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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF KELLY,

Appellant,

-against-

No. 2

DINAPOLI,

Respondent.

MATTER OF SICA,

Respondent,

-against-

No. 3

DINAPOLI,

Appellant.

20 Eagle Street
Albany, New York
January 2, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN



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Appearances:

JOSEPH M. DOUGHERTY, ESQ.
HINMAN STRAUB P.C.
Attorney for Appellant Kelly
121 State Street
Albany, NY 12207

WILLIAM E. STORRS, ASG
ATTORNEY GENERAL'S OFFICE FOR THE STATE OF NEW YORK
Attorney for Respondent/Appellant
The Capitol
Albany, NY 12224

DONALD P. HENRY, ESQ.
DONALD P. HENRY P.C.
Attorney for Respondent Sica
99 Church Street, 4th Floor
New York, NY 10601

Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next matter on this
2 afternoon's calendar are appeals number 2 and 3, Matter of
3 Kelly v. DiNapoli, Matter of Sica v. DiNapoli.

4 Counsel.

5 MR. DOUGHERTY: May it - - - may it please the
6 court, my name is Joseph Dougherty. I'm representing James
7 Kelly. I'd like to reserve one minute for rebuttal.

8 CHIEF JUDGE DIFIORE: You may, Mr. Dougherty.

9 MR. DOUGHERTY: Your Honors, this case is very
10 simple for Mr. Kelly. There - - -

11 JUDGE RIVERA: Counsel, what's the accident?
12 From - - - from your client's perspective, what is the
13 actual accident?

14 MR. DOUGHERTY: The accident was my client
15 protecting his partner as a rafter fell towards his
16 partner.

17 CHIEF JUDGE DIFIORE: Is part of the equation
18 that the accident has to be not foreseeable?

19 MR. DOUGHERTY: Exactly.

20 CHIEF JUDGE DIFIORE: And going into a collapsing
21 - - - collapsing building, while obviously laudable and
22 commendable on the part of the police officer, is that
23 something that's not anticipated or foreseeable?

24 MR. DOUGHERTY: Well, I think there's two issues
25 there. The first issue is my client testified at the



1 hearing with the hearing officer who found that my client
2 was entitled to ADR that the building was stable when he
3 went in. That was uncontroverted. As he was in the
4 building attempting to rescue the family that is when the
5 rafter fell and he put his hand up in order - - - neck and
6 back injury in order - - to protect his partner.

7 JUDGE RIVERA: Isn't it a different question - -
8 - let's go with what you're saying that when he goes in
9 it's stable. It isn't a question that it's foreseeable
10 that that stability is momentary given the nature of an
11 ongoing storm and - - - and the condition of the building
12 when he goes in?

13 MR. DOUGHERTY: I would agree with that but at
14 the same time I would say if he's going into the building,
15 in nineteen years he had never been asked to do anything
16 like this. It was not foreseeable that a rafter would fall
17 while he was in the building.

18 JUDGE STEIN: A lot - - - well, it seems to me
19 most of our cases on this subject talk about an unexpected
20 event and - - - and the conversation that I'm hearing and
21 that certainly has been in some of the briefs has been
22 about foreseeability. Is there a difference between
23 unexpected and unforeseeable?

24 MR. DOUGHERTY: I think there has to be. If you
25 look at a lot of the case law that provides a foundation



1 for cases like this, a police officer that sits at a chair
2 in his office and one of the screws falls out, the chair
3 falls, he hurts his back, he gets accidental disability. I
4 think that the case law has evolved to a point where you
5 look at a job description and you say that you're going to
6 respond to an emergency and everything in that emergency is
7 then foreseeable. There has to be a place where there is
8 unforeseeability within a certain emergency and that is
9 this case.

10 JUDGE STEIN: Well, but if - - - if - - - I guess
11 my question is was it unexpected? And could there be other
12 things that - - - that were a part of this scenario such as
13 the fact that it would be unexpected that the normal
14 responders who would actually go into the house could not
15 make it there in time? Could that have been an unexpected
16 event that would be accidental?

17 MR. DOUGHERTY: Yes, and I think that was a
18 predicate to my client having to go into the building is
19 normally if there was not a hurricane the firefighters, the
20 EMS, might have gotten there in time in order to go in and
21 do their job, which is normally their job to try to rescue
22 people that are in such a building.

23 JUDGE STEIN: Well, what about the argument that
24 - - - that this was a voluntary act? Mr. Sica seems to
25 distinguish his case from yours on something along those



1 lines. How do you respond to that?

2 MR. DOUGHERTY: Well, I think, number one, I
3 think the comptroller responded in my matter has conceded
4 that point. I don't think that was - - - that briefed.
5 But at the same time, my client was required to protect and
6 serve, and in situations where the fire department and the
7 EMS could not make it in time, my client was responsible
8 for going in. Now when my client was in the building if
9 he's just pulling rafters, if he's pulling debris, that's
10 one thing. That could be foreseeable. That could be
11 expected. If you're running into a building, you know
12 there's damage, you know you're trying to rescue, pulling
13 debris is definitely something that is expected.

14 JUDGE FAHEY: Well, but - - -

15 MR. DOUGHERTY: A rafter falling is not expected.

16 JUDGE FAHEY: You see here's the thing. It seems
17 that we're talking about risks that are inherent in regular
18 employment duties versus risks that occur during the course
19 of regular employment duties. That - - - that's the
20 distinction you seem to be drawing. So - - - so it's fair
21 to say that a firefighter goes to a scene where property's
22 being damaged and there will always - - - it's always a
23 risk inherent in regular employment duties that part of
24 that building during a fire may fall on somebody who's a
25 firefighter. But it's not part of the risks of a police



1 officer in the risk of their regular - - - regular
2 employment duties to do that. But - - - so the question
3 then becomes - - - I think that's an easy enough
4 distinction to draw. The question then becomes, though, is
5 - - - is are the employment duties written so broadly to
6 cover anything that occurs in terms of public safety in the
7 context of a police officer's duty? And if so, then almost
8 nothing would be an accident and everything would be
9 covered by regular disability or the opposite, everything
10 would be an accident covered by regular disability. And I
11 guess what I search for is the rule on where to draw that
12 line. That's what I'd ask you to point us towards or - - -

13 MR. DOUGHERTY: Yes, I mean, I think that is a
14 fantastic question as far as you don't want to open the
15 floodgates for ADR.

16 JUDGE FAHEY: Yeah, so where is the line here?

17 MR. DOUGHERTY: And I think the line is - - - is
18 there. And in this specific case, the line is definitely
19 present where a hearing officer heard testimony. The
20 hearing officer heard testimony that in nineteen years my
21 client was never asked to do or required to do what he did
22 that day. The hearing officer determined that it was
23 unforeseeable. The hearing officer determined that my
24 client was entitled to accidental disability. The
25 comptroller overruled the hearing officer simply by looking



1 at that broad job description. This case is not one that
2 will open the floodgates for ADR.

3 JUDGE FAHEY: And is that because of the nature
4 of the risk? In - - - in other words, the injury occurred
5 during a hurricane? It's different from, say, a pothole or
6 a wet floor which happens more ordinarily in the course of
7 their duties? Why do you say it's different?

8 MR. DOUGHERTY: I believe it's different because
9 of the circumstances surrounding what my client did. As I
10 said before, if my client ran into the building and was
11 just pulling debris and hurt himself, that would be one
12 thing. But running into the building, pulling debris, and
13 then in the course of pulling debris having a rafter fall,
14 to protect his partner, putting his arm out to deflect that
15 debris caused the injury. There has to be a line whereby
16 even if you're responding to an emergency that there can be
17 within that emergency some form of accident. And I think
18 the hearing officer got it correct, and I think that this
19 court in your previous decision in Yoga Vida was on point
20 as far as looking at the record in its totality,
21 substantial evidence does not support the comptroller
22 overruling the hearing officer.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 Counsel.

25 MR. STORRS: Good afternoon, Your Honors; William



1 Storrs for the respondent. Police and firefighters have
2 dangerous jobs. They know that going in. We know that and
3 we're grateful to them.

4 JUDGE STEIN: But under your - - - as I
5 understand your proposed rule essentially there would never
6 be an accident.

7 MR. STORRS: Absolutely not true, Your Honor.

8 JUDGE STEIN: When would there be an accident?

9 MR. STORRS: Well, for example - - -

10 JUDGE STEIN: Tell me what the rule is.

11 MR. STORRS: For example, it's - - - it's
12 something that is not a risk inherent in the job. For
13 instance, if he'd been driving there, his - - - his
14 steering had broken, his brakes had gone, his equipment
15 broke, if he'd been using a tool - - -

16 JUDGE STEIN: Okay.

17 MR. STORRS: - - - if that tool broke.

18 JUDGE STEIN: How do we define the job? In other
19 words, in this case Mr. Kelly said it was not my job to go
20 into this building. My job was to secure the perimeter,
21 make sure nobody goes into the building, and wait for the
22 firefighters and other people.

23 MR. STORRS: If there - - -

24 JUDGE STEIN: But I couldn't do that. That - - -
25 and that was unexpected.



1 MR. STORRS: If there were other people there but
2 his underlying job description or written job description
3 said that his job was to respond to calls in his assigned
4 area and to assist any injured person. And even then, the
5 instructions that he received on the day of the hurricane
6 were to shelter in place and not to respond except in life-
7 threatening situations.

8 JUDGE RIVERA: So - - - so how should the court
9 factor in the lack of training to deal with a particular
10 emergency?

11 MR. STORRS: The lack of training, I - - - I
12 don't know exactly what training would have been necessary
13 to go in and remove these things.

14 JUDGE WILSON: I'm having trouble with the
15 example you gave to Judge Stein that if he was driving and
16 his car broke down or his equipment failed, I mean those
17 things happen in the real world. And - - -

18 MR. STORRS: But they are not considered to be
19 risks that are inherent in the job.

20 JUDGE WILSON: Why not?

21 MR. STORRS: The comptroller has found - - -

22 JUDGE WILSON: Well, wait. Isn't - - - isn't the
23 risk in my driving my car that a tire's going to blow out?

24 MR. STORRS: That may be, but it is not
25 considered to be a risk inherent in the job of a police



1 officer as the comptroller has construed the retirement
2 law.

3 JUDGE STEIN: But - - - but isn't it part of the
4 police officer's job to drive in his patrol car to the
5 location of the emergency?

6 MR. STORRS: That - - - for instance, I believe
7 in that - - - the expectation is that he would have a car
8 that did not break down. Having a car that breaks down,
9 having a tool that breaks in your hand, things are things
10 that the comptroller has found that are - - -

11 JUDGE RIVERA: But what - - - is your point it's
12 not greater risk than it is for anybody else behind the
13 wheel of a car?

14 MR. STORRS: That's right. It's - - - it's not
15 particular to that - - -

16 JUDGE RIVERA: So it's not particular to the job?

17 MR. STORRS: It's not particular to that job.

18 JUDGE RIVERA: Okay. So let's go back to the
19 training. It seems to me that this is a compelling
20 argument. You're asking the individual to run into a
21 building. Doesn't have training to assess the risk or to
22 assess how to address the risk once they're in the midst of
23 that environment.

24 MR. STORRS: He assessed - - - he assessed the
25 risk correctly. It was a very dangerous thing to do. He



1 went in - - - he - - - they look - - - and contrary to what
2 he says about them not - - - about the building being
3 stable, he said at page 89 - - - 189 of the record that the
4 building appeared to be very unstable when he went in.

5 JUDGE FAHEY: Well, someone had already died
6 there, hadn't they?

7 MR. STORRS: Someone had already died, and he was
8 aware of that.

9 JUDGE FAHEY: There were two other people that he
10 pulled out, right?

11 MR. STORRS: That - - - that's correct.

12 JUDGE RIVERA: When he ran in, did he know
13 someone was dead?

14 MR. STORRS: Yes, he did know. He had already
15 been told I believe - - -

16 JUDGE RIVERA: Do you know how?

17 MR. STORRS: I believe the - - - the tree falling
18 and the - - - and the house collapsing on him.

19 JUDGE RIVERA: It was obvious and visible when he
20 went in?

21 MR. STORRS: Extremely obvious and visible. They
22 said that half of the roof was gone, part of the roof was
23 still dangling. It was shattered. Yeah.

24 JUDGE GARCIA: Isn't also proper training - - -

25 JUDGE FAHEY: So we're back to whether or not



1 it's an occupational hazard or a hazard that's - - - that's
2 not inherent to the occupation itself. Is that the
3 distinction you would draw?

4 MR. STORRS: Well, what - - - what the - - - the
5 Third Department put it best. They said, "The threat that
6 compelled the response was the threat that caused the
7 injury." He responded to the threat of collapsing building
8 and the building continued to collapse on him as he was
9 working to extricate the people.

10 JUDGE FAHEY: So - - - so that is then an
11 occupational hazard to being a police officer?

12 MR. STORRS: Yes.

13 JUDGE RIVERA: So what - - - what's the accident?
14 He told us what he says is the accident. Do you agree?

15 MR. STORRS: No, there is no accident.

16 JUDGE RIVERA: Okay.

17 MR. STORRS: This was - - -

18 JUDGE RIVERA: I'm sorry - - -

19 MR. STORRS: And because there was not an
20 accident petitioner qualified for a benefit that other
21 people don't get.

22 JUDGE RIVERA: But - - - I'm sorry.

23 MR. STORRS: He qualified for performance of
24 duty. It's important to recognize that back in the 1980s
25 the police and the fire complained to the legislature.



1 They said accidental is too hard to get. It's leaving
2 people uncompensated. The response of the legislature was
3 not to expand accidental. It was to create an entirely new
4 level of benefits.

5 JUDGE RIVERA: But - - - but - - - I'm sorry.

6 JUDGE WILSON: And a limited accidental.

7 JUDGE RIVERA: It wasn't clear before. In his
8 position or an officer in this position who runs into a
9 house to try and save someone.

10 MR. STORRS: Yes. Um-hmm.

11 JUDGE RIVERA: You've already given the other
12 example, the drive on the way. So is the comptroller's
13 position once you run into that house anything that happens
14 to you is not an accident? Is there anything that could be
15 an accident when you run into that house?

16 MR. STORRS: I don't know if I can - - - if I can
17 address quite that broad a hypothetical. I think
18 everything depends upon the facts that you are given, that
19 you have to deal with that.

20 JUDGE FEINMAN: Well, let's say he trips on a
21 wire while he's running into the house, you know, because
22 they had a space heater plugged in.

23 MR. STORRS: Probably not. Probably not. We
24 have - - - we have - - -

25 JUDGE RIVERA: Is that - - - is that because it's



1 not related to the danger?

2 MR. STORRS: Yeah, we have the case - - - well,
3 because the danger is in a house that's collapsing there -
4 - - things are going to be - - -

5 JUDGE RIVERA: A collapsing house.

6 MR. STORRS: - - - a mess around you. We have
7 the Lassen case where a firefighter was backing out of a
8 burning building and he tripped over objects on the front
9 porch that he could not see.

10 JUDGE WILSON: But see - - - but see let - - -
11 let's take a step back. Those are ordinary hazards of
12 life, stepping into potholes, stepping on wet floors, and
13 there are cases where accidental disability pensions have
14 been giving potholes, ice, in specific situations.

15 MR. STORRS: Yes.

16 JUDGE FAHEY: Yet, nonetheless they've had it.
17 See, it's the consistency of the rule that I struggle with
18 legally in fairness to the employees, and that's - - -
19 that's where I'm having a hard time drawing the line. And
20 so we not only have the distinction between an occupational
21 hazard and - - - and a risk that is not inherent to the
22 activity but we also have a distinction between those
23 hazards that arise and the ordinary hazards of life that
24 one encounters while doing your job.

25 MR. STORRS: Yes.



1 JUDGE FAHEY: And an accident, these things are
2 all in common probably and it's considered an accident. So
3 once again we're back to what's the rule besides saying
4 foreseeability that would - - - that would tell us where we
5 should be looking to draw this line between the two? What
6 would you suggest to us?

7 MR. STORRS: The - - - the rule is whether it is
8 a risk that is inherent in the duties and the response or
9 whether it is that - - -

10 JUDGE FAHEY: And so - - -

11 MR. STORRS: - - - proverbial - - -

12 JUDGE FAHEY: Is there - - - is there a
13 distinction to some - - - to a first responder of any kind
14 between - - - who's responding to emergencies? Does that
15 mean that anything that happens in the context of that
16 occasion, whether it's a hurricane, whether someone's
17 trying to break into a building, whether you're chasing
18 somebody through an alleyway, whatever it is if you're
19 acting with your police uniform on it cannot be covered by
20 accidental disability insurance?

21 MR. STORRS: No, that is not true.

22 JUDGE FEINMAN: Okay. So what's the rule for us,
23 then?

24 MR. STORRS: It's any - - - it's any risk that is
25 inherent in the duties that you are performing. But if



1 it's something that happens that is extraneous to that - -
2 -

3 JUDGE FAHEY: Give me an example.

4 MR. STORRS: Well, as I said before there are
5 examples where police officers have been using tools to try
6 to extricate people, police or firefighters, and the tool
7 breaks in their hands and disables them. That is not
8 considered to be a risk of the job inherent in the job.
9 That is considered to be an accident.

10 CHIEF JUDGE DIFIORE: What weight do we ascribe
11 to the fact that under these circumstances the police
12 officers were, as I read the record, the only first
13 responders on the scene?

14 MR. STORRS: Well, I think that it - - - what it
15 does is just reinforce the underlying duties in the job
16 description. As he said I did what I did because no one
17 else was there to do it. It was his job to rescue and
18 assist injured persons and he performed that job admirably.
19 And it's because he performed that and was injured in the -
20 - - in the process of doing that as a result of a risk that
21 was inherent to it that he received the benefit of
22 performance of duty.

23 CHIEF JUDGE DIFIORE: Thank you.

24 JUDGE RIVERA: So it's a risk inherent to his job
25 description, what he's doing in the moment, and the nature



1 of the emergency itself?

2 MR. STORRS: That's correct.

3 JUDGE RIVERA: Okay. Thank you.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 Counsel.

6 MR. DOUGHERTY: Your Honors, I - - - I would just
7 like to point out one standard which is substantial
8 evidence. You just heard from the comptroller that there
9 are situations where you respond to an emergency and you
10 can receive accidental disability benefits. In this
11 situation, my client testified to the hearing officer about
12 the emergency. The hearing officer, hearing all the facts,
13 all the testimony which was uncontroverted, rendered a
14 decision that my client should receive accidental
15 disability benefits. The comptroller overruled that
16 determination simply by looking at the job description.
17 Therefore, the comptroller's determination was not
18 supported by substantial evidence.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 Appeal number 3, the Matter of Sica v. DiNapoli.

21 MR. STORRS: I hope I did that right.

22 CHIEF JUDGE DIFIORE: Correct.

23 MR. STORRS: All right. Thank you.

24 CHIEF JUDGE DIFIORE: Please proceed.

25 MR. STORRS: Your Honors, as in Kelly, the very



1 threat that compelled the response is the threat that
2 caused the injury here. Petitioner, a firefighter,
3 responded to a call for difficulty breathing and after
4 treating the people, he himself suffered from - - -

5 JUDGE RIVERA: But what - - - but what in that
6 phone call would have alerted the firefighter that there
7 are toxic fumes?

8 MR. STORRS: I think again, Your Honor, the
9 important - - - the problem - - - and this is the problem
10 in the Third Department's case is they focused on the
11 individual's awareness of the risk as opposed to the
12 analysis of the risk that is inherent in the duties. There
13 have been many, many, many cases where the - - - where the
14 courts have found that there was no accident - - -

15 JUDGE RIVERA: Usually responding to, you know,
16 someone's having difficulty breathing in a store, does that
17 automatically carry with it an inherent risk that there are
18 toxic fumes in the store when everybody else when you run
19 in seems to be fine?

20 MR. STORRS: Well, no, I think that the way to
21 look at it is not that. Although it's true that when he
22 got there he found two people down suffering respiratory
23 difficulties with nothing else apparently wrong. Is that
24 in effect a clue that there may be a problem?

25 JUDGE RIVERA: And a lot of other people who were



1 upset but - - -

2 MR. STORRS: But not - - -

3 JUDGE RIVERA: - - - seemed to be breathing.

4 They were standing.

5 MR. STORRS: They seemed to be breathing but
6 we're not - - -

7 JUDGE RIVERA: They were speaking to him.

8 MR. STORRS: But we're not in - - - I didn't mean
9 to - - -

10 JUDGE RIVERA: No, no. I'm sorry.

11 MR. STORRS: But not in that small, enclosed
12 area. But here the - - - the problem is the focus on the
13 individual awareness of the hazard rather than on the risks
14 inherent in the job. Petitioner's job duties, again, said
15 that the work of a firefighter is of a hazardous nature.
16 His job was to administer first aid as a firefighter.

17 JUDGE RIVERA: So then is the expectation he
18 would have run - - - having received this call to run in
19 with the whole mask, all of the apparatus?

20 MR. STORRS: Or if necessary to - - - to get it
21 when he realized that there were two people down with - - -
22 with breathing difficult - - - who were unconscious. Yes.
23 There was - - - there was nothing in the record to show
24 that he could not have done that had he chosen.

25 JUDGE FAHEY: What - - - what effect does the



1 Harp presumption - - - not to knock you off too much but
2 clarify that in - - - in my own mind for me.

3 MR. STORRS: Well, the Harp presumption really
4 doesn't - - - doesn't have any applicability here. He got
5 the Harp presumption under the performance of duty
6 benefits, but it wasn't even addressed as to whether - - -

7 JUDGE FAHEY: So - - - so - - -

8 MR. STORRS: - - - before you - - - before you
9 would reach that - - -

10 JUDGE FAHEY: - - - effects the performance of
11 duty benefits but not - - - but not the accidental
12 disability pension?

13 MR. STORRS: Not yet. If it had been - - - been
14 determined that this was an accident then there would have
15 to be further findings of causation on that. But those
16 weren't done below so it's really not part of this case at
17 this point.

18 JUDGE STEIN: But what if - - - what if we
19 reversed this case? Does - - - does that have to be
20 addressed?

21 MR. STORRS: Yes. It - - - we'd have to go back
22 to the comptroller for further proceedings. Yes.

23 JUDGE FAHEY: I see. So - - - so it would go
24 back for - - - because there was proof in the record on the
25 Harp presumption. I thought the State had put on an expert



1 and - - -

2 MR. STORRS: There was proof but it wasn't
3 specific to this instance. Petitioner suffered from three
4 separate instances, I believe, where there were - - - where
5 there were - - - were toxic fumes. And there were - - -

6 JUDGE FAHEY: But there were three other besides
7 this?

8 MR. STORRS: Two other besides this.

9 JUDGE FAHEY: Two other? Okay, two. Okay.

10 MR. STORRS: I think two other. But there wasn't
11 any specific causation and those were conceded not be
12 accidents I believe. There was no specific medical
13 evidence tying the causation to this incident as opposed to
14 the other two. I think that it would have to go - - - if -
15 - - if this court confirmed that it was an accident it
16 would have to go back.

17 JUDGE STEIN: Did the - - - did the comptroller
18 rely on the foreseeability of - - - of this toxic fumes in
19 the comptroller's decision?

20 MR. STORRS: Not so much because, again, I say
21 the - - - the individual foreseeability leads you off the -
22 - - it leads you to the wrong path in the analysis. It was
23 - - - it was the reliance- - - the Third Department's
24 errors in this case in analysis were focusing on the
25 individual's awareness rather than an analysis, as this



1 court has said, of the job itself and the risks that are
2 inherent in that job.

3 JUDGE FEINMAN: So how would you re-word the - -
4 - the standard that it's in McCambridge and - - - and in
5 our cases so that we can get some more uniform approach out
6 of the Third Department?

7 MR. STORRS: Well, the - - - the - - -

8 JUDGE FEINMAN: And I'm assuming that we're only
9 talking about this three-tiered system - - -

10 MR. STORRS: Um-hmm.

11 JUDGE FEINMAN: - - - and this has no
12 applicability for what goes on in the city where there's
13 only a two-tiered system.

14 MR. STORRS: That's right. And by the way, I do
15 need to apologize to the court. I almost forgot. There is
16 - - - we - - - we accidentally mistakenly referred to the
17 court officer's Kowal case as involving performance of duty
18 in our brief. It does not. What we would suggest the
19 primary problem here appears to have been in the
20 distinction between ordinary and not ordinary duties, that
21 construction, which comes out of Lichtenstein, the use of
22 the word "ordinary." I would suggest that that word
23 ordinary should be struck. It's not found in the statute.
24 It should be simply an analysis of what the duties are, not
25 ordinary versus irregularly occurring or anything like

1 that.

2 JUDGE STEIN: So - - - so - - - and I forget
3 which one, one of the petitioners here claimed that - - -
4 that the duties had to be routine.

5 MR. STORRS: That's right.

6 JUDGE STEIN: That's - - - that's what you're
7 seeking to - - -

8 MR. STORRS: See - - - yeah, see - - - the 363
9 doesn't say that and what's interesting also is that
10 there's a parallel construction between the accidental in
11 363 and 363(c) the performance of duty. If you put a
12 regular duty requirement in the one you're putting it in
13 the other. That's going to be very problematic for people
14 getting performance of duty if they're told this was a
15 rarely performed duty so you don't get this benefit.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MR. STORRS: Thank you.

18 CHIEF JUDGE DIFIORE: Counsel.

19 MR. HENRY: Good afternoon. May it please the
20 court, my name is Donald Henry, Donald Henry P.C.
21 representing the respondent, Yonkers Firefighter Pat Sica.
22 Judges, let me just start by - - - by saying what you heard
23 from - - - from the comptroller is a superhuman definition
24 of accident. This court said in 1982 in Lichtenstein and
25 again in 1984 in McCambridge v. McGuire, that the intent of



1 the legislature was to apply an ordinary definition of
2 accident. To apply anything other than an ordinary
3 definition of accident is going to basically remove
4 accidental disability from first responders. This is the
5 position the comptroller has historically taken. Judge,
6 when first responders are performing ordinary duties
7 unexpected events do happen, and unexpected events - - - I
8 agree with you, Judge - - - are basically unforeseeable and
9 that is what happened here. Firefighter Sica - - -

10 JUDGE STEIN: Well, can - - -

11 MR. HENRY: Go ahead.

12 JUDGE STEIN: - - - can I just probe you a little
13 bit on that?

14 MR. HENRY: Sure.

15 JUDGE STEIN: Because we got away from it
16 earlier, but it seems to me that an event can be
17 foreseeable but still unexpected. It - - - I don't see the
18 two as - - - as necessarily co-extensive.

19 MR. HENRY: Well, I - - - I think that what we
20 are talking about, we are talking about first responders.
21 Firefighters are on notice of ordinary hazards. They train
22 for ordinary hazards, okay. That's why many of the things
23 that happen on a fire - - -

24 CHIEF JUDGE DIFIORE: Is exposure to a toxic gas
25 an ordinary hazard of the job?



1 MR. HENRY: That - - - this is a context thing
2 and this is why we're - - - this court said going back to
3 Lichenstein is again it's a case-by-case basis. Context
4 matters. The problem with what the comptroller wants to
5 do, he wants to paint a broad brush which I'm saying is
6 just - - - you know, excludes so much. First responders -
7 - -

8 JUDGE FAHEY: No, no. We understand that but
9 going - - - going back to Judge DiFiore's question is in
10 the - - - in the context of responding to a medical
11 emergency you wouldn't think there'd be a chemical leak.
12 That's the core of your argument.

13 MR. HENRY: This is correct.

14 JUDGE FAHEY: Now let's take the other side of
15 that. The other side of that, though, wouldn't that create
16 a number of inconsistencies in our own jurisprudence and in
17 Third Department jurisprudence in the kind of cases where
18 you would have what appear to be serious accidents that
19 wouldn't qualify - - - I shouldn't say serious because
20 these are actually all quite serious. But - - - but a
21 certain type of accident that wouldn't qualify in the
22 context of responding to a non-medical emergency. And for
23 instance, you respond to a chemical leak, you get injured,
24 you're not entitled to accidental disability, the injury
25 could be much, much worse.



1 MR. HENRY: Correct.

2 JUDGE FAHEY: Yet at the same time here, you're
3 responding to a medical emergency, a relatively - - - in
4 the scheme of things a firefighter could that three or four
5 times a day, right, easy?

6 MR. HENRY: Correct.

7 JUDGE FAHEY: So - - - so you're doing that and
8 it's a relatively minor accident in that scheme of things.
9 Yet you get a seventy-five percent disability pension as
10 opposed to say if you got twenty years and sixty-six
11 percent.

12 MR. HENRY: Well, Judge - - -

13 JUDGE FAHEY: You see the - - - you see the
14 problem?

15 MR. HENRY: Right. But - - -

16 JUDGE FAHEY: In terms of our jurisprudence.

17 MR. HENRY: But what the comptroller supports is
18 a first responder gets his pinkie caught in his tool he
19 gets a seventy-five percent pension and then the brave two
20 cases you have before you where the - - - where the first
21 responders are risking life and limb, they don't get it.

22 JUDGE GARCIA: But isn't that a function of the
23 statute? I mean that's the problem here, right, because in
24 your hypothetical they would get a higher recovery under
25 disability then somebody who runs into a building and is



1 injured rescuing a child. And that's one - - - that
2 argument really goes to the statutory scheme, though.

3 MR. HENRY: But what we're asking and I think
4 that what this court has supported since 1982 is a fair
5 case-by-case analysis looking at what the ordinary risks
6 and looking at factors as whether it was reasonable for the
7 first responder not to foresee the hazard. And - - -

8 JUDGE GARCIA: And wasn't that done here and it
9 was found not to be an accident at some point, right, then
10 at the lower level?

11 MR. HENRY: No, no. The hearing officer found it
12 to be an accident, and I'm the respondent. The Third
13 Department majority found it to be an accident.

14 JUDGE GARCIA: But the comptroller found it was
15 not.

16 MR. HENRY: The comptroller found it was not.
17 Not criticizing the foreseeability angle at all. This is
18 not a foreseeability case. Both the hearing officer and
19 the Third Department found as a matter of fact that - - -
20 that Firefighter Sica, it was reasonable for him not to
21 foresee the hazard. The comptroller superseded the hearing
22 officer on the basis of the job description, dangerous job.
23 And if I may just say one more thing. If you look at the
24 record at pages 103, 104, they - - - there is the civil
25 service job description. The civil service job description

1 is written by the employer, and if you look at that - - -
2 if you look at the second paragraph of the second page
3 where it talks about environmental conditions it says that
4 when you're doing emergency medical work the hazard is risk
5 of exposure to disease and, you know, upset people. That's
6 what it says. It doesn't say poisonous gas.

7 JUDGE RIVERA: Well, I thought the comptroller's
8 - - - maybe I misunderstood him. I'll ask him when he gets
9 up. I - - - I thought his position was that once the
10 firefighter ran into the market and observed the
11 circumstances at that point should have realized no, no,
12 no, this is not just someone who's got shortness of breath.
13 There may be something external here and I should be taking
14 precautions, and that's where he failed to do that.

15 MR. HENRY: I agree that that's a very important
16 point, but my - - - but what I'm saying is that the Third
17 Department majority when they looked at the record found as
18 a matter of fact that - - - that the comptroller did not
19 supersede on that basis. So that if you stick to this
20 record you can find that it was not foreseeable because
21 that's a - - - that's a foreseeability thing. The
22 foreseeability angle was added by the dissent down below.
23 It isn't really in the record. And one final point that
24 goes with that. When fire - - -

25 JUDGE RIVERA: The record doesn't support that



1 conclusion - - -

2 MR. HENRY: Correct.

3 JUDGE RIVERA: - - - by the comptroller.

4 MR. HENRY: Correct.

5 JUDGE RIVERA: Okay.

6 MR. HENRY: One final point is Firefighter Sica
7 was one of four people that went to that market. When he
8 got off that fire truck, he had a lieutenant. The
9 lieutenant is responsible for his safety. That lieutenant
10 said don't take your firefighting gear. And I don't mean
11 to insult much words, but they thought they were on a
12 medical call. And he was responsible, if anybody was, to
13 pick up something different and to make that change to go
14 get masks or - - - or to get more protective equipment. He
15 never did that because he never recognized the hazard.

16 CHIEF JUDGE DIFIORE: Thank you, Mr. Henry.

17 MR. HENRY: Thank you.

18 CHIEF JUDGE DIFIORE: Counsel. Do you care to
19 exercise rebuttal?

20 MR. STORRS: Very, very briefly, Your Honors.

21 CHIEF JUDGE DIFIORE: Yeah.

22 MR. STORRS: First of all, what he just said
23 about the lieutenant is not in the record. Secondly, the
24 primary analysis by the - - - by the comptroller's office
25 was on the basis of the job description and the risks



1 inherent. The matters cited by the dissent in the Third
2 Department are certainly supported by the record, though.
3 There was certainly reason for him to have anticipated the
4 hazard once he was on site. But the ultimate thing was
5 that he was there as a firefighter. He was quite
6 particular about that. During the examination, there was
7 some questions about were you there as an EMT? He said,
8 no, I'm a firefighter. So these were the job risks of a
9 firefighter, not the job risks of an EMS person.

10 And as your - - - as your respondent said, yes,
11 the problem here, if there is one, is one in the statutory
12 structure. Would it be possible for the - - - for the
13 legislature to create a benefit, a special benefit, for
14 people who are injured in the course of duty during an
15 emergency response? Of course, they could. They have done
16 things like that, for instance, with the World Trade Center
17 response. They created special presumptions for them.
18 They have even in some cases, such as the O'Brien case that
19 I had here which never got to be argued, to pass a special
20 - - - a special law benefitting a particular individual.
21 But those things were not done in this case. Thank you,
22 Your Honors.

23 CHIEF JUDGE DIFIORE: Thank you, counsel. Thank
24 you.

25 (Court is adjourned)



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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Kelly v. DiNapoli, No. 2 and Matter of SICA v. DiNapoli, No. 3 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: January 08, 2018

