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August 12, 2022

**Via Overnight Mail**
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207
Attention:
Lisa Le Cours, Chief Clerk and Legal Counsel to the Court

Re: *Bazdaric v. Almah Partners LLC*
AD1 Case No.
(203 AD3d 643 (1st Dept. 2022)
COA Docket No. APL-2022-00083

**LETTER BRIEF FOR PLAINTIFFS-APPELLANTS**

Dear Ms. Le Cours,

We represent plaintiffs-appellants Srecko Bazdaric ("Plaintiff-Appellant)[1] and Zorka Bazdaric (collectively, "Plaintiffs-Appellants") in the referenced matter. We submit these written comments and arguments in support of Plaintiffs-Appellants' position respectfully urging reversal of the First Department's opinion dated March 31, 2022.[2]

[1] References to the "Plaintiff" and "Plaintiff-Appellant"are to Srecko Bazdaric.
[2] *Bazdaric v. Almah Partners LLC*, 203 AD3d 643 [1st Dept 2022].

Plaintiffs-Appellants also respectfully submit, however, that the citizens of New York would be better served, with full briefing and oral argument, rather than Rule 500.11 review, because this appeal relates to a matter of great importance for our State's many construction laborers, that is, the "integral to the work" defense. With the enactment of Labor Law §241(6), under review here, the legislature determined that construction laborers, because of their dangerous work, are entitled to special protections. But of course, these workers rely foremost on the judiciary to ensure that these protections, are themselves protected.

The seriousness of this matter is also shown by the two lengthy opinions, and the 3-2 split, in the decision appealed.

Plaintiffs-Appellants incorporate, by reference, the contents of their Respondents' Brief submitted to the Appellate Division, First Department, as well as the arguments within the lower court motion papers that are contained within the Record on Appeal which was before the Appellate Division, First Department. (See, Rule 500.11(f)).

Pursuant to Rule 500.11 and this Court's correspondence of July 21, 2022, we hereby submit these arguments in letter form. We enclose herewith

two copies of this letter submission and proof of service of one copy of this submission on the opposing party.

## UNDERLYING FACTS

The Plaintiff 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 Plaintiff's fall occurred on August 25, 2015, at a renovation job at 180 Maiden Lane in New York County, which premises are owned by Defendant-Respondent 180 Maiden Lane LLC. The general contractor for the renovation job was Defendant-Respondent J.T. Magen & Company Inc. (Magen).[3] The Plaintiff was employed by non-party Kara Painting (Kara), the painting subcontractor. Kara was retained by Magen.[4] Lucas Calamari was a project superintendent for Magen. Kara's owner was Mustafa Kara. The Kara foreman was Cem Cetin.[5] 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."[6]

[3] R. 229
[4] R. 236
[5] R. 224, 237. Plaintiff called his foreman "Jim." (R. 114)
[6] R. 238

The Plaintiff has only been a painter: "I do only painting."[7] After the fall at defendants' job, the Plaintiff "cannot work anymore."[8]

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

On the said day, the 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."[9] The only equipment he was given was a roller, and paint; he had his own brush.[10] For painting the ceiling, a scaffold was used, but "not for [the] wall."[11]

Plaintiff saw that there was "heavy plastic" on the escalator steps. He was not sure who placed the plastic there. [12]

The Plaintiff explained the circumstances leading up to his fall:

> "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 no way to work on this."[13]

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[7] R. 157-158

[8] R. 91. The Plaintiff is disabled from work, and his serious injuries caused by his slip and fall at Defendants-Respondents' 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)

[9] R. 114-115

[10] R. 115-116

[11] R. 116

[12] R. 117

[13] Jimmy's immediate response to Plaintiff's concern --"this no way to work on this" was expletive filled. (R. 121).

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." [14]

The Plaintiff explained that he walked to the middle of the escalator with the buckets[15] 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 I 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."[16]

The buckets of paint were placed on a different escalator-step than the escalator-step that the Plaintiff was standing on.[17] The paint bucket was on a higher escalator-step than the step that Plaintiff was standing on and he actually fell "back up the escalator" and his back hit the paint bucket and

[14] R. 121
[15] R. 13
[16] R. 122
[17] R. 123-124

"all paint came out."[18] His head hit the metal escalator.[19] The Plaintiff summarized it: "I pull the plastic when I slip, plastic was so danger to work."[20]

When Plaintiff slipped on the plastic, he was trying to paint the wall "above his head" – about seven, eight, or nine feet above, and that he used an "extension stick. Nine feet, something like that, longer stick."[21] The longer stick did not belong to the Plaintiff, his foreman gave it to him.[22]

The Plaintiff fell a "couple of minutes" after he started the job; he did not actually do any painting – he "just roller up and I fell."[23]

**B. The boss acknowledged that the plastic was the wrong covering**

Mr. Calamari recalled that the Plaintiff's fall occurred on the escalator between the second and third floors.[24] He did not know that Kara painters were trying to paint the walls around the escalator with a "roller" on an

[18] R. 126-127
[19] R. 128
[20] R. 128
[21] R. 130-131
[22] R. 131
[23] R. 131, 133
[24] R. 238-239

"extension stick", while standing on the escalator steps. [25] 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.[26]

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.[27] 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. [28]

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

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[25] R. 241
[26] R. 242
[27] R. 243
[28] R. 243

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.[29]

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."[30] Indeed, Mr. Calamari recalled that he directed that the plastic covering be removed from the escalator steps, and that "it was removed right away."[31]

The trial judge, taking all of the evidence into account, found that the Plaintiffs-Appellants 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-Appellants' motion for summary judgment under these sections; and correspondingly denied Defendant-Respondents' cross-motion to dismiss these claims.

[29] R. 244
[30] R. 245-246
[31] R. 252

## QUESTIONS 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. The 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 testified, that a) the plastic covering was the wrong covering for 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 superintendent had 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.

Plaintiffs-Appellants moved for summary judgment as to Defendants-Respondents' liability under Labor Law §241(6) and §§ 23-1.7(d)[32] and 23-1.7(e)(1)[33] arguing, and showing, inter alia, that the plastic covering was a hazard to the Plaintiff, and a hindrance to the work of painting, and that the plastic covering was thus a "foreign substance" under §23-1.7(d). Defendants-Respondents cross-moved to dismiss these claims, arguing in sum, and in essence, that since the plastic covering was "intentionally placed" by someone it was "integral to the work." The Supreme Court granted the Plaintiffs-Appellants' motion and denied the Defendants-Respondents' cross-motion, and the First Department reversed, denying the Plaintiffs-Appellants' motion, and granting the Defendants-Respondents' cross-motion to dismiss the Labor Law §241(6) claim.

[32] §23-1.7(d) provides "Slipping hazards. 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. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

[33] §23-1.7(e) entitled "Tripping and other hazards" provides "(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered."

1) The First Department reversed the grant of summary judgment to the Plaintiffs-Appellants 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 First Department err in reversing the grant of summary judgment to the Plaintiffs-Appellants because the defendants "intentionally placed" the plastic, when this Court's precedents on "integral to the work" have nothing at all to do with what the defendants intended?

We say "yes" the First Department erred.

2) The First Department reversed the grant of summary judgment to the Plaintiffs-Appellants holding that the plastic covering was not a "foreign substance" within the meaning of §23-1.7(d) because a "sensible interpretation of the wording of this regulation, calls for the application of the maxim *ejusdem generis*" and seemingly, that statutory canon compelled the Court. Did the First Department err in reversing the grant of summary judgment to the Plaintiffs-Appellants on this basis when *other* canons of construction compel the opposite conclusion, and this Court has announced

that the Labor Law is to be interpreted and applied to effectuate its purpose of protecting laborers against hazards in the workplace?

We say "yes" the First Department erred.

## ISSUES PRESERVED

As to the *first* question presented, Plaintiffs-Appellants argued before the First Department that the "plastic covering was not "integral to the work" of painting while standing on an escalator step; it was a hindrance and a hazard, as a matter of law." (Pls.' Br. at 18-27).

As to the *second* question presented, Plaintiffs-Appellants argued before the First Department that "the plastic covering on the escalator was a "foreign substance" under §23-1.7(d), as a matter of law." (Pls.' Br. at 15-17).

## 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) 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.*

Relatedly, this Court has stated 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 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*, though §241(6) imposes a nondelegable duty, and vicarious liability upon an owner or contractor, 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 by the Court].

*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. (*Misicki v. Caradonna*, supra).

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 construction of 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).[34] 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 on 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

[34] 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).

because "the pole which fell with the plaintiff had not been properly set" 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.

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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], [35] 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

[35] 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."

NYCRR 23-1.7(b)(1)(i) which states that "[e]very hazardous opening into 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, an 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.[36]

For example, the First Department itself had closely adhered to *Salazar* and consistently rejected the defendant's "integral to the work" defense when the safeguard would not have defeated or hindered the work at hand. See e.g., *Hyatt v. Queens W. Dev. Corp*., 194 AD3d 548 [1st Dept 2021] (where plaintiff "was working with a coworker breaking down reshore scaffolding and tower scaffolding" "[when] the tower scaffolding fell and hit [him],'

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[36] The integral to the work defense is raised in three, 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"); see also *Konopczynski v. ADF Const. Corp*., 60 AD3d 1313, 1314 [4th Dept 2009].

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'").

liability was correctly imposed inasmuch as "securing the tower scaffolding would not have hindered the purpose of breaking down scaffolding, as the tower scaffolding was not integral to the context and purpose of the work"); *Ragubir v. Gibraltar Mgt. Co. Inc*., 147 AD3d 563, 564 [1st Dept 2017] (although liability will not be imposed for failure to provide a safety device "[w]here use of such a safety device would defeat or be contrary to the purpose of the work," such was not so in this case in which "demolition of the structure was to occur bay to bay" and the "the roof above plaintiff was not the intended target of the demolition at the time it collapsed on him")[37] 181 AD3d 449 [1st Dept 2020].

Until now, as shown in the brief survey of cases *supra*, 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).

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[37] Though in *Hyatt*, the plaintiff was involved with the work of *breaking down* scaffolding, the First Department still held the defendants to the task of *securing* the scaffolding. Similarly, in *Ragubir*, though demolition was generally underway, since it was not underway at the location where the plaintiff was working, a device should have been provided to protect him from the collapse. *Hyatt* and *Ragubir* were not only correctly decided but they are proud offspring of this Court's *Henry* and *Mullin* decisions discussed above: even when the plaintiff is working a dangerous job, and the accident which occurs seems related to the risks of the plaintiff's job, inquiry must still be made as to whether the risk to which the plaintiff was exposed, could have been lessened or eliminated with measures which would not have defeated or been contrary to the work. And all of this makes sense and is consistent with settled negligence principles recalled at the outset, and upon which §241(6) is built.

**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*." (*Bazdaric*, 203 AD3d at 644) (emphasis added).

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

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. [38]

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" (*Bazdaric*, 203 AD3d at 644).

*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. 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

[38]The First Department did not cite authority for the "intentionally placed" idea.

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.[39]

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[40] is the majority's dismissive and

[39] 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. 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." (*Bazdaric*, 203 AD3d at 649) (emphasis added)

[40] Which is, after all, as recognized in dissent, the *Salazar* criteria. (*Bazdaric*, 203 AD3d at 650-651) (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")

mischaracterizing response to the unequivocal testimony of the plaintiff, and Mr. Calamari that the plastic covering was unsafe, and a hindrance to the work. *Bazdaric,* 203 AD3d at 644. [41]

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*

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[41] Styling the problem as 'the plastic covering was *not* the *best choice*' is misleading. The concession that the plastic was a "poor choice" meant that a safer alternative could easily have been used: "Here, defendants do not argue that it was necessary to perform he 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 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." (*Bazdaric*, 203 AD3d at 651).

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", 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*, 2022 NY Slip Op. 04811 [2d Dept August 3, 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 or that safety markings or other protective measure would have interfered with the work (see *Aragona v. state of New York*, 147 AD3d 808, 809; *Lopez v. New York City Dept. of Envtl. Protection*, 123 AD3d 982, 984). In *Lopez*, as well, "the defendants 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" 147 AD3d at 984.

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, 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. Mr. Calamari readily acknowledged that cloth drop cloths or wood boards should have been used, and were used in the past, and that as soon as he learned of the plaintiff's fall, the slippery covering was removed. 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."

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In addition to the foregoing, Plaintiffs-Appellants wish to especially highlight one decision, which was discussed in the Plaintiffs-Appellants response brief (Pls.' Br. at 19-20) and by the dissent (*Bazdaric*, 203 AD3d at 650), and that is *Galazka v. WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 789-790 [2d Dept 2008]. In *Galazka*, the Second Department affirmed the Supreme Court's grant of summary judgment to the defendants, dismissing the plaintiff's claim under §241(6) and §23-1.7(e)(2) and 23-1.7(d) because, as plaintiffs retold in their brief ""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 (*Galazka*, 55 A.D.3d at 789-790 (citing *O'Sullivan*, 7 N.Y3d at 806)." 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 fiber 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)." (Pls.' Br. at 19-20).

Plaintiffs-Appellants continued in their brief below: "[t]hough 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." (Pls.' Br. at 20)(emphasis in original).

*Galazka* is perfectly cogent, and a correct decision, and respectfully, the majority's ruling at bar and *Galazka* cannot co-exist.

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. See *Bazdaric*, 203 AD3d at 652. 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-Appellants' 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*" *Bazdaric*, 203 AD3d at 652 (emphasis in original).

It is respectfully submitted, that the Plaintiffs-Appellants showed here, and with reference to their brief in the Appellate Division, and with reference to the dissent (*Bazdaric*, 203 AD3d at 646-654) 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; 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.

What is more, the protections of §241(6) have already been reduced by a series of non-literal constructions of the statute. 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

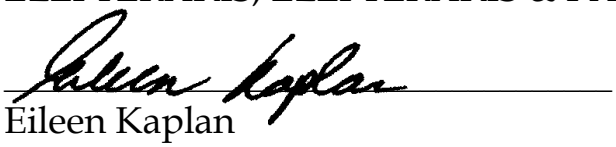
Due to the word count limit of this Rule 500.11 letter brief, the Plaintiffs-Appellants are compelled to refer the Court to their arguments on this issue made to the First Department (Pls'. Br. at 15-17), and to the dissent. *Bazdaric*, 203 AD3d at 649, 652-653.

## CONCLUSION

For the reasons stated herein, and upon the Appellate Division briefs and record, we respectfully request that this Court *reverse* the First Department's ruling and affirm the ruling of the trial court granting the plaintiffs' motion for summary judgment; and grant such other and further relief as this Court deems necessary and proper.

Dated: New York, New York
August 12, 2022

Respectfully submitted,
ELEFTERAKIS, ELEFTERAKIS & PANEK



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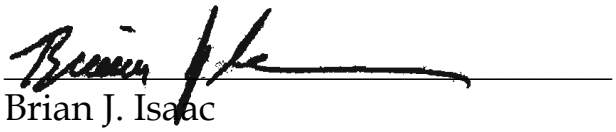

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## CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.11 that the foregoing brief was prepared on a computer.

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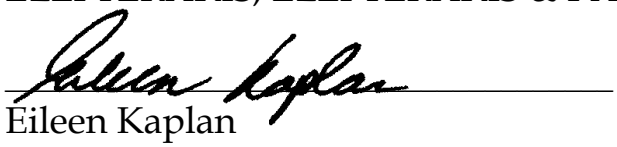
Dated: New York, New York
August 12, 2022

Respectfully submitted,
ELEFTERAKIS, ELEFTERAKIS & PANEK



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