SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 1, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, McGuire, Abdus-Salaam, JJ.

2474 The People of the State of New York, Ind. 737/08
Respondent,

-against-

Allen Albergotti,
Defendant-Appellant.

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered May 6, 2009, convicting defendant, upon his guilty plea, of forgery in the second degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously modified, on the law, to the extent of reducing the mandatory surcharge and crime victim assistance fee from $300 and $25 to $250 and $20, respectively, and otherwise affirmed.

Defendant failed to preserve his claim that his due process rights were violated because the court allegedly failed to conduct an adequate inquiry as to whether he violated the terms

of his plea agreement (*see People v Barnes*, 46 AD3d 375 [2007], *lv denied* 10 NY3d 808 [2008]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The sentencing court conducted a sufficient inquiry and properly concluded that two violations of the plea agreement occurred, namely that defendant failed to appear in court for the scheduled sentencing and that he failed to cooperate with the Department of Probation. The court "provided defendant with a reasonable opportunity to present his explanations for the violation[s]" and properly rejected them (*People v Villaneuva*, 65 AD3d 939, 939 [2009], *lv denied* 13 NY3d 863 [2009]).

We do not agree with defendant's contention that no increase in the promised sentence was warranted even if he did violate one or both conditions. Moreover, the increase the court determined to impose, although not insubstantial, was not so severe as to constitute an abuse of discretion. We perceive no other basis for reducing the sentence. However, as the People concede, the surcharge and crime victim assistance fee should have been based on the statute in effect at the time of the crime.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 1, 2010

CLERK

Gonzalez, P.J., Tom, Friedman, McGuire, Abdus-Salaam, JJ.

2475 Crismary Mendez, an Infant under the Age of Eighteen Years by her Mother and Natural Guardian Christina Davis, et al., Plaintiffs-Respondents,

-against-

Elido A. Mendez, Defendant-Appellant.

Index 111435/04

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel),for appellant.

Law Offices of Mark S. Gray, New York (Peter J. Eliopoulos of counsel), for respondents.

Order, Supreme Court, New York County (Paul Wooten, J.), entered September 28, 2009, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the infant plaintiff's claims of permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system, unanimously affirmed, without costs.

Defendant established prima facie that plaintiff suffered no permanent consequential limitation of use of any body organ or member or significant limitation of use of a body function or system through the affirmed reports of his experts, who examined plaintiff and found full ranges of motion in her cervical and lumbar spine and left ankle, and opined that the sprains in those areas of her body had resolved and that she had no permanent

injury (*see Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

In opposition, plaintiff raised an issue of fact through the affirmations of her experts and her MRI reports. The experts opined that plaintiff suffered permanent injuries that were caused by the car accident. They provided range of motion measurements as well as the results of other tests they performed, and they examined plaintiff shortly after the accident and again in 2008 (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350, 353, 355 [2002]). Plaintiff's experts also explained any gap in her treatment by stating that she had reached the maximum benefit possible from the treatment (*see Pommells v Perez*, 4 NY3d 566, 577 [2005]).

The fact that the MRI reports of plaintiff's ankle and cervical spine were unsworn does not avail defendant, since plaintiff's experts related their own observations and findings as to her injuries and range of motion limitations (*see Rosario v Universal Truck & Trailer Serv.*, 7 AD3d 306, 309 [2004]). Moreover, plaintiff's expert neurologist reviewed the MRI films and concurred with the findings in the reports.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 1, 2010

CLERK

Gonzalez, P.J., Tom, Friedman, McGuire, Abdus-Salaam, JJ.

2477-
2477A George Heath, Index 40555/78
Plaintiff-Appellant,

-against-

John S. Wojtowicz, et al.,
Defendants-Respondents.

George Heath, appellant pro se.

Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered on or about June 9, 2009, inter alia, declaring the extent of plaintiff's right to certain funds, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 17, 2009, which denied plaintiff's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiff's challenges to other claims seeking a portion of the subject funds, including that asserted by the City Human Resources Administration, are precluded by res judicata (*see New York State Crime Victims Bd. v Abbott*, 247 AD2d 263 [1998], *lv dismissed* 92 NY2d 1001 [1998], citing *Heath v Warner Communications*, 891 F Supp 167 [1995], and *New York State Crime Victims Bd. v Abbott*, 212 AD2d 22 [1995]; *see generally O'Brien v City of* Syracuse, 54 NY2d 353, 357 [1981]).

M-1171 - *George Heath v John S. Wojtowicz, et al.*

Motion to dismiss appeal denied.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 1, 2010

CLERK

Gonzalez, P.J., Tom, Friedman, McGuire, Abdus-Salaam, JJ.

2478 Red Hook/Gowanus Chamber of Commerce, Inc., etc., Plaintiff-Respondent, Index 101021/07

-against-

Peter B. Brightbill, et al., Defendants-Respondents,

Law Offices of Stuart A. Klein, et al., Defendants-Appellants.

Furman, Kornfeld & Brennan LLP, New York (Andrew S. Kowlowitz of counsel), for appellants.

Weiss & Hiller, PC, New York (Michael S. Hiller of counsel), for Red Hook/Gowanus Chamber of Commerce, Inc., respondent.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Anthony Proscia of counsel), for Brightbill respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered April 1, 2009, which denied defendants-appellants' motion for partial summary judgment dismissing those portions of the complaint as against them alleging negligent legal representation that occurred after February 12, 2004, unanimously affirmed, without costs.

Appellants employed defendant Brightbill as an associate and assigned him to a land-use dispute involving their client (plaintiff) (*see Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 49 AD3d 749 [2008]). In preparing the CPLR article 78 proceeding seeking to vacate a determination approving a variance, Brightbill allegedly

committed malpractice in failing to name a necessary party. Brightbill subsequently left the firm and formed his own firm, which was substituted for appellants in prosecuting plaintiff's claims. Additional acts of malpractice were allegedly committed in connection with Brightbill's subsequent representation of plaintiff, and appellants maintain that they cannot be held liable for the alleged negligence of Brightbill and his firm.

"[A]n intervening act which is a normal consequence of the situation created by a defendant cannot constitute a superseding cause absolving the defendant from liability" (*Lynch v Bay Ridge Obstetrical & Gynecological Assoc.*, 72 NY2d 632, 636-637 [1988]). Here, the motion court properly determined that appellants failed to sustain their prima facie burden of establishing that the alleged negligence of Brightbill and his firm was not a normal consequence of the situation created by the initial purportedly negligent act of failing to name a necessary party in the article 78 proceeding. In this regard, we note that plaintiff does not allege that the motion to amend the petition to request a remand rather than vacatur of the variance was an act of malpractice.

We have considered appellants' remaining arguments, including that they cannot be held liable because their conduct

could not be considered the proximate cause of plaintiff's damages, and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 1, 2010

CLERK

Gonzalez, P.J., Tom, Friedman, McGuire, Abdus-Salaam, JJ.

2479 The People of the State of New York, Ind. 2457/08
Respondent,

-against-

Saul Sarmiento,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about October 8, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: APRIL 1, 2010

CLERK

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

Gonzalez, P.J., Tom, Friedman, McGuire, Abdus-Salaam, JJ.

2480 In re Alessandro Spano, Index 106547/08
Petitioner-Appellant,

-against-

New York State Racing and Wagering Board,
Respondent-Respondent.

Joseph A. Faraldo, Kew Gardens, for appellant.

Andrew M. Cuomo, Attorney General, New York (Monica Wagner of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered March 2, 2009, insofar as it disposed of petitioner's argument that the search of his trailer was not lawfully conducted, unanimously vacated, on the law, and the determination of respondent, dated March 11, 2008, that petitioner violated 9 NYCRR 4120.6(a) and (c), and suspending his harness racing license for 90 days, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by the aforesaid order) dismissed, without costs.

The court erred in entertaining petitioner's argument before transferring the proceeding to this Court, since that argument does not constitute "such other objection[] as could terminate the proceeding" (CPLR 7804[g]; *see also* CPLR 7804[f]). We therefore vacate that portion of the order and dispose of all the issues raised in the proceeding (*id.*).

The search of petitioner's trailer was lawful. Petitioner consented to the search when he accepted the harness racing license granted him by respondent (*see* 9 NYCRR 4120.6[d]), and when he voluntarily entered the race track, at the entrance of which was posted a sign informing all visitors that they and their vehicles were subject to search. In addition, "[e]ach track, the board and the judges or their designees shall have the right to enter into or upon the buildings, stables, rooms, motor vehicles or other places within the grounds of such track to examine the same and to inspect and examine the personal property and effects of any person within such places" (*id.*). Contrary to petitioner's contention, the two security guards who conducted the initial search fell within the group of named entities and individuals on whom 9 NYCRR 4120.6(d) confers the right to conduct such a search, and their participation did not render the search unlawful (*see Anobile v Pelligrino*, 303 F3d 107, 117-123 [2d Cir 2002]).

Substantial evidence supports respondent's determination that petitioner possessed hypodermic equipment on race track grounds and that the needles contained unidentified liquid substances in violation of 9 NYCRR 4120.6(a)(1) and (c). The record shows that four syringes and hypodermic needles, three of which needles contained unidentified red and clear liquids, were discovered in petitioner's horse trailer while it was parked on

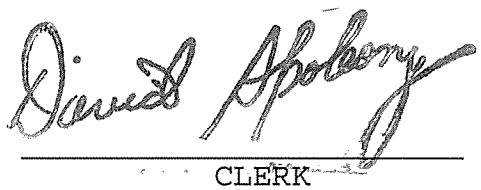
race track grounds, and petitioner offered no evidence to support his claim that while he was away from the trailer someone had planted the prohibited items therein. Moreover, petitioner's attempt to apply the high burden of proof imposed by the Penal Law, which makes it a criminal offense to knowingly possess, for example, a controlled substance (*see* Penal Law § 10.00[8]; § 220.03), to the violation of the rule promulgated by respondent, which prohibits persons other than certain veterinarians to "have or possess [hypodermic equipment] in or upon the premises of a licensed harness race track" (9 NYCRR 4120.6[a][1]), is unavailing (*see Matter of Zaretzky v Hoblock*, 278 AD2d 30 [2000], *lv denied* 96 NY2d 708 [2001]).

We do not find the penalty imposed by respondent shocking to our sense of fairness (*see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]).

We have considered petitioner's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 1, 2010



CLERK

Gonzalez, P.J., Tom, Friedman, McGuire, Abdus-Salaam, JJ.

2482 In re 37 West Realty Company, Index 400969/09
Petitioner-Appellant,

-against-

New York City Loft Board,
Respondent-Respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Robert A. Jacobs of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered June 25, 2009, dismissing this Article 78 proceeding, unanimously reversed, on the law, without costs, and the petition reinstated, without prejudice to the assertion of defenses.

The tenants whose units were specifically addressed in respondent's order, which reduced or vacated an administrative law judge's findings in their favor with regard to rent overcharges, were necessary parties whose rights may be directly and inequitably affected by the judgment (CPLR 1001[a]). As respondent concedes, the tenants were indisputably subject to jurisdiction, and should be joined even if the limitations period has expired (*see Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725 [2008]), without prejudice to interposing such a defense (*see Friedland v Hickox*, 60 AD3d 426 [2009]). It

is unnecessary at this point to consider the "relation back" doctrine.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 1, 2010

CLERK

Gonzalez, P.J., Tom, Friedman, McGuire, Abdus-Salaam, JJ.

2486N Barbara Lerner,
Claimant-Appellant,

-against-

State of New York,
Defendant-Respondent.

Barbara Lerner, appellant pro se.

Andrew M. Cuomo, Attorney General, New York (Owen Demuth of counsel), for respondent.

Order of the Court of Claims of the State of New York (Alan C. Marin, J.), entered January 7, 2008, which denied claimant's motion for leave to file a late claim, unanimously affirmed, without costs.

Leave to file a late claim cannot be granted with respect to the false imprisonment claim, as it accrued more than one year before claimant moved for such leave (*see* CPLR 215[3]; Court of Claims Act § 10[6]; *Sands v State of New York*, 49 AD3d 444 [2008]). Claimant alleged that she was imprisoned during the summer of 2004 and the subject motion was not brought until 2007.

Regarding the claims that arguably are not time-barred, the record demonstrates that the court considered the relevant factors (Court of Claims Act § 10[6]), and exercised its discretion in a provident manner in denying the motion. Claimant's excuses for the delay in filing her claim, i.e.,

illness and inability to secure counsel, are insufficient (*see e.g. Matter of Magee v State of New York*, 54 AD3d 1117, 1118 [2008]; *Musto v State of New York*, 156 AD2d 962 [1989]), and even if, arguendo, the State was not prejudiced by claimant's delay, that factor is not determinative (*see e.g. La Bar Truck Rental v State of New York*, 52 AD2d 1007 [1976]; *Turner v State of New York*, 40 AD2d 923 [1972]). The State did not have notice of the essential facts constituting the claim, even though it "owned and maintained the facility" where claimant was allegedly imprisoned (*id.*), and the fact that claimant's medical records may be at a State facility does not mean that the State had an opportunity to investigate the circumstances underlying her claim (*see Conroy v State of New York*, 192 Misc 2d 71, 72 [2002]). Furthermore, the record as a whole does not "give reasonable cause to believe that a valid cause of action exists" (*Sands*, 49 AD3d at 444), and claimant has other available remedies, namely, she may sue the alleged mastermind of the conspiracy against her, who is not employed by the State, in Supreme Court, where she may also be able to commence an action against individual State employees (*see Morell v Balasubramanian*, 70 NY2d 297 [1987]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 1, 2010

CLERK

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

227 Raul Salazar, Index 21604/04
Plaintiff-Appellant,

-against-

Novalex Contracting Corp., et al.,
Defendants-Respondents.

[And A Third-Party Action]

The Perecman Firm, P.L.L.C., New York (David H. Perecman of counsel), for appellant.

White, Quinlan & Staley, LLP, Garden City (Erin M. O'Hanlon of counsel), for Novalex Contracting Corp., respondent.

Epstein and Rayhill, Elmsford (Russell Monaco of counsel), for 96 Rockaway, LLC, respondent.

Kral Clerkin Redmond Ryan Perry & Girvan, LLP, New York (Rhonda D. Thompson of counsel), for T-Construction Co., Inc., respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about December 19, 2007, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Novalex Contracting Corp., 96 Rockaway, LLC, and T-Construction Co., Inc. for summary judgment dismissing plaintiff's Labor Law § 240(1) and § 241(6) claims, reversed, on the law, without costs, the motion denied, and the claims reinstated.

Plaintiff was injured while he was spreading freshly poured concrete in the basement of a building that was being renovated. He fell into an open trench while walking backwards and using a

tool to smooth out the concrete. Although his torso remained at floor level, his entire right leg went into the trench. According to plaintiff, the room in which the accident occurred contained several trenches. He testified that the trench he fell into was approximately 4 feet deep, 2 feet wide and between 10 and 15 feet long. A representative of defendant Novalex Contracting Corp., the general contractor, stated that there was only one continuous trench, which branched off in several directions. That witness testified that the depth of the trench varied from one foot to three feet and that it was two feet wide. He stated that the trench had been dug so that another contractor could lay underground piping for the building's sanitary system.

Part of plaintiff's task was to spread concrete that was to be poured into and over the trenches. However, he testified that when the accident occurred, he was spreading concrete on the floor and was not attempting to spread concrete in or into any trench. Indeed, he did not know that a trench was behind him when he fell.

Defendant T-Construction Co., Inc., plaintiff's employer,[1] moved for summary judgment dismissing the complaint as against it. As is pertinent to this appeal, it argued that the evidence established that it did not violate Labor Law § 240(1) and

---

[1] It is unclear from the record why the exclusivity rule of Workers' Compensation Law § 10 did not act to bar plaintiff's claims against his employer.

241(6). With regard to section 240(1), the employer maintained that the trench into which plaintiff fell was not an elevation-related hazard and that it was just one of the usual and ordinary dangers associated with a construction site. With regard to section 241(6), the employer asserted that none of the predicate Industrial Code provisions cited by plaintiff, including 12 NYCRR § 23-1.7(b)(1), governing "hazardous openings," applied to the facts of this case.

The owner, 96 Rockaway, LLC, and general contractor cross-moved for summary judgment. Both expressly adopted the employer's arguments regarding Labor Law § 240(1) and § 241(6).

The motion court found that section 240(1) did not apply because the "accident did not result from a fall from a significant height or gravity related risk that could have been prevented with the use of one of [the] protective devices enumerated in the statute." The court further found that Industrial Code (12 NYCRR) § 23-1.7(b), upon which the section 241(6) claim was predicated, did not apply because plaintiff "did not fall through an opening to a level below."

Carpio v Tishman Constr. Corp. of N.Y. (240 AD2d 234 [1997]) involved facts similar to those of this case. There, the plaintiff was extending a paint roller that he was going to use to paint a ceiling. As he was looking up at the ceiling, his leg fell three feet down a 10- to 14-inch-wide shaft in the surface

of the floor. This Court awarded him summary judgment on his Labor Law § 240(1) claim. Relying in part on "common sense," we observed that the risk of injury to the plaintiff was "gravity-related" because it was created by "the 'difference between the elevation level of the required work' . . . and 'a lower level'" (240 AD2d at 235, quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]).

Here, the basement floor on which plaintiff was walking immediately before his accident was equivalent to the floor on which the plaintiff in *Carpio* was standing before he fell. The bottom of the trench into which plaintiff fell is no different from the bottom of the shaft in *Carpio*. Because the risk in this case was elevation-related, as in *Carpio*, Labor Law § 240 applies, and it was error for the motion court to dismiss plaintiff's claim under that section.

The holdings in *Rocovich v Consolidated Edison Co.* (78 NY2d 509 [1991], *supra*) and *Toefer v Long Is. R.R.* (4 NY3d 399 [2005]) do not alter this conclusion. In *Rocovich*, the Court of Appeals found that there was no liability under Labor Law § 240 because it was "difficult to imagine how plaintiff's proximity to" a 12-inch deep, 18- to 36-inch-wide trough carrying a stream of hot oil "could have entailed an elevation-related risk" (78 NY2d at 514-515). Here, plaintiff's task required him to traverse a floor that contained an opening of significantly greater width

and depth than that encountered in *Rocovich*. Indeed, in contrast to *Rocovich*, the bottom of the trench in this case represented a separate *level*, which, relative to the floor itself, surely constituted a gravity-related hazard covered by section 240, even by the standard articulated by the Court of Appeals in *Rocovich* (*id.*).

In *Toefer*, the Court of Appeals held that section 240 did not apply to a worker's fall from the inherently stable surface of a flatbed truck (4 NY3d at 408-409). *Toefer* has no bearing on this case, because there the surfaces on which the plaintiffs were working were inherently safe and a reasonable owner or contractor would not foresee that a person would fall from them. Here, it was eminently foreseeable that a worker would fall into a portion of the trench while spreading concrete on the floor.

The dissent asserts that this case is analogous to other cases in which this Court found that Labor Law § 240(1) did not apply. However, those cases are inapposite. In both *Romeo v Property Owner (USA) LLC* (61 AD3d 491 [2009]) and *Geonie v OD & P NY Ltd.* (50 AD3d 444 [2008]), the worker stepped into an opening in a raised "computer floor" that was created when one of the floor tiles was removed. In *Romeo* the opening was a mere 2 feet by 2 feet and 18 inches deep. It can be presumed that the dimensions of the opening in *Geonie*, although not disclosed in the decision, were similar.

In each of these cases the dimensions of the opening in the floor were not sufficiently significant that the worker could be said to have been working at an elevation. In contrast, the trench that plaintiff fell into here was, according to plaintiff, 4 feet deep and 15 feet long. Further, plaintiff's work area, which was approximately 25 feet by 20 feet, did not contain a single hole of small dimensions. Rather, it contained several long, uncovered trenches (or, according to the general contractor, one large, continuous trench that extended in various directions). Nearly everywhere plaintiff could have turned, a falling hazard presented itself. Under those circumstances, plaintiff's workplace was certainly elevated for purposes of Labor Law § 240.

In reaching this conclusion, we have considered the other cases from this Department cited by the dissent. However, after careful examination, we have determined that they are distinguishable on their facts. We fail to see how this constitutes a rejection of stare decisis, which we agree with our dissenting colleague is a "principled concept."

Recognizing that its position is inconsistent with settled law of this Department, the dissent argues that the various cases it cites from other departments should be followed and that we should overrule *Carpio*. However, the holdings in those cases do not compel any change in the law of this Department, because they

are not consistent with the Court of Appeals cases on which they purport to rely. As discussed, neither *Rocovich* nor *Toefer* holds that the type of hazard encountered by plaintiff here is not covered by Labor Law § 240(1). *Bond v York Hunter Constr.* (95 NY2d 883 [2000]) and *Dilluvio v City of New York* (95 NY2d 928 [2000]) involved falls from a construction vehicle and a pickup truck, respectively, not from the floor on which a worker was situated into a trench or hole in that very floor. *Broggy v Rockefeller Group, Inc.* (8 NY3d 675 [2007]) found that there was no section 240(1) violation because the plaintiff could not establish that the desk that created the elevation was necessary for the performance of the task at hand. In this case, plaintiff could not have avoided being at a higher elevation in relation to the bottom of the trench when the accident occurred.

Absent any Court of Appeals precedent to the contrary, *Carpio* remains the law of this Department. Indeed, as this Court recognized in *Carpio*, the Labor Law "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (240 AD2d at 235, quoting *Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]). Thus, we are constrained to afford protection thereunder wherever that is consistent with Court of Appeals authority, and not to limit the statute's scope as the dissent urges.

Although defendants themselves do not make the argument, the

dissent argues for them that there was no Labor Law § 240(1) violation because "the record plainly establishes that filling the trench with concrete was an integral part of the work being performed at the time of the accident." However, the record does not contain any such facts and does not support the dissent's supposition that it was necessary to have the trenches open at the time plaintiff fell inside one. Moreover, the dissent ignores the rule articulated by the Court of Appeals that "where an owner or contractor fails to provide any safety devices, liability is mandated by the statute without regard to external considerations such as rules and regulations, contracts or custom and usage" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523 [1985]). This Court recently cited *Zimmer* as authority for rejecting certain defendants' argument that "failure to provide an appropriate safety device was . . . impracticable under the circumstances" (*Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472, 473 [2008]).

The motion court also erred in dismissing plaintiff's Labor Law § 241(6) claim. In support of this claim, plaintiff relied on 12 NYCRR 23-1.7(b)(1)(I), which provides:

> "Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)."

This Court has defined the term "hazardous opening" as an opening

"large enough for a person to fit" into (*Messina v City of New York*, 300 AD2d 121, 123 [2002]). Contrary to the motion court's statement, there is no requirement that a plaintiff relying on this rule fall to a floor below. Here, the two-foot wide, three- to four-foot-deep trench into which plaintiff's entire right leg entered was clearly covered by the rule. The cases cited by defendants in support of their argument that the opening was not large enough to merit the protection of the rule are inapposite. In *Messina*, the plaintiff's section 241(6) claim was dismissed because the drainpipe hole in question was only approximately 12 inches in diameter and 7 to 10 inches deep. Similarly, in *Piccuillo v Bank of N.Y. Co.* (277 AD2d 93, 94 [2000]), the plaintiff stepped into a "hand-hole" that was only approximately 12 inches wide and 8 inches deep.

The dissent argues that the rule does not apply because plaintiff did not fall into an opening at least 15 feet deep. This argument relies on subdivision (b)(1)(iii)(a), which requires planking to be placed at least 15 feet beneath a "hazardous opening," where workers "are required to work close to where the edge of such an opening." However, this subdivision only applies where the opening must remain open for work to progress. As discussed below, defendants did not establish that this was the case here. Indeed, the dissent mischaracterizes the record when it states that "plaintiff was injured while engaged

in filling the trench, a task that could not be performed while the trench was covered." According to plaintiff's testimony, he was not filling the trench when he fell; he was spreading concrete and did not even know that the trench was immediately behind him. Moreover, the dissent reads subdivision (b)(1)(iii) so expansively that its construction negates the balance of the rule, which requires a "substantial *cover*" for hazardous openings (subdivision [b][1][I]). It must be noted here that the dissent is overreaching since not even defendants rely on subdivision (b)(1)(iii) in arguing that the rule does not apply to the trench into which plaintiff fell.

Plaintiff's employer suggests that, even if the size of the hole required that the hole be protected, the rule would not apply because "where a cover or railing would completely frustrate the purpose for which the opening is made, the opening may not be deemed hazardous." Similarly, defendant general contractor asserts that the rule is inapplicable because "[t]he use of a cover, railing or some other device to barricade the trench would have prevented the plaintiff and his coworkers from performing the task they were retained to perform." These assertions are not sufficiently supported by the record that we can conclude, as a matter of law, that defendants could not have complied with the rule. Plaintiff's uncontradicted deposition testimony establishes only that he was spreading concrete on the

floor of the basement when he fell and that he had no immediate intention of directing concrete into the trench into which he walked backwards.

There is nothing in the record to indicate that the work could only have been performed in such a manner as to permit no choice but to have the trench open at the time plaintiff fell inside it. Indeed, plaintiff testified that the concrete was being poured from wheelbarrows that were repeatedly filled from a source outside the building. In other words, the concrete was not simply being poured onto the basement floor in one continuous flow. This suggests that the trench could have been covered, and remained covered, until it was time for a wheelbarrow of concrete to arrive to pour concrete directly into it. Even had defendants sequenced the work in such a manner, the workers, as the dissent puts it, "still would have been required, at the end of the process, to stand next to an uncovered trench being filled with cement." However, defendants would have significantly reduced, if not eliminated, the hazard that someone such as plaintiff would inadvertently stumble into an open trench. In determining whether an owner or contractor complied with the Labor Law, the analysis should consider not only how the work was done but also whether it could reasonably have been done in a different way that would have better ensured the safety of the workers.

In any event, plaintiff was not required to present evidence

that a different method from the one that was utilized would have been feasible. On this motion for summary judgment, it was defendants' burden to establish that they could not have complied with the Labor Law and the applicable Industrial Code provisions because of the conditions existing in the basement where plaintiff was injured. Defendants failed to meet that burden. Accordingly, defendants' motion for summary judgment should have been denied.

All concur except Friedman, J. who dissents in a memorandum as follows:

FRIEDMAN, J. (dissenting)

The primary issue presented by this appeal is whether a claim under Labor Law § 240(1) potentially arose when a worker engaged in cementing a basement floor injured himself by accidentally stepping into a three- to four-foot-deep trench in the floor. The trench could not be covered during the work for the simple reason that it was the workers' job to fill it. Further, neither plaintiff nor the majority suggests that the "routine workplace risk[]" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]) posed by the trench could have been addressed by any safety device within the contemplation of the statute, which refers to scaffolding, hoists, stays, ladders and other devices intended to provide protection from substantial elevation-related risks.

In the recent past, two of the three justices constituting the majority of this panel have held, in accordance with Court of Appeals precedent, that section 240(1) does not apply where the situation did not call for the use of a device within the ambit of the statute. Nevertheless, and without offering a sound explanation of why that principle does not apply here, the majority determines to reinstate plaintiff's claim under section 240(1). This kind of decision-making seems inconsistent with a principled concept of stare decisis. I therefore respectfully dissent.

On May 1, 2004, plaintiff and his father, as employees of defendant and third-party defendant T-Construction Co., Inc., were working on a renovation project at 96 Rockaway Avenue in Brooklyn. T-Construction was the concrete subcontractor on the job, and plaintiff and his father were assigned to lay down a concrete floor in a basement. The concrete was poured from a truck into wheelbarrows in the basement by way of a chute through a window, and then dumped on the unfinished floor. Plaintiff used a rake-like device to spread, or "pull," the concrete over the floor, while his father leveled it with a trowel.

Within the floor were open trenches containing plumbing pipes. In the course of laying down the concrete floor, the trenches were to be filled with concrete so that there would be one continuous floor surface. In that regard, plaintiff testified as follows:

> "Q. Were you directed to do anything with respect to the holes [i.e., trenches] at 96 Rockaway Avenue[,] were you instructed to cover them, fill them, or something else?
>
> "A. Yes, we had to fill them up.
>
> "Q. What were you going to fill up the holes with?
>
> "A. Concrete."
>
> . . .
>
> "Q. How did you learn that you had to fill the trenches or holes in that room with cement?
>
> "A. Because when I enter in the room [*sic*] my father was already working in the room and he said that

there were some holes, trenches that had to be filled out."

Similarly, an officer of defendant and third-party plaintiff Novalex Contracting Corp., the project's general contractor, testified that plaintiff's employer, T-Construction, as concrete subcontractor, was responsible for "backfilling," or "closing," the trenches in the basement.

Plaintiff was walking backwards, "pulling" the concrete over the floor with his rake, when he inadvertently placed his right leg into a trench, with his left foot remaining on the floor above the trench. Plaintiff injured himself in attempting to step out of the trench, which he estimated to have been from three to four feet deep at the point where he stepped into it. When he stepped into the trench, it was about half full of concrete, which was flowing over the floor into it.

Contrary to the majority's claim, the record plainly establishes that filling the trench with concrete was an integral part of the work being performed at the time of the accident.[1]

---

[1]To reiterate, the evidence establishing that filling the trenches was part of plaintiff's job when he was injured includes testimony by plaintiff himself that he "had to fill . . . up" the trenches with concrete; his further testimony that, when he entered the room, his father told him that "there were some holes, trenches that had to be filled out"; and the testimony of the general contractor's principal that plaintiff's employer was responsible for "backfilling" or "closing" the trenches. In view of this evidence, which is entirely uncontroverted, I do not understand the majority's assertion that "the record does not contain any . . . facts" showing that filling the trench was part of plaintiff's job. The majority cannot simply wish away

Hence, the premise on which the majority bases its reinstatement of plaintiff's claims -- the notion that the trench could have been covered -- is flatly wrong. Covering the trench obviously would have frustrated the goal of filling it. The record is not merely devoid of support for the majority's supposition that filling the trench was a task distinct and separate from the spreading of concrete over the floor; it plainly contradicts that supposition. In particular, there is not a shred of evidence to support the majority's assumption that a plan existed to pour concrete from wheelbarrows directly into the trenches after the rest of the floor had been laid. To the contrary, according to plaintiff's own testimony, the concrete was poured from the wheelbarrows onto the floor and then spread over the floor, in the course of which the trenches were filled in. And, to reiterate, plaintiff testified that the trench was already half full of concrete when he stepped into it.

The majority's speculation that "the trench could have been covered, and remained covered, until it was time for a wheelbarrow of concrete to arrive to pour concrete directly into it" is utterly disconnected from the reality portrayed in the record. Apparently, the majority imagines that the plan was for workers to pour concrete over the entire floor *except* for the trenches, wait for that concrete to dry, and then push additional

---

evidence inconvenient to its result.

wheelbarrows of wet concrete up to the trenches to fill them in. No hint of any such scheme can be found in the record. Indeed, plaintiff himself has never argued that the job should have been performed in this way.

Once the red herring of the alternative work method devised by the majority is dismissed, it can readily be seen that, on this record, plaintiff has no claim under either Labor Law § 240(1) or Labor Law § 241(6). Since *covering* the trench (the only protective strategy the majority suggests) obviously would have been inconsistent with accomplishing the goal of *filling* the trench, it is illogical to construe either section 240(1) or section 241(6) to require such covering.[2] Plainly, neither statute was intended to make it unlawful to fill in trenches with concrete.

Moreover, even if I were to accept the majority's misperception of the evidence, the record establishes additional and independent grounds for dismissing plaintiff's claim under each statute. The Court of Appeals has long and consistently held that Labor Law § 240(1) applies only where workers are exposed to "an elevation-related risk . . . call[ing] for any of

---

[2]Even if a claim under section 240(1) cannot be defeated by showing that the use of safety device would have been "impracticable under the circumstances" (*Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472, 473 [2008]), in this case covering the trenches would have made it impossible -- not merely impracticable -- to carry out the task of filling the trenches.

the protective devices of the types listed" in the statute (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 515 [1991]). The types of devices listed in the statute are "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, [and] ropes" (*id.* at 513). Thus, even where an accident is related to an elevation differential, Labor Law § 240(1) is not implicated if a device of the kind enumerated in the statute would not be used to address the risk posed by the particular difference in elevation that existed. For example, in the seminal *Rocovich* case, where the plaintiff fell into a 12-inch trough containing hot oil, the Court of Appeals held that section 240(1) did not apply because "it is difficult to imagine how plaintiff's proximity to the 12-inch trough could have entailed an elevation-related risk which called for any of the protective devices of the types listed in section 240(1)" (78 NY2d at 514-515).

More recently, in *Toefer v Long Is. R.R.* (4 NY3d 399 [2005]), the Court of Appeals held that, under the principle established by *Rocovich*, section 240(1) did not cover a case in which the plaintiff fell between four and five feet from the trailer of a flat-bed truck. The Court explained:

> "A four-to-five-foot descent from a flatbed trailer or similar surface does not present the sort of elevation-related risk that triggers Labor Law § 240(1)'s coverage. Safety devices of the kind listed in the statute are normally associated with more dangerous activity than a worker's getting down from the back of

> a truck. Obviously, the distance between the work platform and the ground is relevant; no one would expect a worker to come down without a ladder or other safety device from a work platform that was 10 feet high. But the lesser distance [the plaintiff] had to travel, considering the nature of the platform he was departing from, was not enough to make Labor Law § 240(1) applicable" (4 NY3d at 408-409).[3]

Toefer cites, among other authority, the Court of Appeals' earlier decision in *Bond v York Hunter Constr.* (95 NY2d 883 [2000]), in which the plaintiff lost his footing as he alighted from a demolition vehicle and fell about three feet to the ground (*id.* at 884). In *Bond*, the Court of Appeals affirmed summary judgment dismissing the claim under Labor Law § 240(1) on the ground that, "[a]s a matter of law, the risk of alighting from the construction vehicle was not an elevation-related risk which calls for any of the protective devices of the types listed in [the statute]" (*id.* at 884-885, citing *Rocovich; see also Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007] ["liability turns on whether a . . . task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against"]; *Dilluvio v City of New York*, 95 NY2d 928 [2000] [no claim under section 240[1] where plaintiff fell three

---

[3]The majority seeks to distinguish *Toefer* on the ground that the flatbed trailer from which the plaintiff fell was "inherently stable." This attempted distinction falls flat. There is nothing in the record to suggest that the floor of the basement room where plaintiff was injured (or, for that matter, even the trench he stepped into) was in any way unstable. Certainly, the basement floor in this case was more stable than a flatbed trailer sitting on wheels.

feet from the back of a pickup truck]).

The same principle established by the above-cited Court of Appeals decisions has been recognized by two different unanimous panels of this Court -- each one including a different member of the present majority -- within just the last two years (*see Romeo v Property Owner (USA) LLC*, 61 AD3d 491, 491 [2009] [where plaintiff's foot fell 18 inches through an opening created by a dislodged tile in a raised floor, section 240(1) did not apply because the incident "did not involve an elevation-related hazard of the type contemplated by the statute, and did not necessitate the provision of the type of safety devices set forth in the statute"]; *Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [2008] [the claim under section 240(1) "was properly dismissed because plaintiff's stepping into an opening left by the removal of a tile in a raised 'computer floor' was not caused by defendants' failure to provide safety devices to protect against an elevation-related hazard"]).[4] If this principle was valid in

---

[4]The other departments of the Appellate Division have also recognized this principle (*see Wynne v B. Anthony Constr. Corp.*, 53 AD3d 654, 655 [2d Dept 2008] [dismissing claim where "plaintiff was not exposed to any risk that the safety devices referenced in Labor Law § 240(1) would have protected against"]; *Wells v British Am. Dev. Corp.*, 2 AD3d 1141, 1143 [3d Dept 2003] [statute not implicated where plaintiff "did not require the use of one of the devices contemplated by Labor Law § 240(1) in order to safely perform his tasks"]; *Caradori v Med Inn Ctrs. of Am.*, 5 AD3d 1063, 1064 [4th Dept 2004] [claim dismissed because plaintiff "was not exposed to the type of hazard that the use or placement of the safety devices enumerated in Labor Law § 240(1) was designed to protect against"] [citations and internal

Romeo and *Geonie* -- and, to reiterate, two justices of the majority agreed that it was -- I fail to see why the principle is not valid for this case. The majority simply asserts, without explanation, that, while the 18-inch drop in *Romeo* (and the presumably similar drop in *Geonie*) did not call for a protective device within the statute's contemplation, the three- to four-foot-drop at issue here did. The majority does not suggest any protective device covered by the statute that would have been of use in this case but not in *Romeo* or *Geonie*; nor does the majority otherwise explain its seemingly arbitrary view.

Further, consistent with the line of Court of Appeals authority discussed above, all three of the other departments of the Appellate Division have held, as a matter of law, that no claim under Labor Law § 240(1) arises from a fall into a trench, ditch or hole of a depth comparable to, or even greater than, that of the trench at issue here (*see Miller v Weeden*, 7 AD3d 684, 685-686 [2d Dept 2004] ["plaintiff stepped into an uncovered hole that was approximately two feet wide by three feet deep"]; *Mancini v Pedra Constr.*, 293 AD2d 453, 454 [2d Dept 2002] [plaintiff fell "across and halfway down a trench that was five to six feet deep"]; *Magnuson v Syosset Community Hosp.*, 283 AD2d 404, 405 [2d Dept 2001] [plaintiff "fell into a three-foot deep hole"]; *Wells v British Am. Dev. Corp.*, 2 AD3d at 1142 [3d Dept

---

quotation marks omitted]).

2003] [plaintiff, at an excavation, fell into an elevator pit that was "5 to 6 feet deep"]; *Paolangeli v Cornell Univ.*, 296 AD2d 691, 691 [3d Dept 2002] ["plaintiff fell into a hole in the concrete floor which he described as . . . five to seven feet deep"]; *Kaleta v New York State Elec. & Gas Corp.*, 41 AD3d 1257, 1257-1258 [4th Dept 2007] [plaintiff "fell into a three-foot-deep drainage ditch"]; *Pursel v Wellco, Inc.*, 6 AD3d 1096, 1097 [4th Dept 2004] [plaintiff "fell into an excavation approximately six feet deep"]; *Caradori v Med Inn Ctrs. of Am.*, 5 AD3d at 1064 [4th Dept 2004] [plaintiff "fell into a three-foot-deep trench"]; *Ozzimo v H.E.S., Inc.*, 249 AD2d 912, 913 [4th Dept 1998] [plaintiff fell into "an open five-foot trench" when "the earth beneath his feet gave way"]).[5]

In this case, not even the majority suggests that plaintiff's work in proximity to a trench that was three to four feet deep called for the use of a protective device of any of the types enumerated in Labor Law § 240(1). Certainly, the majority does not identify any protective device within the contemplation of the statute that should have been used to address the routine

---

[5]Consistent with the cases holding that Labor Law § 240(1) does not cover a worker's fall into a hole of a depth similar to that at issue, it has been held that the fall of an object onto a worker from such a height is not covered (*see Perron v Hendrickson/Scalamandre/Posillico [TV]*, 22 AD3d 731, 732 [2005], *lv denied* 7 NY3d 706 [2006] [statute not implicated where "the object that fell on the injured plaintiff's foot was, at most, two feet off the ground"]).

risk of a three- to four-foot-drop in a basement floor (*cf. Runner*, 13 NY3d at 603 [liability under section 240(1) attached where "a device precisely of the sort enumerated by the statute was not 'placed and operated as to give proper protection' to plaintiff"]). The majority nonetheless reinstates plaintiff's claim under section 240(1) in reliance on *Carpio v Tishman Constr. Corp. of N.Y.* (240 AD2d 234 [1997]). In *Carpio*, a divided panel of this Court held that the statute applied to a case in which the plaintiff, while painting the ceiling of the third floor of a building, backed into an open piping hole (10 to 14 inches wide) in the concrete floor, "causing his leg to fall three feet below the surface to his groin area" (*id.* at 234). In my view, *Carpio* is inconsistent with the principle established by the above-cited Court of Appeals authority (including *Broggy*, *Toefer*, *Bond* and *Dilluvio*, all decided after *Carpio*) that section 240(1) is implicated only where the work gave rise to "an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against" (*Broggy*, 8 NY3d at 681). That condition was not satisfied in *Carpio*, just as it is not satisfied here. Accordingly, I believe that we should follow the holding of the Court of Appeals -- and of this Court's more recent decisions in *Romeo* (61 AD3d at 491) and *Geonie* (50 AD3d at

445) -- rather than that of *Carpio*.[6]

The majority concedes that *Carpio*, and the result the majority reaches here in sole reliance on *Carpio*, are inconsistent with the holdings of the other three Appellate Division departments. Further, the majority never comes to grips with the Court of Appeals' plainly stated holding that a necessary condition for the applicability of section 240(1) is, to reiterate, "an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against" (*Broggy*, 8 NY3d at 681). Instead, the majority gives the Court of Appeals decisions articulating that requirement (*see id.*; *Toefer*; *Dilluvio*; *Bond*; *Rocovich*) an unnaturally restrictive reading, in effect limiting such precedents to their facts while studiously ignoring the principle governing the reach of the statute there articulated. Nothing in these Court of Appeals decisions supports the majority's assumption that the Court of Appeals "intended to tether the application of its holding to the particular circumstances of th[ose] case[s]" (*People v Abney*, 57 AD3d 35, 50 [2008] [Moskowitz, J., dissenting], *revd* 13 NY3d 251

---

[6]I note that, since the task in *Carpio* (painting the ceiling) did not require leaving the hole in the floor uncovered, *Carpio* does not stand for the implausible proposition that liability under section 240(1) can be predicated on a failure to cover a hole at the same time as it is being filled. I further observe that this Court found it significant in deciding *Carpio* that the plaintiff therein stepped into the uncovered hole when his "attention was focused toward the ceiling [that he was painting]" (240 AD3d at 235).

[2009]). In sum, this case simply is not one in which plaintiff was injured because of any failure to provide him with "a device precisely of the sort enumerated by the statute" (*Runner*, 13 NY3d 603). Rather, plaintiff's injury resulted from a "routine workplace risk[]" not covered by the statute (*id.*; *see also Cohen v Memorial Sloan-Kettering Cancer Ctr.*, 11 NY3d 823, 825 [2008] [Labor Law § 240(1) protections do not extend to "the usual and ordinary dangers at a construction site"] [citation and internal quotations marks omitted]; *Meslin v New York Post*, 30 AD3d 309, 310 [2006] [dismissing Labor Law § 240(1) claim where "the accident was not attributable to the kind of extraordinary elevation-related risk contemplated by the statute"]).

Plaintiff's claim under Labor Law § 241(6) is equally meritless. The only provision of the Industrial Code plaintiff invokes in support of his claim under section 241(6) is 12 NYCRR 23-1.7(b)(1). This Court has held that the requirements of the portion of section 23-1.7(b)(1) that specifically addresses situations in which "employees are required to work close to the edge of . . . [a hazardous] opening [into which a person may step or fall]" (12 NYCRR 23-1.7[b][1][iii]) do not apply where the drop to which the workers were exposed was less than 15 feet (*see Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [2008]; *Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 338 [2006]; *see also Romeo*, 61 AD3d at 492 [12 NYCRR 23-1.7(b)(1) did not apply where the

opening "did not present significant depth and size to warrant the protection of the provision"]; *Geonie*, 50 AD3d at 445 [12 NYCRR 23-1.7(b)(1) did not apply "because the opening into which plaintiff stepped was not the type of opening intended to be covered by the regulation"]). Thus, even if the trench in this case constituted a "hazardous opening" within the meaning of 12 NYCRR 23-1.7(b)(1), no violation of that Industrial Code provision occurred.

The majority's theory that the claim under section 241(6) may be predicated on subparagraph (I) of 12 NYCRR 23-1.7(b)(1) is without merit.[7] When 12 NYCRR 23-1.7(b)(1) is read as whole, it

---

[7]12 NYCRR 23-1.7(b)(1) provides in pertinent part as follows:

> "(b) Falling hazards.
>
> "(1) Hazardous openings.
>
> > "(I) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
> >
> > . . .
> >
> > "(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:
> >
> > > "(*a*) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or

is clear that subparagraph (I), a general provision providing for the guarding with fastened covers or safety railings of "hazardous opening[s] into which a person may step or fall," does not apply in this case, where covering the opening in question would have been inconsistent with filling it, an integral part of the job.[8] Subparagraph (iii) addresses cases of the specific kind presented here, in which "employees are required to work close to the edge of such an opening." In denying the relevance of subparagraph (iii), the majority ignores the undisputed facts of this case, which, as previously discussed, establish that plaintiff was injured while engaged in filling the trench, a task that could not be performed while the trench was covered.[9]

> "(*b*) An approved life net installed not more than five feet beneath the opening; or
>
> "(*c*) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage."

[8]Thus, *Gallagher v Levien & Co.* (__ AD3d __, 2010 NY Slip Op __ [decided simultaneously herewith]), in which a Labor Law § 241(6) claim based on 12 NYCRR 23-1.7(b)(1)(i) is sustained, is distinguishable on the ground that, in that case, the work did not require leaving the hole at issue uncovered.

[9]The fact that filling the trenches was part of the job is not changed one whit by the circumstance that, at the moment he stepped into the trench, plaintiff was spreading concrete over the floor and was unaware that the trench was directly behind him. Contrary to the majority's implication, the record shows that plaintiff was always aware that there were trenches in the room. As previously discussed, and as shown by plaintiff's own testimony, directing the concrete over the floor and into the

Contrary to the majority's assertion, my reading of subparagraph (iii) does not "negate[] the balance of the rule," but merely applies subparagraph (iii) in accordance with its terms, namely, to situations where a task requires leaving an opening uncovered. Subparagraph (I) remains applicable where covering a hazardous opening is consistent with the work to be performed. By contrast, the majority implies that it is never lawful to assign a task requiring that work be performed next to an uncovered opening. What the majority fails to explain is how one can fill a hole that has a cover fastened over it.

As to the majority's suggestion that it is for the finder of fact to determine "whether [the job] could reasonably have been done in a different way that would have better ensured the safety of the workers," it bears repetition that plaintiff himself has never suggested, through expert evidence or otherwise, that the job should have been done in some way other than the manner in which it was actually performed. The alternative method suggested by the majority -- waiting to fill in the trench until after the rest of the floor had been completed -- is, to reiterate, the majority's own invention; not even a hint of it appears in the record. The majority has no idea whether its preferred alternative would have been reasonable, or even

---

trenches was one continuous job. The majority's attempt to draw a bright line between covering the floor and filling the trenches is, on this record, completely artificial and unrealistic.

feasible. In particular, the majority cannot enlighten us as to whether the manner of proceeding that it suggests would have affected the quality of the floor surface ultimately produced. Nor can the majority tell us whether it would have been feasible to fill in the trench completely by dumping wheelbarrows of wet cement into it, rather than by directing into it a continuous flow of wet cement across the floor.[10]

Finally, to the extent the alternative method proposed by the majority might theoretically have been feasible, failing to use that method would not have constituted a violation of section 240(1). If the work were conducted as envisioned by the majority, the workers still would have been required, at the end of the process, to stand next to an uncovered trench being filled with cement, just as plaintiff was doing when he was injured. Thus, assuming for the sake of argument that (as the majority contends) it would have been somewhat safer to fill the trench after completing the rest of the floor, the fault the majority purports to have identified is, at most, an arguable error in the sequencing or organizing of the work (i.e., directing the workers to fill the trench at the same time they were spreading cement

---

[10]The majority concludes by asserting that it was defendants' burden, as proponents of the summary judgment motion, somehow to prove that no alternative work method exists that, if used, might have avoided the accident, even though plaintiff has not suggested even one such alternative work method. To place this burden on defendants is to require them to prove a negative, which is impossible.

over the rest of the floor). Such a failure would not have constituted a violation of the statutory mandate to "furnish or erect . . . devices" (Labor Law § 240[1]) to protect the workers from elevation-related risks.[11] In other words, the language of section 240(1) simply does not reach arguably sub-optimal choices in the sequencing or organizing of work. In applying the statute to such conduct, the majority stretches its language beyond recognition.[12]

For the reasons discussed above, I would affirm the grant of

---

[11]In pertinent part, Labor Law § 240(1) provides:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

[12]Nor would any error in sequencing or organizing the work constitute a violation of 12 NYCRR 23-1.7(b)(1)(i), the Industrial Code provision on which the majority predicates its reinstatement of plaintiff's Labor Law § 241(6) claim. The language of that provision, which is set forth in footnote 7 above, plainly does not reach an error in sequencing or organizing work.

summary judgment dismissing plaintiff's claims under Labor Law § 240(1) and § 241(6), and respectfully dissent from the majority's reinstatement of those claims.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 1, 2010

CLERK

Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1506-
1506A Joseph Gallagher, et al., Index 100769/01
Plaintiffs-Respondents-Appellants, 590220/01
590611/01

-against-

Levien & Company, et al.,
Defendants-Respondents.

- - - -

[And A Third-Party Action]

- - - -

Levien & Company, et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

Shroid Construction, Inc.,
Second Third-Party
Defendant-Respondent,

Cord Construction,
Second Third-Party Defendant-
Appellant-Respondent.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Jonathan A. Judd of counsel), for appellant-respondent.

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for Gallagher respondents-appellants.

Callan, Koster, Brady & Brennan LLP, New York (Michael P. Kandler of counsel), for Shroid Construction Inc., respondent.

Nicoletti Hornig & Sweeney, New York (Barbara A. Sheehan of counsel), for respondents.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered September 16, 2008, which, to the extent appealed from as limited by the briefs, upon reargument of a prior order, same court and Justice, entered December 7, 2007, granted the

motion of defendants Levien & Company and F.J. Sciame Construction Co., Inc. for summary judgment dismissing plaintiffs' Labor Law § 240(1) claim and dismissing their Labor Law § 200 and common-law negligence claims as against Sciame, and denied the branch of second third-party defendant Cord Construction's motion for summary judgment that sought to dismiss plaintiffs' Labor Law § 241(6) claim and implicitly denied the branch of Cord's motion that sought to dismiss the second third-party complaint as against it, unanimously modified, on the law, to deny Levien and Sciame's motion, and to grant so much of Cord's motion as sought to dismiss the second third-party claim for contractual indemnification against it, and otherwise affirmed, without costs. Appeal from the December 7, 2007 order unanimously dismissed, without costs, as superseded by the appeal from the September 16, 2008 order.

While working on a synagogue restoration project, the injured plaintiff stepped or fell into a hole in an alleyway running alongside the building's wall and above its basement. Plaintiff testified that he became "wedged" in the hole, with one leg in it and the other on the ground above. He said that, immediately before falling, he picked up a piece of unsecured plywood that (unbeknownst to him) had been covering the hole, which he described as having an opening of 3 feet by 4 feet and exposing a drop of 10 to 15 feet to the basement floor below. In

contrast, the general contractor's assistant superintendent, who arrived at the scene minutes after the accident occurred, testified that the hole in question (an opening for an air conditioning duct measuring 14 inches by 2 feet) was only 2 to 3 feet deep; that the hole was one of about 10 such openings in the alleyway, each of which had been covered with secured and marked pieces of plywood pursuant to plans; and that the piece of plywood that had covered the hole plaintiff fell into had perforations in its corners, and the pins left in the concrete had little bits of plywood attached to them.

In view of the conflicting testimony as to the height of the drop exposed by the hole, the size of the hole, and whether the plywood covering had been secured and marked, a triable issue exists whether plaintiff's injuries were causally related to a violation of Labor Law § 240(1). Accordingly, Supreme Court erred dismissing the claim under that statute.

The court correctly declined to dismiss plaintiff's Labor Law § 241(6) claim predicated upon Industrial Code (12 NYCRR) § 23-1.7(b)(1) ("Hazardous openings"). Based on plaintiff's testimony that he fell through the hole in the alleyway up to his chest (albeit with one leg still atop the hole), the Industrial Code provision is applicable to this case (*see Messina v City of New York*, 300 AD2d 121, 123-124 [2002]). However, the evidence raises factual issues whether the covering was properly marked

and securely fastened and whether plaintiff pried up a secured covering over the hole and thus was the sole proximate cause of his injuries.

Plaintiff's Labor Law § 200 and common-law negligence claims should not have been dismissed as against Sciame, the general contractor, because the evidence raises factual issues whether Sciame had control over the work site and knew or should have known of the unsafe condition that allegedly brought about plaintiff's injury (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352-353 [1998]; *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [2009]). Sciame's foreman testified that it was "ultimately" the general contractor's responsibility to ensure that floor openings were properly covered, that he personally supervised the subcontractors' work, including that of Cord, which was responsible for covering air duct holes, and that the work with respect to which he instructed the subcontractors included such safety tasks as covering openings in the floor.

The second third-party claims for common-law indemnification and contribution against Cord were correctly sustained, given the existing factual issues whether Cord was negligent in covering and inspecting all duct holes, and notwithstanding Sciame's foreman's testimony that, as general contractor, Sciame inspected the duct hole coverings (*see e.g. Urban*, 62 AD2d at 557). Sciame

having conceded that it could not locate the contract, its claim for contractual indemnification against Cord should have been dismissed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 1, 2010

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1879 LaSalle Bank National Association, etc., Index 603339/03

Plaintiff-Appellant-Respondent,

-against-

Nomura Asset Capital Corporation, et al.,
Defendants-Respondents-Appellants.

Friedman Kaplan Seiler & Adelman LLP, New York (Robert J. Lack of counsel), for appellant-respondent.

Costantine Cannon LLP, New York (Joel A. Chernov of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered March 11, 2009, which, after remand from this Court, to the extent appealed from as limited by the briefs, held that (1) plaintiff had the burden of establishing mitigation of damages, (2) plaintiff should have given notice to defendants of the breach of representations and warranties with respect to the Lancers Center loan by May 11, 2002, and (3) consequential damages should be determined as of the dates notice should have been given with respect to the Lancers Center and Old Hickory loans, unanimously modified, on the law and the facts, the determination that plaintiff had the burden of establishing mitigation of damages vacated, the limitation on consequential damages vacated and the matter remanded for a calculation of damages as set forth herein, and otherwise affirmed, without costs.

Plaintiff is the trustee for the holders of pass-through certificates for a pool of commercial mortgage loans originated or acquired by defendant Nomura Asset Capital. Nomura pooled the loans and transferred them to defendant Asset Securitization, which in turn issued and sold the certificates as securities, representing beneficial ownership interests in the mortgage loans.

Plaintiff brought this action alleging that defendants had breached certain warranties and representations made in the mortgage and service agreements covering the sale of the securities. After a nonjury trial, the court found that defendants had breached the mortgage agreement by imprudently originating two of the loans - one relating to the Lancers Center, a shopping center where Wal-Mart was the anchor tenant, and the other relating to a Best Western hotel called the Old Hickory Inn. With respect to the Lancers Center loan, the court found that defendants had sufficient information at the time the loan was made that Wal-Mart would likely vacate the shopping center during the term of the loan. As to the Old Hickory Inn, the court found that defendants had breached various representations and warranties not relevant to this appeal.

The trial court, however, declined to award plaintiff damages. The service agreement required that plaintiff give prompt notice to defendants upon becoming aware of any breach of

the representations and warranties in the loan documents. The court found as to both loans that while plaintiff gave notice of the breach to defendants in July 2003, it failed to mitigate its damages by not giving notice earlier. Thus, the court concluded, plaintiff was not entitled to any damages.

On a prior appeal, we affirmed the trial court's finding that the two mortgage loans had been imprudently made but found that the record did not support the complete elimination of damages (47 AD3d 103). We remanded the matter for a calculation of damages and identified the following issues for the court to address: (1) the extent of plaintiff's damages arising from the breaches; (2) the point at which plaintiff possessed enough information requiring it to provide defendants with notice of the breaches; (3) whether or to what extent plaintiff unreasonably delayed in providing notice, or in taking other necessary steps to protect the value of the investment property, thereby unreasonably failing to mitigate damages; and (4) the amount by which plaintiff's damages could have been reduced if it had made reasonably diligent efforts to mitigate.

On remand, the trial court found that the prompt notice provisions of the loan agreement were intended to shift the risk of loss from plaintiff to defendants. Because plaintiff failed to give prompt notice, the court reasoned, the burden on mitigation shifted from defendants to plaintiff to show that it

reasonably mitigated its damages. This was error. As we noted in our prior decision, defendants had the burden of establishing not only that plaintiff failed to make diligent efforts to mitigate (*Cornell v T.V. Dev. Corp.*, 17 NY2d 69, 74 [1966]; *Golbar Properties, Inc. v North Am. Mtge. Invs.*, 78 AD2d 504 [1980], *affd* 53 NY2d 856 [1981]), but also the extent to which such efforts would have diminished plaintiff's damages (*see Matter of Northeast Cent. School Dist. v Webutuck Teachers Assn.*, 121 AD2d 544, 545 [1986]; *Okun v Parker Hardware Co.*, 50 AD2d 781 [1975]).

Although the record establishes that plaintiff did not give prompt notice with respect to both loans, it nevertheless remains defendants' burden to prove whether reasonable mitigation measures would have reduced plaintiff's damages and by how much. Thus, the matter must be remanded for a calculation of damages applying the appropriate burden. We agree with the parties that in this case, expert testimony is not required to determine whether plaintiff reasonably mitigated its damages (*see e.g. Toribio v J.D. Posillico, Inc.*, 297 AD2d 216 [2002]).

We affirm that part of the trial court's decision finding that plaintiff should have given notice of the breach with respect to the Lancers Center loan by May 11, 2002.[1] As noted

---

[1] Neither party challenges the notice date for the Old Hickory loan.

above, the breach centered around defendants' knowledge, at the time the loan was made in 1997, that Wal-Mart would likely vacate the shopping center during the term of the loan. In September 1999, Wal-Mart in fact left the premises but the borrower continued to make payments until March 11, 2002, at which point the loan was transferred to special servicing. The trial court concluded that as of that date, plaintiff had all the relevant information that formed the basis of the breach and was in a position to allege damages. The court then added two months as a reasonable period for plaintiff to review the documents and determine a course of action,[2] and found that notice should have been given by May 11, 2002.

Although plaintiff does not challenge this determination, defendants, on the cross appeal, argue that notice should have been provided in September 1999 when Wal-Mart vacated the shopping center. Defendants' position, however, ignores this Court's earlier finding that Wal-Mart's abandonment of the property, in itself, did not give plaintiff a basis for providing notice of breach (47 AD3d at 108). The trial court determined that once the loan stopped performing and was put into special

---

[2] The court's decision to add the two months is entirely consistent with our decision in the earlier appeal. Before plaintiff may reasonably be expected to have given notice, it must have "a reasonable opportunity to evaluate the information and arrive at the determination that the loan had knowingly been imprudently made" (47 AD3d at 108).

servicing, plaintiff had a basis to allege both a breach and damages, and thus could reasonably have been charged with a duty to provide notice. Under these circumstances, the court's rejection of the September 1999 notice date was not improper.

The court erroneously imposed a cutoff date for what it termed plaintiff's consequential damages. Under the service agreement, plaintiff's damages include "expenses reasonably incurred or to be incurred by the Servicer, the Special Servicer or the Trustee in respect of the breach." Thus, plaintiff is entitled to any such reasonable expenses proven even if they accrued after the repurchase date. Plaintiff is required to have mitigated such damages, with the burden of proof on mitigation falling on defendants.

Defendants' request to present additional evidence upon remand is best determined by the trial court. It is well settled that a trial court's discretion to reopen a case after a party has rested should be sparingly exercised (*King v Burkowski*, 155 AD2d 285 [1989]). Defendants do not identify the precise nature of the proof they seek to introduce, nor do they fully explain why they should now be permitted to present new evidence. Furthermore, the record is unclear as to whether defendants sought to present the additional evidence they now want to introduce after the first remand, and whether such request was rejected by the court. The trial court shall determine, in its

discretion, whether to allow defendants to offer additional proof.

We have considered the parties' remaining contentions and find them unavailing.

M-5039 - *LaSalle Bank National Assoc. v Nomura Asset Capital Corporation*

Plaintiff's motion is granted to the extent of allowing it to file a supplemental appendix including pp. 37-40, 59-63 and 65-67 of the transcript of oral argument before Justice Lowe on October 8, 2008, and the supplemental appendix deemed filed, and denied insofar as it seeks to strike portions of defendants' reply brief.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 1, 2010

CLERK

Tom, J.P., Andrias, Friedman, Nardelli, Catterson, JJ.

2113-
2113A Index 601224/07

Roni LLC, et al.,
Plaintiffs-Appellants,

-against-

Rachel L. Arfa, et al.,
Defendants,

Mintz Levin Cohn Ferris Glovsky
& Popeo, P.C., et al.,
Defendants-Respondents.

Balber Pickard Maldonado & Van Der Tuin, P.C., New York (John Van Der Tuin of counsel), for appellants.

Simpson Thacher & Bartlett LLP, New York (Mark G. Cunha of counsel), for Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., and Jeffrey A. Moerdler, respondents.

Bellin & Associates LLC, White Plains (Aytan Y. Bellin of counsel), for Edward Lukashok, respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 27, 2009, which, upon renewal and reargument, adhered to a prior order, same court and Justice, entered April 15, 2009, granting the motion of defendants Mintz Levin Cohen Ferris Glovsky & Popeo, P.C. (Mintz Levin) and Jeffrey A. Moerdler and the cross motion of Edward Lukashok, Aubrey Realty Co., Aubrey Realty, LLC, 42nd Street Realty, LLC, Tammaz Realty, LLC, and Elul Acquisition, LLC to dismiss the claims of aiding and abetting breach of fiduciary duty as against Mintz Levin, Moerdler and Lukashok (collectively, the Attorney Defendants), affirmed, with costs. Appeal from prior order

unanimously dismissed, without costs, as superseded by the appeal from the October 27, 2009 order.

Plaintiffs' conclusory allegations, and the documentary evidence submitted in support thereof, do not give rise to an inference that the Attorney Defendants had actual knowledge of, or knowingly induced or participated in, the alleged scheme of defendants Rachel L. Arfa, Alexander Shpigel, and Gadi Zamir (collectively, the Promoter Defendants) to inflate the purchase price of the properties they promoted by receiving secret commissions. At most, the documentary evidence indicates that the Attorney Defendants structured and organized entities that acted as the brokers on the property acquisitions and collected commissions - activities which are part of ordinary real estate lawyering (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 46 AD3d 400 [2007], *affd* 12 NY3d 553 [2009]; *Kaufman v Cohen*, 307 AD2d 113, 126 [2003]; *cf. Yuko Ito v Suzuki*, 57 AD3d 205 [2008]). Accordingly, assuming without deciding that plaintiffs have alleged a breach of fiduciary duty by the Promoter Defendants, they have not stated a cause of action for aiding and abetting such a breach by the Attorney Defendants.

We agree with the motion court that the allegations of paragraphs 105 and 106 of the complaint, on which the dissent focuses, are "conclusory," and therefore "do not give rise to an inference that the Attorney Defendants had actual knowledge of,

or knowingly induced, participated in, substantially assisted the furtherance of, or intended to aid in the commission of, the Promoters' scheme to secretly obtain Commissions at the expense of the investors" (citing *Eurycleia*, 12 NY3d at 559-560; *International Strategies Group, Ltd v AN AMRO Bank N.V.*, 49 AD3d 474, 475 [2008]; *Global Min. & Metals Corp. v Holme*, 35 AD3d 93, 101-102 [2006], *lv denied* 8 NY3d 804 [2007]). Simply put, the allegation that the Attorney Defendants structured the transactions at issue does not, without more, give rise to a reasonable inference that such professionals were aware that the Promoter Defendants, in soliciting plaintiffs' investment, were concealing certain commissions that the Promoter Defendants stood to receive. In this regard, it bears emphasis that it is not alleged that the Attorney Defendants solicited plaintiffs or advised the Promoter Defendants concerning such solicitation.

All concur except Tom, J.P. and Nardelli, J. who dissent in a memorandum by Nardelli, J. as follows:

NARDELLI, J. (dissenting)

I respectfully dissent because I cannot agree with the majority's conclusion that the complaint does not give rise to any inference other than that the attorney defendants merely "structured and organized entities that acted as the brokers on the property acquisitions and collected commissions."

Paragraph 105 of the complaint alleges that defendant Lukashok knew of the non-disclosures concerning the non-attorney defendants' secretive receipt of additional funds in connection with the real estate transactions, and failed to disclose them to the investors in the limited liability companies which they were representing at the time of the purchases. It is further alleged that Lukashok himself shared in these secret commissions. Paragraph 106 similarly recites that the other attorney defendants also knew of the non-disclosures concerning the secret payments, and likewise failed to disclose them to the investors. These contentions allege more than that the attorneys were involved in structuring some business entities. Indeed, at a minimum, the attorneys are alleged to have represented the limited liability companies in the transactions.

As this Court has recently noted, "Owners of a fractional interest in a common entity are owed a fiduciary duty by its manager" (*Yuko Ito v Suzuki*, 57 AD3d 205, 208 [2008], citing *Caprer v Nussbaum*, 36 AD3d 176, 189 [2006]). Thus, the non-

attorney defendants are potentially liable to plaintiffs, who were investors in the limited liability companies, if it can be established that they received additional payments in conjunction with the transactions that were not disclosed to plaintiffs.

Concededly, for the attorneys to be liable also for abetting the breach of fiduciary duty, they must have provided "'substantial assistance' to the primary violator" (*Kaufman v Cohen*, 307 AD2d 113, 126 [2003]). Yet, "[s]ubstantial assistance occurs when a defendant affirmatively assists, helps conceal or *fails to act when required to do so*, thereby enabling the breach to occur" (*id.* [emphasis supplied]). If the attorneys are proven to have known about the secret payments, their failure to disclose the details to the investors could be found to have enabled the breach to occur.

Thus, it cannot be said as a matter of law that the pleading is deficient, and dismissal at this stage of the litigation is consequently not warranted.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 1, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Freedman, JJ.

2248 Juanita Young, Index 25645/03
Plaintiff-Respondent,

-against-

City of New York, et al.,
Defendants-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for appellants.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John A. Barone, J.), entered on or about September 22, 2008, after a jury trial, awarding plaintiff $600,000 for past pain and suffering, $500,000 for ten years of future pain and suffering, and $250,000 for the violation of her civil rights, unanimously modified, on the law and the facts, to vacate the award for the claim of civil rights violation and the awards for past and future pain and suffering, and the matter remanded for a new trial solely as to damages for plaintiff's past and future pain and suffering, and otherwise affirmed, without costs, unless plaintiff, within 30 days after service of a copy of this order, stipulates to reduce the award of past pain and suffering from $600,000 to $300,000 and the award of future pain and suffering from $500,000 to $150,000, and to entry of an amended judgment in accordance therewith.

On the morning of June 7, 2003, at 6:50 A.M., plaintiff's

landlord called the police to report that plaintiff, who had previously been evicted from her apartment, had re-entered it without permission. Police Officers Hernandez and Cambridge responded, and after the landlord showed them an eviction letter from the marshal and unlocked the apartment with a key, the officers entered unannounced and, finding plaintiff in bed, arrested her for criminal trespass.

After plaintiff was handcuffed from behind by Officer Cambridge, Officer Hernandez walked her into the hallway and down the steps. Plaintiff testified that because she is legally blind she needed to go down the steps slowly, but Officer Hernandez repeatedly told her to hurry, and she felt a "medium shove" or push from behind from the side of his body, which caused her to fall to the bottom of the landing. Officer Hernandez then angrily tried to pull her up by the handcuffs. She got up and continued down the steps, only to be pushed and to fall a second time, banging into a door at the landing, and a third time, whereupon the officer again tried to raise her by pulling on the handcuffs. Datron Garnett, a 12-year-old friend of plaintiff's son, saw the incident, and his testimony confirmed plaintiff's in this respect.

Officer Hernandez indicated on the arrest report that he had used force on plaintiff to "restrain, control and remove" her, but he testified that he walked her out of the apartment and down

the narrow stairs holding her elbow, and he denied that he pushed her or that she fell on the stairs.

According to plaintiff, while riding to the precinct, Hernandez said to her, "No rallies for you today," which she understood as a reference to her ongoing involvement in rallies against police brutality.

Rather than issuing a desk appearance ticket (DAT) at the precinct, as was permissible because criminal trespass is a misdemeanor, Officer Hernandez decided to hold plaintiff in custody because he wanted to give the landlord time to change the lock before plaintiff had the chance to re-enter the apartment, and with a DAT, plaintiff would have been released in about four hours.

While she was in the precinct holding cell, plaintiff complained about pain in her right hand, and the handcuffs were removed. According to plaintiff, an ambulance came, and, when asked, she responded that she wanted to go to the hospital, but the ambulance went away and did not return. When a second ambulance came, one of the officers offered to issue a DAT so she could go to the hospital, but she said, "No, you hurt [] me. You're taking me to the hospital." Officer Hernandez confirmed in his testimony that plaintiff had complained about pain in her right arm after the arrest and that someone called an ambulance, which took her to the hospital in handcuffs.

In the hospital, plaintiff was shackled to a wheelchair when she was taken for x-rays. In the emergency room, her hand was put in a splint and wrapped in an Ace bandage and her arm was put in a sling, and she was given pain medicine and a prescription for Demerol.

She was then returned to the precinct holding cell and shuttled back and forth from there to central booking four times, and then to a different precinct. She was brought to court on the following day at about 12 P.M., and released on her own recognizance some time after 4 P.M.

Plaintiff then brought this action, asserting causes of action for false arrest, false imprisonment, malicious prosecution, negligence, and violation of federal civil rights (42 USC § 1983). She argued that she was arrested without probable cause, was assaulted and suffered an injury to her right wrist when Hernandez used excessive force, was wrongfully taken into custody rather than given a DAT, and was wrongfully held for an excessive period of time in an effort to delay her release, motivated by ill will.

The trial court correctly dismissed the false arrest, false imprisonment and malicious prosecution claims, since the police had probable cause, which constitutes a complete defense (*see Batista v City of New York*, 15 AD3d 304, 305 [2005]).

The jury found that Officer Hernandez had used excessive

force and been negligent during the arrest, and that the excessive force and negligence were substantial factors in causing plaintiff's injury; it awarded $600,000 for past pain and suffering and $500,000 for 10 years of future pain and suffering. It also found that the detention violated plaintiff's civil rights, and awarded $250,000 in damages on that claim.

Plaintiff's theory is that Hernandez's decision not to issue a DAT amounted to a civil rights violation, entitling her to damages. We conclude that because the arresting officer's initial decision not to issue a DAT was not objectively unreasonable, and because while plaintiff was still in the precinct's holding cell she declined an officer's subsequent offer to write up a DAT because she believed the police should take her to the hospital rather than releasing her to go there herself, the failure to issue a DAT was not a violation of plaintiff's civil rights. Moreover, the damages for her physical injury were covered by the pain and suffering award, and could not be relied on to establish damages for the claimed civil rights violation.

The damage awards for past and future suffering exceeded reasonable compensation to the extent indicated (*see* CPLR 5501[c]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 1, 2010

CLERK

APR 1 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
Rolando T. Acosta
Leland G. DeGrasse
Sallie Manzanet-Daniels, JJ.

Index 103140/06
2010

Rolf Ohlhausen,
Plaintiff-Respondent,

-against-

The City of New York, et al.,
Defendants,

New York City Transit Authority,
Defendant-Appellant.

Defendant New York City Transit Authority appeals from an order of the Supreme Court, New York County (Donna M. Mills, J.), entered September 26, 2008, which denied its motion for summary judgment dismissing the complaint.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellant.

Hofmann & Associates, New York (Dario Anthony Chinigo of counsel), for respondent.

SAXE, J.

On September 14, 2005, a clear, sunny morning, plaintiff Rolf Ohlhausen, a 73-year-old architect, left his apartment on the Upper West Side of Manhattan, and drove his Suzuki motorcycle downtown, headed for the New School in Greenwich Village, where he was enrolled in a philosophy course.

Shortly before 10:00 A.M. on that date, Police Officer Keith Murray, in pursuit of a robber, was driving his patrol cruiser on West 4th Street. The officer came to a stop at a red light at the intersection of West 10th Street and West 4th Street, with lights and siren on, ready to continue north on West 4th Street.

A third participant in the incident yet to occur, New York City Transit Authority bus driver Jeffrey Whaley, was at the same time driving his bus eastbound on West 10th Street. Although the bus had the green light in its favor, the driver stopped at the intersection of West 4th and West 10th, in order to allow Officer Murray's patrol car to proceed. When Whaley's and Officer Murray's eyes met, Whaley signaled to the officer that the officer could proceed by "waving" him through the intersection. Before doing so, Whaley testified, he had turned his head and checked in his left and right mirrors to ascertain whether there was any traffic traveling alongside his bus on West 10th Street,

and had seen none. He could see the full length of his bus, and back to the end of the block, although the side of the bus was his main concern.

Officer Murray drove his police car into the intersection after the bus driver waved him through, but did not immediately go through the intersection; instead, he testified, he stopped in front of the bus for what he thought was about 15 to 20 seconds, so that the bus served as a partial shield, blocking his view of traffic flowing across West 10th Street. He waited there, with his siren off, in the hope that the perpetrator he was looking for would run in front of the patrol car or run southbound on Seventh Avenue South toward the subway entrance, which would place him in the officer's view. After the 15- or 20-second pause, the police car proceeded forward, without first re-activating the siren. Officer Murray testified that by the time he proceeded past the bus through the intersection, the bus driver's earlier hand gesture had no further effect on his driving decisions.

At this time, plaintiff was riding his motorcycle at a speed of 20 to 25 miles per hour eastbound on West 10th Street with the light at the West 4th Street intersection in his favor; with the bus obstructing his view of the police car on West 4th Street, he saw nothing to concern him, and he heard no siren. As he

proceeded into the intersection, he collided with Officer Murray's police car as it continued further into the intersection.

The Transit Authority moved for summary judgment dismissing plaintiff's complaint as against it. Thus, we are concerned not with plaintiff's claim of liability against the City of New York based on the actions of the police car, but *only* his claim based on the conduct of the bus driver. The motion court denied the Transit Authority's motion, relying on a common-law rule that "[u]nder certain circumstances, a driver of a motor vehicle may be liable to a pedestrian where that driver undertakes to direct a pedestrian safely across the road in front of his vehicle, and negligently carries out that duty" (*Valdez v Bernard*, 123 AD2d 351, 351 [1986]; *see also Yau v New York City Tr. Auth.*, 10 AD3d 654 [2004], *lv denied* 4 NY3d 701 [2004]; *Robbins v New York City Tr. Auth.*, 105 AD2d 616 [1984]; *Riley v Board of Educ. of Cent. School Dist. No. 1*, 15 AD2d 303, 305 [1962]).

On appeal, the Transit Authority challenges this rule, suggesting that as a matter of policy, the law should not turn drivers into traffic guards by virtue of a simple, ambiguous movement of the hand (*see generally* Joseph B. Conder, Annotation, *Motorist's Liability for Signaling Other Vehicle or Pedestrian To Proceed, or To Pass Signaling Vehicle*, 14 ALR5th 193). It

protests that a driver yielding the right of way to another should be able to gesture to the other simply to confirm his or her intention to yield, without incurring liability for another motorist's actions. In addition, the Transit Authority suggests that, even accepting the correctness and viability of this rule, the duty imposed by such cases as *Yau* (10 AD3d at 654) does not extend beyond the person to whom the gesture was made, so that where the plaintiff did not personally rely on the gesture, proximate cause cannot be established. Finally, the Transit Authority contends that, in any event, under the circumstances here, the actions of its bus driver cannot be considered a proximate cause of the accident.

To determine whether there are circumstances in which a city bus driver with the right of way who yields to a police car with lights and siren activated may be liable to a third motorist who, in passing the stopped bus and proceeding properly through the intersection, is struck by the police cruiser, we must analyze the intersecting issues of duty, proximate cause and public policy.

There has long been an ongoing debate concerning the elements of tort liability, particularly the element of duty. That issue was the focus of both Judge Cardozo's majority decision and Judge Andrews's dissent in *Palsgraf v Long Is. R.R.*

Co. (248 NY 339, 344, 350 [1928]), and it is a debate that continues today (*see* Weinrib, *The Passing of Palsgraf?*, 54 Vand L Rev 803 [2001]), particularly in the context of a new proposed revision of the Restatement of Torts (*see* Twerski, *The Cleaver, the Violin, and the Scalpel: Duty and the Restatement [Third] of Torts*, 60 Hastings LJ 1 [2008]). Judge Cardozo's classic formulation in *Palsgraf*, that "[t]he risk reasonably to be perceived defines the duty to be obeyed" (*Palsgraf* at 344), emphasizing the link between duty and the foreseeability of harm to a particular person, may have undergone some adjustment in the more recent formulation that "[f]oreseeability of injury does not determine the existence of duty" (*Eiseman v State of New York*, 70 NY2d 175, 187 [1987]). Nevertheless, it remains true that a defendant will be held liable in tort only where that defendant can be said to have breached a legal duty to the plaintiff "to conform to a certain standard of conduct, for the protection of others against unreasonable risks" (Prosser and Keeton, Torts § 30, at 164 [5th ed]), and the question of whether a duty is owed by a defendant to a plaintiff, unlike the factual issues of foreseeability and causation, remains an issue of law to be decided by the court (*Eiseman*, 70 NY2d at 187).

Our discussion must therefore focus first on whether Whaley owed, and breached, a duty to plaintiff.

A motorist always has a duty to operate his or her vehicle with reasonable care (PJI 2:77), which encompasses the duty to see what is there to be seen (PJI 2:77.1). That duty is necessarily owed to everyone else on the roads. However, the duty relied on in *Yau v New York City Transit Authority* (10 AD3d 654, *supra*) and the other cases imposing tort liability where a motorist's gesture to a pedestrian is understood and relied on as an assurance that it is safe for the pedestrian to proceed across the roadway, is actually a separate duty, one that arises only upon the making of the gesture. One New Jersey court quoted Justice Cardozo in justifying the imposition of such a duty: "one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all" (*Thorne v Miller*, 317 NJ Super 554 [1998], citing *Glanzer v Shepard*, 233 NY 236, 276 [1922]).

While we are sympathetic to the Transit Authority's suggestion that a driver yielding the right of way to another should be able to gesture to the other individual simply to confirm his intention to stop and wait for him or her to cross, without incurring liability for another motorist's negligence, we decline its invitation to revisit a rule that is by now well-established law in this State: In appropriate circumstances, a driver may incur a duty to another by gesturing that it is safe

to cross the road.

We also reject the Transit Authority's suggestion that the gesturing driver's duty does not extend to the third party and that the third party's lack of knowledge of, and therefore non-reliance on, the gesture, precludes a finding of proximate cause.

We perceive no logical difficulty in taking a gesturing driver's duty to pedestrians and applying it equally to other drivers. We observe, however, that extending the duty from pedestrians to drivers raises the possibility that the person who is ultimately injured will be a third party, rather than the person who relied on the gesture. For example, when a driver crosses an intersection in reliance on another motorist's gesture and collides with a third vehicle, a passenger in the crossing vehicle, or the driver or passenger in the third vehicle, may be injured. Given that possibility, there is no rationale for limiting the gesturing driver's duty to the gestured-to driver rather than including all those reasonably within the ambit of potential injury: passengers and third parties involved in a collision with the gestured-to driver.

As to the issue of proximate cause, it is well established in the pedestrian cases that such a gesture can only constitute a proximate cause of the accident where the pedestrian relied on the implicit assurance of safety. If the pedestrian understood

the driver's gesture merely to indicate that the driver would pause and allow him or her to pass, rather than as an assurance with regard to any other vehicles on the road, then the gesture cannot be said to have proximately caused the accident (*see Valdez v Bernard*, 123 AD2d at 351). But, may the driver's negligent gesture be treated as a proximate cause of an accident when the party injured in the collision is not the driver who relied on the gesture, but another individual injured in the collision who was unaware of the gesture?

We agree with the motion court that reliance on the part of the injured person is not necessary. When a collision results because one party to the collision relied on a gesture wrongly indicating that the roadway was safe to enter, the gesture is a proximate cause of *the collision*, whether or not the individual who was injured in the collision relied on the gesture.

Despite our rejection of the Transit Authority's arguments, in every other respect we agree with its final argument, and conclude that, under the present circumstances, the material undisputed facts do not permit a claim against the Transit Authority.

We observe that Whaley properly stopped at the intersection despite the green light, because the law required him to stop and yield the right of way to a police vehicle with its lights and

siren activated (*see* Vehicle and Traffic Law § 1144). While there are some differences in the parties' factual recitations as to the exact location of the bus in relation to the lanes of traffic, none of these raise material issues of fact requiring a trial. Leaving aside for the moment any issues relating to Whaley's gesture to Officer Murray, and limiting our discussion to the situation of the bus itself, there is no validity to plaintiff's assertion that the bus driver acted negligently when he positioned the bus in such a way as to block the view of the other motorists, thereby enhancing plaintiff's risk of harm. A bus that stops in its path in order to allow an emergency vehicle to pass cannot be deemed negligent for doing so simply because other vehicles cannot see around or through it. The law does not impose on large vehicles any more than on other vehicles an extra duty to warn nearby drivers of an oncoming emergency vehicle. Nor is there any legal obligation on the part of a driver yielding to an emergency vehicle to activate his own hazard lights or turn signal as an indicator to motorists coming up behind or alongside him; indeed, it seems highly unlikely in this case that hazard blinkers or turn signals would have successfully warned plaintiff of the police car's presence.

Summary judgment is also not precluded by differing testimony as to exactly where the bus was situated in the

roadway. Whaley's testimony was that he did not pull over, but simply stopped in his path to let the police car pass, and that there was less than a full lane open to his left. Plaintiff said that the bus was pulled over and that there was a clear open lane in front of him. The factual dispute is not material, however, since neither stopping the bus in its tracks nor pulling over to the right in an effort to yield the right of way to an emergency vehicle constitutes negligent conduct by the bus driver.

Plaintiff's case against the Transit Authority therefore may survive only if the evidence raises the inference that the bus driver's gesture to Officer Murray was a proximate cause of the collision between plaintiff and Officer Murray's cruiser. It does not. Officer Murray's testimony conclusively establishes that he did *not* rely on Whaley's gesture in deciding to proceed into the portion of the roadway where he collided with plaintiff. Rather, Officer Murray relied on the gesture only to the extent of proceeding into the area directly in front of the bus, where he paused for what he believed was 15 to 20 seconds and looked around. After that pause, he did not look in Whaley's direction again, but simply proceeded further into the roadway without first looking down West 10th Street or re-activating his siren. Under those facts, Whaley's gesture was irrelevant to Officer Murray's decision to proceed further into the intersection after

pausing. Officer Murray acknowledged that he did not rely further on Whaley's gesture once he had stopped in front of the bus and, indeed, after pausing, he could not reasonably have done so. Even if Whaley's estimate that the pause lasted only 3 to 4 seconds were to be accepted as more accurate than Officer Murray's assessment of 15 to 20 seconds, nothing contradicts Officer Murray's statement that before proceeding past the bus he paused and took enough time to look in several directions for the perpetrator he was pursuing. That post-gesture pause, long enough to look in several directions for a robbery suspect, precludes a determination that Officer Murray reasonably continued to rely on the gesture to proceed further into the intersection without checking for oncoming traffic. Indeed, Officer Murray never suggested that when he drove on after pausing in front of the bus, he did so in reliance on Whaley's gesture that it was safe to proceed through the intersection.

Since Officer Murray did not and could not reasonably rely on Whaley's gesture to presume that after pausing, it was still safe to enter the adjacent lane of traffic, as a matter of law the gesture does not constitute a proximate cause of the accident. No other conduct by the bus driver can be properly characterized as negligent, and accordingly, the complaint as against the Transit Authority must be dismissed.

Accordingly, the order of the Supreme Court, New York County (Donna M. Mills, J.), entered September 26, 2008, which denied defendant New York City Transit Authority's motion for summary judgment dismissing the complaint, should be reversed, on the law, without costs, the motion granted and the complaint dismissed as against defendants New York City Transit Authority and John Doe.

M-5414 - *Rolf Ohlausen v City of New York, et al.*

Motion for a stay of trial pending appeal denied as academic.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 1, 2010

CLERK