*To be Argued by:*
JOSH H. KARDISCH
*(Time Requested: 15 Minutes)*

# New York Supreme Court

## Appellate Division—Fourth Department

DAVID M. BONCZAR,

**Docket No.: CA 19-00899**

*Plaintiff-Appellant,*

– against –

AMERICAN MULTI-CINEMA, INC. d/b/a AMC Theaters Webster 12 (as Successor in Interest to Loews Boulevard Cinemas, Inc. f/k/a Loew's Boulevard Corporation and/or Loews Theater Management Corp.),

*Defendants-Respondents.*

## BRIEF FOR DEFENDANTS-RESPONDENTS

RUSSO & TONER, LLP
*Attorneys for Defendants-Respondents*
33 Whitehall Street, 16th Floor
New York, New York 10004
(212) 482-0001
jkardisch@russotoner.com

*Of Counsel:*
JOSH H. KARDISCH, ESQ.

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## PRELIMINARY STATEMENT

Defendant-Respondent, American Multi-Cinema, Inc, d/b/a, AMC Theatres Webster 12, as Successor in Interest to Loews Boulevard Cinemas, Inc., f/k/a Loew's Boulevard Corp and/or Loews Theater Management Corp. (hereinafter, "Defendant" or "AMC"), respectfully submits that the court below properly denied Plaintiff-Appellant David Bonczar's (hereinafter, "Plaintiff's" or "Bonczar's") motion for a directed verdict pursuant to CPLR § 4401 and post-trial motion to set aside the verdict pursuant to CPLR § 4404 (a), and properly entered judgment in favor of Defendant. Plaintiff admitted that the ladder he used to perform his job function was adequate and safe or, at the very least, he did not prove that it was not, and in either event, he did not establish *prima facie* that AMC violated Labor Law § 240 (1). Moreover, Plaintiff controlled the entire process and all circumstances which precipitated the alleged occurrence and, therefore, he was the sole proximate cause thereof. Finally, Defendant's counsel did nothing at trial - either within or outside the jury's presence - which either "tainted the proceeding" or otherwise inured to Plaintiff's prejudice or ultimate detriment. For these reasons, this Court should affirm the lower court's decision which denied Plaintiff's motions for a directed verdict and to set aside the verdict, affirm the Judgment rendered below in Defendant's favor, and deny this appeal in its entirety.

It must be noted at the outset that the court below should have instructed the jury to proceed no further if it determined that Defendant had not violated Labor Law § 240 (1).

Instead, His Honor told the jurors that if they answered this first Special Verdict question in the negative, they should skip the second question on proximate cause, proceed to the third and decide whether Plaintiff was the sole proximate cause of the subject occurrence. R. 938-939. 960-961, 1048-1053. Clearly, if at least five out of six jurors decided that Plaintiff had not satisfied his *prima facie* burden of establishing a violation of the law, there was no justification for the court to instruct them to consider sole proximate cause (or any other affirmative defense). Had the court not erred in instructing the jury in this manner, the members would have returned a defense verdict after answering the first question in the negative, and this Court might now only be reviewing whether Plaintiff proved that Defendant had violated Labor Law § 240 (1).

## COUNTER-STATEMENT OF NATURE OF CASE AND FACTS RELEVANT TO DETERMINING APPEAL

In reversing summary judgment to Plaintiff on liability in the prior appeal, *Bonczar v AMC*, 158 AD3d 1114 (4th Dept. 2018) (R. 990-993), the Fourth Department found genuine issues of material fact with regard to the essential elements of this Labor Law claim: violation on Defendant's part and sole proximate cause on Plaintiff's part. This Court did not limit the fact-finder's potential inquiry to two specific acts or omissions, to wit, whether Bonczar checked the positioning of the ladder and/or checked the locking mechanism. R. 990-991. Rather, the Court stated that "Plaintiff did not know why the ladder wobbled or shifted and he acknowledged that he might not have checked the positioning of the ladder or the locking mechanism, despite having been aware of the need

to do so." R. 990 (emphasis added). Critically, the Fourth Department did not identify when Plaintiff should have inspected the ladder, i.e., before his first use or before each use, leaving that issue an open question for the jury to decide. R. 990-991.

The Fourth Department concluded that:

> whether the ladder "wobbled" or "shifted" because Plaintiff did not check its positioning or its locking mechanism or for other reasons of which he was admittedly unaware are essential to the sole proximate cause analysis…and there is a plausible view of the evidence - enough to raise a fact question – that there was no statutory violation and that Plaintiff's own acts or omissions were the sole proximate cause of the accident.

R. 990 (emphasis added). In so doing, the Court recognized that a jury might find that Defendant did not violate the Labor Law notwithstanding Plaintiff being "unaware" of "other reasons" the ladder may have wobbled or shifted. R. 990. Clearly, if this Court did not believe that a jury could/might evaluate the evidence and reasonably conclude that "reasons other" than Defendant's violation of the law caused the ladder to wobble, it would have affirmed summary judgment for Plaintiff in its prior decision. Everything Plaintiff offered in his motion for a directed verdict and his motion to set aside the verdict and everything he now proffers in support of this appeal exposes the factual questions which the Fourth Department explicitly and tacitly identified and held that a jury must decide…and they certainly did.

Plaintiff was working alone at the time of the alleged occurrence (R. 100, 135-136), and he was the only individual with first-hand knowledge of the subject

occurrence who testified at trial. While he testified that Justin Dommegala witnessed his fall (R. 106-107, 141), opposing counsel never called this individual to the stand and therefore, no one corroborated his client's version of the events. The jury heard Bonczar – the claimant and only purported eyewitness - testify that he does not even remember many of the circumstances which are germane to the Labor Law § 240 (1) analysis, without evidence of which the triers of fact could not have reasonably found in his favor.

While he may have claimed to have fallen from an "unstable" ladder in his initial pleadings (R. 14-20, 28-40), Plaintiff actually conceded the point at trial. Throughout his Brief, opposing counsel reiterates his client's trial testimony that he "visually examined" and "physically tested" the ladder before first ascending and that he observed it to be free of any defects. R. 102, 115-116. The fact that Plaintiff admittedly climbed the ladder "four to six times…successfully", i.e., without an adverse incident (R. 105, 142, 162-163), certainly militates in favor of the jury's rational conclusion that the ladder was adequate, safe, and legally compliant. Perhaps it was for this reason that counsel parked a huge mechanical lift in the extremely high-ceilinged courtroom throughout the trial - the use of which he demonstrated to the jury - and argued that Defendant should have supplied his client with that type of device - *rather than a ladder* – to utilize in the much lower-

ceilinged cash room.[1] R. 117-118, 122-123. Plaintiff effectively abandoned the theory that the ladder was "unstable"; at the very least, his attorney attempted to divert the jury's attention away from the subject device precisely because the evidence demonstrated it was *not* "unstable". In any event, when asked whether Defendant failed to supply an adequate safety device in violation of the law, the jury saw through opposing counsel's diversion and obfuscation and correctly answered in the negative.

At trial, Bonczar testified that initially, there were "one or two ladders" in the cash room (R. 97-99; 102-103, 155), but that when he left and returned, there was one "six-foot A-frame ladder that was fully extended, standing freely in the middle of the room." R. 101, 155. On cross-examination, the jury heard Plaintiff's pre-trial deposition testimony that he could not recall how many ladders were available for his use (R. 156-157), and that he did not know whether he used one that was already there or one that he brought into the room (and set up and positioned himself). R. 1246-1248. He also testified at trial that while he was not certain, the ladder he used looked like one belonging to his employer. R. 163, 166. But although he claims that the device was "fully extended" when he returned to the cash room,

[1] Plaintiff's employer's operations manager, Jonny Smith - who was responsible for ordering the lifts which were present throughout the jobsite - testified at trial that the cash room wouldn't need anything more than a 6-foot ladder since its ceiling was "low…seven (7) feet, roughly" (R. 547, 550).

Plaintiff testified that he was still able to “pull the legs apart”. R. 104-105, 115-116, 124 - 125, 161, 163, and 205-206. If the ladder was indeed properly set up in the room before Plaintiff arrived, the spreader arms would have been in place (i.e., in the down position), and Bonczar would not have been able to separate the two sides any further. Among a host of other issues, the jury was left to decide, therefore, whether the ladder was set up and positioned with the legs fully extended and the hinged spreader bars locked in place when Plaintiff came back to the room or whether Bonczar did so himself. The note which asked about the word “positioning” (R. 1057), evinces that at least at one juncture, the jurors were confused as to Bonczar’s testimony on this point and that after getting clarification and deliberating further, they resolved the issue against Plaintiff.

Bonczar testified at trial that inasmuch as his alleged fall occurred five (5) years prior, he could not recall:

a. how the subject ladder came to be present, set up, or positioned in the "cash" room in the first place (R. 159, 166) (but the jury also heard his deposition averment that it would have been "feasible" for him to have brought the ladder into the room and set it up himself. R. 158);

b. whether the ladder had been moved when he temporarily left the cash room at one point (the ladder "could have been (moved) between when I was there and when I came back.") R. 138-139;

c. whether he checked the ladder's positioning or whether the legs were fully-extended, fully opened, or locked, i.e., its stability, immediately before his last ascent. R. 105-106, 161-162. Plaintiff explicitly testified that he did not recall pushing the ladder's bars down or checking to make sure they were locked into place (R. 205-206), or inspecting the ladder's stability in any manner, relying instead on having visualized the arms in the down position and believing that they were "locked";

d. where the ladder was positioned in the cash room – alternating his testimony between the "center," "middle", "a few feet from the door," and "inside of the doorway to the right a little bit." R. 137-142;

e. where the smoke detector which he was servicing was located in the ceiling and whether its placement required him to reach directly above or above and to one side of the ladder. R. 187-190. Defendant's fact witness, Robert Lutz, actually contradicted Plaintiff's description of the room and the location of the smoke detector. R. 510-512; and

f. having used the ladder earlier that day. R. 164-165.

Contrary to Plaintiff's assertion, defense safety expert Daniel Paine did "take issue" with the manner in which Bonczar inspected and tested the ladder if not initially, then immediately before he climbed it for the last time. As the court below indicated in denying Plaintiff's motions, Mr. Paine told the jury that:

> the person who is using the (ladder) needs to use it properly and safely…should set it up properly and inspect and check to make sure the device is locked and stable *every time (he) use(s) it*.

R. 742. As indicated above, Bonczar did not remember much about the set-up, positioning, securing, movement or location of the subject ladder. He testified repeatedly, however, that he "visually looked" at it and concluded that the device had no "apparent defects" before he first climbed. R. 102, 115-116. The critical point is that Plaintiff "could not say for sure" that he checked the device "that final time" (R. 161-162) which, according to Mr. Paine (R.742), he should have done.

Plaintiff testified at trial that he was "transitioning down the ladder through the drop ceiling" and "shifting his hands" when the ladder "shifted" and "wobbled," causing him to fall. R. 106, 164, 166. He also swore that he could not "say for sure" whether he released his right hand causing him to miss a step, testifying as follows:

> Q. As you were coming down off the ladder, first you released your right hand as you're transitioning down, right?
>
> A. First I would have probably released -- I can't say for sure but it was -- my left hand was solidly on the ladder and I was transitioning through the drop ceiling. As I was doing that and stepping down, when I lost balance, that's when I lost grip on my right hand and I fell to my back.

R.166-167. According to the above answer – in which he said nothing about the

ladder moving – Plaintiff released his right hand as he started to descend, lost his balance, lost his grip, and fell to his back. Plaintiff's trial testimony about the occurrence is consistent with his examination before trial testimony that he had "changed positions with the right side of his body" (R. 168), released his hands from the ladder, "lost [his] balance and fell onto [his] back" (R. 169), again saying nothing about the ladder having moved in any manner. And while he also testified at deposition and at trial that the ladder "shifted" and "wobbled" (but did not fall) as he descended, Bonczar does not know what, if anything other than his own actions, caused it to do so.

For the above reasons, Mr. Paine's testimony with regard to Plaintiff maintaining safe and appropriate contact with the ladder on his descent was significant. Defendant's safety expert testified that whether Plaintiff continued "three-point contact" while climbing down is an important concern because:

> if you do that, you wouldn't fall... *(e)specially (since) the ladder didn't fall*, so he fell off the ladder, not the other way around.

R. 659, 662-663.

As this Court previously recognized, Plaintiff could not identify the reason the ladder shifted or wobbled at the summary judgment stage and over seven (7) days of trial, he still could not do so. The court below articulated several ways in which Defendant could overcome the presumption that it failed to provide the required

proper protection, to wit, by showing: 1) that Plaintiff did not check the ladder's positioning, which positioning was improper and caused the device to shift and wobble; or 2) that Plaintiff did not check whether the spreader arms were fully extended, that said arms were not fully extended, and that that caused the device to shift and wobble. R. 936-937. The jury correctly reached a verdict - "in accordance with the principles of law charged by the Court and *the facts as (it) found them to be ..., "* - in Defendant's favor as follows: 1) Defendant did not violate Labor Law 240 (1) by failing to provide proper protection; 2) Plaintiff failed to check the positioning of the ladder; 3) the ladder was improperly positioned to perform the work; 4) Plaintiff fell because the ladder was improperly positioned to perform the work; 5) the improper position of the ladder was the only substantial factor in causing Plaintiff's fall. R. 960-961, 1048-1051.

As stated above, the trial judge should have had the jury end its inquiry after determining that Defendant had not violated Labor Law 240(1) and not proceed to consider whether Plaintiff was the sole proximate cause of this occurrence. Instead, the court had the jury return its verdict after deciding that Plaintiff fell because he failed to check and properly position the ladder and failed to maintain a safe level of contact with the device. R. 1048-1051.

## ARGUMENT

## I

## THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTIONS FOR A DIRECTED VERDICT AND TO SET ASIDE THE VERDICT AS TO DEFENDANT'S LIABILITY UNDER LABOR LAW 240 (1)

### A. Labor Law § 240 (1)

The New York Court of Appeals has specifically held that "liability is contingent upon the existence of a hazard contemplated in (Labor Law) Section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v Manhasset Bay Assocs.,* 96 NY2d 259, 267 (2001); *Ortiz v Varsity Holdings, LLC,* 18 NY3d 335, 340 (2011); *see also, Jacobsen v New York City Health & Hosps. Corp.,* 22 NY3d 824, 833 (2014); and *Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 (1986). In order to prevail under this section, an injured party must demonstrate that the owner breached a statutory duty to provide workers with adequate safety devices and that the breach proximately caused the alleged injury. *Fazekas v Time Warner Cable, Inc.,* 18 NYS3d 251, 253 (4th Dept. 2015), *quoting, Blake,* 1 NY3d 280, 287 (2003); *see also, Kerrigan v TDX Constr. Corp.,* 970 NYS2d 13, 16 (1st Dept. 2013), *quoting, Robinson v East Med. Ctr., LP,* 6 NY3d 550, 554 (2006); and *Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390 (4th Dept. 2014) (in which this Court cited the Court of Appeals decision in *Robinson*, *supra,* for the proposition that " in order for there to be liability under section 240 (1), the

owner or contractor must breach the statutory duty to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries".)

In the seminal case, *Blake v Neighborhood Hous. Servs. of N. Y. City, Inc.,* 1 N.Y3d 280, 287 (2003), the Court of Appeals specifically recognized that:

> [t]he terms ['strict' and 'absolute' liability] may have given rise to the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party ... that is not the law, and we have never held or suggested otherwise.

1 NY3d at 288. In his attempt to distinguish *Blake*, Plaintiff fails to mention that when that case was remanded for trial, the jury found that the device in question was "so constructed (and) operated as to give proper protection" because plaintiff - precisely like David Bonczar herein - could not identify a single *defect* or instability in the subject ladder. 1 N.Y.3d at 284. In *Abbatiello v Lancaster Studio Assocs.,* 3 NY3d 46, 50 (2004), New York's High Court quoted the following language from *Blake:* a) "an accident alone does not establish a Labor Law § 240 (1) violation;" and b) "absolute liability requires a violation of the statute." *Abbatiello,* 3 NY3d at 50. The Fourth Department has also acknowledged *Blake's* proclamation that "although Labor Law § 240 (1) is to be construed as liberally as necessary to accomplish the purpose of protecting workers ... the language must not be strained to accomplish what the Legislature did not intend." *Bish v. Odell Farms Partnership,* 119 A.D.3d 1337, 1337-1338 (4th Dept. 2014). It is therefore well- established that the "mere

fact that (a plaintiff) fell from a ladder does not establish, in and of itself, that proper protection was not provided ... " *Karwowski v Grolier Club of City of N.Y.,* 144 AD3d 865, 867-866 (2nd Dept. 2016), *citing, Carrion v City of New York,* 111 AD3d 872, 873 (2nd Dept. 2013), and that "not every worker who falls gives rise to the extraordinary protections of Labor Law §240 (1 )". *Narducci v Manhasset Bay Assocs.,* 96 NY2d 259, 267 (2001).

The Fourth Department has held that when no one witnessed a ladder tipping and, therefore, the "manner in which the accident occurred is within the exclusive knowledge of the plaintiff..., plaintiff's testimonial version should be subjected to cross-examination *and his credibility assessed by the fact-finder after a trial." Carlos v Rochester General Hosp.,* 163 AD2d 894 (4th Dept. 1990) (emphasis added); *See also, Doan v Aiken & McGlauklin, Inc.,* 629 NYS2d 921 (4th Dept. 1995) (same result); and *Marasco v Kaplan, 577* NYS2d 977 (4th Dept. 1991) (same result). Where there are "issues of fact with respect to how the accident occurred and whether the ladder was "placed and operated as to give proper protection" to plaintiff pursuant to Labor Law § 240 (1), disposition by means other than a jury trial is not appropriate. *See for example, Fladd v Installed Bldg. Prods., LLC*, 134 AD3d 1480, 1481 (4th Dept. 2015); *Avendano v Sazerac, Inc.*, 248 AD2d 340, 341 (1998).

Each and every case which Plaintiff cites for the proposition that whenever a ladder "wobbles" or "shifts" the Defendant is *prima facie* liable under Labor Law

240 (1) is a decision on a summary judgment motion. *See, Garcia v Church*, 146 AD3d 524 (1st Dept. 2017); *Hill v City of New York*, 140 AD 3d 568 (1st Dept. 2016); *Evans v. Syracuse*, 53 AD 3d 1135 (4th Dept. 2008); and *Newman v C. Destro Dev. Co.,* 46 AD 3d 1452 (4th Dept 2007). In those cases in which summary judgment was granted for plaintiff there was evidence that the subject ladder actually wobbled or shifted. In the present case, the trial court granted Plaintiff summary judgment, but this Court reversed noting, *inter alia*, "there is a plausible view of the evidence - enough to raise a fact question – that there was no statutory violation". Instead of seeking further review of the summary judgment motion record, Plaintiff took his case to trial and subjected it to a jury's scrutiny. From evidentiary and practical viewpoints, this method of resolution is most exacting and comprehensive and unlike a court's adjudication of a dispositive motion, allows for evaluation of the parties' and their witnesses' credibility. Accordingly, decisions which discuss the propriety of summary judgment have no bearing on a Labor Law case which was tried to verdict before a jury.[2]

[2] The Court should dismiss Plaintiff's interpretation of the seminal *Blake* case altogether. Pl. Brief, pp. 20-21. In *Blake*, plaintiff only could not remember if he had locked extension clips in place. In the within case, Plaintiff could barely remember *anything* as to what he did to either secure the ladder or assure that it was properly secured, particularly immediately before he fell. The court should also not consider *Nephew v Klein Building Co., Inc*., 21 AD3d 1419 (4th Dept. 2005), because it involved a ladder which "buckled," a malfunction that clearly demonstrated a defect and a condition which Plaintiff herein certainly did not prove.

Opposing counsel's accusation that defense counsel's cross-examination into Plaintiff's conduct was an illicit attempt to inject "culpable conduct" into the case reveals a basic misunderstanding of Labor Law § 240. Plaintiff's acts and/or omissions at all relevant times are not only a pertinent but a critical area of inquiry in a fall-from-a-ladder case. In fact, the only difference between conduct that is "culpable" and conduct that can be termed the "sole proximate cause" is the degree to which plaintiff's acts and/or omissions were responsible for the injury-producing event.

Where a plaintiff's actions are the sole proximate cause of his injuries, liability under Labor Law § 240 (1) simply does not attach to the owner. *Robinson v East Med. Ctr., LP,* 6 NY3d 550, 554 (2006); *Weininger* v *Hagedorn* & *Co.,* 91 NY2d 958, 960 (1998); *Cioffi* v *Target Corp.,* 114 AD3d 897, 898 (2014); *Corchado v 5030 Broadway Props., LLC,* 103 AD3d 768, 768-769 (2013)*; Piotrowski* v *McGuire Manor, Inc.,* 986 NYS2d 718, 719 (4th Dept. 2014); *and Bascombe* v *West 44th St. Hotel, LLC,* 124 AD 3d 812, 813 (2d Dept. 2015). As the Court of Appeals stated in *Blake,* "it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury), to occupy the same ground as a plaintiff's sole proximate cause for the injury," and "if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation." *Id.* "Extending the statute to impose liability in such a case," *Blake* held, "would be

inconsistent with statutory goals since the accident was not caused by the absence of (or defect in) any safety device or in the way the safety device was placed". *Blake,* 1 NY3d 280, *citing, Weininger,* 91 NY2d at 960 (1998). *See also*, *Bish v. Odell Farms Partnership,* 119 A.D.3d 1337, 1337-1338 (4th Dept. 2014) (in which the Fourth Department reversed summary disposition on liability to plaintiff-appellant, citing *Blake* which tied "Plaintiff-Appellant's burden of proving a statutory violation to whether his own acts or omissions were the sole proximate cause").

## 1. The Trial Court Properly Denied Plaintiff's Motion For A Directed Verdict As To Defendant's Liability Under Labor Law 240 (1)

### a. CPLR § 4401 Standard

CPLR § 4401 provides as follows:

> Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties.

This Court has stated that in considering a motion to direct a verdict,

> the court cannot properly undertake to weigh the evidence. Its duty is to take that view of the evidence most favorable to the nonmoving party, and from the evidence and the inferences reasonably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the moving party. The test is whether the trial court could find 'that by no rational process could the trier of the facts

> base a finding in favor of the [party moved against] upon the evidence presented'.

*Wessel v Krop*, 30 AD2d 764, 765 (4th Dept. 1968); *Fernandes v Allstate Ins. Co.*, 305 AD2d 1065, 1065 (4th Dept. 2003); *See also, Martin v Fitzpatrick*, 19 AD3d 954 (3rd Dept. 2005); and *Butler v N.Y. State Olympic Reg'l Dev. Auth.*, 292 AD2d 748 (3rd Dept. 2002). It is also a basic principle of our law that "it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the court may properly direct a verdict". *Cohen v Hallmark Cards, Inc.,* 45 NY2d 493, 499 (1978).

All of the elements which determine whether a plaintiff-appellant was the sole proximate cause of his injury present issues of fact for a jury to decide. *Lopez* v. *FAHS Canst. Grp., Inc.,* 129 AD3d 1478, 1479 (4th Dept. 2015); *Beesimer* v. *Albany Avenue/Route 9 Realty,* 216 AD2d 853, 854 (3rd Dept. 1995). Thus, in *Weininger, supra,* the Court of Appeals held that the "supreme court (had) erred ... in directing a verdict in favor of plaintiff on the issue of proximate cause" where "a reasonable jury could have concluded that plaintiff's actions were the sole proximate cause of his injuries, and consequently that liability under Section 240 (1) did not attach." And in both *Kopasz v City of Buffalo,* 148 AD3d 1686 (4th Dept. 2017) and *Davis v Brunswick*, 52 AD3d 1231 (4th Dept. 2008), this Court determined that a jury must decide whether (the ladder, in one case, and scaffold, in the other), "failed to provide proper protection because it was not properly placed" or because "plaintiff simply

lost his balance and fell". *Kopasz,* 148 AD3d 1686, 1686 (4th Dept. 2017); and *Davis,* 52 AD3d at 1231 (4th Dept. 2008).

**b. Plaintiff Was Not Entitled to a Directed Verdict**

Bonczar testified that he visually inspected the ladder before *first* ascending and that he observed that it was free of any defects (R. 102), that he had climbed and descended the device "maybe four to six times" before the occasion on which he fell (R. 105, 142, 162-163), and that he released his right hand causing him to lose his balance and miss a step as he "transitioned down the ladder" for the last time.[3] R. 102, 115-116. Apart from the aforementioned, Plaintiff "forgot" more about the circumstances which are relevant to his case and the Labor Law 240 (1) analysis than he "remembered". As delineated in the Counterstatement of the Nature of Case and Facts Relevant to Determining Appeal section above, Plaintiff did not recall whether or not he brought the ladder into the room and set it up, which of several ladders he used, whether he did anything other than visually inspect the device to determine its stability, where the ladder was placed in proximity to the smoke detector he was wiring in the ceiling, and whether he checked to see if the ladder was properly positioned and locked *immediately before his last ascent.* R. 161-162.

Just as plaintiff did, defense expert Thomas Paine told the jury that there was

nothing unstable or defective about the subject ladder. Defendant's expert did not reject one manner in which Plaintiff was the sole proximate cause of this event in favor of another, as Plaintiff's counsel suggests. Rather, he linked two acts/omissions together, testifying that if Bonczar had set up the ladder properly and maintained three-point contact, he would not have missed a step, much less fallen, as evidenced by the undisputed fact that only Plaintiff – not the ladder – fell to the ground. R. 721-722. But whether Mr. Paine concluded that the ladder wobbled because Bonczar failed to properly position and/or lock the spreader bars in the first place, neglected to properly check and position it before his last ascent, did not maintain three-point contact on his final descent, or all of the above, the failure(s) was (were) on Plaintiff's – not Defendant's - part – and it was (or they were) the sole reason(s) he fell. In sum and substance, defense expert Paine, testified: a) that there was nothing unstable or defective about the ladder in question; and b) that plaintiff's acts and/or omissions – in one form or another – were the sole proximate cause of this event. The jury quite reasonably concluded from Plaintiff's and the defense expert's testimony that Bonczar's acts and/or omissions – in one form or another – were the sole proximate cause of this event.

Given Plaintiff's admission that he did not find the ladder to be defective, opposing counsel had (and has) no choice but to insist – as he did at every juncture and throughout the trial - that the mere fact that his client fell from a height proves,

*prima facie*, that Defendant violated the Labor Law. Plaintiff's expert safety consultant, Arthur Dube, apparently operates under the same misconception as the attorney who retained him, i.e., that evidence that he "fell from a height" is all a plaintiff needs to show in order to hold a defendant liable for violating Labor Law § 240 (1). Mr. Dube testified at trial that the basis of his opinion that Defendant did not provide legally proper protection was as follows:

> Obviously… he fell… so he wasn't protected properly.

R. 253-254. In accordance with the case law cited above, however, the mere fact that Plaintiff fell does not prove that Defendant violated the Labor Law by any measure.

While he highlights several differences between his client's deposition and trial testimony, opposing counsel does not apparently recognize that the jury – not the court and not he – is charged with judging Plaintiff's credibility and reconciling contradictory statements, believing one or the other, or rejecting all. The jury heard Bonczar's live trial testimony and several contradicting excerpts from his deposition and reasonably determined that Plaintiff did not make out a *prima facie* showing that Defendant violated Labor Law 240 (1) by failing to provide proper protection and that Plaintiff's acts and/or omissions as described above were the sole proximate causes of his fall.

In deciding Plaintiff's motion for a directed verdict, the court below recognized that: a) "Plaintiff testified that he went up and down the ladder several times and could not recall having checked the spreader arms/locking mechanism immediately before going up… for the last time"; and b) "that Mr. Paine testified that Plaintiff's failure to make sure the spreader arms were locked and his failure to maintain three points of contact on the ladder, was the only cause of the accident". R. 10. Accordingly, the court concluded, "a rational jury could conclude that the Plaintiff's conduct was the sole proximate cause of the accident." R. 10-11. Insofar as the jury determined that Defendant did not violate the law and that Plaintiff was the sole proximate cause of the subject occurrence, the court below properly denied Plaintiff's motion for a directed verdict pursuant to CPLR § 4401.

## 2. The Trial Court Properly Denied Plaintiff's Motion To Set Aside The Verdict As To Defendant's Liability Under Labor Law 240 (1)

### a. CPLR § 4404 (a) Standard

CPLR § 4404 (a) states as follows:

> After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

A long line of cases has held that it is *only* appropriate for a court to set aside a verdict when "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial." *Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499, 410 NYS2d 282 (1978); *Doucette v Cuviello*, 2018 NY App. Div. LEXIS 1943, *2, 2018 NY Slip Op 02049, 1 (4th Dept. 2018); *Doolittle v Nixon Peabody LLP*, 155 AD3d 1652, 1654 (4th Dept. 2017); *Clune v Moore*, 142 AD3d 1330 (4th Dept. 2016); *Jurkowski v Sheehan Mem. Hosp.*, 85 A.D.3d 1672 (4th Dept. 2011); *Lolik v Big Supermarkets, Inc.,* 86 NY2d 744 (1995). It is well established that "[a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation" *(McMillian v Burden,* 136 AD3d 1342 (4th Dept. 2016); *Sauter v Calabretta,* 103 AD3d 1220, 1220 [2013]), when it is "palpably irrational" *(Quigley v Sikora,* 269 AD2d 812, 813 [2000]), "utterly irrational" (*Cohen,* 45 NY2d at 499 [1978], or "palpably wrong" (*Mohamed v Cellino & Barnes,* 300 AD2d 1116, 1117 [2002], *lv denied, 99* NY2d 510 [2003]), or if the verdict is one reasonable persons could *not* have rendered after receiving conflicting evidence". *Mascia,* 299 AD2d at 884 (4th Dept. 2002); and *Melnick v Chase,* 148 AD3d 1589 (4th Dept. 2017). As the court below noted, "the question of whether a verdict is against the weight of the evidence involves what

is in large part a discretionary balancing of many factors" (*Cohen*, 45 NY2d 493 (1978)), and a "trial judge may not set aside a jury verdict simply because he disagrees with it". *Mann v Hunt*, 283 A.D. 140, 141 (3rd Dept. 1953).

While "[t]he determination (of such a motion) is addressed to the sound discretion of the trial court . . . if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury." *McMillian,* 136 A.D.3d at 1342 (4th Dept. 2016). It is solely "within the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses". *Maddex v E.E. Austin & Son, Inc.*, 137 AD3d 1717 (4th Dept. 2016); *McMillian,* 136 AD3d 1342 (4th Dept. 2016). The jury is "entitled to credit the testimony of defendant's witnesses and reject the testimony of plaintiffs' witnesses" if it sees fit to do so. *McMillian,* 136 AD3d 1342*; Guthrie v Overmyer,* 19 AD3d 1169, 1170 (2005). When the testimony of experts (or any other witness, for that matter), at trial is conflicting, the jury must decide the issue of credibility (*Dudek v Call,* 275 AD2d 992, 992 [4th Dept. 2000]), by weighing the conflicting ... evidence and crediting the opinion of one expert over that of another". *Mascia v Olivia,* 299 AD2d 883, 884 (4th Dept. 2002). A record provides no reason to disturb the jury's resolution of credibility issues when it is based upon a fair interpretation of the evidence ... with consideration given to the credibility of the witnesses and the

drawing of reasonable inferences therefrom". *Mecca v Buffalo Niagara Convention Ctr. Mgt. Corp.,* 158 AD 3d 1161, 1163 (4th Dept. 2018).

In *Nicastro v Park,* 113 AD2d 129, 133-139, 495 NYS2d 184,188-192, 1985 N.Y. App. Div. LEXIS 52340, *10-22, the Second Department specifically recognized that:

> the preeminent principle of jurisprudence in this area is that the discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict.
>
> Fact finding is the province of the jury, not the trial court, and a court must act warily lest overzealous enforcement of its duty to oversee the proper administration of justice leads it to overstep its bounds and "unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty" (internal cites omitted).

The *Nicastro* court also noted that:

> particular deference has traditionally been accorded to jury verdicts in favor of defendant-respondents in tort cases because the clash of factual contentions is often sharper and simpler in those matters and the jury need not find that a defendant-respondent has prevailed by a preponderance of the evidence but rather may simply conclude that the plaintiff-appellant has failed to meet the burden of proof requisite of establishing the defendant-respondent's culpability. *Id.*

Thus, it has often been stated that a jury verdict in favor of a defendant should not be set aside unless "the jury could not have reached the verdict on any fair interpretation of the evidence." *Id*.

Section 4404 (a) also authorizes the court, either by motion of any party or on its own initiative, to order a new trial "in the interest of justice." *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376 (1976). In deciding such a motion, the trial court must decide whether substantial justice has been done and whether it is likely that the verdict has been affected, and the judge "must look to his own common sense, experience and sense of fairness rather than to precedents in arriving at a decision." *Micallef v Miehle Co., supra.*

b. **Plaintiff Was Not Entitled to Have the Jury Verdict Set Aside**

For all of the reasons articulated in previous sections, the court below identified the "conflicting evidence" presented at trial and properly concluded that "a reasonable jury may have believed the testimony of Defendant's expert and may not have believed the version of events which they heard as recited by Plaintiff." R. 11-12. Thus, the trial court concluded that "the verdict is one which 'reasonable persons could have rendered after receiving conflicting evidence." R. 11-12.

When the *Blake* trial court denied plaintiff-appellant's motion to set the defense verdict aside, it stated that the "conclusion" was "inescapable" that *"the accident happened not because the ladder malfunctioned, was defective, or was improperly placed, but solely because of Plaintiff-Appellant's own negligence in the way he used it." Id.* (emphasis added.) The First Department affirmed, stating that "a factual issue was posed as to whether plaintiff's injury was caused by some

inadequacy of the ladder or was solely attributable to the manner in which he used the ladder," and that there were no grounds to disturb the jury's factual determinations. *Id.* The Court of Appeals also affirmed, adding that "if liability were to attach even though the proper safety devices were entirely sound and in place, the Legislature would have simply said so, or made owners and contractors into insurers." *Id.* at 292.

This Court's decision in *Maddex v E.E. Austin & Son, Inc.*, 137 A.D.3d 1717 (4th Dept. 2016), is particularly instructive. Therein, plaintiff claimed that the force of gravity caused a "gang box" - the handle of which he was holding inside a van - to plummet to the ground and him onto the pavement. *Id.* at 1717. At the close of his case, plaintiff moved for a directed verdict arguing that because he was injured as a result of the application of the force of gravity and that defendant failed to provide any safety device as required by section 240 (1). *Id.* The court denied the motion. Plaintiff sought the same relief after a jury found for defendant. *Id.* The court denied that motion as well. *Id.*

The Fourth Department affirmed both lower court decisions concluding that: (a) "viewing the evidence in the light most favorable to defendant, there was a rational basis by which the jury could find in favor of defendant"; and (b) "[a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that

it could not have been reached on any fair interpretation of the evidence". Id. at 1717-18. The *Maddex* Court noted that "the evidence introduced by plaintiffs at trial presented conflicting views…and, under such circumstances, there was no basis for the court to grant plaintiffs a directed verdict pursuant to CPLR 4401…or a motion seeking judgment notwithstanding the verdict pursuant to CPLR 4404 (a)". *Id.* at 1718. *See also*, *Piotrowski v. McGuire Manor, Inc.*, 117 AD3d 1390 (4th Dept. 2014) (in which this Court reversed a jury verdict for a plaintiff who claimed that he had sustained injury when he fell from a "wobbly" ladder, reiterating that "where a plaintiff's own actions are the sole proximate cause of his injuries, there is no liability under Labor Law § 240 (1). *Id.* (citations omitted.)

Plaintiff presented no evidence to refute expert Daniel Paine's testimony that Defendant met the requirements of Labor Law § 240 (1) by providing a device that was safe - a "ladder which was in good working condition" and which "in this situation, was the best device that could be used" in accordance with the legal requirement. The jury evaluated the evidence, judged Bonczar's credibility, and determined that Plaintiff proffered insufficient proof that there was any defect, deficiency or inadequacy in the device. Clearly, the jury could have reasonably believed that Plaintiff's memory was not adequate to establish a Labor Law violation or that his testimony about the relevant events and circumstances was too equivocal and/or incredible, especially when he was the only witness whom his attorney called

to testify about the incident, to prove his case. The jury also had sufficient rationale to conclude that Plaintiff presented no evidence that any other device, if supplied, like the prop opposing counsel placed in the courtroom, could have been used under the circumstances and would have prevented this occurrence, and that he, therefore, did not establish that Defendant violated the law.

Although it should not have had to, the jury also determined that Plaintiff controlled the entire process which he claims proximately caused the alleged accident and correctly concluded that he was the sole proximate cause of this event. Plaintiff's testimony (which Daniel Paine confirmed), alone was a sufficient basis upon which the jury could have concluded and apparently did conclude that Bonczar did not properly set up, position or inspect the device's stability at the critical time and /or that the manner in which he shifted his body and released his hands as he started to descend caused him to lose balance and fall.

In short, the jury could have reasonably believed and did, in fact, believe that the subject ladder was a proper safety device under the statute and that Plaintiff alone was responsible for losing his balance, releasing his hands, missing a step, and falling to the ground. Under these circumstances, Plaintiff provided no basis whatsoever for the trial court to have second-guessed the jury in functions which are uniquely and solely within its domain and no grounds upon which the court should have set aside the verdict. For all of these reasons, this Court should affirm the trial court's

decision to deny Plaintiff's motion for a directed verdict.

## II

## THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT IN THE INTERESTS OF JUSTICE[4]

In an alternate attack on the reasonable, rational and well-grounded jury verdict, Plaintiff's attorney levels a litany of accusations against his opponent, none of which supported a setting aside of the verdict and none of which justifies the relief he now requests. In his motion and to a certain degree herein, Plaintiff claims that defense counsel committed misconduct that rises to the level of ethical/disciplinary violations and without any proof whatsoever, posits that those acts tainted the proceedings, robbed him of a fair trial, and cost him a favorable verdict.

While simultaneously claiming that Defendant has the burden of affirmatively disproving the substantive allegations, Plaintiff asserts that counsel may not zealously defend her client and dispute his account of the relevant events and Defendant's liability for the occurrence. Plaintiff's counsel excoriates defense counsel for legitimately attempting to offer documentary and testimonial evidence and get answers from which the jury could have reasonably concluded that David Bonczar was solely responsible for the alleged accident. In denying Defendant's right to contest liability, expose Plaintiff's lack of credibility, and explore Bonczar's

[4] This section addresses the accusations that at certain points in the trial - which Plaintiff references in his Brief – defense counsel acted improperly. To the extent this section contains no citations to the Record, those references are contained in Plaintiff's, Brief.

acts and omissions which were solely responsible for his alleged accident, opposing counsel ignores all rules and customs of trial practice, not to mention the trial court's role in the entire process. His insistence that defense counsel acted improperly by addressing the elements of proof, challenging the legal sufficiency of the evidence both in cross-examination and in summation, testing Bonczar's memory and exposing his lack of credibility, and addressing the lower court's evidentiary rulings both in side bars and on the record outside the jury's presence in order to preserve that record is, therefore, unfounded at best and outrageous at worst. Finally, Plaintiff's insistence that counsel's supposed misconduct taken together over the course of the trial somehow influenced the jury to find that Defendant did not violate the Labor Law and that Bonczar was the sole proximate cause of this event is simply without basis in reality and patently ludicrous.

Defense counsel implored the jury to utilize common sense in determining whether the accident could have occurred as Plaintiff testified given the size of the cash room and the presence of fixtures therein, Bonczar's height and weight, the ceiling's height, where and how Plaintiff was standing on the ladder, and the purported timing of the events. She discussed the so-called "safer" devices which Plaintiff displayed at trial or about which other of Plaintiff's witnesses testified and commented on their irrelevance given the factual scenario presented herein. Defense counsel reminded the jury that when Plaintiff's counsel first demonstrated his own

manlift without locking it in place, he stumbled, reaffirming Daniel Paine's testimony that the person using any device must secure it and otherwise use it properly. She also referred to photographs which Plaintiff had previously shown the jury ... depictions of areas *other than* the room in which Bonczar worked, all with higher ceilings, and legitimately questioned why Plaintiff's counsel did not display the relevant location. When His Honor sustained Plaintiff's counsel's objection to her drawing a picture of the actual room in which Bonczar was working, the attorney told the jurors that they could generate a drawing on their own, and opposing counsel did not object.

In the summation to which Plaintiff's counsel devotes so much attention, the defense attorney properly outlined Plaintiff' burden of proving that the subject ladder was not a proper device and that Defendant's failure to provide a proper device was the proximate cause of the alleged occurrence, and she pointed out that the law requires "proper" protection, not "fall" protection as Mr. Paine testified. Defense counsel appropriately highlighted that which Bonczar could not remember about the relevant events and the significant inconsistencies in his testimony She also properly compared Plaintiff's and Defendan's experts and commented on their testimony (and in particular, Daniel Paine's consistent statements that the subject was a "proper" device under the Labor Law if positioned and used properly), and the relative depth of their experience, knowledge and involvement in the case. In

typical fashion for a seasoned trial attorney, defense counsel summarized the trial testimony as she remembered it, read certain portions verbatim, and told the jurors that neither attorney's recollection matters because the transcripts are available for their review. When Ms. Altshiler referenced Defendant's corporate status, she was quoting the wholly irrelevant and intentionally prejudicial remarks which Plaintiff counsel had made in his opening statement, to wit, that AMC had secured a $2+ million contract to renovate the site and owns 350 theaters nationwide. She did so because Plaintiff's counsel's remarks about Defendant have "nothing to do with anything," and suggested that the only reason he made them was to prejudice the jury against a moneyed party in the hopes of garnering a verdict in his client's favor.

In the *Cherry Creek Nat. Bank v Fidelity & Cas. Co. of NY,* 207 AD 787 (4th Dept. 1924) case, which the Fourth Department characterized as a "close" one plaintiff's counsel told the jury about defendant's bank's payment for multiple insurance policies, and the Court admonished him not to do so again. In his summation, the attorney made accusations so unsubstantiated that the trial judge characterized them as "fantastic," "ridiculous" and "silly," and he instructed the jury to disregard them. At another point, the same attorney referred to the defendant-respondents as "mighty corporations," a phrase the Court termed "directly prejudicial" and uttered "for the purpose of prejudicing the jury". Based upon the frequency of the offending attorney's such comments in front of the jury, the trial

court concluded that they "cannot be deemed inadvertent or harmless".

In *Doody v Gottshall,* 67 A.D.3d 1347, 1348-1349 (4th Dept. 2009), the Fourth Department upheld the ordering of a new trial on damages "in the interest of justice" because defendant-respondents' attorney failed to abide by the court's rulings, made inflammatory remarks concerning plaintiff-appellant's counsel and expert witnesses, repeatedly expressed his personal opinions regarding the cause and severity of the alleged injuries, and made arguments to the jury on summation that were not supported by the evidence, all of which deprived plaintiff-appellant of a fair trial.

In *Johnson v Lazarowitz ;* 4 AD3d 334 (2d Dept. 2004), the Second Department recognized that the issue of causation which was at "the heart of (the) case" was a "close" one. The Court held that a new trial on the issue of damages was warranted based on Plaintiff-Appellants repeated misconduct and "vituperative remarks made ... for the sole purpose of inducing the jury to decide this case on passion rather than on the basis of the evidence." The Court pointed specifically to claims for relief which were not disclosed in the bill of particulars and his "deliberate" reference to the existence of the Defendant-Respondents' liability insurance coverage.

Defense counsel appropriately characterized some of Plaintiff's immaterial evidence and prejudicial comments as "noise" aimed at "distracting" the jurors from the dispositive issues the Court would instruct them to decide. Her singular remark

that she would get through her closing "with some hiccups" was an innocuous reference to the number of times Plaintiff" had interposed objections and requested sidebar conferences. Most of the discussion about defense counsel's closing argument was held outside the presence of the jury, as was her complaints about the fairness of certain rulings, and therefore, they could not have had any effect on its consideration of the evidence, deliberations thereon, or its ultimate decision.

At the trial level, Plaintiff's counsel did not identify any "inflammatory," "vituperative," "fantastic," "ridiculous" or "silly," remarks that defense counsel made at trial or anything she did which was even remotely designed to "induce the jury to decide the case on passion" or that influenced the verdict in a "close" case toward Defendant. Contrary to Plaintiff's characterizations, defense counsel did not assert personal knowledge of any fact(s) or personal opinions as to any witness' credibility, she did not state or allude to irrelevant matters with the intent to degrade opposing counsel or the Court, and she did not engage in undignified or discourteous conduct, particularly in front of the jury, or to any degree which could have prejudiced or affected the verdict.

The trial judge - not Plaintiff's counsel - determines the propriety of cross-examination, opening statements and summation, and the relevance, materiality, probative nature and admissibility of the evidence by ruling on objections timely made. To the extent His Honor sustained his objections, Plaintiff-Appellants

counsel got precisely the relief he sought, and the jury did not get to consider certain evidence which opposing counsel believed was favorable to the defense. It is important to note that Plaintiff's counsel never asked for a curative instruction with regard to anything that defense counsel said or did at trial, a clear indication that at the time, he did not believe that anything was untoward, out-of-bounds or prejudicial. Moreover, the mere fact that the Court sustained many of Plaintiff's counsel's objections is certainly not probative that the defense attorney committed "misconduct," much less acted in a manner which thwarted a fair trial.

In short, Plaintiff's counsel tendered and is now urging the utterly indefensible position that any time an attorney zealously represents her client, tries but is unsuccessful in presenting evidence, disagrees with the Judge's ruling(s), or seeks to create a record for potential appeal (whether within or without the jury's presence), the other side is unfairly prejudiced and is entitled to a verdict in its favor. Certainly, none of the cases which he cites stands for that proposition or militates in favor of the conclusion that defense counsel's statements, questions or conduct during the trial had any effect whatsoever on the jury's verdict in favor of Defendant-Respondent.

The lower court judge reviewed the record of the trial over which he presided including its trial notes and portions of the stenographic record, and duly deliberated on the question of whether defense counsel's conduct rose to the level where it "wrongly deprived Plaintiff of a fair trial". While His Honor criticized

Defendant's trial attorney, the court below recognized "its mandate to give great deference to the trial jury, and only to upset a jury verdict on the basis of attorney misconduct if it actually deprived the Plaintiff of a fair trial". R.12, citing *Doody*, *supra*. The court below correctly stated that "the determinative question" is whether defense counsel's conduct caused the jury to render its decision based on passion rather than proof." R. 12-13, citing *Johnson, supra.* The court stated that "it bears noting that a great deal of defense counsel's objectionable conduct took place outside the earshot of the jury during sidebar conferences" or "otherwise outside the presence of the jury," the court having "directed the jurors back to the jury room many times". His Honor correctly concluded that "there is no definitive indication that the jury was improperly influenced by counsel's inappropriate conduct" and that "it is important to note that the "procedural step" (of excusing the jury, when necessary), was an adequate safeguard to the harmful error which might have (otherwise) occurred".

## CONCLUSION

For all the foregoing reasons, Defendant respectfully submits that Plaintiff did not set forth any basis upon which the court below could have either directed a verdict in his favor or set aside the verdict in favor of a new trial. This Court should therefore affirm the lower court's decision which denied Plaintiff's motions for a directed verdict and to set aside the verdict, affirm the Judgment rendered below in Defendant's favor, deny this appeal in its entirety, and let the jury verdict stand.

Dated: May 21, 2020
East Meadow, New York

Russo & Toner, LLP

Josh H. Kardisch, Of Counsel
Attorneys for Defendant-Respondent
*American Multi-Cinema, Inc, d/b/a, AMC Theatres Webster 12, as Successor in Interest to Loews Boulevard Cinemas, Inc., f/k/a Loew's Boulevard Corp and/or Loews Theater Management Corp.*
33 Whitehall Street, 16th Floor
New York, New York 10004
Tel.: 212-482-0001
Email: jkardisch@russotoner.com

## PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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