SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 14, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Buckley, McGuire, Moskowitz, Acosta, JJ.

767 The People of the State of New York, Respondent, Ind. 6453/06

-against-

Pasqual Reyes, etc., Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Jones Day, New York (Michael Dallal of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered December 6, 2007, convicting defendant, after a jury trial, of burglary in the second degree, endangering the welfare of a child and four counts of sexual abuse in the third degree, and sentencing him to an aggregate term of 4 years, affirmed.

The deliberating jury sent a note in relation to the second-degree burglary count for "clarification of intent – How does the age of the victim impact on intent?" In response the court stated that it would tell the jury:

> "The answer to their intent question is if he intended to go into the building with a person and intended to have physical contact with that person, the age does not matter. In essence, he's stuck with the age."

Defense counsel objected, "No. No. No. No," and requested that the court reread its original instruction on that subject:

> "I'm asking for the readback of just the burglary with just the intent because in order to commit a crime, in a burglary situation, I believe that he has to know the age of the person when he goes in. He doesn't have to know the age of the person to commit the underlying crimes of the sex[ual] abuse. But in order to have an intent to commit a crime inside, burglary in the second degree [he does]. And you are guaranteeing a conviction."

The court responded by saying "It's not. And once again, if there is a conviction - as you now predict - this is the first point on appeal, I gather."

Because the trial court ruled on defense counsel's objection, the court demonstrated "that [it] specifically confronted and resolved this issue. Under these circumstances, . . . preservation was adequate" (*People v Feingold*, 7 NY3d 288, 290 [2006]; CPL 470.05[2]).

However, the court declined to reread its instruction and instead delivered a more specific instruction. Counsel "did not specify why the charge as given was inadequate. Thus, while there was preservation as to the court's refusal to charge in accordance with defendant's request, there was no preservation with respect to error in the [intent] charge as given" (*People v Hoke*, 62 NY2d 1022, 1023 [1984]). Because the jury had already expressed its inability to understand the original instructions,

it was appropriate for the court to provide more than the simple readback counsel had requested. While counsel raised a specific issue regarding defendant's intent, he never requested anything but a rereading of the original charge and made no objection to the supplemental charge the court actually delivered until he made his postverdict motion, which had no preservation effect (*see People v Padro*, 75 NY2d 820 [1990]). This Court recently found a lack of preservation in *People v Hesterbay* (60 AD3d 564 [2009], *lv denied* 12 NY3d 916 [2009]), when defense counsel only asked the court to reread the elements of the crimes in response to the jury's note. The Court of Appeals recently reiterated its warnings to the defense bar about the importance of specifying objections sufficiently to "alert the trial court to the argument now being advanced" (*People v Hawkins*, 11 NY3d 484, 493 [2008]). Accordingly, by only asking for a rereading of the original charge on intent in the second-degree burglary charge, defendant's present claim that the supplemental instruction was incorrect or prejudicially misleading is unpreserved and we decline to review it in the interest of justice.

As an alternative holding, we also reject defendant's present claim on the merits. Defendant argues that his commission of strict liability offense of second-degree sexual abuse was not sufficient to satisfy the specific element of burglary that he "intended" to commit a crime when he entered the building. However, as the trial court correctly explained in its supplemental charge:

> "How does the age of victim impact on intent? If the jury determines that a person intentionally went into a building for the purposes of having some sexual contact with an underaged person, even if the accused did not know the age of the underaged person, it would not matter.
>
> "The intent - the intent that the law would focus on under those circumstances are the intent to have sexual contact.
>
> "And the law says that a person is responsible for the age of a person with whom they have sexual interaction of any sort, notwithstanding the fact that the actor - - supposed actor did not know the actual age, even if the person who was the supposed victim informed the person of a different age than what the person actually was."

The crimes of which the jury convicted defendant were endangering the welfare of a child and four counts of sexual abuse in the third degree. The convictions are all strict liability crimes, in which, for the sexual abuse, the victim's lack of consent was based on the victim's incapacity because of age (Penal Law § 130.55 ["A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent"]; Penal Law § 130.05[3][a] ["A person is deemed incapable of consent when he or she is . . . less than seventeen years old"]). And Penal Law § 260.10(1) states:

> "A person is guilty of endangering the welfare of a child when:
> 1. He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old . . ."

At the trial, the People established that the victim was 14 years old and defendant was 32 years old. Because these misdemeanors do not require a specific intent, can their

violation satisfy the intent required for a second-degree burglary conviction?

Penal Law § 140.25(2) states:

> "A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when . . . 2. The building is a dwelling."

Matter of Gormley v New York State Ethics Commn. (11 NY3d 423 [2008]), is instructive. In discussing the Penal Law definitions of "knowingly" and "intentionally" to construe Public Officers Law § 73, the court noted the definitions revolve around a conscious objective to engage in conduct as opposed to a conscious objective to violate a statute (*id.* at 427). Thus, Penal Law § 15.05(1) states:

> "1: 'Intentionally.' A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his *conscious objective* is to cause such result or *to engage in such conduct*" (emphasis added).

Here, the trial court correctly charged the jury that all the People had to prove was that defendant entered the building intending to have sexual contact with the victim. The People did not have to prove that defendant intended to commit a crime or that he knew the victim's age or that she was under 17, as that was irrelevant to the intention necessary for the jury to find defendant committed burglary in the second degree.

This analysis is similar to the reasoning utilized in convictions for attempt. A defendant may intend to commit a particular act but does not complete the act because of legal impossibility. Even though the crime itself may not require

intent because it is a strict liability crime, the defendant may be convicted of the attempt. For instance, in a conviction for attempted rape in the second degree, the court reasoned that defendant could be convicted for attempting to have sex with a police officer who posed as a 13-year-old girl over the Internet. The "core conduct" was "[e]ngaging in sexual intercourse with a person who does not give, or is incapable of giving, consent"; the victim's age was an additional circumstance that made the conduct felonious (*People v Mormile*, 28 AD3d 333 [2006], lv denied 7 NY3d 759 [2006]). Likewise, the "core conduct" proscribed in the second-degree burglary statute is knowingly entering a residential building with intent to have sexual contact without consent (*see also People v Saunders*, 85 NY2d 339 [conviction upheld for attempt to criminally possess a weapon - - a strict liability offense - - although the gun was inoperable]).

All concur except McGuire, J. who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

Defendant's conviction of second-degree burglary (Penal Law § 140.25[2]) was based on proof that after approaching a 14-year-old girl on the street, he knowingly and unlawfully entered a dwelling (the basement of an apartment building with which he had no connection) with the intent to engage in acts of "sexual contact" (Penal Law § 130.00[3]) with the victim, and thus with the intent to commit conduct constituting the crimes of sexual abuse in the third degree (Penal Law § 130.55) and endangering the welfare of a child (Penal Law 260.10[1]). On the basis of evidence that defendant, inter alia, repeatedly kissed the victim, touched, sucked and licked her breasts and caused her to place her hand on his penis, defendant also was convicted of four counts of third-degree sexual abuse and a single count of endangering the welfare of a child.

During deliberations, the jury sent out a note seeking "clarification of intent" with regard to the burglary charge, asking "[h]ow does the age of the victim impact on intent." In discussing the note with counsel, the court stated that "[t]he answer to their intent question is if he intended to go into the building with a person and intended to have physical contact with that person, the age does not matter. In essence, he's stuck with the age." Defense counsel disagreed as follows:

> "[Defense counsel]: No. No. No. No. I'm asking for the readback of just the burglary with just the intent because in order to commit a crime, in a burglary situation, I believe that he has to know the age of the person when he goes in. He doesn't have to know the age of the person to commit the underlying crimes of the sex[ual] abuse."

After brief additional discussion, the jury was brought into the courtroom and instructed as follows:

> "The Court: If the jury determines that a person intentionally went into a building for the purposes of having some sexual contact with an underaged person, even if the accused did not know the age of the underaged person, it would not matter.
>
> "The intent – the intent that the law would focus on under those circumstances are [*sic*] the intent to have sexual contact."

Thus, at trial defense counsel contended (contention 1) that "to commit a crime, in a burglary situation, . . . [defendant] has to know the age of the person when he goes in." On appeal, although defendant formulates his claim in various ways, he apparently regards each as equivalent to the others and to contention 1. He contends (contention 2) that the trial court should have instructed the jury that "to satisfy the 'intent to commit a crime' element of burglary, the jury must find . . . that at the time [he] . . . entered the building, he . . . had the conscious objective and purpose of causing a particular unlawful result, knowing that result to be unlawful." A variant of this contention (contention 2A) is that the "intent to commit a crime" element requires the jury to "find beyond . . . that the

defendant, at the time he . . . entered the building, had the conscious objective and purpose of causing a particular unlawful result, i.e., breaking the law." More generally, but without purporting to require proof of any intent to cause a result, he contends (contention 3) that "someone who stands accused of burglary must possess knowledge of the facts making his intended actions criminal." He also contends (contention 3A) that to satisfy the "intent to commit a crime" element, the People were required to prove that "he . . . believe[d] that [the victim] was under the age of consent" for the third-degree sexual abuse charge, i.e., that she was less than 17 years old (Penal Law § 130.55). Defendant acknowledges that he could be convicted of the burglary charge under the alternative theory that he intended to commit the crime of endangering the welfare of a child, which requires, in relevant part, that the actor "knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old" (Penal Law 260.10[1]). Thus, he contends as well (contention 3B) that with "respect to the predicate offenses for burglary [third-degree sexual abuse and endangering the welfare of a child], there must be an additional showing that [he] knew the minor with whom he . . . intended to have sexual conduct was a minor."

Without differentiating between these contentions, the majority states at the outset of its analysis that "preservation was adequate" under *People v Feingold* (7 NY3d 288 [2006]) "[b]ecause the trial court ruled on defense counsel's objection,"

and thus "demonstrated that it specifically confronted and resolved this issue" [internal quotation marks omitted]. As noted below, however, the contentions defendant presses on appeal differ from the contention he pressed at trial. But putting aside both this discrepancy (for the moment) and that a ruling preserves an issue of law only if there is a causal nexus between the ruling and a protest by a party (*People v Colon*, 46 AD3d 260, 262-264 [2007]) which is not the case here, the majority's conclusion that defendant has preserved one or more of his appellate contentions is pointless. The critical fact, which the majority recognizes, is that defendant did not ask that the jury be instructed in accordance with his position that the People were required to prove that he knew the age of the victim when he went into the building with her. Rather, he expressly asked only "for the readback of just the burglary with just the intent." That request was far from irrational, as the court's main charge on the element of "intent to commit a crime" might have led the jury to conclude that the People were required to prove defendant knew the victim's age. In any event, regardless of whether defendant thereby waived the contentions he now presses upon us (*cf. People v Ahmed*, 66 NY2d 307, 311 [1985]), none of those contentions are preserved for review (*People v Hoke*, 62 NY2d 1022 [1984]; *People v Hesterbay*, 60 AD3d 564, 565-66 [2009], *lv denied* 12 NY3d 916 [2009]).

Thus, the only claim that defendant is entitled to raise on this appeal as a question of law is that the court should have simply repeated its main charge on the intent element of the burglary charge. As defendant does not make that claim, we need not decide it or any other issue. I agree with the majority, however, that any claim that the court erred by not repeating that portion of the main charge is meritless (*see generally People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]), and that we should not exercise our interest of justice jurisdiction and review the contentions defendant does raise.

I also agree with the majority's alternative holding that defendant's appellate contentions are without merit in any event. But I also think they are unpreserved for another reason. Each of defendant's appellate formulations of his position would require the People to prove defendant's subjective knowledge of a legal rule, a position to which the trial court would not have been alerted by contention 1. Thus, for example, contention 2A would require the People to prove that defendant knew that the conduct he intended to commit was defined by the law to be a crime (and, to boot, that his conscious objective was to break the law); contentions 3 and 3A would require proof that defendant knew the rule of law that a person less than 17 years old cannot consent to acts of sexual contact (and that he knew the victim was less than 17 years old). By contrast, contention 1 -- that the People were required to prove that defendant knew the

victim's age -- would require proof of defendant's knowledge not of a rule of law but of a pure fact. Obviously, the law could require proof that a defendant knew the age of the alleged victim without also requiring proof that the defendant knew the legal significance of that fact, i.e., either the specific rule that a person less than 17 years old cannot consent to sexual contact or the more general rule that sexual contact with a person less than 17 years old is criminal. Whether a law requiring proof only of the age of the alleged victim would be a silly law is beside the point. The point is that the specific contentions defendant seeks to raise on appeal are not preserved because defendant pressed a distinct contention at trial (*cf. People v Gray*, 86 NY2d 10, 20-21 [1995]).

As for the merits, defendant's appellate contentions are, obviously enough, at odds with the hoary maxim that ignorance of the law is no excuse (*see e.g. People v Nelson*, 309 NY2d 231, 236 [1955]). More importantly, they are at odds with the language of the Penal Law. A "crime" is a misdemeanor or a felony (Penal Law § 10.00[6]), each of which requires the commission of "conduct," i.e., "an act or omission and its accompanying mental state" (Penal Law § 15.00[4]). A "person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct" (Penal Law § 15.05[1]). Accordingly, under a plain reading of the relevant statutory

language, a person "inten[ds] to commit a crime" when his conscious objective is to engage in conduct that constitutes a felony or misdemeanor. That means, in turn, that when the crime is a strict liability offense, i.e., the conduct constituting the crime does not include an accompanying mental state, a person intends to commit that crime when his or her conscious objective is simply to cause the proscribed result or to commit the proscribed conduct.

In sum, the burglary statute does not require additional proof that the defendant knew that causing the intended result or committing the intended conduct is illegal (i.e., violates a rule of law), and we cannot properly read an additional element into the statute (*Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394 [1995] ["a court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact"] [internal quotation marks omitted]). Moreover, as the Court of Appeals has stated with regard to the Penal Law provisions defining "knowingly" and "intentionally," "[n]either mental state requires [the actor] to have knowledge of the illegality of his conduct or to have the conscious objective to violate the statute; the requirement that [the actor] be aware that his conduct was illegal is normally embodied in the term 'wilfully'" (*Matter of Gormley v New York State Ethics Commn.*, 11 NY3d 423, 427 [2008]).

In addition, acceptance of defendant's position would entail something that is at least controversial even if some might not view it as an oddity: the more knowledgeable about the law a criminal is, the more likely it is that he will be convicted of burglary if he commits criminal trespass in a building and enters with the intent to commit conduct that constitutes a strict liability crime. Suffice it to say, it is far from obvious that the Legislature would have regarded as significantly less blameworthy a criminal who commits such a trespass but does not know and does not care whether the conduct he intends to commit is a crime. Moreover, at least in some cases acceptance of defendant's position could permit particularly blameworthy persons to avoid conviction. Consider, for example, a case like this except that the victim was less than 11 years old and the defendant knew her age but did not know the law prohibited any sexual contact with the child. Alternatively, the defendant might know the applicable rule of law, but subjectively and irresponsibly believe that the victim was 17 years old. Again, it is far from obvious that the Legislature intended that a person otherwise guilty of burglary be acquitted of that crime in either such situation. The provisions of the Penal Law "must be construed according to the fair import of their terms to promote justice and effect the objects of the law" (Penal Law § 5.00). At the very least, this legislative command does not provide clear support for defendant's position.

Another problem with defendant's position is that it is not clear how much knowledge the accused must have. Suppose the defendant touches the "sexual or other intimate parts" (Penal Law § 130.00[3]) of the victim through her clothing or causes her to touch his "sexual or other intimate parts." Must the defendant know that the law defines sexual contact to "include the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing" (*id.*)? In this case, to convict defendant of burglary on the theory that he intended to commit acts constituting the crime of endangering the welfare of a child, must defendant have known that the conduct he intended to commit was "likely to be injurious to the physical, mental or moral welfare" (Penal Law § 260.10[1]) of the child? Defendant provides no answer to these questions, and it is not clear what could justify requiring the People to prove the defendant knew one legal rule (e.g., a person less than 17 years old cannot consent to acts of sexual contact) but not another legal rule (e.g., sexual contact includes touching "directly or through clothing) defining a strict liability crime. This much is clear, however, nothing in the language of the burglary statute provides such a justification. A related problem, which I will mention but not discuss, is that it also is not clear how the text of the burglary statute could support confining defendant's position to burglary charges predicated on intent to commit strict liability crimes.

Finally, although the parties do not discuss Penal Law § 130.10(1), this statute provides another reason to reject defendant's position, or at least contention 1. It provides that "[i]n any prosecution under this article in which the victim's lack of consent is based solely upon his or her incapacity to consent because he or she was mentally disabled, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent." Thus, this affirmative defense is not available when the victim's lack of consent is based on his or her age. Defendant's position is in tension with the Legislature's determination that although criminal liability should not attach when the defendant "did not know of the facts or conditions responsible [for the other specified grounds for lack of consent]," it should attach regardless of whether the defendant knew the victim was incapable of consent because of age. After all, under defendant's view of the law, his knowledge of this particular ground for lack of capacity is essential to criminal liability attaching for the burglary. And in a burglary prosecution alleging that the defendant intended to engage in sexual conduct with a person who, for example, was mentally disabled, defendant would contradict his own position if he were to concede, consistent with the affirmative defense, that the People did not need to prove that the defendant knew at the time of the unlawful entry that the

person was mentally disabled and unable to consent. But the only alternative view of the law, that the People must prove that knowledge at the time of the unlawful entry, would render the affirmative defense pointless.

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

ENTERED: SEPTEMBER 14, 2010

CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1916 DMP Contracting Corp., Index 18455/06
Plaintiff-Appellant,

-against-

Essex Insurance Company,
Defendant-Respondent,

Katherine Falcon, etc., et al.,
Defendants.

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Vouté, Lohrfink, Magro & Collins, LLP, White Plains (Elliot A. Cristantello of counsel), for appellant.

Clausen Miller PC, Chicago, IL (Kimberly A. Hartman of the Bars of the States of Maryland and Illinois admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about September 19, 2008, which denied plaintiff's motion for leave to amend the complaint and for summary judgment against defendant Essex Insurance Company, and granted Essex's cross motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, to declare that Essex is not obligated to defend plaintiff in the underlying personal injury action, and otherwise affirmed.

In the underlying slip and fall action, the property owner Beechwood was sued for negligently allowing a parking lot to remain in an uneven, snowy and icy condition. According to the deposition testimony of the injured plaintiff, the plaintiff's father moved his vehicle out of its parking spot and she slipped as she pulled the handle to open the vehicle's door. While the

father claimed that his vehicle remained in its parking spot, he testified similarly that his daughter fell near the passenger door as "she was coming to the car to get in."

Beechwood filed a third-party complaint against the father and DMP, an excavation contractor. Beechwood alleged that the father was negligent because he allowed his vehicle to either move or come into contact with his daughter as she tried to enter it and that DMP was negligent in performing snow removal work. Beechwood also sought contractual indemnification from DMP and damages for DMP's alleged failure to name it as an additional insured on DMP's commercial general liability (CGL) policy with Essex.

Essex disclaimed coverage on the grounds that the CGL policy excluded coverage for snow removal operations and for any personal injuries arising out of the use of "any auto," whether owned by the insured or not, and that there was no coverage pursuant to the policy's "Contractual Liability Limitation" and "Breach of Contract" endorsements. In response, DMP filed this action seeking a declaration that Essex had a duty to defend. Thereafter, DMP's motion for summary judgment dismissing the third-party complaint in the underlying action, based on DMP's claim that it had no duty and did not perform snow removal, was granted on default. When negotiations between DMP and Essex to settle DMP's claim for defense costs failed, the motions that were decided by the order on appeal followed.

A duty to defend exists whenever the allegations in the

complaint in the underlying action, construed liberally, suggest a reasonable possibility of coverage, or where the insurer has actual knowledge of facts establishing such a reasonable possibility (*see Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]; *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]). "Any . . . exclusion [] . . . from policy coverage must be specific and clear in order to be enforced" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]), and "an ambiguity in an exclusionary clause must be construed most strongly against the insurer "(*Guachichulca v Laszlo N. Tauber & Assoc., LLC*, 37 AD3d 760, 761 [2007]).

The test for ambiguity is whether the language of the insurance contract is "susceptible of two reasonable interpretations" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]). In this regard, insurance contracts should be read in light of common speech *(Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]), and "are to be interpreted according to the reasonable expectations and purposes of ordinary businesspeople when making ordinary business contracts" (*City of New York v Evanston Ins. Co.*, 39 AD3d 153, 156 [2007]). The plain meaning of the policy's language may not be disregarded to find an ambiguity where none exists (*see Bassuk Bros. v Utica First Ins. Co.*, 1 AD3d 470 [2003], *lv dismissed* 3 NY3d 696 [2004]).

Applying these principles, Essex has no duty to defend, because the policy's unambiguous "auto exclusion" bars even the

potential for coverage of the underlying claim (*see American Guar. & Liab. Ins. Co. v Hoffman*, 61 AD3d 410 [2009]).

Because DMP concedes that the accident arose out of the use of the father's vehicle, we do not decide the issue (*compare Mount Vernon Fire. Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 350-51 [1996] ["arising out of" language in an insurance exclusion clause is unambiguous and is to be applied broadly in the form of a "but-for" test in determining coverage] *with D'Avilar v Folks Elec. Inc.*, 67 AD3d 472, 472 [2009] ["the law draws a distinction between a condition that merely sets the occasion for and facilitated an accident and an act that is a proximate cause of the accident"]*; see also Cowan Systems, Inc. v Harelysville Mutual Ins. Co.*, 457 F.3d 368 [4th Cir. 2006]).

DMP does contend that the auto exclusion is unusual, unfair and ambiguous and should be construed in favor of coverage. This argument is without merit.

The auto exclusion provides:

> "This insurance does not apply to 'bodily injury' . . . arising out of, caused by or contributed to by the ownership, non-ownership, maintenance, use or entrustment to others of any 'auto.' Use includes operation and 'loading and unloading.'"

The plain meaning of this language, which focuses on the connection between a vehicle and the injury, not between a vehicle and the insured, is that bodily injury occurring as described is not covered, whether or not it is the insured who owned, maintained, used or entrusted to others the subject automobile (*see e.g. Allstate Insurance Company v Naai*, 684 F

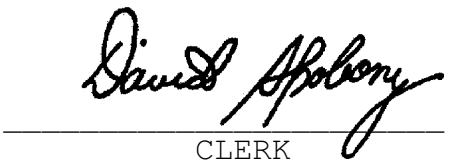
Supp 2d 1220, 1230-1231 [Hawaii 2010]; *Mosher v Essex Ins. Co.*, 2009 WL 1693218, *5, 2009 Mich App LEXIS 1342, *12-13 [Mich Ct App 2009]; *Essex Ins. Co. v Neely*, 2008 WL 619194, *9-10, 2008 US Dist LEXIS 16615, *24-28 [ND WV 2008]). Thus, as the trial court found, "[a] fair reading of the policy and the plain language of the provision should have placed the insured on notice that the provision was applicable to the 'use' of 'any auto' regardless of ownership[,] [t]hus[] providing the insured with the opportunity to question or renegotiate coverage."

Plaintiff's allegations of bad faith are unsupported by evidence sufficient to warrant a finding that Essex's disclaimer of coverage constituted "gross disregard" of plaintiff's interests (*see Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 452–453 [1993]).

We have considered plaintiff's remaining arguments and find them unavailing.

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

ENTERED: SEPTEMBER 14, 2010



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Saxe, J.P., Catterson, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

1969 Margaret Sweeney, Index 25009/05
Plaintiff-Appellant,

-against-

Riverbay Corporation,
Defendants-Respondents.

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Mark B. Rubin, Bronx, for appellant.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered on or about August 13, 2008, which granted defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Plaintiff seeks damages for injuries she sustained after tripping and falling over a garden hose that had been placed across the sidewalk in front of a building managed by defendant. Even assuming that the deposition testimony and photographs suggesting the hose was clearly visible from all directions compels the conclusion as a matter of law that the hazard was open and obvious (*see Tagle v Jakob*, 97 NY2d 165, 169 [2001]), the question remains whether defendant breached its duty to maintain the premises in a reasonably safe condition (*see*

Westbrook v WR Activities-Cabrera Mkts., 5 AD3d 69, 72-73 [2004]).

We find that the hose stretching across the sidewalk constituted a tripping hazard (*see e.g. Harris v New York City Health & Hosps. Corp.*, 24 AD3d 164 [2005] [overlapping sections of carpet]*; Westbrook* at 75 ["lone 10-to-12-inch-high box in a supermarket aisle"]). Eric Harvey, who witnessed the accident, testified that the hose was stretched across the sidewalk at 8:30 A.M. when he came downstairs from his apartment. Plaintiff's verified bill of particulars and defendant's complaint report fix the time of the accident at 9:10 A.M. and 9:12 A.M. respectively. Therefore, there is a basis for Harvey's estimate that the hose had been on the sidewalk for approximately 30 minutes before the accident. Here, there exists a triable issue of fact as to whether the hose had been on the sidewalk for a sufficient length of time prior to the accident so as to permit its discovery and removal by defendant. *Gordon v American Museum of Natural History* (67 NY2d 836 [1986]), which the dissent cites, is distinguishable because in that case there was no evidence that anyone observed the dangerous condition prior to the accident (*see e. g. Villaurel v City of New York*, 59 AD3d 709, 711-712 [2009], *lv denied* 13 NY3d 704 [2009]). Defendant presented no

evidence as to whether it had inspected or watered the area since the day before the accident, when its maintenance person was on duty.

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

CATTERSON, J. (dissenting)

I must respectfully dissent because, in my opinion, 30 minutes is not sufficient time for the defendant to have had constructive notice of the alleged hazardous condition of a garden hose stretched across a walkway on a 300-acre property. Therefore, I would affirm the order granting the defendant summary judgment and dismissing the complaint.

The following facts are undisputed: On or about August 3, 2005, at approximately 10:00 a.m., 74-year-old plaintiff Margaret Sweeney tripped and fell over a green garden hose that stretched across a cement sidewalk in Co-Op City in the Bronx. The residential community comprises 35 high-rise buildings, and 7 townhouse clusters, located on 300 acres. The defendant, Riverbay Corporation, is the owner and manager of Co-Op City, and is responsible for the maintenance of the community.

At deposition, Sweeney testified that she noticed rotating sprinklers, to which the hose was attached. She also testified that although it was a dry and clear day, the sidewalk was wet from the spray of the sprinklers. At the time that Sweeney fell she was wearing flat shoes and carrying a purse. There was no one walking on the sidewalk. Sweeney asserts that she had an unobstructed view of the path in front of her and that she had no trouble with her vision, but claims that she did not see the hose before she tripped over it. She stated that it was only when she looked back, she saw that the hose was "spirally."

Eric Harvey, also a resident of Co-Op City, testified at

deposition that he witnessed the accident from approximately 30 to 40 feet away. Harvey, an off-duty police officer, first swore in an affidavit prepared by the plaintiff's counsel that he saw the hose lying across the sidewalk about a half hour before the accident, but he did not inform any Riverbay worker about the presence of the hose. He also stated that the hose was the type which he has seen used by Riverbay. However, at his deposition, he testified that he was unfamiliar with the type of hose used by Riverbay and that he was not sure he saw the hose a full 30 minutes before the accident. Rather, he testified only that the hose may have been there a "little while."

Osborne Pearson, the grounds maintenance supervisor for Riverbay, testified at deposition that neither the hose nor the sprinkler was owned by Riverbay. Mr. Pearson also testified that no Riverbay employee was assigned to any watering duties on the morning of the accident. He stated that Riverbay uses only straight stretch hoses, not coil and that Riverbay has a policy of ensuring that at least one maintenance person is present when a hose is running across the sidewalk. He further testified that while watering, the maintenance crew generally uses a caution sign or a cone. Mr. Pearson did not know how long the hose had been lying on the sidewalk prior to the accident.

Upon completion of discovery, the defendant moved for summary judgment. The court below granted the motion and dismissed the complaint finding that the hose stretched across the sidewalk was "easily observable" and thus "open and

apparent." As such, the court found it did not constitute a "dangerous hazard." I would affirm, but for different reasons.

A court may conclude that a risk was open and obvious, as a matter of law, if the established facts compel such a conclusion on the basis of clear and undisputed evidence. Tagle v. Jakob, 97 N.Y.2d 165, 169, 737 N.Y.S.2d 331, 334, 763 N.E.2d 107, 110 (2001). A danger is considered open and obvious if it would be seen by any passerby reasonably using his or her senses. Tagle, 97 N.Y.2d at 170, 737 N.Y.S.2d at 334. The photographs of the hose taken on the day of the accident depict its open and obvious nature. The plaintiff had an unobstructed view of the sidewalk. Also, the hose could be seen from 25 feet away and was raised and coiled, rather than flat on the ground. The presence of the sprinklers and the fact that the sidewalk was sodden on a sunny day are further evidence that any person reasonably using his or her senses would have been aware of the hose.

However, this does not end the inquiry since it is well settled that an open and obvious condition only relieves the property owner of the duty to warn. The property owner still has a duty to maintain his or her property in a reasonably safe condition. See Westbrook v. WR Activities-Cabrera Mkts., 5 A.D.3d 69, 71-73, 773 N.Y.S.2d 38, 41-42 (1st Dept. 2004); Meola v. Metro Demolition Contr. Corp., 309 A.D.2d 653, 654, 765 N.Y.S.2d 791, 792 (1st Dept. 2003), lv. denied, 2 N.Y.3d 706, 780 N.Y.S.2d 311, 812 N.E.2d 1261 (2004); MacDonald v. City of Schenectady, 308 A.D.2d 125, 127, 761 N.Y.S.2d 752, 754 (3d Dept.

2003).

I would agree with the motion court that the garden hose was not inherently dangerous. The circumstances of this case are more analogous, in my opinion, to those found in Rivera v. City of New York (57 A.D.3d 281, 870 N.Y.S.2d 241 (1st Dept. 2008)) than in Westbrook on which the majority relies. In Rivera, this Court found no dangerous condition when plaintiff fell over a plainly visible and illuminated speed bump spanning the width of the walkway. In Westbrook, the plaintiff tripped over a box while rounding a corner in a grocery store, and this Court found the plaintiff could have overlooked the hazard. See Westbrook, 5 A.D.3d at 75, 773 N.Y.S.2d at 44.

Even assuming arguendo that the hose constituted a dangerous condition, it is well settled that the existence of a defective or dangerous condition does not in and of itself give rise to a cause of action in negligence. Lewis v. Metropolitan Transp. Auth., 99 A.D.2d 246, 472 N.Y.S.2d 368 (1st Dept. 1984), aff'd, 64 N.Y.2d 670, 485 N.Y.S.2d 252, 474 N.E.2d 612 (1984). As the defendant correctly asserts, it is incumbent on the plaintiff to show that either the defendant created the dangerous condition or had actual or constructive notice of the condition in order for the plaintiff to make out a prima facie case of negligence. See Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 622 N.Y.S.2d 493, 646 N.E.2d 795 (1994); Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 501 N.Y.S.2d 646, 492 N.E.2d 774 (1986); Mitchell v. City of New York, 29 A.D.3d 372, 815 N.Y.S.2d 55 (1st

Dept. 2006). In my opinion the plaintiff, in this case, has failed to raise any issues of fact to rebut the defendant's showing that it neither created the condition nor had actual or constructive notice of it.

The plaintiff simply has not controverted the testimony of Mr. Pearson that Riverbay did not own the hose in question and did not assign any employee to the task of watering the plants on the day of the accident at the subject building. See Mayer v. New York City Tr. Auth., 39 A.D.3d 349, 833 N.Y.S.2d 476 (1st Dept. 2007) (where this Court held that it would be mere speculation to conclude that the defendant placed an extension cord (the alleged tripping hazard) on a subway platform, especially since the subcontractor defendants had not worked on the platform on the day of the accident or the two days prior). Notably, Eric Harvey's affidavit suggesting that the hose belonged to Riverbay was contradicted by his deposition testimony. Pearson's testimony establishes that Riverbay did not have any actual notice of the hose lying across the walkway. In opposing summary judgment, the plaintiff did not contend that Riverbay had actual notice nor does the majority suggest that there is any issue of fact as to actual notice.

Lastly, in my opinion, no issue of fact exists as to whether Riverbay had constructive notice of the condition. To constitute constructive notice, a hazardous condition "must be visible and apparent and it must exist for a *sufficient length of time* prior to the accident to permit defendant's employees to discover and

remedy it." Gordon, 67 N.Y.2d at 837, 501 N.Y.S.2d at 647 (emphasis added).

In Gordon, the Court held that the property owner did not have constructive notice of the hazard created by waxy paper deposited on the owner's front steps, reasoning that the paper could have been dropped only seconds or minutes before the accident, and that "any other conclusion would be pure speculation." Gordon, 67 N.Y.2d at 838, 501 N.Y.S.2d at 647.

Although Eric Harvey *estimated* that the hose was stretched across the sidewalk for approximately 30 minutes before the accident, at his deposition he conceded he did not know how long it had actually been lying there. As the defendant correctly asserts, the inability of the plaintiff to place any time frame on the existence of the condition is fatal to the issue of constructive notice. See also Cuddy v. Waldbaum, Inc., 230 A.D.2d 703, 646 N.Y.S.2d 51 (2d Dept. 1996) (summary judgment properly granted where the plaintiff slipped on a piece of lettuce and wet paper in defendant's supermarket and could not establish evidence as to how long the lettuce had been there).

Even if the plaintiff could show the hose was in its position on the sidewalk for 30 minutes, in my opinion that would be an insufficient length of time to put the defendant on constructive notice of the allegedly hazardous condition. In this case, the defendant's staff maintains a community of 35 high-rise buildings and 7 townhouse clusters spread over 300 acres, and thus the instant case is entirely distinguishable from

slip and fall cases occurring in confined spaces such as grocery stores where a hazard would be more readily discoverable.

For the foregoing reasons, I would affirm the order granting summary judgment to the defendant and dismiss the complaint. In view of the absence of the essential elements in this cause of action, I would affirm the court below.

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

ENTERED: SEPTEMBER 14, 2010

CLERK

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1993 Hugo Ramirez, Index 15424/05
Plaintiff-Respondent,

-against-

Cynthia Shoats,
Defendant-Appellant,

Everett Glaspie Construction, Inc., etc., et al.,
Defendants.

_____

Clark, Cuyler & Mederos, LLP, Brooklyn (Robert D. Clark of counsel), for appellant.

Shestack & Young, LLP, New York (Shibu J. Jacob of counsel), for respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered August 26, 2009, which, to the extent appealed from, denied defendant Cynthia Shoats's motion for summary judgment dismissing the Labor Law §§ 240(1) and 241-a causes of action as against her, affirmed, without costs.

Plaintiff was injured when a piece of corrugated metal covering the unfinished landing of a newly constructed stairway slipped under his feet, causing him to fall from the second floor to the basement level of a building under construction, while he was descending from his work area on the fourth floor. Plaintiff testified that the only temporary ladders in the building were positioned at the time of his accident to connect the fourth floor to the third floor and the third to the second, and that therefore the subject stairway was the sole means of descent from the second floor and was so used by "everybody." Defendant's

testimony that she observed a ladder connecting the first and second floors raises an issue of fact whether the corrugated metal landing covering the stairway was the sole means of descent from plaintiff's work area and thus a safety device within the meaning of Labor Law § 240(1) (*see Griffin v New York City Tr. Auth.*, 16 AD3d 202 [2005]; *Crimi v Neves Assoc.*, 306 AD2d 152 [2003]; *Brennan v RCP Assoc.*, 257 AD2d 389 [1999], *lv dismissed* 93 NY2d 889 [1999]).

As he was working near and fell from the stairway, plaintiff is entitled to the protection of Labor Law § 241-a (*see Fuller v Catalfamo*, 223 AD2d 850, 852 [1996]; *Seiger v Port of N.Y. Auth.*, 43 AD2d 339, 341 [1974] ["the statute here involved should be construed liberally"]). Contrary to defendant's contention, the record raises an issue of fact whether plaintiff fell more than one story.

Given the factual issue whether the stairway was plaintiff's sole means of access to and from his work area and thus was a safety device within the meaning of Labor Law § 240(1), the failure of the corrugated metal landing to protect plaintiff from the elevation-related hazard presented by the stairway precludes a finding as a matter of law that plaintiff's conduct was the sole proximate cause of his injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290-291 [2003]; *Miraglia v H & L Holding Corp.*, 36 AD3d 456 [2007], *lv denied* 10 NY3d 703 [2008]; *Osario v BRF Constr. Corp.*, 23 AD3d 202 [2005]; *see also Lajqi v New York City Tr. Auth.*, 23 AD3d 159 [2005]). Nor can it

be found as a matter of law that plaintiff was a recalcitrant worker, given his testimony that he and his coworkers had been informed by the foreman that they should use the subject staircase and that other workers had gone down the stairs ahead of him (*see e.g. Miraglia*, 36 AD3d at 456-457).

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

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

McGUIRE, J. (dissenting)

I respectfully dissent. The majority's decision to uphold the Labor Law § 240(1) claim cannot be reconciled with well-established precedents of this Court and each of the other departments; the majority's decision to uphold the Labor Law § 241-a claim cannot be reconciled with the plain language of the statute and a well-established principle of statutory construction.

Plaintiff, who had been working on the fourth floor of the building installing windows, decided to exit the building to take a coffee break and fell while descending a permanently installed but unfinished interior staircase that had been constructed the day before. Specifically, plaintiff stepped on a piece of metal covering on the second-floor landing of the staircase and fell to the basement when the unsecured covering moved.

With respect to plaintiff's claim under Labor Law § 240(1), our decision in *Ryan v Morse Diesel, Inc.* (98 AD2d 615 [1983]) is controlling. In *Ryan*, the plaintiff was injured when, while carrying a bucket of bolts down a permanently installed but unfinished interior stairway, he stubbed his toe, fell and was injured. We reversed a jury verdict in favor of the plaintiff based on a violation of § 240(1), finding that under no construction of the statute could a "permanently installed stairway, used by the plaintiff as a place of passage, be deemed to be a scaffold, hoist, stay, ladder, sling, hanger, block, pulley, brace, iron or rope," the safety devices specifically

enumerated therein (*id.* at 616). We also found that "[t]he stairway was not a tool used in the performance of the plaintiff's work" but rather "was a passageway from one place of work to another" (*id.*). We specifically stated that "[t]he distinction is critical" and held that "[a]n accident arising on such a passageway does not lie within the purview of subdivision 1 of section 240" (*id.*).

We made this same important distinction more recently in *Griffin v New York City Tr. Auth.* (16 AD3d 202 [2005]). Affirming the denial of a motion for summary judgment by certain defendants on a Labor Law § 240(1) claim, we explained that there were

> "issues of fact as to whether the structure from which [the plaintiff] fell was a permanently affixed ladder which provided the sole access to his work site and therefore a 'device' within the meaning of Labor Law § 240(1), or whether it was a permanent staircase not designed as a safety device to afford protection from an elevation-related risk and therefore outside the coverage of the statute" (*id.* at 203 [citations omitted]).

Here, there is no comparable issue of fact: it is undisputed that plaintiff fell while descending the permanent but unfinished stairway, not a ladder providing the sole access to the work site and thus a safety "device" within the statute. Our decisions in *Ryan* and *Griffin* are not oddities of the law peculiar to this Department. The Second, Third and Fourth Departments also have held that a permanent staircase is not a safety "device" within the meaning of the statute (*see Norton v Park Plaza Owners Corp.*,

263 AD2d 531 [2d Dept 1999]; *Williams v City of Albany*, 245 AD2d 916 [3d Dept 1997], *appeal dismissed* 91 NY2d 957 [1998]; *Dombrowski v Schwartz*, 217 AD2d 914 [4th Dept 1995]).

The majority appears to be of the view that Labor Law § 240(1) would apply if "the stairway was the sole means of descent" from plaintiff's work area. Nothing in *Ryan*, however, suggests that another means of descent was available to the plaintiff or that the holding was predicated on the presence of another means of descent. Rather, the holding in *Ryan* was predicated on the permanent nature of the stairway as a passageway, which precluded it from being characterized as a "device" with the meaning of the statute.

If the staircase here was being used by plaintiff in lieu of a scaffold and was the sole means of access to the elevation level required to perform his work, it may be that it could then be deemed a "safety device" within the ambit of § 240(1) (*see Jones v 414 Equities LLC*, 57 AD3d 65 [1st Dept. 2008]). Given the facts of this case, however, that question is not before us. Plaintiff was neither using the staircase to accomplish his work nor was it the sole means of ascent or descent to his work area. Rather, plaintiff was using the newly installed, permanent staircase as a passageway. "An accident arising on such a passageway does not lie within the purview of subdivision 1 of section 240. The appropriate statute is subdivision 6 of section 241" (*Ryan*, 98 AD2d at 616 [citations omitted]).

Although there is some confusion in the record, it is clear

that plaintiff fell from the second floor landing. It also is clear that temporary ladders were built and used at the site. Indeed, plaintiff ascended to the fourth floor earlier that morning by using two ladders, one connecting the fourth and the third floors and one connecting the third and second floors. Moreover, it is undisputed that those ladders were still present at the site when plaintiff used the newly installed, permanent staircase. But, in any event, even assuming that plaintiff fell while descending from the second floor to the first floor (as opposed to while descending from the third floor to the second floor), the majority is wrong as it is undisputed that a permanent exterior staircase connected the first and second floors. Thus, no matter where the accident occurred, plaintiff had an alternative means of descent.

Likewise, because plaintiff was not working in the stairwell at the time of his accident, the motion to dismiss the claim pursuant to Labor Law § 241-a also should have been granted. The statute specifies that "[a]ny men working in or at . . . stairwells of buildings in course of construction . . . shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such men . . ." Since it is undisputed that plaintiff was not working in or at the stairwell, the claim is foreclosed by the plain language of the statute. The statute applies when "men [are] working in or at . . . stairwells," not "in, near or at . . . stairwells" or when the stairwell "is the

only way . . . to reach [the] work area." The majority broadens the reach of the statute, and introduces additional uncertainty concerning its reach, by impermissibly reading into it words that the Legislature could have but did not include (*see Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394 [1995]).

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

ENTERED: SEPTEMBER 14, 2010

CLERK

Andrias, J.P., Saxe, Catterson, Freedman, Abdus-Salaam, JJ.

2513 In re Langham Mansions, LLC, Index 111188/08
Petitioner-Appellant,

-against-

New York State Division of
Housing and Community Renewal,
Respondent-Respondent,

135 Central Park West Tenant's Association,
Intervenor-Respondent.

_____

Borah, Goldstein, Altschuler Nahins & Goidel, P.C., New York (Robert D. Goldstein of counsel), for appellant.

Gary R. Connor, New York (Jeffrey G. Kelly of counsel), for municipal respondent.

Himmelstein McConnell Gribben Donoghue & Joseph, New York (David S. Hershey-Webb of counsel), for 135 Central Park West Tenant's Association respondent.

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Order and judgment (one paper), Supreme Court, New York County (Marilyn Shafer, J.), entered February 6, 2009, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78 to annul so much of a determination of respondent New York State Division of Housing and Community Renewal (DHCR) as revoked a major capital improvement rent increase for four apartments in petitioner's building, reversed, on the law, without costs, the proceeding reinstated, the petition granted to the extent of annulling DHCR's determination, and the matter remanded to DHCR for further proceedings consistent with this decision.

In this article 78 proceeding, petitioner Langham Mansions LLC ("the owner") undertook an extensive project to replace more than 860 oversized and non-standard windows in its landmark apartment building located at Central Park West, between 73rd and 74th Streets, Manhattan. The building comprises 59 apartments, 19 of which are subject to rent regulation.

The owner received approval from the Landmarks Preservation Commission to replace the existing windows. In June 2005, the owner filed an application with the DHCR pursuant to the Rent Stabilization Code (9 NYCRR § 2522.4) for a major capital improvement rent increase based on the owner's expenditure of more than $1.5 million to replace the windows in the building.

On December 14, 2005, in opposition to the rent increase, 135 Central Park West Tenants Association (the "tenants' association") submitted an answer to the owner's application, asserting that some of the new windows were defective. The tenants' association attached a report from a licensed engineer who had inspected the windows in 10 of the building's 19 rent-regulated apartments in November 2005. The report stated the new windows were difficult to open and close and they required "undue force in pulling up and pushing down the sash."

The owner responded that all windows were functioning properly. By order dated May 19, 2006, the DHCR approved the major capital improvement increase of $39.16 per room per month for the rent-regulated units, effective June 2006. The DHCR also approved a retroactive charge.

In response to the rent increase, the tenants' association filed a petition for administrative review ("PAR"). Contesting the PAR, the owner disagreed with the engineer's report, and attached the report of an independent contractor who had visited 11 of the 19 rent-regulated units, and stated that minor repairs were required in some of the units.

DHCR itself inspected the units in question in early 2008. It found no defects in four units, one unit was vacant. Of the remaining units, one had windows that were missing some moldings, and four units had some windows that were difficult to open and close. Of the more than 860 windows replaced in the building, the DHCR found defects affecting 6 windows out of a total of 50 windows in the four units. Subsequently, DHCR granted the PAR in part, annulling and permanently revoking the rent increases for the four units.[1]

The owner commenced this article 78 proceeding in August 2008, seeking annulment of the DHCR's determination. The owner claimed that its initial request for a major capital improvement rent increase was properly granted, and that the DHCR acted arbitrary and capriciously in revoking the increase where only 6 of a total of 50 windows in the four subject units had problems, and the problems were minor and could be repaired.

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[1]At the time, the rents for the four units ranged from $2,192.75 for a five-room apartment on the penthouse floor to $2,962.25 for a nine-room apartment with 20 windows in a building where the average decontrolled rent is $22,000 a month.

The owner argued that, in similar cases DHCR had not revoked a rent increase but had simply suspended the effective date of the increase until the agency determined that proper repairs had been made. Furthermore, the owner asserted that DHCR had failed to explain why it had reached a different result in this case.

By order and judgment, entered February 6, 2009, the court confirmed the determination on the PAR and dismissed the petition. As to the owner's contention that the window problems in the four apartments were minor, the court found that an evaluation of the problems' severity involved the agency's expertise, which was entitled to deference. The court further found that DHCR's decision to revoke the rent increase rather than suspend it was not arbitrary and capricious because the owner when provided with the opportunity to fix windows, had not done so.

We now reverse for the reasons set forth below. It is well settled that "[j]udicial review of administrative determinations is limited to whether the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion." (*Matter of City of New York v Plumbers Local Union No. 1 of Brooklyn & Queens*, 204 AD2d 183, 184 [1994], *lv denied* 85 NY2d 803 [1995]; CPLR 7803(3). See also *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009], citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]) Further, the Court of Appeals has held that an administrative

agency's determination is arbitrary and capricious when it "'neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts'" *(Matter of Lantry v State of New York*, 6 NY3d 49, 58 [2005], quoting *Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 517 [1985]).

On appeal, DHCR argues that its determination is rational because it is consistent with other decisions where the agency revoked an increase. However, the owner correctly asserts that the determination is arbitrary and capricious because the DHCR neither indicated a reason for its drastic penalty nor adhered to prior rulings in similar cases where only a few units were affected.

Indeed, the record contains copies of DHCR rulings that directly support the owner's assertions. Specifically, in *Matter of Little & Breslow* (DHCR Admin Review Pocket No. NC430029RP [August 2, 1999]), the DHCR order and opinion denying a petition for a PAR stated the Department's policy in terms that could not be clearer:

"The Commissioner notes that it is Division Policy to *suspend* a [major capital improvement] rent increase for individual apartments *until repairs of defects are completed* (rather than revoking the increase as suggested by the tenant-petitioners)."

In those cases where the DHCR has denied an increase specifically because of problems with windows, this Court has

upheld such determinations where the windows were completely defective and/or where a substantial number of the new windows were defectively installed (see e.g. *Matter of Weinreb Mgt. v New York State Div. of Hous. & Community Renewal*, 305 AD2d 207 [2003]; *Matter of Duell, L.L.C. v New York State Div. of Hous. & Community Renewal*, 269 AD2d 235 [2000]; *Simkowitz v New York State Div. of Hous. & Community Renewal*, 256 AD2d 51, 52 [1998] (windows in 18% of the units were found to have "substantial" defects)).

Contrary to the dissent's sweeping generalization which implies that all "the new windows in four of these apartments were inferior," the windows at issue are located in just four units, and of the total of 50 windows in the four units, only six were found to have problems. The record moreover shows that the six inferior windows are to be found in the apartments as follows:

apartment 4SF (five-room apartment)- 1 inferior window out of a total of 12 windows;

apartment 5SF (five-room apartment)- two inferior windows out of nine;

apartment 7SC (nine-room apartment)- two inferior windows out of 20;

apartment PHN (five-room apartment)- one inferior window out of nine.

Moreover, the record reflects that there was no conclusion by the DHCR that the windows could not be repaired or that they

could not serve their intended function if minor repairs were performed by the owner. The DHCR findings were based on an inspection that was made at least three years after the initial installation and the inspection report fails to conclude that any of the windows inspected were installed defectively or in an unworkmanlike manner. Hence, based on its own stated policy, the DHCR should have suspended rather than revoked the rent increases for the four units.

In any event, we find that simple common sense dictates suspending an increase rather than revoking it permanently. Suspension encourages the owner to rectify the problems if the owner wishes to ultimately recoup its investment in the windows. Revocation, on the other hand, is a result that benefits nobody when an owner has no incentive to make repairs or adjustments.

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

FREEDMAN, J. (dissenting)

I would affirm the judgment of the Supreme Court denying the petition and dismissing the proceeding brought pursuant to CPLR article 78 to annul so much of a determination of respondent New York State Division of Housing and Community Renewal (DHCR) as revoked a major capital improvement rent increase for four apartments in petitioner's building.

The record demonstrates that DHCR did not act arbitrarily or abuse its discretion in finding that the window installations in the four apartments at issue were sufficiently defective so as to not justify a major capital improvement (MCI) rent increase for those apartments (*see Matter of Weinreb Mgt. v New York State Div. of Hous. & Community Renewal*, 305 AD2d 207 [2003]).

An administrative agency is to be accorded wide deference in its interpretation of its own regulations (*Vink v New York State Div. of Housing & Community Renewal,* 285 AD2d 203, 209-10 [2001]). In this case, based on the sequence of events, DHCR's determination to revoke rather than suspend the MCI increase for the affected apartments was not arbitrary or capricious, so as to warrant judicial review (*Matter of City of New York v Plumbers Local Union No. 1 of Brooklyn & Queens,* 204 AD2d 183, 184 [1994], *lv denied* 85 NY2d 803 [1995]).

After receiving reports from a licensed engineer hired by the tenants association indicating that certain windows required

"undue force" to open, DHCR's inspection on two specific occasions disclosed that the new windows in four of these apartments were inferior to those that they replaced because they were extremely difficult to open and leaked air causing drafts. One window that was difficult to open led to a fire escape. The inspections took place some three years after the windows had been installed, after tenants had made a number of complaints, and after petitioner hired a company that had tried to fix the windows and had claimed to have repaired them. Thus it appears that minor repairs would not have been sufficient to remedy the defects.

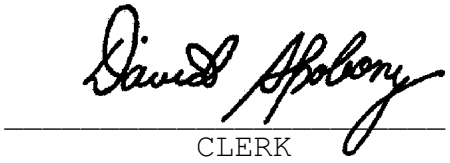
The majority's determination that DHCR's denial of rather than suspension of the MCI increase is irrational is not borne out by the record. The cases cited by petitioner and referred to by the majority, that favor suspension rather than denial, are ones in which building owners either had not been afforded the opportunity to remedy the defects or had completed the repairs by the time they filed their administrative appeals.

This Court has previously upheld DHCR determinations denying MCI increases for entire buildings where replacement

windows were defectively installed (*see Matter of Weinreb Mgt.*, 305 AD2d at 208; *Matter of Duell, L.L.C. v New York State Div. of Hous.* & *Community Renewal*, 269 AD2d 235 [2000]; *Simkowitz v New York State Div. of Hous.* & *Community Renewal*, *256* AD2d 51, 52 [1998]). Thus, the denial of the MCI increase for just these four apartments would be consistent with precedent.

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

ENTERED: SEPTEMBER 14, 2010



CLERK

Andrias, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

2869 The People of the State of New York, Ind. 3401/07
Respondent,

-against-

Damian Leggett, etc.,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Robert A. Neary, J.), rendered May 13, 2009, convicting defendant, after a jury trial, of attempted robbery in the second degree, and sentencing him to a term of 5½ years, unanimously reversed, on the law and as a matter of discretion in the interest of justice, and the matter remanded for a new trial before a different justice.

Defendant was convicted of an attempted gunpoint carjacking. There was a single eyewitness to that crime, Stephen Campbell, who owned the car, a Nissan SUV, and managed to escape in his vehicle. There was a completed carjacking that same day involving a 1996 Acura. Four days later, defendant was arrested while seated in the front passenger side of the stolen Acura. The People did not charge defendant with stealing the Acura. He was accused only of possessing it. However, the jury acquitted defendant of all charges related to criminal possession of stolen property.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility, including its rejection of the alibi testimony. Any differences between the description provided by the victim and other evidence concerning defendant's appearance are explainable. In particular, an examination of the photograph taken at defendant's arrest, four days after the crime, does not reveal such a discrepancy as to facial hair between the photo and the description that would cast doubt on the reliability of the identification (*see People v Garcia*, 272 AD2d 189, 193 [2000], *lv denied* 95 NY2d 889 [2000]). We have considered and rejected defendant's remaining arguments addressing the weight of the evidence, including his claim that the victim identified him at an unduly suggestive lineup.

However, we reverse because the trial court's pervasive denigration of defendant's counsel, in front of the jury, deprived defendant of a fair trial. Even assuming that defense counsel may at times have overstepped the bounds of zealous advocacy, the court's injudicious remarks, in the presence of the jury, were not justified.

The primary duty of the trial judge is to ensure the defendant a fair and impartial trial (*People v Moulton*, 43 NY2d 944, 945 [1978]). To avoid an appearance of bias, a trial judge "must scrupulously avoid denigrating counsel and thereby undermining a party's right to his or her effective assistance"

(*id.* at 946). Our "essential concern" must be that the court's comments do not deny a defendant the "fair trial which is [the] fundamental right of every accused" (*see People v Torres*, 182 AD2d 461, 462 [1992]).

Prior to summation, the court made several unfortunate comments in front of the jury. For instance, when defense counsel continued to question Campbell about what he was doing when he was inspecting the tire just prior to the crime, the court interjected its own objection, stating: "Sustained. We've been over this. *It's irrelevant to begin [with]. To repeat it for a second time is silly*. Let's move on" (emphasis added). The comment that defense counsel's line of questioning was "silly" disparaged defense counsel and effectively negated his line of questioning (*see People v Reina*, 94 AD2d 727, 728 [1983] [reversal of conviction where trial judge disparaged counsel's arguments as surmise and speculation]).

The court's inappropriate comments continued during the parties' summations. In particular, after the court told defense counsel to stop arguing after the prosecutor objects, the court made the following remark while defense counsel was arguing that the jury should "ignore" testimony about the completed carjacking from the victim of that crime, Maria Torres:

> **Mr. Levine**: I'm asking you to ignore that testimony because that testimony –
>
> **[ADA]**: Objection, your Honor.
>
> **Mr. Levine**: -- has nothing to do --

> **The Court:** What happened? You get the admonition, and I understand --
>
> **Mr. Levine:** I was on a roll.
>
> **The Court:** I understand you're enthusiastic.
>
> **[ADA]:** He's instructing the jury what to do.
>
> **The Court:** Enthusiastic may be lightly putting it, all right. There was an objection. Let's continue on your roll. Abide by the rules of the courtroom.
>
> **[ADA]:** The part where I'm objecting to is the portion he instructs the members of the jury to –
>
> **Mr. Levine:** Objection to her speaking her objection, Judge. You've instructed us both not to do that.
>
> **The Court:** *You're turning this into a comedy, and it's not* (emphasis added).

Most egregiously, however, when defense counsel objected during the People's summation, the court did not merely overrule the objection, but stated: "Would you behave like a professional, please and not a *clown.*"(emphasis added).

In addition, the court made the following remarks after defense counsel requested the court to instruct the prosecutor "to not personalize this":

> **The Court:** After your summation? Are you kidding me? This is all fair comment after the way you summed up.
>
> **[Mr. Levine]:** Judge, there was nothing wrong with my summation and again, I'm objecting to this being brought in front of the jury.
>
> **The Court:** You may continue if you can.
>
> **[Mr. Levine]:** Again, I'm asking for a mistrial. This is outrageous, Judge.
>
> **The Court:** Denied. *You're outrageous* (emphasis added).

Lastly, during the prosecutor's summation, the court improperly admonished defense counsel in the jury's presence by asking him whether he wished to "behave like a gentleman" or "[be] escorted out". When defense counsel objected "to any of this happening in front of the jury," the court responded, "Your client[1] brought it on by his comments, his loud comments interrupting [the court's] ability to follow the summations and . . . the jurors as well."

We recognize that sometimes the behavior of counsel may warrant admonishment from the court. Under such circumstances, the court should call counsel to a sidebar, or excuse the jury prior to making any remarks (*see People v Henderson*, 169 AD2d 647, 650 [1991] ["[i]f the court had deemed it appropriate to chastise defendant's lawyer for violating its decision, it should have done so out of the presence of the jury as the court had other alternatives to launching into an attack upon defense counsel in front of the jury"]). If the court finds that it has made an injudicious remark, it should issue curative instructions.

Here, the comments this court made, in front of the jury, and particularly the clear statement that counsel was behaving like a "clown" are simply inexcusable and require a new trial before a different judge.

Because there is to be a new trial, we find it appropriate to address some of defendants remaining points. First, the trial

[1]Apparently, defendant had been disruptive during the trial.

court properly admitted evidence of the second, completed carjacking allegedly committed by a codefendant whose case the court had severed from that of defendant. Because defendant, at the time of his arrest, was in the stolen Acura, he was charged with criminal possession of stolen property.

The court permitted the People to establish that the codefendant stole the car at gunpoint, close in time and distance to the attempted carjacking with which defendant was charged. Defendant argues that it was unduly prejudicial to allow evidence that concerned the completed carjacking because he was not charged with that crime and the circumstances of the actual carjacking concerned only his codefendant who was tried separately.

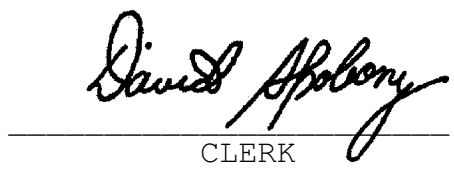
Regardless of whether this evidence was relevant to prove knowledge, it was relevant to prove the vehicle was stolen and probative because it undermined defendant's theory at trial that he had no idea the Acura was stolen when he was arrested. The circumstances of the actual robbery of the car also tended to explain to the jury the events leading to defendant's arrest (*see People v Garcia*, 19 AD3d 215 [2005], *lv denied* 5 NY3d 789 [2005]); *People v Goss*, 281 AD2d 298 [2001], *lv denied*, 96 NY2d 863 [2001]). Defendant was not prejudiced by the evidence because it did not refer to him, but rather to his codefendant (*see Garcia* at *216*). Defendant argues that the jury could have inferred that he was the unidentified second perpetrator in the completed carjacking. However, the jury is presumed to have

followed the court's repeated and thorough limiting instructions, in which it specifically told the jury there was no evidence that defendant was involved in the completed carjacking.

We find defendant's remaining contentions unavailing.

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

ENTERED: SEPTEMBER 14, 2010



CLERK

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

2241 MH Residential 1, LLC, et al., Index 570081/08
Petitioners-Respondents,

-against-

John Barrett, et al.,
Respondents-Appellants,

"John Doe", et al.,
Respondents.

_____

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellants.

Axelrod, Fingerhut & Dennis, New York (David L. Fingerhut of counsel), for respondents.

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Order of the Appellate Term of the Supreme Court, First Department, entered December 2, 2008, modified, on the law, to vacate final judgments awarded to petitioners, and to remand the matter to Civil Court for determination of the parties' remaining claims and defenses, and otherwise affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.