SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

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SRECKO BAZDARIC and ZORKA BAZDARIC,

Index No. 159433/2015
Docket No. 2020-03296

Plaintiffs-Respondents,

-against-

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

Defendants-Appellants.

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BRIEF OF AMICUS CURIAE NEW YORK STATE TRIAL LAWYERS' ASSOCIATION

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Preliminary Statement

This memorandum of law addresses one narrow subject: the so-called "integral to the work" defense, and whether it extends not merely to work conditions that are *unavoidably* hazardous but also those which are eminently avoidable and yet not avoided.[1]

It was undisputed that plaintiff Srecko Bazdaric slipped on a plastic covering while engaged in work (painting) that fell within the ambit of Labor Law § 241(6). It was also undisputed that the work site was made *unnecessarily* slippery by virtue of the

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[1] While NYSTLA agrees with the dissenters' construction of 12 NYCRR 23-1.7(d), NYSTLA does not address that issue inasmuch as it was not critical to the ultimate result and is, in any event, not the aspect of the ruling which is most concerning. It is, however, ultimately puzzling why in the context of regulations that are supposed to be "sensibly" construed to promote "worker safety" affirmative and deliberate placement of an undisputedly slippery surface does not constitute "a slippery condition" whereas passive allowance of water that eventually freezes into ice is "a slippery condition."

We would observe that the majority did not deny that 12 NYCRR 23-1.7(e)(1) was factually applicable to the case. Its *only* stated reason for dismissing the claim premised upon that regulation was its application of the "integral to the work" rule.

defendants' failure to use a non-slippery floor covering (such as ordinary drop cloths) and the additional failure to secure the slippery surface on which plaintiff and his co-workers were compelled to work (R.242).[2] Indeed, *defendants' own counsel* characterized the slippery plastic covering as a "poor choice for the purpose it was used" (R.305).

As if more were needed to establish that the plaintiff had not been provided with "reasonable and adequate protection and safety" — the standard set forth in the statute — Mr. Bazdaric's unrebutted testimony established that he had *actually complained* to his foreman about having to work on an unsecured, slippery covering ("Jimmy, this is no way to work on this") and was told he had to work on the unsecured plastic if he wanted to work at all ("You fucking guy … You have to do it. I go for coffee") (R.121).

All of that notwithstanding, this Court ruled by three to two vote that the very fact that the employer had needed to cover the escalator with *something* in order to protect it from the paint, and that the employer had *deliberately* chosen to use a covering that was both slippery and unsecured, meant that the slippery conditions were "integral to the work" and thus non-actionable as a matter of law. *Bazdaric v Almah Partners LLC*, 203 AD3d 643, 2 [1st Dept 2022]. The Court added that it was immaterial whether the covering "was the best choice to protect the escalator while plaintiff was painting" because "nothing in our precedents suggests that a court should determine whether the

[2] All such references correspond to pages in the Record on Appeal.

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" (*id.*).

In point of fact, the plaintiffs herein never contended that defendants were duty-bound to provide "the best" covering. Nor, if we read the Dissent correctly, did the dissenters. However, there is a world of difference — to the people who are each day economically compelled to do their dangerous work in the conditions they are provided ("You fucking guy ... You have to do it") — between entitlement to the "best" protection and entitlement to protection that minimally provides "reasonable and adequate protection and safety." The majority's ruling herein deprives the plaintiffs of even that, and sets a chilling precedent inasmuch as it will always be within the defendants' power to say that *they intended* the conditions to be just as terrible as they were and that the conditions were therefore "integral to the work."

Summary Of Position

NYSTLA fully agrees that long settled case law establishes that liability cannot be imposed for conditions that were "integral to the work." Indeed, the defense is both broader and deeper than the current (post-1969) iteration of Labor Law § 241(6), for it predates the current statute and also applies to cases brought under common law.

The point, however, is that it is not a game rule without rhyme or reason. ("They intended to use a broken crane, so you lose".) And it does not rest upon considerations

foreign or extrinsic to the general principles of negligence law. Rather, it is a rule of reason that *directly flows* from those principles.

Where (as is true with Labor Law § 241[6]) recovery is ultimately based upon *negligence* and where it was *not unreasonable* to provide the work conditions that were in fact provided, then there is no negligence and no recovery whether the action is brought under Labor Law § 241(6) or under common law. But it is a long jump, unsupported by precedent and wholly contrary to the Legislature's intent in amending the statute, to posit that there is "therefore" no recovery when the conditions were *unnecessarily* dangerous and the parties in charge were manifestly unreasonable in providing them.

The Facts, Very Briefly

The facts were detailed at length in the majority and dissenting opinions. We take it as given that, 1) the defendants needed to cover the escalator with *something*, and, 2) the plaintiff's employer intended the conditions to be every bit as slippery and dangerous as they in fact were.

We also take it as given that the decision to send the workers onto a slippery plastic covering rather than, say, drop cloths, and the further decision not to make any effort whatsoever to secure the plastic coverings in place, did not provide "the best" or "safest" conditions that could have been provided. Of course, that is here an exercise in understatement, not far from saying that a crane with a broken boom is not the best

choice for lifting thousands of tons of steel directly over the heads of the site workers, or that a podiatrist is likely not the best choice for performing brain surgery.

POINT I

THE SO-CALLED "INTEGRAL TO THE WORK" DEFENSE SHOULD BE CONSTRUED CONSISTENTLY WITH THE STATUTE'S LANGUAGE AND PURPOSE: NOT AS AN UNTETHERED EXCEPTION THAT APPLIES WHENEVER THE CONTRACTORS INTENDED THE SITE CONDITIONS TO BE AS THEY WERE, BUT INSTEAD AS THE LOGICAL CONSEQUENCE OF A STATUTE WHICH REQUIRES ONLY THAT THE CONTRACTORS ACT REASONABLY BUT DOES REQUIRE THAT.

To be absolutely clear, NYSTLA does not contend that liability should be imposed even when, a) the subject hazard was unavoidable, or, b) it was not commercially feasible to comply with the regulatory standard in issue. Nor does NYSTLA contend that the statute necessarily requires that the contractors provide "the Best" or safest alternative when there are two or more options that would each provide "reasonable and adequate protection and safety."

However, NYSTLA does maintain that, if the statute means anything at all, liability must be imposed, even if the contractors intended the conditions to be as unsafe as they in fact were, when,

a) the conditions were violative of a "concrete" provision of the Industrial Code,

b) *it was* commercially feasible and "reasonable" to comply with the subject regulation, and,

c) the contractors were *actually negligent* in failing to do so.

NYSTLA further submits that, properly construed, "the integral to the work" rule is not an exception to the above-stated principles or to the statute itself. It is, instead, an *application* of those principles, and of the statute's negligence-based standard, to the particular circumstances in which the work itself dictates that it is just not "reasonable" to comply with the regulatory standard.

In the analysis which follows, we below demonstrate,

a) the statute itself imposes a negligence-based standard of care, which requires that contractors make reasonable efforts to comply with the "concrete" requirements of the Industrial Code,

b) determination as to what conduct is "reasonable" necessarily turn on the specific facts at hand, or, per the classical formulation, upon "time, place and circumstances,"

c) the "integral to the work" defense is, properly construed, the logical result of the application of those principles to the case in which the work itself renders compliance infeasible or unreasonable, and,

d) the majority's very different construction — to the effect that the defense applies and precludes recovery for conditions that were *unnecessarily* unsafe provided that the owners and/or contractors intended the conditions be as bad as they were — is inconsistent with the statute's

language, antithetical to the statute's purpose, wholly unnecessary to achieve the defense's actual objective, and unsupported by authority.

Labor Law § 241(6), Imposing Liability Predicated Upon Fault

Labor Law § 241(6) does not render the site owner an "insurer." Nor, in sharp contrast to Labor Law § 240, does it impose "absolute liability" or liability without fault. *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 502-503 [1993].

However, the statute does "impose[] a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained *due to another party's negligence* in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein." *Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 350 [1998], emphasis by the Court.

The reason the legislature imposed that legal responsibility upon owners and general contractors was, as the Court of Appeals explained in *Allen v Cloutier Const. Corp.*, 44 NY2d 290 [1978], because the prior rule had led to too many work site injuries and deaths.

Prior to the 1969 amendment of Labor Law § 241(6), liability was "dependent upon a showing that they [the owner and general contractor] exercised some degree of control or supervision of the work site." *Allen*, 44 NY2d at 299. In consequence,

"[o]wners and contractors were able to insulate themselves from liability for injuries caused by dangerous and unlawful conditions on the job site, and indeed were encouraged to disregard such conditions, lest they be found to be in control." *Id.* at 299-300. "More importantly, the inclination of an owner or contractor to engage a subcontractor predicated on price alone was greatly enhanced, with a concomitant disregard of the safety record and practices of the subcontractor." *Id.* at 300.

As a result of the human toll that followed from the prior failure to impose a nondelegable duty upon the site owners and general contractors, the present statute was born. To the extent defendants have claimed that it is unduly onerous for them to bear liability for conditions that were created by their contractors, the Court of Appeals' response in *Allen*, 44 NY2d 290 is equally applicable here:

> Doubtless this duty is onerous; yet, it is one the Legislature quite reasonably deemed necessary by reason of the exceptional dangers inherent in connection with "constructing or demolishing buildings or doing any excavating in connection therewith."

Allen, 44 NY2d at 300-301.

"The legislative intent of [Labor Law] section 241(6) is to ensure the safety of workers at construction sites." *Morris v Pavarini Const.*, 22 NY3d 668, 673 [2014]. The same applies to the regulations enacted under the authority of Labor Law § 241(6). Those provisions were drafted for the purpose, "of protecting construction laborers against hazards in the workplace." *St. Louis v Town of N. Elba*, 16 NY3d 411, 416 [2011].

Determination Of "Reasonable Care," Necessarily Predicated Upon "Time, Place And Circumstances"

As has been demonstrated, liability under Labor Law § 241(6) turns on whether there was a *negligent* failure to comply with a "concrete" provision of the Industrial Code. *Rizzuto*, 91 NY2d at 350. In contrast to a case brought under common law, the plaintiff need not show that the owners and contractors made vicariously liable were *personally* negligent. *Toussaint v Port Auth. of New York and New Jersey*, 2022 NY Slip Op 01955, 2 [Ct App Mar. 22, 2022]. But the plaintiff must show that *someone* was negligent. *Rizzuto*, 91 NY2d at 350.

It is ancient learning 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." *Sadowski v Long Is. R. Co.*, 292 NY 448, 455 [1944]. As the Court of Appeals memorably put it in *Sadowski*, "[n]egligence arises from breach of duty and is relative to time, place and circumstance." *Id.*

Determination of whether a particular precaution was dictated under common law in the exercise of reasonable care, and whether the defendant was thus negligent in failing to provide the safeguard, thus 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

determine whether reasonable persons can differ as to whether the defendant was negligent." *Quinlan v Cecchini*, 41 NY2d 686, 689 [1977].[3]

In particular, and in a variety of factual contexts, the Court of Appeals has said that determination of what conduct was "reasonable" under the circumstances is often dependent on what conduct was "feasible" in the circumstances, or, on the other side of the same coin, whether the subject hazard was unavoidable or, at the least, not reasonably avoidable.

For example, in order 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 exercise reasonable care to provide reasonably safe roadways, the reality is that "certain risks are unavoidable" and the duty to act reasonably does not entail an obligation to remove those inherent dangers — including the "close proximity" of "such objects are 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].

To the same effect: while drivers are expected to exercise reasonable care to avoid accidents, that does not entail an obligation to do so when the accident is

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[3] *Quinlan* was, of course, one of the landmark cases in which the Court of Appeals overturned the prior status-based standards (dependent on whether the plaintiff was an "invitee," "trespasser") for the single standard of reasonable care under the circumstances.

unavoidable. *Pfaffenbach v White Plains Exp. Corp.*, 17 NY2d 132, 137 [1966] (Burke, concurring).

In these and other contexts, the general principles of negligence law do not impose liability for a defendant's failure to do that which was not possible or feasible. Nor do they generally impose liability for risks that cannot be reasonably avoided. As we shall see, the so-called "integral to the work" defense arises from the application of those hardly controversial principles to one particular factual context: the situation in which the worker blames the defendant for workplace conditions that were allegedly dangerous, but are defended on the ground that they could not be reasonably or feasibly avoided.

The "Integral To The Work" Rule, Arising From The Application Of Negligence-Based Principles To The Particular Circumstance In Which The Very Nature of The Work Renders The Subject Precaution Infeasible Or Unreasonable

Although we will soon address, a) the two cases in which the Court of Appeals applied the "integral to the work" rule to claims premised on Labor Law § 241(6), and, b) several cases (including the two principally cited by the majority) in which this Court did so, the "integral to the work" rule precedes all of those decisions, and, indeed, long precedes the modern (post-1969) version of Labor Law § 241(6).

The doctrine is not an arbitrary rule that is framed one way rather than another for no particular reason or purpose. Rather, it arises from the same, common-sense

principles noted above: mainly, that the standard of reasonable care does not require a person, or in this instance, an employer, to avoid risks which are not reasonably avoidable or which are inherent to the activity. The "integral to the work" rule arose from the application of those hardly controversial principles to one particular context: the workplace.

The principle, as applied to the workplace, dates back to at least 1911, when the Court of Appeals decided *Henry v Hudson & M.R. Co.*, 201 NY 140 [1911]. There in a case in which the decedent was struck and killed by a piece of falling rock, the accident occurred in the course of constructing a tunnel and the decedent was one of the "blasters" whose very job 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). The *Henry* Court observed that "the master is bound to provide his servant a safe place to work" but that the 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).

Yet, that, tellingly, was not the end of the analysis, nor the actual holding. The *Henry* Court then observed that while the danger of being struck by a falling rock was in a sense inherent to the decedent's work as a "blaster," that was no excuse if reasonable precautions could have been taken yet weren't (*id.* at 142-143). In particular, there had been 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," 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). The Court accordingly held that it was error to dismiss the complaint, and remanded so that a jury could pass on the issue. In other words, while the defendant would not be held liable if the accident was caused by an inherent danger that could not be reasonably avoided, liability could and would be imposed if the defendant had negligently failed to address the risk of injury.

The Court reiterated that guiding principle just a few months later in *Mullin v Genesee County Electric Light, Power & Gas Co.*, 202 NY 275 [1911], wherein the plaintiff was a "lineman" who fell from a pole while working on electrical lines. The Court, describing the common law rule, said that "it was defendant's duty to furnish the plaintiff with a safe place in which to work" but that "[t]hat rule does not apply 'where the prosecution of the work itself makes the place and creates the danger'" (202 NY at 279, *quoting O'Connell v Clark*, 22 AD 466 [2d Dept 1897]). The *Mullin* Court explained: "The reason for this exception to the general rule is that it would be manifestly absurd to hold a master to the duty of providing a safe place, when the very work in which the servant is engaged makes it unsafe" (*id.*). Yet, as in *Henry*, this did not end the analysis, and the plaintiff was not non-suited merely because climbing a pole entails the risk of falling. It appeared that the accident had occurred because "the pole which fell with

the plaintiff had not been properly set," and also that the plaintiff may not have been responsible for setting the pole (*id.*). The case was remanded for trial.

Of course, those same common law principles still exist today, and they exist wholly apart from Labor Law § 241(6). The duty to provide a safe place to work "does not extend to hazards that are part of, or inherent in, the very work the employee is to perform or defects the employee is hired to repair." *Arcabascio v Bentivegna*, 142 AD3d 1120 [2d Dept 2016]. But there has always, at least since 1911, been a recognized difference between those workplace risks that cannot be reasonably avoided and those that can be.

At least until now.

The "Integral To The Work" Defense In The Labor Law Context, And The Court of Appeals' Statement That It Applies When The Safeguard In Issue Would Have Been "Contrary To The Objectives Of The Work Plan"

We now move from the "integral to the work" defense as applied under common law to the defense as applied in modern Labor Law cases. Obviously, there is one notable difference. At common law, there is no duty owed unless the defendant directs or controls the work (*Gasper v Ford Motor Co.*, 13 NY2d 104 [1963]), meaning that the issue of whether the hazard was "integral to the work" is not reached unless that was the case. In contrast, Labor Law § 241(6) renders certain "owners" and "contractors"

vicariously liable for the negligence of those who were in control (often, the employer). *Rizzuto*, 91 NY2d at 350.

However, once we are past the issue of *who* bears responsibility and reach the issue of *what*, exactly, is a reasonably safe workplace, that distinction should no longer matter, and the worker's rights under the Labor Law should be at least as great as under the common law. In fact, that is exactly the case ... at least according to the Court of Appeals' rulings.

The Court of Appeals first acknowledged and applied the "integral part of the work" defense to a claim premised on Labor Law § 241(6) in *O'Sullivan v IDI Const. Co., Inc.*, 7 NY3d 805, 806 [2006]. However, the case was resolved on 500.11 review (no briefing or oral argument) in a single paragraph. The ruling as to the 241(6) claim consisted of a single sentence which consisted only of the conclusion itself. The ruling on the 241(6) claim was in its entirety as follows:

> The courts below properly concluded that plaintiff's Labor Law § 241(6) cause of action, based on 12 NYCRR 23–1.7(e)(1) and (2), failed because the electrical pipe or conduit that plaintiff tripped over was an integral part of the construction.

O'Sullivan, 7 NY3d at 806.

The point, although not stated as such, was that if the hazard is the structure itself and if the only way to avoid the hazard is not to build the structure in the first place, then that is *not* conduct that is required in the exercise of reasonable care. In the

aftermath of *O'Sullivan*, there have been many other instances in which the plaintiff's claim was rejected because the hazard was the structure itself and the only way to avoid the hazard was not to build the structure in the first place.[4]

The Court of Appeals' second and only other application of the doctrine to a Labor Law 241(6) claim came in *Salazar v Novalex Contr. Corp.*, 18 NY3d 134 [2011], this time with an explanation. Plaintiff Paul Salazar "was injured after he stepped into a trench that was partially filled with concrete" (*Salazar*, 18 NY3d at 138). He asserted claims under both Labor Law § 240 and 241(6). With respect to the latter claim, he contended the condition was violative of 12 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

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[4] *E.g.*, *Savlas v City of New York*, 167 AD3d 546, 547 [1st Dept 2018] (where "plaintiff tripped and fell over one of several steel plates covering openings into a lower level of a project building" and the plates "were not scattered materials or debris, but an integral part of the construction"); *Flynn v 835 6th Ave. Master L.P.*, 107 AD3d 614, 614 [1st Dept 2013] (where "the rebar that allegedly caused [plaintiff] to fall was in the process of being installed and thus integral to the ongoing work"); *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"); *Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 712, 713-714 [2d Dept 2020] (where plaintiff's "right foot became entangled in electrical wires hanging from the ceiling" and "[t]he electrical wires had been imbedded in the ceiling ... were waiting to be attached to various light fixtures and receptacles" and were thus "an integral part of the construction"); *Vita v New York Law School*, 163 AD3d 605 [2d Dept 2018] (where plaintiff "tripped over a condensate pipe that was attached to an HVAC unit in a mechanical room" and defendants "demonstrated that the pipe at issue was permanent and an integral part of the construction"); *Konopczynski v ADF Const. Corp.*, 60 AD3d 1313, 1314 [4th Dept 2009] (where plaintiff "tripped and fell in a depression," "[t]here were approximately 132 depressions built into the flooring so that the floor could be adjusted or relocated by lifting hooks and then used as an earthquake simulator," and the "permanently embedded" depression was thus "an integral part of the construction"").

substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part."

The problem was that Salazar was not a worker who was merely passing from Point A to Point B and thus happened to fall into an open trench. He was one of the workers tasked with filling the trench with concrete, and he was actively involved in that process when he fell. What's more, he fell, while "walking backwards across the floor, 'pulling' concrete with a rake held in front of him," because he was "looking forward" but "walking backwards" (*Salazar*, 18 NY3d at 138).

The *Salazar* Court held that the danger was inherent to the work and therefore not actionable. But the reason this was so, Judge Pigott explained, was not that the defendants intended the conditions to be as they were. The reason was that "the installation of a protective device of the kind that Salazar posits ... would have been contrary to the objectives of the work plan in the basement [emphasis added]" (*id.* at 139-140). "Put simply," the Court said, "it 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.*).

If the *Salazar* Court had meant to say that recovery was barred simply because defendants intended there to be an open trench, it presumably would have said that — in which event we would now have very few actions brought under Labor Law § 241(6) because the defendants would have by now realized that they could avoid liability for virtually any condition, no matter how unsafe, by the simple expedient of proclaiming that the conditions were exactly as they intended and were thus "part of the staging conditions of the area" (*Bazdaric* at *2). However, the point had nothing to do with what the defendants intended or didn't intend. The point was that the safeguard in issue would have been "illogical" and "contrary to the objectives of the work plan." Neither of those statements is even arguably true at bar.

Here, it may have taken a few extra minutes to secure the plastic coverings. It may have taken a little bit of foresight to figure out that painting entails drop cloths, and that it therefore might be good to have some. It also may have taken a little bit of common sense — but not very much — to realize it was likely not a good idea to have workers work for literally hours on a surface that made each step an adventure. However, it was certainly not "illogical" or "contrary to the objectives of the work plan" to either provide drops cloths which weren't slippery or at least secure the plastic sheeting that was at hand.

In this context, the Court of Appeals' above-quoted observation in *Sadowski*, 292 NY at 455 — to the effect that allowance of the very same hazard might be negligence

in one case but not in another — is particularly pertinent. For if we take the same exact hazard as in *Salazar*, an open trench, but now change one obviously important detail — we will now assume that the trench was *not* being filled when the plaintiff fell and it was therefore *not* "impracticable to maintain safety devices around the trench at the time" — the very same principles that supported application of the "integral to the work" defense in *Salazar* now dictate the opposite conclusion: that the hazard was not inherent to the work and therefore actionable. Such were the facts, and holding, in *Demetrio v Clune Constr. Co., L.P.*, 176 AD3d 621, 622-623 [1st Dept 2019] (where "plaintiff slipped on a nearby patch of mud in the rain while exiting the building under construction to give instructions to another worker, he grabbed onto the wooden fencing in an attempt to prevent himself from falling into the trench, but the fencing collapsed and fell into the trench along with plaintiff," and where the defendants "failed to raise an issue of fact as to whether there was excavation work being done at the time of the accident, rendering it impracticable to maintain safety devices around the trench at the time," plaintiff prevailed as a matter of law both under Labor Law § 240 and Labor Law § 241[6]).

In the aftermath of *Salazar*, there have been other cases in which recovery was denied either because the purportedly dangerous condition was in fact necessary for the

performance of the work,[5] or, relatedly, because plaintiff was the individual tasked to ameliorate the condition and could not possibly do so without encountering the subject condition.[6] But that does not logically or legally support the defendants' insistence that the "integral to the work" rule bars recovery even when the hazard was eminently avoidable and wholly unnecessary.

To be sure, we would have a different case if the facts at bar were analogous to those in *Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 789-790 [2d Dept 2008]. That was a case where the plastic on which plaintiff slipped *had* to be wet because it was "specially designed and required to collect the accumulation of asbestos fibers during asbestos removal" and "safety regulations required the asbestos fibers to be constantly wet so as to prevent them from filling the air" (*id.*). Here too, the "integral to the work" defense could bar recovery in this case if there were actually some reason that the covering *had to be*, a) slippery, and, b) unsecured. But there was of course no

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[5] *Hammer v ACC Constr. Corp.*, 193 AD3d 455, 456 [1st Dept 2021] ("the loop of electrical wire on which plaintiff tripped was an integral and permanent part of the construction"); *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); *McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582-1583 [4th Dept 2010] (where "plaintiff tripped on a protruding pin that had been stored on a wooden form," "the pin was to be inserted into the form to hold it together while concrete was poured into it," and the object over which plaintiff tripped "was 'an integral part of the construction'"); *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 at the purported site of the accident").

[6] *Griffiths v FC-Canal, LLC*, 120 AD3d 1100, 1102 [1st Dept 2014] (where "plaintiff slipped on 'the very condition he was charged with removing'").

reason, apart from total disregard for the workers' safety, why the covering could not have been installed in compliance with the regulations.

Indeed, this and other courts have in fact repeatedly held that the integral to the work defense does not bar recovery when the hazard was eminently avoidable and, in contrast to *Salazar*, the safeguard dictated by the regulations was not "contrary to the objectives of the work place." One such case was this Court's above-discussed ruling in *Demetrio*, 176 AD3d 621, which was essentially Salazar II but with the significant difference that provision of the protection dictated by 12 NYCRR 23-1.7(d) (*i.e.*, that the trench be covered or guarded by a railing) was not "impracticable" in the circumstances.

Another was *Lois v Flintlock Const. Services, LLC*, 137 AD3d 446 [1st Dept 2016], cited in the dissenting opinion herein, where the plaintiff "allegedly slipped and/or tripped on a plastic tarp and broken concrete on the floor" but the plastic tarp was not essential to the work being performed *at that time* and the "integral to the work" rule was thereby inapplicable.[7]

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[7] *See also Ocampo v Bovis Lend Lease LMB, Inc.*, 123 AD3d 456, 457 [1st Dept 2014] (where plaintiff "allegedly slipped and fell on ice," defendant urged that ice was "integral" to work "which required plaintiff's employer to use water to minimize the risks associated with asbestos," but the Court found "the ice was not integral to the work ... notwithstanding the testimony that the work required the use of a solution of water and a chemical intended to reduce its freezing point"); *Tighe v Hennegan Const. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008] (ruling that the "the hazard at issue—debris accumulated as a result of the demolition" was "not an integral part of the work being performed by the plaintiff at the time of the accident"); *Lester v JD Carlisle Dev. Corp., MD.*, 156 AD3d 577, 578 [1st Dept 2017] (where "the loose

Equally to the point, this Court has specifically and repeatedly said that the test under *Salazar* is not whether the defendants intended the conditions to be as they were, but instead whether the provision of the subject safeguard would have defeated or hindered the work. *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]," 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.*, 146 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 by bay" and "the roof above plaintiff was not the intended target of the demolition at the time it collapsed on him"); *see also Leveron v Prana Growth Fund I, L.P.*, 181 AD3d 449 [1st Dept 2020] ("securing the sidewalk shed against collapse would not have been contrary to the purpose of the undertaking"); *Tropea v. Tishman Constr. Corp.*, 172 AD3d 450, 451 [1st Dept 2019] (securing the cable tray against falling would not have been contrary to the purpose of the work").

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granules on the roof surface that caused plaintiff to slip were not integral to the structure or the work").

Nor, we submit, do this Court's rulings in *Johnson v. 923 Fifth Avenue Condominium*, 102 AD3d 592 [1st Dept 2013] and *Rajkumar v Budd Contr. Corp.*, 77 AD3d 595 [1st Dept 2010], stressed in the majority's opinion in this case, support the extraordinary conclusion that any instrumentality that is being deliberately used in the work is thereby "integral to the work" and thus non-actionable even when provision of the appropriate safeguard *would not have* hindered or been contrary to the purposes of the work.

Although defendants cited the 2013 decision in *Johnson*, 102 AD3d 592, as meaning that an intentionally laid work surface is an "integral part of the work" no matter how unnecessarily unsafe it may be, the Court's short opinion (two sentences for the Labor Law § 200 and common law claims, plus another three sentences for the Labor Law § 241[6] claim) does not say anything remotely like that. Nor did the plaintiff *claim* that the defendants used an improper work surface. The work surface was plywood and there was no claim it should have instead been something else. Far from saying that the conditions were unnecessarily dangerous but nonetheless "integral" and therefore just fine, the Court actually said, in the context of dismissing the common law claim, "the record demonstrates that plaintiff's injury was caused by the way he performed his work, not by a dangerous condition of the work site, and that defendants exercised no supervision or control over plaintiff's work" (102 AD3d at 593).

Likewise, this Court's decision in *Rajkumar*, 77 AD3d 595, did not there find, or say, that the construction paper was unnecessarily dangerous and yet non-actionable

simply because it had been deliberately laid for the purposes of the work. It said only the "brown construction paper that was purposefully laid" to protect the floors and "could not be construed to be a misplaced material over which one might trip," in the process saying nothing that would indicate that the paper was unsafe, or that it was an inappropriate surface (and yet non-actionable anyway), or even that it had been claimed to have been an inappropriate or unsafe covering.[8]

By way of analogy, there have been any number of cases in which suits against allegedly negligent drivers were dismissed because there was no proof they were actually negligent. But that does not mean that negligent driving is therefore not actionable.

Neither *Johnson* nor *Rajkumar* says or suggests that it's "OK" for a work surface to be *unnecessarily* unsafe so long as it was *intended to* be unnecessarily unsafe. Even if they did — which they don't — two perfunctory rulings amongst the hundreds concerning Labor Law §§ 240 and 241(6) should not be construed as effectively transforming a perfectly logical and long-settled common-law principle into something which is neither logical nor remotely consistent with the purposes of Labor Law § 241(6).

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[8] Ironically, the ruling — which defendants could construe as displacing and impliedly overturning the Court of Appeals' focus (in *Salazar*, 18 NY3d at 139-140) on whether compliance with the subject safety regulation would have been "inconsistent with" or "contrary to the objectives of" the work — was also pure dictum. The Court had already held, in the preceding paragraph, that Labor Law § 241(6) did not apply because "the manufacture and hanging of a 300–pound mirror in the hotel defendants' main lobby, was not done in the context of construction, demolition or excavation work." *Rajkumar*, 77 AD3d 595.

The Majority's Ruling At Bar, At Odds With The Statute's Language And Purpose, And Insupportable As Policy

We would be less than honest if we did not acknowledge that the protections provided by Labor Law § 241(6) have already been reduced by a series of non-literal constructions of the statute. *See Toussaint*, 2022 NY Slip Op 01955, Wilson Dissent at *4-*11. Be that as it may, NYSTLA respectfully submits that the three to two ruling herein takes nullification of the statute, and of the Legislature's purpose in amending the statute, to an entirely new level. And we would respectfully ask the Court to carefully consider what would actually happen — both in the courts and out on construction sites — if the majority's ruling were taken at face value and henceforth followed.

There was absolutely no reason why the contractors in this case could not, a) invest in some drop cloths for the painters to use, or, b) at least secure the slippery plastic coverings they had at hand. There was not even a silly or unconvincing argument that such would have impeded the work. They didn't do it because they didn't feel like doing it.

There was absolutely no doubt that the conditions were both unsafe and unnecessarily unsafe, not merely in the opinion of the plaintiffs or of a plaintiffs' expert, but also in the opinion of defendants' site superintendent (R.242-243) and even in the opinion of defendants" counsel (R.305).

The Legislature intended Labor Law § 241(6) "to ensure the safety of workers at construction sites" (*Morris*, 22 NY3d at 673) and it amended the statute to its present form because the prior 1962 version of the statute had led to too many injuries and deaths (*Allen*, 44 NY2d at 300-301).

At bottom, this is a case where, 1) the plaintiff complained about working conditions that were not merely unsafe but also *unnecessarily* unsafe, 2) he was told to shut up and work ("You fucking guy ... You have to do it. I go for coffee" [R.121]), and, 3) this Court then granted defendants summary judgment, stating that it was immaterial whether the conditions were "the best" that might have been provided. NYSTLA respectfully submits that such is not what the Legislature had in mind when it amended Labor Law § 241(6) for the purpose of making construction work safer.

We would ask the Court to reconsider whether it is consistent with the statute, or even with common law, to extend the "integral to the work" defense from risks that cannot reasonably be avoided to those which can be reasonably avoided. Alternatively, we would ask the Court to grant leave so that the Court of Appeals may consider that question.

Conclusion

For the reasons stated above, NYSTLA submits that the plaintiffs' motion for reargument or leave to appeal should be granted.

Dated: New York, New York
May 13, 2022

Respectfully submitted,

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