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COURT OF APPEALS

STATE OF NEW YORK

MANN,

Appellant,

-against-

NO. 39

MEZUYON LLC,

Respondent.

20 Eagle Street
Albany, New York
April 14, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Mann v. Mezuyon.

3 MR. WONG: Good afternoon, Your Honors. May it
4 please the court, Travis Wong for the Plaintiff-Appellant.
5 Today, this appeal presents only one very narrow issue.
6 And that's whether Industrial Code Section 4.2(k) is
7 sufficiently specific to support a cause of action under
8 Labor Law Section 241 sub 6. We respectfully submit that
9 it is, as the codes posits, an actionable and specific
10 command that goes beyond that of the common law. This
11 isn't a case - - - a code that says that defendants are
12 required to provide adequate protection or proper or safe.
13 This code in no uncertain terms requires that workers
14 should not be suffered or permitted to work in areas where
15 they can be struck by excavators.

16 CHIEF JUDGE WILSON: Well, if you were the person
17 working on the excavator, how can you not be in an area
18 where you might be struck by it?

19 MR. WONG: So the interpretation of the law is to
20 be sensibly interpreted. And the codes like such as the
21 1.7 codes involving tripping, they do have an exception for
22 integral to the work. So in that case the operation of the
23 excavator would be integral and - - -

24 JUDGE HALLIGAN: But what about 23-9.5(c). I
25 mean, doesn't that address who can actually be - - - it

1 says no person other than the pitman and excavating crew
2 shall be permitted to stand within the range, et cetera,
3 while the shovel is in operation. Doesn't that govern the
4 operator?

5 MR. WONG: Yes, that would govern the operator.

6 JUDGE HALLIGAN: So why isn't that what's at play
7 here? I'm trying to understand the interplay between that
8 provision and 4.2(k).

9 MR. WONG: So I - - - there are - - - I think
10 that the codes certainly overlap. However, they do provide
11 different protections. And the protection under 9.2(c) is
12 specific in that it is - - - allows - - - it creates an
13 exception for the pitman and the excavating crew to stand
14 in a specific area, which is within the range of a power
15 shovel, or within the range of a swing of a dipper bucket
16 only while the excavator is in operation.

17 JUDGE HALLIGAN: But I thought that on summary
18 judgment there was a finding that the plaintiff was a
19 member of the excavating crew. So what - - - if 9.5(c)
20 applies to the operator and this is a finding that it's the
21 operator? How then does 4.2(k) also apply?

22 MR. WONG: So I would submit that that is not
23 relevant to the issue of whether this code is sufficiently
24 - - -

25 JUDGE HALLIGAN: Which is not relevant?

1 MR. WONG: The facts that Plaintiff - - - the
2 ruling that Plaintiff was part of the excavating crew is
3 not relevant to the issue of whether this code is actually
4 sufficient - - -

5 JUDGE HALLIGAN: I guess I'm asking about just
6 the interplay between 4.2(k) and 9.5(c).

7 MR. WONG: Yes. And to address your question,
8 Plaintiff - - - actually he was performing his work. His
9 machine broke. And he was within the swing, right? So the
10 - - - the excavator's - - -

11 CHIEF JUDGE WILSON: But he was not working on a
12 power shovel or a excavator, right? He was working with a
13 drill blaster?

14 MR. WONG: Yes, a drill blaster.

15 CHIEF JUDGE WILSON: Which is what?

16 MR. WONG: It's a a machine that's used to drill
17 long - - - very deep holes in order to put dynamite in them
18 to blow up and excavate the area. But his drill blaster
19 broke. So they noticed - - - him and the mechanic noticed
20 that the swing of the excavator was close to them to - - -
21 in order to be safe, they moved out of the area of the
22 swing of the excavator, so.

23 JUDGE HALLIGAN: You brought a claim under 9.4(h)
24 and 9.5(c), right?

25 MR. WONG: Yes.

1 JUDGE HALLIGAN: So you must have had a view that
2 it applies.

3 MR. WONG: Yes, absolutely. That was aban - - -
4 that was deemed abandoned during the lower court.

5 JUDGE HALLIGAN: And so who's subject to 4.2(k)
6 and who's subject to 9.5(c)?

7 MR. WONG: Well, I would say anyone who is not
8 within the range of the - - - either of these two things,
9 the power shovel or the dipper bucket, even if they are a
10 member, if you're not in that area where Plaintiff - - - he
11 exited the area of the swing. Therefore, he should be
12 entitled to the protections of 4.2(k) because he's not in
13 the area. The, 9.2(c) specifically has - - - allows
14 workers who are members of this crew who are aware of the
15 dangers to work in these areas. If they leave that area,
16 they should be entitled to the protections of 4.2(k). If
17 the shovel isn't in operation, is just moving, then if the
18 excavator is just moving, then those persons should be
19 entitled to the protections of 4.2(k).

20 CHIEF JUDGE WILSON: I'm afraid I'm not
21 following. If they're not in the area, then they are
22 getting the protection of 4.2(k), which says they can't be
23 in the area.

24 MR. WONG: Yes. And I mean, that's kind of the
25 point, because if the excavator then moves and the

1 defendants don't ensure that the excavator is not moving
2 into this area where they're working - - -

3 JUDGE CANNATARO: So in your articulation, in the
4 first instance, if the worker moves out of the zone of the
5 swing, but then the excavator - - - the excavation
6 equipment moves to the injured party, that's where the
7 violation occurs?

8 MR. WONG: Yes, that is a violation of 4.2(k)
9 because they are not one of the protected - - - they're not
10 one of the accepted people under the 9.2(c) section. And I
11 will - - - I'll just - - - I'll - - -

12 JUDGE HALLIGAN: So if I'm the pitman - - -

13 MR. WONG: Yes.

14 JUDGE HALLIGAN: - - - and I'm walking to - - -
15 but by the way, are you saying that the device in question
16 is not a device defined in 9.5(c)? Are you making that
17 argument?

18 MR. WONG: Oh, I'm sorry, 9.5(c) thank you.

19 JUDGE HALLIGAN: Yes.

20 MR. WONG: The excavator that struck the
21 plaintiff - - -

22 JUDGE HALLIGAN: Is the excavator - - - an
23 excavator - - - that struck the plaintiff here an
24 excavating machine for purposes of (c)?

25 MR. WONG: Yes.

1 JUDGE HALLIGAN: Okay. So if I'm the pitman and
2 I am walking from, you know, some other location to the
3 excavator, does 4.2(k) cover me until I am climbing up on
4 the excavator and starting my work? Where does one start
5 and the other stop?

6 MR. WONG: So I think that that's a great
7 question because these - - - the distances for the swing of
8 an excavator is specific. It's not some random number.
9 This - - - in this case in defendant's brief, they say it's
10 50 feet. The swing of the excavator is 50 feet. So in the
11 radius of this excavator, which, as the defendant
12 testified, did not need to move in order to perform its
13 work, 50 feet would be the radius for the 9.5(c).

14 JUDGE HALLIGAN: And do you agree with that?

15 MR. WONG: Do I agree with that?

16 JUDGE HALLIGAN: Agree with that - - - that
17 articulation of the scope of 9.5(c)?

18 MR. WONG: Yes.

19 JUDGE HALLIGAN: Okay. So if the pitman had - -
20 - if the plaintiff had been injured in the course of
21 operating the machine or within the 50 feet, then you would
22 not have a 4.2(k) claim?

23 MR. WONG: Yes, that is correct.

24 JUDGE HALLIGAN: Thank you.

25 MR. WONG: I would also like to note that insofar

1 like this, the - - - the language not suffered or permitted
2 has been mirrored in other codes which have been determined
3 to be sufficiently specific, such as 3.3(c) and finally,
4 with consideration - - - considering this issue - - - when
5 considering this issue, it's important to keep in mind the
6 purpose of the industrial codes. This code was drafted by
7 the Labor Commissioner to protect workers from a very
8 specific and extreme danger of these very large and very
9 dangerous excavation machines. It provides a specific
10 command that is actionable in order to provide extra
11 protection for these workers who are exposed to these
12 dangerous - - -

13 JUDGE GARCIA: What's the command really beyond
14 don't let workers get hurt by excavation machines?

15 MR. WONG: It's saying don't let workers work in
16 the areas where they can get hurt by these - - -

17 JUDGE GARCIA: But it's really just saying don't
18 let them get hurt, right? Because if you're in the area,
19 you're going to get hurt by it. Things are going to fall
20 off, or are you going to get hit by the - - -

21 MR. WONG: I mean, I - - - I - - -

22 JUDGE GARCIA: - - - things swing around, so it's
23 just kind of like, yeah, just don't let them get hurt.

24 MR. WONG: I would disagree. I mean, I would say
25 it's - - - you tell your babysitter don't let my kid get

1 hit by a car or don't let my kid play in areas where cars
2 may hit them.

3 JUDGE GARCIA: Or you could say, don't let my
4 child go within 50 feet of the road. Like they could have
5 said, you know, they could have established a safety zone.
6 They could have established other specific requirements,
7 but they just basically said, don't let them get hurt.

8 MR. WONG: So I would say the safety zone is
9 built in. It is determined by the work that's being
10 performed. Like I said, the swing of this specific
11 excavator is 50 feet.

12 JUDGE GARCIA: But it also says anything that's
13 dislodged or fallen - - - by or falling from. So that's
14 not defined by the - - - how far the swing of the arm is,
15 right?

16 MR. WONG: I mean, that would - - - I would
17 believe that would also be defined by the swing of - - -
18 not like a radius around that.

19 JUDGE GARCIA: Well, if right outside that
20 radius, they dislodge a rock in the radius, but it fell a
21 foot outside the radius and hit somebody, would that be a
22 violation of this or no?

23 MR. WONG: That would still be a violation. I
24 mean, but - - - and but that's something that an owner, a
25 labor law defendant can take into account. You know, these

1 are - - - the reason that this code was created is because
2 these excav - - - these excavation machines pose such an
3 extreme danger.

4 JUDGE CANNATARO: And the affirmative command, as
5 you see it, is that no worker can be within the swing
6 radius of an excavation piece of equipment?

7 MR. WONG: Yes. I mean, the language is no
8 worker shall be suffered or permitted.

9 JUDGE CANNATARO: Right.

10 MR. WONG: And that imposes a positive command on
11 labor law defendants to prevent workers from working in
12 these areas.

13 JUDGE CANNATARO: That's what I'm asking you. So
14 you're reading no worker shall be suffered or permitted,
15 which to me, I understand that there are cases that say
16 that that's a specific and positive command. It's the
17 second half of that where I get a little confused because
18 as I think someone already said, it's in any area where
19 they might be injured or where they could be struck, right?

20 MR. WONG: Yes.

21 JUDGE CANNATARO: Which is sort of what - - - I
22 don't know what could be struck exactly means. But you're
23 reading, just so I'm clear, is that that basically says no
24 worker can be within the swing radius of a piece of
25 excavation - - - excavation equipment?

1 MR. WONG: I wouldn't say it would be limited to
2 the swing radius, you know, it would be a - - - it's a - -
3 - it's a - - -

4 JUDGE CANNATARO: It's even broader because you
5 might be injured by something beyond the swing radius.

6 MR. WONG: Yes, as Your Honor said. You know,
7 something could fall beyond the radius.

8 JUDGE CANNATARO: And what's the specific command
9 with respect to that? Or does the owner just have to
10 exercise their best judgment about what the zone of risk
11 is?

12 MR. WONG: I mean, I believe that the zone of
13 risk, you know, is determinable by the work area. And I
14 think that these labor law defendants are sophisticated
15 parties who are running construction operations that are -
16 - - would be able to designate areas where work - - -

17 CHIEF JUDGE WILSON: Well, it's sort of - - -

18 MR. WONG: - - - should not be performed.

19 CHIEF JUDGE WILSON: - - - strict liability then,
20 right? Because if you got hit by a piece of debris,
21 wherever you are, it ends up being inside the radius?

22 MR. WONG: Well, let's say, for example, an
23 excavator is working in an area. A labor law defendant
24 could simply mark off that area, you know, where the
25 excavator is working and say, no work is allowed to be - -

1 -

2 CHIEF JUDGE WILSON: My point is a little
3 different, which is that if I understand your argument
4 correctly, whether - - - it's wherever you might be hit.
5 It's not if the swing is 50 feet, but it's 55 feet away and
6 you get hit by a piece of debris from the excavator, you're
7 still covered. I think is what you said, right?

8 MR. WONG: Yes.

9 CHIEF JUDGE WILSON: So effectively, then, anyone
10 who's hit by a piece of debris in an excavation site is - -
11 - it's a violation of the code?

12 JUDGE GARCIA: Strict liability.

13 CHIEF JUDGE WILSON: Yeah. And 6 really isn't
14 about strict liability, 1 through 5 are, right? Strict - -
15 - 6 is just vicarious?

16 MR. WONG: I wouldn't say it is strict liability.
17 I mean, you still - - -

18 CHIEF JUDGE WILSON: Yeah, but you're sort of
19 saying if somebody in - - - if they're in an excavation
20 trench, however big the site is, trench, whatever it is,
21 you walk past these buildings, there's a whole city block.
22 If you're hit when you're in that trench by something that
23 came from a piece of excavation equipment, that's strict
24 liability.

25 MR. WONG: If you were - - -

1 CHIEF JUDGE WILSON: Because they let you be in
2 an area where you could be hit and in fact were hit by
3 something?

4 MR. WONG: No, if you are permitted or suffered
5 to work in that area.

6 JUDGE RIVERA: Yeah, but where are you reading
7 that falling debris is covered by this sentence?

8 MR. WONG: I - - -

9 JUDGE RIVERA: I'm sorry. What did I miss?

10 JUDGE GARCIA: It says any material being
11 dislodged by or falling from such equipment. Isn't that
12 23-4.2(k)?

13 MR. WONG: Yes. That is.

14 JUDGE RIVERA: Oh, I'm sorry, I was looking - - -
15 I thought you were referring to 9.5(c).

16 MR. WONG: 4.2(k).

17 JUDGE RIVERA: So okay. So now we're talking
18 about 4.2(k). I thought you were relying on (c). My
19 apologies.

20 MR. WONG: No problem. I see I have a limited
21 time left. If I may reserve the rest for rebuttal?

22 CHIEF JUDGE WILSON: Sure.

23 MR. WONG: Thank you.

24 MR. ASHNAULT: Good afternoon, Your Honors. I'm
25 Richard Ashnault, representing Mayrich Construction. May

1 it please the court, a couple of things that I have to
2 bring up right off the bat. This court in the Tucson case
3 had talked about that the analysis of these sections of the
4 Industrial Code, and whether or not they are sufficiently
5 specific enough to support a 241(6) claim. That analysis
6 is to be made without reference to the underlying facts of
7 the case, which makes perfect sense because the issue of
8 whether something is going to be specific enough to support
9 vicarious liability under 241(6) shouldn't be determined by
10 whether or not the provision fixed - - - fits the facts of
11 the case, necessarily, because by definition, the broader
12 that is, the more likely it is going to be to cover the
13 facts of any individual case. So one of the things that I
14 think we need to talk about here is the actual language of
15 the provision of 4.2(k) states, persons shall not be
16 suffered or permitted to work in any area where they may be
17 struck or endangered by any excavation equipment. It's not
18 limited to shovels. It's not limited to excavators. It's
19 not limited to moving machines or things that are lifting
20 things up - -

21 JUDGE CANNATARO: Is that fatal?

22 MR. ASHNAULT: - - - in the air or anything.

23 JUDGE CANNATARO: Is that - - - does that make
24 the regulation unenforceable under 241(6) because it's
25 written to cover a broad swath of equipment or maybe even a

1 broad area?

2 MR. ASHNAULT: I do think it's unenforceable to a
3 certain degree. I mean, is a shovel a piece of - - -

4 JUDGE CANNATARO: I don't know.

5 MR. ASHNAULT: - - - excavation equipment? It
6 could very well be.

7 JUDGE CANNATARO: I feel like our search is for
8 positive commands. It's - - - you know, we don't have a
9 rule that I know of that says you can enforce these types
10 of specific regulations unless they have very broad
11 application. I don't think that's the way we view the law.
12 But if there's a positive command in there and your
13 adversary says the positive command is, no one shall be
14 suffered to be present in an area where excavation
15 equipment - - - where they might get hurt by a piece of
16 excavation equipment, or by the debris being emitted by a
17 piece of excavation equipment. That seems very - - - you
18 know, articulated that way, that seems like a very clear,
19 affirmative command, doesn't it?

20 MR. ASHNAULT: Well, then again, as you had kind
21 of mentioned earlier, you don't allow - - - if you're
22 preventing people from working where they can be exposed to
23 any danger from any excavation equipment, you can't operate
24 the equipment.

25 CHIEF JUDGE WILSON: Why don't we read that,

1 though, in tandem with 9.5(c), which does say there is a
2 certain class of people who can and must be working in the
3 area of danger. Doesn't that actually help make 4.2 more
4 specific, 4.2(k)?

5 MR. ASHNAULT: I disagree, because it doesn't
6 exclude any of the people who would then be allowed to be
7 working in that area - - -

8 CHIEF JUDGE WILSON: But basically - - -

9 MR. ASHNAULT: - - - by 9.5.

10 CHIEF JUDGE WILSON: But basically if you read
11 the two together, it basically says, look, if you're
12 somebody who's working on one of these defined pieces of
13 equipment, you can be somewhere where you could be badly
14 injured, but nobody else is allowed to be in that - - - in
15 that area. Why isn't that combination of things specific?

16 MR. ASHNAULT: Well, it also says under 9.5(c) or
17 has - - - it has been interpreted to mean that any member
18 of the excavation crew, of which in this case, the
19 plaintiff was a member of the excavation crew. You - - -

20 JUDGE HALLIGAN: But that's a different question,
21 I think, than whether or not 4.2(k) is sufficiently
22 specific, right? That would be a different ground on which
23 to resolve the case?

24 MR. ASHNAULT: I do agree. I do agree with that.
25 My - - - my - - -

1 JUDGE HALLIGAN: So just to return to the Chief's
2 question, why don't you read 4.2(k) and 9.5(c) to harmonize
3 them such that if you are covered by 9.5(c), you're allowed
4 to be on the equipment in the area, and if you are not, if
5 you're not a pitman or a member of the excavating crew,
6 then, you know, if you're in an area where you can be
7 struck by the equipment or dislodged material, then, you
8 know, some liability can attach?

9 MR. ASHNAULT: Well, because then I think you run
10 into the problem that you have that the - - - the Torres
11 case kind of raises. They essentially say even if you're a
12 member of 9.5(c) or somebody who's covered by 9.5(c), you
13 can still claim the protections of 4.2(k), which doesn't
14 make a whole lot of sense to me, because you are obviously
15 going to have to be in the - - - in an area where you could
16 be exposed to some danger or some hazard by - - -

17 JUDGE HALLIGAN: Well, that question, I think,
18 would obtain for individuals who are the pitman or the
19 member of the excavating crew, right? But would it also be
20 an issue with respect to someone who's not - - - somebody
21 who is properly on the job site, but doesn't happen to be a
22 member of the excavating crew or the pitman?

23 MR. ASHNAULT: Well, I think that is a difference
24 and 4.2(k) doesn't provide any exclusion for those people,
25 which - - -

1 JUDGE CANNATARO: Right. That's the question
2 though. I mean, if they're not covered under 9.5, right?
3 Then why couldn't - - - you know, then you are - - - you
4 can be a beneficiary of 4.2?

5 MR. ASHNAULT: Well, I mean, I think you
6 potentially could, but 4.2 still, when you look at it,
7 doesn't impose any greater - - -

8 JUDGE HALLIGAN: Yeah, but we often read, you
9 know, statutes or regulations in an effort to harmonize
10 them, even if on their face they don't explicitly lay out
11 how two different provisions that might look like their
12 intention, you know, can be made sense of together. That's
13 a pretty routine interpretive exercise, I think.

14 MR. ASHNAULT: I think that's fine. I think what
15 the issue with 4.2(k) goes beyond that, because what it
16 does not do is impose anything specific other than just
17 reiterating general safety command - - - safety - - -
18 safety standards. Excuse me.

19 JUDGE HALLIGAN: That's his - - -

20 JUDGE CANNATARO: It goes back to my question.
21 What it does, it says keep everybody away. Everybody who's
22 not part of the excavation team, stay away. That sounds so
23 specific to me.

24 MR. ASHNAULT: Stay away from any danger.

25 JUDGE CANNATARO: From the operation of the

1 excavation crew.

2 MR. ASHNAULT: Well, that's another issue with -
3 - - with one of the Second Department cases is Cunha
4 essentially says there doesn't even have to be excavation
5 operations going on for this to apply. You just need - - -
6 and by the plain language of the statute or the regulation,
7 that is true. It doesn't even say that - - - it says any
8 danger from any excavation equipment in any area.

9 JUDGE CANNATARO: So this could apply to a shut
10 off piece of excavation equipment that - - -

11 MR. ASHNAULT: It could.

12 JUDGE CANNATARO: - - - somehow injured someone?

13 MR. ASHNAULT: It could. It could.

14 CHIEF JUDGE WILSON: So what happened - - -

15 MR. ASHNAULT: It could.

16 CHIEF JUDGE WILSON: What happened if the
17 mechanic who was - - - in front of you. What happened if
18 the mechanic who was working on - - - is he a member of the
19 excavation team? The mechanic? Do we know that?

20 MR. ASHNAULT: I don't know the answer to that.

21 CHIEF JUDGE WILSON: Suppose - - - just
22 hypothetically suppose he's not, and he's down in the
23 excavation area, and he's the one who actually gets hit by
24 this instead of Mr. Mann. Why doesn't 4.2 cover him? He
25 shouldn't be repairing a piece of equipment in the

1 excavation area. Isn't that a way to read 4.2 sensibly?

2 MR. ASHNAULT: Potentially. But that's not the
3 way 4.2 is written.

4 CHIEF JUDGE WILSON: Well.

5 MR. ASHNAULT: It's written to apply to
6 everybody, not - - -

7 CHIEF JUDGE WILSON: Well, except - -

8 MR. ASHNAULT: - - - not just - - -

9 CHIEF JUDGE WILSON: - - - that 9.5 seems to
10 exclude a bunch of people. So it is - - - it does then
11 perhaps create a specific rule that divides the people who
12 work at construction sites into two groups, one group who
13 can be in an area and one group who can't. And that seems
14 to me different than what the common law would say.

15 MR. ASHNAULT: I don't - - -

16 CHIEF JUDGE WILSON: Common law would just say,
17 take care of everybody.

18 MR. ASHNAULT: I'm sorry?

19 CHIEF JUDGE WILSON: The common law would say,
20 take care of everybody.

21 MR. ASHNAULT: Well, and so does 4.2(k). It says
22 - - -

23 CHIEF JUDGE WILSON: No.

24 MR. ASHNAULT: - - - any person.

25 CHIEF JUDGE WILSON: Unless we read 9.5 in tandem

1 with it maybe.

2 MR. ASHNAULT: Perhaps. But it - -

3 JUDGE RIVERA: But it can't be read the way you
4 suggest.

5 MR. ASHNAULT: I'm sorry?

6 JUDGE RIVERA: Because people - - - it can't be
7 read the way you suggest because people have to work on the
8 machine.

9 MR. ASHNAULT: I understand, and I think that's
10 part of the problem with the regulation in general.

11 JUDGE RIVERA: So we can't read it in a way
12 that's irrational.

13 MR. ASHNAULT: Well, it also can't be written in
14 a way that makes it irrational.

15 JUDGE RIVERA: Well, all we're saying is that
16 there's potentially a way to harmonize these two sections,
17 right?

18 MR. ASHNAULT: There could be. There could be.
19 But I don't know that it's going to require - - - I don't
20 know that it's required that 9.5(c) be considered when
21 determining whether or not 4.2(k) in and of itself is
22 sufficiently specific.

23 CHIEF JUDGE WILSON: 9.5(c) doesn't have to do
24 with the facts, right?

25 MR. ASHNAULT: None of them do.

1 CHIEF JUDGE WILSON: Yeah. Okay. I'm just
2 checking we're complying with the directive he gave us at
3 the beginning.

4 MR. ASHNAULT: I also see my red light is on, so
5 I don't want to overstay my welcome here. Thank you.

6 MS. DONNELLY: Good afternoon. May it please the
7 court, I represent Mezuyon. This appeal presents a pure
8 legal question. Whether 23-4.2(k) is sufficiently specific
9 to support a Labor Law 241(6) claim. As the First, Third,
10 and Fourth Department have held, it is not. All one has to
11 do is to look at the statute itself, and the statute alone
12 in and of itself, to determine that it is not a specific
13 positive command. In terms of - - -

14 JUDGE RIVERA: What makes it not specific?

15 MS. DONNELLY: It's not specific. It does not
16 define any minimum distance. It does not identify any
17 protective measures. It does not specify any method of
18 compliance. It does not - - -

19 JUDGE RIVERA: Keep them out?

20 MS. DONNELLY: - - - apply to - - -

21 JUDGE RIVERA: Keep them out? Why isn't that a
22 method of compliance?

23 MS. DONNELLY: I'm sorry?

24 JUDGE RIVERA: Keep them out. They can't be in
25 that area.

1 MS. DONNELLY: That's a - - - that's a general
2 safety workplace statute. It is not a specific positive.

3 JUDGE CANNATARO: Shall not suffer or permit is
4 not specific enough?

5 MS. DONNELLY: It is not, because case - - - the
6 case law, and I believe this court as well has said that
7 the words permitted or suffered are not sufficiently
8 specific.

9 JUDGE HALLIGAN: But isn't the question - - -

10 MS. DONNELLY: And as this court - - -

11 JUDGE HALLIGAN: - - - what can you not suffer or
12 permit if that directive is clear? In other words, you
13 can't cross this line.

14 MS. DONNELLY: What line? This statute doesn't
15 say what line.

16 JUDGE HALLIGAN: Well, the - - - the - - -

17 MS. DONNELLY: The - - - the - - -

18 JUDGE HALLIGAN: No. I think that's maybe open
19 to debate. If the statute says, as Judge Rivera said, keep
20 them out of this area, in other words, you can't cross the
21 line into the excavation area, why is that not specifically
22 - - -

23 MS. DONNELLY: But it - - -

24 JUDGE HALLIGAN: - - - sufficiently specific?

25 MS. DONNELLY: It's not specific, because it



1 doesn't tell you what the area is. It could be the entire
2 construction project is an excavation area. It could be
3 one little corner of a piece of property.

4 JUDGE RIVERA: Well, it says - - -

5 MS. DONNELLY: It is not defined.

6 JUDGE RIVERA: It says any excavation equipment.
7 So you're starting from the equipment and moving outward.

8 MS. DONNELLY: Okay. And it isn't - - -

9 JUDGE RIVERA: And so maybe it's the whole
10 excavation area. It depends how the equipment is deployed,
11 or maybe not.

12 MS. DONNELLY: But it does not specify the
13 equipment. The equipment could be a shovel - - -

14 JUDGE RIVERA: Excavation equipment.

15 MS. DONNELLY: - - - a pick. It could be a huge,
16 you know, excavator. The fact that - - -

17 JUDGE HALLIGAN: But that kind of question - - -

18 JUDGE RIVERA: But it's got to be a huge
19 excavator because that's excavation equipment. I mean,
20 that's not a maybe, right?

21 MS. DONNELLY: That's - - - it I believe that
22 there'll be case law where - - - which will be - - - if the
23 court holds that this is specific enough or not specific
24 enough, that they're going to say that a shovel is - -

25 JUDGE RIVERA: Well, look - -

1 MS. DONNELLY: - - - excavation equipment.

2 JUDGE RIVERA: Whatever argument you want to make
3 about a shovel, the excavator machine is excavation
4 equipment, correct?

5 MS. DONNELLY: Yes, it is.

6 JUDGE RIVERA: Okay.

7 MS. DONNELLY: Yes, it is.

8 JUDGE RIVERA: All right.

9 MS. DONNELLY: It is but the - - - but the - - -
10 but this statute does not specify that. This is not a
11 positive specific command that is required to impose Labor
12 Law 241(6) liability.

13 JUDGE CANNATARO: Counsel, there was some
14 discussion earlier. I think a lot of times we hear this
15 argument framed as we know that this is not a sufficiently
16 specific positive command, because this is really nothing
17 more than a reiteration of a common law duty of care. Do
18 you have that argument here? And what about this section
19 of the Industrial Code makes it nothing more than the
20 common law duty of care?

21 MS. DONNELLY: The text of the regulation itself
22 makes it nothing more than a common law duty of care.

23 JUDGE CANNATARO: Which part of the text, because
24 - - -

25 MS. DONNELLY: The entire part.



1 JUDGE CANNATARO: - - - this goes back to the
2 question she says - - -

3 MS. DONNELLY: It's what it doesn't say. It
4 doesn't have any objective benchmarks. It doesn't show how
5 is the - - -

6 CHIEF JUDGE WILSON: In Rizzuto - - - In Rizzuto
7 we don't have objective benchmarks. It's just slippery
8 surface, water, grease, other foreign substance. There's
9 nothing specific about that, objective. There's no measure
10 of coefficient of friction.

11 MS. DONNELLY: But this - - -

12 CHIEF JUDGE WILSON: And we said that's specific
13 enough.

14 MS. DONNELLY: In that particular - - -

15 CHIEF JUDGE WILSON: Uh-huh.

16 MS. DONNELLY: - - - instance it is. But what we
17 have - - -

18 CHIEF JUDGE WILSON: Why?

19 MS. DONNELLY: - - - to look at is - - -

20 CHIEF JUDGE WILSON: Why? There's no numbers.

21 MS. DONNELLY: But this is just a general, well,
22 workplace safety statute.

23 CHIEF JUDGE WILSON: And you don't think that not
24 working - - -

25 MS. DONNELLY: It just says - - -



1 CHIEF JUDGE WILSON: - - - on a slippery floor is
2 a general safety standard?

3 MS. DONNELLY: It has been interpreted to be
4 specific.

5 CHIEF JUDGE WILSON: By us - - -

6 MS. DONNELLY: Yes.

7 CHIEF JUDGE WILSON: - - - in Rizzuto, and the
8 language is suffer or permit, right?

9 MS. DONNELLY: Yes. And but in Gasques this
10 court said those - - -

11 JUDGE HALLIGAN: This court in Gasques, the word
12 is good repair and safe working condition, right? Those
13 words, good and safe are the kinds of words that you might
14 see in any common law opinion, where you are looking to see
15 whether or not the conduct was reasonable. And I think the
16 question I'm grappling with anyway is if we understand the
17 regulation to say if you're not working on the piece of
18 equipment, you can't be within its range. That seems
19 perhaps more specific than saying good or safe.

20 MS. DONNELLY: I think what the issue on - - - my
21 - - -

22 JUDGE HALLIGAN: Why is that not different?

23 MS. DONNELLY: - - - problem with this is that
24 when we look at - - - when we impose liability under Labor
25 Law 241(6), it's based on a specific statute, and you have

1 to look at the language of that specific statute itself,
2 not in tandem with any other statute, because otherwise you
3 can pick and choose any statute and combine them together
4 and say it's a specific command. You have to look at that
5 specific statute. Here, if we, based upon the language of
6 this particular statute with the vague and ambiguous terms
7 of suffer, permitted, area, endangered, the impact and the
8 consequences are going to be significant because - - -

9 JUDGE SINGAS: I think in Rizzuto - - -

10 MS. DONNELLY: - - - what will happen is - - -

11 JUDGE SINGAS: I think in Rizzuto, we said that -
12 - - I think the statute said the regulations said that
13 anything which may cause a slippery footing shall be
14 removed to provide safe footing. Is that the kind of
15 directive that you're saying is missing here?

16 MS. DONNELLY: Yes, yes.

17 JUDGE SINGAS: That there's no affirmative duty
18 on the employer to actually do anything?

19 MS. DONNELLY: He - - - the owner and general
20 contractor is going - - -

21 JUDGE RIVERA: Well, of course there's an
22 affirmative - - -

23 MS. DONNELLY: - - - to be held - - -

24 JUDGE RIVERA: Hold on, hold on.

25 MS. DONNELLY: I'm sorry.



1 JUDGE RIVERA: Shall not be suffered or
 2 permitted, shall not be tolerated or authorized. That
 3 means you have to take affirmative action to ensure they're
 4 not in this area. Whatever that affirmative action is that
 5 the entity responsible for that work site thinks is
 6 appropriate, but you have to do something.

7 MS. DONNELLY: The - - -

8 JUDGE RIVERA: That's the point.

9 MS. DONNELLY: Well, it's a general comment.
 10 This one, this particular provision is just a general work
 11 safety statute. It does not define what a job owner and
 12 general contractor must do in terms of complying with the
 13 statute. Keeping everyone out in - - - without any more
 14 detail as to radius, what type of equipment, what type of
 15 workers is simply a general workplace vague, nonspecific,
 16 nonpositive command and the court should find in light with
 17 the majority, the First, Third, and Fourth Department, that
 18 23-4.2(k) is insufficiently specific to support a Labor Law
 19 241(6) claim. Thank you.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. WONG: I would just really - - - I would like
 22 to point out that in *Basdaric v. Almah Partners*, this court
 23 held that the Industrial Code should be sensibly
 24 interpreted and applied to effectuate its purpose - - -
 25 purpose of protecting construction laborers against hazards



1 in the workplace. As this court has expressed, they can do
2 this with 4.2(k) and harmonize it with 9.5(c). 4.2(k)
3 creates a broader protection for - - -

4 JUDGE RIVERA: What about her argument that we're
5 supposed to look at each of the subsections individually to
6 decide if - - - if they are actually sufficiently specific,
7 not go looking for other areas to add in some specificity
8 that the commissioner didn't add themselves?

9 MR. WONG: I don't know if there's any case law
10 that actually says that.

11 JUDGE RIVERA: Uh-huh.

12 MR. WONG: And in any event, I believe that the
13 specificity of a code, the whole purpose of the code is to
14 protect workers. So if there's any way that this court can
15 effectuate that purpose through sensibly interpreting these
16 codes, then that's the path that it should take.

17 JUDGE GARCIA: And how would that be with a
18 9.5(c) argument? How would we apply that here to interpret
19 it the way you want us to?

20 MR. WONG: I mean, as Your Honors have said, this
21 - - - as you said, Judge Rivera, that this code has a
22 specific command to keep everybody out. However, 9.5(c)
23 creates an exception to that that makes it make more sense.
24 It allows for the pitman and the crew to be in that certain
25 area during - - -

1 JUDGE GARCIA: If you just had a regulation that
2 said - - - it was obviously too general, just said, you
3 know, you can't let anybody - - - you know, you can't be
4 negligent for people around an excavation machine and then
5 you limited who that applied to, would that fix that code
6 provision in your view?

7 MR. WONG: I mean, I think that's a - - - that's
8 a completely different instance. And I - - - - you - - -
9 so if this were a general - - - like, you're just - - - I'm
10 sorry, you're saying if this were very general?

11 JUDGE GARCIA: So how could who is affected fix
12 an over general regulation, right? So if the wording of
13 25.2 - - - 23, I'm sorry, 23-4.2 is not sufficiently
14 specific, how do we fix that by limiting who it applies to?

15 MR. WONG: I don't - - - I'm sorry, I don't think
16 I quite understand the question because it's - - - if it
17 weren't sufficiently specific?

18 JUDGE GARCIA: On its face.

19 MR. WONG: On its face.

20 JUDGE GARCIA: On its face.

21 MR. WONG: On its face, if it was too general,
22 you wouldn't fix it. It's - - -

23 JUDGE GARCIA: Okay.

24 MR. WONG: - - - it would be - - - you can't fix
25 it.

1 JUDGE GARCIA: Then what's the - - - what is the
2 implication of 9.5(c)? How does that help you?

3 MR. WONG: How does 9.5(c) help me? I mean,
4 9.5(c) is - - - has already been determined to be
5 sufficiently specific. And it says specific - - - that
6 specific people are allowed to work in this area. However,
7 everyone else is not permitted.

8 JUDGE CANNATARO: Counsel, can I - - -

9 MR. WONG: Yes, of course.

10 JUDGE CANNATARO: I want you to finish your
11 answer to that question, but I think you just hit on the
12 key of what might be the problem. The statute speaks of
13 the area. It doesn't speak of the people. If we were to
14 employ 9.5, and there have been arguments made why we
15 shouldn't go wandering around the Industrial Code to find
16 other sections to limit this section, but even if we were
17 to employ 9.5 to close the scope of who might be covered,
18 this is talking about an area. And that's what I think I
19 hear your adversary saying is part of the key fault in this
20 provision in terms of making it specific enough. Who knows
21 what the area is? You heard questions when you were up
22 here before. It could happen really, really far away from
23 where the excavation activity is happening. So that's
24 where 9.5, I think, does you no good.

25 MR. WONG: Fair enough. But I do think when you

1 talk about sensibly interpreting this law and sensibly
2 applying it, you have to - - - you have to look at the
3 performance of excavation. This isn't - - - this is in a
4 limited area. It's not the entire site, it's where the
5 excavation machines are being operated.

6 JUDGE GARCIA: But it's anywhere you get hit by a
7 dislodged piece of material, right?

8 MR. WONG: Yes, and sensibly a dislodged piece of
9 material would be close within the bounds of that area. I
10 mean, I don't know of any - - - I think it's - - -

11 JUDGE GARCIA: The arm is swinging and it hits
12 something and it goes 20 feet. That's still covered,
13 right? 20 feet outside the arc, the radius of the
14 equipment?

15 MR. WONG: I mean, I think that is a very
16 unlikely scenario.

17 JUDGE CANNATARO: Maybe the excavation is on an
18 incline and something falls off, a piece of excavation
19 equipment rolls down and, you know, injures somebody in the
20 area or not even the area, but down the hill?

21 MR. WONG: Hypothetically, if - - - I mean, I
22 think the courts would have to look at those - - - at that
23 - - - that on a fact-based instance. I mean, this isn't
24 finding that 4.2(k) is sufficiently specific of - - - just
25 allows for workers to be entitled to the protections which

1 are created by the code. There's still - - - like, we
2 still have sole proximate cause or comparative negligence,
3 and all of these things are - - - will be interpreted based
4 on facts. At the end of the day, it's my position that we
5 have a code that was created to protect people, and it
6 should be applied in that way to protect people, because it
7 does create a specific command.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. WONG: Thank you.

10 (Court is adjourned)

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

I, Leda Yeager, certify that the foregoing transcript of proceedings in the Court of Appeals of Mann v. Mezuyon LLC, No. 39 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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