ATTORNEYS:
JOHN NED LIPSITZ
MICHAEL A. PONTERIO
JOHN P. COMERFORD*
MATHEW J. MORTON
JOSEPH T. KREMER
ANNE E. JOYNT
DENNIS P. HARLOW
ZACHARY J. WOODS
MARY M. COMERFORD
GRACE M. GANNON
RYAN D. LEDEBUR
JILLIAN M. PONTERIO
SEAN M. ESFORD
KATHERINE L. DIBBLE
ERIC R. WINNERT

*Also admitted in Massachusetts

Lipsitz, Ponterio & Comerford LLC
Mesothelioma & Catastrophic Injury Attorneys

IN THE FIGHT WITH YOU.

424 Main Street, Suite 1500
Buffalo, New York 14202
Phone: (716) 849-0701
Fax: (716) 849-0708
Toll Free: (866) 238-1452

www.lipsitzponterio.com
lp@lipsitzponterio.com

OF COUNSEL:
HENRY D. GARTNER

ROCHESTER OFFICE:
Phone: (585) 286-9787

February 10, 2023

State of New York
Court of Appeals
Lisa LeCours, Esq.
Chief Clerk and Legal Counsel to the Court
20 Eagle Street
Albany, New York 12207-1095

Re: Stoneham v. Barsuk
APL-2023-00001

Dear Ms. LeCours:

This office represents the plaintiffs-appellants in this matter. Please accept this letter submission pursuant to Rule 500.11 of the Court of Appeals' Rules of Practice and pursuant to the Court's letter of January 20, 2023.

PRELIMINARY STATEMENT

Mark Stoneham was injured while working beneath a trailer hoisted up by a front-end loader, several feet above his prone body. (Record on Appeal to Court below (hereinafter "R.") at 99-100, ¶¶26-34). The trailer in question is a 35-foot

long, 8 ½ foot-wide multi-ton object, designed to haul heavy industrial equipment. (R. 96 at 10; R. 148, Lines 1-3). At the time of Stoneham's injury, the trailer was inoperable and in need of repair. (R. 239, Line 8 to R. 240, Line 1). Due to the failure of the defendant property owner to furnish proper safety devices, the wheels of the front-end loader rolled backwards, causing the trailer to collapse onto Stoneham, crushing his pelvis. Video surveillance captured the moment of the trailer's collapse, showing the full weight of the object crashing down on the hapless plaintiff. (R. 383 (provided on disk labeled "Docket No. 65")). Had the defendant provided safety blocks for the wheels of the front-end loader, to keep it from rolling back, and jacks to keep the trailer from collapsing, the grievous injuries suffered by the plaintiff would have been prevented. In short, what occurred was a catastrophic injury at an unsafe workplace due to the jerry-rigged use of a piece of construction equipment to keep the force of gravity at bay, which, inevitably, it failed to accomplish.

Stoneham's work occurred in an open-air, unregulated setting, which is exactly the type of workplace the New York State legislature contemplated when enacting the protections of Labor Law §240(1). In his deposition testimony, Stoneham described the place he was injured as a "scrapyard". (R. 231, Line 20).

The work Stoneham was performing was far from routine. In order to accomplish this work, Stoneham was left to use heavy construction equipment—a front-end loader, without adequate safety devices, as mandated by §240(1).

The November 18, 2022 Memorandum and Order of the Fourth Department, granting defendant Barsuk summary judgment, dismissing plaintiffs' Labor Law §240(1) cause of action, should be reversed, and this case should be remanded for further proceedings.

OBJECTION TO RULE 500.11 REVIEW

Plaintiffs-Appellants object to Rule 500.11 review because the appeal does not present a narrow issue of law not of statewide importance, nor does it involve issues of discretion, mixed questions of fact and law, or affirmed findings of fact.

Full briefing and argument would appear both useful and necessary. The majority's November 18, 2022 Memorandum and Order represents a radical departure from the original purpose of the Legislature in promulgating §240(1). The Memorandum and Order amounts to an abrupt break from the jurisprudence the Court of Appeal established over the course of more than a century. Were the Court to affirm the Memorandum and Order, the Court would in effect endorse a restriction

of the scope of the statute, unwarranted by the facts of Stoneham's case. In doing so, the Court would engage in an exercise of judicial activism that is inconsistent with both the legislative intent behind §240(1) and the statute's common law development.

Litigants in §240(1) cases are at a critical juncture, justifying normal course treatment of Stoneham's appeal. Unless the Court provides the lower courts with guidance, they may, like the majority below, further stray from adherence to the original purpose of the statute to the point where "structure" will be viewed as a subset of "building," rather than the other way around, and the protections of the statute will erroneously be restricted to work on buildings at traditional construction sites involving workers in the building trades like ironworkers, carpenters, and plumbers.

If the majority's Memorandum and Order is allowed to stand, workers engaged in making repairs to structures who are injured due to the failure of a defendant to provide adequate devices designed to prevent gravity-related injuries will never (or only in exceptional cases) enjoy the protections of §240(1). Such a result would be at odds with a string of cases decided by this Court beginning in

1909 with Caddy v. Interborough Rapid Transit Co., 195 N.Y. 415 (1909). It would also be at odds with cases decided in recent years by the Second Department (McCoy v. Abigail Kirsch at Tappan Hill, Inc., 99 A.D.3d 13 (2012)) and by the Third Department (Eherts v. Shoprite Supermarkets, Inc., 199 A.D.3d 1270 (2021)).

COMMENTS AND ARGUMENTS ON THE MERITS

In its November 18, 2022 Memorandum and Order in the Stoneham case, the Fourth Department majority erroneously decided two separate but related issues of law. First, it erroneously held that the massive, multi-ton trailer, which plaintiff was in the process of repairing when it collapsed upon him, was not a "structure," as that term has been understood and defined for more than a hundred years by the appellate courts of this State. Second, it erroneously held that, because the repair work that plaintiff was engaged in took place apart from a traditional "construction site," the protections of §240(1) should not apply.

The legal error pervading the majority's Memorandum and Order can be illustrated by analogy to the case of a worker at a building construction site engaged in protected work activity beneath the upper surface of a scaffold erected alongside a building under construction. If the scaffold in this scenario were to collapse due

to inadequate safety measures adopted in its assembly, resulting in crushing injuries to a worker below, there would be no question about the applicability of §240(1). Likewise, in Stoneham's case, where the massive platform composed of the trailer above him collapsed due to the use of a jerry-rigged safety device, the protections of the statute should apply, as well.

In granting summary judgment to the defendant, Supreme Court relied, in part, on its characterization of plaintiff's work at the time of his injury as, "the kind of work" performed "every day on trucks and trailers outside of a construction setting." (R. 12). The majority's Memorandum and Order, however, assumed, for the sake of argument, that Stoneham's work on the trailer at the time of his injury-- the replacement of the air tank-- was "appropriately considered a repair". Stoneham v. Joseph Barsuk, Inc., 210 A.D.3d 1479, 1480 (2022). Furthermore, the dissenting opinion in the court below, issued by the Honorable Justices Winslow and Bannister, drove home the point by explaining that there remain triable issues of fact "whether plaintiff was engaged in routine maintenance –which falls outside of the protections of Labor Law § 240 (1)—or a repair of the flatbed trailer, a protected activity. Id. at 1482 (citations omitted). The dissent further opined, "[h]ere, defendant failed to

establish that the replacement of the air tank was a common occurrence due to normal wear and tear" Id. (citation omitted). Accordingly, the Fourth Department panel, as a whole, did not conclude as a matter of law that Stoneham was engaged in routine maintenance. Thus, the question of "repair vs. routine maintenance" is not before this Court and should be considered, if at all, as an unresolved question of fact to be determined ultimately by a jury. See, e.g., Riccio v. NHT Owners, LLC, 51 A.D.3d 897, 899 (2nd Dept 2008) ("The question of whether a particular activity constitutes a 'repair' or 'routine maintenance' must be determined on a case-by-case basis."); Kostyo v Schmitt & Behling, LLC, 82 AD3d 1575, 1576, 919 N.Y.S.2d 606 [4th Dept 2011]); see, also, dissenting opinion in Stoneham, supra, at 1482 ("'[D]elineating between routine maintenance and repairs is frequently a close, fact-driven issue') (Pieri v B & B Welch Assoc., 74 AD3d 1727, 1728, 904 N.Y.S.2d 595 [4th Dept 2010] [internal quotation marks omitted]). 'That distinction depends upon whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work . . ., and whether the work involved the replacement of components damaged by normal wear and tear'.").

Supreme Court erroneously held, at least implicitly, that, because the trailer under which plaintiff was working was a vehicle, it could not be considered a structure for purposes of §240(1). (R. 12). Supreme Court also erred by disregarding the plain text §240(1). The court found "that the plaintiff was not engaged in 'the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building' within the meaning of Labor Law § 240 (1)." (R. 12). The court simply disregarded and omitted the statutory words "or structure," which follow the word, "building." The majority's November 18, 2022 Memorandum and Order compounded this error in stating that, "any activity must be considered in light of the text of Labor Law § 240 (1) as a whole and the statute's 'central concern [, which] is the dangers that beset workers in the construction industry' (*Dahar*, 18 NY3d at 525)." Stoneham, 210 A.D.3d at 1480.

Undoubtedly, when it comes to "buildings", and especially when it comes to "cleaning," the dangers that beset workers in the construction industry are a central concern of the statute. But, just as certainly, considering the text of the statute and its history, Labor Law § 240 (1) applies with equal force to workers engaged in the repairing and cleaning of "structures," even outside of a traditional construction

setting, unless the activity in question takes place within the confines of a manufacturing operation. To hold otherwise would involve a serious contraction of the reach of the statute. Plaintiffs respectfully submit that, if the defendant seeks to contract the reach of §240(1) merely because it disagrees with the long-established and text-based reading of the statute and its purpose, defendant's complaint would be best addressed to the Legislature, not to the courts.

Neither the Appellate Division nor the Court has ever held that vehicles per se fall outside of the definition of structure for purposes of the application of the statute. Although, that may have been the implicit holding of Supreme Court in the Stoneham case, even the majority's Memorandum and Order declined the invitation to go to such an extreme. Indeed, such a holding would fly in the face of this Court's jurisprudence, beginning with its foundational decision in Caddy v. Interborough Rapid Transit Co., 125 A.D. 681 at 415.

At the Fourth Department, defendant advocated a public policy argument that insisted, by treating the trailer as a structure, the court would open the floodgates to claims involving injuries caused by cars falling off hydraulic lifts onto mechanics or claims involving injuries resulting from roadside replacements of flat tires.

Defendant's public policy argument is absurd because the statute's provisions implicate only those situations where a laborer is not furnished with an appropriate device providing for his proper protection. The mechanic's hydraulic lift is such an appropriate safety device for raising an automobile off the garage floor. Likewise, so is the lift jack used on the roadside to replace a tire. As such, civil recovery for any injuries suffered by hypothetical garage mechanics would typically be governed by ordinary negligence principles, not §240(1).

The Court's decisions in Dahar v. Holland Ladder & Holland Ladder & Mfg. Co., 18 N.Y.3d 521 (2012) and Preston v. APCH, Inc., 34 N.Y.3d 1136 (2020), discussed *infra*, may well place injuries resulting from routine activities in manufacturing facilities outside of the protections of Labor Law § 240 (1), and the reason for doing so may well comport with an understanding of the underlying concerns of the statute. And, even if the same rationale were to be applied to routine activities in the automobile service sector, such as changing the oil in a car or rotating tires, a decision to declare such activities to be beyond the protections afforded by §240(1) would not justify depriving Mark Stoneham of those protections, based on the facts in his case. Justices Winslow and Bannister were correct in stating,

"[a]lthough we are cognizant of the concerns raised by the majority and by the Court of Appeals in *Dahar v. Holland Ladder & Mfg. Co.*, under the unique circumstances of this case, we cannot conclude that plaintiff was not engaged in a protected activity as a matter of law." Stoneham, 210 A.D.3d at 1481 (citation omitted).

It is important initially to note that Caddy, decided in 1909, at a time when the erection of skyscrapers in New York City was in full swing, makes no mention of the dangers that beset workers in the "construction industry." For example, the iconic Flatiron Building in New York City was completed in 1902, has twenty-two stories, and is 285 feet tall. If the "central concern" of the statutory scheme, which embraces work on both "buildings or structures," were the dangers of working on tall buildings, the Legislature could have so declared at the time, and the result favorable to the plaintiff in Caddy would have been much less certain.

The plaintiff in Caddy was injured "while engaged in repairing one of defendant's cars in its shop" in Manhattan. The rail car was "47 feet long, 8 feet six inches wide, and 16 feet high. It was 'jacked up' about six feet above the floor, so that its height overall was about 22 feet." Id. at 417. One of the two principal questions on appeal before the Court was whether the car upon which the plaintiff

was at work was a structure within the purview of the two sections of New York Law (Laws of 1897) which were the forerunners of present-day Labor Law §240(1). The Court's decision in Caddy is the most authoritative, nearly contemporaneous text available concerning the intent of the Legislature; yet nowhere within the several pages of that decision does the Court refer to "the dangers that beset workers in the construction industry" as the statute's "central concern." Indeed, the phrase "construction industry" does not even appear in the decision. The Court's language demonstrates a concern for "dangers to" employees, and not specifically a concern for dangers to construction workers, or those encountered at traditional construction sites.

The Court in Caddy opined that, "the car upon which the plaintiff was at work when injured was a structure." Id. at 423. In amplifying its conclusion that "the word 'structure' is not joined to 'building' and 'house' by the adjective 'other,' but by a simple 'or,' so that the language is 'house, building or structure[.]'" the Court observed that:

> [i]f it had been built of the same shape and dimensions upon wooden posts or stone piers sunk into the ground, and had been intended for a dwelling or a workshop, it would clearly have been a structure. The fact that it

> happens to have been a thing called a 'railroad car' when in use does not exclude it from the category of structures when it is temporarily necessary to use scaffolding thereon in the process of erecting, repairing, altering, or painting.

Id. at 421.

To follow the Court's logic in Caddy, if the trailer in Stoneham's case had been affixed to the ground and had it been intended for a stage to host a musical performance at the Chautauqua County fair, it would also clearly have been considered a structure. The fact that it happens to have been a thing called a "trailer" when in use does not exclude it from the category of structures. And, as a matter of fact, at the time the trailer was being repaired, it was inoperable for use as a trailer.

The lesson to be fairly drawn from Caddy is that anything large enough to require the types of safety devices envisioned by the statute may properly be considered a structure. This logic comports with the opinion expressed by the dissent in the instant action, where it stated:

> Labor Law § 240 (1) provides special protection to those engaged in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880, 800 N.E.2d 351, 768 N.Y.S.2d 178 [2003]). 'Over a century ago, the Court of Appeals made clear that the meaning of the word 'structure,' as used in the Labor Law,

> is not limited to houses or buildings . . . The Court stated, in pertinent part, that 'the word "structure" in its broadest sense includes any production or piece of work artificially built up or composed of parts joined together in some definite manner' (*McCoy v Abigail Kirsch at Tappan Hill, Inc.*, 99 AD3d 13, 15-16, 951 N.Y.S.2d 32 [2d Dept 2012], quoting *Caddy v Interborough R.T. Co.*, 195 NY 415, 420, 88 N.E. 747, 20 N.Y. Ann. Cas. 198 [1909]; *see Lewis-Moors v Contel of N.Y.*, 78 NY2d 942, 943, 578 N.E.2d 434, 573 N.Y.S.2d 636 [1991]; *Cornacchione v Clark Concrete Co.* [appeal No. 2], 278 AD2d 800, 801 [4th Dept 2000]).

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The dissent then concluded that the "flatbed trailer upon which plaintiff was working also fits 'squarely within' the definition of a structure." Id. at 1482.

It is respectfully submitted to the Court that the three-Justice majority in the court below improperly accepted the proposition that, where application of the statute is in doubt or requires a close call, whether the work at issue occurred at a traditional construction site must be the determinative factor. Not only is such a decisional criterion inconsistent with this Court's jurisprudence as expressed in Caddy, it is equally inconsistent with its subsequent holdings. As this Court stated in Caddy:

> [t]he inherent difficulties of the subject are such as to finally compel us to work out each case upon its own peculiar facts in the light of the manifest purpose of the Legislature to secure greater protection to the employee, and to impose upon the employer directly a personal obligation which under the common law he had the right to delegate to competent employees.

Caddy, 195 N.Y. at 423.

The Court in Lewis-Moors v. Contel of New York, Inc., affirmed an order of the Appellate Division, which cited the Caddy case as unquestioned authority for the proposition that "a 'structure' is 'any production or piece of work artificially built up or composed of parts joined together in some definite manner'." 78 N.Y.2d 942 (1991) (citation omitted). According to the Court, "the Appellate Division correctly held that a telephone pole with attached hardware, cable and support systems constitutes a structure within the meaning of" Labor Law §240(1). Id.

Shortly after the Court's decision in Lewis-Moors, the Fourth Department had occasion in Gordon v. E. Ry. Supply, 581 N.Y.S.2d 498 (4th Dept. 1992) to revisit the question, earlier addressed in Caddy, of whether a railroad car was a structure for purposes of application of the statute.

Up to this point in the history of the interpretation and application of §240(1), New York's appellate courts had yet to entertain the proposition that the reach of the statute itself was in any respects limited to work activities related to the "construction industry."

In Gordon, the plaintiff was injured while sandblasting a railroad car. Gordon, supra at 991. The accident occurred when he fell off a ladder leaning against one side of the car while using the sandblaster. Id. Rather than automatically shutting itself off, the sandblaster continued to discharge, causing the plaintiff's injury. Id. According to the Fourth Department, Supreme Court should have granted plaintiff's motion for summary judgment under §240(1) recognizing that, for purposes of the statute, the railroad car was a structure. Id. The court held that since the railroad car was a structure, under the circumstances, the plaintiff was a member of the class of workers protected by the statute. Id. The court went on to observe that the accident itself fit "within the falling worker or objects test" embraced by the Court in Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509 (1991). Subsequently, the Court of Appeals agreed with the Fourth Department and affirmed its order. See, Gordon v. E. Ry. Supply, 82 N.Y.2d 555 (1993).

According to the Court of Appeals in Gordon, §240(1) applies to the cleaning of a building or structure and, "[t]he purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves [citations omitted]." 82 N.Y.2d at 559. In rejecting the defendant's claim that it was free of liability because it did not own the railroad car itself, this Court noted that the defendant owned the property which it leased to a third party "to be used for cleaning and repairing railroad cars." Id. at 560. It logically follows accordingly from: (1) the fact that the trailer in Stoneham's case was by analogy nearly as large as a railroad car; (2) the fact that Stoneham was repairing the trailer when, by the force of gravity, it fell upon him causing serious injury due to defendant's failure to provide adequate safety devices; (3) the fact that defendant's property was used for the purpose of repairing very large, heavy and otherwise inoperable items; and (4) the fact that defendant Barsuk owned both the trailer and the property upon which it was situated (R. 40-41 at ¶2; R. 83) -- that liability must attach under the statute and it light of this Court's decisions through at least 1993.

In 1998, the Court, in Joblon v. Solow, took up the question of the definition of the term "altering" as used in Labor Law §240(1) and, in doing so, engaged in an historical analysis of the special statutory protections afforded to workers "against the dangers of elevation-related hazards in the workplace." 91 N.Y.2d 457, 462 (1998). The case involved an electrician who fell from a ladder "while employed to 'chop a hole through a block wall with a hammer and chisel' and route a conduit pipe and wire through the hole to install a wall clock". Id. at 461.

The Court traced the history of the statute from its origins in 1885 through its contemporary form and language. "Consistent with the legislative objective of worker protection for elevation-related risks, we have given the statute an expansive reading in a variety of circumstances [,]" including those present in Gordon v. Eastern Ry. Supply. Id. at 463. By way of illustrating the basis for this expansive reading, the Court took the occasion to consider what significance, if any, to attach to the wording of the title of Article 10 of the Labor Law, namely "Building Construction, Demolition and Repair Work." In addition, the Court also pointed to the 1969 NY Legis Ann, at 407, for the statement that the law "was created to place 'ultimate responsibility for safety practices at building construction jobs where such

responsibility actually belongs, on the owner and general contractor'." Id. at 463. According to the defendants in Joblon, the title of the law, together with the 1969 legislative comment, meant:

> a guiding principle for courts should be to examine the context of the work leading to the injury, and only when it is performed as part of a building construction job should Labor Law § 240 (1) liability attach.

Id. at 464-465.

The Joblon Court rejected defendant's position, in stating:

> [s]uch a rule would, of course, ignore our prior holdings that workers injured while cleaning a railway car (*Gordon v Eastern Ry. Supply,* 82 NY2d 555, *supra*), repairing an electrical sign (*Izrailev v Ficarra Furniture,* 70 NY2d 813) or painting a house (*Rivers v Sauter,* 26 NY2d 260) come within the ambit of the statute even though they were not working at a building construction site. Furthermore, we have already defined a "structure," for purposes of Labor Law § 240 (1), as " 'any production or piece of work artificially built up or composed of parts joined together in some definite manner' " (*Lewis-Moors v Contel of N. Y.,* 78 NY2d 942, 943). Now to limit the statute's reach to work performed on a construction site would eliminate possible recovery for work performed on many structures falling within the definition of that term but found off construction sites (*see, e.g., id.* [telephone pole]; *Gordon v Eastern Ry. Supply,* 82 NY2d 555, *supra* [railway car]).

Id. at 463-464.

The Court, in calibrating the reach of the statute to align with its text, history, and original purpose, declined to define every change in a structure as an "alteration." Instead, the Court concluded that "'altering' within the meaning of the statute requires making a significant physical change to the configuration or composition of the building or structure." Id. at 465.

In laying down such a rule, the Court viewed itself as implementing "the legislative purpose of providing protection for workers" in a manner fully consistent with the Court's precedents. Id. In a footnote highly germane to plaintiff Stoneham's position on the merits of his case, the Court noted the defendants' complaint that, even defining "altering" as it did, would be to allow too many Labor Law §240(1) claims to go forward. Their complaint was, according to the Court, "better addressed to the Legislature." Id. at 467 ftnt.2 (also noting that the last time the Legislature had amended the statute was in 1980, when it created an exception for owners of one- and two-family dwellings).

It is respectfully submitted that the same should be said in the context of Stoneham's case - if defendants in §240(1) cases complain that the Court's

established jurisprudence on the application of the statute to workers injured while engaged in making repairs to structures allows too many claims to go forward, unless limited to accidents occurring in "the construction industry," then they should address themselves to the Legislature. Certainly, it should not be the role of a three-member majority of the Fourth Department unilaterally to limit the reach of the statute in Stoneham's case in a manner contrary to the legislative purpose and the Court of Appeals' precedents.

In essence, the Court in Joblon adopted a flexible test allowing the lower courts to examine the unique circumstances of each case in order to determine the applicability of the statute, without being constrained by any one factor in particular. In this respect, the test adopted by the Second Department in McCoy v. Abigail Kirsch at Tappan Hill, Inc., 99 A.D.3d 13 (2nd Dept. 2012), if adopted by the Court of Appeals as a means of determining what is or is not a structure for purposes of §240(1), would, as opposed to the Memorandum and Order of the majority in the court below, be faithful to the text, purpose, and history of the statute.

In McCoy, the Second Department considered a variety of factors in determining whether an object was a structure: the item's size, purpose, design,

composition, and degree of complexity, and the ease or difficulty of its assembly or disassembly; the tools required to create it or dismantle it; the manner and degree of its interconnecting parts; and the amount of time the item is to exist. See, generally, McCoy, supra.

Finally, the Court in Joblon, unlike the majority of the Fourth Department in Stoneham's case, dismissed as irrelevant to its determination defendants' assertion that the plaintiff's "job title, job description and normal duties involved only routine maintenance..." 91 N.Y.2d at at 465. Just as the plaintiff in Joblon, in "making a significant physical change to the configuration or composition of the building or structure," did more "than the routine act of standing on a ladder to hang a clock on a wall," so Stoneham, while attempting to restore the functionality to a massive structure, did more than routine automotive maintenance. Yet, the majority below erroneously based its determination on defendant's assertion that Stoneham was simply a mechanic whose normal occupation was repairing vehicles, "a task not a part of any construction project or any renovation or alteration to" the scrapyard where he was employed on the day of his injury. Stoneham, 210 A.D.3d at 1480. Again, under the Fourth Department's erroneous rationale, a worker engaged in

making a repair to a structure, unless the work itself is intrinsic to the "construction industry," is not engaged in a protected activity.

Four years after deciding Joblon v. Solow, the Court again took the opportunity to address the legislative history of §240(1), this time in the context of a worker who fell from a ladder while engaged in a renovation project at a two-family house. Blake v. Neighborhood Hous. Serv. of N.Y.C., Inc., 1 N.Y.3d 280 (2003). In Blake, the Court specifically reviewed its jurisprudence with an eye on "the statute's history and purpose and plaintiff's claims relating to strict or absolute liability." Id. at 284. The Court did not in any manner intimate that the protections of the statute, when it comes to the repair of a structure, are limited in application to the construction industry.

Although the first scaffold law was promulgated in reaction "to widespread accounts of deaths and injuries in the construction trades," it was most telling, according to the Court in Blake, that "the lawmakers fashioned this pioneer legislation to 'give proper protection' to the worker. Those words are at the heart of the statute and have endured through every amendment." Id. at 285. The Court also noted, as it had made clear in Caddy some ninety-four years earlier, that the statute

had always covered the erection, repairing, altering or painting of structures, not only or exclusively of "buildings." It is apparent from a reading of Blake that the Court has always viewed the purpose of the statute to provide a "safe workplace," not necessarily a safe construction site.

The fact that Stoneham's accident occurred at defendant's scrapyard, rather than at a traditional construction site, cannot and should not be dispositive of whether Stoneham was engaged in a protected activity. The text, legislative purpose, and history of the statute all support the proposition that the statute protects workers, like Mark Stoneham, from gravity-related accidents while performing repair work on structures.

In 2011, the Court again spoke of its jurisprudence in Wilinski v. 334 East 92nd House Dev. Fund Corp., where it observed that its "jurisprudence defining the category of injuries that warrant the special protection of Labor Law §240(1) has evolved over the last two decades, centering around a core premise: that a defendant's failure to provide workers with adequate protections from reasonably preventable, gravity-related accidents will result in liability." 18 N.Y.3d 1, 7 (2011). The Court did not limit the reach of the statute to accidents occurring to construction

workers or at construction sites or even generally within the construction industry. The Wilinski Court gave no greater weight to "buildings" than it did to "structures" in terms of the applicability of the statute. Indeed, the Court has never favored one thing over the other.

Ironically, the plaintiff in Wilinski was injured in the course of work "demolishing" brick walls at a vacant warehouse, an activity quite the opposite of any activity designed to construct a building. Id. at 5. During the demolition, two metal vertical plumbing pipes, which rose out of the floor on which plaintiff was working, toppled over and fell approximately four feet on top of plaintiff, injuring his body in multiple places and causing him to suffer a concussion. Id. In effect, in Wilinski, just as in Stoneham's case, a heavy object fell on the plaintiff damaging some part of his body by striking or crushing it. In Stoneham's case, just as in Wilinski, the statute should apply because the elevation-related risk was one that could have been eliminated using a safety device, as enumerated by the statute. Moreover, the facts and the result in Wilinski are illustrative of the futility of attempting to distinguish "the dangers that beset workers in the construction industry" from the gravity-related dangers that beset other workers who are faced

with the task of dealing with objects of crushing size and weight in a host of other loosely regulated workplaces, including the scrapyard where Stoneham was injured.

It cannot reasonably be maintained that the Court's 2012 decision in Dahar v. Holland Ladder & Holland Ladder & Mfg. Co., 18 N.Y.3d 521 (2012) had the effect of undoing the Court's jurisprudence dealing with the interpretation and application of §240(1), as expressed in its prior decisions in Caddy, Lewis-Moors, Gordon, Joblon, and Wilinski.

In Dahar, the plaintiff was injured while cleaning a "steel wall module", manufactured by his employer. Id. at 523-524. Plaintiff argued Labor Law §240(1) applied to his injury, as it occurred while plaintiff was "cleaning" a "structure". Id. The Court of Appeals rejected the plaintiff's argument, characterizing it as "too simple." Id. at 525. In rejecting the argument, the Court did not, as defendant implies, alter, or modify the definition of "structure" set forth in Caddy. The Dahar decision makes no mention of whether a "steel wall module" is "any production or piece of work artificially built up or composed of parts joined together in some definite manner." Instead, the Court found "too simplistic" the argument advanced by the

plaintiff that the cleaning of a manufactured product amounts to the type of cleaning envisioned by §240(1).

In relevant part, the Court's opinion reads:

> [w]e have never, however, gone as far as plaintiff here asks us to go – to extend the statute to reach a factory employee engaged in cleaning a manufactured product.
>
> On the contrary, it seems that every case we have decided involving 'cleaning' as used in Labor Law § 240(1), with a single exception, has involved cleaning the windows of a building. The exception, *Gordon v. Eastern Ry. Supply (82 NY2d 555, 626 NE2d 912, 606 NYS2d 127 [1993]),* involved the cleaning of a railroad car. And even in the window-cleaning cases, we have not extended the statute's coverage to every activity that might fit within its literal terms. We held in *Connors* and *Brown*, and reaffirmed in *Broggy*, that routine household window washing is not covered.

Id. at 525-526 (internal citation omitted).

Dahar did not modify the Court's long-established definition of structure as set forth in Caddy, and as reiterated in Lewis-Moors, Gordon, and Joblon. The holding of the Court in Dahar, while important to an interpretation of the concept of routine maintenance, does not instruct lower courts in any way to curtail the definition of "structure." Broadly applying the holding in Dahar to the facts of

Stoneham's case would undermine both the legislative purpose of the statue to promote safe work places, as well as the Court's jurisprudence on the definitional meaning of "structure." Unlike the Stoneham case, Dahar is a cleaning case involving routine activity in a regulated manufacturing setting. The justifiable concern expressed by the Court in Dahar about extending the reach of the statute to encompass "routine household window washing" cannot justify withdrawing the statute's protections from Mr. Stoneham, whose plea for the protection of the statute is eminently fair and reasonable.

The majority's November 18, 2022 Memorandum and Order points to Dahar in support of its holding, "as well as the Court of Appeals' more recent decision in *Preston v. APCH, Inc.* (34 N.Y.3d 1136,1137 [2020], *affg* 175 A.D.3d 850 [4th Dept 2019])." Stoneham at 1480. Preston was decided by a three-Justice majority in 2019. Preston, 175 A.D.3d 850. The Court affirmed the majority decision in a brief opinion. Preston, 34 N.Y.3d 1136. The 4th Department majority had emphasized the "customary occupational work of fabricating a component during the normal manufacturing process at a facility." Preston, 175 A.D.3d at 853. The injured plaintiff was employed as a welder at the plant. Id. The work was described as

routinized and regular and occurring within a facility during the normal manufacturing process. The "critical inquiry," according to the court was "the type of work that was performed." Id. This is an exceedingly vague criterion and should not be employed as cover to extend the holdings in Dahar and Preston to include the type of work performed by Mr. Stoneham, work performed in an unregulated outdoor environment with the use of heavy construction equipment like a front-end loader.

The arguments on the merits set forth above address the three principal points of law made by plaintiffs before the Fourth Department, namely that the trailer which plaintiff was repairing at the time of the accident was a structure for purposes of the statute; that whether plaintiff was engaged in routine maintenance as opposed to repair work is at the very least a question of fact; and that it would be erroneous to hold that Stoneham's case does not fall within the protection of the statute because the injury did not occur at a "construction site." As for the two other points of law made before the Fourth Department—that Supreme Court correctly concluded that the defendant failed to satisfy its moving burden on the issue of sole proximate cause; and that the record establishes at least a triable question of fact on the issue

of Stoneham's status as an employee, neither of these matters are now before the Court of Appeals. As pointed out in the Brief for Plaintiffs-Appellants at page 40, defendant declined to file a Notice of Cross-Appeal with the Appellate Division seeking to reverse Supreme Court's decision on either of these two issues.

As to the issue of sole proximate cause, Supreme Court denied defendant's motion for summary judgment. Defendant's sole proximate cause argument is largely based on his contention that he lacked "direction and control" over plaintiff's work. This argument cannot stand considering the Court's decision in Santass v. Consolidated Investing, Co., Inc., 10 N.Y.3d 333, 340 (2008). Plaintiffs further provided Supreme Court with ample evidence, including two expert reports, establishing that defendant failed to make adequate safety devices available to Stoneham at the time of the accident. (R. 391-392). Defendant did not brief this issue at the Fourth Department, and neither the majority decision nor the minority opinion spoke to the issue in the Memorandum and Order of the Appellate Division, Fourth Department, issued on November 18, 2022.

As to the issue of plaintiff's status as an employee at the time of the accident, Supreme Court held that, "[p]laintiff has produced sufficient evidentiary proof in

admissible form sufficient to establish the existence of material issues of fact which require a trial of this action." Although defendant did brief this issue before the Fourth Department, the majority decision declined the invitation to disturb the ruling of Supreme Court, while the minority opinion explicitly agreed with Supreme Court in concluding "that plaintiffs raised a triable issue of fact in opposition in that regard". Stoneham v Joseph Barsuk, Inc., 210 A.D.3d 1482 (citations omitted).

It is respectfully submitted that the issue of sole proximate cause is simply not before the Court and that the issue of employee versus volunteer is purely one of fact over which the Court either has no jurisdiction or simply no reason to take up, given the holding of Supreme Court on the record before it. In any event, plaintiffs maintain that they have not abandoned these arguments, should the Court decide that they are germane.

CONCLUSION

Based on the Court's well-established jurisprudence concerning Labor Law §240(1), the Court should hold that where a worker, other than in a well-regulated manufacturing setting, is engaged in repairing a massive object meeting the definition of structure under its decision in Caddy, as reaffirmed in Gordon, the

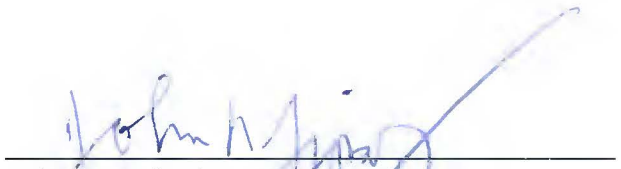
protections of Labor Law § 240 (1) should apply, whether or not the work takes place at a traditional construction site.

Respect for stare decisis requires that, in this case, the Court should recognize that a decision interpreting a statute should be extraordinarily difficult to overturn. Here the Court has reaffirmed, over a long course of years, the definition of "structure" for purposes of the application of the protections afforded to workers under Labor Law Section 240 (1). The Legislature of our state, not our courts, should have the last word on the meaning of a state statute. In 1998, the Court of Appeals in Joblon v. Solow reaffirmed the broad interpretation given by the Caddy Court in 1909 to the meaning of the word "structure." If our Courts are now persuaded that the term itself was given too broad a meaning, they should collectively stay their hands and let the Legislature repair the allegedly erroneous statutory interpretation. They should not undermine that interpretation by incremental steps which depend on an overbroad application of the holdings in such cases as Dahar and Preston.

The Fourth Department's November 18, 2022 Memorandum and Order that awarded summary judgment to the defendant on plaintiff's Labor Law §240(1) cause of action should be reversed and the issue remitted to Supreme Court for trial.

Respectfully submitted,

LIPSITZ, PONTERIO & COMERFORD, LLC



John N. Lipsitz, Esq.
Michael A. Ponterio, Esq.
Zachary J. Woods, Esq.

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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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Dated: February 10, 2023

STATE OF NEW YORK)
) ss.:
COUNTY OF MONROE)

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I, **Jeremy Slyck**, of Rochester, New York, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On February 13, 2023

deponent served the within: **LETTER BRIEF**

Upon:

James M. Specyal, Esq.
Goldberg Segalla LLP
665 Main Street
Buffalo, New York 14203

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Jeremy Slyck

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