

1 COURT OF APPEALS
2 STATE OF NEW YORK

3 -----

4 CURBY TOUSSAINT,
5 Respondent,

6 -against-

7 No. 18

8 PORT AUTHORITY OF NEW YORK AND NEW
9 JERSEY,

10 Appellant.

11 -----

12 20 Eagle Street
13 Albany, New York
14 February 11, 2021

15 Before:

16 CHIEF JUDGE JANET DIFIORE
17 ASSOCIATE JUDGE JENNY RIVERA
18 ASSOCIATE JUDGE LESLIE E. STEIN
19 ASSOCIATE JUDGE EUGENE M. FAHEY
20 ASSOCIATE JUDGE MICHAEL J. GARCIA
21 ASSOCIATE JUDGE ROWAN D. WILSON
22 ASSOCIATE JUDGE PAUL FEINMAN

23 Appearances:

24 ANDREW W. DEAN, ESQ.
25 SEGAL MCCAMBRIDGE SINGER & MAHONEY, LTD.
Attorney for Appellant
850 Third Avenue
Suite 1100
New York, NY 10022

BRIAN J. SHOOT, ESQ.
SULLIVAN PAPAIN BLOCK MCGRATH COFFINAS & CANNAVO P.C.
Attorney for Respondent
120 Broadway
18th Floor
New York, NY 10271

Sharona Shapiro
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, counsel.
2 This is appeal number 18, Toussaint v. Port Authority of
3 New York and New Jersey.

4 Counsel?

5 MR. DEAN: Yes, and may it please the court. My
6 name is Andrew Dean, and I represent defendant-appellant,
7 the Port Authority of New York and New Jersey.

8 I respectfully request two minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: You may have your two
10 minutes for rebuttal.

11 Mr. Dean, is your argument that there's no
12 vicarious liability because there's no breach of the
13 designation requirement, and the accident was entirely
14 unforeseeable, or is it that there is, at the least, a
15 question of fact on whether the duty to keep the worksite
16 was breached as a consequence of the gentleman Mr. Melvin
17 jumping on the buggy and moving the buggy?

18 MR. DEAN: Well, Your Honor my first argument is
19 that the Industrial Code provision at issue, 23-9.9(a), is
20 not sufficiently specific to support a 241(6) claim. And
21 that's a novel issue, and that is why we are before this
22 court to decide that issue.

23 Our second question is yes, that this incident
24 was unforeseeable, as a matter of law, and that the
25 defendant, the Port Authority, can raise any valid defense
to a 241(6) claim, including respondeat superior, that

1 this particular incident occurred outside of the scope of
2 this gentleman's, Mr. Melvin's, duties on the work site.
3 He was supposed to be working on the south side of the
4 worksite. Our plaintiff was working on the north side of
5 the worksite, and that we did not violate the provision at
6 issue - - -

7 JUDGE FAHEY: Judge?

8 MR. DEAN: - - - because - - -

9 JUDGE FAHEY: Judge DiFiore?

10 CHIEF JUDGE DIFIORE: Judge Fahey, please.

11 JUDGE FAHEY: Mr. Dean - - -

12 CHIEF JUDGE DIFIORE: Judge Fahey?

13 JUDGE FAHEY: Yes, thank you, Judge.

14 Mr. Dean, you say this regulation isn't specific
15 enough. I want to ask you a question about your first
16 point.

17 MR. DEAN: Sure.

18 JUDGE FAHEY: As I understand it, the regulation
19 designated a particular person, said this person had to be
20 designated which - - - and also trained, the way I read
21 the regs, and that it applied to power buggies. What
22 language do you think you'd have to put in the reg to make
23 it specific enough? How could it be more specific?

24 MR. DEAN: Well, that's a great question, Your
25 Honor, and I would state that there is case law that has
 held that this - - -

1 JUDGE FAHEY: Well, give me an example of a reg
2 that you think is sufficiently specific and that we could
3 look to to compare to this reg.

4 MR. DEAN: Sure, whether scaffolding is required
5 to be 2.5 inches thick to be a correct scaffolding, or if
6 the provision required an affirmative duty on the part of
7 the defendant to conduct inspections. This provision just
8 said only a trained and competent individual designated by
9 the employer shall operate a power buggy. And the case
10 law has held that those exact - - - that exact language
11 has been deemed - - -

12 JUDGE FAHEY: Well - - -

13 MR. DEAN: - - - too general.

14 JUDGE FAHEY: The way I read it - - -

15 MR. DEAN: So there's an affirmative duty - - -

16 JUDGE FAHEY: Yeah.

17 MR. DEAN: - - - and it is specific.

18 JUDGE FAHEY: Well, it's specific to power
19 buggies, we all agree on that, right? It specifically
20 requires that the individual has to be trained in the
21 operation of those buggies, and then - - - and by
22 "designated", it means that the individual has to be
23 designated by the employer to operate it. What else would
24 you add to that reg to make it more specific?

25 MR. DEAN: That there would have to be some
affirmative action. The provision contains no concrete

1 mandate as to - - -

2 JUDGE FAHEY: I'm confused by that. Tell me
3 what you mean by that.

4 MR. DEAN: There's no language in the provision
5 that says what makes this individual competent. There's
6 no language as to what makes the individual trained.

7 JUDGE FEINMAN: If I may, "trained" and
8 "competent" are not really defined. And "designated", by
9 itself, doesn't guarantee that one can safely operate the
10 buggy. It's just a matter of who the employer has chosen.
11 So I mean, is that your point?

12 MR. DEAN: Well, the point is that the union
13 rules require laborers to operate these power buggies. We
14 had a laborer foreman, Joe DeRosa, who designated his
15 laborer, Paul Estavio, to operate this power buggy. The
16 fact that Mr. Melvin just decided, you know, while he was
17 walking to his employer's office during his lunch break,
18 to just hop on this buggy and drive it into the plaintiff

19 JUDGE STEIN: Well - - -

20 MR. DEAN: - - - without any - - -

21 JUDGE STEIN: How is this less - - -

22 CHIEF JUDGE DIFIIORE: Judge Stein?

23 JUDGE STEIN: I'm sorry.

24 How is this less specific than the - - - what we
25 held to be specific in Misicki, which referred to being -
- - I'm sorry, being designated to - - - that "the

1 servicing and repair of defective equipment shall be
2 performed by or under the supervision of a designated
3 person." We said that was sufficient. How is this
4 different?

5 MR. DEAN: Yes. It's distinguishable, Your
6 Honor, because Misicki dealt with a three-sentence
7 provision. The first two of those sentences were deemed
8 too general to support a Labor Law 241(6) claim. The
9 third sentence which required, again, affirmative action
10 to correct structural defects and conditions, was
11 sufficiently specific.

12 The first two, which - - - the first sentence
13 was that the machine should be operated in good repair,
14 too general. The second sentence, that proper equipment
15 should be utilized, was too general. The third sentence,
16 requiring correcting structural defective conditions,
17 required affirmative action, and that's why it was deemed
18 specific.

19 Here we're dealing with a single-sentence
20 provision, without any punctuation, that just said only
21 trained operators, competent operators, designated by the
22 employer shall operate power buggies. So we're not
23 dealing with the three-sentence provision like we were
24 dealing with in Misicki.

25 JUDGE STEIN: So we can parse sentence by
sentence, but we can't parse within sentences; is that

1 your position?

2 MR. DEAN: To an extent, yes. I mean, the
3 legislature wrote this provision, did not include any
4 punctuation, did not deem it a requirement that you had to
5 define "trained", you had to define "competent", or you
6 had to - - -

7 JUDGE STEIN: No - - -

8 MR. DEAN: - - - define "designated".

9 JUDGE STEIN: I'm assuming that those words are
10 not general - - - are general. But I guess my question is
11 is whether the requirement that the person be designated,
12 isn't that affirmative action?

13 MR. DEAN: Well, we would argue that we did
14 designate a person. We had our laborer foreman, DeRosa,
15 who appointed his laborer, Mr. Estavio, to operate the
16 power buggy. So in terms of applicability, we definitely
17 - - -

18 JUDGE RIVERA: Judge, if I may - - -

19 MR. DEAN: - - - complied with the statute.

20 JUDGE RIVERA: If I may ask a question, Judge?
21 Judge, if I may?

22 CHIEF JUDGE DIFIORE: Judge Rivera?

23 JUDGE RIVERA: Yes, so I want to ask you about
24 that, Mr. Dean. It's certainly something that Mr. Shoot
25 raised in his briefing. Why isn't the question about
Estavio? He's a designated person. And then it's unclear

1 what, if anything, he does to prevent Melvin from getting
2 on this buggy which, as I understand the record, but you
3 will correct me if I'm wrong, the buggy is actually on,
4 and it doesn't take anything to get in and get it going.
5 So the person who is the designated individual, who you're
6 saying is the correct person to be behind the buggy, left
7 it running. Why isn't the case really about that?

8 MR. DEAN: Well, he actually didn't left it
9 running, if you look at the testimony. He had to actually
10 undo the brake. But this incident - - - and there is
11 actually - - -

12 JUDGE RIVERA: Well, no, but the buggy is
13 running. It's got a brake on, which takes nothing to
14 remove, right?

15 MR. DEAN: Yeah, he had to press down the brake
16 and, you know, get it into motion.

17 JUDGE RIVERA: The engine is running. It's not
18 that it's been turned off if he had finished.

19 MR. DEAN: Yes, but there is a video that - - -
20 and it also goes back to the plaintiff's testimony as to
21 how quick this accident happened. So in their briefing
22 opposing our appeal, they have argued that why didn't Mr.
23 Estavio tackle the - - - Mr. Melvin and get him off of the
24 buggy. But there is actually video that was not included
25 in the record, because there was a motion practice related
 to the video, that just shows how quick this accident

1 happened.

2 JUDGE RIVERA: But why is it - - -

3 MR. DEAN: It was literally - - -

4 JUDGE RIVERA: Why isn't it - - -

5 MR. DEAN: - - - like, a matter of seconds.

6 JUDGE RIVERA: So why isn't it a fact question
7 that goes to the trier of fact?

8 MR. DEAN: Well, if we don't reach the issue of
9 specificity, and we don't reach the issue of
10 unforeseeability, the Supreme Court actually ruled that
11 there was a question of fact of whether Mr. Melvin was
12 acting within the scope of his employer or whether he was
13 engaged in horseplay. And that's why our summary judgment
14 motion was denied by Judge Kotler in the Supreme Court.
15 And now we're faced with this issue that the plaintiff is
16 raising that this issue is not preserved or reviewable by
17 this court, to the extent the first two issues are not
18 considered by this court or denied by this court. And
19 Judge Smith, in the Heckett case - - - excuse me if I'm -
20 - -

21 JUDGE RIVERA: Hecker.

22 MR. DEAN: Yeah.

23 JUDGE FAHEY: Hecker.

24 JUDGE RIVERA: Hecker.

25 MR. DEAN: Yeah, excuse me - - - you know, ruled
that it actually benefits a plaintiff who did not preserve

1 the issue and leaves us in this position where, upon a
2 search of the record by the First Department, even though
3 we preserved our appellate rights, that we're not in an
4 issue to - - - we can't argue this, even though we did
5 everything we could to get to the Court of Appeals. And
6 Judge Smith did write that, you know, this is - - -

7 JUDGE STEIN: Chief Judge, may I?

8 MR. DEAN: - - - an issue that should be
9 considered by this court. And I believe this is a case
10 that it should be.

11 JUDGE STEIN: Mr. Dean, how - - -

12 CHIEF JUDGE DIFIORE: Yes.

13 JUDGE STEIN: How do we get around Hecker? You
14 know, so as you say, Judge Smith pointed out some seeming
15 or arguable unfairness about the rule, but that was
16 apparently the rule that the court set down. So are you
17 asking us to overrule that case or - - - and on what basis
18 would we do that?

19 MR. DEAN: I'm asking this court that we don't
20 even need to get there, that this Industrial Code
21 provision is not sufficiently specific and - - -

22 JUDGE STEIN: But if we disagree with you on
23 that point, hypothetically, if we do?

24 MR. DEAN: Then yes, I would argue that this
25 court should reconsider the Hecker decision and not grant
plaintiff the benefit of the doubt where they refused to

1 or neglected to preserve the issue for an appellate
2 review, whereas we did.

3 JUDGE FEINMAN: Chief, if I may?

4 CHIEF JUDGE DIFIORE: Judge Feinman?

5 JUDGE FEINMAN: Yeah. So getting to the scope
6 of employment argument that you're making as an
7 alternative argument, my understanding is that the duty
8 here, under 241(6), if we were to find that the reg was
9 specific, is nondelegable. And so I'm not really sure,
10 when you say scope of employment, what you actually mean.

11 Are you saying that Melvin was a participant or
12 not a participant in the construction project when he
13 jumped onto the buggy? I mean, I understand he was
14 assigned to a different part of the project. You have to
15 explain that argument a little better to me.

16 MR. DEAN: Okay. So I believe the case law is
17 clear that an owner can raise any valid defense to
18 liability under 241(6), included - - - including
19 contributory and comparative negligence. And under
20 Gordon, you're only liable for foreseeable consequences of
21 your actions. Here we have an - - -

22 JUDGE FEINMAN: Well, but that's an - - -

23 MR. DEAN: - - - an intervening act that is a
24 superseding cause of liability.

25 JUDGE FEINMAN: I'm - - - you know, I understand
your argument about foreseeability, but I'm not sure what

1 that has to do with scope of employment.

2 MR. DEAN: Well, Mr. Melvin was an oiler for a
3 crane on the south side of the Oculus project, which is
4 the - - -

5 JUDGE FEINMAN: Which is part of the larger
6 project, right?

7 MR. DEAN: Uh-huh. And Mr. Toussaint was working
8 on the north side of the project on Fulton Street. They
9 had nothing to do with each other. He was not permitted,
10 per union rules, to operate a power buggy. We had
11 designated persons who were permitted to operate the power
12 buggy, a laborer foreman who - - -

13 JUDGE FEINMAN: Well, let me jump to your
14 foreseeability and, you know, is it foreseeable that
15 somebody's going to jump on and go for a joy ride. But
16 you know, I'm not sure I follow the scope of employment
17 argument.

18 But getting back to the specificity, I am
19 curious to - - - if you could further elucidate the
20 response, I think, to the initial set of questions by
21 Judge Fahey as to what additional requirements you would
22 need and why this is not just a general command.

23 MR. DEAN: Well, I would argue that, under the
24 court's precedent, under stare decisis, in the Wilke case,
25 23-9.6(c), requiring specifically that aerial basket
operators, quote, "shall be competent designated persons

1 who have been trained in the operation and use of such
2 equipment" was not specific. So there we have precedent
3 that requires a specific piece of equipment, the same
4 exact language that we're dealing with in 23-9.9(a), and
5 it was ruled too general to support a 20 - - - a 241(6)
6 claim.

7 JUDGE FAHEY: You know, there is - - - is it all
8 right, Judge, if I ask a question?

9 CHIEF JUDGE DIFIORE: Yes, please.

10 JUDGE FAHEY: There's a number of cases that may
11 go both ways on this issue. I think it's - - - one of the
12 things that the court may consider is how do we establish
13 some test for specificity in this context. One of the
14 things that strikes me is you could say something, I
15 think, like a reg that conditions performance with a
16 particular task - - - that would be operation here; that
17 would be the particular task; on a particular device - - -
18 that would be specific; here we have a specific device, a
19 power buggy; by a particular person - - - that would be
20 the designated person here that was designated by the
21 employer; with particular preparation, and that would be
22 training.

23 I think courts sometimes struggle on the issue
24 of specificity, and we may have to give them more guidance
25 on it, but it seems even if we outline a test in the
fashion I've done, that this reg would meet those tests or

1 those requirements, but I can see where there's confusion
2 in the bar, between both plaintiffs and defendants and the
3 courts, on the issue of specificity here. And maybe in
4 this case we can seek to address that.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 Mr. Shoot?

7 MR. SHOOT: Thank you, Your Honor.

8 MR. DEAN: Thank you.

9 MR. SHOOT: We have three basic points. One,
10 this particular regulation, 9.9(a) set what the specific
11 standard of conduct within the meaning of the Court of
12 Appeals precedents, which I hope to get to in just a
13 second. Two, the various arguments (audio interference)
14 unforeseeable as a matter of law, supposedly not within
15 the scope of Melvin's employment, lack merit, for reasons
16 I hope to get to. And three, to the extent it's
17 reviewable, the grant of summary judgment by the Appellate
18 Division majority was plainly correct because there's no
19 issue of fact that makes a difference in resolution of the
20 motion.

21 Let me start with 9.9(a). We know, from amongst
22 other places, Judge Rivera's decision in Morris, the
23 legislative intent of the statute is to, quote, "ensure
24 the safety of workers at construction sites."

25 We know from this court's decision in Ross and
Rizzuto, more recently in Morris and St. Louis, that you

1 have a dichotomy here. And the dichotomy is, on the one
2 hand, does the regulation set forth a - - - as it was
3 framed in St. Louis, a specific standard of conduct or, on
4 the other hand, simply a recitation of common law safety
5 principles. And in the latter case, it's not sufficient
6 to give rise to liability. That - - -

7 JUDGE WILSON: Chief, if I might interject
8 there?

9 MR. SHOOT: Yes, Your Honor.

10 JUDGE WILSON: I just want to make sure it's
11 okay with the Chief, who seems to be frozen.

12 CHIEF JUDGE DIFIORE: Judge Wilson, yes, please.

13 JUDGE WILSON: Oh, sorry.

14 What is it - - -

15 CHIEF JUDGE DIFIORE: Yes.

16 JUDGE WILSON: - - - that this particular
17 regulation adds, in your view, over the common law?

18 MR. SHOOT: Well, it's completely different,
19 Your Honor, than, say, operating the machine safely
20 because you have a machine that's operated safely by
21 someone who's not designated or trained to use it. You
22 could have someone who's trained and designated to use it
23 who operates it unsafely. Either way, it's something
24 completely different. And I'm not aware of any common law
25 requirement that, for a specific type of machine (audio
 interference) designate the user, any common law

1 requirement.

2 I would add that here we have a regulation: "No
3 person other than a trained and competent operator
4 designated by the employer shall operate a power buggy".
5 Why - - -

6 JUDGE WILSON: But would it not be negligent to
7 designate somebody who is not trained and competent?
8 Wouldn't that just be ordinary negligence?

9 MR. SHOOT: Your Honor, if the fact that it was
10 negligent ruled out a violation, then you'd have virtually
11 no liability. In many instances, violating a regulation
12 would be negligent, but there's no requirement to
13 designate a specific individual in common law. But even
14 if there were, Your Honor, take a look at in Rizzuto - - -

15 JUDGE WILSON: So then - - -

16 MR. SHOOT: - - - when - - -

17 JUDGE WILSON: So then I'm sorry. Would a
18 regulation that simply said "designate an individual",
19 that is specific enough?

20 MR. SHOOT: Designate an individual? I think it
21 would be. This is more specific than that.

22 But Your Honor, if - - - to your question, the
23 regulation - - -

24 JUDGE FEINMAN: Well, what I - - - if I may,
25 Chief?

What I'm - - - following up on Judge Wilson's

1 question, I'm not sure how being designated, by itself,
2 guarantees one can safely operate the buggy. I'm still
3 not sure how that's a specific safety precaution.

4 MR. SHOOT: Your Honor, it doesn't guarantee
5 that the person can operate the buggy. Being - - - having
6 a driver's license doesn't mean that you can safely
7 operate the car, particularly if the driver happens to be
8 drunk at that time.

9 But the point is you certainly will, globally,
10 across the state, I think, it's obvious, have fewer
11 accidents if the people who are operating these machines -
12 - - and remember, of all these power operating equipment's
13 that are collectively covered by 23-9, all of them, the
14 commission singled out only three machines, aerial
15 baskets, excavators, and this, power buggies, as ones that
16 particularly required a designated operator.

17 JUDGE FEINMAN: All right. So the regulation
18 says a "trained and competent operator designated by the
19 employer". If it did not say a "trained and competent
20 operator", if it just said something, you know - - -
21 again, following up on Judge Wilson's question, it just
22 said the power buggies can be operated by a designated
23 employee - - - you know, an operator designated by the
24 employer, your argument is that that would be specific
25 enough?

MR. SHOOT: Yes, and the Commissioner could

1 conclude, reasonably, that that would reduce the incidence
2 of accidents.

3 JUDGE FEINMAN: All right.

4 MR. SHOOT: But to your point - - -

5 JUDGE FEINMAN: But what if it said "trained and
6 competent, but it didn't say designated by the employer?

7 MR. SHOOT: I don't know, Your Honor. I think
8 that would still be specific enough, and I'll tell you
9 why. In Rizzuto, the regulation you looked at was 1.7(d).
10 It requires that - - - it forbids slippery places on
11 walkways. Can we have an argument about what is slippery?
12 Can people define it differently? Sure. But what this
13 court said is that regulation was precisely the type of
14 concrete specification that Ross requires.

15 If this regulation wasn't only type of
16 equipment, a specific safeguard, the person violating - -
17 - rather, operating it should be designated, trained, and
18 competent, even if you could imagine cases where you could
19 have a factual issue, is that person trained, is that
20 competent, were they designated, it doesn't alter the fact
21 that that's just as specific as 1.7(d) and here (audio
22 interference) issue as to whether this individual was
23 sufficiently trained, sufficiently competent, sufficiently
24 designated.

25 JUDGE WILSON: Chief, if I might?

CHIEF JUDGE DIFIORE: Judge Wilson?

1 JUDGE WILSON: Mr. Shoot, the identification of
2 a specific type of equipment, power buggy, seems to me to
3 be somewhat undercut by the Court's holding in St. Louis
4 which says you don't look at the name of the vehicle or
5 what it's - - - how it's described; you look at its
6 function. And at least as I understand a power buggy,
7 it's to move things around a construction site, which then
8 sort of erodes some of the specificity as to the type of
9 the vehicle, because you could use all kinds of things to
10 move heavy things around a construction site, and I think
11 you probably frequently do.

12 MR. SHOOT: Your Honor, the reason for that
13 holding in St. Louis, stated right in the decision itself,
14 was that because the purpose of the statute and of the
15 regulations enacted thereunder it is to promote safety,
16 the contrary interpretation in that case, which would go
17 the other way, should be rejected. Here, again, it's
18 clear which interpretation, if we even go that far,
19 promotes safety.

20 We talk in our brief, they talk in their brief,
21 a great deal about the Appellate Division authority. By
22 the way, that case cited was a (audio interference)
23 Department case from 2000.

24 In fact, there are more than ten Industrial Code
25 provisions which, in some combination, require a person
 performing a particular activity to be designated and/or

1 competent and/or trained, more than ten. Seven of those
 2 designated - - - of those provisions have been deemed
 3 valid predicates. I won't cite them; they're in my brief.
 4 Three of them, including two of them arrived from the
 5 defendants, go the oppo - - - go - - - they're seemingly
 6 conflicting opinions which may not actually be
 7 conflicting. For a minute - - - in a - - - I'll get to
 8 that.

9 Only two of them - - - that's 9.6c(1) and
 10 7.3(e), have actually consistently been deemed inadequate
 11 but consistently is not, perhaps, the best word since each
 12 case - - - each regulation, it's one case and it goes
 13 defendant's way. And one of those cases is a trial-level
 14 case.

15 But to my point, Your Honor, and your questions
 16 earlier about same sentence or different sentence. One
 17 reason, I think, for this split in authority is because
 18 oftentimes, for example, with 9.1, which governs all power
 19 equipment, you have combined in the same sentence. There
 20 you have one sentence that says: "All power equipment
 21 used in used in construction, demolition and excavation
 22 operations shall be operated only by trained designated
 23 persons and" - - - this is still the same sentence - - -
 24 "all such equipment shall be operated in a safe manner at
 25 all times."

The latter part of that sentence is the classic

1 common law recitation. But what's happened is, in the
 2 first case that dealt with this regulation, the Berg case,
 3 a Third Department case, we show at pages 40 to 44 of our
 4 brief, where (audio interference) involved safe operation
 5 or alleged unsafe operation. There was no claim that the
 6 individual who operated the - - - I forget what the device
 7 was - - - forklift was not designated or trained to
 8 operate it.

9 Berg said this is not specific enough, which
 10 was, I think, a valid holding based upon what the claim
 11 was. But then, because it didn't say in the opinion
 12 itself, the Third Department opinion - - - we're looking
 13 at the second part. What happened is every Appellate
 14 Division decision thereafter cites Berg, nothing else, and
 15 says this has been deemed insufficient (audio
 16 interference) precise.

17 And clearly it shouldn't matter one way or the
 18 other whether there's a period in between the first half
 19 of the sentence and the next. In either case, the second
 20 half of the sentence, whether it's a new sentence or a
 21 continuation of the first, should be deemed inadequate.
 22 The first half of the second, or if it's - - -

23 JUDGE FEINMAN: Judge, may I ask a question, if
 24 I may?

25 CHIEF JUDGE DIFIORE: Judge Feinman?

JUDGE FEINMAN: So I want to change gears for a

1 second, Mr. Shoot, and I just want to understand the
2 framework that you think we need to be analyzing the
3 specificity requirement. And by that I mean, you know, do
4 we look at Ross as the controlling case? Obviously there
5 are other subsequent cases, such as Rizzuto, Morris and
6 Misicki. But you're not asking, and I don't think your
7 adversary is asking for us to overrule Ross as an
8 unworkable framework.

9 MR. SHOOT: No, I think that ship has passed a
10 long time ago, Your Honor. That may be not the holding
11 that some of us in the bar would have guessed, but I mean,
12 that ship has passed. The answer is no.

13 If I can briefly go to the - - -

14 JUDGE WILSON: Might I - - - just while we're on
15 that subject, might I just ask you something, if for no
16 other reason than my own intellectual curiosity.

17 There was a whole strain of cases, of our cases,
18 that long pre-date Ross and then continue beyond it, that
19 make a distinction between statutes that impose a duty,
20 which the first five subsections of 241 do, and
21 regulations. And at least as I read those cases, they say
22 if it's a statute, the duty is nondelegable; that's the
23 end of it. If it's a regulation, however, the regulation
24 can be introduced as evidence of negligence. But I don't
25 see where there's a holding in that line, or really
anywhere else, that says: and if the regulation is less

1 than specific, you lose your 241(6) claim. Can you shed
2 any light on that? Am I misunderstanding something?

3 MR. SHOOT: As I understand it, that's the
4 holding of Ross, that we only consider those - - - we, the
5 Court of Appeals, of course, only consider those
6 regulations which mandate a specific code of conduct as
7 opposed to a recitation of common law principles. There's
8 nothing prior to Ross, I think, that mandates that
9 conclusion Ross did, looking at it at that point in time.

10 And in subdivision 6 it doesn't say: that shall
11 comply with regulations. It says: that shall provide
12 reasonable and adequate protection and safety in the
13 workplace, which the court feels there construed to mean
14 comply with the regulations, at least those that are
15 specific.

16 JUDGE FAHEY: Judge, may I ask a question?

17 CHIEF JUDGE DIFIORE: Yes, Judge Fahey.

18 JUDGE FAHEY: I know we're getting near the end
19 here. Thanks, Judge.

20 Mr. Shoot, turning to a different issue, I - - -
21 I want to go back to the reviewability question for a
22 second. You had cited Hecker, I believe.

23 MR. SHOOT: Amongst others, yes.

24 JUDGE FAHEY: Yeah, amongst others. Here's my
25 problem with that case. Hecker is kind of a classic
reverse summary judgment question where - - - I think it

1 was a Court of Claims case, if I'm right, and then it was
2 - - - the Appellate Division reached the issue on a reg
3 that was cited in the Bill of Particulars and addressed in
4 the motion court in Court of Claims. And the Appellate
5 Division reaches, as an alternative ground upon which to
6 grant the defendant's motion. And that was unreviewable
7 by the court. That was Hecker. I get that. I understand
8 the logic there. It's kind of an outlier, but I
9 understand that.

10 But this really isn't - - - that's not really
11 the situation here. Here we have something different
12 because this summary judgment issue was not raised in a
13 lower court, it wasn't reviewed by the motion court, and
14 then the Appellate Division brought it up and, on their
15 own volition, which they have a right to do, granted
16 reverse summary judgment under 3212(b) which, by the way,
17 Hecker didn't even make reference to 3212(b) in the CPLR.

18 So in that situation, there would be no review
19 at all of the Appellate Division's decision. And we have
20 some case law that goes the other way on that. It was a
21 Judge Kaye case; I think she wrote a decision on it
22 entitled JMD Holding Corp. v. Congress Financial
23 Corporation; it's a 2000 - - - 2005 case that cited Judge
24 Kaye, Merritt Hill Vineyards v. Windy Heights Vineyard.
25 It's a 1984 Court of Appeals case.

Anyway, I know I can take you down that rabbit

1 hole, Mr. Shoot, because you'll understand the cases, as
2 Mr. Dean will, but my simple point being there is - - -
3 her argument is is that this has to be reviewable and that
4 Hecker doesn't really fall within that line of cases. And
5 the line of cases I make reference to are still valid.
6 And I'm wondering, if we don't say this is reviewable,
7 there would be no review at all of a factual determination
8 here. Go ahead.

9 MR. SHOOT: Your Honor, I think - - - let me
10 make two points with respect to that. One, it's not just
11 Hecker. There have been four Court of Appeals decisions
12 since 2013, all cited in my brief.

13 JUDGE FAHEY: Yeah, but let me just leave you on
14 that. The cases aren't going to get you out of this
15 discussion because I can name six in a row that go the
16 other way. And I won't bore the court by reading them to
17 you, but I'm concerned about reviewability, not just in
18 this case, but as a principle. So go ahead.

19 MR. SHOOT: Let me put it this way, Your Honor.
20 If you were writing on a blank slate and these decisions
21 didn't exist, I actually think that Judge Smith's
22 concurrence makes a lot more sense than the majority
23 opinion.

24 And for that reason, let me address why if you
25 did get to the merits you should affirm (audio
interference) issue of fact in terms of whether - - - what

1 actually preceded Melvin's operation of this buggy, right?
2 Was it horseplay or was he moving it out of the way, or
3 was he doing both? They had to move the buggy out of the
4 way, and it was fun to do, and he went on it. But
5 regardless of how that's resolved, regardless of how
6 that's resolved, it had to be moved out of the way. It's
7 not just Melvin that says that; it's Estavio who say that,
8 at page 671 - - - at 671 of the record. Two, you have a
9 regulation which absolutely (audio interference) by a
10 designated person, which the person is. Three, Mr. Melvin
11 has no training whatsoever.

12 And if you take a look, maybe the most important
13 two pages of the record are pages 671 to 672, because
14 that's Estavio's made-for-the-motion affidavit. And when
15 you read that - - - and remember, plaintiff testified,
16 before this affidavit was made, that the two of them,
17 Melville - - - Melvin, rather, and Estavio are both
18 tooling around with this buggy before the incident.

19 What you do not see at that made-for-the-motion
20 affidavit, is a denial (audio interference) and joking
21 with Melvin beforehand, a denial that he, personally, was
22 playing with the buggy beforehand, a denial that he was
23 present throughout the entire event. And what you also
24 don't see, Your Honor, is any claim that he made an
25 attempt - - - I don't mean to tackle - - - made any
attempt to do anything to stop Melvin while he - - -

1 Melvin's in his immediate presence. There is no - - - and
2 it's not a matter of what you believe or what you don't
3 believe. There is no proof which (audio interference)
4 would led you to that. It's just not there.

5 JUDGE FAHEY: I see.

6 MR. SHOOT: If I may address the foreseeability
7 - - - I'll be very brief - - - and beyond the scope of
8 employment. Foreseeability - - -

9 CHIEF JUDGE DIFIORE: Go ahead.

10 MR. SHOOT: Your Honor?

11 CHIEF JUDGE DIFIORE: Please do.

12 MR. SHOOT: Thank you. With respect to
13 foreseeability, I cite in the brief this court's decision
14 in Sanchez v. State. If you have regulations - - -
15 actually, it was rules in that case, it's regulation in
16 this case that specifically foresee an occurrence, then
17 it's foreseeable.

18 The Commissioner foresaw this when he said this
19 is one of the three items which, for whatever reason,
20 we're going to tell you you need someone designated,
21 trained, and competent. There's a lot of power put into
22 construction sites. Why this one?

23 And interestingly enough, my adversary says it's
24 wrong to presume that the Commissioner had some reason for
25 this, because when you go to the legislative history of
these provisions, there isn't any. You might as well find

1 the history of the Hammurabi code; it's more available
2 than that. But I think there was a reason for it, and you
3 can figure out what the reason was.

4 The employment argument, I would say, is, number
5 one, simply wrong legally, but also irrelevant. This
6 Court, again and again - - - Lubrano is one of the cases
7 cited in my brief. We have two gas jockeys - - - that's
8 what the court called them - - - at a gas station who are
9 playing this game of flipping a match into a lighted can
10 and trying not to get it to explode, and it does explode.
11 And this court said injuries or deaths arising from
12 employee horseplay are compensable under the workers'
13 compensation law if they result from conduct which "may be
14 reasonably regarded as an incident to employment".

15 That's carried over in the tort cases too, and
16 even including intentional torts like De Wald, this
17 court's decision where you have the superintendent of the
18 building going to collect the rent and ends up in a
19 fistfight, and of course his job wasn't to engage in a
20 fistfight, but it arose from the employment.

21 And here it's undisputed that that buggy had to
22 be moved. But more importantly, Your Honor, it's a forced
23 issue. One of the regulations cited in our brief, 1.29,
24 deals with flag people at the construction site. You have
25 to have a flag person under certain conditions, like if
there's traffic in the area or if there are a danger of

1 equipment dropping, you have to have a flag person control
2 the traffic.

3 What happens if it's violated? Typically, it's
4 someone who's not employed at all at the site who comes in
5 and smashes into the construction worker. For them, it
6 certainly didn't occur within the scope of their
7 employment; they're not even employed by the site. The
8 issue isn't or shouldn't be whether Melvin was acting
9 within the scope or employment, although he was, under
10 this court's decisions. The issue should be whether there
11 was a violation of a regulation or if, indeed, whether
12 Estavio was acting in the scope of his employment. That's
13 the issue.

14 And in fact, if you take defendant's
15 interpretation, there are two possibilities. A, the
16 operator was designated; B, he was not. If he was
17 designated, trained, and competent, there's no violation.
18 If he wasn't designated, then according to defendant, it's
19 unforeseeable that it will occur, and it didn't occur in
20 the scope of the operation of employment, and so either
21 way, there can never be an instance in which violation
22 gives rise to liability.

23 I suspect I've gone over my time. And thank you
24 very much, Your Honor.

25 CHIEF JUDGE DIFIORE: You're very welcome.

Counsel?

1 JUDGE FEINMAN: So while Mr. Shoot was speaking,
2 I happened to reach up to my shelf and pull down the PJI.
3 And there are almost 100 pages worth of cases going
4 through regulation after regulation after regulation to
5 discuss how Ross applies and whether or not this
6 particular regulation is specific or not.

7 And I guess what would be helpful to me is,
8 regardless of whether we hold it is specific or not
9 specific, what guidance can we give the Court in applying
10 the framework of Ross, you know, in terms of figuring out
11 whether the requirement of a specific regulation is
12 satisfied?

13 MR. DEAN: Thank you, Judge Feinman. And I
14 would say affirmative action. Whether the statute - - -
15 or the provision, excuse me, requires an affirmative
16 action on the part of the employer, such as conducting
17 inspections, such as requiring that scaffolding be of a
18 specific measurement. None of that is addressed in this
19 specific Code. And in fact, there are - - -

20 JUDGE WILSON: Chief Judge, may I?

21 MR. DEAN: - - - multiple Code provisions that -
22 - -

23 JUDGE WILSON: Chief?

24 MR. DEAN: - - - deal with this exact same
25 language.

 CHIEF JUDGE DIFIORE: Judge Wilson?

1 JUDGE WILSON: So this goes back to a prior
2 question. When you say affirmative action, why isn't it
3 affirmative action to require the employer to train
4 somebody? Why isn't it affirmative action to require the
5 employer to designate somebody? Those seem like
6 affirmative acts.

7 MR. DEAN: I guess it's distinguishable, Your
8 Honor, because there's no details requiring - - - there's
9 no concrete mandate as to what deems the person trained.
10 There's no details as to what makes him competent.

11 JUDGE WILSON: Something different from an
12 affirmative action. It's an affirmative obligation placed
13 on the employer to do something that has some what?

14 MR. DEAN: For example, like the - - - the
15 inches requirement for scaffolding.

16 JUDGE WILSON: Sure, but it's easy to find - - -

17 MR. DEAN: You know the - - -

18 JUDGE WILSON: It's easy to come up with
19 something that sufficient. But, sort of ,where is the
20 line?

21 MR. DEAN: Well, that's what we're asking this
22 court to address.

23 JUDGE WILSON: And Judge Feinman was asking if
24 you can articulate a line for us, and I don't think
25 affirmative action does that.

 MR. DEAN: I would just argue that precedent

1 under Wade v. Bovis, the court held that only trained
2 designated person shall operate personnel hoists, not
3 specific. Under Wilke, 23-9.6(c), requiring aerial
4 baskets, operator shall, quote, "be competent designated
5 persons who have been trained with the use of such
6 equipment". It was not specific. And then we also have
7 the Berg and Scott cases ruling that 23-9.2(b)(1),
8 applicable to power operated equipment, generally, was too
9 general to support the claim.

10 JUDGE RIVERA: Judge, if I may ask?

11 CHIEF JUDGE DIFIORE: Judge Rivera?

12 JUDGE RIVERA: Thank you.

13 So Mr. Dean, just staying on this, well, your
14 client - - - well, the employer must have understood what
15 this regulation meant, right, for Estavio? They must know
16 what training means. They must know what designation
17 means, correct?

18 MR. DEAN: Yeah, per union rules.

19 JUDGE RIVERA: Okay. So let me ask this. How
20 did the employer come to the conclusion that the union
21 rules would meet the requirements of the Code?

22 MR. DEAN: Well, that was per contract with the
23 employer SGS, who employed Mr. Estavio and employed Mr.
24 Toussaint. So he obviously was not supposed to be in that
25 area. Union rules said that only laborers could operate
this piece of equipment, and it's well known - - -

1 JUDGE RIVERA: With respect to the training, is
2 the employer assuming, because the union is handling this,
3 that the union has properly trained them in accordance
4 with whatever the code might require?

5 MR. DEAN: Well, I think the provision is too
6 general to even mandate what the Port Authority would know
7 what is specifically required and - - -

8 JUDGE RIVERA: Yeah, but let - - - then aren't
9 you just saying that the employer doesn't know how to
10 comply and they never did because they just don't know?

11 MR. DEAN: No, I think they're requiring - - -
12 they're responding on the union rules that are applicable
13 in the contracts with their subcontractor, that they will
14 comply with these rules.

15 JUDGE RIVERA: Are you saying then that there is
16 the equivalent of a custom and practice about what is
17 appropriate training for driving a power buggy?

18 MR. DEAN: I would say that it was on the
19 employer to designate a specific person, which they did.
20 Per union rules, laborers are the ones that are going to
21 operate these concrete power buggies. We had a laborer
22 foreman who designated a proper laborer to operate the
23 power buggy at issue. And the fact that this individual
24 just took it upon himself to jump on the power buggy and
25 drive it into the plaintiff was completely unforeseeable.

 CHIEF JUDGE DIFIORE: Thank you, counsel.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. DEAN: Thank you, Your Honors.

(Court is adjourned)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of Toussaint v. Port Authority of New York and New Jersey, No. 18, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: February 18, 2021