COURT OF APPEALS NO. APL-2023-00045

TO BE ARGUED BY:
SI AYDINER, ESQ.
TIME REQUESTED: 15 MINUTES

State of New York
Court of Appeals

GREGORY MORRISON,

Plaintiff-Appellant,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

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Appellate Division, First Department Docket No. 2022-01770
Supreme Court, New York County, Index No. 153970/2019

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QUESTIONS PRESENTED

1. Did the Appellate Division, First Judicial Department ("First Department"), commit reversible error where it found that defendant-respondent New York City Housing Authority ("NYCHA") met its burden on a motion for summary judgment where NYCHA submitted contradictory proof in its principal brief and waited until reply to address these issues for the first time?

Answer: Yes. The First Department disregarded *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 317 (1985), and its progeny which required the denial of summary judgment where the movant's proof failed to eliminate material factual issues. The First Department also disregarded stare decisis throughout the Appellate Divisions rejecting curative evidence on reply to meet a movant's burden.

2. Did the First Department commit reversible error where it found that NYCHA's Building Inspection Reports documenting the "unsatisfactory" condition of its staircase treads may have been for a different (or irrelevant) staircase while also crediting the inadmissible affidavit of NYCHA's designee for NYCHA's prima facie case?

Answer: Yes. The First Department's finding that NYCHA's Building Inspection Reports may have been for a different (or irrelevant) staircase was never raised by NYCHA and was inconsistent with the discovery demand and response in the case. The First Department also improvidently considered the affidavit of NYCHA's designee which was in English when that witness demanded an Spanish interpreter for his deposition.

3. Did the First Department commit reversible error where it failed to properly acknowledge that the theory of plaintiff-appellant Gregory Morrison's case was predicated on a cause-or-create theory not requiring notice.

Answer: Yes. Notice is not required where the evidence, construed in the light most favorable to the non-movant, established that NYCHA's application of paint to the stair treads caused inadequate friction when wet.

PRELIMINARY STATEMENT

At its core, this appeal is about the abdication of stare decisis concerning a movant's burden for summary judgement and the construction of facts in the light least favorable to the non-movant. For example, defendant-respondent New York City Housing Authority (NYCHA) moved for summary judgment submitting, with its principal brief, inspection records that not only failed to eliminate issues of fact but, conversely, supported inferences that it had actual knowledge of a dangerous condition in its staircase. NYCHA improperly waited until reply to address these records for the first time and did so without any evidentiary foundation. The Appellate Division, First Judicial Department ("First Department"), not only accepted NYCHA's claim but it also found these inspection reports were for a different (or irrelevant) staircase—an argument NYCHA, itself, never raised. Likewise, the First Department considered the affidavit of NYCHA's designee in finding that the movant's burden was met. An inadmissible affidavit executed in English by a witness that demanded a Spanish interpreter at his deposition.

Perhaps more importantly, the First Department made no effort to construe the facts in the light most favorable to Morrison when it avoided the theory of his case by finding notice of the underlying hazard was not established. As Morrison has argued from the beginning of the odyssey, NYCHA caused-or-created the hazard by applying paint to its stair treads which caused a dangerous reduction in

friction when wet. It is, of course, the paint that provides the platform for danger and not the wetness. The First Department committed reversible error on multiple grounds that should result in dismissal of its decision affirming the dismissal of Morrison's case.

BACKGROUND

I. THE UNDERLYING FACTS

On 16 May 2018 Morrison entered 120 Baruch Drive in New York County ("building") and took the elevator to the sixth floor to visit a friend residing at apartment 6D. (Record on Appeal ("R.") 65, 76, 78). The building was owned and operated by NYCHA. (*Id.* 689-90). As Morrison knocked on the door of apartment 6D, a gentleman in the hallway advised Morrison that: "[Ricky] don't live there no more." (*Id.* 79). Morrison then returned to the elevator where he waited for 5 to 6 minutes before deciding to exist via the stairs. (*Id.* 551). Morrison entered the sixth floor staircase landing, took one step down, and slipped. (*Id.* 562-65). The treads were painted "battleship gray" and Morrison noted, after his accident, a slippery substance on the first tread from the 6th floor landing. (*Id.* 562-63, 566). An ambulance eventually arrived and transported Morrison to Beth Israel hospital. (*Id.* 602-03).

NYCHA designated Amado Santos ("Santos"), a longtime cleaner assigned to the building as its only witness. Santos, using an interpreter at his deposition,

confirmed that the stairs were cleaned twice a week and that NYCHA would have the treads painted gray every 3 years. (*Id.* 695, 702). NYCHA also produced a Building Inspection Report for the subject stairs dated 2 May 2018 (14 days before the accident) where NYCHA—thru Santos's inspections—acknowledged that the "STEPS & TREADS" were "Unsat[isfactory]." (*Id.* 775). There were, also, 3 other prior NYCHA notations concerning the unsatisfactory nature of the treads between August 2017 and July 2016. (*Id.* 772-74).

After suit was commenced, Morrison tasked professional engineer Stanley H. Fein, P.E. ("Fein"), to inspect the subject tread and staircase. Based on his inspection and testing, Fein observed that the steps were, in fact, coated with a paint that *caused* the treads to be slippery by having inadequate coefficient of friction when wet—in violation of the accepted standards in the renowned American Society for Testing and Materials ("ASTM") and Underwriters Laboratory ("UL").[1] (*Id.* 776-80).

Morrison commenced this suit by summons and complaint on 17 April 2019 in New York State Supreme Court, County of New York. (*Id.* 169-81). NYCHA joined issued with their answer on 9 May 2019. As a result of NYCHA's negligence, Morrison underwent two surgeries to his right knee, including the repair of a ruptured patella tendon. (*Id.* 240-46).

[1] NYCHA proffered no expert testimony rebutting this contention.

II. NYCHA'S MOTION AND THE ORDERS OF THE NISI PRIUS COURT AND APPELLATE DIVISION

A) The Nisi Prius Court's Decision

At the close of discovery, NYCHA moved for summary judgment. It claimed that the evidence, construed in the light most favorable to Morrison, revealed that it properly maintained the stairs and otherwise had no notice of any dangerous condition. As discussed later, NYCHA, despite attaching Building Inspection Reports noting the "Unsat[isfactory]" condition of the treads, never addressed or acknowledged these records *until* reply. Morrison opposed the motion by demonstrating that based on the inspection of his engineer, the treads had inadequate coefficient of friction and were dangerously slippery when wet in violation of accepted engineering standards because of paint applied to the treads. The summary judgment motion was assigned to the Honorable Paul A. Goetz, J.S.C., who granted NYCHA's motion after finding "plaintiff did not create an issue of fact because he improperly tried to introduce a new theory of liability [*i.e.*, inadequate friction] through the opinion of his expert." (*Id.* 9). The trial court failed to recognize that the inadequate coefficient of friction was *expressly* pled in Morrison's notice of claim. (*Id.* 45 (alleging "in having a floor without an adequate coefficient of friction.")). Morrison appealed.

B) The Appellate Division's Decision

Following oral argument, the Appellate Division, First Judicial Department ("First Department"), unanimously affirmed the nisi prius court's dismissal. By decision and order dated 25 October 2022 ("D&O") the First Department found—notwithstanding Morrison's claim that NYCHA created the condition with the application of paint—that NYCHA did not have constructive notice of the condition. (*Id.* 870). The issue of cause or create was neither addressed nor acknowledged as a part of NYCHA's burden as the movant. (*See id.* 870-71). The First Department, also, found that NYCHA's Building Inspection Reports did not "indicate specific staircases or floors with unsatisfactory conditions" and that Morrison's engineer failed to establish that it "neither created nor had notice of the transient condition of a wet or slippery substance." (*Id.*).

Morrison moved for leave to appeal to this court which was granted by order dated 16 March 2023. (*Id.* 872).

ARGUMENT

I. STANDARD OF REVIEW

In order to obtain summary judgment, a movant must "tender[] sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925 (1986). The initial burden of showing that there is no material issue of fact lies with the movant. *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 321, 908 N.E.2d 869, 872 (2009). Once a movant meets its burden, it shifts to the non-movant to provide evidence showing an issue of fact. *Id.* at 321, 908 N.E.2d at 872.

A fact is material when it can "'affect the outcome of the suit under the governing law.'" *People v. Grasso*, 50 A.D.3d 535, 545, 858 N.Y.S.2d 23, 32 (1st Dep't 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 248, 106 S. Ct. 2505 (1986)). Because summary judgment is outcome determinative, the evidence—and all inferences—are viewed in the light most favorable to the non-movant. *Sheryll v. L & J Hairstylists of Plainview*, 272 A.D.2d 603, 604, 709 N.Y.S.2d 429, 430 (2d Dep't 2000). And assessments of credibility are improper, *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 631, 665 N.Y.S.2d 25, 30 (1997), because "issue-finding, rather than issue-determination," is the genesis of this exercise. *Matter of Corfian Enters., Ltd.*, 52 A.D.3d 828, 829, 861 N.Y.S.2d 392, 393 (2d Dep't 2008).

II. THE FIRST DEPARTMENT IMPROVIDENTLY FOUND NYCHA MET ITS BURDEN ON THE MOTION WHERE IT ATTACHED CONTRADICTORY PROOF AND WAITED UNTIL REPLY TO ADDRESS THIS EVIDENCE IN A SPECULATIVE MANNER

As this court has previously held, a party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 317 (1985). Focusing on *Winegrad's* requirement of issue *elimination*, the common law has developed reasoned stare decisis directing that where a movant's "own submissions raised issues of fact requiring a trial, they did not meet their burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Gjokaj v. Fo*x, 25 A.D.3d 759, 760, 809 N.Y.S.2d 156, 157-58 (1st Dep't 2006) (citing *Winegrad*, 64 N.Y.2d at 853, 487 N.Y.S.2d at 317); *accord McGuire v. McGuire*, 197 A.D.3d 897, 900, 153 N.Y.S.3d 280, 285 (4th Dep't 2021) (holding "defendant did not meet his initial burden on the motion because his own submissions raise issues of fact."); *Legend Autorama, Ltd. v Audi of Am., Inc.*, 100 A.D.3d 714, 717 954 N.Y.S.2d 141, 144 (2012). In affirming dismissal and finding that NYCHA met its burden, the First Department improvidently disregarded this court's holding in *Winegrad* and stare decisis throughout the

appellate divisions compelling the conclusion that NYCHA did not meet its burden.

Here, Morrison alleged to have slipped on the first step from the 6th floor landing and that NYCHA was negligent in maintaining and allowing the stairs to be slippery. (R. 44-45 (notice of claim), 231-33)). In discovery, NYCHA produced Building Inspection Reports for the *specific* stairwell between the 6th and 5th floors. (*Id.* 260). The specific stairwell was, of course, implicated because of Morrison's discovery demand and NYCHA's response. (*Id.* 260). For example, Morrison served a demand requesting: "[c]opies of any and all . . . written records related to inspection, cleaning, maintenance . . . on the stairwells between the 5th and 6th floors." (*Id.*). And NYCHA responded: "the Building Inspection Reports from July 2016 to May 2018 are attached." (*Id.*). Perhaps more importantly, the First Department's conclusion that the "building inspection reports neither indicate a specific staircase or floors" is wholly inconsistent with NYCHA's underlying posture. This is because NYCHA, in its reply to the nisi prius court, did *not* argue that its Building Inspections Reports were for different (or irrelevant) floors or staircases. (*Id.* 795 ¶ 21-22). This foundation, of course, serves as the backdrop for analysis.

Building Inspections Reports attached to NYCHA's motion demonstrated its actual knowledge, and acknowledgement, of unsatisfactory treads antecedent to

Morrison's accident. For example, on 2 May 2018 (14 days before this accident), 2 May 2017, 12 December 2016, and 7 July 2016 NYCHA identified unsatisfactory treads. (*Id.* 772-75). Rather than reconcile its own findings in the Building Inspection Reports—which construed in the light most favorable to Morrison do not eliminate material issues of fact—NYCHA ignored these records in its principal brief and addressed them for the first time on reply. (*Id.* 795-96 (claiming, without a factual basis, they "general awareness of dirt.")).

In waiting for reply to address damaging findings in its Building Inspection Reports, the First Department, again, improvidently allowed NYCHA to bypass an important principal attendant to all summary judgments. And that is, consistent with *Winegrad* and its progeny, "a deficiency of proof in moving papers [for summary judgment] cannot be cured by submitting evidentiary material in reply." *Henry v. Peguero*, 72 A.D.3d 600, 602, 900 N.Y.S.2d 49, 51 (1st Dep't 2010); *accord All Am. Ins. Co. v. Wilson*, 207 A.D.3d 1124, 1125, 171 N.Y.S.3d 707, 708 (4th Dep't 2022); *Agulnick v. Agulnick*, 191 A.D.3d 12, 16, 136 N.Y.S.3d 462, 467 (2d Dep't 2020); *Westbrook v. Village of Endicott*, 67 A.D.3d 1319, 1320 n.1, 889 N.Y.S.2d 317, 318 (3d Dep't 2009).

As a corollary, NYCHA's argument that the Building Inspection Reports only constituted a "'general awareness' . . . of a transient condition" lacked evidentiary foundation. (R. 795 ¶ 21). Indeed, there is no notation on the actual

Building Inspection Reports providing a basis, express or inferential, to conclude that the unsatisfactory condition of the treads was "dirt" or otherwise a transient condition. Nor did NYCHA address the unsatisfactory notations on the Building Inspection Reports in Santos's (otherwise inadmissible) affidavit.

Collectively, the First Department committed reversible error in allowing NYCHA to address, on reply, evidence submitted with its principal brief that failed to eliminate issues of fact as required. The First Department also made factual findings concerning the Building Inspections Reports—and their applicability—that was neither raised by NYCHA nor supported by the record.

III. THE FIRST DEPARTMENT IMPROVIDENTLY CONSIDERED AN INADMISSIBLE AFFIDAVIT FROM SANTOS CONCERNING NYCHA'S PRACTICES IN FINDING THAT NYCHA MET ITS BURDEN

A premises liability defendant moving for summary judgment is obligated to demonstrate when it "last inspected or cleaned prior to plaintiff's fall, as required to meet its burden on this motion." *Hobbs v. New York City Hous. Auth.*, 168 A.D.3d 634, 635, 91 N.Y.S.3d 685, 686 (1st Dep't 2019). In order to establish its last inspection or cleaning, NYCHA annexed the affidavit of Santos to "attest[] that he followed the NYCHA Janitorial Schedule." The First Department, of course, credited Santos's affidavit by finding NYCHA "demonstrated . . . it had a proper and reasonable inspection and cleaning routine in place to address such

conditions." (*Id.* 870). Santos's affidavit was inadmissible and should have been given no weight in NYCHA meeting its burden.

As discussed, NYCHA designated Santos as its person most knowledgeable and only witness. At his deposition, Santos, consistent with his right as a witness, demanded and was provided a Spanish interpreter to testify. (*Id.* 687). Santos's affidavit here, however, was in English and contained no certification that it was interpreted to, or understood, by him and is not in competent evidentiary form.[2] *Reyes v. Arco Wentworth Mgt. Corp.*, 83 A.D.3d 47, 54 919 N.Y.S.2d 44, 50 (2d Dep't 2011) (holding defendant correctly "argues that the plaintiff had testified at his earlier deposition through a Spanish-language translator as demonstrated by a copy of the deposition transcript submitted with [defendant-movant's] reply papers. The plaintiff's affidavit in opposition to summary judgment, which was in English, was not accompanied by an affidavit of a qualified translator attesting to the accuracy of the English--language affidavit, as required by CPLR [§] 2101(b)."); *see also Eustaquio v. 860 Cortlandt Holdings, Inc.*, 95 A.D.3d 548, 548, 944 N.Y.S.2d 78, 78-79 (1st Dep't 2012); *Leon-Vazquez v. Benjamin*, No. 603750/2015, 2017 N.Y. Misc. LEXIS 7782 at *2-3 (N.Y. Sup. Ct. [Nassau Co.] Jan. 9, 2017) (Murphy, J.) (finding "[a]s to the affidavit, Jose required the services of a Spanish interpreter at deposition; however, the affidavit is written entirely in

[2] To be clear, the undersigned, also not a native speaker, has no desire to be insensitive on this

English. It is not accompanied by a translator's affidavit, which is required of foreign language witnesses. The lack of a translator's affidavit renders Jose's English affidavit facially defective and inadmissible.").

The First Department's tacit decision to ignore this evidentiary defect and consider Santos's affidavit undermines a line of stare decisis serving a critical purpose: testimonial evidence, in either its written or spoken forms, should remain consistent in order to ensure the accuracy of the witness's underlying contentions.[3] This is particularly true where, as here, NYCHA made no effort to establish the bona fides of Santos's ability to understand written English and where the affidavit was notarized by NYCHA's able defense counsel, Michael G. Dempsey, who represented Santos at his deposition and was aware of his use of an interpreter. (*Compare id.* 680-81 *with id.* 728). And if Santos's affidavit is deemed inadmissible, NYCHA cannot establish its cleaning and inspection practice and therefor fails, as a matter of law, to establish its last inspection as required.

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issue. Rather, we make this argument to show NYCHA's disingenuity and not that of its witness.

[3] Consistency in the form of evidence, if for no other reason, is critical because it concerns witness credibility. And as this court has previously observed, the purpose of cross examination is to "delve deep in order to attack credibility and present an alternate view of the facts[.]" *People v. Chin*, 67 N.Y.2d 22, 28, 499 N.Y.S.2d 638, 643 (1986). This is lost if NYCHA is allowed to deploy its designee as its has done so here.

IV. THE FIRST DEPARTMENT CONSTRUED THE FACTS IN THE LIGHT LEAST FAVORABLE TO MORRISON WHILE FAILING TO RECOGNIZE THAT AN ISSUE OF FACT EXISTED AS TO WHETHER'S NYCHA'S APPLICATION OF PAINT TO THE TREADS CAUSED INADEQUATE FRICTION COEFFICIENCY UNDER WET CONDITIONS IN VIOLATION OF ASTM AND UL STANDARDS

Morrison's notice of claim specifically asserted a theory of inadequate coefficiency of friction. (*Id.* 45 (alleging "in having a floor without an adequate coefficient of friction.")). And his theory of inadequate coefficient of friction is platformed on NYCHA's application of tread paint that reduced friction to inadequate levels in violation of ASTM and UL.

A property owner has a non-delegable duty to ensure that its tenants have a safe means of ingress and egress. *Bernstein v. El-Mar Painting & Decorating Co.*, 13 N.Y.2d 1053, 1055, 245 N.Y.S.2d 772, 774 (1963); *accord Richardson v. David Schwager Assocs.*, 249 A.D.2d 531, 531-32, 672 N.Y.S.2d 114, 115 (2d Dep't 1998). A plaintiff must establish that the owner had either actual or constructive notice of the dangerous condition. *Patterson v. Brennan*, 292 A.D.2d 582, 583, 740 N.Y.S.2d 96, 98 (2d Dep't 2002). However, notice is not required where the evidence demonstrates that the property owner caused or created the condition. *Ortega v. Puccia*, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323, 329 (2d Dep't 2008). And post-accident observations of the dangerous condition implicated in an accident is, contrary to NYCHA's suggestion here, wholly appropriate. *Patrikis v.*

Arniotis, 129 A.D.3d 928, 928-29, 12 N.Y.S.3d 174, 175 (2d Dep't 2015) (finding post-accident observation, 2 weeks later, proper).

ASTM D2047-04 and F1637 requires, to achieve adequate slip resistance, a minimum coefficient of friction of 0.50 for a flooring surface. The ASTM standard is buttressed by an identical sister standard in UL 410. An ASTM or UL standard has been specifically recognized as platforming a negligence claim for inadequate coefficient of friction. *Columbus v. Smith & Mahoney P.C.*, 259 A.D.2d 857, 859, 686 N.Y.S.2d 235, 236 (3d Dep't 1999) (holding "ASTM establish[es] legitimate industry standards"); *see also Bradley v. HWA 1290 III LLC*, 32 N.Y.3d 1010, 86 N.Y.S.3d 428, (2018) (holding violation of the sister "American National Standards Institute (ANSI) constitutes evidence of negligence"); *Suponya v. Sr. Louise Demarillac Corp.*, No. 150730-13, 2018 N.Y. Misc. LEXIS 2024, *18 (N.Y. Sup. Ct. 18 May 2018) (Edmead, J.) (holding alleged violation of ASTM D2047-04 can sustain a negligence claim).

Applying these principles here, and construing the facts in the light most favorable to Morrison, Fein performed an inspection of the stairs on 20 October 2020. (R. 777). Fein observed, consistent with Morrison's testimony, that the treads were painted gray. (*Id.*). This gray paint was applied by NYCHA every 3 years. (*Id.* 695, 702). Testing of the subject tread revealed that it had an inadequate wet coefficient of friction of 0.31. (*Id.*). The paint negated the treads' metal

traction nodules and dangerously reduced friction in violation of ASTM and UL standards. (*Id.*; *see also id.* 708). Furthermore, even though post-accident observations of the slippery substance are appropriate, Fein opined that it would have been difficult for Morrison to appreciate the slippery substance against the backdrop of metal nodules and dirty gray pain. (*Id.* 778).

There is colorable evidence to support NYCHA's negligent maintenance over the stairs under a cause-or-create theory. A jury can find NYCHA's application of paint on the treads rendered it dangerously slippery when wet in violation of ASTM and UL standards. A jury can further find that NYCHA's 4 prior notations that the treads were unsatisfactory, including a notation only 14 days before this accident, established that it caused the hazard and was, otherwise, independently aware of it. And because inadequate coefficient of friction here is triggered by the surface being wet, the provenance of the slippery substance is irrelevant. Even if the slippery condition was "transient," the treads are only dangerous when wet because of the painted treads.

The First Department committed reversible error by failing to appreciate Morrison's colorable theory of the case. This conclusion is, of course, compelled because the D&O because it fails to discuss tread paint as the causative factor. Rather, the First Department improvidently focuses on "notice of the transient

condition of a wet or slippery substance" which is, under the facts, a divorced component from the actual engineering theory alleged here.

CONCLUSION

For the reasons stated above, the First Department's D&O should be reversed and this matter remanded for a trial on liability and damages.

Dated: 12 May 2023
Mineola, New York

Respectfully submitted,

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Supreme Court of the State of New York
State of New York: Court of Appeals

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GREGORY MORRISON,

Plaintiff-Appellant,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Respondent.

STATEMENT PURSUANT TO CPLR 5531

1. Supreme Court, New York County, Index No. 153970/2019.

2. The full names of the original parties are the same; there has been no change.

3. Action commenced in Supreme Court, New York County.

4. Action was commenced by the filing of a Summons and Complaint, dated April 17, 2019.

5. Nature of action: Torts.

6. This appeal is from the Decision and Order of the Hon. Paul A. Goetz, dated April 20, 2022.

7. Appeal is on the Record (reproduced) method.

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Affidavit of Service by Overnight Carrier

GREGORY MORRISON v. NEW YORK CITY HOUSING AUTHORITY

State of New York }
County of Kings }

Jonathan Didia , being duly sworn, deposes and says that he is over the age of 18 years of age, is not a party to the action and is employed by Dick Bailey Service, Inc. That in the above case on Friday, May 12, 2023 deponent served 3 copies of the within

Brief [X] Record [ ] Appendix [ ] Notice [ ] Other [ ]_____

upon

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Jonathan Didia

Sworn to before me
Friday, May 12, 2023

WILLIAM BAILEY
Notary Public, State of New York
No. 01BA6311581
Qualified in Richmond County
Commission Expires Sept. 15, 2026

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