To be argued by: **Wayne J. Schaefer**
Time Requested for Argument: 15 Minutes

State of New York Court of Appeals Case No.:

APL-2023-00140

New York State Court of Appeals

In the Matter of the Application of

ROBERT BODENMILLER,

Petitioner,

For an order Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

THOMAS P. DiNAPOLI, in his capacity as Comptroller of the State of New York and Administrator of the New York State and Local Police and Fire Retirement System,

Respondent.

PETITIONER'S REPLY BRIEF

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Appellate Division, Third Department Case No,. 534821

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

PRELIMINARY STATEMENT

Pursuant to this Article 78 proceeding, petitioner, Robert Bodenmiller (hereinafter "petitioner" or "Officer Bodenmiller") challenges the determination of respondent, Thomas DiNapoli ("respondent"), Comptroller of the State of New York and administrator of the New York State and Local Police and Fire Retirement System ("Retirement System"), which denied petitioner's application for an Accidental Disability Retirement benefit.[1]

The Third Department, after initially determining that substantial evidence did not support a finding that Officer Bodenmiller's injury resulted from a risk inherent in his employment; nonetheless, upheld the determination. The court based its holding; not on a finding that petitioner had direct knowledge of the hazard, in accordance with this Court's holding in *Matter of Rizzo v. DiNapoli*, 39 N.Y.3d 991, 2022 N.Y. LEXIS 2093, 182 N.Y.S.3d 1, 2022 NY Slip Op 06027, 202 N.E.3d 559, 2022 WL 14915475 (2022), but, rather, on respondent's finding that Officer Bodenmiller "could have reasonably anticipated the hazard…" (*Matter of Bodenmiller v. DiNapoli*, 215 A.D.3d 96, 188 N.Y.S.3d 288 (3rd Dept. 2023).

[1] Parenthetical references contacting Arabic numerals only are to the pages of the Record on Review.

QUESTION PRESENTED

1. QUESTION: Did the Court below err in holding that substantial evidence supported respondent's denial of petitioner's application for an accidental disability retirement benefit based on a finding that petitioner should have "reasonably anticipated" the hazard resulting in his injury where the record otherwise fails to demonstrate that the hazard was an inherent risk of petitioner's job or that petitioner had direct or actual knowledge of the hazard?

   ANSWER: Yes. Given that the respondent determined, and the Court below confirmed, that petitioner was not injured as a result of a risk inherent in his ordinary job duties, and, also, because the respondent never contended, either at the administrative stage, or in the Court below, that petitioner had direct knowledge of the hazard, the denial of petitioner's application is not supported by substantial evidence. *Matter of McCambridge v McGuire*, 62 NY2d 563, 468 N.E.2d 9, 479 N.Y.S.2d 171 (1984); *Scherbyn v. Wayne-Fingerlakes Bd. of Coop. Educational Services*, 77 N.Y.2d 753 (1991). An after-the-fact determination, in hindsight, that petitioner should have "reasonably anticipated" the hazard does not constitute a sound basis, in fact or law, for determining that the injury did not result from a "'sudden,

fortuitous, out of the ordinary and unexpected event" (*Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art II,* 57 NY2d 1010, 1012, 443 N.E.2d 946, 457 N.Y.S.2d 472 (1982)); see also, *Kelly v. DiNapoli*, 30 N.Y.3d 674, 684, 70 N.Y.S.3d 881, 94 N.E.3d 444 (2018).

ARGUMENT

POINT ONE

RESPONDENT FAILS TO DEMONSTRATE THAT AN INJURY WHICH DOES NOT RESULT FROM A RISK INHERENT IN POLICE EMPLOYMENT, AS A MATTER OF LAW, IS NOT ACCIDENTAL BECAUSE, IN HINDSIGHT, IT SHOULD HAVE BEEN "REASONABLY ANTICIPATED"

On brief, petitioner demonstrated that the standard relied on by the court below -- that an injury which results from a risk not inherent in the work performed can, nevertheless, be determined to not be "accidental" where the petitioner should have "reasonably anticipated" the hazard resulting in the injury -- has no basis in law. Specifically, petitioner demonstrated that the Third Department's embrace of the "reasonably anticipated" standard is based on a misreading of this Court's decision in the *Matter of Kelly v. DiNapoli* and that other relevant caselaw authority; including this Court's decision in the *Matter Rizzo v. DiNapoli*, does not otherwise warrant the adoption of such a standard.

a. Respondent's initial contention that petitioner's actual knowledge of the condition of the floor and his inattention to the attendant risk constituted a separate basis, in addition to "reasonable anticipation", for denying the application is meritless

At Point A (1) of his brief, respondent argues that petitioner's actual knowledge of the condition of the floor where his chair tipped rose to the level of "substantial evidence, that the chair-tipping incident was not an unexpected event

but rather 'the result of the applicant's inattention.' " (Resp. Br., p.20) (citing 46; 25). As petitioner has previously noted on brief, an injury which results from a "misstep" or "inattention" will be deemed non-accidental; see, Pet. Br., p.19, n.6. (citations omitted).

Here, given, among other things, the brevity of respondent's Point A (1), it is difficult to discern whether respondent is invoking petitioner's purported inattention as a separate basis for determining his resulting injury to be non-accidental or, in contrast, as a premise for his contention, elaborated on at Point A (2), that the injury was not the result of an accident because it should have been "reasonably anticipated." For the reasons set forth below, to the extent respondent invokes "inattention" as a distinguishable basis, that argument must fail.

In denying Officer Bodenmiller's application, the Hearing Officer determined;

> Under the circumstances, the hazard reasonably could have been anticipated. (See *Matter of Parry v, New York State Comptroller,* 187 AD3d 1303 (3d Dept. 2020).
>
> The incident was the result of the applicant's inattention where it constituted a risk inherent in the performance of his ordinary job duties. (46)

Initially, the fact that the Hearing Officer's reference to petitioner's inattention follows directly on the heels of his finding that the hazard could have

been reasonably anticipated, weighs heavily against any suggestion that inattention was intended to serve as an independent basis for the determination.

That said, assuming the contrary to be true, to the extent the record, in fact, demonstrates that petitioner was inattentive to the floor conditions which created a hazard; i.e., the potential for the chair to tip, such evidence, at most, would support a finding that Officer Bodenmiller failed to "readily observe" the condition underlying the cause of his injury. However, as petitioner has previously demonstrated on brief, the Third Department itself has interpreted *Matter of Kelly* as precluding the denial of an application on that basis alone; see, Pet. Br., p.19, n.6; quoting, *Matter of Stancarone v. DiNapoli*, 161 A.D.3d 144, 148, 76 N.Y.S.3d 238 (3d Dept 2018) ("if the inattention resulted in the person failing to notice a slippery substance, which substance caused the fall, the inattention would be similar to a failure to recognize a condition that was readily observable… where an injury is caused by the [this] type of inattention… the injury may constitute an accident.") (citing, *Matter of Kelly v. DiNapoli*, 30 N.Y.3d at 385, n.3, 70 N.Y.S.3d 881, 94 N.E.3d 444).

Finally, to the extent respondent's brief can be charitably read as attempting to argue that petitioner had actual knowledge of not only "readily observable" or "reasonably anticipated" conditions but also the hazards associated with those conditions, respondent fails to demonstrate how such knowledge is squared with an

analysis under case law upholding the denial of an application based on either a "misstep" or "inattention" on the part of an applicant.

Rather, a candid assessment of the context in which this argument is raised strongly suggests that it amounts to little more than an attempt to interject, under the rubric of "inattention", an argument that petitioner's purported direct knowledge of the hazard at issue constituted an independent basis, under *Matter of Rizzo*, for upholding the denial. However, as petitioner demonstrated on brief, in an Article 78 proceeding brought to determine whether an administrative determination is either arbitrary and capricious or not based on substantial evidence, judicial review is limited solely to the grounds invoked by the agency. (Pet. Br., p.27, n.8; citing, *Scherbyn v. Wayne-Fingerlakes Bd. of Coop. Educational Services*, 77 N.Y.2d 753 (1991); citing, *Matter of Aronsky v. Board of Educ.*, 75 N.Y.2d 997. In such a case, if the grounds relied on by the agency in making its determination are determined to be inadequate or improper, a reviewing court is powerless to affirm the administrative action on what the court (or the respondent in hindsight) considers to be a more adequate or proper basis; see, *Matter of Montauk Improvement v. Proccacino*,41 N.Y.2d 913 (1977).

Here, as noted above, the Hearing Officer's conclusions, which were adopted by respondent, premised the denial of the application on the grounds that "the hazard could have been reasonably anticipated" or, alternatively, that the

incident, "was the result of the applicant's inattention where it constituted a risk inherent in the performance of his ordinary job duties." (46). Nowhere in the Hearing Officer's report is there any reference to a finding of direct knowledge of the hazard akin to the type of proof before this Court in *Matter of Rizzo* nor does the report cite that case or, for that matter, any other case authority invoking the "direct knowledge" standard. (id.)

Since respondent did not invoke that ground as a basis for its determination, he is precluded from invoking it here to forestall a finding that the grounds he *did* rely on are either arbitrary and capricious or not based on substantial evidence.

b. Respondent fails to address, much less rebut, petitioner's showing on brief that the Third Department's "reasonable anticipation" standard has no basis in law

On brief, petitioner demonstrated that conspicuously absent from the Third Department's articulation of the "reasonable anticipation" standard in *Matter of Stancarone v. DiNapoli*, 161 A.D.3d 144, 76 N.Y.S.3d 238 (3d Dept 2018) was any supporting Court of Appeals authority. In contrast to the court's passing reference to the existing "direct knowledge" line of cases in the Court of Appeals; i.e., *Matter of Kenny v. DiNapoli*, 11 N.Y.3d 875, 874 N.Y.S.2d 399, 902 N.E.2d 952 (2008) and *Matter of Lang v. Kelly*, 21 N.Y.3d 972, 973, 970 N.Y.S.2d 742, 992 N.E.2d 1085 (2013), the sole case law authority cited in support the court's

parallel assertion of its new "reasonable anticipation" standard were four cases from the Third Department itself; all of which were decided before this Court's decision in *Matter of Kelly*; see, Pet. Br., p.18, n.5. (citations omitted).

Here, a fair assessment of respondent's position on brief is that he offers nothing to refute the above argument. Instead, he offers what appears to be a rote recitation of the reasoning of the court below; i.e., that as part of its "useful framework for analyzing whether an incident constitutes an 'accident' ", a non-accidental injury may be found where "the patent nature of the condition and petitioner's awareness of same can support a determination, by substantial evidence, that the precipitating event was reasonably anticipated." (Resp. Br., p.14) (citations omitted).

Proceeding from the assumption that the legitimacy of the "reasonable anticipation" standard is valid, respondent then argues that given petitioner's knowledge of the floor's condition, "he could or should have reasonably anticipated " that the accident would occur. (Rep. Br., p.20). However, the very nature of respondent's argument on this score, as set forth at Point A (2) of his brief, exposes a fundamental flaw in the "reasonable anticipation" standard as articulated by the Third Department.

As noted above, in the instant case, the Court below, articulated the "reasonable anticipation" standard as supporting a finding of non-accidental injury;

not only where the precipitating event could or should have been anticipated but also where it actually "*was* reasonably anticipated." (*Matter of Bodenmiller,* 215 A.D.3d at 100) (emphasis added). However, to hold that an injury suffered where the hazard was, as a matter of fact, reasonably anticipated, is to simply recast, in different language, the "direct knowledge" line of cases; i.e., *Matter of Kenny, et. al.,* which already set forth an independent basis for determining accidental injury prior to the promulgation of the "reasonable anticipation" standard in *Matter of Stancarone*.

More importantly, there is nothing in *Matter of Kenny* or its progeny which supports the jurisprudential leap engaged in by the court in in *Matter of Stancarone;* i.e., that no accidental injury will be found, not only where there was direct knowledge of the hazard, or, put another way, it "*was* reasonably anticipated", but also where it *could or should* have been reasonably anticipated. To the contrary, this Court, in *Matter of Rizzo*, expressly declined an invitation to adopt "reasonable anticipation" as a basis for determining whether an accident occurred precisely because, in the Court's view, the record otherwise demonstrated that the petitioner in that case had direct knowledge of the hazard, which rendered, superfluous, consideration of any "reasonable anticipation" standard.

Finally, with regard to the instant, case, petitioner demonstrates, at Point One (c) of this brief, that respondent's contention, at Point A (2) of his brief, that

substantial evidence supports the result below because petitioner could or should have anticipated the accident resulting in his injury is fundamentally compromised by respondent's reliance on cases decided; not under a "reasonable anticipation" standard, but rather, under the "direct knowledge" standard of *Matter of Kenny*, *et. al.*

Respondent, in essence, appropriates *Matter of Kenny* and its progeny as legal changelings, to support application of a "reasonable anticipation" standard which appears nowhere in any of these decisions. The lack of any legal foundation for this argument simply confirms that respondent's determination that the application was properly denied – not because petitioner had direct knowledge of, or actually anticipated the hazard, but because he "could have" anticipated it – should be annulled.

c. Contrary to respondent's argument, *Matter of Rizzo* does not support a finding of "no accident" where the record, at most, demonstrates an awareness of conditions underlying a hazard – but not the hazard itself

Respondent begins his argument at Point A (2) of his brief in favor of a "reasonable anticipation" standard by citing *Matter of Rizzo* as "instructive." (Resp. Br,. p.21). Specifically, respondent attempts to portray the fact pattern in *Matter of Rizzo*; where the police officer was aware that it was a windy day and that the heavy metal door had no mechanism to slow its closure, as analogous to Officer Bodenmiller's general knowledge of conditions here.

His attempt fails, however, because he ignores a crucial finding in *Matter of Rizzo*; i.e., that "petitioner conceded that she knew that the heavy door slammed automatically *and that, on the day of the injury, her movements were intended to avoid that quick and forceful closure.*" (*Matter of Rizzo*, 39 N.Y.3d at 992) (emphasis added). Accordingly, in *Matter of Rizzo*, this Court concluded that evidence of the police officers' deliberate actions to avoid the risk resulting from the quick and forceful closure of the door floor constituted substantial evidence that that she was aware of not only the underlining condition which ultimately caused her injury but also of the actual hazard involved. It was on that basis this Court determined that since a "known condition… cannot be the cause of accident" there was no need to determine whether "the Appellate Division majority applied a legal standard contrary to our precedent when that Court 'resort[ed] to a 'reasonably anticipated' doctrine' (dissenting op at 999)" and that, for the above reasons, "[a]ny substantive distinction - if there is one - between the "reasonably anticipated" standard applied below and the standard we applied in *Matter of Kelly* is irrelevant here." (id.)

Here, in contrast, there is no direct evidence that Officer Bodenmiller was aware of the actual hazard which resulted in his injury. Unlike the fact pattern in *Matter of Rizzo*, there is no evidence that Officer Bodenmiller engaged in any attempts to evade the risk presented by the ruts in the floor by, for example,

replacing the chair with another with larger rollers or by attempting to cover or fill the rut.

On brief, respondent attempts to explain away this distinction by disingenuously citing an excerpt from the Third Department's decision in *Matter of Rizzo* which opines that the petitioner in that case "could have reasonably anticipated" the risk that caused her injury. (Resp. Br., p.22 citing *Matter of Rizzo*, 201 A.D.3d at 1098). However, that citation loses any probative force in light of the fact that this Court, as noted above, expressly declined to affirm on that basis but, rather, determined that there was no accident on the alternative ground that the petitioner had direct knowledge of the hazard.

In the same vein there is nothing in the other two decisions of this Court cited by respondent at Point A (2); i.e., *Matter of Kenny* and *Matter of Lang* which supports respondent's attempt to impose a "reasonably anticipated" gloss over holdings which, at bottom, are simply additional cases where a finding of accident was denied on the basis that the petitioner in each case had direct knowledge of the hazard which resulted in his or her injury; see, *Matter of Kenny* (confirming denial of application where petitioner was aware that it was raining and that the ramp on which he was walking was wet); *Matter of Lang* (upholding determination of Board of Trustees finding no accident where petitioner was aware that computer

wires had been strung on the floor across her locker-room doorway for several months

d. Respondent's citation to isolated excerpts from the record fails to establish that even under a "reasonably anticipated" standard, substantial evidence supports his finding that an accident did not occur

Having invoked "reasonable anticipation" as the appropriate standard, respondent then contends that substantial evidence supports the result below because Officer Bodenmiller (1) was "aware of the condition of the floor"; (2) speculated that he was "sure [he] had observed the holes or the condition of the overall floor"; (3) had "glanced at" the floor; (4) knew the floor was old and needed care; and (5) had worked at the same desk three or four times previously. (Resp. Br., p.18-19).

Pointedly, respondent fails to reference other testimony from petitioner which demonstrates that his "knowledge" of the condition of the floor never rose above the level of general awareness anyone might gain by simply walking into a room. Among other things, Officer Bodenmiller testified (1) that he worked at the desk where he was injured "maybe two or three times in the five-month time frame that I worked there" (80); (2) that prior to his injury he "never had any, you know, personal issue with the floor, and I don't remember anybody else saying or observing anybody having an issue with the floor" (97); (3) that while some officers would bring in their own chairs, "on this particular day, I just took

whatever chair was there from the guy before" (97); (4) that he had not had a chair get caught in a rut prior to the date of his injury (102); (5) that while he "was aware of the condition of the floor, I wasn't aware of the severity of the particular location" (104); (6) that he became aware of the rut in the floor when "[t]he wheel got stuck in it when I went to stand up." (104); that based on his knowledge, *as of the date of the hearing*, the rut in which his chair got stuck was "three inches across, maybe a little more" (103); and (6) that he could not "be sure of the depth… [t]he depth I can't – it would be speculation I would have to guess … (103).[2]

" 'Substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably—probatively and logically.' " (*Matter of Yoga Vida NYC, Inc. [Commissioner of Labor]*, 28 NY3d 1013, 1015, 41 NYS3d 456, 64 NE3d 276 (2016), quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181, 379 NE2d 1183, 408 NYS2d 54 (1978)).

[2] In contrast, respondent, when characterizing petitioner's testimony, fails to differentiate his recollection of the width of the rut from his ignorance of its depth and instead simply asserts that petitioner "had actual knowledge that there were three-inch holes in the floor right near the wheels of his rolling chair." (Resp. Br., p.18)

Taking the above as the legal lodestar, it is axiomatic that, contrary to respondent's determination, substantial evidence does not support a finding that Officer Bodenmiller had reason to anticipate that when he showed up for work on the date in question, rolling back in his chair would cause it to tip over. Moreover, this conclusion is not belied by the fact that he may have had some general knowledge of the floor's overall condition.

The common and constant shared experience of officer workers is that rolling chairs lead to worn floors (or rugs, or even plastic rolling chair aprons). The fact that most people, in such instances, continue to meet their work responsibilities in lieu of suspending work or alternatively "requesting a mat to place under the chair, placing a piece of cardboard over the damaged area, asking the that the floor be fixed, or requesting a chair without wheels" (Resp. Br., p.20) is not evidence of a blithe disregard of a known risk, but, rather confirmation that, in most cases, the risk, if any, is latent and, consequently, not reasonably comprehended; see, *Matter of Bodenmiller*, 215 A.D.2d. at 100 ("one could be fully aware of a defect, but reasonably not comprehend its risk in the particular situation.") Simply knowing that there is a worn patch of floor, generally, is not sufficient to communicate knowledge of risk in the absence of additional information; e.g., knowledge of the depth of any resulting hole or knowledge of a prior tipping incident. Where such knowledge is not present, people working in an

office -- with the possible exception of those in possession of a ruler and an engineering background -- are simply not in a position to accurately access the risk of *every* worn patch of floor within their assigned work area. Such knowledge, as matter of common experience, cannot be said to constitute knowledge of the "patent nature" of a particular condition sufficient to place someone on notice that their chair is likely to get stuck in a deep rut and tip over.

In summary, the quality and quantity of information to which Officer Bodenmiller was privy, as a matter of law, simply does not rise to the level of substantial evidence needed to sustain respondent's determination – even assuming the legitimacy of the "reasonable anticipation" standard upon which it was based.

POINT TWO

RESPONDENT FAILS TO DEMONSTRATE THAT A REMAND FOR THE PURPOSE OF CONVENING ANOTHER ADMINISTRATIVE HEARING IS WARRANTED

Respondent concludes his argument by requesting -- in the wake of his concession that the Hearing Officer "stopped short of finding that petitioner in fact understood the risk posed by a known condition" – a remand to initiate further administrative proceedings in the event this Court "regards as material petitioner's actual awareness of the extent of the hazard posed." (Resp. Br., p.32). According to respondent, since the Appellate Division had previously upheld "reasonably

anticipated" as a ground for determining that no accident took place "there was no reason to for the hearing officer to expressly discredit petitioner's testimony that he had not appreciated the extent of the risk." (id.).

However, this argument ignores the fact that at the time issue was joined at redetermination, "reasonable anticipation" was not the only argument available to respondent. As demonstrated above, at that point in the proceedings, the "direct knowledge" line of cases was, if anything, more ensconced in the case law than "reasonable "anticipation" – as confirmed by respondent's quotation in his letter memorandum to the Hearing Officer of an excerpt from *Matter of Stancarone* opining that "[w]hen determining whether a precipitating event was unexpected, courts 'may continue to consider whether the injured person had **direct knowledge of the hazard** prior to the incident or whether **the hazard could have been reasonably anticipated,** so long as such a factual finding is based upon substantial evidence in the record.' " (151) (emphasis supplied by Respondent).

Viewed in this light, it is clear that the Hearing Officer's express finding that petitioner was not aware of the severity of the rut and his attendant failure to find that petitioner was actually aware of the extent of the risk posed were not simply reflective of an intent on his part "to characterize petitioner's testimony politely and nonjudgmentally" (Resp. Br., p.32) but rather constituted a factual

determination which he then relied on in declining to hold that petitioner had "direct knowledge" of the hazard.

Given respondent's invocation, before the Hearing Officer, of the "direct knowledge" line of cases and his adoption of the Hearing Officer's resulting determination which upheld the denial of the application; albeit on the alternative ground of "reasonable anticipation", there is no basis for affording respondent another bite at the apple simply because he may have decided, as matter of strategy, to assiduously litigate the latter ground at the expense of the former; see, e.g., *Brousseau v. New York City Police Dept.*, 2022 NY Slip Op 33734(U), 2022 N.Y. Misc. LEXIS 6653 (Sup. Ct., N.Y. Co. 2022).

CONCLUSION

Accordingly, and for all of the above reasons, petitioner, Robert Bodenmiller respectfully requests that this Court enter its Order annulling the Opinion and Judgment of the Appellate Division, Third Department and, further, remitting the matter to respondent with a direction that the Final Determination is annulled and that the relief requested in the Notice of Petition and Verified Petition is granted, and, further, that this Court order such other and further relief as it may deem just and proper.

Dated: Smithtown, New York
June 23, 2024

Respectfully submitted,

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Affirmation of Service

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: ss.:
COUNTY OF NASSAU)

Barton Sobel, an attorney at law duly licensed to practice law in the courts of the State of New York, affirms the truth of the following under penalties of perjury:

I am not a party to this action and am over the age of 18 years old. On June 24, 2024, I caused to be served three (3) true copies of the within REPLY BRIEF BY APPELLANT by:

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Hon. Letitia James
Attorney General, State of New York
Att: Frederick A. Brodie, Esq.
The Capitol
Albany, New York 12224

Dated: June 24, 2024

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Barton Sobel