To be Argued by:
SCOTT A. KORENBAUM
(Time Requested: 30 Minutes)

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Court of Appeals

of the

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 DEFENDANTS-RESPONDENTS

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22 NYCRR PART 500.1(f) Disclosure Statement

Pursuant to 22 NYCRR PART 500.1(f), Defendants-Respondents state that: (1) J.T. MAGEN & COMPANY INC. do not have parents, subsidiaries and/or affiliates; (2) 180 Maiden Lane LLC and Downtown NYC Owner, LLC herein identify CalSTRS; and (3) to date, the undersigned has been unable to discern whether ALMAH PARTNERS LLC and ALMAH MEZZ LLC have any parents, subsidiaries and/or affiliates. Defendants-Respondents will supplement this information if and when additional information becomes available.

Dated: New York, New York
April 17, 2023

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Preliminary Statement

Accidents happen. And they happen in the workplace. But contrary to the suggestions contained in the opening brief of plaintiffs-appellants, Srecko Bazdaric and Zorka Bazdaric ("Mr. Bazdaric"), not all acts of negligence occurring in the workplace are protected by New York Labor Law § 241(6). While the concern of Section 241(6) is to insure employee safety, Section 241(6) and the Industrial Code provisions, as written, represent carefully crafted standards designed to address specific concerns in the workplace. When an employee is injured in a manner that is not covered by the Code's provisions, it is not the job of the courts to rewrite the law. Rather, redress must be found with the Legislature.

The Appellate Division, First Department, recognized this in granting summary judgment to respondents on Mr. Bazdaric's Section 241(6) claim. Applying well-established canons of statutory construction, it correctly found that the solid plastic covering Mr. Bazdaric slipped on was not a "foreign substance" within the meaning of 12 NYCRR § 23-1.7(d), and that the location where he injured himself was not a "passageway" within the meaning of 12 NYCRR § 23-1.7(e)(1). The Appellate Division also correctly held that the use of the plastic covering on the escalator where Mr. Bazdaric was painting was integral to the work he was performing. This Court should affirm.

Procedural History

Mr. Bazdaric commenced this action with the filing of his Summons and Complaint. He alleged, among other things, that on August 25, 2015, while painting the walls and ceilings around the escalator connecting the second and third floors of the building located at 180 Maiden Lane in Manhattan, he slipped on a piece of heavy duty plastic covering the escalator to protect it from paint. (Record on Appeal ("R") 5-6.) Mr. Bazdaric alleged that the respondents, who were the owners of 180 Maiden Lane or contractors responsible for the work being performed, were liable for the injuries he sustained pursuant to Labor Law §§ 200, 240 and 241(6).

Following discovery, Mr. Bazdaric moved for summary judgment. As relevant to this appeal, he alleged that respondents violated 12 NYCRR § 23-1.7(d), 12 NYCRR § 23-1.7(e)(1) and 12 NYCRR § 23-1.7(e)(2). Respondents opposed the motion and cross-moved for summary judgment. Factually, they contended that it was Mr. Bazdaric "who determined the use of the plastic sheeting despite the ready availability of canvas drop cloths" that were provided by his employer. (R 275.)

Respondents also argued that none of the Industrial Code provisions applied to Mr. Bazdaric's accident. They claimed, among other things, that the location

where Mr. Bazdaric was injured was not a passageway within the meaning of 12 NYCRR § 23-1.7(e)(1). (R 276.) Respondents also argued that 12 NYCRR § 23-1.7(d) was inapplicable because the plastic shield he slipped on was not a "foreign substance," *i.e.*, it was not a slipping hazard. They also contended that the use of the plastic sheeting was an integral part of his work. (R 278.)

Supreme Court (Edmead, J.) granted in part, and denied in part, the parties' respective motions. Justice Edmead granted Mr. Bazdaric's motion to the extent it established a violation of 12 NYCRR §§ 23-1.7(d) and 23-1.7(e)(1). It dismissed his Section 241(6) claim to the extent it relied upon 12 NYCRR § 23-1.7(e)(2). (R 8-11.) Supreme Court also dismissed Mr. Bazdaric's claim sounding in violation of Labor Law § 200. (R 11-12.) Justice Edmead did not address Mr. Bazdaric's Labor Law § 240 claim as no party had moved on it.

Respondents timely appealed to the Appellate Division. Mr. Bazdaric did not cross-appeal, thereby abandoning his Labor Law § 200 claim. By Decision and Order entered March 31, 2022, the First Department reversed and granted respondents' motion for summary judgment. The majority found that the heavy duty plastic covering was not a foreign substance within the meaning of 12 NYCRR § 23-1.7(d). (R 310-11.) The majority also determined that the covering was integral to Mr. Bazdaric's work and, as such, his claims were barred by the

integral to work defense. (R 311-12.) Finally, the Appellate Division found that NYCRR § 23-1.7(e)(1) was inapplicable for two reasons. First, the integral to work defense defeated this argument. Second, the escalator where Mr. Bazdaric was injured was not a passageway, but his work area. (R 312-13.)

Justice Moulton and Presiding Justice Manzanet-Daniels dissented. They rejected the majority's holding that the heavy duty plastic covering was not a foreign substance within the meaning of 12 NYCRR § 23-1.7(d). (R 317, 322-25.) Regarding Section 23.1-7(e)(1), the dissenting Justices, without citing any case law, found that the escalator was a passageway even though it was inoperable and where Mr. Bazdaric worked. (R 317-18.) Finally, the dissenting Justices rejected the majority's finding that the use of the heavy duty plastic covering was integral to Mr. Bazdaric's work. (R 318-22.)

Mr. Bazdaric moved, on April 29, 2022, for reargument, or, alternatively, for leave to appeal to this Court, from the Decision and Order. The Appellate Division denied reargument but granted Mr. Bazdaric leave to appeal to this Court. (R. 326-327.)

Mr. Bazdaric defines the issues before this Court too narrowly. Mr. Bazdaric correctly identifies two issues for this Court to decide: (1) whether his claims are barred by the integral to work doctrine; and (2) whether his § 23-1.7(d)

claim is barred because the heavy duty plastic covering was not a foreign substance within the meaning of that regulation. But, as noted, the First Department also found that Mr. Bazdaric's § 23-1.7(e)(1) claim was inapplicable because his work area was not a "passageway" within the meaning of that regulation.[1]

Questions Presented

1. On August 25, 2015, Mr. Bazdaric's assignment was to paint the walls around the area of the escalator connecting the second and third floors at 180 Maiden Lane. While painting, he slipped on a heavy duty plastic shield designed to protect the escalator's steps from paint.

Section 23-1.7 of the Industrial Code contains a number of provisions that are designed to address specific concerns in the workplace. For example, § 23-1.7(c) addresses drowning concerns. Section 23-1.7(d) addresses slipping hazards. And § 23-1.7(e) addresses tripping hazards. The Industrial Code draws unmistakably clear distinctions between accidents occurring in passageways (*see* § 23-1.7(e)(1)) and working areas (*see* § 23-1.7(e)(2)). Here, employing the time-

[1] Respondents also argued below that Section 23.1-7(e)(1) did not apply because Mr. Bazdaric did not trip. The First Department did not address this argument. This Court can affirm, if it so chooses, on any basis found in the record. *See Williams v. Peralta*, 37 AD3d 712, 713 (2d Dep't 2007) ("However, we affirm the denial of summary judgment for a different reason."); *CadleRock Joint Venture II, L.P. v. ADCO Equities, L.P.*, 269 AD2d 251, 253 (1st Dep't 2000) ("We affirm, but for somewhat different reasons.").

honored canon of statutory construction, *ejusdem generis*, the Appellate Division determined that the plastic covering was not a foreign substance within the meaning of 12 NYCRR § 23-1.7(d). Concerning 12 NYCRR § 23-1.7(e)(1), the Appellate Division also held that Mr. Bazdaric's Section 241(6) claim failed because his accident occurred on an inoperable escalator where he was assigned to work. Thus, his accident occurred in his work area, and not a "passageway" within the meaning of the § 23-1.7(e)(1).

The first question for this Court to resolve is whether the Appellate Division correctly held that Mr. Bazdaric's Section 241(6) claim failed because neither § 23-1.7(d) nor § 23-1.7(e)(1) applied? Respondents respectfully submit that the answer is "Yes."

2. The area where Mr. Bazdaric was assigned required a protective cover to insure that paint did not spill on the escalator. Whether he or someone else laid the heavy duty shield, Mr. Bazdaric's assignment required the placement of such a covering at that location. As the First Department noted, "the covering was part of the staging conditions of the area plaintiff was tasked with painting, making it integral to his work." As such, the First Department concluded that "the integral work defense bars plaintiff's reliance on 12 NYCRR 23-1.7(d)." (R 311.) This held true even if the use of the plastic covering was not the best choice to

protect against paint splattering. (R 311-12.)

The second question for this Court to resolve is whether the Appellate Division correctly held that Mr. Bazdaric's claim was barred by the integral to work defense? Respondents respectfully submit that the answer is "Yes."

Statement of Facts

Mr. Bazdaric was employed as a painter by non-party Kara Painting. On August 25, 2015, Mr. Bazdaric was assigned to paint the walls and ceilings around the escalator connecting the second and third floors of the building located at 180 Maiden Lane in Manhattan. Defendant-respondent J.T. Magen & Company Inc. was the general contractor. (R 5.)

When Mr. Bazdaric arrived to begin his task he found the escalator was protected from paint by "heavy duty plastic." (R 5.) He did not believe his employer had laid the plastic covering; he speculated that it was done by the general contractor. Mr. Bazdaric also noted that drop cloths were on hand that could have been used to protect the escalator from paint. (R 6.)

Mr. Bazdaric did not feel comfortable working on the escalator with the protective covering as is. He complained to his foreman, Cem Cestin (R 283), about the plastic protection. Mr. Cestin responded as follows:

"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.' He say, 'You fucking guy.' That's what he tell me. '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.' "

(R 6.) Mr. Bazdaric did as he was told and began to paint. (*Id.*)

The Supreme Court described what happened next to Mr. Bazdaric. As it noted, "[a]s he set up to work on the middle of the escalator, [plaintiff] 'slipped [on] that plastic,' and fell backwards onto the escalator, as well as a three-gallon paint bucket that was two steps behind him on the escalator." (R 6.)

Mr. Bazdaric filled out an accident report with the general contractor. The report was signed by Lucas Calamari, one of J.T. Magen's project supervisors. (R 224-25.) The report reflects Mr. Bazdaric's claim that he slipped on the protective plastic shield. (R 217.)

Mr. Calamari did not have any 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 240-41.) However, Mr. Calamari opined that the plastic covering used on that day was inappropriate, although he did not identify a specific reason why. He also noted that the use of either wood coverings or drop cloths would have been better suited

for the task at hand, and that he had seen Kara Painting use drop cloths in the past. He also directed that the plastic shield be removed from the escalator steps following Mr. Bazdaric's accident. (R 242-44.)

Argument

Point I

The structure and language of 12 NYCRR §§ 23-1.7(d) and 23-1.7(e)(1) make clear that Mr. Bazdaric neither slipped on a foreign substance (23-1.7(d)) nor was injured in a passageway (23-1.7(e)(1))

Mr. Bazdaric predicated his Section 241(6) claim on violations of 12 NYCRR §§ 23-1.7(d) and 23-1.7(e)(1). Relying upon common ordinary parlance, the well-accepted canons of statutory interpretation and relevant case law, the Appellate Division correctly concluded that the plastic shield Mr. Bazdaric slipped on was not a foreign substance within the meaning of 12 NYCRR § 23-1.7(d). Employing these same tools, the Appellate Division also correctly determined that Mr. Bazdaric's accident occurred in his work area, and not in a passageway. Because Mr. Bazdaric provides no reason to conclude otherwise, this Court should affirm.

A. The principles governing Mr. Bazdaric's Labor Law § 241(6) claim

The principles governing Mr. Bazdaric's Labor Law § 241(6) claim are

well-established. Section 241(6) provides, in relevant part, as follows:

> [a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> (6) 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, . . . shall comply therewith.

NY Labor Law § 241(6). As this Court noted in *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503 (1993), Labor Law Section 241(6) "is, in a sense, a hybrid." The first sentence requires "reasonable and adequate" measures, and "reiterates the general common-law standard of care." Its second sentence, on the other hand, "requir[es] owners and contractors to comply with the Commissioner of Labor's rules, [and] creates a nondelegable duty where the regulation in question contains a specific, positive command." *Nostrom v A.W. Chesterton Co.*, 15 N.Y.3d 502, 507 (2010) (citation and quotations omitted). Because the duty is nondelegable, "the particular provision relied upon by a

plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles." *Misicki v. Caradonna*, 12 NY3d 511, 515 (2009) (citation omitted). Where an employee establishes a breach of a specific duty imposed by an Industrial Code regulation, this represents some evidence of negligence. *Toussaint v. Port Auth.*, 38 NY3d 89, 93 n.2 (2022). An employer can still invoke the defenses of contributory and comparative negligence. *Misicki*, 12 NY3d at 515.

B. The principles of statutory construction governing this Court's review

The principles of statutory construction guiding this Court's review are well-known. In interpreting legislative enactments, the Court starts with the language itself, giving effect to its plain meaning. *Alvarez v. Annucci*, 38 NY3d 974, 975 (2022). *See Kimmel v. State of New York*, 29 NY3d 386, 392 (2017). "[T]he obvious and fundamental rule of construction [is] that words of common usage are to be given their ordinary meaning." *Manhattan Pizza Hut, Inc. v. New York State Div. of Human Rts. Appeal Bd.*, 51 NY2d 506, 511 (1980).

The literal language of the statute controls unless the plain intent and purpose of the legislation would otherwise be defeated. *Lynch v. City of New York*, 35 NY3d 517, 523 (2020). In determining legislative intent, this Court "must harmonize the various provisions of related statutes and construe them in a

way that renders them internally compatible." *Alvarez*, 38 NY2d at 975. "[A] statute must be construed to avoid rendering any of its provisions superfluous." *Kimmel*, 29 NY3d at 393. And when the legislature "includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning." *Bittner v. United States*, 598 US ___, 143 S Ct 713, 720 (2023) (citations omitted). Of course, this Court cannot reject an interpretation of legislation because it disagrees with the legislature's policy decisions. *See Morales v. County of Nassau*, 94 NY2d 218, 224 (1999) ("This Court has repeatedly declined to interfere with the Legislature's policy choices as beyond the realm of judicial authority. Where the Legislature has spoken, indicating its policy preferences, it is not for courts to superimpose their own"). *See also In re Chase Nat'l Bank*, 283 NY 350, 360 (1940) (same).

C. Employing the appropriate maxim of *ejusdem generis*, the Appellate Division correctly held that the hard plastic shield Mr. Bazdaric slipped on was not a foreign substance within the meaning of § 23-1.7(d)

The Appellate Division employed the well-established principle of *ejusdem generis* to conclude that Mr. Bazdaric did not slip on a "foreign substance" within the meaning of Section 23-1.7(d). In advancing his argument, Mr. Bazdaric relies primarily, if not exclusively, on the general legislative intent of Labor Law § 241(6). His argument is devoid of any relevant case law and, more important,

renders superfluous the language actually used in Section 23-1.7(d).

Section 23-1.7(d) provides as follows:

> 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.

12 NYCRR § 23-1.7(d). As the Appellate Division noted (R 310), the use of the phrase "any other foreign substance" "makes for a classical case in which to apply the principles of *ejusdem generis*." *Manhattan Pizza Hut, Inc.*, 51 NY2d at 512. This canon of statutory interpretation provides that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." (R 310 (citations omitted).) As this Court has noted, the canon is "[a]n interpretive device fashioned to save draftsmen from undertaking the hazard of spelling out in advance every contingency to which a statute would have been intended to apply . . . , that doctrine yet imposes the understanding that general phraseology will be taken to have been 'limited * * * by the specific words which precede it.'" *Manhattan Pizza Hut, Inc.*, 51 NY2d at 512 (citations omitted). Stated in simpler terms, general phrases, even if

"susceptible of a wide interpretation, becomes one limited in its effect by the specific words which precede it; in the vernacular, it is known by the company it keeps." *People v. Illardo*, 48 NY2d 408, 416 (1979)(citing McKinney's Cons Laws of NY, Book 1, Statutes, § 239).)

Here, the Appellate Division correctly noted that, "[s]ensibly interpreted, the heavy-duty plastic covering is not similar in nature to the foreign substances listed in the regulation, i.e., ice, snow, water or grease." (R 310.) This conclusion is sound. The identified substances all have a liquid, non-solid like quality to them that render them inherently slippery. In contrast, the heavy-duty, solid plastic shield Mr. Bazdaric slipped on does not.

Mr. Bazdaric has no meaningful response to this analysis. He defaults to the dissenting justices' arguments regarding why the canon of *ejusdem generis* is inapplicable. Bazdaric Brf. at 39-40. But the dissenting Justices' argument, that "[h]ad 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 any other *similar* foreign substance which may cause slippery footing' (emphasis added)" (R 323), is misplaced for two fundamental reasons. First, it ignores the purpose behind *ejusdem generis*. *See Manhattan*

Pizza Hut, Inc., 51 NY2d at 512 (citations omitted); *Illardo*, 48 NY2d at 416 (citation omitted). Second, it runs afoul of the canon of statutory interpretation that this Court must "read statutes as they are written." *People v. Page*, 35 NY3d 199, 207-08 (2020).

Against the Appellate Division's common sense reading of § 23-1.7(d), Mr. Bazdaric resorts to a limitless definition of "foreign substance." He argues,

> 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.

Brief for Plaintiffs-Appellants ("Bazdaric Brf.") at 37.

This Court should reject this simplistic definition for multiple reasons. Employing Mr. Bazdaric's limitless definition, every object placed on the escalator would be a foreign substance, which is an absurd result given the specific wording contained in Section 23-1.7(d). For example, the paint cans that Mr. Bazdaric used to paint the walls would be a foreign substance. So would the paint roller he used. As would the drop cloths that Mr. Bazdaric advanced below,

and advances before this Court, to establish that the use of the plastic shield covering was not integral to his work. This Court has emphasized that interpretations of statutes leading to absurd results need be rejected. *People v Warden, Westchester County Corr. Facility*, 36 NY3d 251, 262, 264 (2020). *See also Davis v. Supreme Lodge, K. of H.*, 165 NY 159, 170-71 (1900) ("It is an important function of all courts to give construction to statutes, to reconcile them when there is an apparent conflict, to interpret them in such a way that they will operate reasonably, and so as not to produce absurd results or to come in conflict with constitutional restrictions.").[2]

Mr. Bazdaric's definition fails for a related reason. As noted, this Court has emphasized that statutory interpretation must insure that effect and meaning be given to the entire statute and every part and word thereof, and that "a statute should be construed to avoid rendering any of its provisions superfluous." *Kimmel*, 29 NY3d at 393. *See also Rodriguez v. Perales*, 86 NY2d 361, 366

[2] Such a limitless definition would also serve as the functional equivalent of using a "broad, nonspecific regulatory standard as predicate for an action against a nonsupervising owner or general contractor under Labor Law § 241(6)," which this Court rejected in *Ross* as "seriously distort[ing] the scheme of liability for unsafe working conditions." *Ross*, 81 NY2d at 504. As the *Ross* Court concluded, this "could not have been within the Legislature's intention and was certainly not contemplated by our Court when we held that an owner or general contractor could be held liable for violations of rules promulgated pursuant to Labor Law § 241 (6) without regard to Labor Law § 200(1)'s requirement of supervision or control over the work." *Id.* at 504-05 (citation omitted).

(1995) ("Respondents' construction is unsatisfactory because it would render the first three words of the phrase 'determined to be due' superfluous--a result that the rules of statutory construction disfavor. It is well settled that in the interpretation of a statute we must assume that the Legislature did not deliberately place a phrase in the statute which was intended to serve no purpose … and each word must be read and given a distinct and consistent meaning") (citations and quotations omitted). Here, Mr. Bazdaric's limitless definition of "foreign substance" renders the second clause of § 23-1.7(d) superfluous because if, as he contends, everything is a foreign substance, then there is no need to single out "[i]ce, snow, water, [and] grease for removal. Rather, the second sentence of § 23-1.7(d) would simply provide that "[A]ny foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Respondents note that the Second Department's decision in *Kane v. Peter M. Moore Constr. Co.*, 145 AD3d 864 (2d Dep't 2016), necessarily rejects the argument posited here by Mr. Bazdaric. In *Kane*, the plaintiff, "an employee of Alternative Closets, was injured when he allegedly slipped and fell on a drop cloth that had been placed on a staircase by Moore Construction's employees." *Id.* at 866-67. He brought suit alleging, among other things, violations of Labor Law § 241(6), which he predicated on Section 23-1.7(d).

Mr. Bazdaric's definition of "foreign substance" would embrace the drop cloth the plaintiff slipped and fell on. According to Mr. Bazdaric, the "phrase [foreign substance] means material which is not native to the 'floor, passageway, walkway, scaffold, platform or other elevated working surface.'" But the Second Department rejected the claim of the plaintiff in *Kane*, finding that defendant's "evidence demonstrat[ed] that the injured plaintiff's accident was not caused by a failure to remove or cover a foreign substance." *Id.* at 869.

Mr. Bazdaric provides no relevant case law to support his argument. Only two cases he cites, *St. Louis v. Town of N. Elba*, 16 NY3d 411 (2011), and *Velasquez v. 795 Columbus LLC,* 103 AD3d 541 (1st Dep't 2013), involved claims arising under Labor Law § 241(6). Only *Velasquez* involved an alleged violation of § 23-1.7(d).

The First Department's decision in *Velasquez* supports Respondents' argument. In *Velasquez*, the plaintiff alleged "that he was injured when he slipped and fell on 'mud, rocks and water" at a construction site that, at the time, consisted of an open excavation. He claim[ed] that a muddy condition had formed on the concrete floor at the bottom of the site due to water from rain and a nearby water main break that occurred a few days before the accident." *Velasquez*, 103 A.D.3d at 541. In finding that the plaintiff had established a violation of Section 241(6),

the First Department readily concluded that he had slipped on a "foreign substance" because "the floor became covered with mud and water due to a water main break and rain." *Id.* at 542.[3]

For these same reasons the case law addressing "foreign substances" relied upon by the dissenting justices provides no succor to Mr. Bazdaric. The dissenting Justices' efforts to distinguish *Kane*, among other decisions, falls flat. According to the dissenting Justices,

> The majority cites cases, such as *Kane v Peter M. Moore Constr. Inc.* . . that conclude, without explanation, that § 23-1.7(d) is inapplicable. In addition, the cases do not find that § 23-1.7(d) is inapplicable on the basis that the condition at issue is dissimilar to ice, snow, water, or grease. It may be that the reasoning behind those cases is based on the defendants' and the majority's argument that the condition cannot be considered a "foreign substance" because it was an integral part of the work.

(R 324.) Lest there be a mistake, the *Kane* Court did not rule against plaintiff because the drop cloth he slipped on was an integral part of the work. Rather, it dismissed the claim because "the injured plaintiff's accident was not caused by a failure to remove or cover a foreign substance." *Kane*, 145 AD3d at 869.[4]

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[3] The First Department could have invoked the doctrine of *ejusdem generis* to support its holding if there were any question whether the presence of mud constituted "any other foreign substance." It did not have to given the presence of water.

[4] The *Kane* Court's citations to *Stier v. One Bryant Park LLC*, 113 AD3d 551 (1st Dep't 2014), and *Croussett v. Chen*, 102 AD3d 448 (1st Dep't 2013), leave no doubt that its holding

Mr. Bazdaric provides no principled reason to reverse the Appellate Division's holding that he did not slip on a "foreign substance." This Court should affirm.

D. The Appellate Division correctly held that Mr. Bazdaric's accident did not occur in a passageway within the meaning of § 23-1.7(e)(1), but occurred in his work area

The Appellate Division also rejected Mr. Bazdaric's Section 241(6) claim that was predicated on a violation of § 23-1.7(e)(1) because the escalator where he slipped "was not serving as a 'passageway' but rather was a work area." (R 312-13 (citation omitted).) This Court should affirm for two reasons. First, Mr. Bazdaric does not address this argument in his Opening Brief. As such, he has waived or forfeited his right to challenge this aspect of the Appellate Division's holding. Second, the Appellate Division's holding is correct. The structure of § 23-1.7(e) and the well-established canons of statutory interpretation establish that Mr. Bazdaric injured himself in a work area, and not a passageway.

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rested on whether the drop cloth was a foreign substance. In *Stier*, the First Department rejected plaintiff's Section 241(6) claim because "[t]here was no evidence that plaintiff's accident was the result of a failure to remove or cover a foreign substance, and masonite is not a slipping hazard contemplated by 12 NYCRR 23-1.7 (d)." *Stier*, 113 AD3d at 552. In *Crousette*, the First Department rejected plaintiff's Section 241(6) claim because "[t]here [was] no evidence of a slippery floor or that the masonite, which covered the ceramic floor, was a foreign substance that caused a slippery footing." *Crousette*, 102 AD3d at 448.

1. Mr. Bazdaric has forfeited his right to challenge the Appellate Division's holding that he was not injured in a passageway because he does not address it in his Opening Brief

The Appellate Division rejected Mr. Bazdaric's Section 241(6) claim that was predicated on a violation of § 23-1.7(e)(1) because the escalator where he slipped "was not serving as a 'passageway' but rather was a work area." (R 312-13 (citation omitted).) Mr. Bazdaric's Opening Brief does not address this argument. His failure to do so represents an independent basis to affirm this aspect of the Appellate Division's Decision and Order.

There is no doubt that the Appellate Division's determination represented an independent ground to dismiss Mr. Bazdaric's Section 241(6) claim. The majority decision opened its discussion of Section 23-1.7(e) as follows: "Additionally, the Supreme Court and the dissent incorrectly find liability pursuant to Industrial Code Section 23-1.7(e)." After discussing why Mr. Bazdaric's reliance on 23-1.7(e) failed under the integral part of the work doctrine (*see* Point II below), the Appellate Division closed its discussion as follows: "Moreover, section 23-1.7(e)(1) is not applicable because, here, the escalator was not serving as a 'passageway' but rather as a work area. . . ." (R 312-13 (citation omitted).)

The Appellate Division's holding was not one in hiding. The dissenting

Justices appreciated it and unambiguously addressed it. (R 316-17.) Mr. Bazdaric did not address this aspect of the Appellate Division's holding in his August 12, 2022 letter to the Court and he does not address it in his Opening Brief. As such, this Court should find that Mr. Bazdaric has voluntarily abandoned any challenge to this aspect of the Appellate Division's holding. *Matter of Garner v. New York State Dept. of Correctional Servs.*, 10 NY3d 358, 361 (2008); (affirmative decision to forego an argument on appeal represents an abandonment of the issue); *Aybar v. Aybar*, 27 NY3d 274, 282 & n.1 (2021) (same). *See also United States v. Waters*, Docket No. 21-1219, 2022 U.S. App. LEXIS 32014 (2d Cir. Nov. 21, 2022) ("the district court determined that Waters never identified an 'action or proceeding' that the IRS had brought against him, or any lien that the IRS had 'create[d], perfect[ed], or enforce[d]' against his property. Waters does not challenge this reasoning on appeal and therefore has abandoned any argument he might have raised under those subsections.") (citation omitted) (Summary Order).

2. The Appellate Division correctly held that Mr. Bazdaric's injury occurred in a work area, and not a passageway.

If this Court is inclined to overlook Mr. Bazdaric's waiver, which it should not, the Appellate Division also correctly held that Section 23-1.7(e) did not apply because he was not injured in a passageway. Mr. Bazdaric was not using the

escalator to get from Point A to Point B on August 25, 2015. In fact, no one used the escalator to get from Point A to Point B that day; it was inoperable because Mr. Bazdaric needed to paint the walls surrounding it. Bazdaric Brf. at 2. Put simply, it was his work area, which the First Department correctly recognized. This Court should follow suit and make clear the distinction that exists between these oft-invoked Industrial Code provisions.

The structure of Section 23-1.7(e) and everyday common parlance support the Appellate Division's holding. Section 23-1.7(e) provides as follows:

> (e) Tripping and other hazards.
>
> (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.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

12 NYCRR § 23-1.7(e). By its terms, § 23-1.7(e) draws a clear distinction between passageways (*see* § 23-1.7(e)(1)) and working areas (*see* § 23-1.7(e)(2)). Time and again this Court has recognized that when construing statutes, "where a

law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." *Cohen v. Martin*, 35 NY3d 75, 78 (2020). *See Kimmel*, 29 NY3d at 394 (discussing the maxim *expressio unius est exclusio alterius* and citing McKinney's Cons Laws of NY, Book 1, Statutes § 240 at 412-413 ("where a statute creates provisos or exceptions as to certain matters the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned")). As the Supreme Court has recognized, "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Department of Homeland Security v. MacLean*, 574 US 383, 391 (2015).

Here, Sections 23.1-7(e)(1) and (e)(2) draw a sharp distinction between passageways and working areas. These terms do not mean the same thing for the reasons identified immediately above. Employing common sense and his own description of his work assignment, Mr. Bazdaric slipped and injured himself in the area where he was assigned to work (R 6, 120-22), *i.e.*, a "working area." In contrast, "Passageway" is defined as "a narrow way for passage, as a hall corridor or alley; passage." *New World Dictionary*, Second College Edition at 1038. "Passage," in turn, is defined in relevant part as "a way or means of passing;

specifically a) a road or path; b) a channel, duct, etc.; c) a hall or corridor that is an entrance or exit or onto which several rooms open; passageway." *Id.*[5] Synonyms include corridor, hall and hallway. *Roget's International Thesaurus*, Third Edition, at 191.2-192.11. These common sense definitions, and that the escalator where Mr. Bazdaric was assigned to work on August 25, 2015, was inoperable because of the work he was to perform, establish that the Appellate Division correctly concluded that Mr. Bazdaric was not injured in a passageway.

Conlon v. Carnegie Hall Soc'y, Inc., 159 AD3d 655, 655 (1st Dep't 2018), relied upon by the First Department (R 312-13), is instructive. In *Conlon*, plaintiff contended that § 23.1-7(e)(1) applied when he fell down the staircase where he was working. In rejecting plaintiff's argument, the First Department found that the staircase was not a passageway even though it was "the sole means of access to his work area[.]" *Conlon*, 159 AD3d at 655-66. *Canning v. Barneys N.Y.*, 289 AD2d 32 (1st Dep't 2001), is also instructive. In rejecting plaintiff's argument that his accident occurred in a passageway, the Appellate Division noted the following:

> It is uncontested that, at the time of the accident, the concrete floors of the subject building had been poured and that the surface on which plaintiff fell was a "floor"

[5] "Passage" has multiple, inapplicable definitions that are omitted here, including, among others, "a noted sentence, paragraph, etc. of a written work or speech," or "the enactment of a law by a legislative body." *Id.*

> contained within the outer wall of the structure. It is also clear that the location where plaintiff fell was in constant use as a work site for the loading and unloading of construction material and debris. Although the accident did not occur in plaintiff's own work area, there can be no question that plaintiff was required to "pass" through the area in which he fell in order to reach his work area. At his examination before trial, plaintiff testified that he was required to transport his own materials to the job site and that the bay entrance was the only way to enter the building. Furthermore, plaintiff indicated that the path from the materials shed to the room in which he was assigned to work was essentially a straight line. Therefore, the subject area constitutes an open "working area" subject to the operation of paragraph (2), as opposed to a "passageway" governed by the more stringent requirements of paragraph (1).

Canning, 289 AD2d at 34.

Canning and *Conlon* breathe life into the distinction existing between §§ 23-1.7(e)(1) and (e)(2). In contrast, Mr. Bazdaric does not have any meaningful response. As noted, his brief is silent on this issue. The dissenting Justices' analysis is bereft of case law. Their Opinion devotes two sentences to the issue. After quoting § 23-1.7(e)(1), the dissenting Justices state in conclusory fashion that "all the necessary elements are present in this case. The plastic sheeting was a condition in a 'passageway' that 'could cause tripping.'" (R 318.) This Court should reject this conclusory analysis and give life to the evident distinction existing between §§ 23-1.7(e)(1) and (e)(2).

Point II

The Appellate Division correctly held that the integral to the work defense barred Mr. Bazdaric's claims because it was necessary for him to protect the escalator from dripping paint to complete his job

Respondents demonstrate above that Mr. Bazdaric's claims fail because the protective plastic shield he slipped on was not a "slippery condition" within the meaning of 12 NYCRR § 23-1.7(d), and he was not injured in a "passageway" within the meaning of 12 NYCRR § 23-1.7(e)(1). The Appellate Division also rejected Mr. Bazdaric's Section 241(6) claim because it concluded it was barred by the integral to the work defense. In so holding, it correctly noted that the use of a protective covering was necessary to ensure that paint did not splatter on the escalator. This holding was a principled application of the integral to the work defense. This Court should affirm.

A. The integral to work defense bars Mr. Bazdaric's claims

It is well-settled New York law that an alleged Industrial Code violation fails to create a negligent element for a Labor Law § 241(6) claim where the item that allegedly caused plaintiff's slip and fall was "an integral part of the construction." *O'Sullivan v. IDI Construction Co., Inc.*, 7 NY3d 805, 806 (2006). *See Salazar v. Novalex Contr. Corp.*, 18 NY3d 134 (2011). As Mr. Bazdaric

correctly notes in his brief, the integral to the work defense arises in three scenarios. Here, the Appellate Division correctly found that "the purportedly dangerous condition was necessary for the work itself." Bazdaric Brf. at 27 n.7 (citing *Tucker v. Tishman Constr. Corp. of New York*, 36 AD3d 417, 417 (1st Dep't 2007), and *DeLiso v. State*, 69 AD3d 786, 786 (2d Dep't 2010)).

In finding that the plastic shield covering was integral to the work Mr. Bazdaric needed to perform, the Appellate Division recognized that "the covering was part of the staging conditions of the area plaintiff was tasked with painting, making it integral to his work." (R 311.) In this vein, the plastic shield covering is no different then the hoses the plaintiff allegedly slipped on in *DeLiso*, 69 AD3d at 786-87, or the rebar steel the plaintiff tripped over in *Tucker*. *Tucker* 36 AD3d at 417.[6] Equally important, the Appellate Division recognized that the defense equally "applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident." (R 311 (citing *Krzyzanowski v. City of New York*, 179 AD3d 479, 481 (1st Dep't 2020).)

This Court should make clear that the integral to work defense applies in

[6] A close reading of *Tucker* also supports the Appellate Division's conclusion that Mr. Bazdaric's accident occurred in a working area, and not a "passageway" within the meaning of 12 NYCRR § 23-1.7(e)(1). *See* Point I.C., above.

simulations like Mr. Bazdaric's when the purportedly defective condition is part and parcel of the work that needs to be performed. Here, the Appellate Division correctly concluded that the protective shield was necessary, and, as such, precluded Mr. Bazdaric's claims. (R 311-13.)[7]

On appeal, Mr. Bazdaric raises a host of arguments, often overlapping, that he contends shows that the integral to the work defense does not apply to his Section 241(6) claim. Distilled to their essence, the thrust of Mr. Bazdaric's argument is two-fold. First, Mr. Bazdaric claims that the Appellate Division erred by introducing a subjective element into the integral to the work analysis. Bazdaric Brf. at 28-35. Next, he claims that the sky will fall if the Appellate Division's analysis is correct. Bazdaric Brf. at 35-36. Neither argument withstands scrutiny.

Initially, respondents take issue with Mr. Bazdaric's attempt to characterize the integral to the work defense as a natural outgrowth of common law principles. Bazdaric Brf. at 23-27. His reliance on *Mullin v. Genesee County Electric Light, Power & Gas Co.*, 202 NY 275 (1911), and *Henry v. Hudson & M. R. Co.*, 201 NY

[7] The majority and dissenting opinions clashed over whether the integral to the work defense applied to Section 23-1.7(e)(1). Mr. Bazdaric does not challenge on appeal the majority's conclusion that it does; respondents cannot think of a principled reason why it would not given the purpose of the defense.

140, 142 (1911), 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. This Court, as noted, has made clear that Section 241(6) deviates from the common law in holding contractors liable even in the absence of any supervisory responsibility. *Ross*, *supra*.

1. The Appellate Division did not import a subjective standard into the integral to the work defense

Seizing on the following language employed by the majority opinion, Mr. Bazdaric contends that the First Department established a subjective test for whether the use of equipment was integral to the work to be performed:

> [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).

Bazdaric Brf. at 28 (quoting (R 311 (emphasis added).) According to Mr. Bazdaric, the clear and unmistakable import of this language is the following: "*the defendants' intent = integral to the work, as a matter of law.*" Bazdaric Brf. at 28.

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.[8] A review of the case law relied upon by the First Department makes this point.

The First Department relied upon *Johnson v. 923 Fifth Ave. Condominium*, 102AD3d 592 (1st Dep't 2013), and *Rajkumar v. Budd Contr. Corp.*, 77 AD3d 595 (1st Dep't 2010). In *Johnson*, the First Department rejected plaintiff's Section 241(6) claim, to the extent it was predicated on 12 NYCRR § 23-1.7(e)(2), "because even if the sidewalk may be construed as a floor, platform or similar area where people 'work or pass,' plaintiff did not trip over loose or scattered material. He tripped over a piece of plywood that had been purposefully laid over the sidewalk to protect it and that therefore constituted an integral part of the work." *Johnson*, 102 AD3d at 593.

In *Rajkumar*, the First Department rejected the plaintiff's claims for a number of reasons. As relevant to this appeal, the *Rajkumar* Court rejected the plaintiff's Section 241(6) claim, to the extent it was predicated on 12 NYCRR § 23-1.7(e)(2), because "the plaintiff did not trip over loose or scattered material, but

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[8] As noted, Mr. Bazdaric recognizes this is an area in which the doctrine applies. Bazdaric Brf. at 27 n.7.

rather, over brown construction paper that was purposefully laid over newly installed floors to protect them. Such paper covering constituted an integral part of the floor work on the renovation project, and could not be construed to be a misplaced material over which one might trip." *Rajkumar*, 77 AD3d at 596.

Properly understood, the Appellate Division's holding, like those of *Johnson* and *Rajkumar*, stand for the common sense proposition that when a contractor employs a device that, objectively speaking, is a necessary tool to permit the contractor to complete the work, then it is integral to the work. This definition addresses the concerns of employees like Mr. Bazdaric as it will not permit the defendant's intent to carry the day. In other words, owners and contractors will not be able to "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 Brf. at 29.

Mr. Bazdaric has no meaningful response to *Johnson* and *Rajkumar*. He writes that "neither *Rajkumar* . . . nor *Johnson* . . . , 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 [sic] not have

hindered or been contrary to the purpose of the work." Bazdaric Brf. at 34. As noted, the Appellate Division's holding is not what Mr. Bazdaric claims. And Mr. Bazdaric reads too much into these cases. The "instrumentality" in each case was alleged to have been in a condition that would have run afoul of the Industrial Code but for the fact that it was integral to the work.

Respondents' position will also protect owners and contractors who use objectively appropriate materials when such materials are indisputably required to complete the job. In this light, there is nothing remarkable about the Appellate Division's observation that "nothing in our precedents suggests that a court should determine whether the material at issue is the best (or a poor) choice in making the ultimate determination of whether the material used is integral to the renovation work." (R 311.) Again, Mr. Bazdaric reads too much into the Appellate Division's language. Criticizing the majority's dismissive response to the evidence regarding the nature of the protective shield, he contends that "[a]ssuming 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." Bazdaric Brf. at 31-32 n.13. Respondents agree. But the Appellate Division's observation is sound. Courts should not assume the role of construction manager refereeing the construction process. As the First

Department recognized in *Krzyzanowski v. City of New York*, 179 AD3d 479, 481 (1st Dep't 2020), whether an instrumentality was integral to the work can pose an issue of fact for the jury to decide.

2. Chicken Little, the sky is not falling.

Mr. Bazdaric conjures up a doomsday scenario if this Court affirms. He writes: "[i]f now, . . . 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 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 scheme." Bazdaric Brf. at 36.

Respectfully, Mr. Bazdaric "doth protest too much, methinks." *Hamlet*, Shakespeare, W., Act III, Scene II. Respondents demonstrate above that an objective analysis will strike the appropriate balance required by Labor Law § 241(6).

Conclusion

Accidents are an unfortunate reality in the workplace. And a remedy does not exist for every accident. Courts "must read statutes as they are written and, if the consequence seems unwise, unreasonable or undesirable, the argument for

change is to be addressed to the Legislature, not to the courts." *People v. Kupprat*, 6 N.Y.2d 88, 90 (1959). *See Page*, 35 N.Y.3d at 207-08. Here, the Appellate Division did just that, and correctly concluded that Mr. Bazdaric's Section 241(6) claim failed because it was not covered by either 12 NYCRR § 23-1.7(d) or § 23-1.7(e)(1). It also correctly concluded that his Section 241(6) claim was barred by the integral to work doctrine. Accordingly, this Court should answer the certified question affirmatively, affirm the Decision and Order of the First Department in all respects, and grant such other and further relief as is just and proper.

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April 16, 2023

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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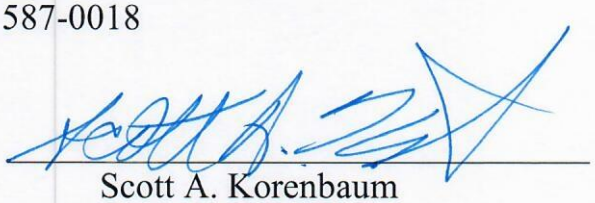
By: 
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