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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.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Plaintiffs-appellants Srecko Bazdaric and Zorka Bazdaric submit this reply brief in response to the respondents' brief submitted by defendants and in further support of plaintiffs' appeal. Defendants in response try to convey that the facts of this case, simply fall into the unfortunate group of workplace "accidents" as to which a claim under §241(6) can offer no recompense. Nothing could be further from the truth. The evidence in the record showed indisputably that there was no reason at all for the plastic which caused the plaintiff to slip, other than the defendants' employees thoughtlessly placing the slippery and unsecured plastic to "protect" the escalator from paint splatter. In other words, as the Appellate Division majority concluded, defendants "intentionally placed" the plastic, and so it was part of the "staging conditions" for the painting work. The evidence here shows a quintessential §241(6) claim, which was erroneously extinguished by the majority ruling.

Contrary to defendants' contention, this is not at all a case for the Legislature – it is a case for this Court to employ its "GPS" to recalibrate a journey gone wrong, and right the course of 'integral to the work' precedent, by reversing the Appellate Division's majority opinion.

I. Defendants, Trying to Justify an Indefensible Majority Ruling, Push This Court to Adopt a Subjective 'Integral to the Work' Rule, Which Sharply Departs from *Salazar*, and Guts §241(6) Protections

Admittedly, on this appeal, defendants were faced with the daunting task of rationalizing the majority's ruling, that an unnecessarily dangerous plastic sheet placed for preventing paint splatter but unnecessary for the work of painting, was 'integral to the work' as a matter of law. As will be shown below, the defendants try to justify an indefensible ruling by glossing the record, and glancing over precedent. Defendants also try softening the majority's opinion by urging, for example, that "Mr. Bazdaric reads too much into the Appellate Division's language" (Resp. Br. at 33). Defendants also quote Shakespeare, and reassure that whatever happens on this appeal, the celestial bodies will remain in the firmament. (Resp. Br. at 34) ("Chicken Little, the sky is not falling").

The law, the facts, Hamlet, and Chicken Little, are all taken in turn.

A. Defendants Gloss the Record, But Still Find No Legal Support for Their Defense of the Plastic as 'Integral to the Work' as a Matter of Law

On numerous occasions in their brief, defendants style the carelessly laid plastic as a "solid plastic covering" (Resp. Br. at 1) or a "plastic shield" (Resp. Br. at 3, 9), or a "heavy duty shield" (Resp. Br. at 6), or a "protective plastic shield"(Resp. Br. at 8), or "the hard plastic shield" (Resp. Br. at 12), or the "heavy-duty, solid plastic shield" (Resp. Br. at 14), or the "plastic shield covering" (Resp.

Br. at 28), or "protective shield" (Resp. Br. at 29). These are, it is submitted, heavy-duty glosses of the factual record, because no witness testified that the plastic was a "shield" and much less that it was "hard." The reason that defendants use these stylings in their brief – "hard" "shield" - is clear: they want to convey that something good, and of course, something "needed" was being accomplished with the plastic.

Defendants' flourishes find no support in the record – no one testified that the plastic was a "shield" or "hard" and the accident report cited by defendants does not indicate this (217).[1] But more fundamentally, even if these descriptions were accurate, the defendants would still not be entitled to a summary-judgment dismissal under 'integral to the work' because 1) the covering was not essentially needed for the work of painting itself – it was simply desired by the defendants, for their convenience, to prevent paint splatter, and, 2) even for this limited convenience-purpose, which had nothing to do with material 'integral to the work', the plastic was unequivocally dangerous.[2]

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[1] Plaintiffs acknowledge that the word "shield" is a synonym for the word protection, which was used, albeit inaptly, in the testimony to describe the plastic, but it is submitted that it is misleading to employ a word like "shield" which has an ameliorative, and remedial connotation, when the testimony was uncontroverted that the plastic was a hindrance to the work, and a hazard to the worker.

[2] Defendants try to create ambiguity, as to the wholly dangerous nature of the plastic by stating, "Mr. Calamari did not have personal knowledge about how the plastic covering ended up on the escalator steps. He also did not have any knowledge about how painters should best protect an escalator from dripping paint. (R. 240-241) However, Mr. Calamari opined that the plastic covering used on that day was inappropriate, although he did not identify a specific reason why." (Resp. Br. at 8). Mr. Calamari, the super for Magen, testified that he was not an "expert" but his testimony, reprinted in plaintiffs' opening brief, related unequivocally that in his opinion, the plastic was the wrong type of covering for the escalator (244). Mr. Calamari further testified that he would expect

No amount of glossing though, can shape the thoughtlessly laid plastic in this case, into a material which was "integral to the work." Defendants have pointed to no authority which provides that a measure taken for convenience, and cosmetic purposes, no matter how unnecessarily dangerous, is "integral to the work", because defendants "intentionally placed" it.

Significantly, the defendants also glance over *Salazar v. Novalex Contr. Corp*., 18 NY3d 134 [2011], this Court's authority on 'integral to the work' under the Labor Law – which was discussed at length in the plaintiffs' opening brief. (App. Br. at 25-26) The defendants nod at *Salazar* by citing it (Resp. Br. at 27), but as stressed in plaintiffs' opening brief, the majority's analysis and holding in this case simply cannot be reconciled with the *Salazar* analysis and holding, and the defendants do not even attempt to reconcile the two.

Defendants do however, "take issue" with the plaintiffs' relating the "integral to the work" defense in this case, to "common law principles" and plaintiffs' reliance on progenitor 'integral to the work' decisions – *Henry v. Hudson & M.R. Co*., 201 NY 140 (1911) and *Mullin v. Genesee County Electric Light Power & Gas Co*., 202 NY 275 (1911) (Resp. Br. at 30). The defense can take issue or not, but it is

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the plastic covering to be non-slippery, and to be secured, and that drop cloths and wood coverings were less slippery, and that when he found out about the plastic and the plaintiff's fall, the plastic was removed, and it would not be used in the future. (242-252) (246) ("we wouldn't allow it to go forward.") This testimony, alongside Mr. Bazdaric's own testimony, reprinted in the plaintiffs' opening brief, eliminates any doubt as to the dangerousness of the plastic.

inescapable, as shown in the plaintiffs' opening brief that the 'integral to the work' defense under review here evolved from common-law negligence and reasonableness principles. The defense states that the plaintiffs' reliance on *Henry* and *Mullin* "misses the mark as both cases are based on a common law negligence standard that does not include Labor Law 241(6) or the Industrial Codes." (Resp. Br. at 30).

This defense argument that common-law negligence and reasonableness principles have nothing to do with §241(6) liability is mistaken because, as set forth previously (App. Br. at 21) the plain language of §241(6) ("reasonable and adequate protection and safety") and this Court's explanations of §241(6) liability in *Ross v. Curtis-Palmer Hydro-Electric Co*., 81 NY2d 494, 502-503 (1993), and *Rizzuto v. L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 350 (1998) make clear that §241(6) is a special statutory embodiment of the reasonable care standard. *Ross*, 81 NY2d at 503 ("Labor Law 241(6) is, in a sense, a hybrid, since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rulemaking authority"); *Rizzuto*, 91 NY2d at 348 (internal citations omitted) ("Labor Law §241(6), by its very terms, imposes a nondelegable duty of reasonable care upon owners and contractors "provide reasonable and adequate protection and safety" to persons employed in, or lawfully

frequenting, all areas in which construction, excavation or demolition work is being performed").

As *Ross* and *Rizzuto* make clear, the need to additionally show a violation of a concrete Industrial Code provision does not take the §241(6) claim out of the reasonableness orbit because under all circumstances, the defendant must be shown to have acted unreasonably.

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Defendants' effort to fit the facts of this case into the "purportedly dangerous condition was necessary for the work itself" line of cases (Resp. Br. at 28), misses the mark by a wide margin, and this is shown vividly by three analogous cases discussed at length in the plaintiffs' Appellate Division response brief: *Galazka v. WFP One Liberty Plaza Co., LLC*, 55 AD3d 789 (2d Dept 2008), *lv denied*, 12 NY3d 709 (2009)[3]; *Lopez v. Edge 11211, LLC,* 150 AD3d 1214 (2d Dept 2017); and *Gist v. Central Sch. Dist. No. 1*, 234 AD2d 976 (4th Dept 1996).

In *Galazka v. WFP One Liberty Plaza Co., LLC*, 55 AD3d 789 (2d Dept 2008), *lv denied*, 12 NY3d 709 (2009), the Second Department affirmed the Supreme Court's grant of summary judgment to the defendants dismissing the plaintiff's

[3] In dissent, Justice Moulton discussed the *Galazka* decision (319), and he well exposed the "plastic as necessity" myth: "[t]he unsafe plastic covering was not a necessary part 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." (320).

Labor Law claim under §241(6), §23-1.7(e)(2), and §23-1.7(d) because "the wet plastic upon which the injured plaintiff slipped was an integral part of the asbestos removal project on which the injured plaintiff was working" (internal citations omitted) (*Galazka*, 55 AD3d at 789-790; accord *O'Sullivan v. IDI Const. Co. Inc*., 28 AD3d 225 (1st Dept 2006), *affd,* 7 NY3d 805 (2006) (plaintiff tripped over a "protruding pipe" and the "record [was] clear that "the protruding pipe was integral part of the floor on which [the] plaintiff was working. Indeed, plaintiff conceded that the conduit he tripped over appeared to be permanent.")

The *Galazka* Court continued, "[t]he moving defendants submitted evidence that the plastic was specially designed and required to collect the accumulation of asbestos fibers during asbestos removal, and that safety regulations required the asbestos fibers to be constantly wet so as to prevent them from filling the air. As such, the wet plastic and asbestos fibers were neither a "foreign substance" as defined by 12 NYCRR §23-1.7(d) [internal citations omitted], nor "debris" within the meaning of §23-1.7 (e)(2)." *Galazka*, 55 AD3d at 789-790 (emphasis added).

Though this case also concerns a "plastic" cover, the thorough, and particularized showing by the *Galazka* defendants, as to the special design of the plastic for the asbestos work underway, and the need for the plastic for safety, is the exact opposite of the evidence before the Court here, where both the plaintiff and Mr. Calamari testified that the plastic cover used was wrong for the job, and unsafe.

Another more recent Second Department decision, in the same vein, is *Lopez v. Edge 11211, LLC,* 150 AD3d 1214 (2d Dept 2017), where this Court affirmed the grant of summary judgment to defendants, dismissing plaintiff's §241(6) claim, where the plaintiff a tile setter was injured on unsecured rosin papers placed where the tile work was being performed. In so holding, the *Lopez* Court explained; "[t]he defendant also established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law §241(6) cause of action, premised upon a violation of 12 NYCRR §23-1.7(d), by establishing that the protective rosin paper upon which the plaintiff slipped was an integral part of the tile work (citations omitted). As such, the rosin paper does not constitute a "foreign substance" within the meaning of 12 NYCRR §23-1.7(d) (citing *O'Sullivan v. IDI Constr. Co., Inc*., supra)."

As in *Galazka*, the rosin paper in *Lopez* may have been "slippery" but it was a specific material which was exactly keyed to the work being performed, and so it was correctly held to be "integral to the work." The plastic placed in this case was not especially designed for the work – the witnesses testified that a drop cloth or a wood covering, was the correct covering for escalator steps, and the covering was not in any event needed to perform the painting work – it was a covering laid for convenience.

Another illustrative case in the same vein is *Gist v. Central Sch. Dist. No. 1*, 234 AD2d 976 (4th Dept 1996). In *Gist*, the plaintiff laborer was employed by a

contractor hired by the defendant to replace a roof at one of defendant's school buildings. Mr. Gist was injured while "carrying a pail of hot tar across an area of the new roof where two-ply felt paper and a water sealant" had been applied when the plaintiff "skidded" on the sealant, causing the hot tar to splash onto his arm." *Id*. at 977. The Fourth Department reversed the denial of defendants' motion for summary judgment dismissing plaintiff's claim under Labor Law §241(6), and §23-1.7(d) because "[t]he water sealant upon which plaintiff slipped does not constitute a foreign substance within the meaning of that regulation but is an integral part of the new roof that was being constructed."

Defendants try to latch onto *Tucker v. Tishman Constr. Corp. of N.Y.*, 36 AD3d 417 (1st Dept 2007) and *DeLiso v. State of New York*, 69 AD3d 786 (2d Dept 2010), cited in the plaintiffs' brief, as representative of the 'dangerous condition was necessary for the work' line of cases. By the foregoing analysis, however, and the plaintiffs' presentation of facts and law in their opening brief, it is not at all true to say, as the defendants do, that the plastic "is no different then the hoses the plaintiff allegedly slipped on" [in *DeLiso*] or the rebar steel the plaintiff tripped over [in *Tucker*]." (Resp. Br. at 28). In *Tucker* and *DeLiso*, the hoses and the rebar steel were

part and parcel of the work underway, but in this case, the slippery plastic was not part and parcel of the actual work, and it was shown to be dangerous. [4]

B. Defendants' Efforts to Rewrite the Majority's Ruling, Should Be Rejected

Defendants try to act as translators or interpreters for the learned Appellate Division majority by urging in this Court that, in effect, the majority did not mean what it said (Resp. Br. at 30-34), in this decision that was hotly debated and deliberated over for a period of five (5) months.

Trying to reconstitute a majority ruling which has no basis in precedent, the defendants offer statements which are designed to soften the majority's stark departure from *Salazar* and prior law: "Mr. Bazdaric misses the import of the passage he cites. A closer reading reveals that the Appellate Division was simply reiterating a well-established principle that when the purportedly dangerous condition was necessary for the work itself, the integral to the work doctrine bars such claims." (Resp. Br. at 30-31).

The problem with this effort to revise the majority's reasoning and holding, is that the said ruling, even viewed under a microscope, does not say what the defendants claim that it did. And Justice Moulton made this point plainly and

[4] Defendants put great stock in *Rajkumar v. Budd Contr. Corp*., 77 AD3d 595 (1st Dept 2010) and *Johnson v. 923 Fifth Ave. Condominium*, 102 AD3d 592 (1st Dept 2013) and say that plaintiffs offered no meaningful response. Plaintiffs referred the Court to Justice Moulton's thorough treatment of these cases (321) (App. Br. at 38).

precisely: "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. […] Contrary to defendants' argument, the fact that someone intentionally placed the plastic covering on the escalator with the goal of protecting the escalator – but not the work – does not make the plastic covering integral to the work." (320).

Thusly, and contrary to defendants' suggestion here, the majority did not even base its reasoning on a purported *necessity* of the plastic (objectivity) – it based its reasoning on the idea consistently and stridently urged by the defendants in the Supreme Court, and in the Appellate Division – that because the plastic was "intentionally placed" by the defendants (subjectivity), it was "integral to the work." And of course, the "staging conditions" concept innovated by the majority fully embodies the "intentionally placed" idea, urged all along, by the defendants.

But now, in their brief in this Court, the defendants bristle at the thought that the reasoning of the majority should reflect a subjective standard. (Resp. Br. at 30-33) ("t]he Appellate Division did not import a subjective standard into the integral to the work defense"; "the Appellate Division's holding is not what Mr. Bazdaric

claims. And Mr. Bazdaric reads too much into these cases"; "[a]gain, Mr. Bazdaric reads too much into the Appellate Division's language."[5]

Though the majority opinion is an intent-based departure from precedent, which has nothing to do with the criteria set forth by this Court in *Salazar*, and it is certainly understandable for the defendants to try here, in this Court, to cast the majority opinion in a fact-based light.

No doubt, defendants now recognize that if they arrive at the doorstep of Eagle Street carrying a basket filled to the brim with their intent, the dismissal of plaintiffs' claims may not be affirmed.

C. Hamlet and Chicken Little

Defendants invoke Shakespeare and a folk tale formerly known as "Henny Penny" to try to convey that on this appeal, plaintiffs are making a big deal about nothing. Plaintiffs cannot make a prediction about the state of the heavens after this appeal is decided. They can say with certainty, however, that if the majority opinion is affirmed, the situation here on Earth for injured construction-laborers will be bleak because the protections of §241(6) will have been snuffed by an 'integral to the work' defense which requires only that the work conditions be precisely as owners and contractors intend, no matter how unsafe.

[5] The "reading too much"-into-language argument is a curious one for the defendants who place "the structure and language" (Resp. Br. at 9) of §23-1.7(d) at the center of their effort to affirm the majority's dismissal of the plaintiffs' case.

With respect to allusions to Elizabethan England, defendants should have said that the plaintiffs are making "Much Ado About Nothing" (Shakespeare's five-act comedy) – because that is what they are trying to argue. (Resp. Br. at 34) ("Mr. Bazdaric conjures up a doomsday scenario if this Court affirms.") The well-known line from Hamlet is inapt for the defendants because it is used to convey that a speaker is overly stating or overly denying, such that the truth is to the contrary. But the quip from Hamlet works well for the plaintiffs here – when defendants urge that "this holding was a principled application of the integral to the work defense" (Resp. Br. at 27) it is the defendants who "doth protest too much, methinks."

II. Defendants' Unduly Narrow Understanding of §23-1.7(d) Protections Should Be Rejected as Contrary to Principles of Statutory Interpretation

As set forth in plaintiffs' opening brief, and above, the Appellate Division majority erroneously held that the plastic sheet was 'integral to the work' as a matter of law, such that plaintiffs' §241(6) claim was barred.

It was also error for the majority to have held that the dismissal of plaintiffs' §241(6) claim was warranted because the plastic sheet was not a "foreign substance" within the meaning of §23-1.7(d), and for a two-fold reason: 1) defendants violated §23-1.7(d) whether or not the plastic sheet is considered a "foreign substance" within the meaning of this subsection; and 2) should the Court require construction of "foreign substance" the plain language of the regulation, and the obvious purpose

behind its enactment – protecting workers against hazards – indicates that the slippery plastic was a "foreign substance" within the meaning of this section.

A. Defendants Violated §23-1.7(d) Whether or Not, the Plastic Sheet is Considered a "Foreign Substance" Within the Meaning of this Subsection

The briefing in this Court, as to whether defendants violated §23-1.7(d), has thus far focused on whether the plastic sheet is a "foreign substance" within the meaning of this subsection.

In truth, however, the Court need not even reach this question since defendants violated §23-1.7(d) regardless of whether the plastic sheet is considered a "foreign substance." This is because the directive of this regulation, which is found in the first sentence[6] is simply to prevent "slipping hazards" and defendants failed to fulfill this mandate by carelessly placing a slippery sheet which had no utility for the work of painting, and which was a "poor choice" for covering a stepped diagonal staircase on which workers would try to paint. The second sentence of this subsection[7] which has garnered the lion's share of the attention, is simply *one way*, in which an owner or contractor may seek to comply with this section. This reading of §23-1.7(d), as amplified below, is supported by review of the entire regulation – that is, §23-1.7.

[6] "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition."
[7] "Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Lest defendants cry that this is a "new" argument, which should not be entertained, the plaintiffs reply that this point was briefed at nisi prius, and the IAS Judge Carol Edmead, in her wisdom, held, on this ground, that defendants violated §23-1.7(d).[8] Plaintiffs also made reference in their opening brief, to the fact that §23-1.7(d) is not just directed to "removing" slipping hazards (the second sentence) but also to "avoiding" slipping hazards (first sentence). See App. Br. at 10 ("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 plaint

[8] Plaintiffs in their reply affirmation on summary judgment argued "there can be no dispute that the plastic sheeting that Mr. Bazdaric slipped on meets the definition of a "foreign substance that could cause slippery footing" within the meaning of §23-1.7(d), *and* that the plastic covering on the escalator steps created a slippery condition on the steps within the meaning of the regulation." (297) (emphasis added). And Judge Edmead, employed this precise rationale in her decision: "As to Defendant's foreign-substance argument, the first sentence of the regulation states that employers shall not suffer or permit a "slippery condition" on elevated working surfaces. The second sentence directs employers to remove foreign substances that may cause slippery conditions. Thus, the intentionally placed" versus "foreign substance" distinction is one without difference under the regulation, and Defendants have violated 12 NYCRR 23-1.7(d) if they permitted a slippery condition on the escalator." (9) (emphasis added).

The question of whether defendants violated §23-1.7(d) is, at bottom, a question of law, and of course, this is a Court of law. Plaintiffs' argument below (297) and the IAS Court's holding (9) as to this legal issue, sufficiently preserved the argument for this Court's review. See generally, *Telaro v. Telaro*, 25 NY2d 433, 438 (1969) ("it is well established that questions raised in the trial court or in the record, even if not argued in the intermediate appellate court, are nevertheless available in the Court of Appeals. […] 'If the question is properly presented in the court of first instance, it is available in the Court of Appeals even though not suggested in the Appellate Division' (quoting Cohen and Karger, Powers of the New York Court of Appeals, n. 1, at p. 624); see also, *Henry v. New Jersey Tr. Corp*., 2023 N.Y. LEXIS 495, *9 (March 21, 2023) (Wilson, J., dissenting) ("Ms. Henry's waiver argument also falls into a second preservation exception because NJT could not have made any factual or legal countersteps between the time when it asserted its sovereign immunity defense and the point at which it advanced the argument here") (citing *Telaro*, 25 NY2d at 439).

language, to "Slipping Hazards" that render construction work within the ambit of the state [sic] unnecessarily dangerous?"); see also App. Br. at 39.

1. The Mandate of §23-1.7(D) is to Prevent Slipping Hazards, and Defendants Violated This Regulation by Placing an Unsecured and Slippery Plastic Which Was Hazardous to Workers, to "Protect" the Escalator from Splatters

This Court has recently reiterated that "[w]hen a statute is part of a broader legislative scheme, its language must be construed 'in context and in a manner that harmonizes the related provisions and renders them compatible'" *James B. Nutter & Co. v. Cnty. of Saratoga*, 2023 N.Y. LEXIS 494, *2 (March 21, 2023) (internal quotations omitted); *accord Matter of Kosmider v. Whitney*, 34 NY3d 48, 55 (2019); *Matter of M.B.*, 6 NY3d 437, 447 (2006). "That is", the *James B. Nutter* Court continued, "a statute must be construed as a whole and … its various sections must be considered with reference to one another" *Id*. quoting, *Matter of Albany Law School v. New York State Off. of Mental Retardation & Dev. Disabilities*, 19 NY3d 106, 120 (2012)). Plaintiffs made this point in their opening brief (App. Br. at 37).

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§23-1.7(d), the provision under review, is a subsection of §23-1.7, which is entitled "Protection from general hazards." It is beyond doubt that the overarching purpose of this section is protecting workers from hazards. Consideration of the sister subsections of §23-1.7 also sheds light. In the main, the first sentence of each

subsection provides a general mandate, which is proactive and preventative in nature, and the sentences which follow, offer either specific directions, or illustrative examples for fulfilling the mandate.

For example, §23-1.7(a)(1), the first subsection, entitled "overhead hazards" provides that "every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection." (See §23-1.7(a)(1)). This is a mandate which seeks *to prevent, in the first instance,* overhead hazards from injuring workers, and the sentences which follow provide directions for doing so: "overhead protection shall consist of tightly laid sound planks at least two inches thick full size […] such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot." (See §23-1.7(a)(1)).

Likewise, §23-1.7(a)(2) also sets forth a mandate, with instructions for preventing, in the first instance, overhead hazards from injuring workers: "such exposed areas shall be provided with barricades, fencing or the equivalent […] to prevent inadvertent entry into such areas." (See, §23-1.7(a)(2)).

§23-1.7(b) entitled "Falling hazards" and §23-1.7(b)(1) "Hazardous openings" follows a similar pattern. §23-1.7(b)(1)(i) provides a general mandate focused on prevention, in the first instance ("[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place

[…]") and the following subsections (§23-1.7(b)(1)(ii), (iii)) provide further and detailed instructions as to complying with this mandate under varying circumstances. See, §23-1.7(b)(1)(ii)("[w]here free access into such an opening is required by work in progress"); §23-1.7(b)(1)(iii)("[w]here employees are required to work close to the edge of such an opening").

Even §23-1.7(c) entitled "Drowning hazards" has a proactive slant: "[s]uch boat shall continuously patrol the area beneath the work location at all times when any person is exposed to the falling and drowning hazard." (See §23-1.7(c)).

§23-1.7(e) entitled "Tripping and other hazards" as well, follows this pattern. The first sentence embodies a mandate to prevent tripping hazards, "[a]ll passageways shall be kept free from accumulations of dirt, debris and from any other obstructions or conditions which could cause tripping" (§23-1.7(e)(1)), while the following sentence offers an illustrative example for fulfilling this mandate: "[s]harp projections which could cut or puncture any person shall be removed or covered." (§23-1.7(e)(1)).

The Code section which forms the basis of plaintiffs' §241(6) claim -- §23-1.7(d) entitled "slipping hazards" – follows this same form: the first sentence provides the mandate, and imposes the duty: "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform, or other elevated working surface which is in a slippery condition" and the second sentence

provides an illustration of fulfilling this duty: "[i]ce, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed." (See, §23-1.7(d)).

The proof that the second sentence is merely an illustrative example of *one way* in which the mandate of "protect[ing]" workers from slipping hazards may be fulfilled, is that if this were not so, the sole duty placed upon an owner or contractor by this subsection, would be that of "removal" of hazards already present – there would be no duty of preventing hazards in the first place, which is not only contrary to the language and structure of §23-1.7(d), and surrounding subsections, but also contrary to the obvious purpose and intent of §23-1.7(d), which is protecting workers from hazards. This reading also runs counter to this Court's instructions for construing the Industrial Code, as stated in *St. Louis v. Town of N. Elba*, 16 NY3d 411 (2011).

In sum, the defendants' violation of §23-1.7(d) consists not merely in failing to remove the slippery plastic sheet, but in "permit[ing] a slippery condition on the escalator" (9) in the first place.

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Plaintiffs acknowledge that it would have been ideal for this argument to have been articulated more fully in their opening brief, and they regret that it was not, however, as noted above, the argument is nonetheless preserved for review in this

Court. This argument was made below, if in attenuated form, and Judge Edmead relied on this point, in holding that the defendants violated §23-1.7(d). (See footnote 7 supra). This question of the defendants' violation of §23-1.7(d), moreover, is a question of statutory construction which could not have been obviated by "factual or legal countersteps" if raised in the Appellate Division, or for that matter, in the plaintiff's opening brief. (See footnote 7 supra)[9]

Accordingly, the Court should find that, contrary to the Appellate Division majority ruling, the defendants violated §23-1.7(d) by permitting a slippery condition on the escalator steps.

B. If the Court Needs to Parse §23-1.7(d), the Court Should Conclude That the Plastic Sheet Was a "Foreign Substance" Within the Meaning of This Subsection

In the plaintiffs' opening brief, they argued that, considering the remedial purposes of Labor Law §241(6) and §23-1.7(d), and the plain language of the regulation, the plastic sheet was a "foreign substance" within the meaning of this subsection. (App. Br. at 36-40).[10] Further consideration here, of this dual approach

[9] Plaintiffs' arguments related to "passageway" are preserved for the same reasons – they were briefed below in the Supreme Court, and the Appellate Division, and addressed by both Courts. Contrary to the defendants' suggestions, the plaintiffs have not "forfeited" their passageway argument since it has been preserved in the record. Defendants state repeatedly that the escalator was "inoperable." This is not exactly so. The escalator was not broken – it was simply taken out of operation while the walls were painted.

[10] Defendants criticize plaintiffs' plain language analysis, saying that it is "limitless" and will lead to "ludicrous" results, saying that paint cans, and rollers will be considered "foreign substances." This is untrue; cans and rollers will never be foreign substances under this section because they are not slippery, and they are needed for the work of painting. Moreover, the *Galazka*, *Gist* and

– construction of language with a view to the intent of the enactors, and the purpose of the enactment, reinforces the conclusion that the plastic sheet is a "foreign substance" within the meaning of this section.

1. This Court's Decisions Illustrate that the Correct Approach to Statutory Interpretation, Eschewed by Defendants, is to Construe Plain Language With a View to the Spirit and Purpose of the Statute or Regulation

In *ATM One, LLC v. Landaverde*, 2 NY3d 472, 476 (2004), the owner of a building challenged the dismissal of its holdover proceeding against a tenant, and this Court affirmed the lower court's holding that the proceeding was properly dismissed. The appeal in *ATM One* turned on when, under 9 NYCRR §2504.1(d)(1)(i)[11] "service of a mailed notice to cure is deemed complete." *Id*. at 476. Significantly, §2504.1(d)(1)(i) provided that the notice to cure must state the wrongful acts of the tenant, the facts necessary to establish such acts, and "the date certain by which the tenant must cure said wrongful acts or omissions, *which date shall be no sooner than 10 days following the date such notice to cure is served upon the tenant*" (*id* at 475, emphasis added by the Court).[12]

Lopez decisions discussed above expressly contemplated that the "rosin paper" (*Lopez*) and the "wet plastic and asbestos fibers" (*Galazka*) and the "water sealant" (*Gist)* could be "foreign substances" under this section but were not, because these specialized items were genuinely integral to the work.

[11] This was a provision of the Division of Housing and Community Renewal's (DHCR) Emergency Tenant Protection regulations.

[12] In *ATM One*, the notice was sent by certified and regular mail on September 8, 2000, and set a "date certain" of September 18, 2020 for cure. The tenant received the notice on September 9, 2000, thus affording her only nine days to cure. *Id*. at 475.

As the *ATM One* Court acknowledged, "the regulation that purports to answer the question of when service of a notice is complete does not actually do so." *Id*. at 477. Accordingly, to construe the regulation, and "to address the failure of the regulations to define when a mailed notice to cure shall be deemed served" this Court, adopting the lower court's reasoning and analysis, urged by the tenant[13] looked at related provisions of the Emergency Tenant Protection Act ("ETPA"), and "borrow[ed]" the concept embodied in CPLR 2103 to require owners "to add five days" to the prescribed period when serving by mail. *Id* at 475-476.

This "borrowing" of the add-5-days concept, led ineluctably to the Court's conclusion that the proceeding was properly dismissed "because the tenant was not afforded 10 days written notice to cure the alleged violation." *Id.* at 475. The Court's interpretative process in *ATM One* thus expanded the boundaries of the notice-to-cure regulation by 5-days, which was significant enough for the holdover to be dismissed on this basis – that is, insufficient notice.

In so construing §2504.1(d)(1)(i)'s notice-to-cure mailing requirement, this Court was animated by the precept that, "in matters of statutory and regulatory interpretation" […] "legislative intent is the great and controlling principle, and the proper judicial function is to discern and apply the will of the [enactors]. Generally, inquiry must be made of the spirit and purpose of the legislation, which requires

[13] The owner argued that service of the notice was complete when it was mailed. *Id*. at 476.

examination of the provision as well as its legislative history" *ATM One*, 2 NY3d at 477 (internal quotations omitted); accord *Mowczan v. Bacon*, 92 NY2d 281, 285 (1998); *Sutka v. Conners*, 73 NY2d 395, 403 (1989). [14]

Thereafter, the Court noted that the DCHR adopted the regulations at issue under its powers under the Emergency Tenant Protection Act, which was remedial legislation designed to "prevent exaction of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and welfare" (*id.* at 477, quoting McKinney's Uncons. Law of NY §8622 [EPTA §2]). The *ATM One* Court wound down its analysis by stating that the lower court's approach, which included adding-5-days for mail service "best effectuates the regulatory purpose to afford tenants a 10-day cure period before they may be subject to lease termination for designated violations." *Id*. at 477. And by contrast, the Court concluded, the owner's approach of defining the act of mailing as the completion of service "is inconsistent" with this said regulatory purpose. *Id*. at 478.

Though *ATM One* was not an appeal in which an Industrial Code provision was construed, it was a decision which told a powerful tale of statutory

[14] The Court was "further guided by the tenet that regulations - like statutes - should be construed to avoid objectionable results." *Id*. at 477 (internal citations omitted); accord *People v. Dozier*, 78 NY2d 242, 250 (1991); McKinney's Cons. Laws of NY, Book 1, Statutes §141; 2 NY Jur.2d, Administrative Law §184 (administrative regulations generally subject to same canons of construction as statutes).

interpretation, and it became a building block of this Court's decision in *St. Louis v. Town of North Elba*, 16 NY3d 411 (2011), a seminal decision on construing Industrial code provisions, which was cited in the plaintiffs' opening brief.

In *St. Louis*, the plaintiff was injured when he was assisting a work crew, which was constructing a drainage pipeline by welding together and laying 20-foot sections of snowmaking pipe. *Id*. at 413. The crew used a "hydraulic-operated clamshell bucket attached to the bucket arm of a front-end loader to lift sections of the pipe" four feet above the ground and hold the pipe in place "in the jaws of the clamshell." *Id*. Mr. St. Louis was hitting the welded seam with a hammer to remove excess metal "when suddenly the jaws of the clamshell bucket opened and released the pipe, pinning the plaintiff to the ground, causing serious injuries. *Id*. The members of the work crew testified that they ordinarily used chains to secure loads in the clamshell bucket, but at the time of the injury, there was no chain, or rope or other device, to prevent the pipe from falling. *Id* at 413.

The *St. Louis* plaintiff commenced an action alleging a claim under Labor Law §241(6) and resting it on 12 NYCRR §23-9.4(e) which provides requirements for the "attachment of load" where "power shovels and backhoes" are used for material handling. (12 NYCRR §23-9.4(e)). The defendants challenged the use of §23-9.4(e) as a predicate for a §241(6) claim, arguing, among other things, that since §23-9.4(e)

only mentions "power shovels and backhoes" – the statute regulation could not be extended to include "front-end loaders." *Id*. at 414.

The *St. Louis* Supreme Court denied defendants' motion for summary judgment, concluding that the provisions of §23-9.4(e) cover front-end loaders when used in the manner and circumstances presented. The lower court, and the Appellate Division in affirming the trial court, relied on *Copp v. City of Elmira*, 31 AD3d 899 (3d Dept 2006), which held, relying on *ATM One*, 2 NY3d at 476-477, that §23-9.4 applies to a "payloader" used to elevate construction material, reasoning: "The regulation clearly addresses situations in which construction equipment is used to lift materials and sets forth pertinent safety standards. The term power shovel is not separately defined and where as here, as here, construction equipment is used to attempt to accomplish the same task as a power shovel, it would be inconsistent with the purpose of the regulation and cause an objectionable result to find the safety precautions regarding lifting materials inapplicable" *St. Louis*, 16 NY3d at 415. This Court affirmed the Appellate Division's order, upholding the denial of summary judgment to defendant, quoting approvingly, the cited rationale from *ATM One*.

This Court in *St. Louis*, wound down its analysis saying: "[…] section 23-9.4(e) was clearly drafted to reduce the threat posed by heavy materials falling from buckets by requiring loads to be fastened with sturdy wire, proportionate to the weight of the load. *The same danger that exists for a worker using a power shovel*

or backhoe with an unsecured load exists for a worker using a front-end loader with an unsecured load." *Id*. at 415-416 (emphasis added).

Likewise, the same danger that exists for a worker slipping on ice, or water, also exists for a worker slipping on unsecured and slippery plastic which is acknowledged to be dangerous, and laid only for the defendants' convenience.

The defendants' cramped approach to statutory construction is isolated from context, and erroneously fails to consider the spirit and purpose of §241(6) and the Industrial Code sections under review. Canons of construction, so emphasized by the defendants, are merely tools to divine legislative intent, and in this case, as Justice Moulton correctly noted, there are canons on both sides.

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 trial 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
May 24, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Dated: New York, New York
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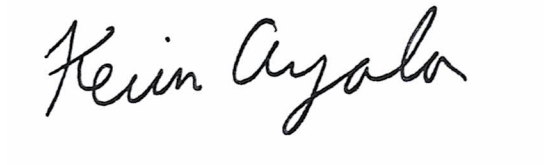

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