To be Argued by:
JAMES J. NAVAGH
(Time Requested: 30 Minutes)

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Appellate Division–Fourth Department Docket Nos. CA 19-01402
and CA 19-01403

Court of Appeals

of the

State of New York

JAMES HEALY,

Plaintiff-Respondent,

– against –

EST DOWNTOWN, LLC c/o First Amherst Development Group,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

LAW OFFICES OF JOHN WALLACE
James J. Navagh, Esq.
Attorneys for Defendant-Appellant
60 Lakefront Boulevard, Suite 102
Buffalo, New York 14202
Tel.: (716) 855-5710
Fax: (877) 837-0698
jnavagh@travelers.com

Section 500.1 (f) Disclosure Statement

This Appellate Brief is filed on behalf of defendant-appellant EST Downtown, LLC. The said business entity does not have any parents or subsidiaries. It is affiliated through common ownership with First Amherst Development Group, LLC.

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PRELIMINARY STATEMENT

This brief is submitted by defendant-appellant EST Downtown, LLC c/o First Amherst ("defendant"). This matter pertains to defendant's appeal as of right from the 3-2 Fourth Department Appellate Division order affirming summary judgment in favor of plaintiff-respondent James Healy ("plaintiff") as to his Labor Law § 240 (1) cause of action and affirming the denial of defendant's summary judgment motion requesting dismissal of plaintiff's Labor Law § 240 cause of action.

QUESTIONS PRESENTED

Plaintiff James Healy, a maintenance worker employed by a property management company, fell from a ladder while removing a bird's nest from the overhead rain gutter of a retail and residential complex owned by defendant EST Downtown, LLC c/o First Amherst Development Group. Plaintiff's complaint asserts a cause of action under Labor Law § 240 (1). The nest was in a hole in the bottom of the gutter. The top of the gutter had been lined with a membrane to prevent water from leaking through the hole. It is undisputed that the gutter in question was completely functional and not leaking. There is conflicting evidence as to whether plaintiff was only removing the nest from the hole or whether his work also included patching the hole.

1. Is removing a bird's nest from a hole in a functional gutter in a non-construction, non-renovation context a protected activity under Labor Law § 240 (1)?

The trial court answered this question in the AFFIRMATIVE.

2. Is a property owner liable under Labor Law § 240 (1) for an injury to a worker who allegedly intended to perform work that was not contracted for by the owner and not assigned to him by his employer?

The trial court answered this question in the AFFIRMATIVE.

3. Does Labor Law § 240 (1) apply where plaintiff's injury was caused by a risk not related to an elevation hazard?

The trial court answered this question in the AFFIRMATIVE.

4. Does Labor Law § 240 (1) apply where plaintiff fell off a functional, appropriate, non-defective ladder because he was startled by a bird?

The trial court answered this question in the AFFIRMATIVE.

STATEMENT OF JURISDICTION

Although the order at issue herein granted judgment to plaintiff on liability in this personal injury action, the order also finally determined the action because the parties entered into a stipulation regarding damages. Therefore there will be no damages trial. This Court conducted a jurisdictional inquiry and determined that the order appealed from is a final order from an Appellate Division decision which

had two justices dissenting and therefore this Court has jurisdiction to hear this appeal on the merits pursuant to CPLR § 5601.

The questions presented, as stated above, were explicitly raised in defendant's motion papers submitted at the trial level. Whether removing a bird's nest from a hole in a functional rain gutter in a non-construction, non-renovation context is a protected activity under Labor Law § 240 (1) was raised in defendant's motion papers at R. 47, 48, 467, and 468. Whether a property owner is liable under Labor Law § 240 (1) for an injury to a worker who allegedly intended to perform work that was not contracted for by the owner and not assigned to him by his employer was raised in defendant's motion papers at R. 48, 49, and 468. Whether Labor Law § 240 (1) applies where plaintiff's injury was caused by a risk not related to an elevation hazard was raised in defendant's motion papers at R. 49, 50 and 471. Whether Labor Law § 240 (1) applies where plaintiff fell off a functional, appropriate, non-defective ladder because he was startled by a bird was raised in defendant's motion papers at R. 49, 468, and 471.

STATEMENT OF FACTS

Plaintiff allegedly fell from a ladder while in the course of his employment for a property management company (R. 94-96, and 99). He was attempting to remove a bird's nest from a hole in an overhead gutter (which the trial court found to be a "repair" and the Fourth Department majority found to be a covered

"cleaning" activity) above a door on the outside of an occupied mixed-use commercial building owned by defendant (R. 349-50). To accomplish this task, plaintiff used an A-frame stepladder, rubber gloves, safety glasses and an old shopping bag (to dispose of the nest) (R. 145-46). All four legs of the stepladder were placed on a dry concrete surface. (R. 212-13). Plaintiff testified that the ladder was "in good operating order," was not broken or defective, and functioned as he intended it to function at the time of the incident (R. 213). Plaintiff testified that he fell because a bird flew out of the nest and startled him causing his body to move, which then caused the ladder to move (R. 144-49, 349). Plaintiff fell off the stepladder, but the stepladder did not fall (R. 149). He testified that he fell approximately five feet (R. 143).

The complaint alleged other causes of action in addition to Labor Law § 240. At the close of discovery both parties moved for summary judgment. The trial court granted summary judgment on the Labor Law § 240 (1) cause of action in plaintiff's favor, denied defendant's motion to dismiss the 240 cause of action, and granted defendant's motion to dismiss the remaining causes of action in the complaint. Plaintiff did not appeal from the part of the order dismissing the other causes of action and the time to do so has expired. Therefore plaintiff's Labor Law § 240 (1) claim is the only cause of action remaining.

ARGUMENT

The activities covered by the extraordinary protections of Labor Law § 240 (1) are "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." "The language of Labor Law § 240 (1) must not be strained to accomplish what the Legislature did not intend" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 292 [2003]; [citations and internal quotation marks omitted]). The question herein is whether the language of section 240 ought to be strained to the extent of affording the extraordinary protections of this statute to a maintenance worker who falls while removing a bird's nest from a gutter in a non-construction, non-renovation context.

POINT I

PLAINTIFF WAS NOT PERFORMING THE TYPE OF CLEANING PROTECTED BY LABOR LAW § 240 (1)

Labor Law § 240 (1) provides:

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

"Cleaning" is one of the protected activities specifically identified in the text of Labor Law § 240 (1). However not all cleaning activities are covered by the

extraordinary protections provided by this statute. Since 2013 when this Court issued its decision in *Soto v J. Crew Inc*., 21 NY3d 562, that case has provided the accepted factors for determining whether an activity is the type of cleaning protected by Labor Law § 240.

Removing debris from overhead rain gutters always involves an elevation risk. Nevertheless, before *Soto*, every reported case on this issue, where the plaintiff's only activity was removing debris from a gutter, held that removing debris from an overhead rain gutter was not protected by Labor Law § 240 (1). For example in *Berardi v Coney Island Ave. Realty*, LLC, 31 AD3d 590 (2d Dept 2006) the Second Department affirmed summary judgment for defendant on the basis that cleaning leaves from gutters of a building was routine cleaning in a non-construction, non-renovation context, and thus outside scope of Labor Law § 240. In *Beavers v Hanafin*, 88 AD2d 683, 683–84 (3d Dept 1982) the Third Department held that section 240 did not apply to the plaintiff who was injured while cleaning the gutters of a building because he was not performing cleaning "incidental to building construction, demolition and repair work" (citations omitted). *See also Chavez v Katonah Mgmt. Grp., Co.,* 305 AD2d 358, 359 (2d Dept 2003); *Perez v Sapra*, 23 Misc. 3d 1137(A), 889 N.Y.S.2d 507 (Civ. Ct. 2009); *and Pascarell v Klubenspies*, No. 7034/04, 2007 WL 6001212 (N.Y. Sup. Ct. Jan. 30, 2007).

In *Soto*, this Court stated:

> [A]n activity cannot be characterized as "cleaning" under the statute, if the task: (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project. Whether the activity is "cleaning" is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other. (21 NY3d 562, 568–69).

In *Soto* this Court applied these factors and determined that the plaintiff was not engaged in the type of cleaning meant by the Legislature to be covered by Labor Law § 240. The plaintiff in *Soto*, an employee of a commercial cleaning company hired to provide janitorial services for a retail store, was injured when he fell from a four-foot-tall ladder while dusting a six-foot-high display shelf. In applying the above factors to this fact situation this Court concluded that:

> The dusting of a six-foot-high display shelf is the type of routine maintenance that occurs frequently in a retail store. It did not require specialized equipment or knowledge and could be accomplished by a single custodial worker using tools commonly found in a domestic setting. Further, the elevation-related risks involved were comparable to those encountered by homeowners during ordinary household cleaning and the task was unrelated to a construction, renovation, painting, alteration or repair project. (21 NY3d 562, 569).

The only case in which a court addressed the issue herein, whether 240 applies to cleaning debris from gutters, since the *Soto* decision was issued, is *Hull v Fieldpoint Cmty. Ass'n, Inc*., 110 AD3d 961 (2d Dept 2013). The Second Department in *Hull* cites the *Soto* decision as authority for its conclusion that Labor Law § 240 "does not apply to work that is incidental to regular maintenance, such as clearing gutters of debris" (110 AD3d 961, 962).

In the present case the trial court and the Fourth Department majority departed from the above precedent and ruled for the first time that the simple single task of removing debris (in this case a bird's nest) from a gutter in a non-construction, non-renovation context is an activity protected by section 240.

The Fourth Department majority found 240 liability despite conceding that two of the four *Soto* factors (the second and fourth) favor the type of cleaning not covered by the statute. The first *Soto* factor is whether the job "is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises." If so the activity is more likely to be not covered by section 240. The Fourth Department majority ruled that plaintiff's work herein was not routine and was not the type of work that occurs on a relatively frequent and recurring basis. Therefore the majority concluded that this factor favored the type of cleaning covered by section 240.

The *Soto* decision refers to "the type of job" (21 NY3d at 568) that occurs on a recurring basis. The decision does not say that the specific job plaintiff was performing must have occurred before on a regular basis ("dusting of a six-foot-high display shelf is *the type of* routine maintenance that occurs frequently in a retail store;" 21 NY3d at 569, emphasis added).

Removing debris of any kind from a gutter is the type of job that occurs on a recurring basis. Removing debris from a gutter is a regularly recurring task for owners of commercial and residential properties. Gutters tend to accumulate debris over time which interferes with their function. The type of debris (whether leaves, a bird's nest, or some other type of debris) should have no bearing on whether or not the work is covered by section 240. A worker injured while removing leaves from a gutter should be treated no differently under section 240 than a worker injured while removing a bird's nest, or some other type of debris, from the same gutter. "[T]he clearing of gutters of extraneous material—whether leaves, other debris or, in this case, a bird's nest—in order to keep the storefronts thereunder clean and safe is the type of job that occurs on a relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises." *Healy v EST Downtown, LLC*, 191 AD3d 1274 (dissenting opinion) (citations, ellipses, and internal quotation marks omitted). Therefore the first Soto

factor favors the conclusion that plaintiff was not performing the type of cleaning covered by Labor Law § 240 at the time of the incident.

The second *Soto* factor is whether the task requires specialized equipment or expertise, or the unusual deployment of labor. If so, then the task is likely to be covered by section 240. In the present case plaintiff required a stepladder and a bag to carry the nest after removing it. (R. 144-46). The Fourth Department majority properly ruled that this factor did not apply. Plaintiff's work did not require specialized equipment, etc. Therefore the second factor favors the conclusion that plaintiff was not performing the type of cleaning covered by Labor Law § 240 at the time of the incident.

The third factor is whether the task generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning. If so, then the task is likely to be routine maintenance not covered by the statute. Plaintiff testified that he fell five feet (from the fifth rung of the stepladder) (R. 143). The Fourth Department ruled that this factor favored the type of cleaning protected by section 240 (plaintiff's work "necessarily involved elevation-related risks that are not generally associated with typical household cleaning," 191 AD3d 1274). It is interesting that five months later, in a similar case addressing whether a worker was entitled to the extraordinary protections of Labor Law § 240, the Fourth Department came to the opposite conclusion regarding a plaintiff who fell

the same distance as plaintiff herein, five feet from an eight foot stepladder ("plaintiff worked at an elevation of approximately five feet, a height that presents an elevation-related risk comparable to that encountered during ordinary domestic or household cleaning," (*Fuhlbruck v 3170 Delaware, LLC,* 196 AD3d 1090, 1092 [4th Dept 2021]). Plaintiff in *Soto* fell four feet. This Court ruled that "the elevation-related risks involved [in *Soto*] were comparable to those encountered by homeowners during ordinary household cleaning," 21 NY3d 562, 569.

In *Dahar v Holland Ladder & Mfg. Co*., 18 NY3d 521 (2012) this Court declined to extend this statute so far beyond the purposes it was designed to serve so that "[e]very bookstore employee who climbs a ladder to dust off a bookshelf; every maintenance worker who climbs to a height to clean a light fixture . . . would become potential Labor Law § 240(1) plaintiffs" 18 NY3d 521, 526. It would not be considered unusual to stand on the fifth rung of a step ladder to clean a bookshelf or a light fixture. As the Fourth Department dissent stated herein, "plaintiff's task of standing on a stepladder approximately five feet above the ground in order to remove extraneous material from a gutter located slightly below a hard canopy over the entrance to a retail storefront presents a scenario analogous to the bookstore and light fixture examples cited [by this Court] in *Dahar*, [18 NY3d 521, 523] and is akin to the injured janitorial worker's task in *Soto* of

standing on a four-foot-tall ladder in order to dust a six-foot-high display shelf," 191 AD3d 1274.

A five-foot elevation is comparable to those encountered by homeowners during ordinary household cleaning. Therefore the third factor favors the conclusion that plaintiff's job at the time of the accident was routine maintenance not covered by 240.

The fourth factor is whether the job is unrelated to any ongoing construction, renovation, painting, alteration, or repair project. The Fourth Department majority properly concluded that plaintiff's work at the time of the accident was not related to an ongoing construction, renovation, painting, alteration, or repair project. Rather plaintiff's work at the time of the accident was the result of a tenant's complaint about bird droppings in front of the tenant's door (R. 348). There were no ongoing projects at the accident location of the type listed in the statute at the time of the accident.

Therefore all four Soto factors favor the conclusion that plaintiff's work was not covered by section 240. Therefore plaintiff's activity at the time of the accident was not the type of cleaning that is covered by the extraordinary protections of Labor Law § 240.

POINT II

PLAINTIFF'S WORK WAS NOT COVERED UNDER ANY OF THE OTHER LABOR LAW § 240 (1) ENUMERATED ACTIVITIES

Plaintiff, a maintenance worker employed by a property management company, was not engaged in erecting demolishing, painting, or pointing a building or structure. As discussed above he was not performing the type of cleaning that is covered by Labor Law § 240. He was not altering the building ("'altering' within the meaning of Labor Law § 240(1) requires making a *significant* physical change to the configuration or composition of the building or structure," *Joblon v Solow*, 91 NY2d 457, 465 [1998]).

Furthermore plaintiff was not performing a repair at the time of the incident. Removing a bird's nest from a gutter is not a repair. Plaintiff testified, contrary to much of the evidence (discussed below), that he intended to patch the hole in the gutter after removing the nest.

Patching a hole in a functional gutter is not a repair covered by Labor Law § 240. Even with a hole in the bottom, the gutter herein was completely functional. One cannot repair something that is not broken (*Smith v Shell Oil Co.,* 85 NY2d 1000, 1002 [1995] "An illuminated sign with a burnt-out lightbulb is not broken, and does not need repair"). The gutter was functional because it had been lined

with a rubber membrane so that water would not leak through a hole in the bottom of the gutter (R. 115, 123-25, 126-27).

In *Azad v 270 5th Realty Corp*., 46 AD3d 728 (2d Dept 2007), lv denied 10 NY3d 706 (2008), the defendant building owner hired the plaintiff to patch holes in a gutter pipe which a small animal had used to enter the building. The gutter was functional, however the holes needed to be patched to prevent the animal from entering the building. Using screws the plaintiff placed metal sheets over the two six-inch by six-inch holes, sealed and then painted them, then he fell after completing this work while descending the ladder. The defendant's motion for summary judgment dismissing § 240 was denied. The Appellate Division reversed and dismissed the 240 claim, stating:

> The task did not involve major structural work, and [plaintiff's] attachment of metal sheets over the holes in the gutter pipe was in the nature of component replacement. Moreover, [plaintiff] was not retained to repair the gutter pipe because it was inoperable, but because an animal had used the holes in the pipe, which had developed in the course of normal wear and tear, to enter the building. (Citations omitted.)

There is conflicting evidence here as to whether or not plaintiff intended to patch the hole in the gutter, a small hole that did not cause water to leak, after removing the bird's nest. Plaintiff's assignment originated as a work order from a tenant complaining about bird excrement from the nest (R. 348). This task was addressed in an email from plaintiff's supervisor that instructed him to "get rid of

bird's nest" (R. 269, 352). Plaintiff's supervisor testified that his maintenance workers have never patched holes in gutters to his knowledge (R. 281) and he does not even stock the sheet metal necessary to patch such a hole (R. 282). His supervisor testified that plaintiff was not supposed to patch the hole in the gutter (R. 269). Benjamin Obletz, defendant's principle, submitted an affidavit stating that he did not retain or contract with plaintiff or his employer to patch the hole in the gutter (R. 355-57). Plaintiff signed off on the work order, indicating that his work was completed (R. 348), after the nest was removed, in spite of the fact that the hole was never patched. Also plaintiff failed to state in his hand-written accident report that his job included patching the hole (R. 349-51). The only evidence supporting plaintiff's position is his uncorroborated testimony. Nevertheless even crediting plaintiff's testimony that he was patching the hole, it is clear that such activity is indistinguishable from the activity in *Azad* and would not be covered by section 240.

Furthermore plaintiff was not hired to patch the hole in the gutter. Labor Law § 240 (1) confers liability upon owners who "contract for" specific types of work. Benjamin N. Obletz, the owner of defendant EST, stated in his affidavit sworn to March 26, 2019 that "EST never hired, retained, or contracted with plaintiff or with [plaintiff's employer] to repair the gutter where the bird's nest was located" (R. 355, paragraph 7).

A property owner does not incur the drastic remedy of strict liability under Labor Law § 240 for work performed gratuitously as a volunteer (*Whelen v Warwick Valley Civic & Soc. Club,* 47 NY2d 970, 971 [1979] "[t]o come within the special class for whose benefit absolute liability is imposed . . . under section 240 of the Labor Law, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent;" *Pelonero v Sturm Roofing, LLC*, 175 AD3d 1062, 1063 [4th Dept 2019]). A property owner cannot protect a worker from an elevation related risk if the worker takes it upon himself to perform work not requested by the property owner. Absolute liability cannot be imposed against a property owner as a result of work that the property owner never requested or contracted for.

Point III

LABOR LAW § 240 (1) DOES NOT APPLY WHERE PLAINTIFF'S INJURY DID NOT RESULT FROM AN ELEVATION-RELATED HAZARD

Liability under § 240 (1) requires a foreseeable risk of injury from an elevation-related hazard (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]). Plaintiff fell, not because of an absent or defective safety device, but rather because he was startled by a bird. The risk of being startled by a bird is not a risk intended to be addressed by an enumerated safety device. It is the type of usual and

ordinary risk to which the extraordinary protections of Labor Law § 240 (1) do not extend. A worker injured as a result of such a risk has recourse through Labor Law §§ 200 and 241 (6) and common law negligence principles.

Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240 liability exists. In *Cohen v Mem'l Sloan-Kettering Cancer Ctr*., 11 NY3d 823 (2008) plaintiff fell to a concrete floor while stepping down from the second rung of a ladder (*Cohen v Mem'l Sloan-Kettering Cancer Ctr.,* 50 AD3d 227, 229). He could not clear the first step due to protruding pipes from a nearby unfinished wall. This Court reversed the Appellate Division's order and dismissed plaintiff's Labor Law § 240 (1) claim, stating:

> [T]he presence of two unconnected pipes protruding from a wall was not the risk which brought about the need for the ladder in the first instance but was one of the usual and ordinary dangers at a construction site to which the extraordinary protections of Labor Law § 240(1) do not extend, (citations, internal quotation marks and brackets omitted) (id.).

In *Melber v 6333 Main St., Inc*., 91 NY2d 759 (1998) the plaintiff had to wear 42-inch stilts to perform dry wall work. The plaintiff tripped on electrical conduit protruding from an unfinished floor and fell to the ground. This Court ruled that this injury was not covered by Labor Law § 240 (1), stating:

> The protective equipment envisioned by the statute is simply not designed to avert the hazard plaintiff encountered here. Thus, we agree with the Appellate Division dissent that the proper erection,

> construction, placement or operation of one or more devices of the sort listed in section 240(1) would not have prevented plaintiff's injuries. (Internal quotation marks omitted) (91 NY2d at 763).

Plaintiff herein lost his balance because he was startled by a bird. A ladder is not intended to protect against the risk of being startled by a bird and falling. The bird was a separate hazard unrelated to the danger that brought about the need for the ladder. "[T]he statute is simply not designed to avert the hazard plaintiff encountered here" (91 NY2d at 763).

Point IV

LABOR LAW § 240 (1) DOES NOT APPLY WHERE PLAINTIFF FELL OFF A NON-DEFECTIVE LADDER

"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," *Blake v Neighborhood Hous. Servs. of New York City, Inc.,* 1 NY3d 280, 292 (2003); *see also Nieves v Five Boro Air Conditioning & Refrigeration Corp*., 93 NY2d 914, 916 (1999) ("[t]here was no evidence of any defective condition of the ladder or instability in its placement. Hence, the risk to plaintiff was not the type of extraordinary peril section 240(1) was designed to prevent") 93 NY2d 914, 916.

Plaintiff herein was using an appropriate A-frame stepladder for the job (R. 143). All four legs of the ladder were placed on a dry concrete surface. (R. 212-

13). The ladder was not defective and performed as intended (R. 213). The bird startled plaintiff and caused him to shift his body which caused him to fall (R. 148-49). The ladder remained in an upright position (R. 149).

The evidence establishes that plaintiff was provided with a proper safety device and that plaintiff fell because he was startled by a bird and lost his balance. Plaintiff's fall was not caused by an absent or defective safety device but rather by a risk wholly unrelated to the need for the ladder. There is no violation of Labor Law § 240 (1), and no 240 liability, where the worker is provided with a proper safety device.

CONCLUSION

The record herein affirmatively establishes that plaintiff was not engaged in any activity covered by Labor Law § 240 (1) at the time of his injury. Removing a bird's nest from a gutter over a door is not the type of activity intended to be covered by this absolute liability statute. The language of section 240 (1) should not be strained to the extent of affording the extraordinary protections of this statute to a maintenance worker removing a bird's nest from a gutter in a non-construction, non-renovation context.

This Court cautioned in *Dahar* that it has "not extended the statute's coverage [of 'cleaning'] to every activity that might fit within its literal terms" (18 NY3d 521, 526). This Court stated in *Soto* that the legislature did not intend Labor

Law § 240 (1) "to cover all cleaning that occurs in a commercial setting, no matter how mundane" (21 NY3d 562, 568).

As discussed above, numerous Appellate Division cases, before and after *Soto*, ruled that the single act of removing debris from an overhead rain gutter was not an activity intended by the Legislature to be covered by section 240 (1). Those cases were correctly decided and should not be overturned. The reasoning of the Fourth Department dissenting opinion is consistent with those cases and compelling.

If patching a small hole in a functional gutter were a repair or alteration covered by the statute, which it is not, then plaintiff's motion should have been denied because there is a question of fact as to whether or not his work included patching the hole. Plaintiff's motion for summary judgment on his Labor Law § 240 cause of action should have been denied, and defendant's motion requesting dismissal of the 240 cause of action should have been granted and the complaint should have been dismissed.

Dated: Buffalo, New York
December 28, 2021

James J. Navagh, Esq.
LAW OFFICES OF JOHN WALLACE
Attorneys for Defendant-Appellant
60 Lakefront Boulevard, Suite 102
Buffalo, New York 14202
Tel. (716) 855-5718

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using WordPerfect.

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James J. Navagh, Esq.
LAW OFFICES OF JOHN WALLACE
Attorneys for Defendant-Appellant
60 Lakefront Boulevard, Suite 102
Buffalo, New York 14202
Tel. (716) 855-5718