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Reporting on
Significant Court of
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CASE LAW DEVELOPMENTS

Majority of Court of Appeals Holds Industrial Code Provision Is Not Sufficiently Specific to Serve as Basis for Vicarious Liability

Provision Here Provides a “Broad, Nonspecific Regulatory Standard”

The issue in *Mann v. Mezuyon, LLC*, 2026 N.Y. Slip Op. 03257 (May 26, 2026), was whether Industrial Code § 23-4.2(k) (12 N.Y.C.R.R. § 23-4.2(k)) is sufficiently specific to serve as a basis for vicarious liability under Labor Law § 241(6). In a narrowly split decision, the Court of Appeals ruled that it is not.

Labor Law § 241(6) provides:

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

In *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993), a seminal case in this area, the Court previously characterized Labor Law § 241(6) as “a ‘hybrid’ statute, as the first sentence ‘reiterates the general common-law standard of care,’ while the second sentence imposes a nondelegable duty with respect to compliance with rules of the Commissioner [of the Department of Labor] which contain ‘specific, positive command[s]’ (citations omitted).” *Mann v. Mezuyon, LLC*, at *2. Where a duty is nondelegable, the plaintiffs are not required to demonstrate “that defendants exercised supervision or control

over [the] worksite in order to establish [a] right of recovery. However, this vicarious liability is limited: ‘only “provisions of the Industrial Code mandating compliance with concrete specifications” give rise to a nondelegable duty under Labor Law § 241 (6)’ (citations omitted).” *Id.*

In this action, the original plaintiff (now deceased) alleged that he was injured at a Manhattan construction site owned by the defendant Mezuyon, LLC. He was working as a drill blaster at an excavation site when he was struck by an excavator machine. Relevant here, plaintiff asserted a Labor Law § 241(6) claim (among others) predicated on a violation of Industrial Code § 23-4.2(k), which states that “[p]ersons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment.” Because Mezuyon was not controlling or directing the plaintiff’s work when he was injured, as noted above, it cannot be liable unless Labor Law § 241(6) imposes a nondelegable duty on Mezuyon, making it vicariously liable. Thus, “the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles (citation omitted).” *Id.*

The Court explained that it has “interpretive tools” available to determine if an Industrial Code section provides “sufficiently concrete specifications” to find Labor Law § 241(6) vicarious liability:

First, we have held that “[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace.” Second, “[i]n assessing whether [a] regulation is specific enough to support a Labor Law § 241 (6) claim, we examine the text without reference to the underlying facts.” Third, we have held that “general regulatory criteria” in the form of words like “adequate,” “designated,” “competent,” “effective,” “good,” “proper,”

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“safe,” “sufficient,” and “trained” “are not sufficient to give rise to a triable claim for damages under Labor Law § 241 (6).” Finally, as we have recently reiterated, “[a]dministrative regulations are generally subject to the same interpretive rules and canons of construction as statutes.” The Industrial Code is no different (citations omitted).

Id. at *2–3.

The majority noted that there was a conflict in the Appellate Division as to whether the precise Industrial Code provision here, section 23-4.2(k), is sufficiently specific to support a Labor Law § 241(6) claim. The First, Third, and Fourth Departments have concluded that it is not sufficiently specific; the Second Department has taken the contrary position.

In order to be sufficiently specific, the Industrial Code provision “must both identify a specific safety concern *and* command a specific action required to address that concern.” The Court held that the provision here sets forth a “broad, non-specific regulatory standard” that failed “to state any action, whatsoever, required to address the safety concerns set forth in the provision.” The Court pointed to the facts that section 23-4.2(k) “does not include a minimum distance that must be maintained between a worker and any excavation equipment, and its protections are not limited to any specific class of worker”; “does not identify any protective measures or reasonable precautions that a site owner must take in order to comply with the section”; and does not “provide clear guidance about how owners and contractors should provide reasonable and adequate protection and safety for workers.” *Id.* at *4. Thus, it does not contain the required specificity to hold site owners vicariously liable under Labor Law § 241(6).

In sum, the provision is “simply a recitation of common-law safety principles,” because it “adds nothing to the general common-law rule requiring the provision of a safe workplace (citation omitted).” *Id.*

The dissent maintained that the relevant section contains a specific positive command different from the common law requirements. Thus,

[s]ubsection (k) requires owners and contractors to ensure people are kept out of any part of an excavation site where they might be injured by excavation equipment or material dislodged by such equipment. That requirement alone distinguishes this provision from the common law negligence standard; the common law does not require that people be excluded from places where they might be injured—people could be allowed into such areas so long as reasonable measures are taken to ensure their safety (citations omitted).

Id. at *5.

With respect to the majority’s contention that the relevant section “fails to state any action, whatsoever, required to address the safety concerns set forth in the provision,” the dissent countered that:

The fact that an instruction is “broad”—in the sense that it affects many people—does not render it nonspecific.

Common signs that say “do not enter,” “stay off the tracks” or “no trespassing” apply to broad swaths of people, yet are quite specific in their command, just as section 23-4.2 (k) is. The instruction to prevent people from entering a dangerous area fully meets the majority’s requirement by specifying an “action . . . required to address the safety concerns set forth in the provision.”

Id. at *7.

The dissent complained that the framework in *Ross v. Curtis-Palmer Hydro-Elec. Co.*, “has proven impossible to provide predictable or consistent results for owners, contractors and workers alike. At this point we need sticky notes from the Legislature tagging those provisions to which vicarious liability attaches. Even if those are haphazard and unprincipled, they will be knowable ahead of time, which would be a substantial benefit over the present chaos.” *Mann v. Mezuyon, LLC* at *8.

Trial Court Erred in Giving Collateral Estoppel Effect to Workers’ Compensation Board 2021 Decision

Justice For Injured Workers Act Enacted After WCB Determination but Before Trial Court Decision Prohibited Court from Doing So

In *Garcia v. Monadnock Constr., Inc.*, 2026 N.Y. Slip Op. 03217 (May 21, 2026), the plaintiff alleges that he sustained personal injuries in a construction site accident in 2020. He commenced this action, and also filed a workers’ compensation claim. In 2021, the Workers’ Compensation Board (WCB) decided that plaintiff’s claimed injuries were not causally related to his accident. A year later, defendants in this action moved to amend their answer to include a collateral estoppel defense based on the WCB’s decision and for partial summary judgment.

The plaintiff argued in opposition that a newly enacted law, the Justice For Injured Workers Act (JIWA) (L. 2022, ch. 835), restrained the court from giving collateral estoppel effect to the WCB decision. Workers’ Compensation Law (WCL) § 118-a, created by JIWA, provides that

[w]ith respect to an action for a workers’ compensation claim permissible under this chapter, no finding or decision by the workers’ compensation board, judge or other arbiter shall be given collateral estoppel effect in any other action or proceeding arising out of the same occurrence, other than the determination of the existence of an employer employee relationship.

Similarly, WCL § 11 (2) states that a “[d]etermination by the board shall not be given collateral estoppel effect in any other action or proceeding arising out of the same occurrence, other than the determination of the existence of an employer employee relationship.” The legislation provided that JIWA would take effect “immediately,” which was December 30, 2022, when the Governor signed it into law. The defendants argued that JIWA should not be applied “retroactively” to cases pending before the legislation’s effective date.

In July 2023, the trial court granted the defendants’ motion, but the Appellate Division reversed, concluding that

Jiwa should be applied retroactively. The Court of Appeals affirmed, but on a different basis. The Court noted that when the trial court issued its decision, Jiwa had already been in effect for months; “[b]y its plain terms, Jiwa, as of its effective date, prohibits courts from giving collateral estoppel effect to workers’ compensation decisions arising out of the same occurrence, except with respect to the existence of an employer-employee relationship”; and thus, “pursuant to a straightforward prospective application of Jiwa,” the trial court had erred in giving collateral estoppel effect to the WCB 2021 decision. *Id.*

The Court rejected the defendants’ argument that applying Jiwa after its effective date to prohibit the collateral estoppel effect of a workers’ compensation decision issued *prior* to Jiwa’s effective date would be a retroactive application.

“A statute has retroactive effect . . . if it would impair rights a party possessed when [they] acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” Application of Jiwa after its effective date has none of those effects. “[A] statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment” (citations omitted).

Id.

The Court stressed that as soon as Jiwa became effective on December 30, 2022, courts could not give collateral estoppel effect to workers’ compensation determinations in pending or future lawsuits, except with respect to the existence of an employer-employee relationship.

Attorney for Child in Family Court Proceeding Has Authority to Appeal a Custody Determination Under Family Court Act Article 6 When Child is Aggrieved

Court Resolves Appellate Division Conflict

In *Matter of Abdoch v. Abdoch*, 2026 N.Y. Slip Op. 03219 (May 21, 2026), the Court of Appeals resolved a conflict in the Appellate Division as to whether an attorney for the child (AFC) has the authority to appeal a custody determination under Family Court Act article 6. Ultimately, the Court concluded that an AFC has such authority when the child is aggrieved.

In a Family Court Act article 6 proceeding, the child can be represented by an attorney appointed at the court’s discretion. The AFC is required zealously to represent the child’s interests, including advocating in Family Court for the child’s wishes. The AFC appointment continues without further court action when either “the attorney on behalf of the child files a notice of appeal, or . . . a party to the original proceeding files a notice of appeal.” Family Court Act § 1120(b).

The Appellate Division Department conflict revolved around whether an AFC can appeal a custody determination on behalf of their client where neither parent-party has appealed. The First, Second and Third Departments have ruled in favor of the AFC’s authority to appeal on behalf of the child, emphasizing the Family Court Act provision noted

above, which expressly sets forth an AFC’s right to file a notice of appeal and thus pursue an appeal on behalf of the child. The Fourth Department has taken a contrary position “reasoning that a ‘child in a custody matter does not have ‘full-party status’ and therefore cannot force their parent to ‘‘litigate a petition that [they] ha[ve] since abandoned.’” (citations omitted).” *Matter of Abdoch* at *2. (citations omitted).

In *Matter of Abdoch*, a Family Court proceeding, the mother and father had an agreed-upon custody order providing that their four children live primarily with their mother. The father sought to modify the order, and the mother opposed the modification in a competing petition. The AFC for the four children also opposed the father’s petition and argued that the children wanted to continue living primarily with the mother. The Family Court granted the modification and awarded joint custody “with designated zones of influence” and shared residency.

The AFC noticed an appeal from the Family Court order. While the mother failed to file her own appeal, it appears that she filed a letter with the Appellate Division in support of the children’s appeal. The father did not appear in the appeal. The Fourth Department dismissed the appeal holding, as per its precedent, that children in custody matters cannot appeal independently of the parent-parties.

The Court of Appeals reversed, holding that the Family Court Act permits an AFC to appeal on behalf of their client even though the child is not a full party to the custody proceedings:

Family Court Act § 1120 (b) provides that the AFC’s appointment continues when “the attorney on behalf of the child files a notice of appeal.” In turn, section 1115 provides that an appeal is taken by filing a notice of appeal, which begins the appellate process. Reading these two sections in harmony, the Family Court Act clearly authorizes an AFC to appeal a Family Court decision on behalf of their client. To hold otherwise would render section 1120 (b)’s relevant language without practical effect (citations omitted).

Id. at *3.

The Court cautioned, however, that the child must still satisfy the CPLR’s aggrievement requirement and other applicable jurisdictional requirements, like any other appealing party.

Here, the children were aggrieved as the AFC argued against modifying the original custody order designating mother as the primary custodial parent and advocated that the children wished to remain primarily with her, but Family Court modified the custody order by awarding mother and father joint custody and shared residency.

Id.

OCFS Lacked Authority to Create Host Family Home Program as Alternative to State’s Statutory Voluntary Foster Care Regime

Program Undermines Carefully Designed Foster System, and Contravenes Various Critical Statutory Protections

In *Matter of Lawyers for Children v. New York State Off. of Children & Family Servs.*, 2026 N.Y. Slip Op. 03218 (May 21, 2026), the question was whether the New York State Office of Children and Family Services (OCFS) had the authority administratively to create the Host Family Home program as an alternative to the state’s statutory voluntary foster care regime. The Court of Appeals held that OCFS lacked such authority.

In New York, OCFS enforces child welfare laws and supervises the foster care system. It administers the voluntary foster care system, under a statutory scheme permitting parents temporarily to place their child in the custody of an “authorized agency” without giving up their parental rights. The authorized agency can then “place out” or “board out” the child with a foster family for the term of the placement. Generally, parents can reassume custody at their discretion within 10–20 days of their request, even before the placement term has expired.

Prior to the temporary foster care placement, OCFS must offer “preventive services,” intended to help resolve the familial impairment or disruption to forestall the child’s separation from the family home. This includes “respite care,” or “the temporary care and supervision of a child to relieve parents . . . where immediate relief is needed to maintain or restore family functioning.” Social Services Law § 409-a(5)(f). The respite care is limited to 30 days at a time, or up to seven weeks per year. Moreover, OCFS must determine whether there are family members or friends who could care for the child before permitting placement and must place siblings in the same foster home unless joint placement would not be in their best interests. Social Services Law § 384-a(1-a). The voluntary foster care statutes also require judicial involvement and oversight at several key points in time.

In 2021, OCFS promulgated regulations creating the Host Family Home program (the “program”), resembling voluntary foster care in many ways. However, under the program, parents retain legal custody of their child and can demand their immediate return at any time. Moreover, there is no requirement for judicial intervention and thus there is no assignment of counsel to parents or children during the placement.

The petitioners commenced this CPLR article 78 proceeding, seeking to annul the program, alleging it was promulgated contrary to law and in excess of OCFS’s regulatory authority. The Court of Appeals initially held that the petitioners, three legal services organizations that contract with state agencies to represent children in voluntary foster care proceedings, “had standing to bring this proceeding given that, under the unique circumstances of this case, they are the parties best situated to vindicate children’s interest in the statutory right to counsel under the voluntary foster care system, and it is exceedingly unlikely that children would be able to effectively seek

counsel to mount this challenge without petitioners’ involvement (citation omitted).” *Id.* at *2–3.

On the core issue, the Court held that the program had to be “annulled because it undermines the carefully designed foster system, and contravenes various critical statutory protections the legislature saw fit to include in that system.” *Id.* at *3. The court pointed to the facts that the statutory foster care system was developed through decades of legislative reform “intended to strengthen and standardize the state’s previous informal foster care regime”; none of the statutes “authorize or can be harmonized with the challenged regulations”; while the statutes require that where an authorized agency places or boards children, the custody of the child is vested with the agency, the program appears to permit the placement without the agency taking custody; and the program is not on the extensive list set forth in the Social Services Law of “every specific type of out-of-home placement an authorized agency is allowed to engage in.” *Id.*

The Court rejected the respondents’ arguments that the program was consistent with the preventative services policies under the Social Service Law or similar to respite care. Moreover, the program appears to eliminate important protections in the foster care system. For example,

[u]nder the program, courts need not approve placements lasting longer than 30 days, nor are they required to assess the well-being of the child if they have been left in foster care for over eight months. Because the courts are not involved, the State need not provide assigned counsel to parents or children to advocate for them during these otherwise mandatory hearings. OCFS is likewise not required to identify known friends or relatives who might care for the child, nor offer any government-paid preventive services, before allowing parents to access host family care.

Id. at *4.

The possible risk here is diverting children from the voluntary foster care system:

A parent would have virtually no reason to seek voluntary foster care if they can instead opt for host family care . . . While many of the statutory limitations on foster care can be frustrating to parents who seek (or need) this kind of assistance, these limits reflect the considered policy judgment of the legislature in balancing the interests of parents and children with the overall safety and stability of the foster care system writ large. It is not for this Court nor respondents to rate the wisdom of these choices by countenancing a parallel regulatory program that attempts to evade them.

Id.

In sum, the governing law did not permit OFCS to create the alternative Host Family Home program through regulation or “indicate that the legislature shared OCFS’s policy preference for the placement of children in Host Homes rather than in foster care.” *Id.*