To be Argued by:
JOHN A. COLLINS, ESQ.
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(10 Minutes)

STATE OF NEW YORK

Supreme Court

APPELLATE DIVISION–FOURTH JUDICIAL DEPARTMENT

Appellate Division Docket Number: CA 19-00899

DAVID M. BONCZAR,

Plaintiff-Appellant,

vs.

AMERICAN MULTI-CINEMA, INC. d/b/a AMC THEATRES WEBSTER 12 (as Successor in Interest to Loews Boulevard Cinemas, Inc. f/k/a Loew's Boulevard Corporation and/or Loews Theater Management Corp.),

Defendants-Respondents.

Erie County Index No. 804799/2014.

BRIEF FOR PLAINTIFF-APPELLANT DAVID M. BONCZAR

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PRELIMINARY STATEMENT

David Bonczar, the plaintiff in this personal injury action brought under Labor Law § 240 (1), is appealing from a final Judgment of the Supreme Court, County of Erie (Joseph R. Glownia, J.), entered April 25, 2019. The Judgment dismissed Mr. Bonczar's complaint pursuant to a jury verdict rendered on April 25, 2018 in favor of defendant American Multi-Cinema, Inc. Plaintiff's appeal brings up for review all issues resolved in Supreme Court's Decision and Order entered December 7, 2018, in which the court denied plaintiff's motion for a directed verdict pursuant to CPLR 4401 or, alternatively, for an order setting the verdict aside and granting a new trial pursuant to CPLR 4404 (a).

As demonstrated below, the trial court erred in denying plaintiff's motion for a directed verdict because, when viewed in the light most favorable to defendant, and with all permissible inferences drawn in its favor, there is no rational process by which the jury could find in defendant's favor. Alternatively, and at a minimum, the verdict should be set aside and a new trial granted because it is contrary to the weight of the evidence, and because defense counsel's misconduct at trial tainted the proceeding, thus requiring that the verdict be set aside in the interest of justice.

QUESTIONS PRESENTED

1. When the trial proof is viewed in the light most favorable to defendant, with all permissible inferences drawn in its favor, could the trier of fact rationally find in defendant's favor?

The trial court said yes.

2. Was the jury's verdict contrary to the weight of the evidence?

The trial court said no.

3. Should the jury's verdict be set aside in the interest of justice based on defense counsel's improper conduct, statements, and arguments at trial?

The trial court said no.

STATEMENT OF THE NATURE OF THE CASE AND FACTS

A. THE NATURE OF THE CASE

David M. Bonczar commenced this action to recover damages compensating him for personal injuries arising out of an accident that occurred on May 22, 2013, when he fell from an unstable ladder while engaged in the renovation of a movie theater in Webster, New York (Summons and Complaint, R. 14-20). Plaintiff named as defendant American Multi-Cinema, Inc. (hereafter, "AMC"), the theater's owner (R. 17, ¶ 4). As amplified in his Bill of Particulars, and insofar as relevant to the issues raised on this appeal, plaintiff alleges that AMC is liable under Labor Law §

240 (1) (R. 38, ¶ 23).

On a prior appeal, the Fourth Department reversed an order of the trial court and denied plaintiff's motion for partial summary judgment as to liability under section 240 (1). *Bonczar v. American Multi-Cinema, Inc.*, 158 A.D.3d 1114 (4th Dep't 2018) (3-2). The majority held that, because plaintiff "acknowledged that he might not have checked the positioning of the ladder or the locking mechanism . . . [t]here is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident." 158 A.D.3d at 1115 (citation and internal quotation marks omitted). The dissent disagreed, "conclud[ing] that plaintiff's deposition testimony does not support a nonspeculative inference that the sole proximate cause of his injuries was his alleged failure to check the positioning of the ladder or whether it was locked into place." 158 A.D.3d at 1117 (Whalen, P.J. and Lindley, J., dissenting).

The action was subsequently tried before a jury from April 17 through 25, 2018. At the close of the evidence, plaintiff moved for a directed verdict on the issue of defendant's liability under Labor Law § 240 (1) (R. 812-825). The court reserved decision (R. 825).

The jury returned a verdict in which it found that: (1) Labor Law § 240 (1) was not violated by a failure to provide proper protection; (2) plaintiff failed to check

the positioning of the ladder; (3) the ladder was improperly positioned to perform the work; (4) plaintiff fell because the ladder was improperly positioned to perform the work; and (5) the improper position of the ladder was the only substantial factor in causing plaintiff's fall (Trial Transcript, R. 960-961; Verdict Sheet, R. 1048-1051, ¶¶ 1, 3-6).

Plaintiff thereafter made a post-trial motion, seeking a directed verdict under CPLR 4401 based on his trial motion (on which the court had reserved decision) or, alternatively, an order setting aside the verdict and granting a new trial pursuant to CPLR 4404 (a) (R. 1323-1350). Plaintiff argued that the verdict should be set aside (1) as contrary to the weight of the evidence, and (2) in the interest of justice, based on defense counsel's improper and prejudicial conduct, statements, and arguments throughout the course of the trial (R. 1333-1350). AMC opposed the motion (R. 1696-1718).

By Decision and Order entered December 7, 2018, the trial court denied plaintiff's post-trial motion in its entirety (R. 8-13). A final Judgment in defendant's favor was entered on April 25, 2019 (R. 6-7). Plaintiff timely appealed the Judgment (R. 1-5), thereby bringing up for review all issues resolved in the Decision and Order, which was subsumed in the Judgment.[1]

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[1] Plaintiff timely appealed the Decision and Order entered December 7, 2018; he withdrew the appeal without prejudice pursuant to 22 NYCRR 1250.2 (b) (1) after taking an appeal from the Judgment.

B. THE FACTS

1. *The Trial Proof.*

In February 2013, defendant AMC entered into a construction contract with Whiting-Turner Contracting Company for the renovation of its twelve-screen movie theater in Webster, New York (R. 964-989). Plaintiff's employer, All State Fire Equipment of WNY, was engaged as a subcontractor to provide fire alarm and sprinkler protection as part of the renovation (R. 473-474).

On May 22, 2013, approximately five or six All State employees were working at the theater (R. 476). They included the plaintiff, David Bonczar, and Robert Lutz (R. 95-96; 504-505; R. 508-509).

Mr. Bonczar testified that on the morning of May 22, 2013, he and Mr. Lutz went to the theater's cash room, which is located down a hallway off the atrium, to determine where a new smoke detector should be installed (R. 96-98). At that time, there were other workers in and around the cash room (R. 99). There were also one or two ladders present in the room, which Mr. Bonczar and Mr. Lutz used to survey the area above the drop ceiling (R. 97-99; R. 102-103; R. 155). They subsequently left the cash room and surveyed several other areas in the theater, after which they split up (R. 100; R. 140). Mr. Bonczar obtained the tools and materials he needed to install the smoke detector in the cash room, and returned there on his own to perform the installation work (R. 100-101; R. 140).

Upon reentering the cash room, Mr. Bonczar observed only one ladder there, i.e., "a 6-foot A-frame ladder that was fully extended, standing freely in the middle of the room" (R. 101; R. 155). Mr. Bonczar said the ladder looked like one belonging to his employer, but that he could not be certain it was (R. 166). He used the ladder to perform the installation work (R. 101). Before doing so, he visually inspected it and observed that it was free of any defects (R. 102; R. 115-116; R. 124). Mr. Bonczar also "grabbed the – one of the rungs on the steps and the back support on the back of the ladder and made sure, tugged on it, that the ladder was fully opened to its furthest position" (R. 102). The ladder, he stated, contained two hinged arms or spreader bars that connected the front section to the rear section (R. 104). When you pull hard on the front and back sections, he explained, "the arms drop down to the bottom" and the legs are "fully extended" (R. 104). Thus, he further stated, when the legs are full extended and the spreader bars drop down, the bars are "forced downward" and necessarily "locked into place" (R. 206). Mr. Bonczar pulled the legs apart before using the ladder, ensuring that they were as far apart as possible and that the spreader arms were all the way down (R. 104-105; R. 115-116; R. 124-125; R. 161; R. 163; R. 205-206).

After visually inspecting and physically testing the ladder in that manner, Mr. Bonczar proceeded to use it while performing his installation work (R. 104-105). In doing so, he positioned himself in the middle of the ladder, between the two side

rails (R. 189). With the ladder remaining in the same position, he ascended and descended it four to six times without incident (R. 105-106; R. 138; R. 161; R. 163; R. 191). Mr. Bonczar visually observed that the ladder remained fully open throughout that time (R. 105-106). He did not physically test it before each ascent, however, because he never moved or repositioned it (R. 105-106).

Toward the end of the installation process, Mr. Bonczar again ascended and descended the ladder (R. 106; R. 136; R. 189). As he was coming down, "the ladder shifted and wobbled," causing him to lose his balance miss a step while moving from the fourth to the third fourth step (R. 106; R. 164; R. 167). Upon losing his balance, plaintiff fell backward, "lost grip on [his] right hand," and eventually released his left hand as well (R. 166-168). Plaintiff landed on his back on the floor, and the ladder remained standing (R. 106; R. 143; R. 168).

On cross-examination, defense counsel read to Mr. Bonczar a portion of his pretrial deposition testimony in which he was asked if, "immediately prior to falling," he had checked to make sure the ladder was properly positioned, with the spreader arms locked into place (R. 161-162). Mr. Bonczar responded at the deposition that he did not know if he did so "that specific time" (R. 161-162).

In explaining his deposition response at trial, Mr. Bonczar testified:

> A. You were saying immediately before I went up. I mean, before I had went up the first time, I checked it in place by pulling on it, visually seeing that it was open and extended fully. And after that,

> it didn't move. The immediately before, as your question was, immediately before, the last time I visually saw, nothing had changed. I hadn't moved the ladder, it was in the same position. So I can't say for sure that I checked it that final time. But that four – before I went up any of those four to six times, the ladder was firm fitted, fully extended, by pulling out on it. [R. 162.]

Plaintiff called Arthur Dube, a construction safety consultant, as an expert witness (R. 239-244). After recounting plaintiff's testimony as to the circumstances surrounding his fall – i.e., that as he was descending a six-foot step ladder, it shifted and wobbled, causing him to miss a step and fall to the floor – counsel asked Mr. Dube if he had an opinion "as to whether the construction safety law known as Labor Law Section 240 paren 1 was violated and whether he was not provided with the statutorily mandated proper protection?" (R. 253-254). Mr. Dube opined: "Yes. Obviously. He fell. So he wasn't protected properly" (R. 254).

Defendant called Daniel Paine, a construction site safety consultant, as an expert witness (R. 622-625; R. 635; R. 651). Mr. Paine did not take issue with the method by which plaintiff inspected and tested the ladder before using it. In particular, he did not opine that plaintiff had not properly positioned the ladder and ensured the spreader bars were in place by visually examining it and physically pulling the front and rear sections as far apart as they could go. Rather, Mr. Paine opined that David Bonczar had been provided with proper protection under Labor Law § 240 (1) because "he was provided with a ladder that was adequate [and]

properly set up" (R. 662 [emphasis supplied]). Mr. Paine also opined that, in any event, the question of whether Mr. Bonczar "had set [the ladder] up properly and performed his work isn't the issue" (R. 659). Rather, he asserted:

> The issue here is he's descending the ladder. And when you descend and/or ascend a ladder, you must maintain three point contact on that ladder, that is one foot and two hands or two feet and one hand, so how you go up and down the ladder. And if you do that, you wouldn't fall. [R. 659.]

Mr. Paine further stated that plaintiff's "problem was when he was descending the ladder, that he did not keep the proper protocols which would have prevented him from falling, therefore making him basically the proximate cause of his own accident" (R. 662).

On cross-examination, Mr. Paine was asked if a worker's positioning of his feet on two separate steps of a step ladder can cause the device to wobble (R. 723). "It happens all the time," he said (R. 723).

In explaining his opinion that plaintiff's failure to maintain three-point contact proximately caused his fall, Mr. Paine stated: "The evidence is that the ladder supposedly twisted or wobbled and he let go of it. That's not something you can do" (R. 719). Asked if he meant that a person who misses a step because a ladder shook or wobbled must continue holding on to the ladder, Mr. Paine stated: "Of course they do. They're not going to fall if they hold on to it" (R. 721). He further asserted that when a ladder shakes or wobbles while a person is on it, "[t]here's no reason why

he should miss a step" (R. 721-722). And, when asked if a person who begins to fall after missing a step because a ladder shifted or wobbled must keep holding on to the ladder as they fall, Mr. Paine stated: "They shouldn't fall to the ground" (R. 722).

2. *The Jury Charge and Verdict.*

In instructing the jury, the trial court charged that plaintiff had the burden of proving he was not provided with proper protection under Labor Law § 240 (1), and that defendant bore the burden of proving that plaintiff's actions were the sole substantial factor in causing his fall (R. 932-937). The court further instructed that, although "David Bonczar could not identify the reason the ladder shifted or wobbled, there is a presumption that the ladder was not good enough to afford the statutorily mandated proper protection when it shifted or wobbled for no apparent reason" (R. 936).

In accordance with this Court's analysis, *see Bonczar*, 158 A.D.3d at 1115, the trial court further instructed:

> In this case, in order to overcome the presumption that the ladder failed to provide the required proper protection and a finding that the law was violated, the defendant must have proved that the plaintiff David Bonczar, on the day of the incident, never checked the positioning of the ladder, and that the ladder was improperly positioned, which caused the ladder to shift and wobble, and those two factors – facts were the only substantial factor in causing the ladder to shift or wobble or for David Bonczar to fall; or, the defendant must have proved that the plaintiff David Bonczar, on the day of the incident, never checked whether the spreader arms were

> fully extended, and that the spreader arms were not fully extended, which caused the ladder to shift or wobble, and those two facts were the only substantial factors in causing the ladder to shift or wobble and for David Bonczar to fall.
>
> If you find that the defendant proved the specific facts set forth above and overcame the presumption that the statute was violated, you will find for the defendant on this issue. [R. 936-937.]

The factual questions identified by the court were set forth in a Jury Verdict Sheet (R. 1043-1047).

During the course of its deliberations, the jury sent a note asking for "clarification on the meaning of positioning of ladder[,] ex: location or setup" (R. 1057). In response, the court stated: "Question 3, the position of the ladder is not to the physical location of the ladder in the room but to the setup of the ladder. Did that answer the question for you?" (R. 959). The foreperson responded, "Yes" (R. 959).

As stated above, the jury returned a verdict in which it found that: (1) Labor Law § 240 (1) was not violated by a failure to provide proper protection; (2) plaintiff failed to check the positioning of the ladder; (3) the ladder was improperly positioned to perform the work; (4) plaintiff fell because the ladder was improperly positioned to perform the work; and (5) the improper position of the ladder was the only substantial factor in causing plaintiff's fall (Trial Transcript, R. 960-961; Verdict Sheet, R. 1048-1051, ¶¶ 1, 3-6).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A DIRECTED VERDICT AS TO DEFENDANT'S LIABILITY UNDER LABOR LAW § 240 (1)

A. JUDGMENT AS A MATTER OF LAW UNDER CPLR 4401.

Pursuant to CPLR 4401, "[a]ny party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of evidence presented by an opposing party with respect to such cause of action or issue . . . ." Judgment is warranted under the rule "when, viewing the evidence in the light most favorable to the nonmoving party and affording such party the benefit of every inference, there is no rational process by which a jury could find in favor of the nonmovant." *Clune v. Moore*, 142 A.D.3d 1330, 1331 (4th Dep't 2016) (citation, internal quotation marks, and brackets omitted). *Accord Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556 (1997).

Although the sufficiency of the trial evidence is, initially, a matter for the trial court's consideration, it presents a question of law and is thus subject to de novo appellate review. *See Killon v. Parrotta*, 28 N.Y.3d 101, 108 (2016) ("Because determining whether a jury verdict was utterly irrational involves a pure question of law, this Court may look at the trial evidence and make that determination");

DeAngelis v. Protopopescu, 37 A.D.3d 1178, 1178-1179 (4th Dep't 2007) (holding that Supreme Court erred in denying defendant's motion for a directed verdict because "there is no rational process by which the jury could find" in plaintiff's favor).

B. A LITIGANT WHO UNSUCCESSFULLY MOVED FOR SUMMARY JUDGMENT MAY NEVERTHELESS OBTAIN A DIRECTED VERDICT UNDER CPLR 4401 BASED ON THE TRIAL PROOF.

The Fourth Department's prior denial of David Bonczar's motion for partial summary judgment[2] does not bar a directed verdict in his favor under CPLR 4401. It is well established that "[a] denial of a motion for summary judgment is not necessarily *res judicata* or the law of the case that there is an issue of fact in the case that will be established at the trial." *Wyoming County Bank v. Ackerman*, 286 A.D.2d 884, 884 (4th Dep't 2001). "Thus," the Court held, "the trial court was not precluded from directing a verdict in plaintiff's favor" even though "another Supreme Court Justice . . . had previously denied plaintiff's motion for summary judgment." *Id.*

That principle applies with equal force where, as in the present case, the Appellate Division rather than the trial court denied a party's motion for summary judgment. In *Smith v. Hooker Chemicals & Plastics Corp.*, 89 A.D.2d 361 (4th Dep't 1982), *appeal dismissed*, 58 N.Y.2d 824 (1983), the Fourth Department – reversing

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[2] *Bonczar v. American Multi-Cinema, Inc.*, 158 A.D.3d 1114 (4th Dep't 2018).

the trial court – denied the plaintiff's motion for partial summary judgment as to liability under Labor Law § 240 (1). Noting that plaintiff had testified he fell because safety lines that were attached to his safety belt gave way, while a coworker testified that plaintiff was not using the safety lines or belt, the Court held that there was a triable question of fact as to whether plaintiff had "declined to use the available safety devices . . . ." 89 A.D.2d at 363-363.

At the subsequent trial, Supreme Court granted plaintiff's motion for judgment as a matter of law under CPLR 4401. The Fourth Department affirmed, holding:

> Even though plaintiff was previously denied summary judgment by this court, the trial court was not precluded from directing a verdict in plaintiff's favor after all the evidence was presented. That evidence established, as a matter of law, that defendant had violated Labor Law § 240 (1) and that the violation was a proximate cause of plaintiff's injuries.

Smith v. Hooker Chemical & Plastics Corp., 125 A.D.2d 944, 946 (4th Dep't 1986), *aff'd*, 70 N.Y.2d 994 (1988), *rearg. denied*, 71 N.Y.2d 995 (1988).

As demonstrated below, the trial evidence in the present case, as in *Smith*, establishes plaintiff's entitlement to a directed verdict on the issue of defendant's liability under Labor Law § 240 (1) notwithstanding this Court's prior denial of his motion for partial summary judgment.

C. DAVID BONCZAR WAS ENTITLED TO A DIRECTED VERDICT.

1. *The Evidentiary Basis for this Court's Denial of Plaintiff's Motion for Partial Summary Judgment as to Liability.*

In denying David Bonczar's motion for partial summary judgment, the Fourth Department held:

> Plaintiff did not know why the ladder wobbled or shifted, and he acknowledged that he might not have checked the positioning of the ladder or the locking mechanism, despite having been aware of the need to do so. We thus conclude that plaintiff failed to meet his initial burden on the motion. There is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident.

Bonczar, 158 A.D.3d at 1115 (citation, internal quotation marks, and brackets omitted).

The Court's legal analysis was predicated on plaintiff's pretrial deposition testimony, which is contained in the present record on appeal as Court Exhibit 17 (R. 1203-1318). Mr. Bonczar testified that, on the day of his accident, he and a coworker used one or more ladders to examine the area above the cash room ceiling in order to determine where a new smoke detector should be installed (R. 1217-1220; R. 1241-1243). There were a number of contractors and ladders on site, Mr. Bonczar said, and he could not state with certainty whether, in performing the preliminary

inspection, he had brought a ladder into the cash room or used one that was already there (R. 1221; R. 1224; R. 1226-1227; R. 1240-1244).

Mr. Bonczar further testified that, in subsequently installing the smoke detector, he used a ladder that was "upright," "fully open," and positioned approximately three to four feet from the entry door (R. 1246-1248). Although he said it was "feasible" he moved the ladder before starting the installation work, Mr. Bonczar stated: "I don't recall actually moving it" (R. 1247). During the installation process, he ascended the ladder, performed some work, and began to descend (R. 1252-1253). As he was doing so, the ladder shifted and wobbled, causing him to lose his balance and fall (R. 1206; R. 1254-1255; R. 1264).

In questioning Mr. Bonczar as to his examination of the ladder, defense counsel expressly confined her inquiry to the ascent that he made immediately before his accident. Counsel asked:

> Q. Before you went up the ladder – *I'm talking about specifically the time immediately prior to falling*. So before you went up that ladder, did you check to make sure that the ladder was properly positioned? [R. 1249 (emphasis supplied).]

In response, plaintiff testified:

> A. I don't recall. I'd like to say that, you know, that's something I try to do. *I just can't be sure I did it that specific time*. [R. 1249 (emphasis supplied).]

Still referring to the time period immediately preceding plaintiff's fall, defense counsel then asked if plaintiff checked the hinged spreader bars to determine

"whether the ladder was locked into place?" (R. 1250). Plaintiff responded "I don't recall" (R. 1250).

Based on that temporally limited testimony, the Fourth Department held that there was a question of fact as to whether there was a statutory violation or, alternatively, whether plaintiff's own acts or omissions relating to the ladder's set-up constituted the sole proximate cause of his accident. *Bonczar*, 158 A.D.3d at 1115.

2. *The Trial Evidence.*

In contrast to his pretrial deposition testimony, David Bonczar's trial testimony was not limited to his examination of the ladder immediately before his final ascent. Rather, it also encompassed his visual and physical inspection of the ladder prior to and throughout the time he performed installation work in the cash room. As shown below, Mr. Bonczar's testimony establishes that he determined the ladder was properly positioned, and that the spreader bars were fully open, before he began the installation work. The ladder nevertheless shook and wobbled as he was descending it, causing him to fall. Mr. Bonczar is therefore entitled to judgment as a matter of law under CPLR 4401. The ladder's undisputed failure establishes that it was not constructed, placed, and operated so as to provide the proper protection mandated by Labor Law § 240 (1), and defendant failed to interpose evidence warranting submission of the case to the jury on the question of whether plaintiff's

own conduct constituted the sole proximate cause of his fall.

Mr. Bonczar testified that, on the day of his accident, he and coworker Robert Lutz initially went to the cash room to determine where a new smoke detector should be installed (R. 97-98). At that time, there were at least one or two ladders in the room, which they used to survey the area above the drop ceiling (R. 97-99; R. 155). After surveying several other areas in the theater, Mr. Bonczar and Mr. Lutz split up (R. 100; R. 140). Mr. Bonczar then retrieved the tools and materials he needed to install the smoke detector in the cash room, and returned there on his own to perform the installation work (R. 100-101; R. 140).

Upon reentering the cash room, Mr. Bonczar saw only one ladder there, i.e., "a 6-foot A-frame ladder that was fully extended, standing freely in the middle of the room" (R. 101; R. 155). Mr. Bonczar used it to perform the installation work (R. 101). Before doing so, he visually inspected the ladder and observed that it was free of any defects (R. 102; R. 115-116; R. 124). Mr. Bonczar also "grabbed the – one of the rungs on the steps and the back support on the back of the ladder and made sure, tugged on it, that the ladder was fully opened to its furthest position" (R. 102). The ladder incorporated two hinged arms or spreader bars that connected the front section to the rear section (R. 104). When you pull hard on the front and back sections, plaintiff explained, "the arms drop down to the bottom" and the legs are "fully extended" (R. 104). Mr. Bonczar did so before using the ladder, ensuring that the

legs were pulled apart as far as they could go and that the spreader arms were all the way down (R. 104; R. 116; R. 124-125). When the spreader bars are "forced downward" in that fashion, they are necessarily "locked into place," Mr. Bonczar testified (R. 206).

After visually inspecting and physically testing the ladder in that manner, Mr. Bonczar proceeded to use it while performing his installation work (R. 104-105). With the ladder remaining in the same position, he ascended and descended it four to six times without incident (R. 105-106; R. 138). Mr. Bonczar visually observed that the ladder remained fully open throughout that time (R. 105-106). He did not physically test it before each ascent, however, because he never moved or repositioned it (R. 105-106).

Toward the end of the installation process, David Bonczar again ascended and descended the ladder (R. 106; R. 136). As he was coming down, "the ladder shifted and wobbled," causing him to miss a step and fall to the floor as he was moving from the fourth to the third fourth step (R. 106; R. 164). On cross-examination, defense counsel read to Mr. Bonczar the portion of his deposition testimony in which he testified that he could not recall having checked to make sure the ladder was properly positioned, with the spreader arms locked into place (R. 161-162). In response, Mr. Bonczar testified:

> A. You were saying immediately before I went up. I mean, before I had went up the first time, I checked it in place by pulling on it, visually

> seeing that it was open and extended fully. And after that, it didn't move. The immediately before, as your question was, immediately before, the last time I visually saw, nothing had changed. I hadn't moved the ladder, it was in the same position. So I can't say for sure that I checked it that final time. But that four – before I went up any of those four to six times, the ladder was firm fitted, fully extended, by pulling out on it. [R. 162.]

In contrast to his deposition testimony (with which it is entirely consistent), David Bonczar's trial testimony establishes his prima facie entitlement to judgment as a matter of law on the issue of defendant's liability under Labor Law § 240 (1). Unconstrained by the temporal limitation that defense counsel imposed when examining him (i.e., seeking a description solely of his inspection efforts immediately before his accident), Mr. Bonczar established that he visually examined and physically tested the ladder before ascending it the first time, and continued to visually inspect it while using it in the same location.

Those inspections materially distinguish this action from *Blake v. Neighborhood Hous. Servs. of New York City*, 1 N.Y.3d 280 (2003), upon which this Court relied in denying Mr. Bonczar's motion for partial summary judgment. *See Bonczar*, 158 A.D.3d at 1115. In *Blake*, the plaintiff – who was injured when his extension ladder suddenly retracted – conceded that "he was not sure if he had locked the extension clips in place before ascending the rungs." 1 N.Y.3d at 284. Upon considering that testimony, the jury found that there had been no statutory violation, "leading to the inescapable conclusion that the accident happened not because the

ladder malfunctioned or was defective or improperly placed, but solely because of plaintiff's own negligence in the way he used it." *Id.*

In the present case, by contrast, Mr. Bonczar's thorough visual and physical examination of the ladder before he first climbed it establish that he exercised reasonable care before using the device. That is further borne out by the fact that: (1) after performing those preliminary inspections, Mr. Bonczar did not reposition the ladder during the course of his work, (2) Mr. Bonczar visually confirmed that the ladder remained fully open, with the spreader bars extended, throughout the course of his work, and (3) Mr. Bonczar successfully ascended and descended the ladder four to six times before his accident.

Thus, the trial evidence does not support a nonspeculative inference that plaintiff failed to check the positioning of the ladder or the spreader bars before ascending it. *Cf. Bonczar*, 158 A.D.3d at 1115. Furthermore, the unrefuted fact that the ladder wobbled and shifted "for no apparent reason" gives rise to a *legal* "presumption that the ladder . . . was not good enough to afford proper protection." *Blake*, 1 N.Y.3d at 289 n.8. *See also Garcia v. Church of St. Joseph of the Holy Family of the City of New York*, 146 A.D.3d 524, 525 (1st Dep't 2017) ("Plaintiff's testimony that the ladder shifted as he descended, thus causing his fall, established a prima facie violation of Labor Law § 240 [1]"); *Hill v. City of New York*, 140 A.D.3d 568, 568-570 (1st Dep't 2016) (plaintiff who lost his balance and fell when

the ladder he was on "wobbled" entitled to judgment as a matter of law); *Evans v. Syracuse Model Neighborhood Corp.*, 53 A.D.3d 1135, 1136 (4th Dep't 2008) (plaintiff demonstrated his entitlement to judgment as a matter of law by establishing that he fell from an aluminum pick when the ladder supporting it "shifted"); *Newman v. C. Destro Dev. Co., Inc.*, 46 A.D.3d 1452, 1452 (4th Dep't 2007) (plaintiff's showing that "he fell from an unstable ladder . . . establish[ed] as a matter of law that the ladder failed to provide him with adequate protection").

In the face of plaintiff's prima facie evidentiary showing, defendant failed to establish the existence of a factual issue as to whether there was no statutory violation *and* that plaintiff's own conduct constituted the sole proximate cause of his accident. *See Blake*, 1 N.Y.3d at 289 n.8 ("Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for [judgment as a matter of law] only if there is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident").

In an effort to raise a factual issue, defendant relied upon the expert testimony of Daniel Paine, a construction site safety consultant (R. 622-625; R. 635; R. 651). As addressed below, Mr. Paine did not opine that David Bonczar failed to properly position the ladder and ensure the spreader arms were full open. Nor did he opine that – even if it occurred – the improper positioning of the ladder caused Mr. Bonczar

to fall. Rather, Mr. Paine opined that Mr. Bonczar fell because he failed to maintain three-point contact with the ladder at all times, even after it wobbled. Any failure on plaintiff's part to maintain three-point contact after the ladder shook and wobbled at most constitutes negligence, however, which does not negate defendant's absolute liability based on the ladder's fundamental failure to provide proper protection.

On direct examination, Mr. Paine did not opine that plaintiff failed to properly position the ladder and ensure that the spreader bars were locked in place when he visually examined it and physically pulled the front and rear sections as far apart as they could go. Indeed, he opined that David Bonczar had been provided with proper protection under Labor Law § 240 (1) because "he was provided with a ladder that was adequate [and] *properly set up*" (R. 662 [emphasis supplied]). Thus, the defense expert expressly conceded that Mr. Bonczar's fall was not attributable to his failure to properly position the ladder and the spreader bars.

Moreover, Mr. Paine further stated that, in any event, the question of whether Mr. Bonczar "had set [the ladder] up properly and performed his work *isn't the issue*" (R. 659 [emphasis supplied]). Rather, he stated:

> The issue here is he's descending the ladder. And when you descend and/or ascend a ladder, you must maintain three point contact on that ladder, that is one foot and two hands or two feet and one hand, so how you go up and down the ladder. And if you do that, you wouldn't fall. [R. 659.]

Addressing plaintiff's fall, Mr. Paine opined: "[H]is problem was when he was descending the ladder, that he did not keep the proper protocols which would have prevented him from falling, therefore making him basically the proximate cause of his own accident" (R. 662).

In expanding upon that opinion on cross-examination, Mr. Paine stated: "The evidence is that the ladder supposedly twisted or wobbled and he let go of it. That's not something you can do" (R. 719). Asked if he meant that a person who misses a step because a ladder shook or wobbled must continue holding on to the ladder, Mr. Paine stated: "Of course they do. They're not going to fall if they hold on to it" (R. 721). He further asserted that when a ladder shakes or wobbles while a person is on it, "[t]here's no reason why he should miss a step" (R. 721-722). And, when asked if a person who begins to fall after missing a step because a ladder shifted or wobbled must keep holding on to the ladder as they fall, Mr. Paine stated: "They shouldn't fall to the ground" (R. 722).

In so testifying, the defense expert failed to counter the unrefuted evidence that (1) David Bonczar carefully examined and tested the ladder before he began his installation work, and used it without a problem four to six times, and (2) the ladder later wobbled and shook as plaintiff was descending it, causing him to miss a step and fall. Contrary to defendant's and its expert's position, plaintiff's conduct in missing a step when the ladder wobbled and shook, and in letting go of the ladder as

he began to fall, neither negated the statutory violation established by the ladder's movement nor constituted the sole proximate cause of the incident.

The unrefuted evidence that the ladder shifted and wobbled for no apparent reason after having been properly positioned establishes as a matter of law that it was inadequate under section 240 (1). *See Nephew v. Klewin Bldg. Co., Inc.*, 21 A.D.3d 1419, 1420 (4th Dep't 2005) ("Plaintiffs established that the ladder 'buckled' or 'walked' when plaintiff leaned to his left to bolt a sign cover to the wall, causing him to lose his balance and fall, and therefore established that the ladder did not provide the requisite protection in accordance with Labor Law § 240 [1]"); *see also Blake*, 1 N.Y.3d at 289 n.8 (where a ladder "malfunction[s] for no apparent reason," there is a legal "presumption that the ladder . . . was not good enough to afford proper protection").

In the face of that statutory violation, any comparative fault on plaintiff's part cannot be deemed the sole proximate cause of his accident. As the Court of Appeals stated in *Blake*:

> Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it.

1 N.Y.3d at 290. *Accord Nephew*, 21 A.D.3d at 1420.

In a related vein, as the Court reaffirmed in *Blake*, a plaintiff's "contributory negligence will not exonerate a defendant who has violated the statute and proximately caused a plaintiff's injury." 1 N.Y.3d at 286 (citations omitted). *See also id.* at 289 ("comparative negligence is not a defense to absolute liability under the statute").

In the present case, David Bonczar testified that the ladder shifted and wobbled as he was descending it, which caused him to miss a step and lose his balance (R. 106; R. 167). Upon losing his balance, Mr. Bonczar fell backward, "lost grip on [his] right hand," and eventually released his left hand as well (R. 166-168). He then landed on his back on the floor, and the ladder remained standing (R. 106; R. 143; R. 168).

Mr. Bonczar's testimony lends no support to the defense expert's assertion that he acted culpably in missing a step and letting go of the ladder (R. 719; R. 721-722), as both actions resulted from the ladder's sudden and unexpected movement. Nor does Mr. Bonczar's testimony support the expert's speculative assertion that Mr. Bonczar is at fault because he would not have fallen if he had simply maintained his grip on the ladder (R. 719; R. 722).

In any event, even if it could be said that Mr. Bonczar's physical response to the ladder's sudden movement was negligent to some degree, it at most constituted comparative fault, which does not negate defendant's statutory liability. *Blake*, 1

N.Y.3d at 286, 289. Equally importantly, because the incident was precipitated by the ladder's shaking and wobbling – which establishes the lack of adequate protection under section 240 (1) – any negligence on plaintiff's part cannot be deemed the sole proximate cause of the incident. *Blake*, 1 N.Y.3d at 290.

Therefore, when the trial proof is considered in the light most favorable to defendant, with every inference supported by the facts drawn in its favor, "there is no rational process by which the fact trier could base a finding in favor of" defendant. *Szczerbiak v. Pilat*, 90 N.Y.2d at 556. The fact that the ladder wobbled and shifted for no apparent reason gives rise to a legal presumption that it was not good enough to afford proper protection under section 240 (1), and there is no evidentiary basis upon which a trier of fact could rationally find that plaintiff's own actions or omissions constituted the sole proximate cause of the incident.

This Court should therefore reverse the judgment entered upon the jury's verdict and grant plaintiff's motion for a directed verdict on the issue of defendant's liability under Labor Law § 240 (1).

POINT II

ALTERNATIVELY, THE COURT SHOULD SET ASIDE THE JURY'S VERDICT PURSUANT TO CPLR 4404 (a) AND REMIT THE ACTION FOR A NEW TRIAL

If the Court concludes that plaintiff is not entitled to a directed verdict under CPLR 4401, it should nevertheless set aside the jury's verdict, reverse the judgment, and remit the action for a new trial pursuant to CPLR 4404 (a).

A. WEIGHT-OF-THE-EVIDENCE DETERMINATIONS UNDER CPLR 4404 (a)

Under CPLR 4404 (a), a trial court may set aside a jury's verdict and "order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence . . . ." As stated in *Nicastro v. Park*, 113 A.D.2d 129 (2d Dep't 1985), "[t]he criteria for setting aside a jury verdict as against the weight of the evidence are necessarily less severe" than those governing motions for a directed verdict because "such a determination results only in a new trial and does not deprive the parties of their right to ultimately have all disputed issues of fact resolved by a jury." 113 A.D.2d at 132-133 (citations omitted). Also in contrast to motions for a directed verdict, "[w]hether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors." *Id.* at 133 (citations omitted).

The standard for determining whether a jury verdict is against the weight of the evidence is "whether the evidence so preponderated in favor of the [losing party] that the verdict could not have been reached on any fair interpretation of the evidence." *Lolik v. Big V Supermarkets, Inc.*, 86 N.Y.2d 744, 746 (1995). In applying that standard, a court's "discretion is at its broadest when it appears that the unsuccessful litigant's position was particularly strong compared to that of the victor." *Nicastro*, 113 A.D.2d at 136. *Accord Pellegrino v. Youll*, 37 A.D.3d 1064, 1064 (4th Dep't 2007). The existence of some evidence favoring both parties does not preclude setting aside a verdict on weight-of-the-evidence grounds because "it is the existence of a factual issue which justifies the granting of a new trial rather than a directed verdict." *Nicastro*, 113 A.D.2d at 135. *See also Grassi v. Ulrich*, 87 N.Y.2d 954, 956 (1996) (in reviewing the denial of plaintiff's motion to aside a verdict as against the weight of the evidence, "[t]he Appellate Division erred in curtailing its review of the denial of that motion after simply finding record evidence to support the jury's verdict").

Although the question of whether a verdict should be set aside on weight-of-the-evidence grounds is, in the first instance, a matter for the trial court to decide, the Appellate Division is empowered to independently review the issue on appeal. As the Court of Appeals held in *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493 (1978): "Whether a particular factual determination is against the weight of the

evidence is itself a factual question. In reviewing a judgment of the Supreme Court, the Appellate Division has the power to determine whether a particular question was correctly resolved by the trier of facts." *Id.* at 498. *See also Killon v. Parrotta*, 28 N.Y.3d at 107 ("When the Appellate Division reviews a jury determination, either it may examine the facts to determine whether the weight of the evidence comports with the verdict, or the Court may determine that the evidence presented was insufficient as a matter of law, rendering the verdict utterly irrational"); *Ferguson v. Rochester City School Dist.*, 99 A.D.3d 1184, 1184-1185 (4th Dep't 2012) (holding that the trial court erred in denying plaintiff's post-trial motion to set aside the verdict because, in the Court's view, "the verdict is contrary to the weight of the evidence"), *appeal withdrawn*, 20 N.Y.3d 930 (2012).

B. APPELLATE REVIEW OF WEIGHT-OF-THE-EVIDENCE DETERMINATIONS IN ACTIONS BROUGHT UNDER LABOR LAW § 240 (1)

In *Arrigo v. Turner Const. Co., Inc.*, 182 A.D.2d 482 (1st Dep't 1992), the First Department held that the trial court erred in denying plaintiff's motion to set aside the jury's verdict in an action arising out of a construction accident in which plaintiff was injured when the ladder on which he was working slid out from underneath him. 182 A.D.2d at 482-483. The unrefuted trial testimony established that the ladder had been positioned on a floor containing water, debris, and chemicals, and that when it slid plaintiff's arm was impaled by a piece of metal when

he reached out in an effort to save himself. *Id.* at 483. Notwithstanding that evidence, the jury found that (1) the ladder had been placed or used as to provide proper protection under Labor Law § 240 (1), and (2) plaintiff was injured before the ladder moved. *Id.* Reversing the trial court, the Appellate Division held that the verdict was against the weight of the evidence and ordered a new trial. *Id.* at 483-484.

In *Brown v. Petracca & Son, Inc.*, 124 A.D.2d 772 (2d Dep't 1986), the plaintiff testified at trial that he fell from a scaffold when two of the platform planks "slid down." *Id.* at 773. The defendant presented no evidence directly controverting plaintiff's testimony, but suggested that plaintiff slipped and fell off the edge of the scaffold and thereby dislodged the planks. *Id.* In answering the first question on the verdict sheet, the jury found that the scaffold provided proper protection under Labor Law § 240 (1). *Id.*

The Appellate Division reversed the judgment in defendant's favor upon the ground that the verdict was contrary to the weight of the evidence. *Id.* "The evidence was strong that the planks slipped from the scaffold to which they ought to have been properly secured," the court held, and there was no evidentiary support for the inference that plaintiff's own conduct caused the accident. 124 A.D.2d at 773.

C. THE JURY'S VERDICT IN THIS CASE WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

In the present case, the jury found that: (1) Labor Law § 240 (1) was not violated by a failure to provide proper protection, and (2) the only substantial factor

in causing plaintiff's fall was plaintiff's own conduct in improperly positioning the ladder and failing to check the ladder's positioning (R. 1049-1051, ¶¶ 1, 3-6). In accordance with the trial court's instruction in response to jury's note (R. 1057), "positioning" refers to the ladder's setup, not physical location (R. 959).

The jury's determination that there was no statutory violation, and that plaintiff's own conduct in failing to set up the ladder properly constituted the sole proximate cause of his fall, is contrary to the weight of the evidence, which so preponderated in plaintiff's favor that the verdict could not have been reached on any fair interpretation of the evidence. *Lolik*, 86 N.Y.2d a 746.

As discussed at length in Point I (at pages 18-20), David Bonczar testified without contradiction that, before initially climbing the ladder during the course of his installation work, he inspected it for visible defects and observed that it was fully open with the spreader bars down (R. 102; R. 115-116; R. 124). He also pulled hard on the front and back sections to physically ensure that they were as far apart as possible, and that the spreader bars were all the way down and thus locked (R. 102-105; R. 116; R. 124-125; R. 205-206).

Mr. Bonczar further testified that, during the installation process, he climbed up and down the ladder four to six time without incident (R. 105-106; R. 138). Throughout that time he visually observed that the ladder remained fully opened, but

did not physically test it before each assent because he did not move or reposition it (R. 105-106).

Defendant elicited no evidence refuting Mr. Bonczar's testimony. In cross-examining him, defense counsel read a portion of his examination before trial, in which he said he could not recall if he had checked the position of the ladder and the spreader arms immediately before making the ascent that resulted in his fall (R. 162-163). Mr. Bonczar explained that his deposition response was governed by the terms of the question – which was limited "specifically [to] the time immediately prior to falling" – and reiterated that he had in fact visually and physically inspected the ladder to confirm its stability at the start of the installation process (R. 161-162).

In its direct case, defendant called Daniel Paine as a construction site safety expert (R. 622-625; R. 635; R. 651). Mr. Paine, however, did not opine that David Bonczar had failed to properly position the ladder or ensure that the spreader bars were not properly positioned. Indeed, he conceded on direct examination that plaintiff had been provided with proper protection under Labor Law § 240 (1) because "he was provided with a ladder that was adequate [and] *properly set up*" (R. 662 [emphasis supplied]).

Mr. Paine further stated that, in any event, the question of whether Mr. Bonczar "had set [the ladder] up properly and performed his work *isn't the issue*" (R. 659 [emphasis supplied]). Rather, he opined, Mr. Bonczar proximately caused

his fall by failing to maintain three-point contact while descending (R. 659; R. 662). Mr. Paine asserted that, when the ladder shook and wobbled, plaintiff should not have missed a step, and should not have let go of the ladder with his hands (R. 719-722).

Thus, Mr. Paine did not opine that plaintiff improperly positioned or set up the ladder, and his testimony does not support an inference that plaintiff failed to do so. Nor does Mr. Paine's testimony support an inference that plaintiff's fall was proximately caused by the ladder's improper positioning. Rather, he asserted, the ladder's set-up "isn't the issue" because plaintiff's fall was proximately caused by his failure to maintain three-point contact (R. 659; R. 662). As demonstrated in Point I (at pages 26-27), such conduct – even if culpable – constitutes nothing more than comparative negligence, and does not negate defendant's statutory liability based on the ladder's sudden and unexpected movement.

Therefore, as in *Arrigo v. Turner Const. Co., Inc.* and *Brown v. Petracca & Son, Inc.*, the jury's determination that defendant provided proper protection under Labor Law § 240 (1) is contrary to the weight of the evidence. *Arrigo*, 182 A.D.2d at 483-484; *Brown*, 124 A.D.2d at 773. As this Court recognized in *Pellegrino v. Youll*, reversal on weight-of-the-evidence grounds is appropriate where the losing party's "position was particularly strong compared to that of the victor." 37 A.D.3d at 1064 (citation and internal quotation marks omitted). Here, there is no evidentiary

support for the jury's finding that plaintiff failed to properly position, and check the position of, the ladder (R. 1050-1051, ¶¶ 3-6). Accordingly, there is likewise no evidentiary support for the jury's finding that Labor Law § 240 (1) was not violated (R. 1049, ¶ 1) because – in the absence of acts or omissions on plaintiff's part giving rise to a sole proximate cause determination – the ladder's instability necessarily establishes defendant's liability under the statute. *See Blake*, 1 N.Y.3d at 289 n. 8 (where a ladder malfunctions for no apparent reason, it is legally presumed "that the ladder . . . was not good enough to afford proper protection").

D. THE JURY'S VERDICT SHOULD BE SET ASIDE IN THE INTEREST OF JUSTICE.

Under CPLR 4404 (a), a court may set aside a verdict "in the interest of justice." That factor encompasses injustice arising out of trial counsel's misconduct. *Doody v. Gottshall*, 67 A.D.3d 1347, 1348-1349 (4th Dep't 2009). *See also Cherry Creek Nat. Bank v. Fidelity & Cas. Co. of N.Y.*, 207 App. Div. 787, 790-791 (4th Dep't 1924) (under pre-CPLR practice, the Court reversed a judgment entered upon a jury verdict and remitted the action for a new trial based on counsel's improper conduct at trial).

Attorney misconduct warranting a new trial includes making "inflammatory remarks" regarding the opposing party's counsel and experts, repeatedly expressing personal opinions as to the matters at issue, and making "arguments to the jury on summation that were not supported by the evidence," *Doody*, 67 A.D.3d at 1348-

1349. *See also Cherry Creek Nat. Bank*, 207 App. Div. at 790 (notwithstanding the wide latitude accorded trial counsel, an attorney may not make a "statement . . . of matter not in evidence, or indulg[e] in argument founded on no proof"). As the court held in *Smith v. Rudolph*, 151 A.D.3d 58 (1st Dep't 2017), it is likewise improper for counsel to misstate the law, and to interrupt and speak over the court despite its directions to stop. 151 A.D.3d at 62.

During the course of the trial in this case, defense counsel improperly:

- Asked irrelevant questions of plaintiff as to whether he was fired two days after the accident, and had been told beforehand that he was going to be let go because his work was inadequate (R. 126-127; R. 134-135).
- In an effort to impugn plaintiff's credibility, asked him why he had not volunteered information at his deposition regarding his pre-use inspection of the ladder even though defense counsel had not asked for that information (R. 162-163).
- Asked irrelevant questions as to whether plaintiff knew if the ladder was "safe," and if plaintiff was familiar with OSHA guidelines (R. 181).
- Asserted in front of the jury that "every time I make an objection, there's no ruling," thereby inviting the jury to conclude that defendant was being treated unfairly by the trial court (R. 720).

In summing up before the jury, defense counsel improperly:

- Accused plaintiff's counsel of asking the jury to find in plaintiff's favor merely because defendant is a large corporation "with money" (R. 838).
- Accused plaintiff's counsel of declining to introduce into evidence various safety-device specifications in order to purposely keep them from the jurors (R. 842-843).
- Asserted, as a matter of fact based solely upon the defense expert's unsupported opinion, that if the subject ladder was in any way defective it would have been removed from service (R. 850).
- Asserted on personal knowledge, with no support from the defense expert or any other witness, that plaintiff did not properly set up the ladder (R. 850).
- Asserted that "[t]he judge is not going to let me draw" a picture during her closing, thus implying that defendant was unfairly being deprived of the right to put evidence or arguments before the jury, thereby prompting the court to admonish counsel to not "argue with me any further with regard to this," and to address only "whatever testimony and evidence is in the record" (R. 851).
- Asserted, without any record support, that the ladder shifted because plaintiff was carrying tools in his pockets (R. 861).
- Asserted that plaintiff chose "to use a device other than the device that was provided," even though there was no record evidence that the ladder was not a proper device or that the ladder necessarily belonged to someone other than plaintiff's employer (R. 878).

- Asserted that plaintiff failed to maintain three points of contact while descending the ladder even though the sole record evidence was that he had two hands and one foot on the ladder when it shook, and that he let go only after he lost his balance, missed a step, and began falling (R. 878).
- Asserted that plaintiff failed to properly lock the ladder's spreader arms, even though (1) plaintiff stated without contradiction that he had firmly pulled the front and rear sections of the ladder fully apart, and observed that the spreader bars were fully down and thus locked, and (2) even though defendant's own expert conceded the ladder was properly set up, and attributed plaintiff's fall to his purported failure to maintain three-point contact and not his failure to properly position or set-up the ladder (R. 878).

Plaintiff, whose attorney objected to each of those improper statements, was unduly prejudiced by defense counsel's repeated injection of accusations, ostensible facts, and arguments that were not supported by the evidence. Furthermore, under *Stewart v. Olean Med. Group, P.C.*, 17 A.D.3d 1094 (4th Dep't 2005), even if plaintiff's counsel had not objected, reversal would be "warranted in the interest of justice because the misconduct of [defendant's counsel] did not consist of an isolated remark during questioning or summation, but a seemingly continual and deliberate effort to divert the jurors' and the court's attention from the issues to be determined." 17 A.D.3d at 1097 (citation and internal quotation marks omitted).

In adjudicating plaintiff's motion to set aside the verdict in the interest of justice, the trial court acknowledged that defense counsel engaged in objectionable and improper conduct throughout the trial, both in the jury's presence and outside of it (R. 12-13). The court concluded, though, that "there is no definitive indication that the jury was improperly influenced by counsel's inappropriate conduct" (R. 13).

Plaintiff submits that defense counsel's improper conduct, and its influence on the verdict, must be considered in conjunction with the question of whether the verdict was against the weight of the evidence. As the court in *Nicastro v. Park* recognized, CPLR 4404 (a)'s interest-of-justice factors may "intervene[] to flavor" the resolution of a weight-of-the-evidence motion brought under the same provision. 113 A.D.2d at 133-134. *See also Brown v. Petracca & Son, Inc.*, 124 A.D.2d at 773 (noting that defendant's injection of irrelevant arguments in defense of a Labor Law § 240 [1] claim "could have affected the jury's determination," which was contrary to the weight of the evidence).

As demonstrated in subpoint C, the verdict in this case was inexplicable given the trial proof, and thus contrary to the weight of the evidence. Therefore, even if defense counsel's improper conduct would not, in and of itself, warrant setting aside the verdict solely in the interest of justice, one can reasonably infer that it affected the jury's deliberations to some degree, and therefore militates in favor of setting the verdict aside on both weight-of-the-evidence and interest-of-justice grounds.

CONCLUSION

When viewed in the light most favorable to defendant, and with all permissible inferences drawn in its favor, there is no rational process by which the jury could find in defendant's favor. Plaintiff is therefore entitled to a directed verdict pursuant to CPLR 4401.

Alternatively, and at a minimum, the verdict should be set aside and a new trial granted because (1) the verdict is contrary to the weight of the evidence, and (2) defense counsel's improper conduct was unduly prejudicial and tainted the proceeding, thus requiring that the verdict be set aside in the interest of justice.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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1. This Brief was prepared on a computer with Microsoft Word 2013 using double spaced Times New Roman 14-point type, a serifed, proportionally spaced type font.

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