - you know, the
4 whole thing is odd - - -

5 MR. SIEGEL: Well - - -

6 CHIEF JUDGE LIPPMAN: - - - in the way it -
7 - - in the way it plays out.

8 MR. SIEGEL: I think joint and several
9 liability, which is - - - which is part of our common
10 law in New York, many people believe is - - - is not
11 fair, but I think - - -

12 JUDGE PIGOTT: But if Mrs. - - - Mrs.
13 Hallock had been hurt and sued, who would she sue?

14 MR. SIEGEL: If Mrs. Hallock had been hurt?

15 JUDGE PIGOTT: Right.

16 MR. SIEGEL: She would have sued and she
17 would have had a right to sue actually - - - she
18 could - - - if she was hurt, she would not be able to
19 sue either the owner, at least under our theory, or
20 the negligent driver, because that negligent driver
21 is insulated by the Workers' Compensation Law.

22 JUDGE PIGOTT: Oh, no, Mrs. - - - I'm
23 talking about Mrs. Hallock, the lady - - - the lady
24 that, you know - - -

25 JUDGE READ: The other driver.

1 JUDGE PIGOTT: - - - has nothing to - - -

2 MR. SIEGEL: Right. I mean, she would
3 certainly be able to sue as a - - - certainly be able
4 to sue Isabella - - -

5 JUDGE PIGOTT: No, he's a passenger.

6 MR. SIEGEL: Right.

7 JUDGE PIGOTT: She - - - she's the one who
8 apparently you did a U-turn in front of, right?

9 JUDGE READ: The other driver.

10 MR. SIEGEL: Correct.

11 JUDGE PIGOTT: So if she gets hurt because
12 of this - - - apparently she didn't, because she
13 didn't sue - - - who does she sue?

14 MR. SIEGEL: Well, she would sue the - - -
15 she has no - - - the employment - - -

16 JUDGE PIGOTT: Who would she sue?

17 MR. SIEGEL: She has no employment
18 relationship - - -

19 JUDGE PIGOTT: Right.

20 MR. SIEGEL: - - - so she could sue the
21 owner - - -

22 JUDGE PIGOTT: Who - - -

23 MR. SIEGEL: - - - of the vehicle.

24 JUDGE PIGOTT: Well, now, who's the owner?

25 MR. SIEGEL: The owner of the vehicle is my

1 client, Koubek.

2 JUDGE PIGOTT: Why - - - why would she - -
3 - why does it make a difference - - - in other words,
4 if Mrs. Hallock gets hurt in a car accident, she sues
5 the driver, right, in this case it's Mrs. Oldenburg -
6 - - is that - - - am I pronouncing that correctly?

7 MR. SIEGEL: Correct.

8 JUDGE PIGOTT: And - - - and Mrs. Oldenburg
9 is going to be defended by one of two people, it
10 seems to me, either - - - either your client's
11 insurance company or the employer. Now, you could
12 make an argument that it should be the employer,
13 because the car was being used in the scope of Mrs.
14 Oldenburg's employment, right, and therefore, the
15 employer should be defending her on this action.

16 MR. SIEGEL: Correct.

17 JUDGE PIGOTT: Now apparently that's not -
18 - - that hasn't been discussed. I couldn't find
19 anything in the - - - in the papers that would
20 indicate that. But if - - - if Mrs. Hallock is hurt
21 and wants to sue the driver of this car, you're
22 suggesting that maybe Mr. Koubek is in.

23 MR. SIEGEL: If there was some act - - - if
24 there was some personal injuries - - -

25 JUDGE PIGOTT: Yeah, I - - - just sue it.

1 I mean, it doesn't make a difference - - -

2 MR. SIEGEL: Right.

3 JUDGE PIGOTT: - - - if he wins or loses,
4 but if she sues, somebody's going to have to defend
5 Mrs. Oldenborg.

6 MR. SIEGEL: Correct.

7 JUDGE PIGOTT: In your view, would it be
8 Mr. Koubek's carrier, or would it be the employer's
9 carrier, defending her on a lawsuit brought by Mrs.
10 Hallock?

11 MR. SIEGEL: I think it would most likely
12 be the - - - Koubek's carrier.

13 JUDGE PIGOTT: All right. And for some
14 reason then, because she's not hurt that - - - that
15 claim can't - - - her only - - - her only injury now
16 is going to be a financial one, if this thing goes
17 the wrong way. She's going to - - - assume she's not
18 insured. She's going to have to pay 800,000 dollars
19 out of her pocket, and you're suggesting that your -
20 - - your client, because he's the owner, but was not
21 the employer is - - - is free of any of that?

22 MR. SIEGEL: He's free of any of that,
23 because the third-party claim is simply to recoup or
24 to try to pay the plaintiff, which would result in
25 the plaintiff - - -

1 JUDGE PIGOTT: No, it's not.

2 MR. SIEGEL: - - - being paid twice.

3 JUDGE PIGOTT: No, it's not.

4 MR. SIEGEL: Sure it will.

5 JUDGE PIGOTT: No, it's not. It's Mrs. - -
6 - Mrs. Holland (sic) is going to go to her purse and
7 take out 800,000 dollars and give it - - - and give
8 it to Mr. Isabella. And then she's going to say,
9 this wasn't my fault. It was the fault of the driver
10 of that car, and she's insured by Mr. Koubek's
11 carrier, and I want them to give me my money back,
12 because it wasn't my fault.

13 MR. SIEGEL: Right, but in that scenario,
14 unlike the one where Hallock is injured, in that
15 scenario, you're going basically after the employer
16 again, because - - -

17 JUDGE SMITH: Isn't - - - isn't the case
18 that Judge Pigott just described essentially Dole v.
19 Dow Chemical?

20 MR. SIEGEL: It is. It is. And that's why
21 there's a statute in Workers' Comp that says only
22 when there's grave injury can a third-party plaintiff
23 bring a claim against the employer.

24 JUDGE PIGOTT: But that's - - - that's the
25 employee doing that.

1 MR. SIEGEL: It's the employee, but a co-
2 employee is in the shoes of the employer.

3 JUDGE PIGOTT: Mrs. Hallock is neither.

4 MR. SIEGEL: Correct, but Mrs. Hallock is
5 not suing for any of her own personal injuries.

6 JUDGE SMITH: Dow Chemical wasn't either.
7 What - - - Dow Chemical wasn't the employee either,
8 was it?

9 MR. SIEGEL: No, it wasn't. But in this
10 particular case, what could happen - - - the other
11 scenario that is - - - is very dangerous here, is
12 that assuming that - - - that Hallock does not have
13 coverage sufficiently to pay their percentage of
14 fault, then they bring a third-party action, then the
15 carrier essentially derived from the liability of the
16 immune Oldenborg co-employee ends up paying - - -

17 JUDGE PIGOTT: Put it this way.

18 MR. SIEGEL: - - - if there's sufficient
19 insurance. That's the double recovery that all these
20 cases - - -

21 JUDGE PIGOTT: It's not a double recovery.

22 MR. SIEGEL: - - - have.

23 JUDGE PIGOTT: Mrs. Hallock - - - Mrs.
24 Hallock is found liable, and she has no coverage. Or
25 is - - - she's got a twenty-five/fifty policy or

1 something, and we've got this mega thing. She's
2 going to lose her house. They're going to - - -
3 she's going to lose her savings; she's going to lose
4 all of her money, because she didn't have enough
5 insurance on her car to cover this.

6 She says, but I can get indemnification
7 because of - - - of the percentages here, from the
8 person who's responsible. That's not double paying
9 Mr. Isabella. That's - - - that's simply making Mrs.
10 Hallock whole for an accident that she didn't cause,
11 and for which she should not be having - - - being
12 required to pay, right?

13 MR. SIEGEL: She's going to turn that money
14 directly over to Isabella.

15 JUDGE PIGOTT: Yeah, why is that - - -

16 MR. SIEGEL: It's Isabella's recovery from
17 - - -

18 JUDGE PIGOTT: To save her house.

19 MR. SIEGEL: - - - an immune employee.

20 JUDGE PIGOTT: To save her house. I mean,
21 but it's - - - I - - - I think we're - - - I think
22 we're just looking at it from two different angles.

23 MR. SIEGEL: Yeah, and - - - and I think
24 joint and several liability is harsh. It has a harsh
25 result, but there is still no answer for the problem

1 of my client, who has no recourse, and has no
2 negligence at all. Remember, Hallock does have a
3 degree of negligence.

4 JUDGE PIGOTT: Well, he does - - - he - - -
5 he has - - - he has it because of 388.

6 MR. SIEGEL: No, he doesn't. He cannot go
7 after the employer because of Workers' Compensation
8 Law.

9 JUDGE PIGOTT: No, no, I'm saying he has a
10 liability because - - - of 388, he - - - he's the
11 permissive owner.

12 MR. SIEGEL: He has the liability, but he's
13 innocent.

14 JUDGE PIGOTT: And you're saying that - - -
15 that because of that, you know, he shouldn't be held
16 liable, which is why I asked you in the beginning,
17 why wouldn't the employer, then, be liable?

18 MR. SIEGEL: Because the - - - liable to
19 Hallock?

20 JUDGE PIGOTT: Yeah.

21 MR. SIEGEL: Because there's a statute, the
22 Workers' Compensation Law, that says that third-party
23 claims cannot be brought - - -

24 JUDGE READ: What - - -

25 MR. SIEGEL: - - - unless there's grave

1 injury. This is the way around the grave injury
2 exception. This is expanding the grave injury to any
3 claim. And Workers' Compensation Law - - - and the
4 reason obviously for that, is to protect employers
5 from having to pay claims. And I understand. This
6 is a situation where you have a - - - you know, you
7 have an owner who's a - - - you know, the husband
8 essentially of a wife co-employee. But that
9 situation was true in Naso as well. There was a
10 situation involving a - - - a son and a father
11 ownership.

12 So the crux of this is that because there's
13 no vicarious liability here, there's nothing that can
14 be vicariously placed upon my client.

15 JUDGE READ: What about the Tikhonova case?
16 Does that have - - - how does that play into this, or
17 does it?

18 MR. SIEGEL: I think it does, because I
19 think this court very clearly said that in that case,
20 there was not a comprehensive statute providing for
21 an exclusive - - - exclusive remedy. And the court
22 had said that Workers' Comp - - - and I mean, it
23 basically relied on the Naso and the other cases,
24 saying unlike this case with diplomatic immunity,
25 Workers' Comp sup - - - "supplants all other

1 statutory or common law causes of action."

2 And - - - so I think, really, Tikhonova
3 supports, sort of, a continuing development of this
4 law, which essentially says that no, you've got a
5 statute that protects employers, and it cannot be
6 invaded by this runaround the statute, by - - - by
7 this vicarious liability statute, and it has - - - it
8 has yielded many times. And this court has caused
9 388 to yield to the Workers' Compensation Law because
10 of the public policy involved.

11 Sikora is an excellent example of that, as
12 well, with the volunteer firefighter immunity. In
13 that case, too, it was decided by this court,
14 consistent with public policy, that these volunteer
15 firefighters - - - if somebody lends them a car, they
16 shouldn't be - - - that - - - that owner of that car
17 shouldn't be liable to - - -

18 JUDGE PIGOTT: Well, that's - - - that's a
19 whole different - - -

20 MR. SIEGEL: Well, it's only different in
21 that now we're dealing with a third-party claim as
22 opposed to - - -

23 JUDGE PIGOTT: Well, no, I mean, we want
24 volunteer fire departments to get to the fire, you
25 know.

1 JUDGE READ: Yeah.

2 MR. SIEGEL: But I - - - I would - - - I
3 would submit that Workers' Compensation Law is even
4 broader.

5 JUDGE GRAFFEO: Although - - - although
6 your red light's on, let me ask you. If we were to
7 agree with you, what's left for the Second Circuit to
8 do?

9 MR. SIEGEL: The Second Circuit would, I
10 believe, reverse district court's holding and find
11 that the third-party complaint against Koubek should
12 be dismissed.

13 JUDGE GRAFFEO: So the Hallocks end up with
14 the 800,000-dollar judgment? Is that - - -

15 MR. SIEGEL: That is - - -

16 JUDGE GRAFFEO: That's - - -

17 MR. SIEGEL: That is correct.

18 JUDGE GRAFFEO: That's the result.

19 MR. SIEGEL: And that would be the result
20 if, in fact - - - is or - - - Oldenburg was the owner
21 and the driver of the car, same result.

22 CHIEF JUDGE LIPPMAN: That's a stipulation,
23 isn't it, that - - - that if it's reversed, that
24 that's what's going to happen?

25 MR. SIEGEL: That's correct. It's a

1 stipulation, and - - -

2 CHIEF JUDGE LIPPMAN: Right.

3 MR. SIEGEL: - - - like I say, that we do
4 have a situation here, where the court, I think,
5 following - - - and I didn't speak about the Clamp
6 case at all - - -

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. SIEGEL: - - - but I - - -

9 CHIEF JUDGE LIPPMAN: You'll have your
10 rebuttal.

11 MR. SIEGEL: Okay, thank you.

12 CHIEF JUDGE LIPPMAN: Thank you.
13 Counsel?

14 MR. KAMINSKA: May it please the court,
15 Glenn Kaminska with the firm of Ahmuty Demers &
16 McManus, counsel for the respondents, Doris and Peter
17 Hallock.

18 CHIEF JUDGE LIPPMAN: Counsel, why isn't
19 Kenny really dispositive of - - - of this? Why isn't
20 that reason - - - that reasoning - - -

21 MR. KAMINSKA: Kenny is based - - -

22 CHIEF JUDGE LIPPMAN: - - - totally
23 applicable here?

24 MR. KAMINSKA: Kenny is based entirely upon
25 Naso and Rauch. Those - - - those cases decided - -

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CHIEF JUDGE LIPPMAN: So why aren't they all - - - that whole line of cases dispositive here?

MR. KAMINSKA: Those cases, decided half century ago, right around the time when this courthouse was being renovated, are in - - - under a different statute. What's happened - - -

JUDGE GRAFFEO: Kenny's '83. Kenny - - -

MR. KAMINSKA: - - - to Workers' Compensation Law - - - I'm - - -

JUDGE GRAFFEO: Kenny is '83; it's not an ancient case.

MR. KAMINSKA: It's not. But it's pre - - -

-

JUDGE GRAFFEO: And the statute - - - the statute is very similar.

MR. KAMINSKA: But it's pre-Workers' Compensation Reform Act. It's pre the grave injury requirement.

CHIEF JUDGE LIPPMAN: But why isn't the logic the same?

MR. KAMINSKA: The logic's not the same, because at the time of Rauch, at the time of Naso, you could have a situation - - -

CHIEF JUDGE LIPPMAN: Yeah, but at the time

1 of Kenny we're talking.

2 MR. KAMINSKA: And at the time of Kenny.
3 All the same. You could have a situation where
4 plaintiff sues the owner of the vehicle, and then
5 that owner would turn around and sue the employer or
6 the co-employee, and there was no bar to it. But
7 today, post-1996, there is, in fact, a bar to it.
8 That end-run around the Workers' Compensation Law
9 doesn't exist today. You can't frustrate the law
10 like you could at the time of Rauch, at the time of
11 Naso.

12 JUDGE ABDUS-SALAAM: Counsel - - -

13 MR. KAMINSKA: As a matter of fact - - -

14 JUDGE SMITH: Well, but you - - -

15 JUDGE ABDUS-SALAAM: Counsel, how would it
16 - - -

17 JUDGE SMITH: Well, you - - - so you - - -
18 you say that - - - so this - - - you would say that
19 Rauch and Naso would be decided differently today?

20 MR. KAMINSKA: Yes.

21 JUDGE SMITH: So you're asking us to
22 overrule those cases?

23 MR. KAMINSKA: And you should.

24 JUDGE SMITH: But if we don't overrule
25 them, can you win the case?

1 MR. KAMINSKA: I can. And the reason why
2 is one thing about Rauch, one thing about Naso, is
3 that the co-employee is one hundred percent at fault.
4 So you might look at that case in a situation and
5 say, well, maybe I'm still frustrating the Workers'
6 Compensation Law by allowing the plaintiff - - -

7 CHIEF JUDGE LIPPMAN: Why isn't it - - -

8 MR. KAMINSKA: - - - a direct suit.

9 CHIEF JUDGE LIPPMAN: Why isn't it very
10 unfair to Koubek, who winds up paying ninety percent
11 of 800,000, and can't seek indemnification?

12 MR. KAMINSKA: It's - - - it's certainly
13 not unfair, and why is - - -

14 CHIEF JUDGE LIPPMAN: It's not unfair?

15 MR. KAMINSKA: It's not unfair.

16 CHIEF JUDGE LIPPMAN: Why is that not
17 unfair?

18 MR. KAMINSKA: The legislature made a
19 policy decision.

20 CHIEF JUDGE LIPPMAN: I mean, it's unfair
21 either way, don't get me wrong, that Hallock winds up
22 footing the bill, but why is that - - - why isn't it
23 unfair to Koubek?

24 MR. KAMINSKA: Well, the legislature made a
25 policy decision.

1 CHIEF JUDGE LIPPMAN: He's bound by the - -
2 - by the Workmen's Compensation Law.

3 MR. KAMINSKA: Well, he's bound by 388.

4 CHIEF JUDGE LIPPMAN: He can't seek
5 indemnification.

6 MR. KAMINSKA: Koubek's bound by 388. 388
7 has a public policy concern that this court
8 recognized in Murdza, which is cited at the reply
9 brief, page 5, which specifically said, "an equally
10 important policy reflected in 388, is the heightened
11 degree of care owners are encouraged to exercise when
12 selecting and supervising drivers." He has a public
13 policy reason why he should be able to be subject to
14 suit.

15 JUDGE ABDUS-SALAAM: How do you respond,
16 counsel, to your adversary's point that if Mrs.
17 Oldenburg, or Ms. Oldenburg, owned the car as well as
18 - - - as being the driver, that the Hallocks wouldn't
19 be able to sue her?

20 MR. KAMINSKA: In that situation, yeah,
21 there would be, in fact, a bar there, and the reason
22 why is because the Workers' Compensation Law is very
23 specific about who can be sued and who can't be.

24 JUDGE SMITH: Why should the case come out
25 differently - - -

1 MR. KAMINSKA: She's - - -

2 JUDGE SMITH: - - - depending on which - -
3 - whether the husband or the wife has title to the
4 car?

5 MR. KAMINSKA: Because two different policy
6 - - - two different statutes - - - two different
7 public policies to be addressed. By not allowing the
8 suit against Koubek, you would be ignoring what this
9 court has already said is a specific and important
10 public policy about owners selecting drivers. You
11 would - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but isn't this
13 about - - -

14 MR. KAMINSKA: By not allowing that - - -

15 CHIEF JUDGE LIPPMAN: Isn't this about the
16 interplay between the two statutes?

17 MR. KAMINSKA: It certainly is about the
18 interplay. And if you look at the interplay, Your
19 Honor - - -

20 CHIEF JUDGE LIPPMAN: But given the
21 overriding purpose of the Workmen's Compensation Law,
22 how - - - how is your position tenable?

23 MR. KAMINSKA: Because when you look at
24 this case, Your Honor, there is no possibility that
25 the employer or co-employee will pay. Whereas it - -

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JUDGE ABDUS-SALAAM: Well, wouldn't it be the same if Mrs. Oldenborg owned the car?

MR. KAMINSKA: If Ms. Oldenborg owned the car, she'd - - -

JUDGE ABDUS-SALAAM: If she owned the car, there would still be - - -

MR. KAMINSKA: - - - immune from suit - - -

JUDGE ABDUS-SALAAM: Right.

MR. KAMINSKA: - - - because of the statute.

JUDGE ABDUS-SALAAM: Right.

MR. KAMINSKA: That's - - - that's absolutely true.

JUDGE ABDUS-SALAAM: So her husband who also - - - who happens to own the car should also be immune from suit, because he can't sue - - -

MR. KAMINSKA: But then you'd be frustrating - - -

JUDGE ABDUS-SALAAM: - - - he can't turn around and sue his wife.

MR. KAMINSKA: No, you can't. You can't. But you'd be ignoring one of the public policy concerns of 388, and there's no reason to do that.

JUDGE PIGOTT: Well, I - - -

1 MR. KAMINSKA: You've already - - -

2 JUDGE PIGOTT: Let me - - - let me ask you

3 - - -

4 MR. KAMINSKA: - - - acknowledged that
5 concern, there's no reason to ignore it. I'm sorry,
6 Your Honor.

7 JUDGE PIGOTT: It's okay. Let me ask you
8 what I asked your - - - your opponent. If - - - if
9 Mrs. Hallock had been hurt and sued, who - - - who
10 would she name as a defendant? Would it be - - -
11 would it be Mr. Koubek as the owner of the vehicle
12 and obviously, Ms. Oldenburg as a driver? Or would
13 it be the company that Ms. - - - that Ms. Oldenburg
14 and Mr. Isabella were working for?

15 MR. KAMINSKA: Well, I would imagine they'd
16 sue all three.

17 JUDGE PIGOTT: All right. Let's assume
18 that. Which ones would be right?

19 MR. KAMINSKA: You could sue - - - because
20 you're talking about an injury, separate and distinct
21 - - - you're talking about Mrs. Hallock's injury.

22 JUDGE PIGOTT: I know, but what I'm worried

23 - - -

24 MR. KAMINSKA: And she could - - - she
25 could recover against all three of them.

1 JUDGE PIGOTT: What I'm worried about is
2 that - - - that Ms. Hallock - - - I mean, the way
3 this comp is been argued, it's as if, there's no
4 insurance for her, that - - - that she - - - she can
5 seek no relief. And that I just think is inimical.
6 I - - - I just don't think you can do that. Either
7 Koubek's going to be responsible or the company's
8 going to be.

9 MR. KAMINSKA: Well, I agree. I mean, it's
10 - - - what has been lost? What has been gained?
11 Here we - - - why are we foreclosing - - -

12 JUDGE PIGOTT: But you don't seem to have
13 an answer either. I'm still trying to figure out if
14 I'm Mrs. Hallock's lawyer who I go after.

15 MR. KAMINSKA: Well - - -

16 JUDGE PIGOTT: And I get going after
17 everybody. You can sue the highway, too. But - - -
18 but - - - or the restaurant.

19 MR. KAMINSKA: Right.

20 JUDGE PIGOTT: But - - -

21 MR. KAMINSKA: Well, if Ms. Hallock's
22 injured, she has the right to - - - against Mr.
23 Koubek under 388. She'll have a right against Ms.
24 Oldenborg as a - - - as the active tortfeasor, and
25 she'll have a right of recovery against the employer

1 as a vicarious respondeat superior. So she'll - - -
2 she'll recover against all three of those entities.

3 JUDGE SMITH: Why - - - why is it fairer
4 for someone who was admittedly only ten percent
5 liable to recover - - - to - - - to pay nothing, and
6 the - - - and someone who has - - - who has no fault
7 at all to pay a hundred percent?

8 MR. KAMINSKA: Well, that's not exactly
9 correct. We - - - we'll still pay our - - - our
10 equitable share.

11 JUDGE SMITH: I'm sorry. No, you're right.
12 You're right.

13 MR. KAMINSKA: We'll pay our equitable
14 share.

15 JUDGE SMITH: You - - - yes, yes, I'm
16 sorry. He - - - yeah, but why - - - but why should
17 the ten - - - so you say the resolution is for the
18 ten - - - the ten percent liable person to pay ten -
19 - - her ten percent, and someone who had no fault at
20 all, to pay ninety percent.

21 MR. KAMINSKA: That's correct, and - - -
22 and the reason goes back to the legislature's
23 determination in deciding 388, and what this court
24 said in Murdza that it is an important policy
25 consideration. So because of that policy

1 consideration, Mr. Koubek is - - -

2 JUDGE SMITH: Well, the policy con - - -

3 MR. KAMINSKA: - - - liable.

4 JUDGE SMITH: As I understand the point of
5 388 is really for the injured - - - is for injured
6 people to have recourse. Mrs. - - - your client
7 actually wasn't injured. She's just - - - she's - -
8 - she's suffering only a financial injury for which
9 she may or may not be insured. Why - - - but we
10 need, yeah. Ms. Oldenborg who - - - not Ms.
11 Oldenborg - - - Mr. Isabella, who was injured, has -
12 - - has no recourse against - - - against Koubek.
13 Why do - - - why should Ms. Hallock have it and Mr.
14 Isabella not?

15 MR. KAMINSKA: And again, I look back to
16 the Murdza case. You - - - you listed - - - you say
17 - - - stated one of the policy concerns is that an
18 injured plaintiff should have a recourse to an owner,
19 okay. But what the statute says - - -

20 JUDGE SMITH: But - - - and that policy is
21 overridden when the injured plaintiff has a Worker's
22 Comp remedy.

23 MR. KAMINSKA: I don't know if - - -

24 JUDGE SMITH: I mean, you still want us to
25 overrule - - - over Naso - - -

1 MR. KAMINSKA: Yeah, I don't know that
2 that's necessarily true, Your Honor.

3 JUDGE SMITH: Okay, but if Naso and Rauch
4 is still the law, that's - - -

5 MR. KAMINSKA: In this day and age, I don't
6 know that that's necessarily true, except for, again,
7 if there - - - like Naso, like Rauch, if they're a
8 hundred percent at fault, my concerns might be
9 different; I might come out the same way, but only
10 because of that circumstance.

11 Here, where you're letting the plaintiff
12 already be outside of the Workers' Comp - - - he's
13 already outside of the Workers' Compensation Law.
14 He's not making his recovery against the Workers'
15 Compensation policy. He's making a recovery against
16 an automobile policy.

17 JUDGE PIGOTT: You're talking about
18 Isabella?

19 JUDGE GRAFFEO: Is - - -

20 MR. KAMINSKA: I'm talking about Isabella.

21 JUDGE PIGOTT: Not only that, but when he
22 does that, he's going to get all of the Workers' Comp
23 back - - -

24 MR. KAMINSKA: Exactly.

25 JUDGE PIGOTT: - - - for his employer.

1 MR. KAMINSKA: Exactly. So where - - -
2 where counsel - - - where Koubek says in the reply
3 brief, well, we get the benefit of 4545, that's
4 simply not true. We don't get the benefit of 4545.
5 We actually pay that money back; it's a lien. So
6 it's not a double recovery here. There's nothing
7 that makes the employer or the co-employee pay
8 anything. The Workers' Comp policy is not implicated
9 in any way.

10 JUDGE SMITH: But isn't - - - but isn't the
11 problem, really, as your adversary says, the
12 harshness of joint and several liability? I mean,
13 you keep talking about the policy behind 388, but
14 there's a policy behind joint and several liability,
15 too that - - - which is that when there is - - - when
16 it so happens that the ninety-percent person is
17 immune, the ten percent person is stuck.

18 MR. KAMINSKA: That - - - and that's true
19 if there is no remedy. But the law does allow for a
20 remedy. In 388, there is a remedy.

21 JUDGE GRAFFEO: Well, following up on that
22 question, if this wasn't an employment situation and
23 Mrs. Oldenborg was, say, judgment-proof for some
24 reason, under joint and several liability, wouldn't -
25 - - wouldn't the Hallenbecks (sic) have to pay the

1 entire judgment?

2 MR. KAMINSKA: The Hallocks - - -

3 JUDGE GRAFFEO: The Hallocks?

4 MR. KAMINSKA: If plaintiff Isabella was -

5 - - had sued both Hallock and Oldenburg - - -

6 JUDGE GRAFFEO: Yes.

7 MR. KAMINSKA: - - - because it wasn't an

8 employment situation - - -

9 JUDGE GRAFFEO: Yes.

10 MR. KAMINSKA: - - - then we would pay - -

11 - the Hallocks would be forced to pay because it's an

12 exception to Article 16 as an automobile accident,

13 one percent would be joint and several; we would pay.

14 We would be able, though, to have a judgment - - -

15 JUDGE GRAFFEO: So it's - - - it's somewhat

16 comparable - - -

17 MR. KAMINSKA: - - - as against Oldenburg.

18 JUDGE GRAFFEO: - - - to the Workers' Comp

19 scheme in that there's an immunity there.

20 MR. KAMINSKA: Well, I don't - - - I don't

21 think the inability to pay creates an immunity. It

22 just puts - - - joint and several means I pay - - - I

23 pay the injured party. I have to, but it doesn't

24 mean - - -

25 JUDGE SMITH: But joint - - - joint and

1 several - - -

2 MR. KAMINSKA: - - - I then don't have a
3 remedy to someone else.

4 JUDGE SMITH: But joint and several does.
5 It protects that injured party, even where one of the
6 - - - even where the person most at fault, or one of
7 the joint tortfeasors, maybe the one most at fault,
8 is for any reason unable to respond, either because
9 she doesn't have the money, or because she's a co-
10 employee. What's wrong with that?

11 MR. KAMINSKA: There's nothing wrong with
12 that. Certainly, it would - - - joint and several
13 should - - - should protect that party. But it
14 doesn't - - - it's not answering the second phase.
15 It doesn't mean that I, as someone joint and several,
16 don't then have rights against someone else. Yes, I
17 pay Isabella.

18 JUDGE SMITH: Yeah, but you - - - so you -
19 - - so you - - - but you - - -

20 MR. KAMINSKA: Isabella deserves to get
21 their money.

22 JUDGE SMITH: So you can't shift to the
23 party who's mostly at fault, so you want to shift to
24 a totally innocent party. Admittedly in this case,
25 it happens to be the husband of the main tortfeasor,

1 but that's a happenstance. It could be anyone who
2 loaned her the - - - who loaned her his car.

3 MR. KAMINSKA: It could be anyone that
4 hands over the keys of the car.

5 JUDGE SMITH: I just - - - I guess - - -

6 MR. KAMINSKA: Or it could be - - -

7 JUDGE SMITH: - - - I'm not seeing why it's
8 fairer to - - - to stick that person rather than the
9 person who had admittedly a small share in the fault.

10 MR. KAMINSKA: I think it's - - - it is
11 eminently more fair to have the person that - - -
12 that gave the keys to the person that is ninety
13 percent at fault to pay, especially when there is a
14 statute that says - - -

15 JUDGE ABDUS-SALAAM: What if the fault were
16 fifty-fifty - - -

17 MR. KAMINSKA: - - - you will pay. You
18 bear responsibly. The statute says it.

19 JUDGE ABDUS-SALAAM: Counsel, what if the
20 fault were fifty-fifty, as opposed to ninety-ten.
21 Would you say it's fair to have the other person pay?

22 MR. KAMINSKA: Well, they would only pay
23 their fifty percent. I'm never looking for them to
24 pay more than their equitable share. So they would
25 pay their fifty percent.

1 JUDGE RIVERA: You're saying it's the same
2 expectation. They're - - - they're always in this
3 position of the owner of the car, and they're always
4 potentially liable. There's nothing different?

5 MR. KAMINSKA: That's right. They - - -
6 they're always - - - the statute says you have
7 responsibility for these injuries. It doesn't say
8 you have responsibility only to the injured party.
9 You are responsible for these injuries, and this
10 court has said in a number of different cases,
11 Tikhonova being one of them, that derivative
12 liability can exist, even when the driver is immune.

13 So we're not stretching the law here a
14 great deal. What was concerned in Rauch and
15 concerned in Naso can't happen today. And so like
16 the Appellate Division said in Tikhonova, the courts
17 - - - the appellate courts have an obligation to look
18 at what's happening with the law and to stop the
19 inappropriate expansion of certain laws, and to focus
20 them again.

21 JUDGE SMITH: So is it - - -

22 MR. KAMINSKA: I'm paraphrasing a little
23 bit there, because I couldn't find my quote, but
24 that's essentially what they were saying.

25 JUDGE SMITH: But they - - - but I - - - so

1 I guess, maybe I'm - - - maybe we're just repeating
2 ourselves, it's a major theme of your argument that
3 those cases, Rauch and Naso, are obsolete.

4 MR. KAMINSKA: That I - - - excepting out
5 when they're a hundred percent at fault like they
6 were in Naso and Rauch. But just look at the
7 language of the statutes involved, I would say that
8 those cases should be decided differently, or could,
9 in fact, be decided differently today.

10 JUDGE SMITH: Well, if they're a hundred
11 percent at fault, but insolvent, then - - - then the
12 owner would still be immune?

13 MR. KAMINSKA: Well, it's - - -

14 JUDGE SMITH: I guess it doesn't matter if
15 they're insolvent or not, since they're - - - since
16 they're immune.

17 MR. KAMINSKA: See the - - - the difference
18 - - - the distinction being made with that hundred
19 percent is because just logically, you're looking at
20 it, and saying the employee is a hundred percent at
21 fault - - -

22 JUDGE SMITH: If they're a hundred percent
23 at fault, then there is no - - - then there's nobody
24 to bring a third-party claim, so - - -

25 MR. KAMINSKA: Right, so it just logically

1 - - - it just seems to make sense, but in this case,
2 it's different.

3 JUDGE SMITH: Yeah, it could not - - - it
4 could not come up on those facts.

5 MR. KAMINSKA: Right.

6 JUDGE PIGOTT: Well, Naso or Nasro (sic)
7 and Rauch were - - - there's no innocent person, so
8 to speak, in this. I mean, I keep thinking Mrs.
9 Hallock, I mean, she's got nothing to do with any - -
10 - with the employer, with the owner, with the driver.
11 I mean, she's going down the road and this accident
12 happens, and - - - and it - - - so I - - - I'm
13 missing why once a judgment is rendered against her,
14 she can't proceed against anyone who may be
15 responsible for that judgment being rendered against
16 her.

17 That's why I was curious as to whether or
18 not the employer wouldn't be the defendant, you know,
19 in this case, as - - - because Mrs. or Mr. Koubek
20 says, I didn't give her permissive use to use it for
21 employment. I mean, I know that he didn't say that -
22 - -

23 MR. KAMINSKA: Right.

24 JUDGE PIGOTT: - - - but essentially that's
25 what we seem to be saying is that he's out, because

1 she's using it in the course of her employment.

2 MR. KAMINSKA: I'm saying that - - - I'm
3 not saying that she's out - - - that Koubek's out at
4 all. In closing - - -

5 JUDGE SMITH: Well, the - - -

6 MR. KAMINSKA: - - - I see my time is up.

7 JUDGE SMITH: Well, wait a minute. If
8 you're buying the idea of switch - - - of shifting
9 liability to the employer - - - I'm not quite sure
10 whether you are or not - - - but isn't - - - then
11 haven't you just revived Dole v. Dow?

12 MR. KAMINSKA: No, no. I - - - to the
13 extent that you took whatever I just said as meaning
14 that I would have a direct suit against the employer,
15 that is certainly not true. That would violate - - -

16 JUDGE SMITH: I didn't hear you say it. I
17 heard it from somewhere. I don't think it was from
18 you.

19 MR. KAMINSKA: That would violate the
20 actual letter of the statute. But I would just in
21 closing - - -

22 CHIEF JUDGE LIPPMAN: Okay, counsel, close,
23 go ahead.

24 MR. KAMINSKA: - - - is just looking at
25 pages 590 and 591 of Naso, the concern about how this

1 statute gets frustrated is - - - is written right
2 there.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.

4 MR. KAMINSKA: And I'm saying it doesn't
5 exist.

6 CHIEF JUDGE LIPPMAN: Thank you, counsel.
7 Appreciate it.

8 MR. KAMINSKA: Thank you.

9 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

10 MR. SIEGEL: Thank you, Your Honor. I just
11 want to reiterate, the purpose of 388 is not to
12 protect a third-party plaintiff. It's to protect a
13 plaintiff. And here the plaintiff's protected by
14 Workers' Comp. And I think one of the things we're
15 not thinking of here is the fact that this - - -

16 JUDGE PIGOTT: But, wait a minute, wait a
17 minute, wait a minute. Let - - - if you take the
18 employment out of this thing, if this case just
19 happened between two cars, all right, are you saying
20 that Ms. Hallock has no claim against the other
21 driver?

22 MR. SIEGEL: Because this is an employment
23 situation - - -

24 JUDGE PIGOTT: No, no. 388 is not here to
25 protect an employ - - - a plaintiff, you know,

1 employee. It's there, so that anybody on the road
2 knows, that every car is insured, and somebody can't
3 say, I didn't give my kid permission - - - well, I
4 guess you can say that - - - but the fact of the
5 matter is, you got to make sure everybody is insured.
6 That's what - - - that's - - -

7 MR. SIEGEL: No, but the distinction is
8 that Hallock here is not suing for her own injuries.
9 That's the purpose of 388, to make sure you find a
10 responsible party to pay a judgment. Not to pay a
11 verdict or - - -

12 JUDGE PIGOTT: Suppose it was property - -
13 -

14 MR. SIEGEL: - - - or a percentage.

15 JUDGE PIGOTT: Suppose it was property
16 damage only. Can she sue for property damage?

17 MR. SIEGEL: Under 388?

18 JUDGE PIGOTT: Yeah.

19 MR. SIEGEL: She could, but she didn't have
20 property damage.

21 JUDGE PIGOTT: I understand that, but now
22 I'm going to ask you suppose she says, my bank
23 account's empty, thanks to you - - - your driving,
24 Mrs. Oldenborg, and I'm going to sue you for it. Can
25 - - - can she do that under 388?

1 MR. SIEGEL: If she has affirmative losses
2 - - - if she's been injured financially - - -

3 JUDGE PIGOTT: She has. Somebody took
4 800,000 dollars out of her bank account.

5 MR. SIEGEL: She is simply trying to
6 collect under 388 to pay a judgment and to avoid
7 joint and several liability. That's why 388 should
8 not be used in this particular situation. She should
9 not be able to do indirectly what she can't by
10 statute do directly. And it's - - - we all agree and
11 - - - and the Second Circuit made it clear that the
12 third-party plaintiff here, Hallock, cannot sue the
13 employer.

14 And I would just want to say one more thing
15 about Rauch and Naso.

16 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

17 MR. SIEGEL: I'm sorry?

18 CHIEF JUDGE LIPPMAN: Go ahead.

19 MR. SIEGEL: I'm sorry. With respect to
20 Rauch and Naso, it's - - - it's not really an issue -
21 - -

22 CHIEF JUDGE LIPPMAN: He says they're
23 outdated.

24 MR. SIEGEL: I think that the principles in
25 those cases are as relevant today as they ever were,

1 and that's the principle that you cannot have
2 vicarious liability when you have no liability to
3 start with. And there are many ways the courts have
4 articulated that but when - - -

5 CHIEF JUDGE LIPPMAN: It's the same
6 principle picked up in Kenny?

7 MR. SIEGEL: It's the same principle in
8 Kenny to a third-party claim.

9 JUDGE SMITH: What about - - - what about
10 Tikhonova, wasn't that vicarious liability with no
11 liability to start with?

12 MR. SIEGEL: Different statute.

13 JUDGE SMITH: Well, okay, but - - -

14 MR. SIEGEL: Different statute.

15 JUDGE SMITH: But it's inconsistent with
16 the principle, isn't it?

17 MR. SIEGEL: Well, no, but the court found
18 that there wasn't a public policy concern about the
19 renters of - - - of diplomat cars. They
20 distinguished Kenny, Rauch very, very clearly in that
21 case, saying that we have a Workers' Comp statute,
22 that's supposed to provide comprehensive relief,
23 that's supposed to not expose the employer directly
24 or indirectly.

25 JUDGE ABDUS-SALAAM: Counsel, you wanted to

1 say something about Clamp?

2 MR. SIEGEL: Oh.

3 JUDGE ABDUS-SALAAM: When you sat down - -
4 - before you sat down?

5 MR. SIEGEL: Yeah, I think Clamp is based
6 on two false premises. One is the Raquet case, which
7 involved active negligence only. It was very - - -
8 very plainly an active negligence case. It was a
9 third-party action, but it was against a contractor,
10 who had apparently constructed walls that caused a
11 roof to collapse.

12 The other thing was this concept of - - -
13 in Clamp, the whole issue of vicarious liability was
14 completely missed. The court was applying this
15 principle that basically Workers' Comp really didn't
16 exist, that 388 could be used under any circumstances
17 - - -

18 CHIEF JUDGE LIPPMAN: Your view is that
19 case was in a vacuum, essentially?

20 MR. SIEGEL: It was in a vacuum, and it was
21 - - - it was frankly wrongly decided, because it
22 missed the whole interplay between 388 and Workers'
23 Comp.

24 CHIEF JUDGE LIPPMAN: Okay, counsel.

25 MR. SIEGEL: Thank you very much.

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CHIEF JUDGE LIPPMAN: Thank you both.
Appreciate it.
(Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Isabella v. Hallock v. Koubek, No. 45 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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