APL-2018-00076

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Appellate Division, Second Department Docket Nos. 2013-06118 and 2013-06120

Court of Appeals

STATE OF NEW YORK

SOFIA FASOLAS, as Administratrix of the Estate of ELIAS N. FASOLAS, a/k/a ELIAS FASOLAS, deceased,

Plaintiff-Respondent,

against

BOBCAT OF LONG ISLAND, INC., BOBCAT COMPANY, an unincorporated business unit of Clark Equipment Company,

Defendants-Appellants,

PORT JEFFERSON RENTAL CENTER, INC. d/b/a TAYLOR RENTAL CENTER,

Defendant-Respondent,

and

BOBCAT OF NEW YORK, INC. and BOBCAT OF LONDON, LTD.,

Defendants.

BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

TREATISE:

CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. (hereinafter "DANY") as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

DANY is a specialty bar association created to promote continuing legal education, diversity and justice for all in the civil justice system.

This action for damages has been prosecuted under the theory of products liability. At issue is the application of this Court's well-settled decision in Scarangella v. Thomas Build Buses, Inc., 93 N.Y.2d 655 (1999).

The upshot of this litigation is that the courts below have crafted a significant exception to the Scarangella rule.

The rule set forth by this Court in Scarangella has been in place for almost 20 years, and it is accepted as settled law around the country. As multiple courts have recognized, the Scarangella rule is workable as written.

The exception crafted by the lower courts herein, which involves limiting Scarangella's application to instances where the end user is experienced, will create additional litigation and hamper the application of this laudable rule.

We submit that there is no good reason why this exception should be accepted by this Court.

STATEMENT OF FACTS

This case involves the issue of whether a Scarangella charge should be given to a jury deciding whether a product sold without optional safety equipment is defective when such product is sold to a buyer for use in the rental market.

As explained below, the jury in this case was presented with evidence that (1) the buyer was thoroughly knowledgeable regarding the product and its use and was actually aware that the safety feature is available; (2) there existed normal circumstances of use in which the product was not unreasonably dangerous without the optional equipment; and (3) the buyer was in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product. While the plaintiff offered conflicting evidence to support a finding that the product was defective without the available safety feature, based on the law of this Court, the jury should have been given a Scarangella instruction to consider before rendering its verdict.

a. The Product: Bobcat Steer Front Loader Model S175

Bobcat Company is the manufacturer of the Bobcat Steer Front Loader Model S175 (the "S175")(R 1370-373). Bobcat of

Long Island ("Bobcat LI") was Bobcat Company's Long Island distributor. The S715 is a lightweight and versatile piece of construction equipment (R 1362). Although featuring an open front entry operator cab, a rollover protection and fall protection system is standard equipment (R 1376, 1379, 1384). The standard open cab is open for ease of use, convenient entry and exit, and visibility (R 1390, 1602-604, 2423). The S175 (including the open cab) satisfies the standards set forth by the Society of Automotive Engineers ("SAE"), the International Standards Organization ("ISO"), and American National Standards Safety ("ANSI") (R 1470, 1474, 1874, 1878).

The S175 is primarily used to transport and level soil (R 1249, 1260). It accommodates up to 150 different attachments, allowing it to be used for numerous different tasks (R 376, 1342, 1364, 1380). Each attachment performs different functions. The bucket attachment, with or without teeth, could be used to move and pick up dirt, broken branches, downed trees, and winter debris (R 273). A bucket with teeth could also dig up and loosen hard-packed earth (R 208, 1833). However, the S175 with bucket attachment is not to be used to knock down trees (R 273).

The Lexan door is part of the special applications kit, which is not required for safe operation of the S175 (R 253, 257). The S175 can be used safely in a number of ways without a special applications kit installed.

In particular, when the Bobcat loader is used with a bucket attachment, a special applications kit is not necessary (R 1403-1404). The bucket is used to dig and carry loose materials and dump materials into a container or fill a hole. The bucket could also be used to back-drag. None of these uses necessitate the need for a special applications kit, including the Lexan door (R 1602). The Lexan door's purpose and design was to stop flying debris from entering the cab (R 253, 257, 265, 343). It was intended to be used with attachments that could break off or knock down objects in order to protect the operator from objects flying through the air (R 1604).

The S175 was designed to be used safely with a bucket attachment and an open cab (R 1399). Evidence was presented at trial that no other manufacturer of a similar skid-steer loader included a Lexan door or plastic cover of any kind as part of the standard features (R 1605). Indeed, evidence was presented demonstrating benefits of and considerations for

not using the Lexan door on the S175 with a bucket attachment, including:

- Operators of the S175 would get in and out of the machine four or five times an hour rendering doors a hindrance to utility;
- The Lexan does not have the same visual clearness for the operator that needs good visibility to see the load they are carrying;
- The Lexan could become clouded with dust during operation which reduced visibility;
- The Lexan could present an entrapment danger as it does not have an emergency exit feature that would allow the operator to open the front door.

(R 1389-1390, 1602-1604).

When other attachments which were likely to result in flying debris, such as the "brush saw" or jackhammer— i.e., a "hydraulic breaker," are used with the Sl75, the Lexan is to be used (R 1393-394, 1604). For example, the Lexan is standard for work involving the "environmental harvesting of trees" (R 1454-1455).

b. The Buyer: Taylor Rental Center

Port Jefferson Rental Center, Inc. operates an independent franchise of Taylor Rental Center ("Taylor") (R 350, 677). Taylor is a national chain affiliated with the True Value company (R 206, 677). Part of Taylor's business involves the rental of construction tools and equipment,

including jackhammers, stump grinders, and the S175. (R. 682, 685, 1237) Half of its business is the rental of construction equipment. (R. 1237-238) Taylor rents to both contractors and the public. (R. 685, 1238) It services the local community, including businesses, schools, fire departments, churches, and homeowners (R 1287).

In November 2006, Taylor purchased four S175 skid steer loaders from Bobcat Company (R 384). In the decade prior to the incident giving rise to this litigation, Taylor had purchased approximately 20 S175s in least a decade before the incident (R 384-85). Taylor placed its orders directly through Bobcat (R 203). Bobcat LI delivered the machines to Taylor (R 217).

During the delivery process for the S175, a Delivery Report containing a checklist of 20 items was provided to Taylor by Bobcat LI (R 220, 2629) Relevant here, item 12 on the Delivery Report stated: "Explain availability of Enclosures and Special Applications Kits to restrict material from entering cab openings" (R 2629). The Delivery Report had to be signed by both the Bobcat LI employee delivering the machine and the Taylor employee taking possession of it (R 220-221).

The S175 could operate with over 150 attachments, but Taylor only purchased buckets (R 207-8). One bucket was smooth and the other had "teeth" (R 207-8). The bucket with teeth was used to dig up dirt (R 208). Taylor had the option of which bucket it purchased with the S175 (R 693).

Taylor's procedure was to discuss the intended use of the machine with the rental customer in detail and recommend the proper attachments and safety information accordingly (R 1249, 1256). The customer was asked if the soil was hard packed (R 1256-257). The bucket with teeth was used to dig hard ground, and the smooth bucket to finish grade on loose soil (R 1276, 1288, 1290). If a customer advised that they were going to "clear dirt and dead logs," Taylor would ask "many, many, many more questions" (R 1256). Taylor would explain that the primary and intended use of the S175 is to move and level soil" (R 1249, 1250-1255). Taylor would not rent an S175 if the customer would be using it to pull up tree stumps or for demolition (R 1256, 1258-1259, 1287-1288). Pulling tree stumps was destructive to the machine and not its intended use (R 1258-1259). Taylor had different equipment to offer customers for tree stump removal (R 1260). The rental customer was also instructed to carry a load low (R 1269).

An Operator's Handbook and an Operation & Maintenance Manual was provided with each S175. Both discussed the availability of the special applications kit (R 224-25, 253-255, 326-327, 1635-1636, 2378, 2412). The optional Lexan door cost an additional $800 to $1,000 (R 257).

On the Delivery Report for the S175 involved in the accident, Item 12 was checked off indicating that Bobcat LI explained to Taylor the availability of the special applications kit to restrict material from entering cab openings (R 2629). Directly above the signature line for Taylor was an acknowledgement:

> "[t]he above delivery information has been explained to me. I understand the operation and maintenance of this machine . . .."

(R 2629-2630, 2661-2668).

c. The Accident And Suit

On March 10, 2017, Elias Fasolas ("the plaintiff") rented one of the S175 skid steer loaders Taylor purchased from Bobcat (R 691). In the course of this transaction, Taylor inquired as to the plaintiff's intended use of the S175, which was described as digging up hard soil and moving debris (R 521-522). The plaintiff planned to use the machine for one day (R 805). Taylor recommended the plaintiff get

teeth on the bucket in order to dig into compact soil (R 810).

After signing the contract, the plaintiff was instructed to bring his vehicle to the back of the store (R 696-697). Taylor's workers would put the S175 on the trailer and go over its operation with the plaintiff (R 697).

A review of the photographs admitted into evidence, however, reflect that the plaintiff was not just digging up hard soil or moving debris (R 2643-2644, 2689-2715, 2742-2759). In fact, while plaintiff was using the S175, a small tree entered the cab from underneath the bucket attachment and crushed him, resulting in his death. According to the investigating detective from the Suffolk County Police Department, the tree was still rooted in the ground (R 521-522).

Plaintiff thereafter sued Taylor and Bobcat Company, alleging that they were liable under theories of negligence, strict products' liability, breach of warranty, and failure to warn (R 39-55, 63-87, 109-125). In its answer, Bobcat asserted that the S175 was safe when properly used, and the operator was properly trained (R 101-102). The parties conducted discovery, and Bobcat Company moved for summary

judgment. The Supreme Court denied the motion. The parties then proceeded to trial.

d. The Trial And Jury Instructions

Bobcat Company requested that the jury receive a Scarangella charge (R 1955). The trial court declined to do so and concluded there were separate markets: use by professionals and for rental (R 2135). According to the trial court, Scarangella was inapplicable in the rental market (R 1955, 2277). Bobcat Company objected (R 2135). Instead of a Scarangella charge, the court created a jury charge based on PJI 2:120 (the standard charge regarding strict products liability). Over objection, the court modified the standard charge to conform to plaintiff's rental market liability theory (R 2295-2296, 2298).

The jury found in favor of plaintiff and against Bobcat Company and Taylor (R 2356-2361, 3076-3091). The jury found that the S175 was defectively designed for the rental market, but concluded Bobcat Company was not liable for an alleged failure to warn. All parties made post-trial motions to set aside the verdict and dismiss the complaint (R 3467-3501).

The trial court denied Bobcat Company's post-trial motion (R 14-15). The court acknowledged that "the equipment as sold may be adequately 'safe'" in the hands of

professionals, but it was the "non-professional occasional renter who deserved protection" (R 14-15). The court ruled that there were "two 'streams of commerce' into which the Bobcat machine in question was released and to which" Bobcat Company owed a duty (R 15). The jury found that the front windshield should have been installed on "all machines destined for rental to non-professionals," and the court refused to set it aside (R 15). Plaintiff thereafter filed a judgment (R 7-10). All parties appealed.

e. Appellate History

By decision dated April 12, 2017, the Appellate Division, Second Department affirmed the trial court's decision declining to vacate the jury verdict. Although the Appellate Division correctly acknowledged that a Scarangella charge was appropriate where the "buyer, mindful of the environment in which the product is to be used, is in a position to engage in rational and reasonable balancing of the risk against the reward of not purchasing the optional safety device, and can be assumed to be adequately motivated to do so," it held that Scarangella is not applicable where the product is knowingly sold to a rental company (R 3822-3831).

To distinguish Scarangella from this case, the Appellate Division noted that "the person making the purchasing decision on Taylor's behalf was not at risk of personal harm through use of the loader without the optional safety device, thus reducing the motivation to engage in a rational and reasonable risk-benefit analysis." The Appellate Division determined that while "Taylor could have been motivated by a desire to avoid tort liability to third parties placed at risk . . . in contrast to the immediate added cost of buying the optional safety device, the true cost of potential tort liability was uncertain and unknown at the time Taylor elected not to purchase the optional special applications kit." Ultimately, the Appellate Division concluded that "Bobcat could not have reasonably expected Taylor to be in a better position than itself to balance both the costs and benefits associated with inclusion of the optional safety device" (R 3829).

The Appellate Division, Second Department cited to no case from New York or any state in support its conclusion that Scarangella is not applicable when the product is sold for use in the rental market.

Bobcat Company timely moved at the Second Department for reargument or, in the alternative, for leave to appeal to

this Court. The Appellate Division, Second Department denied the motion. Thereafter, Bobcat Company timely moved for leave to appeal to this Court, and this Court granted this application (R 3832-3833).

POINT I

THE APPELLATE DIVISION HAS DRAMATICALLY DEPARTED FROM THE WELL SETTLED ANALYTICAL FRAMEWORK TO BE APPLIED IN THIS AREA OF THE LAW AND THIS COURT SHOULD REVERSE COURSE AND ADHERE TO ITS PRECEDENT IN SCARANGELLA

In Scarangella v. Thomas Build Buses, Inc., 93 N.Y.2d 655 (1999), this Court enunciated a policy limiting liability to manufacturers for design defect when the purchaser of the product is sophisticated in the use and application of the product. This case, however, seeks to shift that analysis from focusing on the purchase to focusing on the ultimate user of the product. Such a tectonic shift of the Scarangella rule would destroy it. Now, instead of a manufacturer being allowed to rely on the purchaser to determine what optional safety equipment is appropriate for their use, the manufacturer must investigate who the ultimate user of the product will be. This is contrary to the rule of law set by this Court in Scarangella and contrary to the policy behind that law. The Appellate Division's order, therefore, should be reversed.

A. The Law Under Scarangella

Generally, manufacturers may be held liable for selling defectively designed products because the manufacturer is

often in a "superior position to discover any design defects and alter the design before making the product available to the public" Scarangella, 93 N.Y.2d at 659 citing, Voss v Black & Decker Mfg. Co., 59 N.Y.2d 102, 107 (1983). However, this Court carved out an applicable exception in Scarangella:

> The product is not defective where the evidence and reasonable inferences therefrom show that: (1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product.

Id. at 661 (emphasis added)

In Scarangella, the plaintiff alleged that a school bus driven by a co-worker which injured him was defectively designed because the bus did not include a back-up alarm that sounded when the bus was being driven in reverse. Id. at 658. In dismissing the case, this Court first examined the sophistication of the purchaser, in that case, the bus company. This Court determined that the purchaser was a "highly knowledgeable" consumer. Id. at 661. In particular,

this Court observed that the purchaser (i) owned and operated school buses for decades and was aware that the bus driver had a blind spot when operating the vehicle in reverse; (ii) the purchaser knew the optional safety device (back-up alarm) was available at the time of purchase; and (iii) the product was in the exact condition contemplated and selected by purchaser at the time of purchase. Id.

Next, this Court analyzed the risk of potential harm that would be caused by the use of the product with the absence of an alarm. More specifically, this Court looked at "the actual circumstances of the operation of the buses in reverse by Huntington (the purchaser)" Id. Notably, this Court looked to the purchaser's policies with regard to using buses in reverse, not the user's behavior. In Scarangella, the only time the buses were used in reverse was in positioning the buses in and backing them out of the purchaser's yard per the policy set by the bus company. Id. at 662.

With respect to the third element this Court held:

> only [the purchaser] knew how it would instruct and train its drivers and when and how the buses would operate in reverse . . . The [purchaser] had the ability to understand and weigh the significance of costs associated with noise pollution and neighborhood

> relations, given the particular suburban location of the parking lot, against the anticipated, foreseeable risks of operating buses in a parking lot without a back-up alarm device or safeguard.

Id. As such, this Court found that the purchaser of the bus was sophisticated enough to determine what safety equipment was appropriate for its needs.

The Appellate Division, Fourth Department's decision in Biss v Tenneco, 64 A.D.2d 204 (4th Dep't 1978) is instructive as well. The decedent in Biss was operating a loader that went off the road and collided with a telephone pole. The plaintiff alleged that the manufacturer of the loader negligently designed the product without a rollover protection structure (referred to as a ROPS). The purchaser of the loader was aware that a ROPS could be purchased and added to the loader. For this reason, the Fourth Department concluded that the manufacturer cannot be liable. "If knowledge of available safety options is brought home to the purchaser, the duty to exercise reasonable care in selecting those appropriate to intended use rests upon him." Biss, 64 A.D.2d at 207. The Fourth Department went on to acknowledge that "[t]o hold otherwise casts the manufacturer and supplier in the role of insurers answerable to injured parties in any

event, because the purchaser of the equipment for his own reasons, economic or otherwise, elects not to purchase available options to ensure safety" Id. at 208.

Pahuta v. Massey-Ferguson, Inc., 170 F.3d 125 (2nd Cir. 1999) is also notable. The decedent in Pahuta was using a hydraulic tractor loader to load pipes into a tractor trailer. Like the equipment in this case, the loader in Pahuta was meant to be used with multiple attachments for multiple purposes. The wheels on the loader struck the wheels on the tractor trailer causing the pipes to come loose and fall on plaintiff. Notably, like plaintiff in this case, the Pahuta plaintiff alleged that the product was defective because the cab of the loader was not enclosed. Like the trial court in this case, the trial court in Pahuta refused to charge the jury with the law as outlined in Scarangella. However, the Second Circuit found that Biss, which was wholly consistent with this Court's subsequent decision in Scarangella, was the appropriate law that ought to have been charged to the jury and remanded the case for a new trial.

As the United States Court of Appeals for the Eighth Circuit noted in Parks v. Ariens Co., 829 F.3d 655 (8th Cir. 2016), Scarangella is the best summary of the law that has been adopted in many jurisdictions. [See, Austin v Clark

Equipment Co., 48 F.3d 833 (4th Cir. 1997) (applying Virginia law); Scallan v. Duriron Co., 11 F.3d 1249 (5th Cir. 1994) (applying Louisiana law); Morrison v. Kubota Tractor Corp., 891 S.W.2d 422 (Mo. Ct. App. 1994); Davis v Caterpillar Tractor Co., 719 P.2d 324 (Colo. Ct. App. 1985)]. That court went on to find that Supreme Court of Iowa would adopt Scarangella in a case where a lawnmower, which did not have a ROPS system, rolled over killing the operator.

The lawnmower in Parks was sold by the manufacturer to a dealer. The dealer elected not to purchase the ROPS because the owner of the dealer "preferred to leave the choice to his customers." Parks, 829 F.3d at 657. The lawnmower was purchased and later traded back in by a customer of the dealer. Later, the dealer sold the lawnmower, without the ROPS, to the decedent. The owner of the dealer remembered selling the mower to the decedent and specifically discussed the types of terrain on which the decedent intended to operate the mower. The owner did not recall specially discussing the availability of the ROPS but did testify that he had such a conversation with all of his customers and was aware of no reason why he would not have discussed it with the decedent. Additionally, the owner had every customer

sign an Equipment Safety Check form which specifically covered the use of a ROPS.

With regard to the first Scarangella factor, the Parks court found that the conversations between the decedent and the owner of the dealership, and the use of the Equipment Safety Check form rendered the decedent a knowledgeable purchaser. Id. at 660. The Eighth Circuit also concluded that there were normal uses of the mower without a ROPS that was not inherently dangerous which satisfied the second Scarangella factor. Id. Finally, the decedent's knowledge of the property he intended to mow put him in the best position to determine if the ROPS was appropriate for his needs. Id.

Scarangella has been accepted law in New York and around the country for almost twenty years. Multiple courts have found it workable and worthy of continued application. By limiting its application to only those circumstances when the person who ultimately uses the product is experienced would add layers of litigation and analysis that would make the rule less effective. If the Appellate Division's order is affirmed, the analysis would now encompass the knowledge of the purchaser, the business model employed by the purchaser, whether the purchaser was at personal risk of injury and

whether the purchaser would allow someone with little experience to use the product. Such layers of inquiry would make Scarangella unworkable. The Appellate Division's order, therefore, should be reversed.

B. By Excluding The "Rental Market" From Scarangella, The Appellate Division Has Incorrectly Shifted The Legal Analysis At Issue

Application of Scarangella focuses the analysis on the knowledge of the purchaser, not the knowledge of the user. Moreover, it does not consider the purchaser's business as a basis to second guess the purchaser's decision to purchase optional safety equipment. By focusing on the fact that Port Jefferson Rental was operating in the "rental market," the Appellate Division has reformulated Scarangella in a way not previously envisioned by this Court's precedents. As such, this Court reverse course and focus on the fact that Port Jefferson Rental's knowledge as a purchaser, instead of its business model.

In this case, the Appellate Division attempted to distinguish Port Jefferson Rental's business from the defendant in Scarangella because the equipment at issue here was not being used by the purchaser’s employees. "Where, as here, the buyer is purchasing the product for use not by its employees but by the general public, over whom the buyer will

exercise no control once the product is rented, it would be inappropriate to apply an exception to liability that is premised on the buyer being in a superior position to make the risk-utility assessment." (R 3828) Moreover, the Appellate Division incorrectly imposed a new layer of analysis by holding "[h]ere, however, the person making the purchasing decision on Taylor's behalf was not at risk of personal harm through a rational and reasonable risk-benefit analysis. Taylor could have been motivated by a desire to avoid tort liability to third parties placed at risk" (R 3829). Stated differently, the Appellate Division has found that not only must the purchaser be knowledgeable of the risks of not purchasing optional safety equipment, but the purchaser must also be at personal risk of injury in order to justify their decision.

Absent from the Appellate Division's decision is any authority, from this or any other court, to justify such a departure from Scarangella. Instead, the Appellate Division cited to James A. Henderson, Jr. and Aaron D. Twerski Optional Safety Devices: Delegating Product Design Responsibility To The Market 45 Ariz. St. LJ 1399 (2013). This article, however, advocates for a new Restatement section on the issue of optional safety equipment that is

admittedly at odds with current New York law. For example, the Appellate Division's finding that the purchaser ought to be at risk of personal harm in order for Scarangella to apply is premised on the article. However, as the authors acknowledge, *they were the first and only ones* to have such a requirement. "To these traditionally-recognized characteristics of knowledgeability and cognitive capacity this analysis adds a third characteristic, *as yet unrecognized in the literature* or *judicial decisions*, that must be satisfied for a purchaser to reach reasonable, socially optimally decisions regarding optional safety devices—adequate motivation to weigh the relevant social costs and benefits without unduly favoring the purchaser's own selfish interests." (Optional Safety Devices, 45 Ariz. St. LJ at 1405 (emphasis added). Moreover, the authors are of the opinion that Scarangella is not workable in its current form. Id. at 1421. ("For the rule in Scarangella to function as a meaningful safe haven for product sellers the factors set forth will require considerable revision").

Importantly, while the vernacular of Appellate Division's order speaks of the purchaser, the court was instead focused on the position of the user of the product. Disqualifying this case from Scarangella analysis because the

purchaser was in the "rental market" is simply holding that Scarangella only applies when the actual user is sophisticated in the risks of using the product without optional safety equipment. Such a rule, however, returns the burden of the risk-utility analysis to the manufacturer instead of the knowledgeable purchaser who is in the superior position to determine how the product will be used and what risks are attendant to that use. We submit that this is exactly the opposite of what this Court intended when crafting the Scarangella factors. As such, the Appellate Division erred in finding that Scarangella does not apply to this case because the purchaser of the product was in the "rental market."

C. The Appellate Division's Order Should Be Reversed Because The Jury Did Not Evaluate This Case In Accordance With Scarangella

This case should be remanded for a new trial so a jury can be given an instruction of the law that is consistent with Scarangella. By summarily determining that Scarangella does not apply to the "rental market," the lower courts in this case deprived the jury of the ability to evaluate this case under the correct legal principles. For the reasons stated above, Scarangella applies to the facts of this case

and the jury should be instructed in this regard before a verdict that is inconsistent with Scarangella is affirmed.

CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

Dated: Jericho, New York
December 4, 2018

Respectfully submitted,

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CERTIFICATION PURSUANT TO §500.13(c)(1)

Court of Appeals

I hereby certify pursuant to §500.13(c)(1) that the foregoing brief was prepared on a computer.

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