To Be Argued By:
Eileen Kaplan
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Appellate Division, First Department Case No. 2020-03296

Court of Appeals

STATE OF NEW YORK

SRECKO BAZDARIC and ZORKA BAZDARIC,

Plaintiffs-Appellants,

against

ALMAH PARTNERS LLC, ALMAH MEZZ LLC,
180 MAIDEN LANE LLC, DOWNTOWN NYC OWNER, LLC
and J.T. MAGEN & COMPANY, INC.,

Defendants-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS

ELEFTERAKIS, ELEFTERAKIS
& PANEK
Attorneys for Plaintiffs-Appellants
80 Pine Street, 38th Floor
New York, New York 10005
212-532-1116
ekaplan@elefterakislaw.com

and

POLLACK, POLLACK, ISAAC
& DECICCO, LLP
225 Broadway, 3rd Floor
New York, New York 10007
212-233-8100
bji@ppid.com

Appellate Counsel to
Plaintiffs-Appellants

Of Counsel:
Eileen Kaplan
Brian J. Isaac

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PRELIMINARY STATEMENT

All agree that a work condition is not actionable under Labor Law §241(6) if it is, as a practical matter, unavoidable and in that sense "integral" to the work.

The question posed in this appeal is whether the same result – no liability – should follow when all agree, even including the defendants themselves and the defendants' own counsel, that the subject condition was not only dangerous but, more to the point, *unnecessarily* dangerous.

Does Labor Law §241(6) compel the persons in charge of a construction site to *at least try* to provide the site workers with "reasonable and adequate protection and safety"? Or does the very fact that the powers that be intended the site to be unsafe, and intentionally made it so, mean that the subject conditions were "integral to the work" and therefore nonactionable?

That is the issue presented in this case in which the defendants acknowledged that the conditions were unnecessarily unsafe (R. 242-252) but nonetheless evaded liability on the theory that their intent to provide

such conditions made those conditions "integral" and therefore nonactionable (R. 305, 311-313).

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Srecko Bazdaric was a painter. On August 25, 2015, he was employed by non-party Kara Painting (Kara) and assigned to work at a renovation job at 180 Maiden Lane in New York County, premises owned by defendant 180 Maiden Lane LLC (Maiden Lane). The general contractor for the job was defendant J.T. Magen & Company Inc (Magen). Kara was hired by Magen.

The plaintiff's Kara foreman Cem ("Jim") Cetin assigned him "to do escalator, paint, paint escalator walls, and ceilings. Around the escalator between second and third floor." (R. 114-115). The escalator had been taken out of service and was stationary. There was "heavy plastic" on the escalator steps. Mr. Bazdaric was not sure who placed the plastic there. (R. 117).

The plaintiff explained: "Jimmy say this way. "Steve, you got to paint this wall and escalator. I say "No problem." When I see this, the escalator protection, I told him, "Jimmy, this is no way to work on this."(R. 121). The plaintiff continued to relate Jim's comments: "Why you complain?" I say, I got to complain. This is no way to work, this way." And he says, "You have to do it. I go for coffee." […] "You paint, I go buy coffee." (R. 121).

Mr. Bazdaric explained: "I started because I have to take the order" […] "as soon as I get roller, my feet fell –- I mean slipped to that plastic because I told him I no want to work like that. I have to take order. As soon as I slip I fell. The paint -- then I pull the paint, almost 3-gallon paint fall on my leg, flush me in my -- my feet hit me and I lay down and I hit metal of the escalator. That's what happened." (R. 122).

Lucas Calamari, the Magen superintendent did not know that Kara painters were trying to paint the walls around the escalator with a "roller" on "extension stick" while standing on the escalator steps (R. 241). Mr. Calamari readily testified that any covering over the escalator steps should have been secured, and that if plastic were used, it should have been non-slippery. He also testified that drop cloths are less slippery than plastic and that he observed that when painting needed to be done around escalators, the steps would be protected with wood coverings, and not plastic.

Mr. Calamari acknowledged that the plastic was the wrong type of covering for the escalator steps, and that if he seen that covering before the plaintiff's fall, he would have directed Cem Cetin or Mustafa Kara to remove the plastic and to place a safer covering on the steps. After plaintiff's fall, Mr.

Calamari directed that the plastic covering be removed, and "it was removed right away" and it "wasn't used anymore." (R. 245-246, 252).

Mr. Bazdaric, after his August 2015 fall, "cannot work anymore." (R. 157-158, 91).[1] The plaintiffs commenced an action against the defendants in Supreme Court, New York County to recover damages for the personal injuries Mr. Bazdaric sustained in the August 2015 fall, alleging, inter alia, violations of Labor Law §241(6) (R. 31-37).

The trial judge (Carol R. Edmead, J.), taking all the evidence into account, found that the plaintiffs established their entitlement to judgment as a matter of law, as to the defendants' liability under Labor Law §241(6) and Industrial Code §§23-1.7(d) and 23-1.7(e)(1), and granted plaintiffs' motion for summary judgment under these sections; and correspondingly, denied defendants' cross-motion to dismiss these claims (R. 4-13).

The defendants appealed to the Appellate Division, arguing, that since the plastic covering was "intentionally placed" to protect the escalator steps

[1] The plaintiff is disabled from work, and his serious injuries caused by his slip and fall at defendants' job include cervical spinal surgery consisting of an anterior cervical spinal fusion of C4, C5, and C6 with placement of a biomechanical device at C4-C5 and C5-C6. (R. 59-78)

from paint splatter, it was "integral to the work" and thus not a "foreign substance" or a "condition [] which could cause tripping" under Labor Law §241(6) and §§23-1.7(d) and 23-1.7(e)(1). In response, the plaintiffs argued inter alia, that the plastic covering was not integral to the work – it was a hindrance to the work, and a hazard to the plaintiff.

In a decision and order entered on March 31, 2022, a divided Appellate Division agreed with the defendants and *reversed* the Supreme Court's grant of summary judgment to the plaintiffs under §241(6) and §§23-1.7(d) and 23-1.7(e)(1), and granted the defendants' cross-motion to dismiss the §241(6) claim, over the dissents of Presiding Justice Manzanet-Daniels and Justice Moulton (R. 309-325). The majority embraced the defendants' arguments, reasoning that "it is not disputed that the covering was intentionally placed on the escalator to protect it from paint. In other words, the covering was part of the staging conditions of the area plaintiff was tasked with painting, making it integral to the work." (R. 311).

The dissenters disagreed finding, inter alia, that "the majority erroneously concludes that the integral to the work defense bars plaintiffs' reliance on Industrial Code §§23-1.7(d) and 23-1.7(e)(1) based on a flawed definition of the defense that insulates a defendant for "purposeful use of a

material regardless of whether the material is integral to the work. If a material was "intentionally placed," the majority reasons, then it was "integral to the work" and will not run afoul of the two Industrial Code sections at issue herein. This framing of the defense ignores the necessity of showing that there was something intrinsic about the material in relation to the work, i.e., whether it was part of a structure being worked on, whether it was part of the work performed by the plaintiff, or whether it was specifically designed for the task of painting on a stepped diagonal worksite." (R. 318).

The dissent continued: "The integral to the work defense is derived from our case law. In determining whether the defense applies in this case we are guided by the principle that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis v. Town of N. Elba*, 16 NY3d 411, 416 [2011])." (R. 318-319).

Thereafter, on April 29, 2022, plaintiffs moved for reargument, or in the alternative, for leave to appeal to the Court of Appeals, from the decision and order entered on March 31, 2022. The Appellate Division denied reargument, but granted plaintiffs leave to appeal to this Court (R. 326-327).

The two issues raised by plaintiffs' appeal to this Court are the two issues briefed by the parties, and addressed by the Appellate Division, to wit, 1) whether the plastic covering was integral to the work as a matter of law, and 2) whether the plastic covering was a "foreign substance" within the meaning of §23-1.7(d), as a matter of law.

The plaintiffs are grateful for this opportunity to fully present their arguments for reversal to this Court, since this appeal relates to matters of great importance for our State's many construction laborers. With the enactment of Labor Law §241(6), under review here, the legislature sought to provide construction laborers, due to their dangerous work, with special protections. But workers such as Mr. Bazdaric rely foremost on the judiciary to ensure that these protections, are themselves protected.

JURISDICTION TO HEAR APPEAL

This action originated in Supreme Court, New York County (R. 31-37). The non-final Appellate Division order from which plaintiffs appeal was dated and entered on March 31, 2022 (R. 309-325). Plaintiffs timely moved in the Appellate Division for leave to appeal on April 29, 2022, and the Appellate Division granted plaintiffs leave to appeal by an order dated and entered on June 23, 2022 (R. 326-327).

The Court accordingly has jurisdiction to hear this appeal under CPLR §5602(b)(1).

ISSUES PRESENTED

An unsecured plastic covering is placed on escalator steps to protect the steps from paint splatter when the walls around the escalator are to be painted. Plaintiff is assigned the work of painting the walls around the escalator and he observes the unsecured plastic on the escalator steps and he repeatedly complains to his boss, "this is no way to work." The superintendent for the general contractor Mr. Calamari, acknowledged that a) the plastic covering was unsafe for working on the escalator steps; b) the covering should have been non-slippery and secured; c) when he saw the

plastic covering after the plaintiff's fall, he directed that it be removed, and it was removed, and it was not used again.

The general contractor's super Mr. Calamari observed that when painting needed to be done around escalators, the escalator steps would be protected with wood coverings, and not plastic. He also acknowledged that painters at the site had used drop cloths made of cloth, rather than plastic, and that drop cloths made of cloth are less slippery than plastic.

1) The Appellate Division reversed the grant of summary judgment to plaintiffs stating that the plastic covering "was intentionally placed on the escalator to protect it from paint. In other words, the covering was part of the staging conditions of the area plaintiff was tasked with painting, making it integral to his work." Did the Appellate Division err in so holding that the plastic covering was "integral" to the work, and thus nonactionable, when it was conceded by the defendants that the plastic was wrong, and unsafe, and there were safe alternative coverings readily available?

Plaintiffs respectfully submit that the answer is Yes.

2) The Appellate Division reversed the grant of summary judgment to the plaintiffs holding that the plastic covering was not a "foreign substance" within the meaning of §23-1.7(d). Did the Appellate Division err in so holding, and concluding that this regulation requiring avoidance and removal of "Slipping Hazards" only applied to some small subset of such hazards, and ignoring all the rest, and not to apply, per the provision's plain language, to "Slipping Hazards" that render construction work within the ambit of the state unnecessarily dangerous?

Plaintiffs respectfully submit that the answer is Yes.

UNDERLYING FACTS

The plaintiff, as noted, was a painter. He slipped and fell on an unsecured plastic covering over an escalator, while he was standing on an escalator step, trying to paint the walls around the escalator. The fall occurred on August 25, 2015, at a renovation job at premises owned by defendant Maiden Lane. Defendant Magen was the general contractor (R. 229), and plaintiff was employed by non-party Kara, the painting subcontractor, retained by Magen (R. 236). Lucas Calamari was a project superintendent for Magen. Kara's owner was Mustafa Kara, and the Kara

foreman was Cem ("Jim") Cetin (R. 224, 237).[2] The job encompassed renovating the lobby and the first, second, and third floors. Magen hired Kara for "[i]nstallation of wall covering and painting of walls, ceilings and columns." (R. 238).

The plaintiff has only been a painter: "I do only painting."(R. 157-158). After the fall at defendants' job, plaintiff "cannot work anymore."(R. 91).

A. Slip and fall on unsecured plastic while trying to paint walls.

On the said day of August 25th, 2015, plaintiff's foreman "Jim" (Cem Cetin) assigned him "to do escalator, paint, paint, escalator walls, and ceilings. Around the escalator between second and third floor."(R. 114-115). The only equipment he was given was a roller, and paint; he had his own brush (R. 115-116). For painting the ceiling, a scaffold was used, but "not for [the] wall."(R. 116)

Plaintiff saw that there was "heavy plastic" on the escalator steps. He was not sure who placed the plastic there (R. 117). Mr. Bazdaric explained the circumstances leading up to his fall:

[2] Plaintiff called his foreman "Jim." (R. 114)

"Jimmy say this way. "Steve, you got to paint this wall and escalator." I say "No problem." When I see this, the escalator protection, I told him "Jimmy, this is no way to work on this."(R. 121) [3]

Plaintiff continued to relate Jimmy's comments:

"Why you complain?" I say, I got to complain. This is no way to work, this way," and he says, "You have to do it. I go for coffee." […] "You go paint, I go buy coffee." (R.121).

The Plaintiff explained that he walked to the middle of the escalator with the buckets and that,

"-- I started because I have to take the order, he give me like 3-gallon paint and 5-gallon bucket […] I take the roller and stick, and I put stick on and roll. As soon as I get -- and roller was maybe 2 step behind me was paint. Not maybe. That's for sure. Because you need a little room and, you know, you can step in the paint. So as soon as I get roller, my feet fell -- I mean slipped

[3] Jimmy's immediate response was expletive filled (R. 121).

to that plastic because I told him I no want to work like that. I have to take order. As soon as I slip, I fell. The paint -- then I pull the paint, almost 3-gallon paint fall on my leg, flush me in my-- my feet hit me and I lay down and I hit metal of the escalator. That's what happened."(R. 121-122)

There was a bucket on a higher step and when Mr. Bazdaric fell, his back hit the bucket and "all paint came out."(R. 126-27) His head hit the metal escalator (R. 128). The plaintiff summarized it: "I pull the plastic when I slip, plastic was so danger to work." (*Id*.)

When plaintiff slipped on the plastic, he was trying to paint the wall "above his head" – about seven, eight, or nine feet above, and he used an "extension stick. Nine feet, something like that, longer stick."(R. 130-131). The longer stick did not belong to plaintiff; his foreman gave it to him (R. 131). Mr. Bazdaric fell a "couple of minutes" after he started the job; he did not actually do any painting – he "just roller up and I fell."(R. 131, 133).

B. The boss acknowledged that the plastic was unsafe.

Mr. Calamari recalled that plaintiff's fall occurred on the escalator between the second and third floors (R. 238-239). He did not know that Kara painters were trying to paint the walls around the escalator with a "roller" on an "extension stick", while standing on the escalator steps (R. 241). Mr. Calamari testified as follows:

> Q. Would it be important if the workers had to step on the escalator steps while they were painting, would it be important for the covering whatever was covering those escalator steps to be secured?
>
> A. Yes.
>
> Q. That is because you wouldn't want any slipping or tripping hazards on the work area where they are working. Correct?
>
> A. Yes.
>
> Q. If there was plastic being used, you would expect that plastic to be held down securely?
>
> A. Was it also expected to be non-slippery type of plastic if they were using plastic?

Q. Yes. (R. 242)

Mr. Calamari acknowledged that he had observed that when painting needed to be done around escalators the escalator steps would be protected with wood coverings, as opposed to plastic (R. 243). He also acknowledged that he had seen Kara painters at this site, using drop cloths made of cloth, rather than plastic, and that drop cloths are less slippery than plastic (R. 243).

Mr. Calamari recalled that after the plaintiff's fall, he saw the plastic covering on the escalator:

Q. In your opinion, was that the wrong type of covering for the escalator steps?

A. Yes.

Q. Had you seen that before Srecko had his accident, would you direct Cem or Mustafa to take the plastic off and put more safer covering on those steps?

A. Yes.

Q. Did you talk to Cem after the accident or Mustafa and direct them to change the covering on the steps?

A. Yes, it was removed. (R. 244)

Mr. Calamari recalled that he discussed the plaintiff's fall with others at the site, and that "it [the plastic covering] wasn't used anymore." (R. 245-246). Indeed, Mr. Calamari directed that the plastic covering be removed from the escalator steps, and "it was removed right away."(R. 252).

As shown vividly in this testimony from Mr. Calamari, the plastic covering was indisputably dangerous, and unsafe, and what is more, it was *unnecessarily* dangerous and unsafe because Mr. Calamari was aware of, and had seen at the site, cloth drop cloths which were acknowledged to be less slippery, and safer, and he had seen wood coverings used on the escalator steps for painting around the escalator.

And strikingly, defense counsel himself, in his submission to the Supreme Court, admitted that the plastic covering was *unnecessarily* dangerous and unsafe: "[p]lastic sheeting was admittedly a poor choice for the purpose it was used." (R. 305).

ARGUMENT

I. The Majority Opinion at Bar Announced a New 'Integral to the Work' Rule Which Is Unmoored From Precedent, and Bereft of Reason. If the First Department is Not Reversed, Labor Law §241(6) Protections, Already Limited, Will Be Disemboweled.

Labor Law §241(6) requires that 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…" (See Labor Law §241(6))(emphasis added). Though §241(6) imposes *vicarious* liability upon an owner or contractor, and the Commissioner of Labor's Industrial Code provisions (here §§23-1.7(d) and 23-1.7(e)(1)) give life and form to liability under this section, §241(6) is grounded in negligence principles because liability under this section requires a determination as to whether the safety measures employed were "reasonable and adequate" under the circumstances. See e.g., *Rizzuto v. L.A. Wenger Contr. Co. Inc.*, 91 NY2d 343 [1998]; *Zimmer v. Chemung County Performing Arts, Inc*., 65 NY2d 513 [1985].[4] Or, viewed and stated somewhat

[4] §241(6) stands in contrast to both §§240(1) and 200, albeit for different reasons. §240(1) imposes absolute liability for violations, regardless of reasonableness, and an absence of due care. Labor Law §200, another sister statute commonly referred to as a 'codification

differently "section 241(6) imposes a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained *due to another party's negligence* in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein." *Rizzuto*, 91 NY2d at 350 (emphasis in original).

Accordingly, Labor Law §241(6) is, in essence, just a special statutory embodiment of the 'reasonable care' (negligence) standard, applied to the setting of construction, excavation, and demolition work.

This Court has time and again, expressed the principles animating the 'negligence' idea. In *Sadowski v. Long Is. R. Co.*, 292 NY 448, 455 [1944] the Court recalled that "what is negligence in a given case is a question of fact" and also that "[u]nder circumstances existing in one case the ordinary care required might not be the same as that required under other circumstances." The *Sadowski* Court summarized it: "[n]egligence arises from breach of duty and is relative to time, place and circumstance." *Id.*

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of common law negligence' does not impose vicarious liability - a defendant must be shown to have been "actively" negligent. Though §200 is more readily associated with the negligence idea, §241(6) is also founded on negligence, for the reasons above.

Relatedly, this Court has also expressed that that whether, for example, a particular precaution was warranted in the exercise of reasonable care, and whether the defendant was thus negligent in failing to provide the safeguard, varies with the circumstances, and may involve "the weighing of the probability of the harm, the gravity of the harm against the burden of precaution, and other relevant and material considerations from which it can be determined [that] the defendant was negligent." *Quinlan v. Cecchini*, 41 NY2d 686, 689 [1977].

And more particularly, this Court has stated that the determination of what conduct was "reasonable" under the circumstances often turns on what conduct was "feasible" in the circumstances, and conversely, whether the hazard was unavoidable, or not reasonably avoidable.

For example, in a products liability case, to prove that a product was negligently designed, the plaintiff must show, *inter alia*, that "it was feasible to design the product in a safer manner." *Voss v. Black & Decker Mfg. Co.*, 59 NY2d 102, 108 [1983].

Similarly, while municipalities are obligated to provide reasonably safe roadways, the reality is that "certain risks are unavoidable" and the duty to exercise reasonable care, does not entail an obligation to remove

those inherent dangers – including the "close proximity" of "such objects as utility poles, drainage ditches, culverts, trees, and shrubbery" – that are not avoidable in the exercise of reasonable care. *Tomassi v. Town of Union*, 46 NY2d 91, 97 [1978].

And in the same vein, while drivers are expected to exercise reasonable care to avoid accidents, that does not entail an obligation to do so when the accident is unavoidable. *Pfaffenbach v. While Plains Exp*. Corp., 17 NY2d 132, 137 [1966] (Burke, concurring).

In these and other contexts, general principles of negligence law do not impose liability for a defendant's failure to do what was not possible or feasible. Nor is liability generally imposed for risks that cannot reasonably be avoided.

A. Labor Law §241(6) Protections Are Already Modest

Labor Law §241(6) provides, as noted above, that: "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." (emphasis added).

Several salient aspects of the §241(6) scheme must be recalled.

First, as noted above, though §241(6) imposes a nondelegable duty, and vicarious liability upon an owner or contractor, as noted above, it does not impose "absolute liability" or liability without fault. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 502-503 [1993]. Rather, the owner or contractor must "respond in damages for injuries sustained *due to another party's negligence* in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein." *Rizzuto v. L.A. Wenger Contr. Co., Inc.*, 81 NY2d 343, 350 [1998][emphasis in original].

Second, the breach of reasonable care, or fault, must in this case manifest itself further in the violation of an *applicable* Industrial Code section which requires compliance with *concrete* commands. *Misicki v. Caradonna*, 12

NY3d 511, 515 [2009]. Naturally, many §241(6) claims cannot withstand these tests and are dismissed.

And *third*, since §241(6) is a fault-based statute which, in contrast to Labor §240(1), does not impose "absolute liability" the comparative negligence of the plaintiff is also a defense.

Accordingly, in view of the foregoing, while §241(6) is a remedial statute designed to afford protections to construction laborers, it is hardly a windfall. The plaintiff-worker must show that a) someone in the chain of command at the construction site was negligent; and that b) this negligence was actually a violation of an applicable Industrial Code section, which c) Code section mandates concrete, and specific action; and d) the Code violation was a cause of the plaintiff's accident, and injuries, and e) the plaintiff was not comparatively negligent, or if s/he was, the fault will be allocated, such that the plaintiff's damages will accordingly be diminished.

B. Integral to the Work: Historically, and Recently

The "integral to the work" rule arose at common law, and from the same common sense principles animating negligence law in general: reasonable care does not require a person to avoid risks which are not reasonably avoidable, or which are inherent to the activity. The "integral to the work" rule is an embodiment of these ideas, as applied to the workplace.

Two cases decided in this Court over 110 years ago well illustrate the "integral to the work" idea at common law.

In *Henry v. Hudson & M.R. Co.*, 201 NY 140 [1911] the decedent was one of the "blasters" whose job, during the course of constructing a tunnel, was to "remove or pull down any pieces of rock which, after the blast, might project or be loose and in danger of falling" (201 NY at 141) and the decedent was struck and killed by a piece of falling rock. The *Henry* Court observed that "the master is bound to provide his servant a safe place to work" but that principle "has no application to a case like the one before us, where the prosecution of the work itself makes the place [dangerous] to work" (*id.* at 142)

Strikingly, though the decedent's *job* was to remove or pull the pieces of rock, and so the danger of being struck by rock was inherent in the

decedent's work, that was *still* no excuse if, as it appeared, reasonable precautions could have been taken but were not. (*Id*. at 142-143).[5] Accordingly, the Court held that it was error to dismiss the complaint and remanded for a trial. Though falling rock appeared "inherent" to the decedent's work–the defendant would still be liable if there were reasonable steps which could have been taken, to address the risk.

Several months later in *Mullin v. Genesee County Electric Light, Power & Gas Co.*, 202 NY 275 [1911], the Court had another occasion to analyze and apply this same rule. In *Mullin*, the plaintiff was a "lineman" who fell from a pole while working electrical lines. Though the plaintiff was a lineman who fell while working on electrical lines, as in *Henry*, the plaintiff was not simply non-suited because his job entailed climbing a pole, and climbing a pole entails a risk of falling. Since it appeared that the accident had occurred because "the pole which fell with the plaintiff had not been properly set"

[5] Specifically, there was evidence that "one Montgomery, who was the general superintendent of the work, was told by one of the workmen that the rocks at the head of the tunnel were dangerous and likely to fall " and that "Montgomery replied that they did look pretty dangerous, and that he would have them removed by nightfall," and that there was no proof "that Montgomery did anything to have them removed, or took any precautions against the danger (*id*. at 142).

and that the plaintiff may not have been responsible for setting the pole, the case was remanded for a trial.

In both *Henry* and *Mullin*, the workers held dangerous jobs, and they sustained injuries, and death due to accidents seemingly related to their jobs, and yet this Court concluded that summary dismissal was not warranted, because the evidence raised questions as to whether reasonable steps could have been taken to ameliorate the risks.

***

In 2011, exactly 100 years after *Henry* and *Mullin* were decided, this Court had occasion to apply "integral to the work" principles in the context of a Labor Law §241(6) claim. In *Salazar v. Novalex Contr. Corp.*, 18 NY3d 134 [2011], [6] plaintiff Raul Salazar "was injured after he stepped into a trench that was partially filled with concrete" (*Salazar*, 18 NY3d at 138). He alleged inter alia, a claim under §241(6) contending that the condition violated 12 NYCRR 23-1.7(b)(1)(i) which states that "[e]very hazardous opening into

[6] Prior to *Salazar*, the Court acknowledged and applied the "integral part of the work" defense to a claim premised on §241(6) in *O'Sullivan v. IDI Const. Co., Inc.*, 7 NY3d 805, 806 [2006] but that case was resolved on 500.11 review in a single paragraph, and as to the §241(6), in a single sentence which consisted only of the conclusion itself: plaintiff's §241(6) claim failed because "the electrical pipe or conduit that plaintiff tripped over was an integral part of the construction."

which a person may step or fall shall be guarded by a substantial covering fastened in place or by a safety railing constructed and installed in compliance with this Part." Salazar however was one of the workers charged with filling the trench with concrete, and he was actively involved in that process when he fell. (*Salazar* 18 NY3d at 138).

The *Salazar* Court held that the danger was inherent to the work, and therefore not actionable, because "the installation of a protective device of the kind that *Salazar* posits […] would have been contrary to the objectives of the work plan [emphasis added]" (*id* at 139-140). The Court continued "[i]t would be illogical to require an owner or general contractor to place a protective cover over, or otherwise barricade a three- or four-foot-deep hole when the very goal of the work is to fill that hole with concrete" (*id* at 140). Similarly, the regulation requiring that hazardous openings be covered or guarded by a railing could not "be reasonably interpreted to apply to a case like this one, where covering the opening in question would have been inconsistent with filling it, and integral part of the job" (*id*.)

The Appellate Divisions, including the First Department at least until the opinion at bar, had followed the *Salazar* analysis when deciding cases in

which an "integral to the work" defense was raised.[7] Accordingly, at least until this point, application of the "integral to the work" rule was, for the most part, in harmony with, and a reflection of, the very negligence principles which ground §241(6).

[7] The integral to the work defense is raised in three (3), sometimes overlapping, categories of cases. The *first* is an *O'Sullivan* type of case, where, as there, the plaintiff's claim was rejected because the hazard was the structure itself. *O'Sullivan*, 7 NY3d at 806 ("[t]he courts below properly concluded that plaintiff's Labor Law 241(6) cause of action […] failed because the electrical pipe or conduit that plaintiff tripped over was an integral part of the construction."); see also, *Sanchez v. BBL Constr. Services, LLC*, 202 AD3d 847, 851 [2d Dept 2022] (where "the protruding drainage pipe over which the plaintiff allegedly fell was a permanent and an integral part of what was being constructed"); *Konopczynski v. ADF Const. Corp.*, 60 AD3d 1313, 1314 [4th Dept 2009] (where plaintiff "tripped and fell in a depression," "[t]here were approximately 132 depressions built into the flooring so that the floor could be adjusted or relocated by lifting hooks and then used as an earthquake simulator," and the "permanently embedded" depression was thus "an integral part of the construction"").

A *second* type of case is where the purportedly dangerous condition was necessary for the work itself. *Tucker v. Tishman Const. Corp. of New York,* 36 AD3d 417, 417 [1st Dept 2007] (the rebar steel on which plaintiff tripped was "an integral part of the work"); *DeLiso v. State*, 69 AD3d 786, 786 [2d Dept 2010] (where "[t]he hoses on which the claimant allegedly tripped were an integral part of the work being performed").

And a *third* type of case is where the worker was charged with ameliorating the condition and could not do so without encountering the subject condition. See e.g., *Griffiths v. FC-Canal, LLC*, 120 AD3d 1100, 1102 [1st Dept 2014] (where "plaintiff slipped on 'the very condition he was charged with removing'").

C. The Opinion at Bar Dramatically Departs from Precedent

The centerpiece of the majority's ruling was its wholehearted embrace of the idea, propounded by the defendants, that since the plastic covering was "intentionally placed" on the escalator, it was, *ipso facto*, "integral to the work", as a matter of law.

The First Department explained "[i]t is not disputed that the covering was intentionally placed on the escalator to protect it from paint. In other words, *the covering was part of the staging conditions of the area* plaintiff was tasked with painting, *making it integral to his work*. Therefore, even if the regulation arguably contemplates plastic sheeting to be a slipping hazard, under the factual circumstances here, the integral to the work defense bars plaintiff's reliance on 12 NYCRR 23-1.7(d)." (311)(emphasis added).[8]

With this above passage, the First Department made a clear equation: *the defendants' intent = integral to the work, as a matter of law*.

[8]And the majority restated this approach at the end of its opinion: "regardless of whether the heavy-duty plastic covering was the best choice, in retrospect, for the specific task of painting, there can be no dispute that the covering was purposefully laid to protect the escalator and the floor during the renovation project." (*Bazdaric*, 203 AD3d at 646) (emphasis added). Put simply, the defendants intended it, and they did it, and so it was integral.

It is respectfully submitted that this equation and holding was clear error and not simply because it is unmoored from precedent, but because it subverts the very foundation of the reasonableness standard of negligence upon which §241(6), and much of civil decision-making is based.

First, nowhere in the entirety of "integral to the work" jurisprudence, at common law or in the context of §241(6), has any court given weight, much less summary-dismissal weight, to *the defendants' intent*! -- the defendants intended the conditions to be as they were, and so the conditions were "integral to the work" and the plaintiff's claim is barred. [9]

For example, in *Salazar*, this Court did not state that the plaintiff's recovery was barred because the defendants intended there to be an open trench! Had this Court announced such a rule, it would have been the end of §241(6) protections because owners and contractors would have quickly realized that they could avoid liability for virtually any condition, no matter how unsafe, by proclaiming that the conditions were exactly as they intended, and thus "part of the staging conditions of the area" (R. 311).

[9]The First Department did not cite authority for the "intentionally placed" idea. The few cases cited by the majority to support its opinion in general, are discussed *infra*.

Secondly, not only is the First Department's approach *new*, it is also *contrary* to, and indeed *subversive* of, the very underpinnings of negligence law. How so? The negligence question, as set forth, is an inquiry as to reasonableness, under the circumstances. It is thus, a fact-based inquiry which looks to objectivity.[10] The "integral to the work" rule, as noted, is simply an outgrowth of the reasonableness standard: if a condition exposes the worker to a risk, but the condition is necessary for the work, and the risk cannot be ameliorated, without defeating or hindering the work, the condition may be "integral to the work" and thus not actionable *because* it would be unreasonable or unfeasible, or "illogical" and "contrary to the objectives of the work plan" (*Salazar,* supra) to cure the condition.

However, the "integral to the work" rule stated, and applied by the First Department, is not this fair, and sensible rule rooted in precedent, and looking to facts; it is rather an intent-based inquiry, which is fueled by subjectivity – the defendants intended it, and thus it was integral.[11]

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[10] If a driver runs a red light, or speeds, or drives while intoxicated, can he avoid culpability by arguing that he intended to do so?

[11] The dissent made this precise point: "The majority erroneously concludes that the integral to the work defense bars plaintiffs' reliance on Industrial Code §§ 23-1.7(d), 23-1.7(1) based on a flawed definition of the defense that insulates a defendant for "purposeful" use of a material regardless of whether the material is integral to the work.

And a hint in the majority opinion that the First Department employed an inappropriately subjective standard which had nothing to do with what was needed to perform the work[12] is the majority's dismissive and mischaracterizing response to the unequivocal testimony of the plaintiff, and Mr. Calamari that the plastic covering was unsafe, and a hindrance to the work. (R. 311) ("[t]he dissent focuses exclusively on plaintiff's and a foreman's testimony concerning whether the use of the covering was the *best choice* to protect the escalator while plaintiff was painting.")(emphasis added).[13]

If the material was "intentionally placed," the majority reasons, then it was "integral to the work" and will not run afoul of the two Industrial Code sections at issue herein. This framing of the defense ignores the necessity of showing that there was something intrinsic about the material in relation to the work, i.e., whether it was part of a structure being worked on, whether it was part of the work performed by the plaintiff, or whether it was specifically designed for the task of plaintiff on a stepped diagonal worksite." (R. 318) (emphasis added)

[12] Which is, after all, as recognized in dissent, the *Salazar* criteria (R. 320) (citing *Salazar*, "[t]he common theme in all of these cases is that the defense applies when it was necessary to perform the work in the manner that it was done").

[13] Styling the problem as 'the plastic covering was *not* the *best choice*' is misleading. As the dissent noted, "Here, defendants do not argue that it was necessary to perform the work using the plastic sheeting. Notably, in their cross-motion below defendants conceded that the "[p]lastic sheeting was admittedly a poor choice for the purpose it was used." Moreover, the proposed alternative of covering the escalator steps with boards or a cloth drop cloth would not be inconsistent with the painting work performed. In fact, it would be consistent with how the work was previously performed according to Calamari's unrebutted testimony. The unsafe plastic covering was not a necessary part

Here and in the dissent, the majority's analysis is measured against the *Salazar* standard, and shown to be wanting. But when the majority's rationale and holding, is juxtaposed against this Court's analyses in *Henry* and *Mullin*, the progenitor "integral to the work" decisions, the error of the First Department's decision is shown even more starkly. In *Henry* and *Mullin*, the plaintiffs were working dangerous jobs, and they were injured by risks which were actually associated with their jobs – in *Henry*, the plaintiff was a "blaster" who was pulling or removing rock after a blast, and he was killed by falling rock, and in *Mullin*, the plaintiff was a "lineman"

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of the structure, it was not a condition that Bazdaric was charged with removing or installing, and it was not specially designed and required for the task at hand." (R. 320).

Assuming arguendo that *something* was needed to cover the steps, that does not mean that the *anything* that was chosen was "integral to the work" and much less, as a matter of law. The Second Department has addressed cases in which the defendants insisted that the hazardous condition was a natural part of the worksite landscape but their "integral to the work " defense was resolutely rejected because, as in *Henry* and *Mullin,* steps could have been taken to ameliorate the hazard. See e.g., *Murphy v. 80 Pine, LLC*, 208 AD3d 492, 497 [2d Dep't 2022] ("[w]hile it was undisputed that the stub up was an integral part of the construction, none of the defendants have pointed to evidence that it was necessary that the stub ups be unmarked o that safety markings or other protective measure would have interfered with the work" (citing *Aragona v. State of New York*, 147 AD3d 808, 809 [2d Dep't 2017]; *Lopez v. New York City Dept. of Envtl. Protection*, 123 AD3d 982, 984 [2d Dep't 2014]). In *Lopez v. New York City Dept. of Envtl. Protection,* as well, "the defendant failed to raise a triable issue of fact as to their allegation that the uncapped rebar was an integral part of the work, that was not subject to the cited regulation." *Lopez,* 123 AD3d at 984.

who was injured when he fell from an electrical pole, during the course of his work – and in both cases, this Court remanded for a jury trial because the Court was not satisfied that the defendants had shown their entitlement to an "integral to the work" defense as a matter of law.

Here in sharp contrast, the plaintiff was injured when he slipped on a slippery plastic covering that the plaintiff ***complained*** about, and which both the plaintiff and Mr. Calamari acknowledged to be the wrong covering, and unsafe. Mr. Calamari readily acknowledged that cloth drop cloths or wood boards were available, and were used in the past, and that as soon as he learned of the plaintiff's fall, the slippery covering was removed (R. 242-252).

And again, defense counsel himself acknowledged that the plastic was unsafe, and unnecessarily so: "[p]lastic sheeting was admittedly a poor choice for the purpose it was used." (R. 305).

Accordingly, it is beyond doubt that slipping on a slippery plastic covering, was ***not*** an inherent risk of the plaintiff's job of painting the walls – it was rather, an *unnecessary*, and perfectly *avoidable* risk. But somehow, the First Department determined that the defendants were entitled to the dismissal of the plaintiffs' §241(6) claim because the slippery plastic covering was "integral to the work."

Further and finally, contrary to the majority's opinion neither *Rajkumar v. Budd Contr. Corp*., 77 AD3d 595 [1st Dept 2010] nor *Johnson v 923 Fifth Ave. Condominium* 102 AD3d 592 [1st Dept 2013], both stressed by the Appellate Division, support the extraordinary conclusion that any instrumentality that is deliberately used in the work, is thereby "integral to the work" and thus not actionable even when the provision of an appropriate safeguard with not have hindered or been contrary to the purpose of the work. The dissent also persuasively addressed these decisions. (R. 321-322). Likewise, the majority's citation to *Krzyzanowski v. City of New York*, 179 AD3d 479 [1st Dept 2020] is difficult to understand, since, as the dissent pointed out, this decision *supports* the plaintiffs' arguments. The plywood boards in *Krzyzanowski* were no doubt, "intentionally placed" but still the court held that the defendants did not establish their entitlement to summary judgment because the evidence was "insufficient to establish as a matter of law that the boards were a protective floor covering *integral to the work being done*" (R. 322) (emphasis in original).

It is respectfully submitted, that the plaintiffs have showed here, and upon the record, and with reference to the dissent (R. 314-325) that legal precedents do not support the majority's ruling, and that it should therefore be reversed.

D. If the Opinion at Bar Stands, § 241(6), a Fault-Based Statute Enacted for Worker Protection, Will Be Gutted

Few words are needed to explain how, and why an affirmance of the majority opinion will lead to the ruination of §241(6) protections. As set forth at the outset, §241(6) is designed to afford protections, but a §241(6) plaintiff already has high hurdles to clear. As noted, the plaintiff-worker must show that (a) someone in the chain of command at the construction site was negligent; (b) this negligence was actually violative of an applicable Industrial Code section, which (c) Code section mandates concrete, specific action; and (d) the Code violation was a cause of the plaintiff's accident, and injuries, and (e) the plaintiff was not comparatively negligent, or if s/he was, the fault will be allocated, such that the plaintiff's damages will accordingly be diminished.

What is more, the protections of §241(6) have already been reduced by a series of non-literal constructions of the statute, and Industrial Code provisions. See *Toussaint v. Port Auth. of New York and New Jersey*, 38 NY3d 89, 98-111 [2022] (Wilson, J., dissenting, and repeatedly questioning the *Ross* "specificity" requirement).

If now, in addition, an owner or contractor may simply contend that the condition was *intended* to be as it was, and thereby defeat the plaintiff's entitlement to relief, it is difficult to see how any §241(6) claims will make it to the finish line. And of course, eventually, no plaintiffs will bother to bring §241(6) claims, and that is certainly not what the legislature intended when it enacted this remedial statute.

II. The Majority's Ruling as to Construction of "Foreign Substance" within the Meaning of §23-1.7(d) Should be Reversed

The phrase "foreign substance" is not defined in the Industrial Code's definitional section. (See, 12 NYCRR § 23-1.4) .

This Court has "long held that the statutory text is the clearest indicator of legislative intent, and that a court "should construe unambiguous language to give effect to its plain meaning" *Matter of Walsh v.*

New York State Comptroller, 34 NY3d 520, 524 (2019) (citing *Nadkos, Inc., v. Preferred Contrs. Ins. Co. Risk Retention Group LLC*, 34 NY3d 1, 7 (2019)).

"In the absence of a statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as use guideposts in determining the meaning of a word or phrase" (*Walsh*, 34 NY3d at 524, citing *Nadkos*, 34 NY3d at 7). Further, a statute "must be construed as a whole and [ ] its various sections must be considered together and with reference to each other" *Walsh*, 34 NY3d at 524, citing and quoting, *Matter of New York County Lawyers' Assn v. Bloomberg*, 19 NY3d 712, 721 [2012]); see also *Colon v. Martin*, 35 NY3d 75, 78 (2020).

The word "foreign" means "strange" or as used with its antonym, "not native" and the word "substance" means "material" or "matter." Taken together and read with the rest of § 23-1.7(d), this phrase means material which is not native to the "floor, passageway, walkway, scaffold, platform or other elevated working surface." By the plain meaning of "foreign substance" the plastic covering is encompassed within the words of § 23-1.7(d) – it is surely a "foreign substance" to the escalator – it was not part and parcel of the escalator itself. The dissent well stated this point. (R.

317)("[a]s the plastic sheeting was a physical material not normally present on an escalator, it constitutes a "foreign substance" within the meaning of Industrial Code § 23-1.7(d) (see *Velasquez v. 795 Columbus LLC*, 103 AD3d 541, 542 [1st Dep't 2013])").

The conclusion that the plastic covering is a "foreign substance" within the meaning of § 23-1.7(d) is reinforced when § 23-1.7(d) is "construed as a whole and … its various sections [are] considered together and with reference to each other" (*Walsh*, 34 NY3d at 524). With § 23-1.7(d), the Legislature is plainly providing that an employer shall not permit anything slippery on a "floor, passageway, walkway, scaffold, platform, or other elevated working surface" which is not native to, and part of the said surface, for the simple reason that slippery surfaces are unsafe.

The Supreme Court correctly observed: "The Court of Appeals has noted that '[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborer against hazards in the workplace" (citing *St. Louis v. Town of N. Elba*, 16 NY3d at 416)." (R. 8). Construing the slippery plastic covering atop the escalator to be a "foreign substance" under the circumstances presented here, is a rational

interpretation of § 23-1.7(d), which furthers the remedial purpose of protecting workers against hazards in the workplace.

Defendants urged below that the covering was not a "foreign substance" within the meaning of § 23-1.7(d) because it was "intentionally placed" on the escalator. This argument has no legal support and is akin to saying that if an unkind prankster decided to put snow on the escalator, it would not be a "foreign substance" because it was "intentionally placed." Judge Edmead correctly rejected the defendants' "placed" contentions (R. 9), and this Court should as well.

The majority relied upon the statutory canon of ejusdem generis in concluding that the plastic covering was not a "foreign substance" within the meaning of § 23-1.7(d). (R. 310). The problem with this argument is that, as the dissent cogently discussed, there are maxims and rules of construction which point to the opposite conclusion (R. 322-324). The plaintiffs here can do no better than to quote Justice Moulton's eloquent dissent: "[w]hile maxims can provide stable rules of construction, they should not be used mechanically to advance an interpretation of statutory language that runs athwart a statute's fundamental purpose. "The Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting

construction laborers against hazards in the work place" (*St. Louis v. Town of N. Elba*, 16 NY3d 411, 416 [2011]). Had the legislature intended to limit § 23-1.7(d)'s reference to "any other foreign substance which may cause slippery footing" to a narrow class of slipping hazards, contrary to the Industrial Code's overall purpose, it could have referred to "ice, snow, water, grease and other *similar* foreign substance which may cause slippery footing" (emphasis added)." (R. 323).

It is respectfully submitted that the majority's ruling that the plastic covering was not a "foreign substance" within the meaning of § 23-1.7(d), is mistaken and should be reversed.

CONCLUSION

For the reasons stated herein, and upon the record, we respectfully request that this Court *reverse* the Appellate Division's ruling and affirm the ruling of the Supreme Court granting the plaintiffs' motion for summary judgment under Labor Law §241(6), along with such other and further relief as this Court deems necessary and proper.

Dated: New York, New York
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Respectfully submitted,

ELEFTERAKIS, ELEFTERAKIS & PANEK

Eileen Kaplan
80 Pine Street, 38th floor
New York, New York 10005
(212) 532-1116
Counsel for Plaintiffs-Appellants
Srecko Bazdaric and Zorka Bazdaric

POLLACK, POLLACK, ISAAC & DeCICCO, LLP

Brian J. Isaac
225 Broadway, 3rd floor
New York, New York 10007
(212) 233-8100
Appellate Counsel for Plaintiffs-Appellants
Srecko Bazdaric and Zorka Bazdaric

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CALLAHAN & FUSCO, LLC
Attorneys for
Defendants-Respondents
40 Exchange Place, 18th Floor
New York, New York 10005
877-618-9770
cdelbove@callahanfusco.com

Sworn to me this
Friday, January 27, 2023

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