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COURT OF APPEALS

STATE OF NEW YORK

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SOFIA FASOLAS,

Respondent,

-against-

NO. 29

BOBCAT OF NEW YORK, INC., ET AL.,

Appellants.

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20 Eagle Street  
Albany, New York  
March 26, 2019

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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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 29, Fasolas v.  
2 Bobcat of New York.

3 Counsel?

4 MR. FITZPATRICK: Your Honor, may I please  
5 reserve two minutes?

6 CHIEF JUDGE DIFIORE: Two minutes?

7 MR. FITZPATRICK: Yes, Your Honor.

8 CHIEF JUDGE DIFIORE: You may.

9 MR. FITZPATRICK: Thank you.

10 May it please the court, Brendan Fitzpatrick,  
11 counsel for the appellant, Bobcat Company.

12 Your Honor, in Scarangella, this court created a  
13 safe harbor for manufacturers that sell products with  
14 optional safety - - - optional safety devices, to buy them,  
15 as long as three elements were satisfied. Contrary to  
16 claims of plaintiff and Taylor Rental, Bobcat Company  
17 doesn't want to change the law. It simply wants  
18 Scarangella applied to the facts of this case.

19 JUDGE FEINMAN: Well, to - - - to reverse here,  
20 do we even have to reach that issue? Could we just say  
21 that the charge as modified to address the rental market is  
22 a sufficient basis to send this back?

23 MR. FITZPATRICK: Yes, that is our alternative  
24 argument, Your Honor, our point two in our briefs.

25 JUDGE FEINMAN: So if we do that, we don't need



1 to reach the Scarangella argument?

2 MR. FITZPATRICK: Potentially yes. I - - - I  
3 believe that the facts in this case warrant the application  
4 of Scarangella to - - - to the case, to support dismissal.

5 JUDGE FEINMAN: So how do you satisfy the first  
6 factor?

7 MR. FITZPATRICK: The first factor. With respect  
8 to the thoroughly knowledgeable pur - - - purchaser, Your  
9 Honor, here we have Taylor Rental, who is in the business.  
10 Fifty percent of their business is renting equipment.  
11 There's no debate about that. Mr. Callahan testified that  
12 Taylor Rental purchased approximately twenty S175s, at  
13 least in the decade before the incident.

14 JUDGE RIVERA: Can I just interrupt you?

15 MR. FITZPATRICK: Yes.

16 JUDGE RIVERA: I just want to be clear with  
17 respect to the optional safety device. Is that something  
18 that they install, the purchaser installs, or the seller  
19 installs?

20 MR. FITZPATRICK: The - - - it would come - - -  
21 Bobcat would install the Lexan door.

22 JUDGE RIVERA: Okay. So they would make - - -  
23 the buyer would make this choice at the point of purchase  
24 or potentially at the point of delivery?

25 MR. FITZPATRICK: At the point of delivery, yes.



1 It could be installed afterwards, yes.

2 JUDGE RIVERA: But ideally it would be at the  
3 point of purchase, no, because then you would have  
4 installed it before you deliver it? Under this other  
5 scenario, you're delivering it, and then all of a sudden,  
6 they say, oh, I want that optional safety device. It has  
7 to go back, right?

8 MR. FITZPATRICK: No, Your Honor, they - - -  
9 there are Lexan doors available.

10 JUDGE RIVERA: So you mean at the point of  
11 delivery - - -

12 MR. FITZPATRICK: Yes, it could - - -

13 JUDGE RIVERA: - - - someone has some of these  
14 doors, so if the person, who is accepting the delivery,  
15 says I want the door, they would install it right there?

16 MR. FITZPATRICK: I'm not sure if - - - if the  
17 record is developed that the Lexan doors were - - - we - -  
18 - we do - - -

19 JUDGE RIVERA: No, I'm asking you how this wo - -  
20 - I'm sorry; I'm not being clear. I wanted to know how  
21 this would proceed. Obviously, if you're - - - if the  
22 buyer makes a decision at the point of purchase, this can  
23 be installed before it's ever delivered. But you're saying  
24 there's also an opportunity at the point of delivery, which  
25 is what you're arguing here. So how would this work, if at



1 the point of delivery, the individual wanted it?

2 MR. FITZPATRICK: If the individual wanted it, it  
3 could be - - -

4 JUDGE RIVERA: The buyer, yeah.

5 MR. FITZPATRICK: - - - it would - - - if the  
6 buyer wanted it, it would be delivered and it would be  
7 installed at their place of business.

8 JUDGE RIVERA: So - - - so I'm still trying to  
9 get clear. So if at that delivery, there's no door  
10 available to install, what happens?

11 MR. FITZPATRICK: It would - - - it - - - Your  
12 Honor, I believe, at least according to the record, there  
13 are available Lexan doors un - - - with Bobcat of Long  
14 Island, and they would most likely drive one out to the  
15 next day or that day to the purchaser and they would  
16 install it.

17 JUDGE WILSON: You're saying that it's - - - even  
18 if it's a year-old machine, you could get the door  
19 installed - - -

20 MR. FITZPATRICK: Yes.

21 JUDGE WILSON: - - - if you later change your  
22 mind?

23 MR. FITZPATRICK: Yes, at any time, they are  
24 available to be installed.

25 JUDGE RIVERA: But the - - - but the purchaser



1 doesn't install it?

2 MR. FITZPATRICK: I mean, the purchaser could  
3 install it; they can also remove it. But the pur - - - the  
4 - - - it could - - - I - - - I believe it's - - - I don't  
5 think the record is developed on that issue, but it could  
6 be done properly - - -

7 JUDGE RIVERA: But I'm just trying to understand  
8 how this works - - - this - - - this rental market - - -  
9 buying for the rental market works. Let's say that I'm a  
10 company that rents out this machinery and I buy the  
11 machines, but at that point, I haven't bought this optional  
12 safety device, and the machines are delivered, and I say,  
13 you know, I'd like the optional safety device.

14 MR. FITZPATRICK: It would be delivered.

15 JUDGE RIVERA: It - - - but not necessarily in  
16 that moment, correct?

17 MR. FITZPATRICK: No, Your Honor. I believe  
18 there are ones available on the - - - on Long Island, and  
19 it would be delivered, whether it's that day or the next  
20 day.

21 JUDGE RIVERA: And if I said, just give me the  
22 door; I'll put it on myself, do you permit that?

23 MR. FITZPATRICK: I'm not sure there's any  
24 evidence in the record as to whether that's permitted for  
25 the - - -



1 JUDGE RIVERA: Okay.

2 MR. FITZPATRICK: - - - purchaser to buy it.

3 JUDGE RIVERA: Thank you, counsel.

4 JUDGE FAHEY: Well, let - - - let me just follow  
5 up a little bit on - - - on that question, because it goes  
6 to the Scarangella prongs, that's why I'm asking these  
7 factual questions, what your ans - - - understanding of the  
8 record is. My understanding of the record is that, in  
9 reading Lafferty and I think, Iadarola, two of the  
10 witnesses that - - - Taylor Rental never offered a special  
11 application kit to a customer renting a Bobcat loader. Is  
12 that correct? Is that your understanding? That they never  
13 offered anybody. They didn't say, you're doing this a  
14 certain way; we think you should have a special  
15 applications kit. Does it - - - does that ever happen? Is  
16 there any proof in the record of that ever happening?

17 MR. FITZPATRICK: No, Taylor Rental never - - -

18 JUDGE FAHEY: All right. Did - - -

19 MR. FITZPATRICK: - - - offered to the - - -

20 JUDGE FAHEY: Did - - - is there any proof in the  
21 record that Taylor Rental possessed a special application  
22 kit that it could offer to the customer itself, because my  
23 understanding of the way they were done, was that they were  
24 put on at the point of manufacture and not by the rental  
25 company. So do you know if they even possessed a special



1 application kit that it could offer?

2 MR. FITZPATRICK: No, because they never  
3 requested one. They had been purchasing them for - - -

4 JUDGE FAHEY: All right.

5 MR. FITZPATRICK: - - - twenty years, and each  
6 time they were offered to purchase the special applications  
7 kit or the Lexan door - - -

8 JUDGE FAHEY: Okay.

9 MR. FITZPATRICK: - - - and each time they said,  
10 we don't want it.

11 JUDGE FAHEY: I see.

12 MR. FITZPATRICK: And they - - -

13 JUDGE FAHEY: So now, other than the delivery  
14 reports, which I think is some evidence of - - - of Bobcat  
15 informing Taylor Rental of the existence of this special  
16 application reports, you'd agree with that, right, that the  
17 deliver - - - you would argue that the delivery reports  
18 favors your side giving notice to them of the existence of  
19 these special application kits?

20 MR. FITZPATRICK: Yes, Your Honor.

21 JUDGE FAHEY: All right. Is there anything other  
22 than the delivery reports?

23 MR. FITZPATRICK: I think Mr. Callahan also when  
24 he testified, when he delivered, he said he - - -

25 JUDGE FAHEY: What would you have us look at



1           there?

2                   MR. FITZPATRICK: Mr. Callahan's testimony, where  
3           he testified that with each delivery, he would explain it  
4           to, whether it was Craig Behrens, who was the former owner  
5           of Taylor Rental, or whoever was the Taylor representative  
6           picking up the delivery that day. He went through each and  
7           every item on the delivery report, including item 12, which  
8           include - - - which discussed the - - - the actual panel.  
9           So - - -

10                   JUDGE FAHEY: So - - -

11                   MR. FITZPATRICK: - - - Mr. Cal - - -

12                   JUDGE FAHEY: - - - let - - - let me just stop  
13           you for a second. So if you are arguing for the case to be  
14           submitted to the jury, would this be the lynch pin in your  
15           arguing that's create - - - created a question of fact as  
16           to the existence of a - - - a jury question?

17                   MR. FITZPATRICK: I think it's one of the things.  
18           I think it supports us, but then when you - - -

19                   JUDGE FAHEY: Well, what else would you point to?

20                   MR. FITZPATRICK: Well, I think when you look at  
21           Mr. Lafferty and Mr. Iadarola's testimony, they never  
22           wanted this. They knew about it. They specifically  
23           testified, Mr. Iadarola, page 1297, he was asked, don't you  
24           think you should have this? And he said, for my intended  
25           use, I have no use for the protective door. And the



1 intended use for the S175 with a bucket is simply to dig  
2 dirt, to move dirt and loose debris, and to level dirt.

3 JUDGE FAHEY: Um-hum.

4 MR. FITZPATRICK: That is the sole purpose for  
5 what Bobcat Company sold these machines for, with the  
6 bucket attachment - - -

7 JUDGE RIVERA: Here's what - - - here's what I'm  
8 having a little bit of difficulty understanding in this  
9 case. So Bobcat sells a product that it knows the  
10 purchaser has not purchased, and is not interested,  
11 according to what you've just said, in the optional safety  
12 device. And you also know that the purchaser is not the  
13 end user. And you also know the purchaser has no control  
14 over the end user. And you also know that this particular  
15 rental market is one that involves unsophisticated - - -  
16 let me put it that way - - - unsophisticated users, that  
17 is, it's not contractors - - - it's not people who  
18 regularly rent this kind of machinery.

19 MR. FITZPATRICK: Sometimes there - - - there  
20 are, Your Honor, but - - -

21 JUDGE RIVERA: Yeah, sometimes there are, but the  
22 - - - this particular rental company potentially rents to  
23 both.

24 MR. FITZPATRICK: Yes.

25 JUDGE RIVERA: And yet the manufacturer knows



1 that one of those rentals may be to an individual,  
2 unfortunately like the decedent here, who may not have  
3 superior knowledge, because Scarangella turns on that  
4 superior knowledge by the purchaser or the purchaser who's  
5 controlling the end user. And that's why I'm having some  
6 difficulty in understanding this particular case.

7 MR. FITZPATRICK: Well, Your Honor, the purchaser  
8 here is Taylor Rental.

9 JUDGE RIVERA: Yeah.

10 MR. FITZPATRICK: They know their clients.

11 JUDGE RIVERA: Yeah.

12 MR. FITZPATRICK: They question their clients who  
13 rent the equipment extensively.

14 JUDGE RIVERA: So what should have happened? The  
15 person says, I'm just going to dig dirt, and they said,  
16 then you don't need the door.

17 MR. FITZPATRICK: Well, Your Honor - - -

18 JUDGE RIVERA: Correct?

19 MR. FITZPATRICK: - - - for the intended use that  
20 Taylor Rental had - - - purchases these machines - - -

21 JUDGE RIVERA: Yeah.

22 MR. FITZPATRICK: - - - the Lexan door is not  
23 needed. Mr. Ihringer testified to that. Mr. - - - Mr.  
24 Iadarola testified to that. Mr. Lafferty testified to  
25 that. The - - - even Mr. Burkhardt said - - -



1 JUDGE RIVERA: Yeah, I agree with you. The - - -  
2 there is a difference between a - - - a product that has  
3 only one use and that has multiple uses. Wherein the  
4 safety device is - - - is important to one of those types  
5 of uses, but not the others; I agree.

6 MR. FITZPATRICK: Yes, and - - - and what we have  
7 here is plaintiffs and def - - - and Taylor Rental  
8 conflating the myriad uses of an S175, because we readily  
9 admit that there are numerous applications for the S175.  
10 But in this case - - -

11 JUDGE RIVERA: Would you - - - would you - - -  
12 would you still be strictly liable if - - - if the jury, of  
13 course, found there was liability - - - if - - - if there  
14 had been no information? This all turns, in your opinion,  
15 because of the way Scarangella sets out the factors,  
16 because you've informed the - - - the company that buys to  
17 rent of the risks and how the door should be attached for  
18 particular types of uses?

19 MR. FITZPATRICK: Yes, I believe - - - I believe  
20 that.

21 JUDGE RIVERA: That - - - that's what it turned  
22 on. So if you had not said that, if - - - if you - - - if  
23 you had not provided that information to them - - -

24 MR. FITZPATRICK: No, I think even under - - -  
25 under Scarangella and the - - - the Biss case, against



1 Tenneco case, that this court relied upon. Again when the  
2 purchaser is made - - - the purchaser is made aware of it.  
3 And again, in that case, the end user was not the  
4 purchaser. But when the purchaser is made aware, it is up  
5 to the buyer to determine the cost of benefits as to what  
6 they want and - - -

7 JUDGE RIVERA: Yeah.

8 JUDGE FAHEY: It's - - - it's kind of a - - -

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 JUDGE FAHEY: - - - it's kind - - - hang on; just  
11 one last point, Judge; and I'd ask you to respond. It - -  
12 - it seems the difficulty in the case is the - - - the  
13 renter is the only one who would know how this product is  
14 actually going to be used. And of course, that's the  
15 person who's totally unqualified to balance any risk.

16 MR. FITZPATRICK: Well, the - - - I think when  
17 you have a situation such as that, you have the testimony  
18 of Mr. Iadarola and Mr. Lafferty, who say, they intensively  
19 question their clients. They determine what they are going  
20 to use these eq - - - this equipment for. And they  
21 testified quite readily, they will refuse to rent this  
22 machine if they believe it's going to be used for something  
23 inappropriate. That's their testimony. They know their  
24 clients best. They know who is coming in to rent this  
25 equipment.



1           And they know the intended purpose of this  
2 machine, and that is to simply dig dirt, level dirt, carry  
3 loose materials. That's not what we have - - - that's  
4 exactly what we have here. And the door was not a required  
5 - - - or it was an optional safety device that should have  
6 been left optional, not mandated by the courts.

7           CHIEF JUDGE DIFIORE: Thank you, counsel.

8           Counsel?

9           MR. WATSON: Thank you, Your Honors. Scott  
10 Watson for Port Jefferson.

11           I had prepared a - - - a brief opening, but I'll  
12 try to respond in - - - in kind to the points that were  
13 made - - - made by the judges.

14           JUDGE STEIN: Counsel, can I ask you - - -

15           MR. WATSON: Yes?

16           JUDGE STEIN: - - - that - - - I know that  
17 Scarangella itself involved an employee-employer  
18 relationship.

19           MR. WATSON: Right.

20           JUDGE STEIN: But did we say anywhere in  
21 Scarangella that that was a critical element of the  
22 Scarangella exception?

23           MR. WATSON: Judge, the - - - the line in the  
24 Scarangella opinion that I like is where - - - where the -  
25 - - where the court speaks about "distilling some governing



1 principles" that can be reached by assessment of the three  
2 prior cases, which, of course, were the Biss case, the  
3 Rainbow case, and the Rosado case. The first two from the  
4 Fourth Department, and the Rosado from the - - - from the  
5 Court of Appeals.

6 And the - - - laying out in distilling the  
7 governing principles, which are the three factors, the  
8 first of which is really two factors; thoroughly  
9 knowledgeable and actually aware. And of course, the third  
10 factor is, if a person is not actually aware the safety  
11 product exists, how could you possibly balance the benefits  
12 of using the product without the safety attachment.

13 Now a question came up earlier as to - - -

14 JUDGE RIVERA: But - - - but that - - - isn't  
15 that, in part, what I was trying to ask before if - - - and  
16 I think Judge Fahey also - - -

17 MR. WATSON: Yes, and - - -

18 JUDGE RIVERA: - - - questioned about that. In  
19 Scarangella, the employer controls the use, even if they  
20 are not themselves, right? It - - - it's not - - - the  
21 employer is not behind the steering wheel of the bus, but  
22 they controlled the use - - -

23 MR. WATSON: Correct, in - - - in - - -

24 JUDGE RIVERA: - - - right? So that - - - so  
25 you're putting - - - let me just finish the thought. Is -



1 - - isn't the point then of that - - - those factors that  
2 the - - - the - - - the individual, the company, with the  
3 superior knowledge is in a position to do something with  
4 it.

5 MR. WATSON: Yes, and - - - and as a matter of  
6 fact, the - - -

7 JUDGE RIVERA: So - - - so how - - - how is it in  
8 this particular case - - -

9 MR. WATSON: Well, we - - -

10 JUDGE RIVERA: - - - that Taylor doesn't have the  
11 superior knowledge to do something with it.

12 MR. WATSON: First of all, Your Honor, there is  
13 no proof in the record that - - - that Craig Behrens, the  
14 deceased owner, unlike Mr. Clifford who testified at length  
15 in the Scarangella case, was actually aware of the special  
16 applications kit. In - - - in an - - - in answer to one of  
17 your earlier questions, was this at the point of delivery  
18 or the point of - - - of transaction, it was at the point  
19 of the sale. There's - - - there's no proof in the record  
20 at all in this six-week trial, that there was any  
21 conversations later on that you could always add this  
22 special applications kit later on.

23 And as a matter of fact, in - - - in the question  
24 that Lafferty - - - that Callahan said at - - - at trial  
25 when asked about whether a discussion with Mr. Behrens



1 about the special applications kit would come up, he  
2 stated, "would never come up". Not that it would come up  
3 from time to time, and Behrens made a decision not to buy  
4 it. The quote is "would never come up." This is on my  
5 recross of Mr. Callahan.

6 JUDGE GARCIA: Counsel, I'm - - - I'm sorry to  
7 interrupt you, but - - -

8 MR. WATSON: Sure.

9 JUDGE GARCIA: - - - if we find for you, if we  
10 affirm here, and now Bobcat wants to comply and avoid  
11 liability in this situation, and they're making sales to  
12 you, what do they have to do?

13 MR. WATSON: Well, you know, the Bobcat  
14 philosophy on this product started in a - - -

15 JUDGE GARCIA: No, I just want - - - I don't want  
16 their philosophy. I just want to know, in the future, if  
17 we uphold this rule, what do they do when they sell you one  
18 of these?

19 MR. WATSON: Well, they would have to have this  
20 special applications kit as standard equipment - - -

21 JUDGE GARCIA: Right, so if you say, I don't want  
22 this. I don't want this; my people don't want this.  
23 They're going to have to tell you, sorry, they can't sell  
24 you this machine without this - - -

25 MR. WATSON: Correct.



1 JUDGE GARCIA: Okay.

2 MR. WATSON: Correct, Your Honor.

3 In response to a question earlier about wouldn't  
4 Bobcat's position - - -

5 JUDGE RIVERA: Well, how is that efficient? If -  
6 - - if - - - to the extent - - - no - - - here again, this  
7 is my issue in - - - part of my issue in this case, is that  
8 you have a machine that has multiple uses. Some, there is  
9 no risk to use it without the door. So how is that  
10 efficient to force the manufacturer to put on something  
11 that's not useful?

12 MR. WATSON: Well, of course, in this Court of  
13 Appeals, this court stated in Rosado, that one of the  
14 public policy positions underlying the entire law of  
15 product liability is preventing accidents.

16 JUDGE RIVERA: True.

17 JUDGE WILSON: But isn't there some - - -

18 MR. WATSON: And so that - - -

19 JUDGE WILSON: But isn't there some evidence in  
20 the record that for certain of the applications, you're  
21 better off not having the door?

22 MR. WATSON: That is Bobcat's position. Mr. - -  
23 -

24 JUDGE WILSON: Well, is there contrary evidence  
25 in the record?



1 MR. WATSON: There is no contrary evidence. The  
2 - - - the reason why this - - - this - - - this special  
3 applications kit never came up in discussions with Callahan  
4 and Behrens, is because the Bobcat philosophy, starting in  
5 the 1970s, as clearly stated by Mr. Ihringer, was that  
6 there are go - - - good reasons not to have this door, and  
7 he listed out four.

8 I - - - I would like to address the loader  
9 reports, because Your Honor asked the question about from  
10 Bobcat's standpoint, wouldn't that be "some evidence"?

11 JUDGE FAHEY: Delivery reports that - - -

12 MR. WATSON: Yes, I - - - I disagree with that  
13 completely.

14 JUDGE FAHEY: Why is that?

15 MR. WATSON: Because in Callahan's testimony, he  
16 indicated that these delivery reports would be gone over  
17 for about five to ten minutes. And page 2630 of the  
18 record, the first item of this twenty-one-point checklist  
19 is "explain delivery packet; operations and maintenance  
20 manual; safety manual and warranty brochure when given to  
21 owner/operator." That's about 130 pages worth of  
22 documents.

23 Item number 9, dem - - - on this so-called some  
24 evidence, and I mean that in all due respect, Your Honor,  
25 that Bobcat used at trial. Item number 9, "demonstrate how



1 to start, stop, turn, and park the loader. Also, show how  
2 to fill, carry, and dump the bucket or use other  
3 attachments."

4 JUDGE STEIN: But isn't that a question for the  
5 jury to determine?

6 MR. WATSON: It - - - it - - - this is - - -

7 JUDGE STEIN: You're - - - you're - - - it - - -  
8 it seems to me that you're - - - you're demonstrating some  
9 inferences that you might conclude from that, that there's  
10 no way they discussed this - - - this issue, but how - - -  
11 how - - - you know, isn't that for the jury to determine,  
12 based on everybody's testimony?

13 MR. WATSON: Respectfully, I don't believe so,  
14 Your Honor. This is a generic form used to attribute  
15 particular actual knowledge to the - - - to Port Jefferson  
16 when testimony had - - -

17 JUDGE STEIN: But there's also testimony that  
18 says that they discussed it.

19 MR. WATSON: There is no testimony that they  
20 discussed it. The - - - the - - - I've mentioned before  
21 that Callahan said point blank - - -

22 JUDGE STEIN: There's a checkbox at least that  
23 says that they discussed it.

24 MR. WATSON: With - - - with - - - with - - -  
25 with a - - - with a kid who's coming to pick up the - - -



1 pick up the - - - pick up the units. As a matter of fact,  
2 Bobcat couldn't even - - - even say, of the four units that  
3 were bought, which two were delivered and which two were  
4 picked up.

5 And I'd like to correct something - - -

6 JUDGE RIVERA: Let me ask - - - let - - - can I  
7 just ask you. Is - - - is it your position, with respect  
8 to the rule, that if - - - if - - - if Taylor had been - -  
9 - had been given the proper information and notification,  
10 and had made a choice that it could very well shift strict  
11 liability from the manufacturer, or are you taking the  
12 position that once you have a rental market, Scarangella  
13 just should not apply.

14 MR. WATSON: No, that's not - - - that's not our  
15 position at all. Is that the - - - the - - - the  
16 distilling governing principles that this court established  
17 twenty years ago in Scarangella, should apply to all of the  
18 markets. It's - - - it's - - - it's our position - - - not  
19 that it's an incorrect statement that the case of  
20 Scarangella doesn't apply to this case, or to a - - - a  
21 product that is put into the rental market.

22 The - - - the factors that this court has  
23 established, and - - - and - - - and the language where  
24 this court said, "distilling some controlling principles",  
25 in part, comes from the facts of Scarangella where there



1 was clear testimony by the owner of the company that he  
2 knew about the backup alarms on the buses that would - - --  
3 that would automatically go when the bus couldn't - - -  
4 went into reverse.

5 And I think the language is that he made a  
6 "considered decision" not to employ them, because he can  
7 control the environment which - - - which of the - - -  
8 although he bought ten buses from Thomas Built Bus Company,  
9 he would have to have installed the backup alarm on a  
10 hundred buses.

11 JUDGE RIVERA: Well, Taylor controls the  
12 environment by just not renting it to someone - - -

13 MR. WATSON: Taylor does not control the  
14 environment - - -

15 JUDGE RIVERA: - - - who's going to misuse it?

16 MR. WATSON: - - - once the - - - once the - - -  
17 once the Bobcat is - - - is - - - is rented out. How could  
18 they control the environment?

19 JUDGE RIVERA: Okay. So then I'm not clear why  
20 you're arguing about Scarangella.

21 MR. WATSON: What I'm saying is - - -

22 JUDGE RIVERA: As opposed to a per se rule. It  
23 sounds to me like you're devolving into a per se rule that  
24 Scarangella doesn't apply to a rental market.

25 MR. WATSON: No, it's a - - - it's a - - - I - -



1 - I - - - I - - - if I said that or suggested that, I - - -  
2 that's not - - - that's not my position.

3 JUDGE RIVERA: Okay.

4 MR. WATSON: The - - - the - - - the factors that  
5 have been established in Scarangella, coming from the facts  
6 of that case, and the three prior cases, which talk about  
7 when knowledge - - - the first case, I think it's Biss - -  
8 - when knowledge of the thing is brought home to the  
9 purchaser.

10 JUDGE FAHEY: So your basic point is that the  
11 delivery reports don't establish knowledge on behalf of the  
12 rental company?

13 MR. WATSON: Absolutely.

14 JUDGE FAHEY: That's your basic point.

15 MR. WATSON: Correct, and - - -

16 JUDGE FAHEY: All right. And that's the core of  
17 your argument on the first prong of Scarangella?

18 MR. WATSON: And - - - and - - - yes, and both  
19 Iadarola - - - and if I just could correct Mr. Fitzpatrick  
20 - - - both Iadarola and Lafferty testified pointblank,  
21 unequivocally, that at the time of their deposition in  
22 2010, that they had never heard of this special  
23 applications kit. It is incorrect to state that their  
24 position was in 2007 or 2010 that they had no use for it.  
25 That was - - - that was not their position. Their position



1 is clear and unequivocal in the record - - -

2 JUDGE RIVERA: And - - - and if you had - - -

3 MR. WATSON: - - - they had not heard of it.

4 JUDGE RIVERA: And if you had the superior  
5 knowledge, it doesn't matter that the end user doesn't have  
6 any of that knowledge. As long as Taylor had it, that's  
7 all that matters.

8 MR. WATSON: Well, if Taylor had it, then - - -  
9 then they could make some decisions with regard to who to  
10 rent to, but they - - -

11 JUDGE RIVERA: And that - - - that's what I'm  
12 asking.

13 MR. WATSON: Yes.

14 JUDGE RIVERA: So then Taylor's in the position  
15 to say, I'm not going to rent it to you?

16 MR. WATSON: Correct.

17 JUDGE RIVERA: Or I'm going to give you all of  
18 the information and let you walk out the door? Which one  
19 would it be?

20 MR. WATSON: Well, it could be either, Judge. In  
21 my - - - my view is that the full responsibility for this  
22 case lies with Bobcat, because had this Bobcat come with  
23 the special applications kit that plaintiff's expert claims  
24 it should have, this accident wouldn't have occurred.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



1 MR. WATSON: Thank you.

2 CHIEF JUDGE DIFIORE: Counsel?

3 MR. PILLERSDORF: May it please the court, Andrew  
4 Pillersdorf, for Fasolas, respondent.

5 I'm not even going to try and start with my - - -  
6 my set remarks. I just want to add to something Scott  
7 started with just a moment ago. He was talking - - - I  
8 agree with him on the factual issue. I think there's no  
9 testimony in the record whatsoever that prong one of  
10 Scarangella could be met on actual knowledge.

11 In fact, if you look at Mr. Callahan's testimony,  
12 he actually says pointblank, that it wouldn't have been him  
13 to have that conversation even with Mr. Behrens, that that  
14 would have been handled on the national account.  
15 Therefore, Bobcat put in no testimony whatsoever that there  
16 was an actual awareness on the part of Port Jefferson.

17 But beyond that, I - - - I think that where I  
18 might disagree slightly is when it comes to a more blanket  
19 prohibition based on the policy grounds on prong three of  
20 Scarangella. I think that the entire purpose of  
21 Scarangella was a carveout to products liability law, which  
22 accepts strict liability, which has the policy grounds of,  
23 once the manufacturer has injected the product into the  
24 stream of commerce, they are in the best position to  
25 understand the potential risks, all of the potential uses



1 of the product, and are the most incentivized to actually  
2 put down - - - put the safe product into the market - - -

3 JUDGE STEIN: Except when - - -

4 MR. PILLERSDORF: - - - and not a strict down - -  
5 -

6 JUDGE STEIN: Except when the buyer is in as good  
7 a position to do that or - - -

8 MR. PILLERSDORF: It - - -

9 JUDGE STEIN: - - - has the - - - has the  
10 knowledge and the expertise and the information and - - -  
11 and all - - - you - - - you know, the prongs of  
12 Scarangella, right? Isn't that - - - isn't that the  
13 purpose of Scarangella, is to say, that - - - that policy  
14 doesn't apply when - - - when the - - - the buyer has  
15 access to all that information, right?

16 MR. PILLERSDORF: I agree with that, but  
17 Scarangella was a narrow carveout intended for policy  
18 grounds. And in fact, Scarangella in the decision made - -  
19 - went to great lengths to talk about the specific  
20 knowledge and the control and the - - - the ability of the  
21 purchaser to limit the potential risks. In fact, Passante  
22 - - -

23 JUDGE GARCIA: Counsel, just so I'm clear, and I  
24 was a little unclear before, you're not arguing for a rule  
25 that says Scarangella is inapplicable to a rental



1 situation.

2 MR. PILLERSDORF: I - - - I actually am. I - - -

3 I think that - - -

4 JUDGE GARCIA: You are arguing that.

5 MR. PILLERSDORF: I think that - - -

6 JUDGE GARCIA: So the door has to go all the time

7 in your view.

8 MR. PILLERSDORF: To the - - -

9 JUDGE GARCIA: They have to do the safety - - -

10 MR. PILLERSDORF: - - - to the rental unit - - -

11 to the rental market. I - - - I don't think there are

12 never instances when Scaran - - - Scarangella can apply to

13 specific purchasers. I think where it came in, the - - -

14 the general field of products liability looks at the

15 ultimate consumer, okay. All of - - - all of the cases

16 talk about when a market - - - it must be reasonably safe

17 as marketed to the end user.

18 I think what happened in Scarangella is the

19 language of the third prong, seeking to narrow it, talks

20 about the buyer's specific use and control of the

21 environment. And I think what - - - what Bobcat has

22 attempted to do is use that language to say, once the

23 purchaser knows about it, and has control - - - you know,

24 is - - - is a knowledgeable purchaser, and has control over

25 the next step in the stream of commerce, that they've met



1 that prong.

2 I think, fundamentally, that undermines the very  
3 policy of strict liability.

4 JUDGE GARCIA: I guess on a policy matter,  
5 though, it - - - it comes to - - - and I understand your  
6 point and it's well made, but where you have this type of  
7 rental market, is it the rentor, you know, in this case,  
8 who has the better view of the field, policy-wise, to say  
9 you need this, you don't need this. What are you going to  
10 use this for; are you going to do X or are you going to do  
11 Y? Otherwise, essentially, you're saying, and I think you  
12 are saying now, always, all the time, in the rental market,  
13 you get this safety device. It's mandatory, in effect, in  
14 a rental market.

15 MR. PILLERSDORF: I do. I - - - I think that  
16 while it could be spun to say that the person on the ground  
17 would have the best knowledge because they spoke to the  
18 user, I actually think that if you look at the facts, it -  
19 - - it's actually the reverse. What they're looking to do,  
20 if - - - if you read the record, it is a part-time employee  
21 in - - - behind the - - - that - - - that is explaining to  
22 Mr. Fasolas how to use the process. You're dealing with -  
23 - -

24 JUDGE GARCIA: Certainly, they have a better in -  
25 - - they have a better insight into the end user, than the



1 manufacturer.

2 MR. PILLERSDORF: But - - - but what you're doing  
3 is essentially putting the part-time employee or - - - or  
4 in a big box store - - - for policy implications - - - the  
5 - - - the salesperson, you're - - - you're inserting them  
6 as almost a learned intermediary to the use of that.

7 JUDGE RIVERA: But isn't that the - - -

8 MR. PILLERSDORF: You're - - - you're - - -

9 JUDGE RIVERA: - - - responsibility of the  
10 company that buys this machinery to then rent? Isn't that  
11 their responsibility to ensure that they have properly  
12 trained individuals who are interacting with the renter?

13 MR. PILLERSDORF: I think that's why in products  
14 liability law, you have strict liability down the chain of  
15 custody. It doesn't end with one party or the other. The  
16 reason for this is they all should have this  
17 responsibility. What would - - -

18 JUDGE RIVERA: So might it - - - might it be  
19 different depending on the nature of the - - - the renter  
20 population, where you have very sophisticated contractors,  
21 let's say, who are renting versus someone who is not as  
22 sophisticated, not as well informed? Might that make a  
23 difference?

24 MR. PILLERSDORF: No, I don't believe so, because  
25 once you're dealing with - - - with a rental market,



1 inherently you're giving the authority to make that  
2 determination to the reseller. And by definition, they're  
3 putting it into a stream of commerce that the infinite  
4 number of op - - - options are available for use.

5 JUDGE RIVERA: So then the way that this would  
6 work is that if Bobcat is selling to the actual end user,  
7 unless that end user has superior knowledge, satisfies  
8 otherwise the Scarangella factors, the - - - the strict  
9 liability burden doesn't shift from them. But if they sell  
10 it to a company that's going to rent, strict liability  
11 always remains with the manufacturer. Is that the way this  
12 - - - regardless of the end user there and their knowledge  
13 and their understanding?

14 MR. PILLERSDORF: I - - - I think on a practical  
15 level they talk about the - - - the fact that this Lexan  
16 special application thing can be removed. If you truly  
17 have a knowledgeable end user who doesn't want it, it can  
18 be taken off. This isn't a major obstacle to the - - - to  
19 the ultimate use. And I think, yes, ultimately you - - -

20 JUDGE RIVERA: The renter may not - - -

21 MR. PILLERSDORF: - - - you have a policy  
22 determination - - -

23 JUDGE RIVERA: - - - may violate a rental term to  
24 do that.

25 MR. PILLERSDORF: I - - - I think - - -



1 JUDGE RIVERA: Like what company would let you do  
2 that as Taylor and rent it to you?

3 MR. PILLERSDORF: Well, that's a contract issue  
4 between Bobcat and - - - and if they have a - - - a  
5 sophisticated renter or a specific contractor that wants  
6 it. That's a contractual issue between them.

7 JUDGE RIVERA: I think - - -

8 JUDGE FAHEY: Well, it seems that - - - I think  
9 you raise good policy points. But ultimately here, what  
10 would be the effect, I guess - - - let - - - let me  
11 rephrase my question. Here - - - here we start with the  
12 premise that let's assume for - - - for a moment that this  
13 product was defectively designed because there was a safety  
14 equipment that could have been put on - - - on this device  
15 that would have made this device safer and this person  
16 would not have been hurt, and this would apply to anyone  
17 who use - - - uses it in any form.

18 And - - - and that the reasons for not using this  
19 safety device is because it would be more convenient to not  
20 use it if you were in a different line of work or you're  
21 doing some different kind of work in a particular day.  
22 You're just moving the dirt, as opposed to taking down a  
23 tree, that it has a different effect.

24 The way I understand products liability is the  
25 end user doesn't get to make that call. That - - - that



1 the responsibility stays with the manufacturer, and - - -  
2 and the manufacturer is then strictly liable as you move  
3 down the pro - - - as to the chain. What's aberrant here  
4 is that we have a - - - the law is built around the  
5 purchaser, being the person who uses it. And so do you  
6 think Scarangella was right to begin with, I guess, is what  
7 I'm asking?

8 MR. PILLERSDORF: Do I think it was right? I - -  
9 - I think there are limited instances where a knowledgeable  
10 user and purchaser may be in a better position. I - - - I  
11 think where the - - - the huge distinction comes in is when  
12 the purchaser is intending to put it into the secondary  
13 market. I think we - - -

14 JUDGE FAHEY: So - - - so the - - - in - - - in  
15 other words, Scarangella is a very, very narrow exception,  
16 is what you're saying, to be eligible for - - -

17 MR. PILLERSDORF: I - - - I believe so. And I  
18 think if you - - - I - - - I think the case was  
19 specifically - - - and the decision was written that way -  
20 - - I think as Passante and later cases referred to it, it  
21 continued to read it that way and look at the fact that the  
22 risk was already - - - increasingly narrow.

23 JUDGE FAHEY: Okay, my - - - my particular  
24 concern was on the - - - on whether or not this should be a  
25 jury question. And why shouldn't it be a jury question - -



1 -

2 MR. PILLERSDORF: I think that - - -

3 JUDGE FAHEY: - - - on the first prong of  
4 Scarangella?

5 MR. PILLERSDORF: Under - - - well, under the  
6 first and third prong, I - - - I think that there has to be  
7 a - - - fir - - - a certain threshold that a judge has to  
8 make a determination, and no different than any other  
9 emergency doctor in - - -

10 JUDGE FAHEY: So basically, you're saying that -  
11 - -

12 MR. PILLERSDORF: - - - a reckless disregard - -  
13 -

14 JUDGE FAHEY: - - - the delivery report in and of  
15 itself, was legally insufficient to establish a question to  
16 go to the jury?

17 MR. PILLERSDORF: Well, be - - - because what - -  
18 - what the case law actually says is that there's a  
19 requirement to actual knowledge. And there's - - - there's  
20 no testimony that there's actual knowledge. There's  
21 circumstantial evidence that there may have been some  
22 superficial passing on of information, but that - - - but I  
23 - - - I also think in prong three, when you're dealing with  
24 a situation where it's being put back into the stream of  
25 commerce, it fundamentally can't meet - - -



1 JUDGE RIVERA: But I thought your position was it  
2 just doesn't apply when you have a rental market. So what  
3 does it matter?

4 MR. PILLERSDORF: I'm sorry.

5 JUDGE RIVERA: What does it matter what Taylor  
6 knows? I thought your position is once it goes into this  
7 kind of market, it doesn't - - - doesn't matter what the  
8 renting company knows.

9 MR. PILLERSDORF: I - - - I do - - -

10 JUDGE RIVERA: And all that matters is what the  
11 end user knows.

12 MR. PILLERSDORF: I - - - I do. I think it's  
13 both the first and third prong of Scarangella that prevent  
14 it from even needing it to go to a jury.

15 JUDGE FAHEY: Okay.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MR. PILLERSDORF: Thank you.

18 CHIEF JUDGE DIFIORE: Counsel?

19 MR. FITZPATRICK: With respect to the first  
20 prong, quickly - - -

21 JUDGE RIVERA: Counsel, let me just ask you.

22 MR. FITZPATRICK: Yes.

23 JUDGE RIVERA: Do you have a sense of nationally  
24 how the rental market is addressed for purposes of strict  
25 liability?



1 MR. FITZPATRICK: No, Your Honor, because this is  
2 the first case. There's - - - the numerous other  
3 departments, numerous other circuits, numerous other  
4 states, have applied Scarangella. Not one has ever  
5 distinguished between the knowledgeable purchaser as  
6 opposed to the end user.

7 JUDGE RIVERA: Can you - - - can you point me to  
8 a rental market or a renter case?

9 MR. FITZPATRICK: There are none, Your Honor,  
10 throughout the entire country. I mean, there are - - -

11 JUDGE RIVERA: E - - - even with all these rent-  
12 a-machine, rent-a-whatever you'd have it?

13 MR. FITZPATRICK: It - - - Biss - - - Biss was a  
14 rental.

15 JUDGE RIVERA: I'm sorry, what?

16 MR. FITZPATRICK: Biss.

17 JUDGE RIVERA: Ah, yes, yes.

18 MR. FITZPATRICK: What that Biss court relied  
19 upon on - - - in Scarangella to dismiss.

20 JUDGE RIVERA: Um-hum.

21 MR. FITZPATRICK: And that's - - - and that's the  
22 key issue here, Your Honor. What we're talking about here  
23 is an optional safety device where the intended use of the  
24 product did not reasonably - - - there - - - it was  
25 reasonably for - - - it was reasonably safe for its



1 intended use. And that's the issue we're here. The S175  
2 without the Lexan door was reasonably safe for its intended  
3 use, not only by Bobcat, but by Taylor Rental. They knew  
4 what the product was, and they rented it for that specific  
5 purpose.

6 In the Appellate Division, the Appellate Division  
7 relied upon an - - - an article to support its ruling that  
8 this should not apply in the rental markets. And it's - -  
9 - the optional safety argu - - - article, that we noted  
10 extensively in our briefs, that no party is ever - - -

11 JUDGE RIVERA: If - - - if - - -

12 MR. FITZPATRICK: - - - addressed.

13 JUDGE RIVERA: - - - Mr. Fasolas has just bought  
14 it - - - just bought it from Bobcat Long Island?

15 MR. FITZPATRICK: I think you have - - - I think  
16 - - -

17 JUDGE RIVERA: Would he have been - - - would - -  
18 - would you be liable?

19 MR. FITZPATRICK: I think you have to go through  
20 the - - - the Scarangella elements to see if - - - what  
21 happened there.

22 JUDGE RIVERA: But I mean, he's got the owner's  
23 manual, maybe someone says something to him upon the  
24 purchase, points out that there's this door, but he thinks  
25 I'm just going to do some - - -



1 MR. FITZPATRICK: If those Scar - - -

2 JUDGE RIVERA: - - - dirt digging in the  
3 backyard?

4 MR. FITZPATRICK: If those Scarangella elements  
5 are met?

6 JUDGE RIVERA: Yes.

7 MR. FITZPATRICK: Yes, it would. But we don't -  
8 - -

9 JUDGE RIVERA: Yes. Even though this is not a  
10 person who's got sophisticated knowledge and understanding  
11 of the machinery?

12 MR. FITZPATRICK: Again, Your Honor, it goes to  
13 what is explained to him. Does they be - - - do they  
14 become knowledgeable with the explanations given to him  
15 directly by Bobcat of Long Island or whoever the pur - - -  
16 whoever the manufacturer is that is selling to the direct  
17 end user.

18 JUDGE RIVERA: But even Scarangella suggested  
19 that Huntington Bus, right, the - - - the employer really  
20 had some other kind of knowledge, apart from whatever they  
21 might have learned regarding the - - - the backup alarm,  
22 right? That there was more that they knew.

23 MR. FITZPATRICK: Well, they - - - they knew that  
24 they didn't want the backup alarm because it - - - it was  
25 going to annoy their - - - their - - - their neighbors.



1 They were in a residential area. And that's why they  
2 didn't want it. And because they didn't - - - they - - -

3 JUDGE RIVERA: But they also had a sense of what  
4 happens in that parking lot, how the buses back up - - -

5 MR. FITZPATRICK: Right, and they knew - - -

6 JUDGE RIVERA: - - - or how often they do, what's  
7 - - -

8 MR. FITZPATRICK: Yes.

9 JUDGE RIVERA: - - - what their drivers were able  
10 to do.

11 MR. FITZPATRICK: And they knew when it was out  
12 on the street. It was not - - -

13 JUDGE RIVERA: Yeah, that just sounds very  
14 different from someone coming to buy the Bobcat, who's not  
15 a sophisticated - - - who's just going to use it on the  
16 weekends to pick up some dirt. And you just tell them,  
17 look, this is - - - we have a door; it'll protect something  
18 from going inside. You can buy it if you want.

19 MR. FITZPATRICK: Your Honor, I think you would  
20 have to have that ex - - - that testimony, that evidence  
21 would have to be really gotten through, and so you could  
22 potentially get those Scarangella elements. But based upon  
23 you - - - you - - - from what you've said, we just don't  
24 know.

25 Your Honor, just to be quick, there are safety



1 features that are feasible, cost effective, and vitally  
 2 important to - - - in some contexts. But in others, they  
 3 are unnecessary, inconvenient, and even dangerous. Here,  
 4 we have the courts mandating that manufacturers install  
 5 every conceivable safety device. That's not - - - that's  
 6 not just what Bobcat's saying.

7 That is what plaintiff's expert who had  
 8 absolutely no justification, no basis whatsoever to come to  
 9 his conclusion. He never performed any testing. He never  
 10 reviewed anything. He never - - - and - - - performed any  
 11 case analysis. This was simply his opinion. No other  
 12 expert in the history of products liability, no one in the  
 13 Uni - - - entire United States had ever come to this  
 14 conclusion.

15 But based upon that, now manufacturers in this  
 16 state will have to - - - are mandated, if it's going to go  
 17 to the rental market, or if the end user is not the actual  
 18 purchaser, they have to put every single conceivable safety  
 19 device in their equipment, in their machines, regardless if  
 20 the purchaser wants it or not.

21 Your Honor, the markets are the ones that are  
 22 going to - - - that - - - and Scarangella talked about  
 23 this. The markets are the ones that should dictate this,  
 24 when there is a knowledgeable purchaser, which we have  
 25 here.



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CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. FITZPATRICK: Thank you, Your Honor.

(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 Sofia Fasolas v. Bobcat of New York, Inc., et al., No. 29 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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