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COURT OF APPEALS
STATE OF NEW YORK

CURBY TOUSSAINT,

Respondent,

-against-

PORT AUTHORITY OF
NEW YORK AND NEW JERSEY,

Appellant.

NO. 16
(Reargument)

20 Eagle Street
Albany, New York
February 10, 2022

Before:

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

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 16, Toussaint v.
2 Port Authority.

3 Counsel?

4 MR. GANNON: Good afternoon, Your Honor.
5 Christian Gannon on behalf of appellant, The Port Authority
6 of New York and New Jersey.

7 Your Honor, may I ask two minutes for rebuttal?

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. GANNON: Your Honor, what we're asking the
10 court to do today in this proceeding is to reverse the
11 Appellate Division and find that 9.9(a) is insufficiently
12 specific to be a predicate under 241(6).

13 In the inquiry, Your Honor, I would ask the court
14 to start with record page 627, which provides a photograph
15 of the power buggy that's at issue in this case. Why is
16 that important? This is a complicated machine to use.
17 It's gas-powered; it has a single wheel in the back which
18 is difficult to steer, and it also has a handlebar that - -
19 - that you need to follow.

20 Your Honor - - - Your Honor, in New York State,
21 to get a basic driver's license, you need to pass a written
22 test, and you need to pass a road test. The language of
23 9.9(a) does not give any indication or call for any
24 specific conduct for a contractor or an owner to follow.

25 What the commissioner should do, in this



1 situation, is either define training under these
2 circumstances - - - training is defined under OSHA. If you
3 want to get an OSHA card, either a ten-card, you take ten
4 hours of classes. If you want a OSHA thirty-card, you take
5 thirty hours of classes. The commissioner can very easily
6 define what training is. Training is actually not a
7 definition.

8 JUDGE GARCIA: But Counsel, let's - - - I'm
9 sorry, here.

10 So let's step - - - take a step back and try a
11 different scenario, and it would be where there's a driver
12 who's been designated, and that driver gets in this
13 accident, and you make this argument, and it's very - - -
14 you know. You would say, look, competent and training and
15 all these things aren't specific enough.

16 But here we have somebody driving who isn't
17 designated. Why isn't designated specific enough?

18 MR. GANNON: Well, Your Honor, I think the
19 problem with the designated word is some - - - an owner or
20 contractor can designate anybody. There's no definition as
21 to what designated means, and - - -

22 JUDGE GARCIA: But - - -

23 MR. GANNON: - - - in fact, Mr. Estavio, on this
24 job site, was the designated operator for this.

25 JUDGE GARCIA: But it - - - there's no question



1 that the person who was actually driving when the accident
2 occurred was not designated, right?

3 MR. GANNON: Correct, Your Honor. Which is why I
4 think if the court finds this pro - - - regulation
5 sufficiently specific, I think as Justice Tom said in his
6 dissent, there is a question of fact as to whether or not
7 Mr. Melvin was - - - was authorized or not. And that could
8 be a question of fact. If this court were to find that
9 this 9.9(a) is actually specific - - -

10 JUDGE GARCIA: But why isn't designated specific
11 enough?

12 MR. GANNON: Well, Your Honor, designated is
13 actually defined in the statute - - - I'm sorry, in the
14 regulations - - - and it says, "A person selected and
15 directed by an employer or his authorized agent to perform
16 a specific task or duty." All that does, Your Honor, is it
17 just says, I designate you, Judge Garcia, to operate this
18 power buggy. That is not going to advance the safety of
19 this job site, because designation is merely nothing more
20 than pointing to someone and say, you can operate this
21 power buggy today. It leaves out the entire separate
22 argument about training that's needed to operate such a
23 complicated machine.

24 JUDGE WILSON: Why doesn't that help ensure
25 safety to - - - sorry, over here. Why doesn't it help



1 ensure safety to some degree, if you think that the
2 employer isn't just going to designate people randomly?

3 MR. GANNON: Well, the - - - it - - - that - - -
4 Your Honor, the thing about - - - it gets to scope of work
5 as well, but on this project, it's a union job. The only
6 persons that can use this power buggy are laborers. It's a
7 totally separate union. So if they - - - if that's the
8 case, and they designated a laborer, which they did, Mr.
9 Estavio, that portion of the regulation, I believe, is
10 complied with.

11 It - - - it - - - it's the broader part of the
12 reg - - - of the regulation that's at issue. And the
13 problem with the First Department decision is Justice Singh
14 found that trained and competent are too vague, not general
15 enough, but said designated is. You have a one-single-
16 sentence regulation, in which the Appellate Division has
17 said, half of it is too general; the other half is
18 specific. That's a problem right there for compliance with
19 contractors and owners in New York State.

20 Because what does that mean when they say,
21 trained? We can now then ignore that provision of 9.9(a),
22 because he just says it's too general. And then all you're
23 left with is saying, you just have to designate a person.
24 Pick a person out who's in the right union to operate it,
25 and you've complied.



1 The way this decision stands now, there doesn't
2 need to be any training, because the training's not defined
3 in the stat - - - in the regulation. And Justice Singh
4 said the language itself is - - - is not specific enough.

5 JUDGE CANNATARO: I'm sorry, Counsel. I know you
6 want to talk about training. But I just want to go back to
7 something you said in response to the last question. Are
8 you saying that there's a concession here that there's been
9 compliance with the designation part of the regulation?

10 MR. GANNON: No, Your Honor. I - - - I - - - I
11 appreciate that clarification. There is not. I - - - I
12 think the entire regulation 9.9(a) should be thrown out as
13 too general. And I think just using the word designation -
14 - - just because you designate someone, I don't think
15 you've complied with the Rule 23. I'm just saying
16 factually, there - - - there is an argument that Mr.
17 Estavio, who - - - which he says in his affidavit, was
18 instructed by his foreman, you're going to be the person to
19 operate that power buggy that day.

20 I do not concede, however, that designation is
21 sufficiently specific for predicate under 241(6).

22 JUDGE CANNATARO: Okay.

23 MR. GANNON: So in the brief of respondent,
24 there's an awful lot of language - - - and very well
25 written; Mr. Shoot is a very talented lawyer - - - in which

1 he cites other regulations that have these three words in
2 it. And I think that is - - - that's where the inquiry
3 should not stop. This is not about matching up words from
4 one regulation to another. In those instances where they
5 found where the regulations had trained, competent, and
6 designated, there was far more language in the statutes
7 where they found them specific - - - specific, because
8 those regulations actually dictated and mandated a course
9 of conduct.

10 This regulation on its own does not regulate or
11 dictate or mandate a course of conduct whatsoever. And the
12 other issue about the danger - - - I shouldn't say danger -
13 - - the difficulty of this regulation is, the training is
14 not uniform throughout New York State. The commissioner is
15 charged with making sure every job operates the same way,
16 with the same safety standards, under the same conditions.
17 Owners and contractors are aware of what they need to do.

18 To say someone needs to be trained, without
19 defining what it is, could be nothing more than I show up
20 on a job site; I get designated; they show me for fifteen
21 minutes how to drive this power buggy around; therefore,
22 I'm designated and trained. The unions involved here,
23 under their rules, have adopted training regulations, which
24 go to how many hours you have to operate the power buggy,
25 just like - - -



1 JUDGE TROUTMAN: Does the addition of the word
2 competent - - - trained, competent - - - make any
3 difference?

4 MR. GANNON: I don't think it does, Your Honor,
5 because I think comp - - - I think when you're dealing with
6 heavy duty equipment on construction sites, you have - - -
7 I think you have to specifically define what these words
8 mean. And competent, under 23-1.4(b)(12) under the
9 definitions, says nothing more than competent is "qualified
10 by training, and/or experience to perform a particular task
11 or duty." So now we're in a circle about what does that
12 mean.

13 You keep referring back to the definitions. They
14 don't define training. If you go to 9.9(a), they don't
15 define competent. I'm sorry; they don't - - - they - - -
16 they just don't define training. And the problem is, you
17 have the potential, if this regulation stands, that you'll
18 have different training at a non-union job, versus a union
19 job. I think the commissioner's obligation is to amend
20 this regulation - - -

21 JUDGE RIVERA: Well - - - well, Counsel, if I - - -
22 - I'm - - - so I'm on the screen.

23 MR. GANNON: Yes - - -

24 JUDGE RIVERA: Hello.

25 MR. GANNON: - - - Judge Rivera.



1 JUDGE RIVERA: But - - - good afternoon, sorry.

2 So if I - - - if I kind of go through to the
3 logical end of your argument, that would mean that despite
4 the rules saying training, competent, the designated - - -
5 those are three words you've focused on - - - that the
6 employer could do absolutely nothing related to those three
7 and a victim would never have - - - right, a worker-victim
8 would never have a Labor Law action.

9 As opposed to the employer tries, and so that
10 might go to a question as to whether or not the lawyer - -
11 - excuse me, the - - - the employer did enough under the
12 circumstances to ensure proper training, appropriate
13 competence, and that adequately designated who should drive
14 the buggy.

15 MR. GANNON: Your Honor - - -

16 JUDGE RIVERA: You see the difference between the
17 two? Under - - - under your rule, you're incentivizing
18 them to do nothing to avoid liability. And that - - - that
19 doesn't make sense to me.

20 MR. GANNON: I'm not incentivizing to - - - to do
21 nothing, Your Honor. I'm - - - I'm asking the commissioner
22 should define training within the regulation. Training
23 itself is not even defined. And the - - - the scenario
24 you're posing, Your Honor, would - - - would, I think,
25 create nothing more than if there's no training, then there



1 is a violation of the regulation, which is nothing more
2 than proof of negligence.

3 There still has to be a decision by the jury as
4 to whether or not that negligent conduct by a party or
5 participant in the construction activities, was the
6 proximate cause of the incident. Which is why I think also
7 the Appellate Division went too far, because there are - -
8 - they - - - if they - - - if they ruled that there was a
9 violation of this regulation, the inquiry doesn't stop
10 there. Then we're into a Batista situation, where the jury
11 is the exclusive one to say, does the owner or contractor -
12 - - are they vicariously liable because of this
13 individual's conduct?

14 CHIEF JUDGE DIFIORE: Thank you, Counsel. You'll
15 have your rebuttal time.

16 Counsel?

17 MR. SHOOT: Thank you, Your Honor. Brian Shoot
18 for the plaintiff.

19 Your Honors, this is not a close case at all. I
20 don't know why it was three to two in the Appellate
21 Division. The standards set forth by this court back in
22 Ross, the dichotomy, is that you look to whether the
23 regulation in issue, quote, sets forth a "specific
24 requirement or standard of conduct" as opposed to "no more
25 than the work area provide reasonable and adequate



1 protection and safety."

2 Here, assuming for sake of argument that we can
3 reasonably disagree about what is training, what is
4 competent. Assuming that, number one, that's not this
5 case, where he had zero training and was obviously not
6 competent, and according to the defendant, was also not
7 designated, which is pretty clear. Designated means
8 selected. He wasn't selected to operate this machine.

9 Now, the argument made just now wasn't to that
10 dichotomy. The argument made just now was, well, this
11 regulation doesn't really guarantee that if it's construed
12 - - - if it's followed, it will end worksite accidents.
13 That's not part of the inquiry. First of all, no
14 regulation, of course, guarantees that result. The idea is
15 that if you have the safeguards that are set forth in Rule
16 23, you will reduce the incidents of accidents, not - - -
17 no one pretends that compliance with these regulations is
18 going to end all accidents.

19 And we don't sit and say, well, is this a
20 sensible regulation? Does it make sense? Is it something
21 I would have enacted? It's simply whether it's a specific
22 standard of conduct, as opposed to generally reasonable
23 care. It is a specific standard.

24 Now, there are, as we point out in our brief,
25 pages 30 to 36, more than ten of these regulations



1 scattered throughout Rule 23, where it's some combination
2 of designated, trained, or competent to do some particular
3 activity: build a scaffold; check for whether the flooring
4 during hand demolition operations is secure, with the 9.5
5 excavating machines. There are three - - - only three
6 machines, which the commissioner singled out.

7 Although 9.2(b) (1) of the regulations requires
8 that everyone who's operating "power oper" - - - proper - -
9 - "a power-operated machinery be trained and designated",
10 the commissioner, beyond that, singled about three
11 different kinds of machines. Three. Buggies are one of
12 them; excavating machines are another; aerial baskets are a
13 third, for which you have this redundant precaution. This
14 particular object, a power buggy. The person who's
15 operating it must be designated, trained, and competent.

16 Now, why did the Appellate Division, even though
17 there had not been a motion for summary judgment by the
18 plaintiff below, find that there were no issues of fact?
19 Let me show you why. There's no mystery as to what
20 occurred. If I can refer you to the photographs that begin
21 at page 398. It's in volume 1, page 398 of the record.
22 What you have here, Your Honors, is a sequential series of
23 photographs of exactly what occurred. It's taken from the
24 video.

25 When you look at the first photograph at page



1 398, you'll see in the middle of it, there's an individual
2 circled. That's the plaintiff. He did the circling during
3 his deposition. When you look to the left, you'll see two
4 heads. You can't see much more than their heads, and - - -
5 on page 398 - - - and the top part of their body. Those
6 are, respectively, James Melvin. You can't tell it from
7 here, but as you go through the rest of the photographs,
8 you will see it. He is already seated on the buggy that
9 was already running when he sat on it. The man next to
10 him, that's the designated operator.

11 And as you go through the sequential photographs,
12 which show, after a gap, that buggy finally starts moving.
13 And so at page 408, then you could finally see, he emerges,
14 so you can now see all of James Melvin - - - Melvin, seated
15 on the buggy. You can see the entire buggy, and it keeps
16 on going until it collides with the plaintiff.

17 The Appellate Division saw this. He did not, in
18 the dead of night, sneak onto that machine by means of
19 stealth. He did not overpower the operator. According to
20 the plaintiff's testimony - - -

21 JUDGE RIVERA: Counsel, I'm - - - I'm sorry to
22 interrupt you. I'm on the screen. It just - - - I don't
23 know that we need to run through all of that. I appreciate
24 your argumentation. But isn't the only legal question for
25 us, whether or not, indeed, what you allege has some legal



1 basis under the Labor Law, for a cause of action? I mean,
2 that's really - - - have - - - have I missed something?
3 Isn't that really the only question for us?

4 MR. SHOOT: Your Honor, I - - - I totally agree
5 with that. I believe that is the only question that the -
6 - -

7 JUDGE RIVERA: Okay.

8 MR. SHOOT: - - - court actually - - -

9 JUDGE RIVERA: So - - - so given that, then - - -
10 then the only question is, again, since you're relying on
11 the Industrial Code, whether or not, it is specific enough.
12 You've - - - you've argued why it's specific enough, but
13 let me ask you this. Why - - - why isn't your adversary
14 correct when he says, well, you know, what - - - what does
15 training tell you? That it doesn't tell you the nature of
16 the training, and that's really a major flaw in this
17 particular provision. And as a consequence, they can't
18 rely on it, to hold the employer liable, right? I - - -
19 unless I've misunderstood his position, I think that's what
20 you got to respond to.

21 MR. SHOOT: Your Honor, two points there. And
22 that is, number one, any regulation - - - of course, there
23 might be close cases, where you could say, it was - - - it
24 - - - is this sufficient training or is this - - - any
25 right - - - any term you might use. Of course, that's not



1 this case, because as the - - - as - - - as was pointed
2 out, the term designated, which is prerequisite here, is
3 pretty - - - I don't think one can reasonably disagree
4 about what designated means. I don't think one can
5 reasonably say that Melvin, even if the operator allowed
6 him to do so, to get on this machine and use it, was
7 designated to use it. I don't think one can in the context
8 of this case say there's any doubt that whether this man
9 had sufficient training or competence to operate the
10 machine.

11 And I think that if you looked at the regulations
12 with that kind of - - - well, like each regulation has to
13 run a gauntlet, as it were. It has to be specific. It has
14 to, indeed, promote safety. It has to guarantee that an
15 accident won't occur. It has to be of such nature that
16 people can't disagree over what it means and when it's
17 going to be followed. No regulation meets that criteria.
18 And Rule 23 gets thrown out. And that's, of course, not
19 what this court's - - - that's not what the right - - - the
20 statute is about, Labor Law section 241(6).

21 And that's not what this court said, most
22 recently in Morris and St. Louis, about how these
23 regulations should be construed. They - - - they should be
24 construed expansively.

25 JUDGE CANNATARO: Mr. Shoot, can I ask you - - -



1 if you get a 241(6) cause of action, is proximate cause
2 still an issue for the jury in this case?

3 MR. SHOOT: Well, it - - - a proximate cause is,
4 of course, an issue in every 241(6) cause of action.

5 JUDGE CANNATARO: I'll - - - I'll tell - - - that
6 - - - I'll tell you why I'm asking. You know, Melvin
7 admitted that he had no training whatsoever in how to use
8 the machine, and - - - but he also admitted that he wasn't
9 designated by his employer as a person who could use the
10 machine.

11 So it occurs to me, it, you know - - - that
12 there's no question here that none of the three affirmative
13 requirements in 241 - - - I'm sorry, in the Industrial Code
14 section were complied with here. But that's specifically
15 because he broke the designation rule. He - - - he got on
16 the machine and used it.

17 So - - - and I'm just wondering whether that
18 error gets charged to the employer, who did take the time
19 to designate who - - - who should use the buggy and who
20 shouldn't, versus someone who just decides to get on and go
21 for a ride.

22 MR. SHOOT: Proximate cause is a prerequisite in
23 every case, involving 241(6). That does not mean, however,
24 that is, in fact, really an issue, in every single case, or
25 that there aren't cases where it's clear as a matter of



1 law, that there was - - - or for that matter, wasn't - - -
2 proximate cause.

3 Here, the question in terms of proximate cause
4 is, was the accident a product of the fact that you had an
5 untrained, incompetent, undesignated person, on top of it,
6 operating the machine? There is no, I don't think,
7 proximate cause - - - there's no doubt as to the answer to
8 that question.

9 JUDGE CANNATARO: Well, I guess it's all in how
10 you phrase the question, because I think another aspect of
11 proximate cause would be, is it the employer's
12 responsibility that an untrained, incompetent,
13 nondesignated person decided to use the machine?

14 MR. SHOOT: Well, at - - - that argument, Your
15 Honor, actually is - - - is made in some respects by the
16 defendant. And of course, the curious thing about it is
17 that it posits that the very violation is itself the
18 defense. That because we violated the regulation, and I
19 had an undesignated driver; therefore, that's a defense we
20 - - - that we didn't want that to occur.

21 JUDGE CANNATARO: So under this section, the
22 employer is responsible for policing compliance with the
23 designation provision?

24 MR. SHOOT: Yes, Your Honor, and under the
25 statute label at 241(6), the owner, the general contractor,



1 all those higher up on the food chain, as it were, are
2 vicariously responsible for the negligence of those
3 underneath, including, as is usually the case, the
4 plaintiff's employer, or in this case, the defendant's
5 employer.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.

7 Counsel - - -

8 MR. SHOOT: Thank you.

9 CHIEF JUDGE DIFIORE: - - - your rebuttal?

10 MR. GANNON: Thank you, Your Honor.

11 Two points. I - - - I think any owner or
12 contractor needs to be able to read a regulation, and by
13 reading that regulation understand what specific conduct is
14 required. 9.9(a) does not achieve that.

15 The other point in terms of proximate cause is,
16 not to lose sight of it, but in our brief, we raise issues
17 of foreseeability and scope of work. Mr. Melvin was a
18 Skanska employee. Mr. Toussaint was a Skanska employee.
19 They're on separate parts of the World Trade Center
20 project. Scope of work doesn't just go to location. It
21 goes to tasks. They're operating under separate contracts.
22 They're in separate unions. And on a union job, an
23 operating engineer, which Mr. Melvin was - - - and what - -
24 - here it does mean he operates the material. He's an
25 oiler; he's a mechanic. He was a crane mechanic and an



1 oiler on the job.

2 He cannot stray outside of his lane as an
3 operating engineer and do something other than that. If he
4 had gone over and done some electrical work, he's clearly
5 outside the scope of his employment. If he jumped into a
6 high-rise crane - - - crane, and tried to operate in that
7 cab, he's outside the scope of his employment. Even Mr.
8 Toussaint, when he described Mr. Melvin being in that
9 location, it - - - in his deposition, he says, I don't know
10 what he was doing on our side of town. So he's clearly an
11 interloper, as Justice Tom said in the dissent.

12 And I think the point was well made that it's not
13 the job of the owner or operator to watch every single
14 person on the World Trade Center construction site, and
15 there were thousands of them, to make sure they stay in - -
16 -

17 JUDGE RIVERA: No, but Coun - - - Counsel, if I
18 can interrupt you? On the screen again.

19 MR. GANNON: Yes.

20 JUDGE RIVERA: Is - - - is it not the employer's
21 responsibility to ensure that an interloper cannot ac - - -
22 access the buggy? I mean, somebody off - - - under your
23 argument, somebody off the street, could walk in and get in
24 this buggy?

25 MR. GANNON: Well, Your Honor, I think that - - -



1 that's where, I think, under these - - - under your
2 scenario, someone coming off the street, and of Mr.
3 Melvin's straying into an area where he shouldn't be and
4 doing something he should not do, gets us back to the issue
5 of vicarious liability.

6 Yes, of course, an owner has a - - - an
7 obligation to make his - - - make sure his job site is
8 safe. But someone who comes off the street and uses a
9 machine like this, you know - - - you know, my
10 understanding would not make the Port Authority vicariously
11 liable for that act. Just - - -

12 JUDGE RIVERA: No, but my point is, you're
13 equating the two, and that's not - - - I'm sorry; I may not
14 have been clear. You're equating the two, and that's not
15 the situation here, right?

16 MR. GANNON: Your Honor, I - - - I agree with
17 you, that - - - that certainly an owner and an op - - - and
18 a contractor, they have an obligation to make sure that,
19 from a general safety standpoint, the job is - - - is run
20 safely. And what - - - what doesn't come across from the
21 photographs is Mr. Melvin jumped on this power buggy, and
22 within seconds, he hit Mr. Toussaint because he lost
23 control of it.

24 So he was not supposed to be there; he wasn't
25 anticipated to be there. It would be no different, in my



1 view, if Mr. Melvin decided to go across Church Street in
 2 Manhattan to another Skanska job and do the same thing.
 3 He's not furthering the interest of his employer in doing
 4 that. He's cer - - - certainly not furthering the interest
 5 of the contractor and the Port Authority in doing that. He
 6 should not have been there.

7 So if the - - - if the regulation stands, there's
 8 still an issue of proximate cause, of foreseeability of
 9 whether or not he was authorized to use the power buggy,
 10 and that should all go to a jury at this point.

11 But my original point, Your Honor, is I think
 12 this - - -

13 JUDGE RIVERA: And - - - and your - - - your - -
 14 - your view is that there is no responsibility on the
 15 employer to ensure that that would not happen?

16 MR. GANNON: Well, the - - - there is a
 17 responsibility for an employer and a contractor to make
 18 sure the job site is safe. But that doesn't mean that they
 19 have to anticipate every single possible scenario,
 20 including, I better watch this power buggy, because another
 21 union member from the other side of the job, might jump - -
 22 -

23 JUDGE RIVERA: No, no, no, but the rule is
 24 obvious, that you only want certain people who know what
 25 they're doing, who have been told that they can use the



1 buggy, to actually work that particular machinery. And so
2 you want to ensure, that - - - that no one else gets on the
3 thing, for the very reason described, right, by - - - these
4 facts make out why - - - why one would take - - - be
5 cautious about that.

6 MR. GANNON: Well, I think they did do that.

7 JUDGE RIVERA: I don't see why a - - - why the -
8 - - why it isn't obvious from the Rule, that you're not
9 only ensuring, well, the person behind it got training and
10 is competent, but that the goal of that is that you don't
11 want anyone else behind that wheel who might try and get
12 behind the wheel.

13 MR. GANNON: Right. Which is why Mr. Estavio was
14 designated by his foreman to be the sole operator of the
15 power buggy that day, and - - -

16 JUDGE RIVERA: Um-hum.

17 MR. GANNON: - - - to - - - if we extend it too
18 far, you're essentially putting a burden on a owner and a
19 contractor to look out for every conceivable incident that
20 could happen with use to a power buggy.

21 JUDGE RIVERA: Well, the - - - the only incident
22 we're talking about is, and no one else will get on this
23 buggy.

24 MR. GANNON: Right.

25 JUDGE RIVERA: I mean, that - - - that's it - - -



1 this is not a whole range of scenarios. That - - - that's
2 it. No one else but that person - - - the Rule is clear
3 about that - - - can get on this buggy.

4 MR. GANNON: Right.

5 JUDGE RIVERA: Take whatever precautions you need
6 to, to make sure that doesn't happen.

7 MR. GANNON: I agree with that, Your Honor. And
8 so what's to stop the owner or oper - - - or how does an
9 owner operate or react when Mr. Estavio is stand - - - is
10 standing there. Mr. Melvin wanders through the job site,
11 is talking to Mr. Estavio for a brief period of time, and
12 then just suddenly jumps on the power buggy. I mean, is he
13 supposed to tackle him? Is he - - - what - - - I mean, I -
14 - - I think there's enough there in terms of - - - of
15 keeping a safe job site, where the contractor designated
16 Mr. Estavio as the operator for that day.

17 Unfortunately, on job sites, they're so big,
18 they're so busy, there's so much going on, it's frankly, in
19 my view, impossible to foresee every kind of scenario that
20 could lead to a - - - an injury on - - - on a construction
21 site.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 MR. GANNON: Thank you, Your Honor.

24 (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 Toussaint v. The Port Authority of New York and New Jersey, No. 16 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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