

predicated on a violation of Industrial Code (12 NYCRR) § 23-1.7(d), modified, on the law, to grant plaintiff's motion for summary judgment on his § 240(1) claim, and to deny plaintiff summary judgment on his § 241(6) claim as predicated on a violation of 12 NYCRR § 23-1.7(d), and otherwise affirmed, without costs.

Plaintiff was working as an operating engineer at the World Trade Center Freedom Tower construction site, responsible for maintaining the welding machines on site. He slipped and fell down a steel staircase while he was attempting to walk down to the supply shanty.

Plaintiff is entitled to partial summary judgment on his Labor Law § 240(1) claim. As the dissent recognizes, plaintiff was engaged in a covered activity at the time he slipped and fell down the stairs of a temporary tower scaffold. A fall down a temporary staircase is the type of elevation-related risk to which section 240(1) applies, and the staircase, which had been erected to allow workers access to different levels of the worksite, is a safety device within the meaning of the statute (*see McGarry v CVP 1 LLC*, 55 AD3d 441 [1st Dept 2008]; *Wescott v Shear*, 161 AD2d 925 [3d Dept 1990], *appeal dismissed* 76 NY2d 846 [1990]). As we stated in *Ervin v Consolidated Edison of N.Y.* (93

AD3d 485, 485 [1st Dept 2012]), involving a worker who fell when the temporary structure he was descending gave way, "It is irrelevant whether the structure constituted a staircase, ramp, or passageway since it was a safety device that failed to afford him proper protection from a gravity-related risk." We are thus at a loss to comprehend the dissent's reasoning that although the temporary staircase was a safety device and although it admittedly did not prevent plaintiff's fall, there is nonetheless a factual issue which would defeat plaintiff's entitlement to partial summary judgment on his section 240(1) claim.

The fact that the affidavits of plaintiff's and defendant's experts conflict as to the adequacy and safety of the temporary stairs does not preclude summary judgment in plaintiff's favor. A plaintiff is entitled to partial summary judgment on a section 240(1) claim where, as here, stairs prove inadequate to shield him against harm resulting from the force of gravity, and his injuries are at least in part attributable to the defendants' failure to take mandated safety measures to protect him against an elevation-related risk (see *Stallone v Plaza Constr. Corp.*, 95 AD3d 633 [1st Dept 2012]). Plaintiff's expert opined, inter alia, that the stairs showed obvious signs of longstanding use, wear and tear; therefore, a decrease in anti-slip properties was

to be expected. Given that it is undisputed that the staircase, a safety device, malfunctioned or was inadequate to protect plaintiff against the risk of falling, plaintiff is entitled to summary judgment, whatever the weather conditions might have been.

The grant of summary judgment on plaintiff's § 241(6) claim insofar as it was predicated on a violation of 12 NYCRR § 23-1.7(d) was also in error. Issues of fact exist concerning whether someone within the chain of the construction project had notice of the hazardous condition (see *Booth v Seven World Trade Co., L.P.*, 82 AD3d 499 [1st Dept 2011]).

We have considered the remaining arguments and find them unavailing.

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

FRIEDMAN, J.P. (dissenting in part)

While I otherwise concur in the majority's disposition of the appeal, I respectfully dissent from its modification of the order appealed from to grant plaintiff summary judgment as to liability on his cause of action under Labor Law § 240(1). Plaintiff, while working at an outdoor construction site, slipped and fell on a temporary steel staircase that was wet due to rain. The parties' conflicting expert affidavits raise a triable issue as to whether a staircase offering superior protection from slipping hazards could have been provided. If a factfinder determines that no better staircase could have been provided, there was no violation of Labor Law § 240(1).

Plaintiff was an operating engineer at the World Trade Center Freedom Tower construction site, responsible for maintaining the welding machines on site. He slipped and fell down a temporary steel staircase while he was attempting to descend to the supply shanty to retrieve his raincoat. The construction site was outdoors and, at the time of the accident, the staircase was wet due to rain.

In my view, the motion court correctly determined that neither side was entitled to summary judgment on plaintiff's Labor Law § 240(1) cause of action. While the staircase in

question was a safety device within the purview of section 240(1), the record, including the conflicting expert affidavits concerning the adequacy of the staircase under prevailing safety standards, gives rise to a question of fact as to whether the accident arose from a violation of the statute (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288-290 [2003]; *Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]). Contrary to the majority's implication, the Court of Appeals has made clear that "a fall from a scaffold or ladder, in and of itself, [does not] result[] in an award of damages to the injured party [under section 240(1)]" (*Blake*, 1 NY3d at 288). Rather, to obtain summary judgment as to liability, a plaintiff suing under the statute "must establish that there is a safety device of the kind enumerated in section 240(1) that could have prevented his fall, because liability is contingent upon the failure to use, or the inadequacy of such a device" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011] [internal quotation marks and ellipsis omitted]).

While the availability of a safety device that could have prevented the injury will generally not be an issue in cases where the safety device "collapse[d] or malfunction[ed] for no apparent reason" (*Blake*, 1 NY3d at 289 n 8), this is not such a

case. Rather, the staircase at issue here naturally became wet when it rained (as was inevitable at an outdoor construction site), and the record contains conflicting evidence as to whether the staircase could have been designed to be less slippery in rainy weather or, if adequately designed, was too worn down to provide the intended level of protection from slipping. If, as averred by the defense expert, the staircase met prevailing safety standards and had not become defective due to wear and tear, there was no violation of section 240(1) on which to predicate liability. While a defendant that has violated the statute by failing to provide an adequate device cannot raise the plaintiff's own negligence as a defense, "there can be no liability under section 240(1) when there is no violation and the worker's actions (here, his negligence) are the "sole proximate cause" of the accident'" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004], quoting *Blake*, 1 NY3d at 290).

The majority ignores *Ortiz*, in which the Court of Appeals made clear that a claim under section 240(1) does not lie where there is no available safety device that could have prevented the accident. That is precisely the question raised by the conflicting expert affidavits in this case, which differ over whether the subject staircase met prevailing safety standards.

If it did, as maintained by the defense expert, the conclusion would be that the accident happened, notwithstanding the provision of appropriate safety devices, because there is simply no way to eliminate all danger of slipping on a wet surface at an outdoor construction site. If the staircase was adequate and the sole cause of the accident was plaintiff's failure to use due care in descending it when it was unavoidably wet, as a jury could find on this record, there would no basis for imposing liability upon defendants under section 240(1). As broad as it is, section 240(1) does not make owners and contractors insurers against risks that even the provision of the best equipment cannot entirely eliminate.

In granting plaintiff summary judgment on the section 240(1) claim, the majority relies on the affidavit of plaintiff's expert, opining that the staircase was inadequate, and ignores the two affidavits of the defense expert, David H. Glabe, P.E., opining that the staircase met applicable safety standards and was in good condition at the time of the accident. I quote below portions of Mr. Glabe's affidavits to demonstrate that, at the very least, defendants have raised a triable issue as to the adequacy of the safety features and condition of the staircase, bearing in mind that the elimination of all conceivable risk is

not a humanly attainable standard.

In his affidavit sworn to October 16, 2012, Mr. Glabe averred:

"9. It is a known and accepted fact in the construction industry that much work and activity takes place outdoors and in times of inclement weather. The staircase involved in the alleged accident is designed for use in both indoor and outdoor settings. Based upon my training, knowledge and experience, the involved staircase is routinely used not only in commercial settings such as construction sites but also in industrial settings such as power plants, refineries and chemical plants. Given the forgoing, the manufacturer of the type of staircase used by the plaintiff, is fully aware that when used outside, it may be exposed to the elements. The evidence I have reviewed establishes that the staircase is designed and manufactured so as to provide traction acceptable within industry standards and practice in times of inclement weather.

"10. With regard to traction, the treads for the staircase meet with good and acceptable construction safety requirements in that they are manufactured with perforated holes and raised metal nubs. The perforated holes in the stairs serve the purpose of allowing water, rain and snow to pass through them. The raised metal nubs are specifically designed for traction and grip. Industry standards do not require the application of additional anti-skid protection to the steps. I note that plaintiff's expert claims that anti-skid material should have been added to the steps yet he fails to cite or reference any standard, code, rule or regulation that requires the application of anti-skid protection.

"11. As noted above, the material used for the staircase treads is perforated steel. Based upon the evidence in the record, [and] my experience, training and knowledge of the type of staircase involved in

plaintiff's alleged accident, there is simply no evidence to support an allegation that such a staircase was worn down as a result of foot traffic i.e., being stepped upon by construction boots whose soles [sic] are routinely made of rubber and/or leather.

"12. The testimony of the Atlantic Scaffold witness Kieran Ennis establishes that the subject stair tower had a rise of six feet six inches (vertically) over a seven-foot opening (horizontally). . . . The testimony, drawings, specifications and photographic evidence, establish that the height of the stair risers and the width and depth of the stair treads were uniform and therefore complied with good and accepted industry standards. In fact, based upon my experience, my training and my knowledge, as well as my familiarity with the type of staircase involved in the alleged accident, the staircase and its component parts are typical of staircases used to provide access to and from different levels of a construction site. Based upon my experience, my training and my knowledge, as well as my familiarity with the type of staircase involved in the alleged accident, the tread depth and width met good and acceptable construction industry standards. Furthermore, the tread depth and width was [sic] of sufficient size such that anyone ascending or descending the stairs had adequate space to bear upon the tread surface. Based upon my experience, my training and my knowledge, as well as my familiarity with the type of staircase involved in the alleged accident, there is no evidence to support the allegation that the subject staircase was smaller, narrower and steeper than what is routinely and customarily used in the construction industry."

In his affidavit sworn to January 7, 2013, Mr. Glabe averred:

"7. On November 13, 2012, I performed an inspection of the same make and model staircase as that used by the plaintiff at the time of the alleged accident. The inspection confirmed what I have

previously affirmed in my October 16, 2012 affidavit in support of the Defendant's Motion for Summary Judgment.

"8. As noted by my credentials and qualifications, I am a certified instructor regarding the use of stairways/staircases at construction sites; served as an international consultant regarding the use of the type of staircase involved in the alleged accident; have conducted investigations into the use and misuse of the type of staircase at issue. I am fully familiar with the involved staircase and its component parts.

"9. My inspection confirmed that the treads for the staircase are manufactured with perforated holes and raised metal nubs. The perforated holes in the stairs serve the purpose of allowing water, rain and snow to pass through them. The raised metal nubs are specifically designed for traction and grip. The type of tread on the subject staircase is the most widely used tread in the construction industry.

"10. Mr. Konon [plaintiff's expert] avers that the small round metal nubs provide limited anti-slip protection and even less when they are worn down, 'as they were here.' Mr. Konon does not aver that he inspected the subject staircase or that he even inspected a staircase of the same make and model. I have reviewed the same photographs of the staircase that Mr. Konon reviewed and it is simply not possible to conclude from the photographs that the stairs were worn or that they show signs of longstanding use and wear and tear with a decrease of anti-slip properties as he claims. Based upon my experience, the steel used in the manufacture of this type of staircase is specifically designed to withstand the usual wear and tear of being treaded upon by the soles of work boots, which will simply not cause it to lose its anti-slip properties. In fact, the components of the staircase as designed will routinely outlast the use of a particular staircase and these types of staircases may eventually be replaced based only upon a new design rather than due to wear and tear.

"11. Mr. Konon also repeatedly avers that additional anti-slip protection should have been added to the steps based upon industry standards without making reference to any specific rule, regulation and standard or code requirement. The explanation for his failure to do so is simple; there are no such rules, regulations, standards or codes.

"12. Although Mr. Konon claims that anti-skid materials should have been added to the steps, my inspection confirmed that the material used for the staircase treads, perforated steel with raised metal nubs, does not become worn down as a result of foot traffic i.e., being stepped upon by construction boots whose soles [sic] are routinely made of rubber and/or leather.

"13. Furthermore, Mr. Konon's contention that the stairs had a decreased coefficient of friction is utterly meaningless. There is absolutely no evidence that he ever inspected and tested the involved step or steps, let alone that he tested them in conjunction with testing the condition of the soles of the plaintiff's construction boots as they were on the date of the alleged accident. Therefore, he could not possibly know what the coefficient of friction of the involved step was and cannot offer any opinion regarding same.

"14. Mr. Konon also avers that the staircase was narrow and steep but does not make reference to any measurements that would support such a conclusion or any statement as to how the width, depth and height differs from what is acceptable in the construction industry. My inspection of the staircase of similar make and model confirmed that the height of the tread rise (8 inches) was uniform throughout the staircase, as was the width ($9 \frac{3}{4}$ inches) and length ($31 \frac{3}{4}$ inches) of the stair treads. While simply reviewing the photographs of the staircase would not offer any evidence as to the traction on the treads, the coefficient of friction between the treads and plaintiff's work boots, or where a worker descending

would place his foot, it does confirm that the height[,] width and depth of the stairs was uniform, which complies with good and accepted industry standards.

"15. There is no evidence to support the allegation that the subject staircase was smaller, narrower and steeper than what is routinely and customarily used in the construction industry, thereby causing people using it to make contact with the front portion of the step. Mr. Konon's sworn statement that the '[front] is the part of the stair tread that must provide slip resistance, if any . . . ' is patently absurd. It is the stair tread that is stepped upon and must provide traction, as did the stair treads at issue. My inspection of the staircase of similar make and model confirms that the tread depth and width was of sufficient size such that anyone ascending or descending the stairs had adequate space to bear upon the tread surface and avoid contact with the nose or front of the step."

Manifestly, the foregoing expert evidence, when set against the expert evidence submitted by plaintiff on which the majority focuses exclusively, raises a triable issue as to whether the staircase in question afforded plaintiff adequate protection against slipping risks. Thus, defendants' expert, through his affidavit, flatly contradicts the majority's assertion that "it is *undisputed* that the staircase . . . malfunctioned or was inadequate to protect . . . against the risk of falling" (emphasis added). Again, that plaintiff fell does not necessarily mean that there was something wrong with the staircase (see *Blake*, 1 NY3d at 288). Indeed, if the fall by

itself indicated a statutory violation (as the majority seems to imply), there would be no reason for the majority to rely, as it does, on the affidavit of plaintiff's expert. Since the majority ascribes significance to plaintiff's expert evidence, it follows that defendants' conflicting expert evidence raises a triable issue as to whether the staircase was an "adequate safety device[]" (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). What the statute requires is an adequate safety device, not a device so perfect that the worker need not exercise due care on his own behalf – a standard that would be unattainable. Accordingly, I would affirm the motion court's denial of summary judgment to plaintiff as to liability on his section 240(1) claim, and dissent from the majority's disposition of the appeal to the extent it does otherwise.

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

ENTERED: SEPTEMBER 8, 2015



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Gonzalez, P.J., Mazzarelli, Acosta, Clark, Kapnick, JJ.

15321 Danielle Lerman, Index 150605/12
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

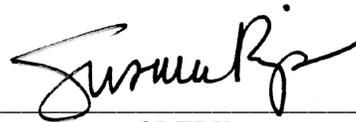
An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Kathryn E. Freed, J.), entered on or about May 22, 2014,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 24, 2015,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

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

ENTERED: SEPTEMBER 8, 2015



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Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13926 Emmanuel B., an Infant by His Mother and Natural Guardian, Chiningua W., Plaintiff-Appellant, Index 102967/10

-against-

The City of New York, etc., et al.,
Defendants-Respondents.

The Fitzgerald Law Firm, P.C., Yonkers (Mitchell L. Gittin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Fay Ng of counsel), for respondents.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered December 21, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for leave to amend the caption, affirmed, without costs.

The infant plaintiff alleges that, when he was a seven-year-old second-grade student at a New York City public school, he suffered serious physical injuries as the result of an altercation in which a classmate (hereinafter, WEM) caused him to strike his head against a bookcase. Earlier on the day of the incident, plaintiff had informed his teacher that WEM was picking on him and calling him names. At the end of the school day, when

students were lining up to go home, plaintiff and WEM exchanged words, and WEM pushed plaintiff into a desk. Plaintiff pushed back, and WEM pushed him again, causing plaintiff to fall back into a bookcase. This action for negligent supervision ensued.

Plaintiff testified that other boys in his class, including WEM, had been teasing him during the school year, but he made no claim that WEM had physically attacked him before the subject incident.¹ Also before the subject incident, plaintiff's mother complained to the principal that several boys had been bullying her son, but she did not identify the offenders by name. The school principal testified that, before the subject incident, she had never received any complaints that WEM had acted violently or had been involved in physical altercations or engaged in improper touching or hitting of other students. No prior incidents involving WEM were found on defendant New York City Department of Education's (DOE) incident database.

We affirm the grant of the motion for summary judgment dismissing the complaint. Initially, while "schools have a duty

¹While plaintiff testified that he had seen WEM hit one other student before the subject incident, there was no evidence that the school had notice of WEM's hitting of that other student. Plaintiff testified that he never saw WEM fighting students other than that one.

to adequately supervise their students, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010] [internal quotation marks omitted]), "unanticipated third-party acts causing injury upon a fellow student will generally not give rise to a school's liability in negligence absent actual or constructive notice of prior similar conduct" (*id.*). Here, the record contains no evidence that the school had notice that WEM had a proclivity to engage in physically aggressive conduct. The evidence that plaintiff had complained to his teacher and others that WEM was "picking on him" and calling him names, and that his mother had called the principal's office and reported that some unidentified boys were "picking on her son," when viewed in the light most favorable to plaintiff, shows only that the school knew that WEM had been picking on plaintiff verbally. Knowledge of such taunting, however, did not give the school "sufficiently specific knowledge or notice" of "prior conduct similar to the unanticipated injury-causing act" by WEM to support a finding of actual or constructive notice of the risk that he would engage in violent or physically aggressive behavior against plaintiff (see *Brandy B.*, 15 NY3d at 302 [a sexual assault by an 11-year-old student on

a school bus was unforeseeable from his disciplinary history, which, although troubled, did not include sexually aggressive behavior]; *Martinez v City of New York*, 85 AD3d 586 [1st Dept 2011] [a physical attack by a student having a record of disciplinary problems, but no history of violence, was unforeseeable]; *Sanzo v Solvay Union Free School Dist.*, 299 AD2d 878 [4th Dept 2002] [an assault by a student was unforeseeable, where, while the school knew that he had engaged in "verbal taunting," it had no knowledge of any prior violent or threatening behavior by him, and "no amount of supervision" would have prevented the sudden assault]).

Summary judgment is also warranted because plaintiff has not raised an issue as to proximate causation. There is no non-speculative basis for finding that any greater level of supervision than was provided would have prevented the sudden and spontaneous altercation between the two students. "Schools are not insurers of safety" and "cannot reasonably be expected to continuously supervise and control all movements and activities of students" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; see also *Espino v New York City Bd. of Educ.*, 80 AD3d 496, 496 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011] [granting summary

judgment dismissing negligent supervision claim where the evidence established that "the attack on plaintiff was sudden and spontaneous and could not have been prevented by more supervision"]).

All concur except Acosta and Kapnick, JJ. who dissent in a memorandum by Kapnick, J. as follows:

KAPNICK, J. (dissenting)

I respectfully dissent, and would reverse the motion court's grant of defendants' motion for summary judgment dismissing the complaint.

A school owes a duty of care to the students it takes into its custody and control (see *Pratt v Robinson*, 39 NY2d 554, 560 [1976]), which includes the duty to adequately supervise (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]). Schools "will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*id.*). As is the case here, when the student is a very young child who cannot defend himself, a greater duty of supervision is owed (see *Garcia v City of New York*, 222 AD2d 192, 195-196 [1st Dept 1996], *lv denied* 89 NY2d 808 [1997]). To determine

"whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" (*Mirand*, 84 NY2d at 49).

The record here shows that plaintiff had complained to multiple teachers at his school, including the second-grade teacher in whose class the assault took place, that the assailant

had been bullying and teasing him. Further, plaintiff testified that his assailant had previously picked on other children and had hit another friend of his. Plaintiff's mother had also complained to school officials about a student picking on her son, and she testified that the student or other students had stolen from the child's backpack. She also testified that, after the incident, she was told by other teachers and officials that the assailant had bullied and fought with other students.

While the majority construes this evidence narrowly, finding that the school was not on notice that the assailant had a proclivity to engage in physical violence towards plaintiff, I disagree, and find that, viewing the evidence in the light most favorable to plaintiff as the opponent of summary judgment (see *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]), it cannot be said as a matter of law that the assailant's dangerous conduct could not have been reasonably anticipated, especially given the conflicting testimony as to whether the assailant had previously engaged in physical violence against other students.

As to proximate causation, I find, contrary to the majority's opinion, that an issue of fact has been raised as to whether the assault occurred so suddenly that no amount of supervision could have prevented it, given the evidence that the

students had been verbally quarreling before the physical altercation and that the teacher had told them to stop arguing (cf. *Sanzo v Solvay Union Free School Dist.*, 299 AD2d 878, 879 [4th Dept 2002]).

Under these circumstances, triable issues of fact exist as to whether the DOE failed to adequately supervise the children and whether plaintiff's injuries were a reasonably foreseeable consequence of the alleged inadequate supervision (see *Garcia*, 222 AD2d at 195-197; *Shante D. v City of New York*, 190 AD2d 356, 361-362 [1st Dept 1993], *affd* 83 NY2d 948 [1994]; see also *Wilson v Vestal Cent. School Dist.*, 34 AD3d 999 [3d Dept 2006]).

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ENTERED: SEPTEMBER 8, 2015



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wood flooring to replace the flooring that had been found defective.

Plaintiff commenced this action seeking to recover \$48,188.50 of wood flooring that was delivered to MD Floors. After discovery, plaintiff moved for summary judgment on its breach of contract claim (first claim) against MD Floors and its claim (fourth) against Savino personally based upon an alleged personal guaranty. Plaintiff also moved for summary judgment dismissing MD Floors' first and second counterclaims against plaintiff. Supreme Court denied plaintiff's motion, finding that plaintiff had "default[ed]" on the motion by failing to appear for oral argument. Alternatively, Supreme Court denied the motion on the merits by finding triable issues of fact on both plaintiff's claims and MD Floors' counterclaims.

We now affirm the denial of the motion for summary judgment. We find, however, that Supreme Court erred in finding that plaintiff had "default[ed]" on this motion. We fail to perceive the conduct that constituted plaintiff's default. It was plaintiff who submitted the motion for summary judgment. Typically, a motion for summary judgment can be readily decided on the papers unless oral argument is mandated by the motion court as "necessary." Nothing in the record before us suggests

that the parties were on notice that oral argument was indispensable for resolution of plaintiff's motion. Indeed, when Supreme Court ultimately rendered its decision on the record, counsel for both parties were present. Under the circumstances, Supreme Court abused its discretion as a matter of law by disposing of the motion on the procedural ground sua sponte imposed by the court.

On the merits, however, we agree with Supreme Court in all respects. Plaintiff was not entitled to summary judgment on its breach of contract claim against MD Floors or its claim against Savino. With regard to the breach of contract claim (first claim), plaintiff moved for summary judgment for the full amount alleged in the complaint. MD Floors, however, has submitted testimonial and documentary evidence tending to establish that it made partial payment to plaintiff.

With regard to its breach of contract claim for attorney's fees, plaintiff has failed to meet its burden of showing entitlement to summary judgment. In support of this claim, plaintiff relied on what purports to be a photocopy of the back of a transaction invoice, which states that past due sums would be subject to a 1.15 percent monthly interest rate and attorney's fees. This document, however, was submitted together with

plaintiff's reply affirmation. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion" (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). In any event, the invoices are not signed by MD Floors, nor was any evidence submitted that the invoices were provided to MD Floors either before or at the time of delivery, such that it can be inferred that MD Floors assented to its terms.

On the claim against Savino individually based on a personal guaranty, Savino raised triable issues of fact as to whether he signed the credit agreement, which contained the personal guaranty provision. Contrary to plaintiff's allegations, defendant Savino proffered more than a bald assertion of forgery. He provided an affidavit in which he disputed the signature, and provided an exemplar which showed differences in the signatures (see *Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 3884 [2004]; *Diplacidi v Gruder*, 135 AD2d 395 [1st Dept 1987]).

Lastly, plaintiff was not entitled to summary judgment dismissing MD Floors' first and second counterclaims against plaintiff. As clarified during discovery, MD Floors' first counterclaim, for consequential damages, is based on the

allegation that it incurred additional labor costs because of the defective flooring delivered by plaintiff. Savino's testimony on this counterclaim was sufficient to defeat summary judgment. Savino explained that he arrived at the extra cost sought by calculating the cost of manpower hours incurred by MD Floors in having to sort through the defective wood. MD Floors also raised triable issues of fact on its second counterclaim, which alleges that it was double-billed for flooring. While plaintiff concedes that a portion of the shipment was defective, no testimonial or documentary evidence was submitted to contradict the claim of double-billing.

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debt would be decided by the court. According to the guarantors, the borrower's payment should be applied to the judgment, thereby extinguishing their obligations to the lender, because the borrower was thereafter released from any remaining debt. In an order entered December 23, 2011, Supreme Court construed the limitation in defendants' guaranty to apply to the total of the guaranteed obligation minus any money collected by plaintiff, meaning that the lender could pursue any of the borrower's remaining debt in excess of the release amount against the borrower or the guarantor, even if the lender decided not to pursue the debt against the borrower. Supreme Court then ordered a hearing before a special referee to report the amount due the lender, based on the deficiency between the nonparty borrower's obligation and the lender's collections. Following the report, the lender entered a "corrected" judgment against the guarantors which superceded the 2010 judgment it already had.

Although the guarantors did not pursue their appeal of the December 23, 2011 order and failed to perfect it, those issues are fundamental to the issues on this appeal and provide the foundation for this "corrected" judgment. Therefore, we reach them, in the exercise of our discretion (see generally *Faricelli v TSS Seedman's*, 94 NY2d 772, 774 [1999]). In doing so, we find

that the court correctly construed the limitation in the guaranty (see *Gateway State Bank v Winchester Bldrs.*, 248 AD2d 588 [2d Dept 1998], *lv denied* 92 NY2d 807 [1998]). The “corrected” judgment should never have been entered, it must be vacated, and the 2010 judgment reinstated. There was no need for a new judgment after the Referee’s report, which recalculated the amount due based on the deficiency between the nonparty borrower’s obligation and plaintiff’s collections, was confirmed; the lender could simply have proceeded to enforce the 2010 judgment it already had, as adjusted for the credits it had already received, plus the interest that had accrued. The correction of the 2010 judgment impermissibly affected a substantial right of defendants (CPLR 5019[a]; see *Poughkeepsie Sav. Bank, FSB v Maplewood Land Dev. Co.*, 210 AD2d 606, 608 [2d Dept 1994]).

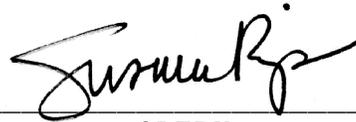
Furthermore, defendants’ objections to the Special Referee’s calculations of the value of certain collateral obtained by plaintiff for which they are due credit are not barred. Defendants are correct that plaintiff has the burden of establishing the commercial reasonableness of the disposition of the collateral (see *Weinsten v Fleet Factors Corp.*, 210 AD2d 74 [1st Dept 1994]). This was not, however, part of the reference

to the Special Referee. Thus, a further hearing on whether the collateral was disposed of in a commercially reasonable manner is necessary with a possible recomputation of the deficiency. We remand for further proceedings in conformance of our order.

The Decision and Order of this Court entered herein on June 11, 2015 is hereby recalled and vacated (see M-3107 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 8, 2015

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CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15695 Marianne Kutza, as Administratrix Index 116427/04
for the Estate of Thomas Pyle, etc.,
Plaintiff-Appellant,

-against-

Bovis Lend Lease LMB, Inc., et al.,
Defendants-Respondents.

The Edelsteins, Faegenburg & Brown, LLP, New York (Glenn
Faegenburg of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J.
Lawless of counsel), for respondents.

Order, Supreme Court, New York County (Joan M. Kenney, J.),
entered July 25, 2013, which, to the extent appealed from, denied
plaintiff's motion pursuant to CPLR 4401 and 4404(a) to set aside
the jury verdict finding the decedent 50% responsible for his
accident, and awarding \$100,000 for pain and suffering and no
damages for loss of consortium, unanimously reversed, on the law
and the facts, without costs, and the motion granted to the
extent of remanding the matter for a new trial, unless the
parties stipulate, within 20 days of service of a copy of this
order with notice of entry, to attribute 0% of the fault for
plaintiff's decedent's injuries to his own negligence, and to
increase the verdict to \$400,000 for pain and suffering and

\$50,000 for loss of consortium, and to entry of judgment accordingly.

Plaintiff's decedent, Thomas Pyle, sustained an injury to his left hand when he tripped and fell over construction debris at a building site where he was employed as a tile finisher. The jury found that defendant Bovis Lend Lease LMB, Inc. violated Labor Law § 241(6) by failing to comply with Industrial Code (12 NYCRR) § 23-1.7[e][2]), but attributed 50% of the fault for Pyle's injuries to negligence on his part.

The trial court erred in charging the jury on comparative fault. "A charge on comparative fault should be given 'if there is a valid line of reasoning and permissible inferences from which rational people can draw a conclusion of [the plaintiff's] negligence on the basis of the evidence presented at trial'" (*Johnson v New York City Tr. Auth.*, 88 AD3d 321, 324 [1st Dept 2011], quoting *Bruni v City of New York*, 2 NY3d 319, 328 [2004]). Although defendants argued that the extensive debris and garbage on the floor could have easily been avoided, the jury's verdict established that defendants were responsible for keeping the area clear. Moreover, Pyle was not obligated to clear the floor of garbage and there was no clear path that Pyle could use. Thus, the charge was not warranted because no evidence of culpable

conduct on the part of Pyle was shown here (see *Once v Service Ctr. of N.Y.*, 96 AD3d 483, 483-484 [1st Dept 2012], lv dismissed 20 NY3d 1075 [2013]).

Plaintiff's argument about the verdict sheet is unpreserved for appellate review since she failed to raise it before the sheet was submitted to the jury (*Singh v Young Manor, Inc.*, 23 AD3d 249, 249 [1st Dept 2005]).

The evidence established that, as a result of his hand injury, Pyle developed, inter alia, nerve damage, painful symptoms consistent with reflex sympathetic dystrophy, anxiety, and significant limitation of the use of his left hand due to permanent contracture of the fingers. Upon a review of other relevant cases, we find that the award of \$100,000 for pain and suffering materially deviates from reasonable compensation (see *Serrano v 432 Park S. Realty Co., LLC*, 59 AD3d 242, 242-243 [1st Dept 2009], lv denied 13 NY3d 711 [2009] [affirming \$600,000 past pain and suffering award where the plaintiff suffered a wrist fracture and herniated disc, and developed reflex sympathetic dystrophy and post-traumatic stress disorder associated with major depressive disorder]; *Jeffries v 3520 Broadway Mgt. Co.*, 36 AD3d 421, 422 [1st Dept 2007], lv denied 8 NY3d 811 [2007] [affirming \$250,000 past pain and suffering award for diagnosis

of reflex sympathetic dystrophy)).

The jury's decision not to award damages to plaintiff for loss of consortium was against the weight of the evidence (see *Osoria v Marlo Equities*, 255 AD2d 132 [1st Dept 1998] [affirming \$50,000 loss of consortium award where plaintiff fractured his knee, was in a cast from ankle to groin for a month and a half and on crutches for six months, sustained atrophy of the thigh, calf and bone, and suffered chronic pain]; *Safchik v Board of Educ. of City of N.Y.*, 158 AD2d 277, 279 [1st Dept 1990] [holding that verdict of zero dollars on husband's claim for loss of consortium was inconsistent with the verdict awarding wife compensation for her painful and debilitating injury]).

Plaintiff described significant changes in Pyle's behavior after his accident and explained the impact this had on their relationship. On this record, the jury's decision to award

damages for pain and suffering, but none for loss of consortium,
is inconsistent. Accordingly, we reverse and remand unless the
parties stipulate to the increased awards, as indicated above.

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

ENTERED: SEPTEMBER 8, 2015

A handwritten signature in black ink, appearing to read "Susan R. Jones", is written over a horizontal line.

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14258 Albana Rugova, as Administrator Index 303175/09
 of the Estate of Darden Binakaj,
 et al.,
 Plaintiffs-Respondents-Appellants,

-against-

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

Zachary W. Carter, Corporation Counsel, New York (Amy G. London
of counsel), for appellants-respondents.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of
counsel), for respondents-appellants.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.),
entered May 30, 2013, affirmed, without costs.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
Sallie Manzanet-Daniels
Judith J. Gische
Darcel D. Clark, JJ.

14258
Index 303175/09

x

Albana Rugova, as Administrator
of the Estate of Darden Binakaj,
et al.,
Plaintiffs-Respondents-Appellants,

-against-

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

x

Cross appeals from an order of the Supreme Court, Bronx County
(Larry S. Schachner, J.), entered May 30,
2013, which, to the extent appealed from as
limited by the briefs, denied defendants'
motion for summary judgment insofar as it
sought dismissal of plaintiffs' claim for the
loss of the right of sepulcher, granted
plaintiffs' cross motion for partial summary
judgment as to liability on that claim, and
granted defendants' motion insofar as it
sought summary judgment dismissing
plaintiff's claim for negligent performance
of an autopsy.

Zachary W. Carter, Corporation Counsel, New York (Amy G. London, Pamela Seider Dolgow and Margaret G. King of counsel), for appellants-respondents.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac and Kenneth J. Gorman of counsel), for respondents-appellants.

TOM, J.P.

The complaint in this matter alleges a deprivation of the common-law right of sepulcher resulting from the failure of defendants (collectively the City), employees and agencies of the City of New York – including police officers and members of the staff of the Office of the Chief Medical Examiner (OCME) – to timely notify plaintiffs, family members of decedent Darden Binakaj, that his body was available for burial. The City appeals from so much of an order as granted plaintiffs partial summary judgment with respect to liability on plaintiffs' claim that the untimely notification interfered with their right to immediate possession of the body for burial, and from so much of the order as denied the City's motion for summary judgment dismissing that claim. Plaintiffs cross-appeal from so much of the order as dismissed their claim for negligent performance of an autopsy on the ground that the right to conduct an autopsy is conferred on the OCME by statute and is not actionable. Plaintiffs have not established that the autopsy was conducted in violation of any statutory provision, and the City has not demonstrated that the court's ruling is inconsistent with governing precedent. Thus, we affirm.

On Sunday, April 20, 2008 at about 1:00 a.m., defendant New York City Police Officers Dennis Vickery and Michael Sharpe

responded to a radio call of an accident on the Bronx River Parkway. Upon arriving at the scene, they observed one vehicle positioned across all three lanes of the roadway and another, a Nissan Maxima, on its roof in a grassy area on the shoulder. The operator of the Maxima, decedent Darden Binakaj, was identified by the number on the driver's license found in his wallet. The Maxima had struck a tree, and its driver was ejected through the sunroof. He was declared dead by emergency medical personnel.

After investigating the accident scene, the officers returned to the station house, where they vouchered property that had been recovered. Officer Sharpe testified that in the event of a driver fatality, it is standard procedure for the detective assigned to the case to inform the vehicle's registered owner of its location; however, he did not know if such contact was made in this case.

The accident scene was also investigated by a police detective assigned to the "night watch," who called for a medical examiner team. He passed along the case information to a detective in the "precinct of occurrence," in this case "Precinct 47," which was responsible for notifying the family. A police sergeant assigned to the 47th Precinct, who also responded to the accident scene, verified that in the event of a fatal accident, the accident investigation squad will notify the local precinct's

detective squad that an accident occurred, and the detective squad will, in turn, inform the next of kin.

At about 2:30 a.m., Medical Examiner Aglae Charlot, a pathologist with the OCME, arrived at the scene. She was acting as the on-call Medical Legal Investigator, the person assigned to go to the scene of a fatal accident, conduct a preliminary investigation into the cause and manner of death, and forward that information to the Medical Examiner. At about 4:00 a.m., Dr. Charlot requested an OCME transport team, which retrieved the body and brought it to the Bronx Medical Examiner's Office, located at Jacobi Hospital, a facility operated by defendant New York City Health and Hospitals Corporation.

An autopsy was performed at approximately 9:00 a.m. that same morning. A criminalist for the OCME testified that the office performs autopsies on most accident victims, even when the immediate cause of death is apparent, in order to obtain more information about how the accident occurred. Because the OCME has the "legal authority to perform autopsies," it was not the policy of the OCME to give prior notice to the next of kin.

On the night of the accident, at about 1:15 a.m., defendant Police Officers Filiberty and Delanuez, assigned to the 43rd Precinct in the Bronx, became tangentially involved in the investigation after receiving a radio dispatch to respond to an

incident at 1265 Morrison Avenue. Finding no evidence of a recent accident, they contacted the dispatcher, who informed them that a male would be coming downstairs. An intoxicated man exited the building and told the officers that he had been involved in an accident. However, he could supply no details beyond indicating that either a friend or a cousin was driving an automobile involved in a collision. The next day, the officers were visited at the precinct house by a highway detective, who questioned them about the incident without indicating whether their informant had been involved in an accident on the Bronx River Parkway.

Decedent Darden Binakaj had been living with his parents, plaintiffs Drita and Musa Binakaj, and his sister, plaintiff Donika Berani. On the evening of Saturday, April 19, 2008, decedent went out with his girlfriend, Fatlina Oshlani. At about 12:30 a.m. the next morning, he called his mother and told her that he would be coming home soon. Some 90 minutes later, his girlfriend called Drita and asked her if Darden had made it home. While he had not, Drita did not call the police or any hospitals, assuming that his car had broken down.

At about 8:30 or 9:00 a.m., the family began a search. They went to the 52nd Precinct but were informed that a missing person report would not be taken because Darden was an adult without any

history of mental illness. They contacted hospitals and searched the Bronx River Parkway from Briggs Avenue (Drita's residence) to Ossining (Fatlina's residence). They returned to the 52nd precinct, where the police ran decedent's driver's license and license plate through their system and called neighborhood hospitals, including Jacobi Hospital, all without success. The family continued their search until about 1:00 a.m., trying other hospitals and police stations and filing a missing person's report with the Ossining police station.

The family resumed its efforts on Monday, April 21, 2008, searching from about 7:00 to 10:00 a.m. Decedent's other sister, plaintiff Albana Rugova and her husband, Kujtim, stopped at a gas station to check the newspapers and found a Daily News article about a hit-and-run accident on the Bronx River Parkway. At the accident scene, they recovered personal items, including decedent's clothes, sneakers, watch, bag, cell phone, and CDs, but no identification or wallet, items they allege were never returned by the police. After visiting the two nearest hospitals, Montefiore and North Central, they ultimately called Jacobi Hospital, learning that decedent's body was there. Kujtim identified decedent's body at the hospital at about 11:00 or 12:00 o'clock that night and was informed that an autopsy had been performed.

Decedent's father, Musa Binakaj, was visiting Kosovo, the family's native country, at the time of his son's death. The family had not contacted him during their search as they were hoping for a favorable outcome. He learned of Darden's death and the ensuing autopsy from a relative in Kosovo on Monday, April 21, 2008 at about 6:00 p.m. New York time. Because the autopsy damaged the body, which violated the family's Muslim religion and rites, they decided to transport the remains to Kosovo for religious rituals, which lasted about a month. No mention of the autopsy was ever made to anyone in Kosovo.

In July 2008, plaintiffs filed a notice of claim and thereafter commenced this action which asserts, as pertinent to this appeal, four causes of action alleging, respectively, a breach of the duty to notify them of decedent's death, an interference with their right to immediate possession of the body, the conduction of an autopsy in the absence of any compelling public necessity, and the deprivation of the next of kin's opportunity to claim the body and object to the performance of the autopsy in violation of Public Health Law § 4214(1). In their several bills of particulars, each individual plaintiff alleges that the various defendants' failures and omissions caused serious emotional suffering and distress, anxiety, and mental anguish.

After discovery, the City moved for summary judgment dismissing the complaint. It contended that the police investigation and the OCME's handling of decedent's body were governmental functions that are not actionable in view of plaintiffs' failure to plead, and inability to prove, a special relationship with defendant officials. As to the alleged violations of the Public Health Law, the City argued that consent is not required for the performance of an autopsy by the Medical Examiner because Administrative Code of the City of New York § 17-203 provides that an autopsy shall be performed if, in the opinion of a Medical Examiner, it is deemed necessary. The City further argued that plaintiffs' claims for negligent interference with decedent's right to a proper burial should be dismissed because there was neither an unreasonable passage of time nor an improper burial to support a claim for loss of sepulcher. The City contends that after "mere hours," decedent's brother-in-law had identified and taken custody of his remains; furthermore, the family's Muslim religious rituals consumed nearly an entire month.

Plaintiffs cross-moved for partial summary judgment on the issue of liability with respect to the loss of the right of sepulcher, the performance of an unauthorized autopsy, and the interference with decedent's right to a proper burial. They

argued that no special relationship is required to sustain a claim for loss of the right of sepulcher for failing to notify the next of kin, and since the City defendants were in possession of all necessary identifying documents, their failure to notify plaintiffs for over 36 hours entitles plaintiffs to judgment as a matter of law. As to the autopsy, plaintiffs argued that an issue of fact exists as to whether it was statutorily authorized because Administrative Code § 17-203 limits the Medical Examiner's ability to conduct an autopsy to situations where it is "necessary." It further provides that if it may be concluded with "reasonable certainty" that death occurred from, among other things, "obvious traumatic injury," the medical examiner "shall certify the cause of death and file a report of his or her findings." Finally, plaintiffs asserted that the length of time they were deprived of the decedent's body is relevant only with respect to damages, not liability, since the common-law right of sepulcher gives the next of kin an "absolute right to the immediate possession of a decedent's body for preservation and burial."

In reply, the City argued that the autopsy was permitted by New York City Charter § 557(f), since the death resulted from an "accident." With respect to the failure to notify plaintiffs about decedent's death, the City noted that plaintiffs were still

able to dispose of the body as they wished, and that they therefore have no claim for the common-law right of sepulcher. The City further argued that the reference to "immediate possession" of a body refers to the time necessary for a proper burial, and should not be interpreted literally, particularly if an autopsy is necessary.

Supreme Court granted the City's motion in part and granted plaintiffs' cross motion in part. It noted that the "authority to conduct an autopsy derives solely from statute," citing New York City Charter § 557(f) (1) and Administrative Code § 17-203. Based on the discretion accorded to the OCME to conduct an autopsy in accident cases, the court dismissed plaintiffs' claims for negligent performance of an autopsy.

As a matter of statute, the Medical Examiner has extensive authority to perform autopsies within the exercise of professional discretion (Public Health Law § 4210) including where, as here, circumstances indicate that the death was accidental (NY City Charter § 557[f][1]). Public Health Law § 4214, which imposes an affirmative duty to seek consent before doing an autopsy, is limited to hospitals and does not impose any such duty on the OCME (*Harris-Cunningham v Medical Examiner of N.Y. County*, 261 AD2d 285, 286 [1st Dept 1999]). Thus, the fourth cause of action (failure to notify next of kin prior to

performing autopsy) was properly dismissed.

Plaintiffs' contention that in the absence of suspicious circumstances providing "compelling public necessity," the OCME was required, at the very least, to seek permission from the family before conducting an autopsy, is similarly without merit. Pursuant to statute, compelling public necessity is only required where the Medical Examiner has received an objection on religious grounds from a surviving friend or relative or has reason to believe that an autopsy is contrary to the decedent's religious beliefs (*Harris-Cunningham*, 261 AD2d at 285). Since no such information was ever communicated to the OCME, the third cause of action (conducting an autopsy in the absence of any compelling public necessity) was properly dismissed. While plaintiffs obviously could not make such objection, since they had not been informed of decedent's death, it is submitted that the Medical Examiner's office was not obligated to wait and see if an objection would be made before performing the autopsy (*see id.*).

The court granted plaintiffs partial summary judgment as to liability for the loss of the right of sepulcher because of defendants' failure to provide timely notice of the death and their interference with the right to a proper burial. The court construed the length of time that the next of kin were deprived of the decedent's body and the resulting interference with

immediate possession and burial as issues of fact with respect to damages, which must await trial.

The first cause of action alleges that as a result of the failure to receive timely notification of the death of Darden Binakaj, plaintiffs sustained emotional injury. The second cause of action specifies that mental anguish resulted from defendants' interference with the family's right to the immediate possession of decedent's body. Thus, these causes of action can be read to advance a claim for violation of the common-law right of sepulcher.

The City contends that it cannot be held accountable for negligence in informing the family of the death of Darden Binakaj because it implicates "quintessential governmental functions." It argues that the role of the police is governmental (citing *Tinney v City of New York*, 94 AD3d 417 [1st Dept 2012]), as opposed to proprietary or ministerial, requiring the pleading and proof of a special relationship to establish municipal liability.¹ The City portrays the complaint as tantamount to a

¹ The elements of a special relationship are:
"(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the

claim of negligence in connection with a police search for a missing person, citing this Court's decision in *Estate of Scheuer v City of New York* (10 AD3d 272 [1st Dept 2004] lv denied 6 NY3d 708 [2006]), in support of its position that the task in which its employees were engaged was discretionary (see *Gabriel v City of New York*, 89 AD3d 982, 983 [2d Dept 2011] [failure to expeditiously identify body of missing child not actionable, as it involved discretionary investigative action by police]). Finally, the City asserts that no recovery is available for emotional distress experienced while awaiting information regarding a loved one's safety (citing e.g. *Maracallo v Board of Educ. of City of N.Y.*, 21 AD3d 318 [1st Dept 2005]).

It should be noted at the outset that the complaint seeks recovery for emotional injury resulting not, as in *Gabriel*, from delay in locating and identifying a missing person but from the failure to inform plaintiffs of the death of a person whose identity was immediately ascertained. Under the facts at bar, there was no need to undertake an investigation that would implicate the exercise of discretion. As the City acknowledges, if notification of the next of kin is a ministerial act, negligent conduct by City employees may afford a basis for

municipality's affirmative undertaking" (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]).

recovery.

While emotional distress resulting from injury inflicted on another is not compensable under New York law, as the City argues, the emotional harm alleged in this matter is the direct result of the breach of a duty to timely communicate information about a death to plaintiffs themselves (*see generally Shepherd v Whitestar Dev. Corp.*, 113 AD3d 1078 [4th Dept 2014]). In *Johnson v State of New York* (37 NY2d 378 [1975]), the plaintiff alleged emotional harm as a result of receiving a message that negligently reported the death of her mother, a patient in a state hospital, when in fact the person who had died was another patient with the identical name. The Court of Appeals sustained recovery for emotional suffering on the reasoning that the particular circumstances were associated with “genuine and serious mental distress . . . which serves as a guarantee that the claim is not spurious” (*id.* at 382, quoting Prosser, Torts § 54 at 330 [4th ed 1978]). The Court noted that the false message informing the plaintiff of the death and the resulting psychological injury were within the orbit of duty owed by the hospital to the patient’s daughter and that she was entitled to recover for breach of that duty (*id.* at 382-383). Contrary to the City’s contention, *Johnson* holds that in the case of negligent communications involving the death of a family member,

damages are recoverable for purely emotional injury, expressly distinguishing negligent communication that causes emotional suffering from that sustained "solely as a result of injuries inflicted directly upon another, regardless of the relationship" (*id.* at 383, distinguishing *Tobin v Grossman*, 24 NY2d 609 [1969]). The unavoidable implication is that such communication is a ministerial function, as opposed to the discretionary exercise envisioned by the City for which no recovery is available. While the injury alleged in this matter resulted from an untimely rather than false communication, the City's contention that it cannot be held liable for negligence in informing the plaintiffs about the death of their loved one finds no support under *Johnson*.

The second cause of action alleges that as a result of the untimely notification, which deprived plaintiffs of any opportunity to state their objection to the autopsy, the City interfered with their right to immediate possession of decedent's body. As this Court stated in *Melfi v Mount Sinai Hosp.* (64 AD3d 26, 31 [1st Dept 2009]), "the common-law right of sepulcher gives the next of kin an absolute right to the immediate possession of a decedent's body for preservation and burial, and . . . damages will be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body."

Damages are awarded as compensation to the next of kin for the "solely emotional injury" experienced as a result of the interference with their ability to properly bury their decedent (*id.* at 32; see *Darcy v Presbyterian Hosp. in City of N.Y.*, 202 NY 259 [1911]).

The wrong alleged in *Melfi* was the failure of the City defendants to notify the family of the death of Leonard Melfi, as a result of which the decedent was buried in a mass grave after his body was used for embalming practice (64 AD3d at 28-30). There was no indication in the record that the City defendants made any effort to locate and notify the next of kin, who did not learn of the death for several months (*id.* at 29-30). Thus, *Melfi*, like *Johnson*, involves a claim of negligent communication. As this Court stated:

"[F]or a right of sepulcher claim to accrue (1) there must be interference with the next of kin's immediate possession of decedent's body and (2) the interference has caused mental anguish, which is generally presumed. Interference can arise either by unauthorized autopsy or by disposing of the remains inadvertently or, as in this case, by failure to notify the next of kin of the death" (*id.* at 39 [internal citations omitted]).

The City states no compelling reason to depart from clear precedent to bar a cause of action for loss of sepulcher in this instance (see *Matter of Terrace Ct., LLC v New York State Div. of*

Hous. & Community Renewal, 79 AD3d 630, 642 [1st Dept 2010] [“it is the role of this Court to follow its precedents”], *affd* 18 NY3d 446 [2012]). While the City argues that any mental anguish resulting from the delay in learning of the death of Darden Binakaj was minimal, the distinction is one of degree, not kind, and goes to the measure of damages and not the right of recovery.

The City nevertheless argues that even if the ministerial nature of the negligent communication were to be conceded, the action is not viable in the absence of a special relationship between the City – particularly the police or the Medical Examiner – and plaintiffs (citing *Lauer v City of New York*, 95 NY2d 95, 100, 102 [2000]; *see also McLean v City of New York*, 12 NY3d 194, 199, 202 [2009]). While the Court sustained recovery against the municipality, the special duty issue was not expressly discussed in *Johnson*, which resolved the narrower issue of whether a plaintiff may recover for the mental anguish resulting from a mistaken notification of a death without any “contemporaneous or consequential physical injury” (*Johnson*, 37 NY2d at 381). Nor was the special duty requirement before this Court in *Melfi*, which holds that for the purpose of deciding when the statute of limitations begins to run, a right of sepulcher claim accrues at the time the plaintiff actually suffers mental anguish as a result of the interference with the right to

immediate possession of the body (*Melfi*, 64 AD3d at 39). *Shipley v City of New York* (80 AD3d 171 [2d Dept 2010], rev'd __NY3d__ [2015], 2015 NY Slip Op 04791 [2015]), cited by both parties, deals with the Medical Examiner's statutory and common-law obligation to turn over remains following the completion of an autopsy and only tangentially involves notification of the specific fact that "one or more organs have been removed for further examination" (*id.* at 178). The Court of Appeals recently held in *Shipley* the statutory discretion bestowed upon the Medical Examiner imposes no ministerial duty to notify the plaintiffs, obviating any basis for recovery (__NY3d at__, 2015 NY Slip Op 04791, *10).

The law in this Department was reiterated in *Tinney v City of New York* (94 AD3d 417 [1st Dept 2012]), which holds that where the City defendants "had all the necessary identifying documents," the asserted negligence – failure to timely inform the next of kin of their father's death – was a breach of a ministerial function, not a discretionary act shielding the City from liability (*id.* at 418). Implicit in this and similar rulings is that, as a matter of judicial policy, the function of informing the family of a death is a special duty that runs to the next of kin and not the public at large (see *McLean*, 12 NY3d at 202; *Lauer*, 95 NY2d at 100). The imposition of liability

against the City for an inaccurate report of the death of a close relative reflects a policy that a municipality's duty of accurate communication is both ministerial and owed directly to the next of kin (*Johnson*, 37 NY2d at 382-383). Likewise, this Court's holding that interference with the next of kin's right to immediate possession of a decedent's body may arise from the municipality's failure to notify them of the death presumes a ministerial duty owed directly to the immediate family (*Melfi*, 64 AD3d at 39). Moreover, contrary to the City's argument, plaintiffs have standing to bring this action and claim such damages (see Public Health Law § 4201[2][a][iv], [v]; *Shepherd*, 113 AD3d at 1080-1081).

As to plaintiffs' claim of loss of sepulcher, whether the approximately 36-hour delay in informing the next of kin that they could take possession of decedent's remains caused any interference with the family's burial rights, which the City disputes, is an issue that presents a clear question for the trier of fact.

Accordingly, the order of the Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 30, 2013, which, to the extent appealed from as limited by the briefs, denied the City's motion for summary judgment insofar as it sought dismissal of plaintiffs' claim for the loss of the right of sepulcher, granted

plaintiffs' cross motion for partial summary judgment as to liability on that claim, and granted defendants' motion insofar as it sought summary judgment dismissing plaintiff's claim for negligent performance of an autopsy, should be unanimously affirmed, without costs.

All concur.

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

ENTERED: September 8, 2015

A handwritten signature in black ink, appearing to read "Susan R. Jones", is written over a horizontal line.

CLERK