INTRODUCTION

This is an appeal from an Order of the Supreme Court, Nassau County (Hon. Robert A. Bruno, J.), dated August 13, 2013, that denied a motion by Plaintiff-Appellant RICHARD ERICKSON (hereafter Appellant) to resettle the earlier Order of that Court (Hon. Ute Wolff Lally, J.), dated June 20, 2011.

On appeal, it is Appellant's position that the Order appealed from, denying him resettlement of the earlier Order, is entirely erroneous and should be reversed.

In seeking resettlement of that earlier Order, Appellant did not seek to "design" a motion to "substantively change" said Order or to "amplify" it. His use of the term “constructively reverse” was intended to bring its text in closer harmony with a more recently decided Appellate Division decision in the case.

Rather, Appellant did no more than move to "correct errors or omissions" in the previous Order, to "clarify" the previous Order, and to make the Order conform more accurately to the more recent Appellate Division decision.

Certainly, had the Court below granted Appellant's application here, such action would have been within the "inherent power of Courts to 'cure mistakes, defects and irregularities'" without affecting the substantive rights of any defendant in this controversy, including the third-Party Defendant.

At the same time, denying Appellant's application here, and permitting the Order to stand uncorrected, has most assuredly negatively impacted Appellant's substantive rights.

FACTUAL BACKGROUND AND LITIGATION IN THE COURT BELOW

Action No. 1

Action No. 1 is an action for personal injuries sustained by Appellant in the course of his employment at a construction site. On November 4, 2003, Appellant was employed as a concrete or masonry worker by COMMODORE CONSTRUCTION CORPORATION (hereinafter Commodore), a sub-contractor at a building project located at 177 Cantiague Rock Road, Hicksville, New York 11810 (19, 20).

On the day in question, Appellant's job duties included making preparation of concrete forms for the pouring of cement into previously prepared holes for lamp-pole bases on a parking lot at the work site in Hicksville. The parking lot area itself had been extensively torn up and was replete with piles of construction refuse and debris throughout the work site (21, 63).

Appellant and a co-worker were preparing a concrete form to fill a lamp pole hole when a truck started backing up towards the hole, which was between four and six feet deep. The driver of the truck, contrary to safety regulations, backed up his large vehicle alone, without having the regulation specified "point man" (another worker) to direct him. Also contrary to safety regulations, the truck itself was missing necessary equipment, specifically a warning beeper, that might have timely warned Appellant of oncoming danger (21, 63-64).

At that exact time of the vehicle's approach, Appellant and his co-worker were facing the lamp pole hole, with their backs toward the on-coming cement truck. Fortunately, the truck did not run the two men over; its chassis passed, missing them (21, 64).

However, the cement chute arm attached to the rear of the truck had not been properly secured and was loose from its normal mooring. As the truck passed Appellant, it ran over a piled of debris that caused the entire vehicle to tilt sideways significantly. As a result, the cement chute arm swung toward Appellant, striking him in the back and propelling him into the previously excavated hole that had been intended for the concrete lamp pole base (21, 64, 69-70).

The fall caused Appellant to sustain serious, permanent and ongoing injuries to his back, neck, spine and lower extremities (65, 66-67).

* * *

Based upon the above incident, Action No. 1 is comprised of two Labor Law complaints and cross claims that were later consolidated (20).

Appellant served a Summon and Complaint dated January 22, 2005 under Nassau County Index No. 1554/05 against CROSS READY-MIX, Inc. (hereafter Cross Ready-Mix). At the time, it was believed that Cross Ready-Mix was the owner of the truck involved in Appellant's accident and as such the employer of that truck's operator. Also named in the complaint as a Defendant was "John Doe," the truck's operator, believed to be an agent, servant and/or employee of Cross Ready-Mix (63, 100-108).

As more information became available, Appellant served a Summon and Complaint dated June 28, 2005 under Nassau County Index No. 11947/05 against additional parties. As noted above, Appellant's employer was Commodore. Commodore had been hired as a sub-contractor to do cement work at the Cantiague Road building construction project by the general contractor TURNER CONSTRUCTION CORPORATION (hereafter Turner). Accordingly, Turner was named in this Complaint as a Defendant on that basis (20, 63, 71-84).

Turner had hired Cross Ready-Mix as a sub-contractor to deliver cement mix to the Cantiague Road job site. Cross Ready Mix was obligated, *inter alia*, to provide cement mix for the pouring of concrete into forms prepared for this purpose by Commodore employees, including Appellant (63).

However, Cross Ready-Mix claimed that on the day of Appellant's accident, all of its cement trucks were occupied on other work assignments. In order to fulfill its job commitments to Turner, Cross Ready Mix was compelled to hire another cement company, ELITE READY MIX CORPORATION (hereafter Elite), to provide the contracted for cement delivery to the job site. This arrangement was done supposedly in accordance with concrete delivery business practice and custom (75).

Therefore, the Summon and Complaint dated June 28, 2005 (Nassau County Index No. 11947/05), *supra* (71-84), brought against Turner, was also brought against Elite and "John Doe," said to be an agent, servant and/or employee of Elite.

As Turner served its Verified Answer to Appellant's complaint, Turner served a Third-Party Summons and Complaint, dated September 28, 2005 against Appellant's employer Commodore. In this manner, Appellant's employer was brought into this controversy (85-93).

By Order of the Supreme Court, Nassau County (Hon. Daniel Martin, J.), dated January 25, 2006, all proceedings in this controversy were consolidated under Index No. 11947/05 (139-140).

Action No. 2

As stated above, as a result of his accident, Appellant sustained serious, permanent and ongoing injuries to his back, neck, spine and lower extremities (65, 66-67). In order to remedy the situation, Appellant underwent lumbar spinal fusion surgery on or about December 29, 2006. This curative surgery should have alleviated the effects of the injuries Appellant sustained in the accident. This was not to be the case, due to medical malpractice that occurred during his operation. Action No. 2, therefore, is Appellant's effort to obtain relief due him as a result of the medical malpractice (141-148, 211-217).

The surgery was for circumferential arthrodesis of the lumbar spine. A misplaced screw in Appellant's spine pierced his spinal canal. Appellant has a lack of sensation in his feet and toes. He suffers from ankle pain. He requires the use of an ankle brace and a cane. The screw "sawed" on Appellant's nerves causing him permanent and serious injuries (212-214).

On or about January 31, 2009, Appellant served a Summons and Complaint upon the surgeon at fault in his case, Dr. Gary Gonya, his medical corporation and the hospital. Both the surgeon and his medical corporation have joined issue in this matter (141-148, 149-154).

Prior Appellate Litigation

To obtain an appropriate and sufficient perspective of the subject matter of the current appeal -- being from an order to resettle a previous order that did not have the benefit of a subsequent Appellate Division decision -- a summary of the prior appellate litigation in this controversy is in order.

Appellate Division Docket No. 2008-10020 (Appeal No. 1)

This case has been officially reported as Erickson v. Cross Ready-Mix, et al., 75 A.D.3d (2d Dept. 2010). *See*, Record on Appeal, pp. 234-237.

Appellant appealed from the Order, Supreme Court, Nassau County (Hon. Daniel Martin, J.), entered on September 30, 2008, that granted Cross Ready-Mix' motion for summary judgment dismissing Appellant's Causes of Action for Common Law negligence and Labor Law Section 200 relief. In this decision, the Court below also granted summary judgment to Commodore, dismissing Turner's Third-Party Complaint against it. Supreme Court, Nassau County did not disturb Appellant's cause of action for Labor Law Section 241(6) relief.

In this appeal and in Appeal No. 2, below, taken together, Appellant was entirely successful in restoring all dismissed causes of action. Moreover, in this

appeal, this Court reversed the granting of summary judgment to Commodore in the Third-Party matter, thereby restoring that part of the case, as well. In doing so, this court, recognizing that because the Court below had upheld Appellant's Labor Law Section 241(6) cause of action, Commodore still could be found to be liable to Turner in the Third Party action (236-237).

In reversing summary judgment for Cross Ready-Mix as to the Labor Law Section 200 cause of action, this Court observed that when injury occurs as a result of a sub-contractor's actions, "recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged had authority to supervise or control the operation" (236) This Court found that Cross Ready-Mix had "failed to establish, *prima facie*, that neither the owner nor Turner conferred authority upon it to supervise or direct the operation of the truck within the work site" (237).

In addition, this Court stated that dismissal of the Common Law negligence cause of action against Cross Ready-Mix was improper because within this case there was "a triable issue of fact as to whether the subcontractor's employee created an unreasonable risk of harm that was the proximate cause of the injured plaintiff's injuries" (237).

This case has been officially reported as Erickson v. Cross Ready-Mix, et al., 75 A.D.3d 524 (2d Dept. 2010). *See*, Record on Appeal, pp. 238-240.

Appellant appealed from the Order, Supreme Court, Nassau County (Hon. Daniel Martin, J.), entered on April 21, 2009, that granted Turner's motion for summary judgment dismissing Appellant's Cause of Action for Labor Law Section 241(6) relief. The Court below

1. found that the statute was not applicable to Appellant's cause of action insofar that violations of the Industrial Code at 12 NYCRR 23-1.23(a), (b) or (c) were relied upon, because Appellant's accident had not occurred on a ramp or runway.

2. Reasoned that Appellant possibly could have based reliance upon 12 NYCRR 23-1.7(b)(1)(i), except that the hole into which he had been forced by the cement truck arm was not a "hazardous opening" with in definition of statue or regulation.

3. Also noted that Appellant was precluded from arguing that 12 NYCRR 23-1.5(c)(1) assisted his case because the reulation was a general safety standard, which could not serve as a predicate for liability under Section 241(6) of the Labor Law.

On appeal, this Court found no reason to overturn Justice Martin's decision based upon the above reasoning (239-240). However, this Court reversed the Order appealed from and denied summary judgment to Turner on other grounds.

This Court found that the Court below had failed to recognize that Appellant's Labor Law Section 241(6) caused of action was sustainable upon reliance on 12 NYCRR 23-9.7(d). The provision states that

> [t]rucks shall not be backed or dumped in places where persons are working not backed into hazardous locations unless guided by a person who was properly positioned…

This Court stated in its opinion that evidence of the absence of a person "properly positioned" to guide the truck was sufficient for Appellant to raise a triable issue of fact at trial (240).

This Court also noted that the Court below also erred in its holding that Turner, not owning or operating the truck, given that it was the general contractor, was not liable to Appellant under Labor Law Section 241(6). The Court below failed to notice that the statute created *vicarious liability* for owners and contractors for violations by subcontractors and others of regulations promulgated by the Commissioner of Labor at work locations. Accordingly, Appellant’s cause of action against Turner was revived (240).

Appellate Division Docket No. 2010-9892 (Appeal No. 3)

This case has been officially reported as Erickson v. Cross Ready-Mix, et al, 98 A.D.3d 717 (2d Dept. 2012). *See*, Record on Appeal, pp. 58-60.

Appellant appealed from the Order, Supreme Court, Nassau County (Hon. Thomas Feinman, J.), entered on September 20, 2010, that denied Appellant's motion for leave to serve an amended bill of particulars (58).

On appeal, this Court reversed the Court below in a Decision and Order dated August 29, 2012. This Court stated that, in effect, Appellant's motion for permission of the Court to serve an amended bill of particulars was superfluous. Given the nature of Appellant's case, his "Amended Response to Defendant's Demand for a Verified Bill of Particulars" dated May 12, 2008, was characterized by this Court to be a perfectly acceptable supplemental bill of particulars (59).

The "Law of the Case" doctrine that the Court below in the person of Justice Feinman below relied upon was, accordingly, entirely inapplicable to the case. The actual statute controlling this branch of the Controversy turned out to be C.P.L.R. Section 3043(b), as identified by this Court (59-60).

The provisions of this statute state that a plaintiff in a personal injury action may "serve a supplemental bill of particulars with respect to claims of continuing special damages and liabilities without leave of the court at any time, but not less

than thirty days before trial" provided that the Plaintiff does not allege any new injury or any new cause of action (59-60).

This Court, in applying the statute to Appellant's case specifically stated as follows:

> Where, as here, [Appellant] seeks to allege continuing consequences of the injuries suffered and described in previous bills of particulars, rather than new and unrelated injuries, the contested bill of particulars is a supplemental bill of particulars (59-60).

Clearly, since it cannot be seriously disputed that Appellant's Amended Bill of Particulars at issue alleged continuing consequences of injuries suffered and described in his previous bill of particulars, as well as giving notice that Appellant was presenting an expert witness at trial, Dr. Brian Holmes, and that the technical precondition that the document was served "more than thirty days before the trial date," by operation of C.P.L.R. Section 3043(b) was met, the document was properly considered to be a supplemental bill of particulars as specified by this Court (60).

Justice Lally's Order dated June 20, 2011 (predicating this appeal)

Of course, on the date of the entry of Justice Lally's Order underlying the present resettlement application, to wit, June 20, 2011, the lower Court did not

have the benefit of being guided by this Court's decision in Appeal No. 3 (decided August 29, 2012).

At the beginning of the lower Court's Short Form Order, Justice Lally, in pertinent part with respect to the subject matter of the present appeal, ruled as follows:

a. The Court granted Cross Ready-Mix' motion to "strike" Appellant's Notice of Expert document and to preclude that expert's testimony at the trial (49-53);

b. The Court denied Appellant's cross-motion granting renewal and reargument of a prior motion for leave to amend its bill of particulars and related relief related to Appellant's injuries sustained in Action No. 2, as well as to the expert witness' testimony to be given in support thereof (53).

In the Short Form Order of June 20, 2011 (41-57), Justice Lally was well aware of the decision of this Court in Appeal No. 2, which restored Appellant's Labor Law Section 241(6) cause of action to the trial calendar. Nevertheless, Justice Lally stated that reversal of the earlier erroneous decision of Justice Martin as to the Labor Law cause of action did not warrant granting Appellant's motion for amendment of his bill of particulars (48-53).

Justice Lally reasoned that because Appellant had not raised the denial of his application for leave to amend his bill of particulars on appeal, here, specifically in

Appeal No. 2, this issue was supposedly "finally decided" against Appellant and he could never raise this issue again in this Controversy in any procedural form, renewal, reargument or otherwise (. Indeed, Justice Lally reproached Appellant for having "already petitioned this Court on at least two prior occasions for an order permitting the pleading of the newly alleged injuries and this Court has consistently ordered that said injuries be struck" (53).

Had Justice Lally the benefit of this Court's decision in Appeal No. 3, perhaps that lower Court might have understood that while Appellant's motion for leave to amend the bill of particulars was unnecessary, nevertheless, another branch of Appellant's motion that was before said Court, to wit, for the defendants in the case to be ordered to accept the service of Appellant's amendment as a supplementary bill of particulars would and should have been granted.

Appellant's Motion to Resettle Justice Lally's Order

Initially, it should be noted that both of his actions were consolidated for trial by Justice Robert A Bruno, by Order dated April 1, 2013, as follows: determining liability in the Labor Law matter would take place first, after which, as necessary, there would be a trial on the damages phase of the Labor Law case that would be full medical malpractice case (38-40).

In the course of the proceedings before Justice Bruno, in addition to consolidation, Appellant requested Justice Bruno to harmonize Justice Lally's decision with that of this Court in Appeal No. 3 in a motion to renew. Justice Bruno declined to do so, stating that Appellant's motion was "incomplete" (40).

To remedy this, Appellant moved to resettle Justice Lally's Order by Order to Show Cause dated June 10, 2013 (15-37). Appellant specifically moved to cure the inconsistency in the lower Court's decision that continued to preclude Appellant from calling his expert witness of choice, Dr. Brian Holmes, as part of his case (27-28).

Reciting the factual background and the litigation history of the present controversy, Appellant demonstrated how the line of adverse decisions in the Supreme Court, Nassau County were consistently reversed by this Court. He demonstrated in his motion pleadings before the Court below that previous Court orders preventing him from calling Dr. Holmes as his expert witness at trial were not "on the merits" and had effectively been procedurally swept away by the decision of this Court in Appeal No. 3, rendering inappropriate application of the issue preclusion doctrine of Law of the Case to the case (26-33).

A procedural statute, C.P.L.R. Section 3043(b), permitted Appellant as the injured party to update the Court as to the changing nature of his bodily injury damages (29-30). Further, Appellant pointed out that permitting Justice Lally's

Order to stand would greatly prejudice his right to be heard at trial, in that the erroneous holdings of three members of the Supreme Court, Nassau County to the effect that (1) a spinal fusion surgery was not continuing damages, and (2) a plaintiff requires permission of the Court to be able to update, amend or supplement his corresponding bill of particulars, would trump both the C.P.L.R. statute and his right to be heard at trial (33).

Furthermore, the decision of this Court in Appeal No. 3 has confirmed Appellant's contention that his unsuccessful spinal fusion surgery caused him bodily injury that was not "new" in terms of his cause of action against the several defendants in the case. Rather, the injuries from the medical malpractice were indisputably related to the injuries originally sustained during the job site accident of November 4, 2003 (32).

The Court below, in the person of the Hon. Robert A. Bruno, should have granted Appellant the requested resettlement without fanfare.

Resettlement Denied

By Decision and Order dated August 13, 2013, Justice Bruno denied Appellant's Motion to resettle the Order of Justice Lally, utilizing for this purpose three sentences contained in two short paragraphs (4).

For the reasons stated in the Introduction to this Brief, Justice Bruno issued a short but profoundly flawed decision as to Appellant's resettlement application. Each of the three sentences in the decision is simply wrong in a major legal sense.

The first paragraph with the first sentence is wrong because Appellant never sought to "constructively reverse" Justice Lally's decision, but to correct it.

The first sentence in the second paragraph is wrong because Appellant "designed" nothing in his motion, nor did he seek to "substantively change" said Order or "amplify" it.

The second sentence in the second paragraph is wrong because permitting said erroneous unsettled Order to stand would negatively impact Appellant's substantive right to make out his case with a witness of his own selection.

According, Appellant now appeals (for the fourth time in this controversy) to this Court (5-14).

QUESTION PRESENTED

Did Appellant request the appropriate relief when he moved to resettle and harmonize a controlling decision of the Appellate Division with an earlier Order of the Court below?

Appellant submits that the question should be answered in the affirmative.

ARGUMENT

THE DECISION AND ORDER OT THE COURT BELOW BEING APPEALLED SHOULD BE REVERSED AND APPELLANT SHOULD BE GRANTED THE RELIEF HE REQUESTED, BECAUSE APPELLANT'S MOTION TO RESETTLE JUSTICE LALLY'S ORDER WAS APPROPRIATELY MADE, AS THE MOTION HARMONIZED THE TERMS OF JUSTICE LALLY'S ORDER WITHIN THOSE OF A SUBSEQUENT, CONTROLLING DECISION OF THE APPELLATE DIVISION.

The Decision and Order of the Court below that is being appealed here reads (minus cases cited as authority) as follows:

> Upon the foregoing papers, plaintiff's motion requesting this Court to issue an order to resettle or constructively reverse the Decision and Order of the Honorable Ute Wolff Lally dated Jume 20, 2011 is denied.
>
> Such a motion is designed "not for substantive changes [in, or to amplify a prior decision of, the court], but to correct errors or omissions in form, for clarification or to make the [judgment] conform more accurately to the decision," Such motions rest on the inherent power of courts to "'cure mistakes, defects and irregularities that do not affect significant rights of [the] parties.'"

With all due respect to the Court below, the decision is entirely wrong as applied to Appellant's motion to resettle. The cases cited as authority are all miscited; while some of the cited cases do stand for the proposition(s) for which they were cited, the factual and circumstantial predicate of this case does not serve as a viable predicate for their use against Appellant and his position in seeking resettlement in the instant motion. Indeed, many of the cases, upon even a superficial analysis, overwhelmingly favor Appellant's position in the motion, and -- it is submitted -- could have been cited in a legal memorandum by the Court granting Appellant's motion for resettlement.

A. Appellant did not seek to *constructively reverse* Justice Lally's decision in the motion; rather, that already had occurred when this Court decided Appeal No. 3; in bringing this motion for resettlement, Appellant did no more advise Justice Bruno that the Appellate Division decision in Appeal No. 3 had invalidated portions of Justice Lally's decision.

In denying Appellant's motion to resettle Justice Lally's order, the Court below seemingly reproached Appellant for requesting the Court to "constructively reverse" an Order previously issued in the case by a Justice of concurrent jurisdiction. The Court below summarily (and possibly in record time) rejected

Appellant's application. Perhaps, Appellant's usage of the term "constructive reversal was misunderstood by the Court below.

Yet, asking the Court below to "constructively reverse" Justice Lally's order was definitely *not* what Appellant was requesting of it. The thrust of Appellant's argument in his motion papers was for the Court to consider that interplay of the Appellate Division decisions -- three at the time -- with those of the Court below.

Appellant sought to have Justice Bruno realize that the third of the Appellate Division decisions (decided after Justice Lally's Order, but before Appellant made the present motion) -- and not Appellant on the motion -- had "constructively reversed" the pertinent part of Justice Lally's Order.

* * *

Justice Lally had precluded Appellant from calling Dr. Brian Holmes as an expert witness at his trial, on the authority of an earlier order in the case that had been made by Justice Thomas Fineman. By Order dated September 20, 2010, Justice Feinman had denied Appellant's motion for leave to serve an amended bill of particulars, and applied the legal doctrine of "Law of the Case" to the controversy to "freeze" the parties in place. As a result, in Justice Lally's view, preclusion of Dr, Holmes as an expert witness for Appellant was not only warranted, but mandated.

Subsequent to Justice Lally's decision, this Court reversed Justice Fineman's decision in all respects in the decision reported at 98 A.D.3d 717 (2d Dept. 2012) [Appellate Division Docket No. 2010-9892 (Appeal No. 3)]. *See*, Record on Appeal, pp. 58-60.

This Court found that Justice Fineman had erred in preventing Appellant from serving his "Amended Response to Defendant's Demand for a Verified Bill of Particulars," dated May 12, 2008. Appellant's "Amended Response…" was characterized by this Court as being be a perfectly acceptable "supplemental bill of particulars" that could be served and filed without leave of the Court at any time prior to trial, so long as the provisions of C.P.L.R. Section 3043(b) were complied with. The "Law of the Case" doctrine was also found to be entirely inapplicable to this case, because the subject matter of the appeal was of a procedural nature, not substantive.

Accordingly, the decision of this Court in Appeal No, 3, effectively knocked out the legal underpinning of Justice Lally's order. Yet, that Order still stood. In moving for its resettlement Appellant was standing up for his due right to choose a particular expert witness to testify on his behalf at his trial, which position should have been understood and honored by Justice Bruno.

This is why the decision appealed from here should not be permitted to stand. Justice Bruno was essentially refusing to correct Justice Lally's order, not

on the grounds that it was wrongly decided, but on the grounds that Appellant was acting *ultra viries* in seeking to "constructively reverse" Justice Lally's Order. Justice Bruno seemingly did not perceive that the Appellate Division had already performed this task in its decision in Appeal No. 3.

What the Court below should have done here was to perform what is actually a ministerial act -- that of modifying the no longer accurate Order of Justice Lally's -- in such a way as to conform the Order with this Court's decision in Appeal No. 3.

B. Appellant brought his motion to resettle Justice Lally's Order, in order to correct errors and omissions in the Order, as a matter *of form*, to clarify the Order, and to make the Order conform more accurately to the other decisions and orders in the controversy, especially to the three Appellate Division decisions on file, but *not* to make substantive changes or amplifications in prior decisions reached within the Court system.

In moving to resettle Justice Lally's Order, the Motion Papers make it clear that was no effort to make any substantive changes in Justice Lally's Order, nor was anything placed into those papers to amplify it in any manner to distort the decision.

In Appellant's motion papers, in addition to complying with the direction of Justice Bruno to provide him with a "complete history" of the case, Appellant explained to Justice Bruno exactly how the Appellate Division decision in Appeal No. 3, rendered Justice Lally's Order obsolete and inconsistent, so as to mandate its resettlement. Appellant demonstrated that permitting Justice Lally's Order to stand was prejudicial to his case at trial, not only procedurally, but as a matter of violating his substantive rights.

Appellant submitted that Justice Feinman's decision (leading up to Appeal No. 3) denied Appellant permission to amend his Bill of Particulars with respect to damages sustained by him in both of his actions. In a subsequent proceeding, Justice Lally precluded Appellant from calling Dr. Holmes as his expert at trial, in light of Justice Feinman's decision denying Appellant permission to amend his Bill of Particulars.

Appellant appealed Justice Fineman's decision to this Court. Subsequent to the entry of Justice Lally's Order precluding Dr. Holmes testimony at Appellant's trial, this Court reversed Justice Feinman's decision, pointing to a statute that permitted liberal supplementation of injured plaintiff's Bills of Particulars.

Justice Lally's decision now was inconsistent with the Appellate Division decision that was subsequently decided. However, unless properly altered, Justice Lally's decision still precluded Appellant's calling of Dr. Holmes as his expert

witness at trial. Appellant's remedy under the circumstances was to move to resettle Justice Lally's Order, to bring it into harmony with this Court's decision in Appela No. 3.

Moving to resettle Justice Lally's Order was appropriate here because the issue of preclusion of Appellant from calling his expert as a witness at trial was a matter of form, not substance. Justice Lally's reliance upon Justice Feinman's earlier refusal to permit Appellant's amendment of his Bill of Particulars, was clearly, an issue of procedure, not substance.

Indeed, during the proceedings during Appeal No. 3, this Court found Justice Feinman's action to permit amendment of a Bill of Particulars to be risible. This Court stated in its decision of reversal in Appeal No. 3, that according to CPLR Section 3043(b), a plaintiff standing in Appellant's shoes, may supplement his bill of particulars at any time until within a short period before trial, and may do so later, including during trial upon receiving permission from the trial court.

Clearly, therefore, resettlement of Justice Lally's Order to permit Appellant to call the expert witness of his choice to testify as to the nature and extent of his injuries in Action No. 1, as aggravated due to medical malpractice in Action No. 2, was procedural, not substantive, when that medical malpractice in Action No. 2 was in the causal chain of events that began with the industrial accident in Action No. 1.

There has been a need for this Court to correct errors and omissions caused by three past errors in orders and judgments previously promulgated by the Courts below in evaluating Appellant's case. Appellant submits that because Justice Bruno has declined to "correct," "clarify" and "conform" Justice Lally's Order to the previous decisions of the Courts system, this Court should do so, itself.

C. In keeping with what the Court below wrote in the third sentence of its decision, the Court should have resettled Justice Lally's Order as requested by Appellant, as being within the inherent power of courts to "cure mistakes, defects and irregularities that do not affect substantial rights of [the] parties."

There can be no doubt that the appropriate decision in this matter should have been for Justice Bruno to have granted Appellant's motion to resettle. The above discussion makes this apparent. However, Justice Bruno also spoke in terms of there being a necessity that Courts should "cure mistakes, defects and irregularities that do not affect substantive rights of parties to litigation.

It is as if the Court below, in denying Appellant's resettlement motion, acted to somehow protect some substantive right, some interest of the defendants in this case that required protection. If such existed, it certainly was many degrees less than evident. Indeed, from the state of the Record, no defendant may lay claim to

any such substantive right or interest, and none of the defendants in either action has done so. In actuality, the only defendant who has opposed resettlement, Elite, did so on procedural, and not substantive grounds (589-586).

Therefore, it cannot be said that the granting of resettlement to Appellant here would impact upon or otherwise prejudice any defendants' right or interest. Significantly, the Court below, itself, did not point to the existence of any such substantive right or interest in the case, and it is clear that this is because no such thing existed. With all due respect to the Court below, in denying Appellant's motion to resettle, the Court appears to elevate form over substance.

Appellant states this because all Defendant's except one (Elite) concede that Appellant may call to the witness stand any witness he chooses, including Dr. Holmes, given that the work-place accident case and the medical malpractice case have been consolidated fir trial. The preclusion of the medical malpractice expert from testifying in the work-place accident case is no longer necessary. Therefore, to permit Dr. Holmes to testify becomes a procedural determination, rather than a substantive one. Furthermore, in the present posture of this case, not permitting Appellant to call any witness he chooses, who possesses evidence that is competent, material and relevant to this case would be prejudicial to Appellant, and a violation of Plaintiff's substantive rights.

D. THE COURT BELOW CORRECTLY CITED LAW REGARDING RESETTLING ORDERS, BUT THE CASES CITED ALL FAVORED APPELLANT'S POSITION IN THIS CONTROVERSY.

****

CONCLUSION

Appellant submits that the Court should reverse and vacate the Order appealed from, grant Appellant's motion to resettle the Order of Justice Ute Wolff Lally dated June 20, 2011, to specifically permit Dr. Brian Holmes to testify at Appellant's trial; remand this matter to Supreme Court, Nassau County to a Justice, thereof, not previously involved in the appellate litigation in this case; and grant Appellant all due costs, disbursements and sanctions related to the instant appeal.